



In the Matter of:

**CHARLES A. WEBB,**

**ARB CASE NO. 96-176**

**COMPLAINANT,**

**ALJ CASE NO. 93-ERA-42**

**v.**

**DATE: August 26, 1997**

**CAROLINA POWER & LIGHT COMPANY,**

**RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. §5851 (1988 and Supp. IV 1992). Complainant Charles A. Webb alleges that Respondent Carolina Power & Light Company (Carolina Power or CP&L) violated the ERA by blacklisting him and declining to rehire him because he engaged in activities protected under that statute. The Administrative Law Judge (ALJ) found that Webb did not prove that CP&L discriminated against him in violation of the ERA and recommended dismissal of the complaint. Although we strongly disapprove of Carolina Power's management of some important evidence in this case, the Board agrees with the ultimate outcome recommended by the ALJ and dismisses the complaint.

### **BACKGROUND**

#### **Webb's Employment at CP&L**

After nine years' experience in the nuclear industry, T. 72, 80,<sup>1/</sup> Webb began working in 1985 as a structural engineer at CP&L's Shearon-Harris nuclear plant, through a "job shop" that provided contract workers to the nuclear industry. T. 73-74. Webb was hired temporarily to meet the increased need for engineers during an "outage," or period when the plant was not

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<sup>1/</sup> "T." refers to the hearing transcript. Other designations to the record are: CX for Complainant's exhibit and RX for Respondent's exhibit.

producing power and was implementing numerous design changes. Webb's first supervisor recommended him to acquaintances at CP&L's Brunswick nuclear plant, who in turn hired Webb as a contract structural engineer in 1987. T. 83. Webb subsequently worked every Brunswick outage from 1987 through November 1991 and, in addition, worked at CP&L for significant periods between outages. T. 87.

After a lay-off of a few weeks' duration, Webb was rehired as a contract engineer by CP&L's headquarters-based Nuclear Engineering Department in August 1989. T. 88. That same month, the Nuclear Regulatory Commission (NRC) conducted an inspection at Brunswick and issued a report in which it criticized the plant's condition and stated that the educational level of the Brunswick engineering staff was only "marginally adequate." RX 37; T. 346-348. About 75 percent of the engineering staff did not have four-year engineering degrees. RX 37 p. 71; T. 348-350. The NRC report led CP&L to downgrade the positions of some of its engineers who lacked degrees. T. 446.

Webb had a high school diploma and a limited number of correspondence courses in engineering, but did not have an engineering degree. T. 69-70. Nevertheless, in a 1990 performance evaluation, Webb's supervisor, Bobby Marlar, rated his work highly. CX 10.

Although assigned to the headquarters Nuclear Engineering Department, Webb was transferred in August 1990 to the Brunswick plant as a civil/structural engineer, reporting directly to John McIntyre who, in turn, reported to J. E. Harrell. T. 397, 442, 646-648. In January of the next year, Richard Tripp replaced McIntyre as Webb's immediate supervisor. T. 821.

The Nuclear Engineering Department's funds covering Webb's salary were depleted in August 1991. T. 648, 877. After determining that they needed to hire a contract engineer, Harrell and Tripp hired Webb directly into their organization, where he functioned as a design engineer. T. 648-649. When design work tapered off in November 1991, Harrell and Tripp laid off four contract engineers, including Webb. T. 650. Webb does not allege that his layoff violated the ERA.

In an exit interview, Tripp told Webb that he was eligible for rehire by CP&L. T. 98, 100, 262, 844; *see* CX 35. Webb was given the opportunity to raise safety issues at that time, but he did not. RX 36; T. 240 -241.

### **Webb's Protected Activities**

An April 1992 NRC reinspection of the Brunswick plant revealed a backlog in completing needed structural modifications as well as several problems with bolts installed at the plant. As a consequence, CP&L unexpectedly shut down both nuclear units at Brunswick. T. 370. A newspaper article concerning fraudulent bolts at the plant led Webb to speak with the NRC that month about structural design defects he had observed at Brunswick over a period of years. T. 101, 103, 106. In early May, the NRC sent two letters informing CP&L about

information “received by the NRC” concerning certain safety defects at the Brunswick plant. RX 28, 29.

The first safety defect identified by the NRC was an undersized steel beam in the North RHR room in the reactor building. RX 28; T. 116. The plant engineering records relating to the beam contain an entry in which Webb is named as one of the individuals who had identified and documented the problem with the beam. T. 116-118. Tripp accompanied the NRC resident inspector to inspect the beam. T. 846-849; CX 41 at 52.

The next safety defect, 2(a), identified by the NRC in its correspondence was a missing bolt in the control room that Webb had previously reported to Tripp and that had been the subject of an extended discussion between them. T. 119-120. Again, Tripp accompanied an NRC inspector to the control room and determined that the bolt was missing. CX 41 at 52. Safety issue 2(b) related to a missing bolt that Webb had reported to Tripp and regarding which Webb recommended the preparation of a “trouble ticket.” T. 122-123.

Safety issue 3(a) related to the proper length of runs of conduit on which Webb had performed the engineering analysis prior to modification. T. 124. Webb had observed that the craft workers were running conduit spans that exceeded the lengths identified in the engineering drawings and he required the craft workers to make 40 design fixes. CX 40A at 7; T. 124-125. Webb personally informed Tripp and other supervisors of the need to modify the conduit spans. T. 126-128.

Issue 4 concerned the improper installation of a door latch on a sacrificial shield door, a problem that Webb had pointed out to his supervisors in a 1989 letter. T. 128-129. In addition to the above safety issues identified in the NRC’s correspondence, Webb had documented in a December 1988 memorandum the structural defects that are the subject of Issue 7. T. 291. Webb’s close involvement with a number of the safety issues raised by the NRC is well documented.

At the NRC’s request, Webb met on May 13, 1992 with two NRC representatives, David Nelson and Joe Lenahan, at a motel and provided documentation about the plant. T. 107, 112-113. Webb asked the NRC to keep his name confidential and received assurances that the NRC would do so. T. 109-110. For self protection, Webb carried a gun to the meeting. T. 200. Nelson in turn became concerned about his own safety, CX 61 at 39-40, and told other NRC personnel about what came to be known as the “armed allegor incident” so that other NRC employees might be prepared in any future similar incidents. CX 61 at 37-38.<sup>2/</sup>

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<sup>2/</sup> The ALJ rejected a document, CX 72, that purportedly would show that Nelson revealed to another NRC employee, William Levis, that Webb was the “armed allegor.” 4/19/96 T. at 46-48. At the time of the hearing, Levis was working for CP&L at the Brunswick plant. We agree with the ruling that CX 72 not be admitted because Webb did not cross-examine Nelson concerning it. The

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Although Harrell admitted that he and other CP&L employees speculated about the identity of the NRC informant, T. 674-675, he testified that he had not concluded that Webb was the informant. T. 676. Tripp also denied suspecting Webb. T. 845-846. Both Harrell and Tripp were directly involved with the investigation and resolution of the issues that Webb raised with the NRC. T. 501-502, 505, 514-517, 523-524; CX 41 at 19, 39, 52.

### **Webb's Efforts to be Rehired at CP&L**

Quantum Resources (Quantum), a "job shop," was under contract to provide technical workers, including engineers, to CP&L. When it received a CP&L job order, Quantum used its computer system to generate a list of potential candidates whom it would contact for permission to submit their names to CP&L for consideration. CX 72 at 8-9.

Quantum faxed Webb's resume to Brunswick employee Janet Crews on May 6, 1992 for two Civil/Structural engineer positions. CX 22, CX 72 at 12, CX 73 at 59. Crews did not recall receiving Webb's resume and testified that if she did, she may have thrown it away because the Quantum submittal did not have an identification number connecting it to a specific CP&L position. T. 981, 985, 988.

Quantum's computer record indicated that a degree was required for one of the positions, and for the second a "degree not an absolute, but is desired." CX 32; *see also* RX 49. One of the listed hiring supervisors, Geoffrey Wertz, testified that the position in his group required a degree and he hired a candidate with a four-year engineering degree. T. 784. Wertz did not recall seeing Webb's resume. *Id.*

The other hiring supervisor, Ken Fennel, testified that a few days after he received authority to hire an additional engineer the plant unexpectedly shut down. Consequently, Fennel did not need to fill the position and he never examined resumes in connection with it. T. 776-777; *see also* RX 7 (notation about job not existing).

Quantum next submitted Webb's resume to Ray Heatherington as a "blind submittal" without reference to any specific opening. CX 14; CX 30. Heatherington did not remember receiving the resume and believes he probably discarded it since CP&L disfavors blind submittals. T. 690-691.

Webb's resume was submitted by Quantum a third time, on June 15, 1992, for the position of structural/mechanical field engineer. CX 25. Quantum's record indicates that the

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<sup>2</sup>(...continued)

ALJ also sustained Carolina Power's objection to testimony from the author of CX 72 on the ground that it was too late to bring in an additional witness. 4/16/96 T. at 46-47. Webb made an offer of proof concerning the testimony that the document's author would present. 4/16/96 T. at 53. Any error in excluding either CX 72 or the testimony of its author was harmless since neither the document nor the testimony would have established Carolina Power's liability.

position did not require a college degree. *Id.* Harrell, the listed supervisor, needed to hire several engineers. *Id.* Quantum submitted six other candidates, two of whom, like Webb, did not have a four-year degree. CX 23. A later entry in Quantum's computer record for this position states that CP&L needed two structural engineers and a degree was required. CX 25.

Soon after his resume was submitted, Webb informed Quantum that a rival job shop said that a degree was required for this position. T. 252; RX 9 at 4; CX 26; CX 72 at 49. At about the same time, Webb telephoned Harrell to indicate his availability for rehire, and Harrell replied that there would be no problem in Webb's returning to the Brunswick plant during an outage. T. 162. Harrell explained that he was unaware that Webb lacked a college degree when he spoke with him. T. 617. Harrell verified that later he reviewed Webb's resume and rejected him because he lacked a four-year degree. T. 616. During that summer, Harrell hired into the position five candidates all of whom had at least a bachelor's degree in engineering. T. 616-620.

Webb telephoned Quantum's Michelle Cooke on September 21, 1992 to inquire about the result of the June 15 resume submittal. Cooke checked with co-worker Sharon George and told Webb that he would not be hired because he did not have an engineering degree. That same day, Cooke entered into Quantum's computer record for the position a statement that only Webb had been ruled out on this job request. A final computer entry concerning this position cancels Quantum's job order because a competitor job shop had an exclusive contract to provide degreed engineers for this job request. CX 25; CX 72 at 35, 39, 111-113.

Webb also used informal approaches to return to work at CP&L. He notified his friends at the Brunswick plant that he wished to return, and the friends in turn told various supervisors that Webb was available. One friend, George Frick, asked Tripp if he had any problem with Webb's performance. RX 71 at 9 (Frick); T. 842 (Tripp). Tripp replied that there was a problem and suggested that Webb was "not as strong a performer as other people in the group, that he did not really get along that well in a group setting." T. 843; *see also* RX 71 at 8-10. Tripp believed that his conversation with Frick occurred in October, T. 842, and Webb's diary confirms that Frick related the conversation to him on November 1, 1992. RX 28 at 49.

Webb filed this complaint on April 5, 1993, alleging that CP&L has refused to rehire him and has "badmouthed" him in contravention of the employee protection provision of the ERA.<sup>3/</sup> He has continued to seek work in the nuclear industry but had not succeeded as of the hearing.

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<sup>3/</sup> The ALJ incorrectly states that the complaint was filed on April 7, 1993. R.D. and O. at 15, citing CX 1, 2. The regulations provide that an ERA complaint is filed as of the date it is mailed, 29 C.F.R. §24.3(b), and Webb mailed the complaint on April 5, 1993. We note that in a prior order the 180 day statute of limitations date was miscalculated. Sec. Rem. Ord., July 17, 1995, slip op. at 9. The correct date is October 7, 1992.

## DISCUSSION

### Timeliness of the Complaint

The ERA provides that a person who “believes that he has been discharged or otherwise discriminated against by any person” in violation of the Act “may, within 180 days after such violation occurs, file . . . a complaint with the Secretary of Labor. . . .” 42 U.S.C. §5851(b)(1). The ALJ found that the complaint was untimely because it was not filed within 180 days of Webb’s informing Quantum of his suspicion that CP&L was wrongly refusing to rehire him. R. D. and O. at 15-16. In addition, the ALJ found that the continuing violation theory did not apply to Webb's claim. *Id.* at 16.

Since Webb strongly suspected by September 21, 1992, the day on which Quantum informed him that CP&L would not be hiring him for any of the positions for which he applied, that CP&L was wrongly excluding him from consideration for employment, the Board agrees with the ALJ that the limitation period began to run on that date. The April 5, 1993 complaint was filed more than 180 days after that date.

We next determine if there was an adverse action that occurred within 180 days of the filing. Webb offers as evidence of continuing discrimination the October 1992 incident in which Tripp negatively characterized Webb’s potential for rehire. CX 28 at 49. We find below that Tripp’s negative remarks about Webb’s performance were motivated by discriminatory animus.<sup>4/</sup>

CP&L argues that Tripp's negative reference was so different in kind from the failure to rehire Webb that it cannot preserve the timeliness of the failure to rehire issues. Resp. Brief at 22. The Secretary of Labor adopted a three factor test to evaluate whether particular alleged acts of discrimination constitute “a course of related discriminatory conduct” under the continuing violation theory. *Thomas v. Arizona Public Service Co.*, Case No. 88-ERA-212, Sec. Dec. and Ord. of Rem., Sept. 25, 1993, slip op. at 13, citing *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986):

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<sup>4/</sup> As explained in the discussion of the merits, Tripp made the negative remarks to Frick because he suspected that Webb was the NRC allegor. In this instance, we find that Webb did not suffer a tangible job detriment as a result of Tripp’s statements. Thus Webb did not sustain the burden of proving an independent ERA violation concerning Tripp’s discriminatory remarks.

Tripp made the negative comments about Webb more than six months after Webb’s protected activities. However, Tripp’s discriminatory animus could have manifested itself earlier in other actions that Carolina Power took in failing to rehire Webb. We therefore examine the merits of all of the alleged incidents to determine if they were tainted by the same animus. If so, Webb would have the opportunity to show that the Tripp’s remarks were evidence of a practice of exclusion that wrongfully prevented Webb from being considered for jobs for which he was qualified.

(1) whether the alleged acts involve the same subject matter, (2) whether the alleged acts are recurring or more in the nature of isolated decisions, and (3) the degree of permanence.

All of the alleged discriminatory incidents in this case involved the same subject matter, CP&L's refusal to rehire Webb. The ALJ found that the rejections of Webb's applications -- Quantum's submittal of his resume on May 6 and June 15, 1992 -- were "not related in subject matter to Tripp's comment, and were isolated employment decisions of a permanent nature that should have triggered Webb's awareness of, and duty to, assert his rights." R. D. and O. at 16. We disagree because the ALJ did not consider several critical factors. Quantum's blind submittal of Webb's resume could have led to his being rehired at CP&L even after Webb learned that two of his applications for specific positions had been rejected. In addition, Tripp's testimony shows that CP&L managers often consider an informal performance assessment by a former supervisor in making hiring decisions about candidates who have worked for CP&L previously. T. 867.

Systematically excluding an individual from consideration for employment, by its very nature, is a continuing course of conduct and may constitute a continuing violation if it is based upon an employee's protected activity. *Egenrieder v. Metropolitan Edison Co./G.P.U.*, Case No. 85-ERA-23, Order of Remand, Apr. 20, 1987, slip op. at 4. In this case, Tripp's negative reference, to the extent it is accepted as evidence of an ongoing decision to exclude Webb from consideration for employment, is sufficiently similar in nature to Webb's other allegations as to constitute a continuing violation. Accordingly, the merits of all of the alleged claims will be considered.

### The Merits

To prevail on the merits, Webb has the burden of showing by a preponderance of the evidence that his protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. §5251(b)(3)(C). However, "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action" in the absence of the complainant's protected activities, relief may not be ordered. 42 U.S.C. §5251(b)(2)(D).

In making the required showing of a "contributing factor," Webb must demonstrate that the CP&L employee or employees responsible for excluding him from consideration for rehire were aware that he had raised safety issues with the NRC. It is undisputed that Webb asked for, and received, assurances that the NRC would try to keep his name confidential. We do not agree with the ALJ that "it is irrelevant that CP&L could have fingerprinted Webb as the NRC allegor." R. D. and O. at 12. Rather, if Webb shows that any of the CP&L employees either knew or suspected that he was the NRC's allegor and that such an employee took adverse action against him as a result, Webb will have proved his case.

We will begin with Tripp, who uniformly listed Webb as eligible for rehire on official documents, but testified that he personally would not rehire Webb because of low productivity and a communication problem. The oral performance evaluation Tripp gave to Frick in October 1992 allegedly was consistent with the written evaluation Tripp made at the time of Webb's layoff one year earlier.

There are serious problems with the 1991 performance evaluation that preclude our relying upon it. Tripp did not recall having made the written evaluation when a Department of Labor interviewer questioned him approximately 18 months after he supposedly made it. CX 3 at 4. According to Tripp, he remembered making the evaluation only after John Duncan faxed it to him, although he did not have a copy of the faxed evaluation. T. 831-834. Duncan, however, testified that he did not fax a copy of the evaluation to Tripp; the only person to whom he sent the evaluation was an attorney for CP&L. CX 69 at 22, 38. This is not the only contradiction in the testimony concerning the evaluation.

Roy Heatherington testified that he and Duncan together found the original of the evaluation in locked files in the company's Center Plaza Building. T. 722; CX 68 at 15-18. Duncan, however, maintains that CP&L did not keep the originals of the November 1991 evaluations of Webb and his coworkers, but rather sent the originals to the vendor, Quantum. T. 753; CX 69 at 23. Nevertheless, counsel for Quantum advised the Department of Labor investigator that Quantum did not have either a copy or the original of this evaluation in its files. CX 45 at E-5-a. Moreover, Duncan further contradicts Heatherington on the location in which the evaluation was found. Duncan testified that it was found in his own office, which is not in the Center Plaza Building. T. 739-741, 753.

Finally, Tripp claimed that CP&L routinely and periodically evaluated all contract employees. T. 890. Duncan contradicted him, testifying that the 1991 evaluations at issue were a one-time effort and were not periodically performed. T. 741.

In view of all the evidentiary problems with the purported 1991 performance evaluation, the ALJ properly gave it no weight in making a recommended decision. The conflicting testimony regarding the evaluation raises concerns about its validity. The Board finds the document inherently unreliable.

Tripp contradicted his own purported negative evaluation of Webb's work when he told the Department of Labor investigator that the quality of Webb's work was satisfactory. CX 3 at 2. Tripp signed the handwritten transcription of his answers to the investigator's questions. Tripp had no explanation for why the reference to Webb's satisfactory quality of work was removed in the typed version of the statement that CP&L produced. T. 907-909; *see* CX 6. The difference in the handwritten and typed statements is highly probative of an effort to cover up unlawful motivation on Tripp's part.

That difference is not the only suspicious change in the statement. Tripp's handwritten statement to the investigator listed low productivity, inability to accept criticism, and lack of

initiative as the reasons he would not rehire Webb. CX 3 at 6-7. The typed version contained an additional reason, that Webb lacked a four-year engineering degree. CX 6 at 6. Again, neither Tripp nor any Carolina Power representative provided an explanation of how the additional reason got into Tripp's statement. We see no reason why CP&L would materially alter Tripp's DOL statement, other than in an effort to cover up Tripp's true motivation for giving a negative evaluation of Webb.

We digress briefly from discussing the merits to underscore our concern with the highly suspicious behavior of Carolina Power representatives concerning the material changes to Tripp's DOL statement. Although it is not entirely clear from the record, it appears that Carolina Power submitted CX 6 (Tripp typed statement) to the investigator as a typed version of the handwritten statement, CX 3, that Tripp earlier had signed.

Counsel for Carolina Power was present when the DOL investigator interviewed Tripp. T. 881; CX 2 at 7 (DOL investigator's report referring to presence of Joan Fife). Therefore, Carolina Power had ample opportunity to make for the record corrections had the investigator failed to record Tripp's answers accurately. Tripp had no idea why the statement was changed in the typed version. T. 907-909. If counsel knowingly allowed the altered version to be submitted to the Department of Labor assuming that it would be accepted as a typed version of the handwritten statement, that would be a serious violation of the standards of conduct for practice before the administrative tribunals of the Department. *See* 29 C.F.R. §18.36(a): "All persons appearing in proceedings before an administrative law judge are expected to act with integrity, and in an ethical manner."

The ALJ noted that the typed version differed from the handwritten version of Tripp's statement but did not pursue the issue. T. 886. Where the integrity of the Department's adjudicative processes is at stake, the presiding Administrative Law Judge should take all appropriate steps to resolve the uncertainty surrounding questionable conduct.

The material alterations in Tripp's statement and Tripp's contradictory assessments of Webb's performance lead us to conclude that Tripp suspected Webb was the NRC allegor and also that Webb's nuclear safety complaints to the NRC were a contributing factor in Tripp's negative employment appraisal.<sup>5/</sup> We therefore find discriminatory animus on Tripp's part.

Next we consider whether there is clear and convincing evidence that Tripp would have made the same negative remarks in the absence of suspecting that Webb was the NRC allegor. The evidence leads us to question Tripp's assessment that Webb's productivity was low. Tripp admitted that he did not know the reason why there was an increased number of man-hours expended on two assignments that Webb shared with other engineers, and that he did not blame

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<sup>5/</sup> Since the ALJ did not consider the material alterations in Tripp's statement to the DOL investigator, we do not feel constrained to defer to the ALJ's assessment that Webb did not show that Tripp "fingerprinted" Webb as the NRC allegor.

any one engineer for the delays. T. 873-874. One of the two projects on which too much time was expended involved plant modifications in the control room, which was a congested area. T. 875. Moreover, notwithstanding the delays in these projects, Tripp and his supervisor, Harrell, decided to hire Webb for their group in August 1991. T. 877-878. We find that there is not clear and convincing evidence that Tripp would have given the negative appraisal to Frick even if he did not suspect that Webb had engaged in protected activities.

Notwithstanding Tripp's unlawful motive in making the negative remarks about Webb's performance, the record does not establish an adverse action. The adverse action element of a whistleblower claim requires a showing of a consequent tangible job detriment. See *Varnadore v. Oak Ridge Natl Laboratory*, Case Nos. 92-CAA-2 *et al.*, Sec. Dec. and Ord., Feb. 5, 1996, slip op. at 77 and Final Consolidated Dec. and Ord., June 14, 1996, slip op. at 69-81, *pet. for review pending sub nom. Varnadore v. Secretary of Labor*, No. 96-3888 (6th Cir. filed Aug. 13, 1996) (two actions taken by employer that were motivated by discriminatory animus, a supervisor's warning to a co-worker not to be seen talking with the complainant and the posting of a memorandum that placed the complainant in an unfavorable light, did not establish violations of the Clean Air Act's employee protection provision because they did not involve tangible job detriment and did not constitute a hostile work environment).

In other cases in which negative employment references were motivated by animus because of the complainants' protected activities, we have found a statutory violation even where the complainant did not show that he was refused employment or suffered actual job loss. For example, in *Leveille v. New York Air Natl. Guard*, Case Nos. 94-TSC-3 and -4, Sec. Dec. and Rem. Ord., Dec. 11, 1995 slip op. at 18, the Secretary found a violation of the analogous employee protection provisions of several environmental statutes where a former supervisor "who was advised that he was speaking to an employer in possession of [the complainant's] resume, essentially recommended that the caller avoid employing [the complainant] by stating that [the former supervisor] would not hire her." In fact, the caller worked for a reference checking company that the complainant had hired.

Likewise, in *Gaballa v. The Atlantic Group, Inc.*, Case No. 94-ERA-9, Sec. Final Dec. and Ord., Jan. 18, 1996, the Secretary found an ERA blacklisting violation where the respondent referred to the complainant's discrimination complaint in a conversation with a hired reference checker. The Secretary there stated broadly that "[d]iscriminatory referencing violates the ERA regardless of the recipient of the information." *Gaballa*, slip op. at 3. The Secretary also reiterated the earlier ruling in *Earwood v. Dart Container Corp.*, Case No. 93-STA-16, Sec. Dec., Dec. 7, 1994, slip op. at 5, that "the risk that improper information may be provided to prospective employers or placed in records maintained by outside organizations like reference checking companies, requires a 'prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result.'" *Gaballa*, slip op. at 3.

In this case there was no reference checking company involved and hence there was far less risk that Tripp's negative remarks would be maintained in records. Tripp made the remarks

informally to a colleague who also happened to be a friend of Webb's. There is no basis in this record to find that Tripp gave the same negative reference to any person who stated that he was considering hiring Webb.

In the context of this case, with its unique facts, we find that this case is not sufficiently analogous to those previous cases where substantial job detriment would be a predictable and natural outcome of the respondent's conduct. In those cases the complainant demonstrated that the respondent's actions in providing negative references to outside sources occupationally impaired them. In this case Webb has not established that there was a substantial risk that the negative reference would be maintained in a record or would be given to outside organizations seeking information about Webb. We therefore find that Webb has not established an independent violation of the ERA's employee protection provision. Consequently, Webb must establish that Tripp's comments were part of an ongoing practice of exclusion which explains the other earlier adverse actions.

An examination of the earlier employment actions does not support a finding that they were part of pattern or practice of exclusion motivated by Webb's whistleblowing activities. The remainder of Webb's claims concern the failure of CP&L to rehire him in response to the submittal of his resume. CP&L claims that it legitimately did not rehire Webb because he did not have a four-year technical degree. After the NRC's 1989 report stated that the number of degreed engineers at the Brunswick plant was too low, CP&L clearly preferred to hire engineers with technical degrees. Webb challenges this assertion on the basis that CP&L continued to hire non-degreed engineers, including himself, after the 1989 NRC report. Webb Brief at 17-18. The Board finds that the April 1992 NRC reinspection revealed a large backlog in making the necessary plant modifications to fix structural problems, and did lead CP&L to insist more strenuously on hiring degreed engineers at Brunswick.

The focus in this case is specifically on CP&L's hiring decisions when Webb applied in May and June 1992. The issue is whether CP&L acted consistently at that time and legitimately declined to rehire Webb because he lacked an engineering degree.

Quantum submitted Webb's resume to CP&L's Director of Contracts, Janet Crews, on May 6, 1992, for consideration for the position of civil/structural engineer, but the submission did not include a BNP [Brunswick Nuclear Plant] identifying number. CX 22; T. 983, 985. Crews did not recall receiving Webb's resume and did not know whether she forwarded it to the hiring supervisors. T. 983-984.

The corresponding CP&L document alerting Quantum to the need for two civil/structural engineers, dated April 22, 1992, states "desire degreed individual for at least one of these positions" and lists two supervisors, Ken Fennel and Geoff Wertz. RX 49; *see also* CX 32. Fennel testified credibly that he never filled the position in his group because immediately after receiving permission to hire, both units of the plant shut down unexpectedly and he no longer had the need for the additional engineer. T. 776-777. Quantum's records are consistent with this explanation. CX 32.

Concerning the second engineer position, CP&L advised six job shops, including Quantum, that the resumes it had received were “not adequate” and that the position required a degree. RX 48. Wertz verified that the position in his group required a degree, T. 782, 807, that the individual he hired had a four-year mechanical engineering degree, and that he did not recall seeing Webb’s application. T. 784.

Since there was no inconsistency in the testimony concerning the hiring process for the civil/structural engineer positions under Fennel and Wertz, we find no evidence that Webb’s protected activities were a contributing factor in his not being rehired as a result of the May 6 resume submittal.<sup>6/</sup>

Michelle Cooke, who considered Webb one of her favorite candidates for work at CP&L, submitted his resume “blind” to Ray Heatherington on May 13, 1992, for consideration for any positions at headquarters or at the Brunswick plant. CX 14, CX 26 at 3, CX 72 at 17, 55. Heatherington did not remember receiving Webb’s resume and believed that he probably discarded it because it was not submitted in response to a particular job requirement. T. 690-691. When Quantum checked on the response to the blind submittal, Janet Crews advised that she had no idea where Webb’s resume “might have ended up.” CX 31. Since there was consistent testimony that CP&L disfavored blind submittals, *e.g.*, T. 701 (Heatherington), CX 72 at 21, 55 (Cooke), we find that Webb’s protected activities were not a contributing factor in his not being rehired pursuant to the blind submittal.

In response to a specific job requirement listing four openings for civil/structural field engineers, CX 25, Quantum again submitted Webb’s resume to Heatherington on June 15, 1992. At the outset, Quantum believed that these positions did not require a college degree. CX 25 at item 28. Between June 15 and July 1, Quantum submitted four resumes, including Webb’s, and of these four, two others besides Webb did not have a degree. CX 23. Quantum’s computer record concerning these submittals, CX 25, includes these additional notes under “status report”:

8/19/92      Need 2 plant structural modifications engineers, deg[ree]  
req[uires].

09/21      Switched over to MC [Michelle Cooke]. Old req[uires], and per  
SLG [Sharon L. George], user is slow moving. Only will      hire 1 per  
month & nobody ruled out on this req[uires] except      f o r m e r  
emp[loyee] Chuck Webb.

*See also* CX 72 at 18.

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<sup>6/</sup> Citing CX 32, Webb faults CP&L for failing to identify the supervisor responsible for staffing a position denoted as “BNP 10” or to produce a witness or document concerning that position. Webb Brief at 14. CX 32 does not establish that Webb’s resume was submitted for the “BNP 10” position and consequently we draw no adverse inference from any lack of testimony concerning that position.

We begin with the undisputed evidence that Harrell hired five individuals for these positions, all of whom had at least a four-year engineering degree. T. 618-619. Webb contends that the September remark ruling out only himself is direct evidence of discrimination, since two of the other submitted candidates also lacked degrees. Webb Brief at 20.

CP&L emphasizes the August remark in Quantum's computer record, which states that a degree was required for these positions. Michelle Cooke explained that after a brief hiatus she had just returned to work at Quantum when Webb telephoned, complained that he was being blackballed, and threatened to sue both CP&L and Quantum. CX 72 at 111-112. Cooke telephoned co-worker Sharon George, who informed her that a degree was required for these positions and, since Webb did not have a degree, he was not being considered. CX 72 at 112; CX 73 at 52-53, T. 620. Cooke explained that she made the notation that only Webb was eliminated because she talked to George only about Webb and did not inquire about the fate of any of the other candidates who had been submitted. CX 72 at 112-114.

Although the remark that only Webb was excluded, taken alone, would seem to be direct evidence of discrimination, we believe Cooke's explanation that it reflected only Webb's elimination from consideration because she asked George only about Webb's candidacy. Notwithstanding a seeming "smoking gun" in the record, other evidence may show that there was no discriminatory intent. *Acord v. Alyeska Pipeline Service Co.*, ARB Case No. 97-011, Final Dec. and Ord., June 30, 1997, slip op. at 5, 9. That is the case here.

According to Cooke, it was an error to list the jobs as not requiring a degree since actually a degree was required all along. CX 72 at 18-19. Webb argues that Cooke's explanation cannot be correct and there must also have been non-degreed positions that remained available. First, he contends that according to Sharon George, CP&L "never changed the non-degree requirement and . . . the non-degreed engineering position remained open until the job order was canceled on October 20, 1992." Webb Brief at 16 n. 19, citing CX 73 at 32-41. We do not agree with this contention. George, who did not make the computer entry, was unsure if the notation of the need for two degreed engineers "was a true need for two additional people" or a correction of the earlier notation that no degree was required for the positions under Harrell. CX 73 at 36-37.

Webb cites a second indication that there must have been a non-degreed field engineering position available: Heatherington, whose job was to screen resumes to make sure that the candidates had the appropriate education, nevertheless forwarded Webb's resume to Harrell for his consideration. Webb Brief at 16 n.18. Heatherington did not recall forwarding Webb's resume, however, T. 696, and he may simply have erred in sending it forward despite the lack of an engineering degree.

Finally, Webb argues that there also must have been a position that did not require a degree since Cooke contacted a non-degreed candidate concerning these positions even after she learned that a degree was required. Webb Brief at 17 n. 19. See CX 25 (showing that Cooke contacted Edward J. Babcock on October 19, 1992 about this position) and CX 37 (showing that

Babcock lacked an engineering degree). Webb did not question Cooke about her contact with Babcock, however.

Other evidence leads us to believe that there never was a non-degreed field engineering position under Harrell on the job listing in question. First, about nine days after his resume was submitted, Webb alerted Quantum that a rival job shop told him that a degree was required for this position. T. 252; RX 9 at 4; CX 26; CX 72 at 49. Also, Cooke testified knowledgeably that Quantum canceled the entire job requirement when it learned that a rival job shop, Enercon, had a sole source contract that covered these openings because they required a degree. CX 72 at 15, 121. If there were any remaining openings that did not require a degree, they would not have been canceled by the Enercon sole source contract. In addition, after making the “degree required” notation, Quantum submitted only candidates who had engineering degrees. CX 23. Finally, Harrell stated that he never listed a need for non-degreed field engineers with anyone. T. 639, 645.

Webb alleges that Harrell acted inconsistently, first stating there was no reason he could not be rehired at CP&L, T. 162, 617, then eliminating Webb because he lacked an engineering degree. Harrell testified credibly that at the time of the first statement he assumed Webb had a degree, T. 617, and only later eliminated him from consideration because he learned from the resume that Webb lacked the requisite education. T. 619-620.

Webb counters that Harrell’s eliminating him for lacking a degree is not credible because Harrell hired other non-degreed candidates for engineer positions. The positions for which non-degreed candidates were hired were distinguishable because they did not require design calculations. T. 267-269; see CX 8 at 1. The record shows that only degreed candidates were hired for the positions for which Webb’s resume was submitted.

Webb also is troubled by an inconsistency in Harrell’s assessment of the quality of his work. In his statement to the Department of Labor investigator, Harrell stated that Webb’s “work was below average to average on production and quality.” CX 7 at 4; CX 8 at 7. Harrell maintained this opinion at the hearing as well. T. 657. But in deposition testimony given between the time of the statement to the investigator and the hearing, Harrell agreed with the 1990 Marlar performance evaluation that Webb was above average in quality and quantity of work. T. 662-663. We are left with no clear indication of Harrell's opinion of the quality of Webb's work. The lack of clarity is not dispositive here, however, because Harrell consistently stated that he eliminated Webb from consideration for the engineer openings in June 1992 solely because he lacked a degree. T. 619-620; CX 7 at 4; CX 8 at 6. On the issue of not rehiring Webb in response to the June 15 resume submittal, we again find that Webb did not establish that his protected activities were a contributing factor.

An additional matter requires clarification. Although Webb may have believed that Quantum submitted him to CP&L for non-degreed field engineer positions, the record demonstrates otherwise. There is no evidence suggesting that Quantum’s computer records were incomplete with respect to the number of times it submitted Webb’s resume to CP&L. Although

Sharon George told the Department of Labor investigator that she had submitted Webb for field engineering positions, it is likely that George referred to the June 1992 submittal for openings that in reality required a degree. CX 73 at 103. At her later deposition, George indicated that Quantum did not submit Webb at any time other than the three occasions listed in its computer records. CX 73 at 101-102. In addition, Michelle Cooke explained that she did not submit Webb for a field engineering position that arose at about the same time as the engineer positions that reported to Harrell because Webb's pay "rate exceeds the rate for a CP&L Brunswick structural field engineer." CX 72 at 115. George concurred with that view. CX 73 at 102- 103. Neither Cooke nor George recalled Webb stating that the pay rate did not matter and he wished to be submitted for lower paying field engineering positions. CX 72 at 116; CX 73 at 103.

Finally, Webb claims that the reason he had not been hired by any employer in the nuclear industry, despite making numerous applications, must be CP&L blacklisting. Webb presented no evidence that any other employer contacted CP&L for a reference or otherwise received negative information about Webb from the company. Moreover, Webb sent out 1,400 resumes in January 1992 and had no job offers in the four months prior to the NRC writing to CP&L about the safety issues Webb raised. CP&L could not possibly be responsible for any negative result in Webb's job search prior to the NRC's notices. Webb simply has not presented sufficient evidence establishing that CP&L blacklisted him in the nuclear industry.

In summary, we find no evidence that Tripp's impermissible, discriminatory animus against Webb had any influence on the actions taken by the other CP&L personnel involved in evaluating Webb's qualifications for the positions for which his resume was submitted. Webb has not established that his protected activities were a contributing factor in any of the actions that CP&L took with regard to his submitted resume.

## **CONCLUSION**

Webb has not proved that Carolina Power violated the employee protection provision of the ERA. The complaint is **DISMISSED**.

**SO ORDERED.**

**DAVID A. O'BRIEN**  
Chair

**KARL J. SANDSTROM**  
Member

**JOYCE D. MILLER**  
Alternate Member