



In the Matter of:

ALFIO ADORNETTO,

ARB CASE NO. 98-037

COMPLAINANT,

(ALJ CASE NO. 97-ERA-16)

v.

DATE: March 31, 1999

PERRY NUCLEAR POWER PLANT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. §5851 (1994). Complainant Alfio Adornetto alleges he was laid off by Respondent Perry Nuclear Power Plant (PNPP) in retaliation for engaging in activities protected under the ERA. The Administrative Law Judge submitted a Recommended Decision and Order (R. D. and O.) in which he concluded that Adornetto failed to prove by a preponderance of the evidence that PNPP discharged Adornetto because he had engaged in protected activity. R. D. and O. at 9. We agree with the ALJ that Adornetto did not carry his burden of proof and, accordingly, dismiss Adornetto's complaint.

BACKGROUND

1. Facts.

The facts are stated in detail in the ALJ's recommended decision. *See* R. D. and O. at 2-6. As the ALJ found, Adornetto worked as a senior engineering technician and an advanced engineering technician in the Instrumentation and Controls unit (I&C) at PNPP from 1985 until his layoff in 1996. T. (Transcript of hearing) 10-12; 44. Adornetto made a complaint to the Nuclear Regulatory Commission resident inspector on April 16, 1996, alleging that he had been treated differently than other I&C technicians since making an internal complaint to management in 1990 about adherence to proper procedures. He also complained to the NRC that the procedures used by the PNPP's Quality Control department to close the 1990 complaint were

improper. R. D. & O. at 2. *See also* R- (PNPP's Exhibit) 1.^{1/} In May and June 1996, Adornetto also raised several quality and safety complaints internally to the plant ombudsman, and to PNPP's Quality Control, security and human resources departments. T. 68-71; 306; 313-315; 319.

Since 1993, PNPP had been undergoing restructuring and downsizing. Pursuant to this downsizing, PNPP laid off 175 workers in 1996. T. 184. Management determined how many employees had to be laid off in each unit. The unit supervisors reviewed the qualifications of the workers in the unit and recommended whom to lay off. The recommendations then were considered by a management human resources review board composed of the vice president for administration, an attorney, the director of human resources and the site human resources representative. Each employee recommended for layoff to the human resources review board was identified by unit and social security number, but not by name. T. 189.

Management made the decision to cut one position in I&C (Adornetto's unit) on May 6, 1996. T. 237. At the same time, many positions in other units also were being eliminated. *See* R-10. The decision regarding staff reductions was announced in the weekly plant newsletter on or about May 9, 1996. T. 225; R-11. Subsequently, Jim Wright, the I&C superintendent, met with his supervisors to determine who within the unit should be released. Consensus ultimately was reached that Adornetto was the employee to be released. T. 263.^{2/}

Ted Lutkehaus, a management consultant on the restructuring of the maintenance department, testified that a major factor in selecting candidates for severance, including the selection of Adornetto, was performance, which, along with other factors such as an employee's skills, the jobs the employee performs, and the needs of the work place, are incorporated into a company-wide forced ranking system of all employees.^{3/} T. 46, 229. The forced ranking system served as a basis for the selective severance program undertaken by PNPP in its downsizing efforts. PNPP's forced ranking of Adornetto for 1996 listed him as lowest among all I&C technicians. *Id.* The forced rankings for 1996 were made in December 1995 or January 1996. T. 269-70. Adornetto was also last on the forced ranking for 1995, third from last for 1994, and thirty-seventh out of fifty-four I&C technicians for 1993.

^{1/} The NRC investigated this complaint, and by letter of May 23, 1996 responded to Adornetto that it found no merit to his charge.

^{2/} The record is not clear exactly what date this decision was made, but it must have been between May 6, the date Wright learned they had to cut one position in I&C, and July 16, the date PNPP's human resources review board approved the I&C supervisors' recommendation to release Adornetto.

^{3/} PNPP's forced ranking list of employees was established by determining the best employee and comparing and ranking all others in the same work group or unit to that individual. T. 187. The forced rankings were done on an annual basis, and were used especially to determine salary. *Id.* Rankings of employees within a work group involved input, review and decision-making by a number of individuals within PNPP's management team. T. 188-189.

PNPP's I&C superintendent testified that other factors relevant to PNPP's low performance rating of Adornetto (and thus the decision to terminate his employment) included the fact that Adornetto needed more supervision than other technicians in the I&C unit; that he needed to be told things repeatedly; and that he was not a "self-starter." T. 258.^{4/} The I&C superintendent testified that a good I&C technician was one who was technically competent, reliable, and self-motivated. *Id.*

Adornetto was notified of his layoff on August 23, 1996, but he was kept on the payroll until September 13, 1996, because PNPP wanted to complete its investigations into the concerns Adornetto had raised internally. T. 44. The superintendent testified that he was unaware that Adornetto had made a complaint to the NRC until after Adornetto was laid off. T. 264. Adornetto filed a complaint with the Department of Labor on October 18, 1996, alleging he was wrongfully discharged.

2. The ALJ's Recommended Decision.

The ALJ found that Adornetto engaged in activity protected under 42 U.S.C. §5851, and because he had been included in a layoff, that he was the subject of adverse employment action. R. D. and O. at 8. Nevertheless, the ALJ concluded that Adornetto failed to present sufficient evidence to raise an inference that his protected activity was the motivation for his layoff, and thus Adornetto failed to establish a *prima facie* case of discrimination under Section 5851. R. D. and O. at 8-9. In any event, the ALJ concluded that even if it could be argued that Adornetto had established a *prima facie* case, PNPP had established by clear and convincing evidence a legitimate non-discriminatory reason for Adornetto's severance, in response to which Adornetto failed to carry his burden of proving that his protected activity was nevertheless a contributing factor in PNPP's adverse action against Adornetto. *Id.*^{5/}

^{4/} Adornetto's supervisors made attempts to improve his performance by giving him weekly coaching and counseling and checking back with him to assure that his tasks were being carried out. T. 259-60. The supervisors apparently spent more time trying to improve Adornetto's performance than they did with the other technicians. T. 261. Each of Adornetto's supervisors had similar experiences with him. *Id.*

^{5/} The ALJ's discussion of the shifting burdens of production in an ERA case is not accurate. The ALJ held that Adornetto must establish a *prima facie* case by a preponderance of the evidence and that in response to Adornetto's *prima facie* case, PNPP must establish by clear and convincing evidence that it had a legitimate reason for its action. R. D. and O. at 9. There is no requirement that a complainant establish a *prima facie* case by a preponderance of the evidence; a complainant only is required to present evidence sufficient to raise an inference of discriminatory motivation to establish a *prima facie* case. Furthermore, Respondent only has the burden at this point of articulating a legitimate, nondiscriminatory reason for the adverse action. Complainant must prove by a preponderance of the evidence that complainant's protected conduct was a contributing factor in the adverse action taken. If complainant carries that burden, Respondent can avoid liability by establishing by clear and convincing evidence that it would have taken the same action even in the absence of protected activity.

(continued...)

DISCUSSION

Because this case has been tried fully on the merits, it no longer serves any analytical purpose to address and resolve the question of whether Adornetto presented a *prima facie* case. Instead, the relevant inquiry is whether Adornetto prevailed by a preponderance of the evidence on the ultimate question of liability. *Carroll v. Bechtel Power Corp.*, 91-ERA-46 (Sec'y, Feb. 15, 1995), slip op. at 9-11, *aff'd Carroll v. U.S. Dept. of Labor*, 78 F.3d 352 (8th Cir. 1996).

We therefore turn to the substantive issue presented in this matter, *i.e.*, whether, upon consideration of the record as a whole, Complainant Adornetto has proven by a preponderance of the evidence that PNPP discriminated against him because of his protected activities. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y, Mar. 4, 1996), slip op. at 4-5 n.1.^{5/} Adornetto claims that he was laid off because he raised safety and quality issues internally and complained to the NRC about his treatment by management. However, the only evidence he presented in support of this claim was the temporal proximity of the layoff to his protected activity. On the other hand, PNPP produced credible evidence that its decision to lay off Adornetto was the result of a general, long-term, company-wide restructuring and downsizing which, *inter alia*, resulted in cutting one position in the I&C unit in which Adornetto worked in the summer of 1996. T. 183; R-10. PNPP further provided evidence that, as a result of its downsizing within the I&C unit, Adornetto was selected for layoff based on a legitimate, non-discriminatory reason, *i.e.*, his lower performance rating in comparison with other employees in the I&C unit. As previously noted, a major factor in deciding to lay off Adornetto was PNPP's annual forced rankings of all company employees. The most recent ranking, which had been determined by January of 1996, ranked Adornetto last among all employees in the I&C unit for 1996, with similarly low rankings for previous years. T. 263. Other legitimate and non-discriminatory reasons for selecting Claimant for layoff were that he was not highly motivated, that he spent a great deal of time in non-work related conversation, and that he had to be checked constantly to make sure he was completing his assignments. T. 258-261.

Adornetto argues that the fact that four employees were added to the I&C unit (two new hires in the winter of 1995, and two after Adornetto was laid off) demonstrated that no reduction in force was necessary, and that the reasons given by PNPP for his layoff were pretextual. However, we concur in the ALJ's finding that the two employees who had been added to the

^{5/}(...continued)

42 U.S.C. §5851(b)(3)(C) and (D).

^{6/} Before us Adornetto also raises the issue of whether the ALJ afforded him sufficient discovery. Before the ALJ, Adornetto moved for production of all the material in his personnel file as well as the performance appraisals and rankings of other employees in the I&C unit. The ALJ granted the motion in part and ordered the production of most of the material, including Adornetto's 1994 and 1995 performance appraisals, which were admitted into evidence. The ALJ did not admit the performance appraisals of other employees out of concern for their privacy. T. 340. We do not find that the ALJ abused his discretion in this regard.

I&C unit prior to Adornetto's dismissal, although not part of the most recent forced ranking because they had only recently been hired, were nevertheless considered with all others for possible termination based on their performance. T. 269-270.^{7/} We also agree with the ALJ's finding that the two employees added after Adornetto's layoff were not new hires, but individuals who had been in the I&C unit in supervisory and specialist positions who had been transferred back into technician positions as part of the company's plant restructuring. T. 269, 278. *See* R. D. & O. at 9. Even if the transfer of these employees into technician positions raises a question about how many technicians were needed at the time of Adornetto's layoff, it is insufficient, without more, to establish that PNPP's reason for laying off Adornetto was pretextual.

For all of the foregoing reasons, we find that Adornetto has not carried his burden of proving that he was selected for layoff because of his protected activities. Thus, we hold for PNPP and dismiss Adornetto's complaint.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

^{7/} PNPP testified that the two employees hired before Adornetto's layoff were needed in early 1996 because the maintenance department, which includes the I&C unit, was implementing an improvement plan and because the plant was going into an outage when work is very intensive. T. 269. Both employees were considered for layoff along with all others when the decision was made to lay off Adornetto. Both of the workers hired in late 1995 were determined to be good performers and therefore were not selected for layoff. T. 270.