



In the Matter of:

**A. D. PAYNES,**

**ARB CASE NO. 98-045**

**COMPLAINANT**

**ALJ CASE NO. 93-ERA-47**

**v.**

**DATE: August 31, 1999**

**GULF STATES UTILITIES  
COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

Steven Irving, Esq.  
*Baton Rouge, Louisiana*

*For the Respondent:*

Robert M. Rader, Esq., Joan B. Tucker Fife, Esq., *Winston and Strawn  
Washington, D.C.*

**FINAL DECISION AND ORDER**

This case arises under Section 211 of the Energy Reorganization Act of 1974, as amended (ERA), codified at 42 U.S.C. §5851 (1994) and the regulations promulgated thereunder at 29 C.F.R. Part 24.<sup>1/</sup> Complainant A. D. Paynes ("Paynes") alleged that Respondent Gulf States Utilities Company ("Gulf States") violated the whistleblower protection provisions of the ERA when it removed him from his position as a Radiation Protection Technician (RPT) First

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<sup>1/</sup> These regulations were amended to provide, *inter alia*, for review of ERA and other environmental "whistleblower" complaints only upon the filing of an appeal by a party aggrieved by an Administrative Law Judge's decision. *See* 63 Fed. Reg. 6614 (Feb. 9, 1998). Here, the Administrative Law Judge issued a recommended decision and order on December 3, 1997; accordingly, this matter is before the Board pursuant to the previous automatic review provision of the regulation at 29 C.F.R. §24.6(a) (1997).

Class and reassigned him to perform duties in Gulf States' tool room. In the December 3, 1997 Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) determined that Gulf States removed Paynes from his position as an RPT First Class for legitimate, nondiscriminatory, business reasons. Accordingly, the ALJ recommended that Paynes' complaint be dismissed. Although the Board disagrees with the ALJ's analysis, we concur that Paynes did not prove that his reassignment was the result of discrimination, and we therefore dismiss the complaint.

## BACKGROUND

The record in this case has been thoroughly reviewed. We find that it fully supports the ALJ's factual findings in support of the conclusion that Paynes was removed from his position as an RPT First Class for legitimate business reasons and not, as Paynes alleges, in retaliation for having engaged in whistleblower activities protected under the ERA. The ALJ prepared 27 pages of enumerated paragraphs denoted under the caption "Findings of Fact." These are, in large measure, merely recitations of testimony at the hearing. Nevertheless, to the extent that these enumerated items are uncontradicted or otherwise accepted as fact by the ALJ's credibility findings, they do provide the necessary background of this dispute, which is summarized:

Complainant Paynes was employed by Respondent Gulf States since 1981. At the time of the hearing before the ALJ in this matter, Paynes had worked at Gulf States' River Bend nuclear power facility for five years. R. D. and O. at 2. Paynes commenced working for Gulf States as a lineman helper and eventually, through advancement, worked his way up to a position in the Radiation Protection Department of the River Bend station. *Id.* At the time this whistleblower dispute arose, Paynes had achieved the position of RPT First Class. *Id.* at 3.

On September 30, 1992, Paynes was working at the River Bend access control desk, from which position workers were monitored for access to areas of the plant. During the course of that duty, Paynes was informed that a ladder had been left in a high radiation area of the plant, thus posing a potentially dangerous situation for anyone using the ladder. As a result of this information, Paynes wrote up a Radiological Deficiency Report (RDR), which documented the ladder incident, *id.*, and which was subsequently reviewed and signed by the director of Gulf States' radiological program on October 16, 1992.<sup>2/</sup> R. D. and O. at 18.

The day following his write-up of the RDR, on October 1, 1992, Paynes was notified that a waste bag containing radioactive contaminants had been discovered in the plant's radioactive waste building. The bag was marked with a tag identifying it as having been inspected by

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<sup>2/</sup> According to the testimony presented to the ALJ, an RDR is generated so that management can make a first-hand assessment of the situation at issue and determine whether or not further action, by way of a "Condition Report," is warranted. The ladder incident was subsequently determined not to rise to the level of concern necessitating a "Condition Report." R. D. and O. at 4.

Paynes on September 4, 1992. The bag, upon investigation by Gulf States employees, was shown to be very radioactive, generating approximately 14,000 millirems (14 R) of radiation per hour, R. D. and O. at 5, although the identification tag for the bag which had been signed by Paynes specified that the waste bag was emitting less than two millirems per hour of radiation. *Id.* at 8.

Following an investigation by Gulf States of the 14 R bag incident, which found Paynes to be responsible for the mislabeling, Paynes was suspended for three days. Subsequently, in January of 1993, management for Gulf States removed Paynes from his RPT First Class position and transferred him to a new position involving a substantial reduction in pay.<sup>3/</sup> Gulf States asserted at hearing before the ALJ that the basis for Paynes' removal and demotion was management's conclusion that Paynes' overall employment history and job performance (including *inter alia* the 14 R bag incident, numerous other safety violations, insubordination, failure to follow required procedures, etc.) constituted a risk to the plant and a risk to plant workers. R. D. and O. at 15, 18.

Paynes filed his whistleblower complaint, initiating this proceeding, on June 21, 1993, alleging that his job transfer and demotion were effected because of his reporting of the ladder incident in an RDR.

## DISCUSSION

### I. Res Judicata/Collateral Estoppel

Before the ALJ, Gulf States contended that Paynes' ERA complaint was barred by *res judicata*, based on an arbitration proceeding in which Paynes' transfer to the tool room was litigated. The arbitrator had determined that Gulf States' transfer of Paynes to the tool room was invalid as a matter of contract law, but that Paynes' performance was so unsatisfactory as to require a disciplinary demotion to the lowest position within the radiation protection department.

The ALJ reviewed the law of both claim preclusion and issue preclusion, and determined that the arbitration proceeding had no *res judicata* effect, *i.e.*, that Paynes' whistleblower complaint was not precluded as a matter of law by the arbitration proceeding's outcome. Claim preclusion was not applicable because Paynes could not have successfully raised his ERA Section 211 complaint in the arbitration proceeding, which was grounded in a breach of contract claim. *See Restatement (Second) of Judgments*, §26. The ALJ further held that issue preclusion (collateral estoppel) was not applicable because the issue of Paynes' actual job performance was

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<sup>3/</sup> Upon his transfer to the tool room, Paynes experienced a reduction in his hourly rate of pay from \$17.00 to \$12.64. R. D. and O. at 7. However, Paynes was eventually returned to duty in the Radiation Protection Group as the result of an arbitrator's decision which concluded that as a matter of contract law under an applicable union agreement, the transfer to the tool room was not justified.

not fully and vigorously litigated in the arbitration proceeding, and because the main issue in the arbitration proceeding concerning the transfer was decided as a matter of contract law.

The law of *res judicata* is applicable to administrative proceedings when an agency is acting in a judicial capacity. Under this doctrine, a judgment on the merits in a prior suit bars a second suit involving the same parties based on the same cause of action. The judgment precludes the parties from relitigating issues that were or could have been raised in that action. For the same reasons as set forth by the ALJ, the Board holds that neither *res judicata* (claim preclusion) nor collateral estoppel (issue preclusion) are applicable in the instant case. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (four-part standard for applicability of issue preclusion).

## II. Paynes' Claim of Whistleblower Protection under the ERA

Since this case has been fully tried on the merits, the relevant inquiry before the Board is whether Paynes prevailed by a preponderance of the evidence on the ultimate question of liability. *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, Sec'y Dec., Feb. 15, 1995, slip op. at 9-11, *aff'd Carroll v. U.S. Dept. of Labor*, 78 F.3d 352 (8th Cir. 1996); *Adornetto v. Perry Nuclear Power Plant*, Case No. 97-ERA-16, ARB Case No. 98-037, Fin. Dec. and Ord., Mar. 31, 1999, slip op. at 3. See also *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8, Sec'y Dec., Mar. 4, 1996, slip op. at 4-5 n.1. Thus, it must be determined whether Paynes has proven, by a preponderance of the evidence, that he engaged in protected activity under the ERA,<sup>4/</sup> that Gulf States took adverse action against Paynes, and that Paynes' ERA-protected activity was a contributing factor in the adverse action that was taken. *Dysert v. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997); *Simon v. Simmons Foods*, 49 F.3d 386 (8th Cir. 1995); *Ross v. Florida Power and Light*, Case No. 96-ERA-36, ARB Case No. 98-044, Fin. Dec. & Ord., Mar. 31, 1999, slip op. at 6. See 42 U.S.C. §5851(b)(3)(C).<sup>5/</sup>

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<sup>4/</sup> The employee protection provisions of the ERA relevant to the instant action, found at 42 U.S.C. §5851 (1994), provide in pertinent part:

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 . . .

<sup>5/</sup> The burden of proof is on the complainant. Thus, it is *not* as the ALJ opined (R. D. & O. at 31), respondent's burden to prove that the complainant was subjected to adverse action for legitimate, non-discriminatory reasons.

As the ALJ correctly concluded (R. D. and O. at 35), Paynes did engage in protected activity when he filed the RDR reporting the ladder that had been inadvertently left in a radioactive area of Gulf States' nuclear plant. This constituted an internal complaint protected under the ERA.<sup>6/</sup> Moreover, it is undisputed that Gulf States took adverse action against Paynes, in the form of the demotion and reassignment to the tool room. However, Paynes failed to prove by a preponderance of the evidence that his filing of the RDR was a contributing factor in the adverse action taken against him.

Gulf States presented extensive documentary evidence and testimony found credible by the ALJ supporting the conclusion that Paynes' internal RDR "complaint" had nothing to do with the adverse action taken, but that Gulf States had ample legitimate, non-discriminatory reasons to transfer Paynes to the lower-paid tool room position. As the ALJ summarized the relevant credible evidence:

Previous to Complainant's transfer, Complainant was receiving job evaluations that were mediocre at best. These job evaluations frequently stated that Complainant had problems with insubordination, punctuality, completeness and accuracy of documentation, and failure to follow proper procedure with routine tasks. Past disciplinary action had been taken against Complainant for loafing, insubordination, tardiness, absenteeism while on duty, possession of a TV [in violation of company policy], and production and possession of objectionable drawings.

R. D. and O. at 31.<sup>7/</sup>

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<sup>6/</sup> Before the ALJ and this Board, Gulf States argued that Paynes failed to demonstrate that the filing of the RDR in September, 1992 was a protected activity, because at that time, the filing of internal complaints was not deemed protected under the ERA in the Fifth Circuit where this matter arose. *See Brown and Root v. Donovan*, 747 F.2d 1029, 1036 (5th Cir. 1984). However, the ERA was amended to specifically include the filing of internal complaints by the Comprehensive National Energy Policy Act of 1992 (CNEPA), enacted on October 24, 1992. Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992). Subsection 2902(i) of the CNEPA provides:

The amendments made by this section shall apply to claims filed under section 211(b) of the Energy Reorganization Act of 1974 (42 U.S.C. 5851(b)(1)) on or after the date of the enactment of this Act.

Thus, the ALJ properly concluded that Paynes' filing of the RDR in September 1992 – although prior to enactment of the ERA amendments – was nevertheless protected activity because the complaint in this matter was filed in June 1993, after the ERA was amended.

<sup>7/</sup> *See also* R. D. and O. at 27, ¶150 and Respondent's Exhibit (RX) -20 (insubordination); R. D. and O. at 27, ¶¶154 and 155 and RX-30 (punctuality and tardiness); R. D. and O. at 27, ¶155 and RX-35 (continued...)

Two episodes cited by Gulf States as justification for the action taken against Paynes are worth particular note: the incident of the improperly tagged bag of radioactive materials (the 14 R bag incident), and the mishandling by Paynes of a radioactive source used in monitoring radiological survey equipment. Both incidents were cited by Gulf States as clear evidence of Paynes' lack of nuclear safety-consciousness. Concerning the matter of the improperly labeled bag, the ALJ found more credible Gulf States' evidence regarding Paynes' responsibility for the 14 R bag, which had been discovered by another RPT lying unattended in the radioactive waste area. Paynes was found by the ALJ to have mistakenly tagged the bag as only producing two millirems of radiation, a relatively low level. In fact, however, the bag was "very hot," with about 14,000 millirems of gamma radiation.<sup>8/</sup> R. D. and O. at 5. Paynes' explanation, not credited by the ALJ, was that he believed he could not "have missed such a highly radioactive dose rate and written out the wrong tag for it." *Id.*; Transcript (T.) 38-39. At hearing, Paynes additionally argued, but failed to prove, that the 14 R bag incident was the result of his having been "set up" by Gulf States. R. D. and O. at 6; T. 60. The ALJ concluded that Paynes' explanation was not supported by the evidence and that Gulf States' more credible evidence supported the finding of Paynes' misfeasance with regard to the tagging of the 14 R bag. R. D. and O. at 31-32.

Gulf States also cited, as an example of Paynes' overall unsuitability for the safety position he had held, Paynes' failure to exercise proper care in the handling of a radioactive source used for monitoring the accuracy of radiological survey equipment. As the ALJ noted, the radioactive source had been checked out by Paynes; was never checked back in; and was later found in the device that Paynes had been responsible for testing. R. D. and O. at 33.

In summary, we find that there is no evidence that Gulf States' demotion and reassignment of Paynes was in any way motivated by Paynes' filing of the RDR. Moreover, based on the two episodes discussed above, as well as the many other similar incidents cited in the record of serious and repeated problems with Paynes' job performance, we agree with the ALJ's conclusion that Paynes was subjected to adverse action for legitimate, nondiscriminatory reasons.

### **III. The ALJ's determination concerning the *prima facie* case**

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<sup>7/</sup>(...continued)

(producing and possessing objectionable drawings, loafing and neglect of duties; R. D. and O. at 28, ¶157 (possession of a portable television while on duty); R. D. and O. at 28, ¶158 and RX-36 (failure to respond to numerous plant pages while on duty).

<sup>8/</sup> The Nuclear Regulatory Commission (NRC) subsequently levied a fine of \$100,000 against Gulf States, in large part for the 14 R bag incident. The ALJ found, based on the testimony of one of Respondent's vice-presidents, that "Complainant was directly or indirectly responsible for 9 of the remaining 14 violations [found by the NRC]. Most of these violations were 'cascading' from the initial improper survey of the 14 R bag." R. D. and O. at 12; Transcript (T.) 357, 363.

We note that although this case was fully tried on the merits, the ALJ nevertheless analyzed the record to determine whether Paynes presented a *prima facie* case, concluding that Paynes did not. R. D. and O. at 39. Notwithstanding the lack of utility of determining in the instant case whether a *prima facie* case may have been presented, the ALJ's analysis of this issue compels the following response and clarification as a matter of law.

We take no issue with the ALJ's analysis and conclusions that Paynes had demonstrated the first three elements of a *prima facie* case.<sup>9/</sup> However, in concluding that Paynes had failed to establish the fourth element (inference of a causal relationship),<sup>10/</sup> the ALJ improperly relied on evidence that Paynes had filed an Equal Employment Opportunity Commission (EEOC) complaint and invoked a contractual union arbitration proceeding both seeking relief from his transfer.<sup>11/</sup> See R. D. and O. at 39-40. The ALJ stated that:

Here it seems that Complainant had multiple theories on why he had been transferred. However, his initial theory was that he had been discriminated against because of his race, not because of any "protected activity." Thus, I have great difficulty in trying to infer that Complainant's filing of the RDR was the reason for his transfer when Complainant himself first alleged discrimination based on race and held to this allegation for five months. Eventually, Complainant later completely changed his story, stating that he had been discriminated against because of his RDR on the ladder incident. In considering that Complainant also sought arbitration with his union, it appears to me that Complainant was in essence, "covering all his bases" in his efforts to regain his higher paying position. Also, in each of the three separate actions, Complainant put forth three different arguments as to why he should be reinstated to his former position. For the EEOC action, Complainant asserted discrimination based on race. For the arbitration action, Complainant asserted contract law and

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<sup>9/</sup> The first three elements of a *prima facie* case are: (1) that the complainant engaged in protected activity; (2) that the employer was aware of that conduct; and (3) that the employer took some adverse action against the employee. *Bechtel Construction Company v. Secretary of Labor*, 50 F.3d 926, 933 (11th Cir. 1995); *Dean Darty v. Zack Company of Chicago*, Case No. 82-ERA-2, Sec'y Dec., Apr. 25, 1983, slip op. at 7-8.

<sup>10/</sup> This element requires evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. See *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983).

<sup>11/</sup> In the former proceeding, Paynes alleged that the transfer was illegal racial discrimination based on the fact that he is African American; in the latter, Paynes alleged that the transfer was a violation of his employment contract.

did not mention discrimination of any sort. Finally, for the present action Complainant asserts discrimination based on protected activity and wishes this Court to infer as much. This I cannot do.

R. D. and O. at 39.

The fact that Paynes filed two other actions – in addition to the instant whistleblower complaint – arising from the same factual circumstances and alleging different theories to advance his causes is simply not relevant to consideration of whether he had been discriminated against for engaging in activity protected under the ERA. Paynes had a right to file his racial discrimination complaint with the EEOC and his contract claim in the arbitration process. Availing himself of separate forums and separate theories seeking redress for the adverse transfer action has no bearing on whether his whistleblower complaint under the ERA was meritorious. As the Secretary opined in an analogous situation: “Clearly the same set of operative facts which give rise to [an ERA] complaint could serve as the basis for a complaint under another statute or common law theory of redress.” *Brown v. Tennessee Valley Authority*, ALJ Case No. 89-ERA-2, Sec. Dec., Mar. 21, 1994, slip op. at p. 2, n.1. Accordingly, we reject the ALJ’s determination that Complainant failed to demonstrate the fourth element of a *prima facie* case based on the fact that Paynes also sought relief from the EEOC and in arbitration proceedings based on the same facts giving rise to his whistleblower complaint.

## CONCLUSION

Based on our review of the record in this case, considered in light of statutory authority and applicable case law, we conclude that Paynes failed to prove by a preponderance of the evidence that he was discriminated against for having engaged in activity protected by the ERA. Accordingly, the complaint in this matter is **DISMISSED**.

**SO ORDERED.**

**PAUL GREENBERG**

Chair

**E. COOPER BROWN**

Member

**CYNTHIA L. ATTWOOD**

Member