In the Matter of:

SYED M. A. HASAN, **ARB CASE NO. 04-045**

COMPLAINANT, **ALJ CASE NO. 03-ERA-31**

v. **DATE: May 18, 2005**

ENERCON SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Syed M. A. Hasan, pro se, ***Madison, Alabama***

For the Respondents:
Terry M. Kollmorgen, Esq., ***Moyers, Martin, Santee, Imel & Tetrick, LLP, Tulsa, Oklahoma***

FINAL DECISION AND ORDER

The Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1995) (ERA) protects whistleblowers from retaliation for engaging in protected activity related to atomic energy safety concerns. Because Syed M. A. Hasan failed to adduce evidence that Enercon Services, Inc. refused to hire him because of his prior whistleblowing activity, the Administrative Law Judge (ALJ) in this case granted summary judgment for Enercon Services, Inc. Recommended Decision and Order (R. D. & O.). For the reasons that follow, we accept that recommendation and deny Hasan's complaint.

BACKGROUND

The facts are stated in the R. D. & O., and those that are dispositive of Hasan's complaint are uncontested. Hasan was a civil/structural engineer with experience in the nuclear industry. Enercon was a consulting firm that employed engineers and other personnel and furnished them to clients in the nuclear and other power generating fields.

In late 2002 and early 2003, Hasan applied for three positions with Enercon. Enercon advertised these positions to fill the specific needs of an individual client. Hasan's applications gave no indication of his prior whistleblower activity. See Respondent's Motion for Summary Judgment and Brief in Support (Motion for Summary Judgment), Exhibits A, B, C. In two cases, Enercon filled the positions with candidates Enercon deemed more qualified than Hasan. Enercon hired no one for the third position, because the client decided to fill it in-house with existing resources. R. D. & O. at 3-9.

On May 21, 2003, Hasan filed a complaint with the Department of Labor, in which he speculated that he was not hired "because some background check by Enercon must have revealed that I had engaged in [prior] whistleblower activities." Complaint, at 2. After an investigation, the Occupational Safety and Health Administration determined that Hasan's complaint had no merit, whereupon Hasan requested a hearing before an ALJ. Enercon then filed a motion for summary judgment (summary decision), together with affidavits from two Enercon managers involved in the hiring process. Both denied knowledge of Hasan's prior whistleblowing activities, either from him or from other sources, and stated those activities played no role in the decisions to hire two other superior candidates. R. D. & O. at 8-9; Respondent's Motion for Summary Judgment and Brief in Support, Exhibits B, C. Enercon's client's decision not to fill the third opening caused no harm to Hasan, because no one was hired. It also occurred before Hasan's February 21, 2003 and March 19, 2003 letters disclosing for the first time to Enercon his claimed whistleblower status. R. D. & O. at 8-9. For these reasons, the ALJ held that Hasan's retaliation claim failed, and that Enercon was entitled to judgment as a matter of law. R. D. & O. at 8-9. Hasan then appealed to this Board.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's recommended decision pursuant to 29 C.F.R. § 24.8 (2004 and Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.1(a), including the whistleblower protection provisions of the ERA). *Hasan v. Southern Co., Inc.,* ARB No. 04-040, ALJ No. 03-ERA-32, slip op. at 3 (ARB Mar. 29, 2005); *Demski v. Indiana Mich. Power Co.,* ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 3 (ARB Apr. 9, 2004); *Kelly v. Lambda Research, Inc.,* ARB No. 02-075, ALJ No. 2000-ERA-35, slip op. at 2 (ARB Mar. 31, 2004).

We review an ALJ's recommended grant of summary judgment (summary decision) under 29 C.F.R. § 18.40, 18.41, de novo. *Seetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. 3 (ARB May 28, 2004); *Demski*, slip op. at 3. Pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *Seetharaman*, slip op. at 4, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Seetharaman,* slip op. at 4.

At this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Id.*, citing *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e).

If the non-moving party fails to establish an element essential to his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Seetharaman*, slip op. at 4, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Accordingly, the Board will affirm an ALJ's recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Seetharaman*, slip op. at 4; *Demski*, slip op. at 3. *See also Hasan*, slip op. at 3-4.

DISCUSSION

To prevail under the ERA, a complainant must prove by a preponderance of the evidence that he was an employee who engaged in protected activity, that the employer knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action the employer took. 42 U.S.C.A. § 5851(b)(3)(C); *Hasan*, slip op. at 2, 4; *Demski*, slip op. at 3; *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 5-8 (Sept. 30, 2003). However, "[r]elief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior [i.e., the protected activity]." 42 U.S.C.A. § 5851(b)(3)(D); *Demski*, slip op. at 3; *Kester*, slip op. at 7.

To succeed on summary decision, Enercon need only demonstrate a "complete failure of proof concerning an essential element of [Hasan's] case," in this instance that Enercon was aware of his protected activity at the time it chose not to hire him. In the face of affidavits from two Enercon managers swearing that they had no knowledge of his previous whistleblower activities when they made the decision, Hasan offered only speculation that Enercon did not hire him because "some background check" must have disclosed his earlier whistleblower activities or that the affiants must have committed perjury. Hasan did not set forth specific facts on an issue upon which he would bear the ultimate burden of proof at trial.[1] Therefore, the ALJ correctly concluded that Enercon

[1] Although Hasan is pro se, we note that he is quite experienced at litigating whistleblower cases under the ERA. The Office of Administrative Law Judges, the Administrative Review Board and the federal Courts of Appeals have repeatedly instructed him on the elements necessary to prove unlawful retaliation under the ERA. *See e.g., Hasan v. Sargent & Lundy*, ARB No. 03-030, ALJ No. 2000-ERA-7 (ARB July 30, 2004), *aff'd sub*

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was entitled to summary decision. R. D. & O. at 3-9. In addition, when Hasan was not hired for the third position for which he applied, he suffered no adverse action, since Enercon's client withdrew the request to fill the position.[2] R. D. & O. at 3-9. Because Enercon is entitled to summary decision, Hasan's complaint is **DENIED.**

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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nom., Hasan v. United States Dep't of Labor, No. 04-3030, 2005 WL 578791 (7th Cir. Mar. 14, 2005); *Hasan v. Stone & Webster Engineers & Constructors, Inc.*, ARB No. 03-058, ALJ No. 2000-ERA-10 (ARB June 27, 2003), *aff'd sub nom., Hasan v. Secretary of Labor*, No. 03-1981, 2004 WL 574520 (1st Cir. Mar. 24, 2004); *Hasan v. J.A. Jones, Inc.,* ARB No. 02-121, ALJ No. 2002-ERA-18 (ARB June 25, 2003), *aff'd sub nom., Hasan v. United States Dep't of Labor,* No. 03-1852, 2004 WL 1539635 (4th Cir. July 9, 2004); *Hasan v. J.A. Jones, Inc.,* ARB No. 02-123, ALJ No. 2002-ERA-5 (ARB June 25, 2003), *aff'd sub nom., Hasan v. United States Dep't of Labor,* No. 03-15469, 2004 WL 1121580 (11th Cir. May 11, 2004); *Hasan v. Florida Power & Light Co.*, ARB No. 01-004, ALJ No. 2000-ERA-12 (ARB May 17, 2001), *aff'd sub nom., Hasan v. United States Dep't of Labor,* No. 01-12953, 2002 WL 833328 (11th Cir. Apr. 11, 2002); *Hasan v. Wolfe Creek Nuclear Operating Corp.*, ARB No. 01-006, ALJ No. 2000-ERA-14 (ARB May 31, 2001), *aff'd sub nom., Hasan v. United States Dep't of Labor,* 298 F.3d 914 (10th Cir. 2002); *Hasan v. Commonwealth Edison Co.*, ARB Nos. 01-002, 01-003, 01-005, ALJ Nos. 2000-ERA-8, 11, 13 (ARB Apr. 23, 2001), *aff'd sub nom., Hasan v. United States Dep't of Labor,* No. 01-1130, 2002 WL 448410 (7th Cir. Mar. 19, 2002); *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA- 6 (ARB Jan. 30, 2001), *aff'd sub nom., Hasan* v. *United States Sec'y of Labor,* No. 01-1322, 2004 WL 1055257 (3d Cir. Apr. 23, 2004); *Hasan v. Intergraph Corp.,* ARB Nos. 97-016, 97-051, ALJ Nos. 1996-ERA-17, 27 (ARB Aug. 6, 1997), *aff'd sub nom., Hasan v. Director*, 190 F.3d 544 (11th Cir. 1999); *Hasan v. Commonwealth Edison Co.*, ARB No. 00-028, ALJ No. 2000-ERA-1 (ARB Dec. 29, 2000), *aff'd sub nom., Hasan v. United States Dep't of Labor,* No. 01-1131, 2002 WL 448410 (7th Cir. Mar. 19, 2002); *Hasan v. Commonwealth Edison Co.*, ARB No. 00-043, ALJ No. 1999-ERA-17 (ARB Dec. 29, 2000), *aff'd sub nom., Hasan v. United States Dep't of Labor,* No. 01-2177, 2002 WL 448410 (7th Cir. Mar. 19, 2002).

[2] Enercon asserts that, notwithstanding Hasan's alleged whistleblowing, it had legitimate, non-discriminatory reasons for hiring other candidates, namely they were better qualified for the particular positions. Respondent, Enercon Services, Inc.'s Brief on Appeal, at 19-20, 23. Since resolution of that issue may involve the weighing of evidence and is not necessary for resolution of the complaint, we do not reach it.