

U.S. Department of Labor

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Issue Date: 22 December 2004

CASE NO.: 2004-ERA-22 AND 2004-ERA-27

IN THE MATTER OF

**SYED M.A. HASAN,
Complainant**

v.

**ENERCON SERVICES, INC.,
Respondent**

APPEARANCES:

**Syed M.A. Hasan,
Pro Se**

**Terry M. Kollmorgen, Esq.
On behalf of Respondent**

**Before: CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**

**RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT**

A. Background

This case arises under the employee protection provisions of Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 *et seq.*, and the regulations promulgated at 29 C.F.R. Part 24. The ERA prohibits an employer from discriminating against or otherwise taking unfavorable personnel action against an employee concerning compensation, terms, conditions or privileges of employment, because the employee engages in protected whistle blowing activity.

On May 21, 2003, Complainant, a civil/structural engineer, filed his initial complaint against Respondent contending that Respondent refused to hire him on three separate occasions, in January and February, 2003, for civil/structural engineering positions at First Energy's Perry Nuclear Power Plant jobsite, allegedly because of protected whistle blowing activities. On the first two occasions, Respondent hired engineers, Folgu J. Nag and Juan J. Vizcaya to fill these positions. On the third occasion, which involved work during a temporary outage, First Energy cancelled the job order deciding to perform the work on overtime using existing personnel.¹ Complainant further alleged Respondent discriminatorily refused to hire him for unspecified civil/structural engineer positions which it advertised on its website in February, and March, 2003.

On January 15, 2004, Administrative Law Judge, Larry W. Price, issued a Recommended Decision and Order granting summary judgment and denying complaint finding either that Respondent had no knowledge of Complainant's whistle blowing activity when it failed to hire him for available positions or that there was no evidence of adverse employment action when Respondent failed to hire anyone for either the temporary outage or website advertised positions. Indeed, Judge Price found that the website advertised positions never existed, but rather, constituted an attempt by Respondent to solicit names of engineers to add to its data base for potential future employment. That Decision is currently before the Board on appeal.²

In the present case, Complainant filed complaints on May 3, 2004 and July 23, 2004, alleging Respondent's continual refusal to hire him for additional engineering website positions advertised on November 22, 2003, February 5, 2004, and July 23, 2004, because of his whistle blowing activities. On November 2, 2004, Complainant amended his complaints to include another refusal to hire for an engineering website position advertised on October 3, 2004. The Occupational Health and Safety Administration investigated the May 3, 2004 complaint and on May 24, 2004 issued its report finding no merit to Complainant's allegations. Complainant timely appealed the OSHA determination and the matter was referred to the undersigned for hearing. Due to a similarity of issues, and in agreement with the parties, the undersigned consolidated for determination the May 3, July 23, and November 2, 2004 complaints.

Prior to issuance of this decision, Complainant filed a series of motions seeking to discover among other things the names, qualifications and experience, location, job requirement and client of those civil/structural engineers it hired nationwide from November 23, 2002 to present. Respondent provided that information for 16 engineers it hired during that period in its civil/structural piping division including the resumes of said individuals. In addition,

¹ *Hasan v. Enercon*, 2003-ERA-31 (ALJ, January 15, 2004).

² Complainant has filed multiple, non-meritorious whistle blowing complaints in the past against various employers including: Nuclear Power Systems, Inc. (1986-ERA-24); System Energy Resources, Inc. (1989-ERA-36); Bechtel Power Corporation (1993-ERA-22; 1993-ERA-40; 1994-ERA-210); Sargent & Lundy (1996-ERA-27, 2000-ERA-7, 2002-ERA-32); Intergraph Corporation (1996-ERA-17); Commonwealth Edison The Estes Group (1999-ERA-17, 2000-ERA-1); Burns and Roe Enterprises (2000-ERA-6); Commonwealth Edison Co. (2000-ERA-8, 2000-ERA-11, 2000-ERA-13); Florida Power and Light (2000-ERA-12); J.A. Jones-Lockwood Greene (2002-ERA-5, 2002-ERA-18); J.A. Jones Inc. (2003-ERA-7); J.A. Jones Serv. and Professional Project (2003-ERA-33); Southern Company, Inc. (2003-ERA-32); Stone and Webster Engineering Corp. (2000-ERA-10); Wolf Creek Nuclear Operating Corp. (2000-ERA-14 and 2002-ERA-29).

Respondent identified the names of those individuals that made the hiring decisions and provided Complainant with an explanation of why he was not selected. Based upon Respondent's compliance with discovery request the undersigned denied Complainant's request for sanctions and default judgment.

On September 13, 2004, and November 29, 2004, Respondent filed motions for summary decision with supporting briefs. Complainant responded to both motions seeking default judgments due to Respondent's alleged refusal to comply with his discovery requests.³ Contrary to Complainant's contention the undersigned found that Respondent furnished Complainant with sufficient and pertinent discovery materials as noted above. In addition, Respondent provided Complainant with the reason and procedure behind each new hire, with the name of each client the new hires were sent to serve. Respondent was not required to turn over the entire personnel files of all new hires, nor to respond to questions concerning engineers, Folgu and Juan J. Vizcaya, which were the subject of Judge Price's decision in *Hasan v. Enercon*, 2003-ERA-31. A request for all personnel files constituted an unwarranted 'fishing expedition' rejected by the Board and U.S. Seventh Circuit Court of Appeals in *Hasan v. United States Dept. of Labor*, 31 Fed Appx 328 (2002).

In response to Respondent's current motion for summary decision, Complainant asked for the undersigned to recuse himself, and if unsuccessful with that motion, to reconsider previous motions to sanction Respondent and its law firm for lying to the Court regarding its hiring of engineers and its reasons for refusing to hire Complainant.⁴ Complainant further asserted that: (1) he was at a disadvantage in not having a copy of a November, 2004 transcript of a conference call, between the undersigned and the parties, so as to apparently detail instances of deception by Respondent's lawyer;⁵ (2) the undersigned should take notice of Respondent's past illegal refusal to hire him⁶; (3) Respondent refused to provide full discovery, including the name of the school and year of graduation and work experience in chronological order for each newly hired engineer;⁷ and (4) Respondent also refused to provide entire personnel files on newly hired

³ Complainant's latest response is a 25 page document dated December 20, 2004, entitled "Pro Se Complainant's Response to Respondent's Reply of December 16, 2004. This was preceded by a 36 page document filed on December 13, 2004 entitled "Pro Se Complainant's Sworn Response to Respondent's Second (Supplemental) Motion for Summary Decision."

⁴ As stated previously Complainant has not asserted nor does the undersigned find any reason to recuse himself in this matter.

⁵ Contrary to Complainant's assertion, he was provided pursuant to FOIA a copy of the November 2, 2004 conference call on December 9, 2004. Further, a review of the transcript does not reveal any evidence of misrepresentations by Respondent's counsel including Kim Cruse's difficulty in finding on Respondent's internet an advertisement that ran from January 7, 2004 through October 3, 2004, seeking experienced civil/structural engineers for temporary positions. Respondent in its reply brief on pages 3 and 4 provides an explanation for Ms. Cruse's difficulty in locating the ad.

⁶ There is no evidence of Respondent illegally refusing to hire Complainant.

⁷ Respondent provided Complainant with job resumes of newly hired structural engineers that it possessed. Complainant was not satisfied with this wanting Respondent instead to conduct additional inquiry and supply the information on each newly hired engineer, showing school and year of graduation with a listing of jobs in chronological order. The undersigned directed Respondent that it was not necessary to do additional research so as

engineers including documentation of interviews⁸; (5) Respondent and its attorney repeatedly lied to ALJ Price in the prior proceeding when they stated Respondent did not hire any individuals in the civil/structural engineering division between January 23, 2003 and May 21, 2003,⁹ (6) Respondent's discovery did not include the hiring of engineer Juan J. Vizcaya, previously disclosed to Complainant in the case before ALJ Price¹⁰; (7) Respondent's supervisors, Whitmore and McGoe, lied to ALJ Price concerning the date they initially learned of Complainant's protected activities;¹¹ (8) Respondent was obligated to hire Complainant for any of the available jobs for which he was qualified and experienced,¹² (9) If the undersigned drew all reasonable inferences in the light most favorable to Complainant, he would find genuine issues of material fact which allegedly can only be resolved after full discovery and a hearing; (10) Respondent failed to send discovery response, but instead sent two copies of an affidavit from David Studley¹³ and marked the copies as exhibits 15 and 16; (11) Respondent failed to

to provide the additional requested information as long as it supplied Complainant with the resumes it had on file. Respondent did not have to provide Complainant with letters from clients requesting specific engineers by name because no such letters exist. In those cases where engineers were requested by name such requests were oral. (See page 4 of Respondent's reply brief.)

⁸ Respondent had no documentation of interviews. Complainant asserted he needed the entire personnel file so as to cross examine witnesses at trial and establish disparate treatment. Complainant also asserted that he needed all hiring records, because Respondent failed to initially list engineers Don McGuigan and Abe A Lofti among its new hires. Lofti was hired before the discovery period commenced. McGuigan was not hired as an engineer, but rather a senior consultant.

⁹ Discovery in the prior case involved only Respondent's Germantown, Maryland, and Mt. Arlington, New Jersey offices.

¹⁰ The undersigned instructed Respondent that it did not have to supply Complainant again with information it had previously given him in the prior proceeding before ALJ Price.

¹¹ Contrary to Complainant's assertions there is no evidence of lying by either Whitmore or McGoe.

¹² Complainant argued that when employers use informal methods of hiring, they have a duty to consider all those who might reasonably be interested, as well as those who express formal interest. See *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1133 (11th Cir. 1984). Further, a job applicant need not formally apply for a job. See *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th Cir. 1992). In its reply brief, Respondent correctly asserts that Complainant has misread the principal established in both cases, namely that an employer cannot raise as a defense for not hiring an individual that said individual did not formally apply for the job when employer already knows that the individual is interested in the position. Respondent knew Complainant was interested in employment, but admittedly did not consider Complainant who was one of hundreds of engineers on its data base because he was not requested /identified by a client nor was he known to Respondent or a client as a high performer.

¹³ Respondent's exhibit 15 attached to its supplemental motion for summary decision consisted of three documents previously provided Complainant on September 10, 2004; November 1, 2004; and November 19, 2004. (Respondents amended response to request for copies of documents and answers to interrogatories, Respondents supplemental discovery responses and Respondents second supplemental discovery responses).

timely file an affidavit of supervisor Tien Lee¹⁴; and (12) Respondent's reasons for not hiring Complainant were a mere pretext to cover up intentional discrimination.¹⁵

For the reasons set forth *infra* the undersigned finds in the present case that Complainant failed to establish the essential elements of a *prima facie* case against Respondent, and accordingly, recommends dismissal of the instant complaints. In so, recommending the undersigned does not condone Respondent's practice of advertising immediate job openings over the internet when such jobs do not exist. Indeed, it was precisely this misleading advertising that prompted Complainant to file repeated complaints asserting discriminatory refusals to hire.

B. Uncontested Facts:

1. Complainant is a civil/structural engineer with over 23 year of engineering design and analysis experience at various nuclear projects throughout the United States, including those at Beaver Valley, North Anna Nuclear, Clinch River Breeder Reactor, Catawba, South Texas, Comanche Peak, Arkansas, Nuclear One, and Grand Gulf plant sites.
2. Respondent is an engineer consulting firm that provides both licensed and unlicensed engineers and technicians to client companies engaged in nuclear and non nuclear power generation. Respondent interfaces with its clients providing in-depth knowledge of licensing issues, industry initiatives, plant operating experience and technical expertise. Respondent has 15 offices located throughout the United States in Oakland, California; Idaho Falls, Idaho; Kennesaw, Georgia; Germantown, Maryland; Mount Arlington, New Jersey; Albuquerque, New Mexico; Raleigh and Wilmington, North Carolina; Oklahoma City and Tulsa, Oklahoma; Murrysville, Pennsylvania; Dallas, Houston, Midland, Texas; and Richland, Washington. Corporate headquarters are located in Tulsa, Oklahoma.
3. Respondent procedures for filling job vacancies involved five steps: (A) when a client requested services, Respondent searched its records to match an individual's capabilities and availability with job demands of the position in question. In choosing individuals to fill the position, Respondent gave first priority to its current employees; (B) if no current employees were qualified and available, Respondent then hired individuals who were specifically requested or identified by the client to perform the work; (C) if none were so identified, preference was then given to individuals known and highly regarded by the client. These individuals include past employees of the client, past employees of Respondent or its competitors who were assigned to the client or individuals who worked with or for employee/representatives of the client; (D) if no such individuals were available, Respondent then determined from its personal knowledge whether other

¹⁴ Tien Lee's initial affidavit was taken on November 27, 2004 and provided to Complainant shortly thereafter. Because of the difficulty in initially obtaining this document Respondent was given additional time to supply it. The undersigned received the affidavit on December 2, 2004.

¹⁵ Complainant throughout its response to Respondent's supplemental motion for summary decision claimed that Respondent lied in an attempt to cover up evidence of intentional discrimination and that such deception raises at least doubts of Respondent's motivation requiring a hearing pursuant to *Reves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000). Despite Respondent's use of misleading website advertisements, the undersigned finds no evidence of deception regarding the actual hiring process.

individuals who have worked for either Respondent or its employee/representatives were qualified and available, and if so, recommended that individual to the client; and (E) if this process failed to produce an acceptable candidate, Respondent then searched its data bank to identify and recommend qualified applicants.

4. Respondent utilized website advertisements to recruit currently employed engineers and to build its data base of prospective job applicants. In so doing, Respondent advertised immediate job openings when such openings did not exist. Respondent employed this tactic to achieve a better response than would be the case if it simply announced potential future openings and to promote itself in the business market as a growing, successful and viable company. If an individual submitted his/her application and possessed the right capabilities, expertise and industry contacts, Respondent could interview and hire such individual without the need for any specific job opening. However, this appears to be a rare occurrence and certainly has not happened since November 23, 2002, the period covered by Complainant's on discovery request.
5. November 22, 2003, Respondent ran an advertisement on its website announcing among other things the following career opportunities in its Mid-Atlantic Region:

Mechanical, Electrical, Nuclear, and Structural Engineers- Immediate opportunities exist for mechanical, electrical, and Structural engineers with commercial nuclear power experience. Enercon is looking for motivated engineers who can contribute to the growth of its highly successful Germantown, MD engineering office. Local candidates are preferred. Available positions range from junior engineers to senior level engineers.

6. On November 24, 2003, Complainant in response to this ad sent a letter Respondent's Mount Arlington representative, Rick McGoey, indicating extensive experience with stress analysis and the design of steel and reinforced concrete structures and attaching his resume.¹⁶ Complainant asserted that he was willing to work for Respondent at any place, for any shift and for any salary he deemed reasonable and in last paragraph stated:

Please do not Discriminate and Retaliate against me for being a Truthful and Honest Whistleblower of this Country and for filing a Whistleblower (ERA) complaint against Enercon Services, Inc.--I have, repeatedly, informed the NRC and others about Serious Safety Concerns regarding my Safety Concern. Thanks very much for your time and interest.¹⁷

Complainant attached a copy of his resume to the letter.

¹⁶ Once an individual is referred to by his/her full name, subsequent references are to the last name only, except in those instances wherein an individual has the same last name. In that case, the full name is used to identify said individuals.

¹⁷ On February 21, 2003 and March 19, 2003, Complainant sent similar letters to McGoey, applying for civil/ structural engineering positions which Respondent advertised on those days over the internet.

7. On December 15, 2003, McGoey replied, indicating that he was in receipt of Complainant's November 24, 2003 letter concerning employment opportunities with Respondent, and that Complainant's letter and resume were being reviewed against company needs. Further, Respondent would keep Complainant informed of the results of its review.
8. On February 5, 2004, Respondent ran another ad on its website with similar language to the previous ad of November 22, 2003, indicating immediate career opportunities for mechanical, electrical, nuclear and structural engineers at its Germantown, Maryland office. In addition, Respondent listed temporary electrical, instrumentation & control and civil engineering positions for experienced engineers in the design and installation of nuclear power plant security systems at multiple locations. On March 27, and June 27, 2004, Respondent ran additional website ads for immediate career opportunities for mechanical, electrical, nuclear and structural engineers at the Germantown office.
9. On February 5, 2004, Complainant wrote McGoey, stating he was applying for the engineering position advertised on that date. Complainant attached a copy of his resume and advised McGoey not to discriminate against him for his past whistle blowing activities which included filing a complaint against Respondent. Complainant sent similar letters to Jr. John Corn, at Respondent's corporate headquarters in Tulsa and Respondent's Human Resources Department in Germantown. Complainant's February 5, 2004 letters also indicated a willingness to work at any place, on any shift and for any salary Respondent deemed reasonable.
10. On March 27, 2004 and June 27, 2004, Respondent ran other website ads indicating immediate career opportunities for its Germantown, Maryland office for mechanical, electrical, nuclear and structural engineers at junior and senior level positions. The June 27th ad also advised the existence of temporary electrical, instrumentation, and civil/structural engineer positions at multiple locations. On October 3, 2004, Respondent ran its last website ad indicating that Respondent was seeking experienced electrical, instrumentation, and civil structural engineers for temporary positions at multiple locations.
11. Respondent never interviewed Complainant for any of the advertised positions, nor did they inform Complainant of their review of his resume against company needs. Indeed, Respondent had no job openings despite its advertisements to the contrary. However, in November, 2002, Respondent received from a recruiter and reviewed Complainant's resume in connection with an engineering position requiring performance of ANSYS analysis at First Energy. The position was available through Respondent's Mt. Arlington, New Jersey office managed by McGoey. In mid-December, 2002, McGoey set up a telephone interview of Complainant, wherein Complainant revealed he had no ANSYS experience and was not hired. Subsequently, McGoey arranged for Complainant's interviews by Ken Whitmore on January 20 and January 23, 2003, for a prospective temporary outage position for First Energy Nuclear Operating Company (FENOC) at the Perry Nuclear Power Plant in Ohio. First Energy decided not to create the position and neither Complainant, nor anyone else was hired.

12. Respondent did not maintain a system that identified specific advertisements with job resumes. However, a large percentage of new hires were currently working when Respondent contacted and began recruiting them. The website ads of November 22, 2003 and July 23, 2004 were designed to attract local candidates in the Germantown, Maryland area and enhance Respondent's ability to win contracts with First Energy. David Sudley was responsible for the ad posting and for hiring employees to build up the Germantown office. Sudley did not hire anyone who did not work for him in the past, and did not review resumes submitted in response to the advertisements except to scan resume names to see if he recognized former co-workers. Sudley did not review Complainant's resume, was not aware of Complainant's protected activity, and did not hire any engineers in response to the advertisements.
13. The advertisement dated October 3, 2004, was originally posted on Respondent's website on January 7, 2004 in anticipation of additional security work from NMC, Entergy North at the Fitzpatrick Plant and Florida Power and Light at the Turkey Point Plant. The prospective work did not materialize with ongoing work completed by existing full time employees of Respondent.
14. McGoey hired the following civil/structural engineers during the period covered by Complainant's subpoena: Surendra K .Goel, Raymond S. Markowski, Michael K. Ying, David J. Rollins, Arun C. Pal, and Clyde E. Stroup. Goel was hired as a senior civil/structural engineer and worked for Respondent from November 17, 2003 to January 5, 2004 for Entergy Indian Point Power Plant control room upgrade project. He was responsible for the review, analysis and oversight of new control room panels being installed at the power plant. Respondent was well aware of Goel's past work performance having worked for Respondent on other projects in the past including First Energy Davis-Besse Nuclear Power Station restart project from July, 2002 to March, 2003, and on the dry fuel storage project at the Entergy River Bend Nuclear Facility in 2000 and 2001. Goel had more than 35 years experience in civil/structural engineering, was a professional engineer, and had a Ph. D in structural engineering. McGoey hired him because of his experience, skills, qualifications which were well known to McGoey prior to Goel's most recent employment.
15. Markowski was last employed by Respondent from December 22, 2003 to January 2, 2004 at the life extension project for Amergen Energy Co. LLC, Oyster Creek Nuclear Plant facility. There he was responsible for quickly locating historical design information on the Oyster Creek facility with many years of prior experience in this field at this facility. Markowski worked for Goey for 5 years locating and assessing design basis information and had 15 years of experience for GPU Nuclear, the previous owner of Oyster Creek. In addition, Markowski had extensive experience in providing technical support to engineering and operational functions in nuclear power generation with specific expertise in configuration maintenance, design basis and research, corrective action formulation, and related fields which skills, experience and qualification matched the job requirements.
16. Ying worked as a civil/structural engineer from September 30, 2003 through December 29, 2003, during which period he was classified as a limited term limited benefit (LTLB) employee. He transferred to regular employment status on December 30, 2003. He was

- initially hired to work for Progress Energy Co. H.B. Robinson Nuclear Power Plant project structure evaluation project and was responsible for preparing a model and analyzing for existing and new plant conditions. The position required an individual such as Ying who had extensive experience in the use of GT STR:UDL software and in structural analysis. Ying had over 30 years experience in civil structural engineering and was a known performer to Respondent having worked with another Respondent senior engineer for 12 years.
17. Rollins worked for Respondent as a senior civil/structural from January 16, 2004 to September 16, 2004. He was initially hired to work for Energy's Inc.'s Vermont Yankee Power Plant structural analysis project and to support the Constellation Power Nine Mile Power Plant structural analysis project. His duties included assessing a structure for existing and new plant conditions. Rollins had over 28 years of experience in structural engineering with extensive knowledge of the Vermont Yankee facility, plus experience for the Nine Mile project and was a known performer to Respondent. Rollins has spent most of his engineering career designing and analyzing steel structures and designing and routing of pipe and pipe support systems.
 18. Pal was hired on April 5, 2004 and worked until August 13, 2004 as a senior civil/structural engineer for the Energy's Fitzpatrick dry fuel storage project. Pal was responsible for providing engineering support and analysis of dry fuel storage issues at Fitzpatrick Pal possessed specific knowledge about the project and existing procedures having worked for the previous project owner, New York Power Authority. The client specifically requested Pal's employment for this project. Pal had more than 30 years experience in civil structural engineering having worked for New York Power for more than 20 years on multiple projects including those at Fitzpatrick where he was responsible for overall engineering and analysis.
 19. Stroup was hired on May 3, 2004 to work as a senior civil/structural engineer on the Constellation Nine Mile Power Plant project. He was responsible for assessing the Nine Mile structure for new and existing plant conditions. The position required extensive experience and knowledge of the facility which Stroup possessed having worked there for over 8 years as an employee and contractor. Stroup had over 25 years experience in static, dynamic, seismic and fatigue analysis of structures, connections, and components. He was a known performer and possessed the needed ability to respond rapidly to a demanding project schedule. He was also local to the project allowing Respondent to avoid relocation and per diem expenses.
 20. Doug Whitmore, Respondent's Client Service Manager, hired civil structural engineer Victory G. Penacerrada on November 10, 2003, to work on the Alloy 600 project. Penacerrada had previously worked for Respondent in 1992, 1993, 1994, 1995, 1996-1999, 2000, 2001, 2002, and 2003, and possessed extensive experienced in structural design modifications and documentation. The client requested Penacerrada be hired for the project and was a known performer. Subsequently, Penacerrada had been assigned to other engineering projects at Entergy Arkansas Nuclear One Facility, Russellville, Arkansas and at ANO, Cooper Nuclear Station in Nebraska.

21. Robert Bryan, Respondent's Director of Atlanta operations hired the following civil structural engineers: J. Michael Brady, Behrooz Shakibnia, Dinesh Patel, Ashwin Patel, Nalin Patel, and Robert J. Sand. Brady and Shakibnia were hired on the same day, May 24, 2003, to work as civil/structural engineers for the client, Pacific Gas & Electric (PG&E) at the Diablo Canyon Power Plant (DCPP). Brady was a professional civil engineer with over 30 years of civil/structural engineering experience involving power generation facilities including PG&E at DCPP. Bryan hired Brady to perform structural design and analysis of existing structural systems and components for seismic and extreme wind tornado loads at DCCP. His responsibilities included structural design and analysis of concrete and steel systems in power block buildings and structural analysis of steel water tanks for seismic-induced hydrodynamic loading and support foundations. While employed by another consulting firm at DCCP in 1999, Brady assisted and checked calculations for the development of analytical models for qualifications on various non load bearing walls. PG &E knew and held Brady's work in high regard. Brady was local to the jobsite saving Respondent the cost of relocation and per diem.
22. Like Brady, Shakibnia was a professional engineer with more than 20 years of civil/structural experience at power generation facilities including DCCP. At DCCP, Shakibnia was responsible for structural design and analysis of new plant structures, system and components for seismic and extreme wind loads. His past experience included senior project engineer for Structural Mechanics Group of Altran Corporation from 1998 to 2004, where he was responsible for seismic analysis and hazard mitigation efforts for plant facilities and structures. From 1989 to 1998 he worked as a consulting engineer at DCCP responsible for seismic qualification of equipment. The client, PG&E, knew and highly regarded Shakibnia's work. Since he was a local, Respondent did not have to pay relocation and per diem when hiring him.
23. Dinesh Patel was initially hired in November, 2002, as a LTLB civil/structural engineer at the Davis Besse site. He worked through August, 2003, as a LTLB employee with no leave or vacation benefits. His employment ceased in August, 2003, when he took a vacation to India. When he returned in September, 2003, he was rehired as a new LTLB employee until December 22, 2003 when he was transferred to regular employee status as a staff civil engineer. The position of staff engineer required experience in pipe and pipe support analysis plus a background in condition report closure which Dinesh Patel possessed. Dinesh Patel was not only a former employee of Respondent, but one highly recommended for staff civil engineer by Respondent engineering employee, Atul Patel.
24. Ashwin Patel initially started worked for Respondent as a LTLB civil/structural engineer in July, 2000. He continued working in this capacity until February, 2004, when terminated due to a lack of work. On April 12, 2004 he was rehired as a LTLB employee when worked became available. He was rehired due to his experience with pipe support, a background in analytical software, and his location near Respondent's Atlanta office saving Respondent relocation and per diem expenses. Ashwin Patel had over 20 years of extensive and diversified experience as a civil/structural engineer including supervision of engineers and draftsmen working on ASME Class I, II, and III pipe support systems. His design work experience included analysis, checking and reviewing structural frames, pipe and conduit supports. Currently he is assigned to Respondent's Atlanta office where he is

responsible for designing, checking, and reviewing HVAC frames, conduit and pipe supports utilizing various computer programs.

25. Nalin Patel began his employment with Respondent in August, 2002, as a LTLB civil/structural engineer. He continued to work for Respondent until January, 2004, when terminated due to a lack of work. When work became available two months later on March 17, 2004, Respondent rehired him as a LTLB due to his background in pipe supports and analytical software, his location in Atlanta, knowledge of Respondent's clients and past work performance for Respondent. Nalin Patel had over 20 years of experience in civil/structural, MOV and pipe support engineering.
26. Robert K. Sand was hired on July 1, 2003 as a civil/structural design engineer in Respondent's Atlanta office. Sand has over 30 years of engineering experience in concept, design, and construction. He established and managed an engineering design and CAD drafting firm, was a structural department manager for an A/E firm, and served as a lead structural engineer for office buildings, paper mills, steel mills, recovery boiler, aircraft maintenance hangers, automobile assembly plants, pre-stressed concrete parking garage structure, distribution centers, food process plants, manufacturing plants, highway bridges, conveyers, pipe bridges, bag houses, heat exchangers and stacks. Sand was a licensed professional engineer, a preferred asset for the position he was hired to fill, which involved approval and stamping of drawings. In addition, he was a local Atlanta resident saving Respondent cost of relocation and per diem.
27. Jim Gannon, client services manager for Respondent hired civil/structural engineers Abe Lofti, and Gani Kotwani. Lofti was hired on November 21, 2002, as a design engineer to work with Respondent's Client, First Energy (FENOC). Lofti had experience in concrete and steel structures and immediately prior to his employment had been working for a competitor contractor providing services to FENOC. When FENOC terminated the services of the competitor contractor and began using Respondent, FENOC indicated to Respondent that they would like Lofti to continue working at FENOC's facility. Respondent agreed and so employed Lofti who had extensive managerial and supervisor experience which were known to Respondent before hiring him.
28. Kotwani was hired on April 12, 2004 to work as a civil/structural engineer at Florida Power and Light's Turkey Point facility. Previously Kotwani had worked for Florida Power and Light as a contractor from March, 2003, to November, 2003. Before hiring him Respondent was aware of his past work experience and regarded him as a highly qualified and competent engineer. Florida Power and Light Civil Supervisor for its St. Lucie Nuclear Plant, Jim Giampietro, provided Gannon with Kotwani's resume and recommended him for future employment with Respondent. Kotwani has a diversified experience in the nuclear power industry including structural and engineering mechanics, safety related structures, components, equipment and systems. Kotwani knew the Florida Power and Light system and prior to his employment with Respondent, had been badges for unescorted access at the St. Lucie facility enabling Respondent to place him on the job without undergoing time consuming delays necessitated with background checks.

29. On April 15, 2004, engineering manager, Tien Lee hired Armen Bagdasarian as a part time civil/structural engineer for a vertical dynamic application study for Respondent's client, PG& E at its Diablo Canyon facility. Bagdasarian worked 10 hours per week until July, 2004, during which time he performed seismic analysis which was the same type of work he had previously performed at the same job site. Before hiring him, Lee was aware of his quality work performance through PG&E representatives and having worked with him in the past. Bagdasarian was a license professional structural engineer with over 30 years of experience in civil/structural engineering involving power generation facilities including PG&E's Diablo Canyon facility.
30. In November, 2003, client service manager, Doug Whitson, hired Victor Penacerrada as a civil/structural engineer for the Alloy 600 project. Penacerrada had previously worked for Respondent from July, 1992, through October, 1993; January, 1994; April, 1995 through December 1995; May, 1996 through February 1999; May, 1999 through December 1999; July, 2000 through May, 2001; June, 2001 through July, 2001; August, 2001 through October 2001; and September, 2002 through September, 2003. As a design engineer Penacerrada had extensive experience in structural design modifications and Alloy 600 project, Entergy Arkansas Nuclear One Facility, Russelville, Arkansas, requested Respondent hired Penacerrada for the Alloy 600 project. Whitson knew Penacerrada to be a highly competent engineer having worked approximately 11 years in the past for Respondent.
31. Respondent hired the civil/structural engineers named in paragraphs 13 to 30 above because of their work background, skills and abilities, and the demands of the job for which they were hired. In addition, the following engineers were hired for these reasons: Penacerrada (prior work for Respondent starting in 1992; identified by client for position); Brady (13 years work for client who highly regarded his work, his license and location near project); Shakibnia (prior work for client who held him in high regard, his license, and location near project); Dinesh Patel (prior highly regarded work for Respondent who wanted to continue Patel's employment following his vacation); Ashwin Patel (prior work for Respondent, and location near jobsite); Nalin Patel (prior work for Respondent and location near jobsite); Sand (licensed professional engineer, high recommendations from Respondent's employees, and location near jobsite); Lofti (requested by client); Kotwani (recommended by client, known as a high quality engineer by Respondent, possessed unescorted badge access); Bagdasarian (work performance known and respected by Respondent and client; California license and location near jobsite); Markowski (known performer to Respondent with particular subject matter expertise); Ying (known performer to Respondent, location near jobsite); Rollins (known performer to Respondent with extensive jobsite site knowledge); Stroup (known performer to Respondent with extensive jobsite knowledge); Pal (specific jobsite knowledge, requested by client); and Goel (known performer to Respondent; prior work experience similar to that done at jobsite).

C. Parties Position

Throughout the complaint process, Complainant asserted that since he was not a trained attorney, but only a pro se litigant, his pleadings should be liberally construed. Complainant contends that if his pleadings are liberally construed they will show Respondent discriminatorily refusing to hire him for advertised civil/structural engineering positions because of his protected whistle blowing activities in filing complaints against Respondent and other employers. Complainant further argued, that he applied for not only advertised internet civil/structural positions, but other unadvertised jobs with Respondent throughout the United States, indicating a willingness to relocate to any place, and work on any shift, for any salary deemed reasonable by Respondent. However, he was not considered for any position because of his whistle blowing activities.

Complainant pointed out that Respondent as early as February 3, 2003, was impressed with his capabilities and interest in employment opportunities and for that reason kept his resume on file for potential future employment. Yet, Respondent never contacted him to fill advertised positions, or for that matter unadvertised positions apparently hiring other engineers at various times and locations. Those engineers included the following: Penacerrada, Shakibnia, Brady, Sand, Penacerrada, Goel, Markowski, Dinesh Patel, Ying, Rollins, Nalin Patel, Arun Pal, Ashwin Patel, Kotwani, Bagdasarian, and Stroup. In essence, Complainant contended that he has proven by his submissions a *prima facie* case of employment discrimination by showing: (1) he engaged in protected activity; (2) Respondent was aware of his protected activity; (3) he suffered unfavorable personnel action in not being hired; and (4) his protected activity was a contributing factor in his being denied employment.

Respondent did not dispute Complainant's assertions of protected activity and agreed that in order for Complainant to prevail, he must establish all 4 elements of a *prima facie* case, i.e., protected activity, Respondent's knowledge of the protected activity, adverse employment action, and a nexus between the protected activity and the adverse employment action. Further, in order to show adverse employment action in a refusal to hire case, Complainant must establish that he applied for and was qualified for a job for which employer was seeking applicants; that despite his qualifications, he was rejected; and that after his rejection the position remained open and employer continued to seek applicants with his qualifications. *Hasan v. United States Department of Labor*, 298 F.3d. 914 (10th Cir. 2002, *cert denied*, 537 U.S. 1168 (2003)).

Respondent contended that notwithstanding Complainant's assertions to the contrary, there was no evidence of any nexus between Complainant's protected activity and his inability to secure employment with it. Complainant was also unable to show knowledge of protected activities on the part of Bryan, Gannon, Lee and Whitson. Bryan who hired Brady, Shakibnia, Dinesh Patel, Ashwin Patel, Nalin Patel Sand testified he had no prior knowledge of Complainant's protected activity, and thus, any such activity played no part in his hiring decisions. Gannon who hired Lofti and Kotwani as well as Lee, who hired Bagdasarian and Whitson who hired Penacerrada, testified they had no prior knowledge of Complainant's protected activity.¹⁸ Thus, Complainant's whistle blowing activities played no part in these

¹⁸ Although Respondent and Complainant do not agree on the date McGoey learned of Complainant's protected activities with McGoey contending it was the later part of May, 2003, and Complainant contending it was as early as

hiring decisions. Moreover, McGoey, who hired Goel, Markowski, Ying, Rollins, Pal, and Stroup testified that Complainant's protected activity was not a factor in these hiring decisions. Rather, they like other new hires were hired for legitimate business reasons (i.e., their experience with the client or known performance to Respondent) in accord with established hiring procedures. Further, since there were in fact no advertised job openings, Complainant suffered no adverse employment regarding the internet advertisement.

D. Substantive Law and Procedure

The standard for granting summary judgment or decision is set forth at 20 C.F.R § 18.40(d)(1994) which is derived from Federal Rules of Civil Procedure (FRCP) 56. Section 18.40(d) permits an Administrative Law Judge to enter summary judgment for either party "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision." If the moving party meets the initial burden of showing no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate facts showing the existence of genuine issue(s) for trial with doubts and reasonable inferences resolved in favor of the non-moving party. *Reves v. Sanderson Plumbing Products Inc.*, 120 S. Ct. 2097, 2110 (2000); 475 U.S. 574 587 (1986). *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 278 (5th Cir. 2004).

Section 18.40(c) provides that when a motion for summary judgment is made and supported by appropriate evidence, the non-movant or party opposing the motion may not rest upon mere allegations or denials of such pleading, but must set forth specific factors showing there are genuine issues of material facts. As the Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) the non-movant must present affirmative evidence in order to defeat a properly supported motion for summary judgment, even where the evidence is within the possession of the moving party, as long as the non-movant had a full opportunity to conduct discovery.

The non-movant's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. Where the non-movant presents admissible direct evidence such as affidavits, answers to interrogatories or depositions, the judge must accept the truth of the evidence set forth without making credibility or plausibility determinations. *T. W. Electric Service v. Pacific Electric Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). Conversely, if the non-movant fails to make a showing sufficient to establish the existence of an element essential to his case and on which they bear the burden of proof at trial, there is no genuine issue of material fact and the movant is entitled to summary judgment. *Celotex Corp., v. Catrett*, 477 U.S. 317, 322-323.

Concerning the use of discovery, Complainant had previously been advised that discovery has reasonable limits in order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense and the undersigned has an obligation to prevent

February or March, 2003, the exact date does not matter since McGoey admittedly approved of the hiring of engineers Markowski, Ying, Rollins, Stroup, Pal and Goel after May, 2003.

discovery abuse. *Hasan v. Burns & Roe, Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. (ARB, Jan.30, 2001). In *Hasan* the Board at 3 stated:

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 affect their purpose of adequately informing litigants in civil trials.

...But the discovery provisions, like all 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"...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.

In the present case, Complainant has not demonstrated any legitimate need for the entire personnel file of all newly hired engineers. While there may be relevant information in the files other than what has already been revealed, disclosure of the entire files could easily disclose personal medical, financial, or other similar data that would only serve to annoy or embarrass the new hire which cannot be condoned.

Moreover, it is apparent to the undersigned that Complainant seeks to invert or misuse the discovery process by requiring Respondent to go to hearing so that he can call and interrogate supervisors in the hope of establishing some evidence, either direct or circumstantial, of discrimination without first developing such evidence through the normal discovery process by admissions, interrogatories and depositions. Such a misuse creates needless expense for both Respondent and the government, is without precedent, and totally unjustified especially since he was afforded ample opportunity to conduct proper pre-hearing discovery.

The purpose of the employee protection provisions of the ERA is to protect whistle blowers who act in prescribed ways to ensure safety from employer retaliation. *Stone & Webster Engineering Corp., v. Herman*, 1997 U.S. App. LEXIS 16225, No. 95-6850 (11th Cir. July 2, 1997). In so doing, the ERA promotes a working environment in which

employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment. *Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474, 478 (3rd Cir. 1993). The ERA is not designed to shield employees from the consequences of their own misconduct or failures. See *Kahn v. Secretary of Labor*, 64 F.3d 271, 279 (7th Cir. 1995). Neither is it designed to afford an employee preferential hiring status when new positions become available.

In whistle blower cases involving a refusal to hire Complainant in order to prevail must establish 4 elements: (1) he engaged in protected activity; (2) the persons responsible for the hiring knew or could be presumed to know of Complainant's protected activities; (3) Complainant suffered adverse employment action; and (4) a nexus existed between the adverse employment action and Complainant's protected activities. *Hasan v. Burns & Roe, supra*; *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46 (Sec'y Final Decision and Order, February 15, 1995) *aff'd sub nom.* 78 F.3d 352 (8th Cir. 1996); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983).

Respondent asserts and the record supports the contention that Complainant failed to establish any nexus between Complainant's protected activities and Respondent's refusal to hire him. Contrary to Complainant's assertions, there is no evidence of pre-text or lying by Respondent so as to raise an inference of discrimination in the hiring process. Respondent had legitimate reasons for hiring all engineers it did from November 23, 2002 to the present, which included their knowledge, skills, prior work experience, demands of the job, requests of the client, and location of new hires near jobsites.

While there is a dispute regarding Respondent's knowledge of his protected activity with Complainant contending knowledge was established as early as his February and March, 2003 letters to McGoey with Respondent arguing May, 2003, as the date of McGoey's knowledge, there is no dispute or evidence to suggest knowledge by hiring supervisors Bryan, Gannon and Lee. There is also no dispute that the hiring supervisors were well aware of the quality of each new hires past work and followed Respondent's non discriminatory hiring procedure when employing them.

Complainant's contention that Respondent failed to hire him because of his whistle blowing activities is at best mere conjecture or speculation and certainly far less than what is necessary to establish the fourth element of a *prima facie* case.¹⁹ Such speculation carries no

¹⁹ At page 3 of its December 20, 2004, response, Complainant stated for the first time that Whitmore verbally offered Complainant a temporary job at an unidentified nuclear power plant on the morning of January 24, 2003. Allegedly Complainant accepted the offer which was never confirmed in writing. Complainant speculated that Respondent must have done a background check, discovered his protected activities and refused to confirm the offer in writing. Whitmore in an affidavit taken in June, 2003, admitted that a client, First Energy Nuclear Operating Company (FENOC) informally asked him in January, 2003, whether Respondent could provide an individual to work at the Perry Ohio Nuclear Power Plant during a temporary outage position. On January 20, 2003, Whitmore had a telephone interview with Complainant, found him to be qualified and personally interviewed him several days later. Whitmore denied making Complainant a verbal offer. Rather, Whitmore stated that McGoey determined that another engineer, Jerry Whittle was more qualified and it was that individual whom Whitmore recommended. However, Respondent supplied no engineer to FENOC because FENOC decided to complete the work with in-house personnel.

probative weight in summary judgment proceedings. *Hasan v. Burns and Roe, supra*, at 6. Complainant moreover failed to show adverse employment concerning the internet advertisements because contrary to what the advertisement depicted, there were no job openings. Thus, Complainant failed to establish the necessary elements of a *prima facie* case, requiring dismissal of the instant complaints.

E. Recommended Order

Accordingly, the undersigned recommends dismissal of the instant complaints. The undersigned finds no merit to Respondent's request for cost and fees in defending this action, inasmuch as, Complainant filed the instant complaints in response to inaccurate website advertisements which led Complainant to believe that Respondent had immediate job openings.

IT IS HEREBY ORDERED that the documents due on December 27, 2004-preliminary motions; and the January 3, 2005 pre-hearing exchanges are no longer necessary.

IT IS FURTHER ORDERED that the hearing scheduled for **JANUARY 12, 2005**, at 9:00 a.m., in the Huntsville, Alabama area is **CANCELED**.

A

CLEMENT J. KENNINGTON

ADMINISTRATIVE LAW JUDGE