



**In the Matter of:**

**HEATHER ADDIS,**

**ARB CASE NOS. 05-118**

**COMPLAINANT,**

**ALJ CASE NO. 2004-ERA-023**

**v.**

**DATE: October 31, 2007**

**EXELON NUCLEAR GENERATION  
CO., LLC,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**M. Megan O'Malley, Esq., John P. Madden, Esq., O'Malley & Madden, P.C.,  
Chicago, Illinois**

*For the Respondent:*

**Donn C. Meindertsma, Esq., Conner & Winters, Washington, D.C.**

### **FINAL DECISION AND ORDER**

Heather J. Addis filed a complaint with the United States Department of Labor alleging that her employer, Exelon Nuclear Generation Company (Exelon), violated the employee protection section of the Energy Reorganization Act (ERA or Act). The Act safeguards employees who engage in certain protected activities from employer retaliation.<sup>1</sup> A Department of Labor Administrative Law Judge (ALJ) concluded that

---

<sup>1</sup> 42 U.S.C.A. § 5851(a) (West 2007). The ERA has been amended since Addis filed this complaint. Energy Policy Act of 2005, Pub. L. 109-58, title VI, § 629, 119 Stat. 785 (Aug. 8, 2005). Even if the amendments were retroactively applicable to cases filed before the effective date they are not implicated by the issues raised here. The ERA's implementing regulations, found at 29 C.F.R. Part 24, have also been amended. 72 Fed. Reg. 44,956 (Aug.

Exelon did not violate the ERA and recommended that we dismiss the complaint. We accept the ALJ's conclusion and deny Addis's complaint.

### BACKGROUND

The ALJ thoroughly discussed the facts of this case as presented at the hearing on February 1-4, 2005. R. D. & O. at 2-4. We summarize briefly.

Exelon operates the Dresden Nuclear Power Station, which is located about 60 miles south of Chicago. Tr. 53. Addis began working at Dresden in 1997 as an emergency preparedness coordinator. Tr. 48-49. In 2002 she became a shift or unit supervisor, which is the beginning management level on a shift. Tr. 142. Exelon required that its shift supervisors keep working files and scorecards on all of their subordinates. Tr. 672. The working files documented employee strengths and weaknesses on a weekly basis. Exelon required its supervisors to maintain an 80/20 ratio of positive to negative comments in the working files. Scorecards identified strengths and gaps in performance on specific tasks. R. D. & O. at 2; Tr. 669, 673.

Addis had a history of poor performance in maintaining scorecards and working files. In a February 2003 performance review, David Throne, her first supervisor at Exelon, characterized her working file entries as "weak" and gave her a rating of "D" ("Development Needed") in the categories of "Provides Directions" and "Develops Others." Tr. 189-190; RX-10 at 62. In a July 24, 2003 management review meeting, Glenn Morrow, who had replaced Throne as her supervisor, informed her that her working file entries did not meet the required 80/20 ratio of positive to negative comments. According to his notes on the meeting, he told her that if she did not meet the 80/20 ratio of positive to negative comments, she would be put on a performance improvement plan. Tr. 84-85, 808-809; RX-16 at 46. On August 16, 2003, Morrow informed Addis that her quarterly scorecard production was unacceptable. R. D. & O. at 2-3; RX-16 at 47.

There were also other problems with Addis's performance. On May 16, 2003, she failed to complete an equipment evaluation in a timely manner. Tr. 816; RX-16 at 6. On August 26, 2003, she did not timely contact the shift manager about an electrical malfunction alarm and again failed to complete an equipment evaluation in a timely manner. Tr. 816; RX-16 at 48. On September 25, 2003, she did not respond promptly to an alarm in the control room, failed to write a clearance order for the next shift, and did

---

10, 2007). As explained more fully at note 4, *infra*, even if the amended regulations were applicable to this case, they would not change the outcome.

not complete a housekeeping “walkdown.” R. D. & O. at 3; Tr. 817, 820; RX-16 at 49-50.

In his notes for September 28, 2003, Morrow reported that Addis had not provided her working files for review, had not updated her Fundamentals matrix as assigned, and had completed only 10 scorecards of the 19 assigned to her. RX-16 at 50.<sup>2</sup> He then described a meeting with her on the same day:

At the end of shift I discussed Heather’s performance with her and [working file] entries documenting the same. I covered the entries [which] dealt with her inability to follow direction and lack of alignment with the department and even confirmed them with entries made by previous Shift Manager earlier in the year. She stated that she did not feel that the [working file] program is effective in motivating her to improve her performance. I stated I will discuss Heather’s issues with the Operations Manager on Monday at 1300 hours. Heather exited the meeting stating she would hand in her resignation tomorrow. There was never a statement requiring her resignation or impending plan of action other than report out to Operations Manager. I only stated that I felt I was unable to motivate her by requests to perform her expected duties. She is unusually reluctant to do this. This was reinforced by the preceding working file entries that demonstrated that Heather appears that she will supervise on her own terms and not as expected by her Shift Manager.

RX-16 at 50-51. On September 29, 2003, Addis submitted a letter to Morrow, tendering her resignation, effective on October 10, 2003. R. D. & O. at 3; Tr. 99-100; CX-10.

On October 1, 2003, Addis reported two concerns to Exelon’s Employee Concerns Program (ECP): (1) upper management operations did not focus on reactor safety, and (2) supervisors were not allowed to express opinions or concerns without fear of retaliation. She told Robert Speek, Exelon’s Employee Concerns Investigator for the Midwest, that she had been reprimanded for raising safety concerns, which she thought could put a potentially chilling effect on a supervisor’s raising safety issues. Tr. 105-106; CX-11.

---

<sup>2</sup> The Fundamentals are a set of 21 standards and behaviors that are expected of all Exelon employees. RX-17. Exelon supervisors use the Fundamentals as a rubric in assessing employee performance. Tr. 667-668.

On the next day, October 2, 2003, Addis submitted a letter to Morrow rescinding her resignation. Tr. 113, CX-13. Exelon management did not respond to either Addis's resignation letter or her rescission letter until October 10, 2003, when Rich Gadbois, shift operations supervisor, met with Addis and informed her that her employment was terminated. Reading from a prepared statement, Gadbois told Addis that her working files were deficient and that if she had remained with Exelon, she would have been placed on a performance improvement plan. Tr. 119.

Addis filed a complaint with DOL's Occupational Safety and Health Administration (OSHA), on April 5, 2004, alleging that Exelon had discriminated against her in violation of the ERA's whistleblower protection provision because she made safety complaints to the ECP. R. D. & O. at 2; CX-1. After an investigation, OSHA dismissed the complaint on May 27, 2004, and Addis requested a hearing. R. D. & O. at 2; RX-2. Following a hearing, the ALJ recommended that her complaint be dismissed because she had not established that her protected activity was a contributing factor in her termination. R. D. & O. at 7. Addis thereafter filed a timely appeal with the Administrative Review Board (ARB or the Board).

#### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated authority to the ARB to review an ALJ's recommended decision in cases arising under the ERA's whistleblower protection provision and to issue the final agency decision.<sup>3</sup> Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The Board reviews the ALJ's recommended decision de novo.<sup>4</sup> It is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature.<sup>5</sup>

---

<sup>3</sup> Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

<sup>4</sup> See 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8 (2006); *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ No. 1997-CAA-002, 1997 CAA-009, slip op. at 15 (ARB Feb. 29, 2000). The ERA's amended regulations provide for substantial evidence review of the ALJ's factual findings. 29 C.F.R. § 24.110(b) (2007). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401

## DISCUSSION

The ERA provides, in pertinent part, that “[n]o 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 . . . [notifies a covered employer about an alleged violation of [the ERA] or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists or participates in a proceeding under the ERA or AEA].”<sup>6</sup>

To prevail on her ERA whistleblower claim, Addis must prove by a preponderance of evidence that she engaged in activity that the ERA protects, that Exelon knew about this activity, that Exelon then took adverse action against her, and that her protected activity was a contributing factor in the adverse action Exelon took.<sup>7</sup> Even if Addis proves that Exelon violated the Act, Exelon may avoid liability if it demonstrates “by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of” protected activity.<sup>8</sup>

It is undisputed that Addis’s report to the ECP about Exelon’s lack of focus on reactor safety constitutes protected activity and that Exelon knew about her protected activity. R. D. & O. at 4. The ALJ found that Addis’s complaint to the ECP

---

(1971)). As indicated above, even if the Board applied a substantial evidence review to the ALJ’s findings in this case, such review would not change the outcome of our decision, because applying the less restrictive *de novo* review standard, we agree with the ALJ’s ultimate recommendation that Addis’s complaint be denied.

<sup>5</sup> See Attorney Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) (“the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself”). See generally *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ’s findings and conclusions); *Mattes v. U.S.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), in rejecting argument that higher level administrative official was bound by ALJ’s decision).

<sup>6</sup> 42 U.S.C.A. § 5851 (a)(1).

<sup>7</sup> See *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 8 (ARB Sept. 30, 2003).

<sup>8</sup> 42 U.S.C.A. § 5851(b)(3)(D).

“unquestionably implicated safety.” The ALJ also concluded that Addis failed to demonstrate by a preponderance of the evidence that Exelon’s refusal to accept her resignation rescission was adverse action. Although the ALJ could have dismissed the complaint for failure to establish adverse action, the ALJ went on to examine whether Addis’s protected activity was a contributing factor to the alleged adverse action because he found the law unsettled on the issue of whether an employer’s refusal to accept a rescission of a resignation is adverse action. R. D. & O. at 5. He concluded that the decision to accept her resignation was based on her “substandard performance as a unit supervisor” and not on her protected activity. R. D. & O. at 6-7.

We agree with the ALJ that Addis failed to demonstrate by a preponderance of the evidence that the concerns she raised with the ECP contributed to Exelon’s decision to terminate her employment.<sup>9</sup> The ALJ’s decision thoroughly and fairly discusses and evaluates the relevant facts underlying this dispute and correctly applies relevant law.<sup>10</sup> Accordingly, we adopt and attach the ALJ’s Recommended Decision and Order and **DENY** Addis’s complaint.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**DAVID G. DYE**  
**Administrative Appeals Judge**

---

<sup>9</sup> See 42 U.S.C.A. § 5851(b)(3)(C); *Kester*, slip op. at 7.

<sup>10</sup> We question, however, the ALJ’s conclusion “that Addis’s complaints to ECP regarding Exelon’s lack of focus on reactor safety and a potential chilling effect on supervisor complaints unquestionably implicated safety.” R. D. & O. at 4. There is little evidence of protected activity in the record beyond Addis’s general and vague complaints about safety. “To constitute protected activity under the ERA, an employee’s acts must implicate safety definitively and specifically.” *Makam v. Pub. Serv. Elec. & Gas Co.*, ARB No. 99-045, ALJ Nos. 1998-ERA-022, 1998-ERA-026, slip op. at 5 (ARB Jan. 30, 2001); *Am. Nuclear Res. v. U.S. Dep’t of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). In fact, Addis has not proved that any of her actions were motivated by a belief that Exelon was violating any nuclear laws or regulations, ignoring safety procedures, or assuming unacceptable risks. Thus, we cannot conclude that any of Addis’s actions implicated safety definitively and specifically. However, since there was no dispute that Addis engaged in protected activity, and neither party has raised the issue on appeal, we decline to address it further.