U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 August 2008

CASE NO: 2008-ERA-00011

In the Matter of:

MICHAEL T. GOETZ,
Complainant

v.

BARTLETT NUCLEAR,
PEACH BOTTOM ATOMIC POWER STATION
Respondents

DECISION AND ORDER
GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

This matter arises under the whistleblower protection provisions of Section 211 of the Energy Reorganization Act of 1974 ("the Act"), as amended, 42 U.S.C. § 5851, and the regulations promulgated pursuant to and set forth at 20 C.F.R. § 1978. A hearing is scheduled before me on August 18, 2008. On July 18, 2008, Exelon Generation Company ("Exelon"), filed a Motion for Summary Decision pursuant to 29 C.F.R. § 18.40. Complainant has not filed a response to the Motion for Summary Decision.

STATEMENT OF FACTS

Exelon operates the Peach Bottom Atomic Power Station ("Peach Bottom"). Peach Bottom is located in Delta, Pennsylvania and is operated under a license granted to Exelon by the Nuclear Regulatory Commission ("NRC"). (Concannon Dec. at ¶ 2). Kevin P. Concannon is Senior Access Authorization Analyst for Exelon. (Concannon Dec. at ¶ 1). It is Mr. Concannon's responsibility to ensure that individuals requesting access to work at Exelon's nuclear facilities are legally authorized to do so. (Concannon Dec. at ¶ 3). The NRC requires that Exelon maintain an access authorization program. (Concannon Dec. at ¶ 4, Attachment A, Attachment B). The NRC procedure requires "'red flag[s]' on an application must be adequately resolved before Exelon can grant" the applicant access to Peach Bottom. (Concannon Dec. at ¶ 5; Attachment B).

During planned maintenance "outages" Exelon retains supplemental workers hired by contractors. Exelon contracted with Bartlett Nuclear, Inc., ("Bartlett") to supply temporary outage workers during an outage in September of 2007. (Concannon Dec. at ¶ 7). From September 4, 2007 through September 30, 2007, Mr. Concannon was responsible for processing applications for unescorted access to Peach Bottom for the outage workers. (Concannon Dec. ¶ 8, 14). Exelon requires all applicants to complete a questionnaire detailing personal,

employment, financial, and other relevant information. Mr. Concannon uses the questionnaire to determine whether unescorted access will be granted to the applicant. (Concannon Dec. at ¶ 11, 13). Exelon also performs a background check and credit check on each applicant. (Concannon Dec. at ¶ 12).

Michael T. Goetz ("Complainant") was recruited to work as a Health Physics Technician at Peach Bottom by Bartlett. (Complaint at 1; Concannon Dec. at ¶ 10). On September 17, 2007, Complainant attended a training session at Peach Bottom to apply for unescorted access to the facility. (Complaint at 1; Concannon Dec. at ¶ 9-10). Complainant was required to fill out the questionnaire. (Concannon Dec. at ¶ 11, 15, Attachment C). Complainant indicated that he had been previously denied unescorted access to a nuclear power plant in August of 1984 and April of 1994. (Concannon Dec. at Attachment C). Complainant disclosed that he was terminated in February of 1986 for being accused of a procedure violation for bypassing a security bag check. (Concannon Dec. at Attachment C). In addition, Complainant disclosed that he had been terminated in November of 2004 from a position at Nasa Plumbrook in Sandusky, Ohio. The documented reason for being terminated was a computer policy violation; however Complainant claims that he was fired for providing information in a Department of Energy ("DOE") investigation. (Complaint at 1; Concannon Dec. at Attachment C).

Mr. Concannon filled out a File Status Sheet outlining his concerns relative to Complainant's questionnaire revelations. (Concannon Dec. at ¶ 15, Attachment D). Mr. Concannon noted the following problems with Complainant's questionnaire: prior terminations, substantial period of unemployment for twenty-three out of the last thirty-six months, and Complainant's listed references being outside of Illinois, his state residence. (Concannon Dec. at ¶ 16, Attachment C, Attachment D). Complainant included jobs that were older than three years, so Mr. Concannon was required to address issues raised by that information. (Concannon Dec. at ¶ 17). Mr. Concannon's colleague, Steven Henry, addressed questions regarding Complainant's employment history. (Concannon Dec. at ¶ 17). Complainant's credit report also caused concern as it stated at the top: "High Risk Fraud Alert" and included no credit history. (Concannon Dec. at ¶ 18, Attachment D, Attachment E). The credit report also showed a Virginia address for Complainant, which was different than the Illinois address that he provided. (Concannon Dec. at ¶ 19; Attachment C, Attachment E).

Complainant repeatedly entered the restricted area without authorization where applications were being processed and had a confrontational attitude when he was asked to leave. (Concannon Dec. at ¶ 23, 24, Attachment D).

Mr. Concannon spoke with Complainant on September 17, 2007 in his office at Peach Bottom and expressed his concerns regarding the lack of credit and the incorrect addresses. (Concannon Dec. at ¶ 20). On September 18, 2007, Mr. Concannon spoke with Complainant regarding his unemployment history and requesting better references who lived closer to him. (Concannon Dec. at ¶ 21). Complainant alleges that Mr. Concannan stated: "so your [sic] a rat" after learning that Complainant had been fired from his previous employment for providing information to the DOE. (Complaint at 1). Complainant did not provide the requested information regarding any of these issues. (Concannon Dec. at ¶ 20-22).

Mr. Concannon denied Complainant's application for unrestricted access to Peach Bottom on September 19, 2007. (Complaint at 2; Concannon Dec. at ¶ 25). Mr. Concannon concluded that Complainant was not a good candidate due to lack of trustworthiness and unreliability. (Concannon Dec. at ¶ 25). Mr. Concannon did not put a temporary hold on Complainant's application because he wanted to afford Complainant the opportunity for an immediate appeal. (Concannon Dec. at ¶ 30). Complainant appealed the denial of his application on October 8, 2007, six days after the deadline. (Concannon Dec. at ¶ 32).

Mr. Concannon issued a letter denying access to Complainant on September 22, 2007, citing previous employment issues as the reason for the denial. (Concannon Dec. at ¶ 26, Attachment F). Mr. Concannon stated that he noticed Complainant's terminations in 1986 and 2004 on the questionnaire, but he did not consider them in deciding to deny Complainant's application. (Concannon Dec. at ¶ 27). Mr. Concannon claims that he did not speak with Complainant regarding the circumstances surrounding those terminations nor did he refer to Complainant in a derogatory manner. (Concannon Dec. at ¶ 28-29).

Since being denied access at Peach Bottom, Complainant has been unable to secure employment at any Nuclear Regulatory Commission or Department of Energy licensed facility. (Complaint at 2).

DISCUSSION

A motion for summary decision under the Act is governed by 29 C.F.R. §§ 18.40 and 18.41. Under those regulations, the Secretary and the Circuit Courts apply the summary judgment standards of Rule 56 of the Federal Rules of Civil Procedure. *Webb v. Carolina Power and Light Co.,* 1993-ERA-42, Slip Op. at 4-6 (Sec'y July 17, 1995); *Howard v. TVA,* 1990-ERA-24, Slip Op. at 4 (Sec'y July 13, 1991), *aff'd sum nom. Howard v. U.S. Department of Labor,* 959 F.2d 234 (6th Cir. 1992).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party opposing a motion for summary decision must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). The non-moving party "may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial… [T]he party opposing summary judgment must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby,* 477 U.S. 242, 256-2578 (1986); *See* Fed. R. Civ. P. 56(e). A "material fact" is one whose existence affects the outcome of the case. *Anderson,* 477 U.S. at 248. A "genuine issue" exists when the non-moving party produces sufficient evidence of a material fact that a fact finder is required to resolve the parties' differing version at trial. Sufficient evidence is any significant probative evidence. *Id.* at 249, citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 288-290 (1968).

Section 211 of the Act encourages employees in the nuclear industry to report safety violations and provides a mechanism for protecting them against retaliation for doing so. *See English v. General Electric Co.,* 496 U.S. 72, 82 (1990). That section states in relevant 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 (or any person acting pursuant to a request of the employee)—
>
> (A) notified his employer of an alleged violation of this chapter;
> (B) refused to engage in any practice made unlawful by this chapter…,if the employee has identified the alleged illegality to the employer;
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter;
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter…or a proceeding for the administration or enforcement of any requirement imposed under this chapter;
> (E) testified or is about to testify in any such proceeding or;
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding…

42 U.S.C. § 5851(a)(1).

A complaint under the Act shall be dismissed unless the complainant has made a *prima facie* showing that the behavior complained of was a contributing factor in the unfavorable personnel action alleged in the complaint. 42 U.S.C. § 5851(b)(3)(A). To establish a *prima facie* case under the Act, a complainant must establish: (1) the complainant engaged in protected activity; (2) respondent had knowledge of the protected activity; (3) a retaliatory employment action; and (4) the retaliation was motivated, in part, by the protected activity. *Carroll v. USDOL*, 78 F.3d 352, 356 (8th Cir. 1996); *See also St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Bauer v. United States Enrichment Corp.*, 2001-ERA-9 (ARB May 30, 2003). If the complainant establishes a *prima facie* case, the burden then shifts to the employer to demonstrate by clear and convincing evidence that a "legitimate, nondiscriminatory reason exists for discharging the complainant." *Carroll*, 78 F.3d at 356. Once the employer meets this burden of production, the complainant must then prove that the proffered legitimate reason is pretextual. *Id.*

In this case, it is undisputed that Complainant engaged in protected activity when he provided information in a previous Department of Energy investigation regarding nuclear material theft. Complainant alleges that Respondent failed to authorize him for unescorted access to the Peach Bottom facility, thus failing to hire him for a temporary outage position at Peach Bottom, when it learned of the protected activity. (Complainant's 6/10/08 Letter at 1-2). It is

undisputed that Mr. Concannon made the decision to deny Complainant's application for unrestricted access to Peach Bottom. It is also undisputed that Mr. Concannon and thus, Respondent, knew of Complainant's protected activity because Mr. Concannon read that information on Complainant's questionnaire.

Where a complainant alleges that the adverse action was the prospective employer's refusal to hire him, he must also establish: (1) that he applied and was qualified for a job for which the employer was seeking applicants; (2) that, despite his qualifications he was rejected; and (3) that, after his rejection, the position was either filled or remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Hasan v. U.S. Dep't. of Labor*, 298 F.3d 914, 916-917 (10th Cir. 2002); *see also Hasan v. Sargent & Lundy*, ARB No. 03-030, ALJ 2000-ERA-7, slip op. at 3 (ARB July 30, 2004) (*Hasan III); Samadurov v. Gen. Physics Corp.*, No. 1989-ERA-20, slip op. at 9-10 (Sec'y Nov. 16, 1993) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

It is undisputed that Complainant was refused unrestricted access to Peach Bottom. It is further undisputed that Complainant was subsequently not hired for the temporary outage position at the Peach Bottom facility. Respondent asserts that Complainant has not set forth specific facts that he was qualified for the position for which he applied. (R. Motion at 21). The undisputed facts demonstrate that Mr. Concannon determined that Complainant was not qualified for unrestricted access for the following reasons: significant unemployment history, insufficient references, and lack of credit history. The facts also establish that Mr. Concannon attempted to rectify these issues with Complainant on multiple occasions and Complainant failed to provide the corrected information at any time. The facts show that Complainant did not cooperate to complete the background investigation required to gain unrestricted access to Peach Bottom. Thus, the facts support the proposition that Complainant was not qualified for the temporary outage position and thus, was not the subject of adverse action. Therefore, Exelon is entitled to summary decision on that basis.

However, I will assume, *arguendo*, that Complainant was subject to adverse action and consider the remaining element. The Complainant asserts that he was denied access to Peach Bottom and ultimately not hired for the temporary outage position because of retaliation for his protected activity. (Complaint at 1). The Respondent argues that the facts demonstrate that there was a non-discriminatory reason for refusing to grant Complainant access to the facility and it would have made the same decision absent the protected activity. (R. Motion at 21-22). Complainant argues that Mr. Concannon stated to him "so your [sic] a rat" after learning of the protected activity and then denied him access to the facility. (Complaint at 1). However, Mr. Concannon states that "at no time did [he] refer to [Complainant] as a rat or use any other derogatory term…" (Concannon Dec. at ¶ 29). Since on summary decision I must view the evidence in the light most favorable to the non-moving party, in this case the Complainant, I find that a genuine fact exists as to whether this conversation took place. If this conversation took place then it raises an inference that Complainant's protected activity contributed to the alleged adverse action. Therefore, Exelon is not entitled to summary decision on that basis.

In addition to its argument that Complainant's protected activity did not contribute to the alleged adverse action, Exelon also argues that the facts demonstrate that there was a non-

discriminatory reason for refusing to grant Complainant access to the facility and it would have made the same decision absent the protected activity. (R. Motion at 21-22). Complainant has not set forth any facts that refute Respondent's claim that he was denied unrestricted access to Peach Bottom and ultimately not hired because there were problems with Complainant's application, specifically his significant unemployment history, insufficient references, and lack of credit history, which Complainant failed to rectify after being asked to do so by Mr. Concannon. As the facts establish that Exelon would have refused Complainant access to Peach Bottom regardless of Complainant's protected activity, Exelon is entitled to summary decision.

CONCLUSION

The undisputed facts set forth in the pleadings and affidavits establish that Complainant engaged in protected activity when he provided information to a DOE investigation, which Respondent, through Mr. Concannon, knew of when he refused to grant Complainant unrestricted access to Peach Bottom. However, Complainant failed to demonstrate that he was qualified for the position as he did not cooperate fully with the application process. Therefore, Respondent, Exelon, had legitimate reasons for refusing Complainant unrestricted access to the Peach Bottom facility, ultimately leading to the refusal to hire Complainant for the temporary outage position at the facility.

ORDER

It is hereby ORDERED:

Exelon Generation Co., L.L.C.'s, Motion for Summary Judgment is hereby GRANTED, and the complaint of Michael T. Goetz is hereby DENIED.

It is further ORDERED that the hearing scheduled for August 18, 2008 in Chicago, Illinois, is CANCELED.

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RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).