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**Issue Date: 08 September 2004**

ALJ CASE NO.: 2000-ERA-00023

ARB CASE NO.: 00-082

In the Matter of

**JEROME REID**
Complainant

v.

**NIAGARA MOHAWK POWER CORPORATION**
Respondent

Appearances:

Jerome Reid, Syracuse, New York, *pro se*
and Marion Chase-Pacheco, Esq., Syracuse, New York
for the Complainant[1]

Robert A. LaBerge, Esq. (Bond,
Schoeneck & King, PLLC) Syracuse,
New York for the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

## SUPPLEMENTAL DECISION AND ORDER ON REMAND

### I. Statement of the Case

This matter arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1995) ("ERA"), and the implementing regulations found at 29 C.F.R. Part 24 (1995), based on a complaint filed by

[1] Reid, who has represented himself through most of this proceeding, retained Attorney Chase-Pacheco in July 2003 and was represented by Attorney Chase-Pacheco through the hearing on remand which was conducted on February 9, 2004. Attorney Chase-Pacheco withdrew her appearance as Reid's attorney on March 3, 2004, and Reid has not retained replacement counsel.

Jerome Reid ("Reid") who alleges that in April 1993 his employer, Niagara Mohawk Power Corporation ("Niagara Mohawk"), violated the ERA by reducing his grade and pay rate because he engaged in activities protected under the ERA. The matter is before me a second time pursuant to a remand from the Administrative Review Board ("ARB") in *Reid v. Niagara Mohawk Corp*., USDOL/OALJ Reporter (HTML), ARB No. 00-082, ALJ No. 2000-ERA-00023 (ARB Aug. 30, 2002) ("Decision and Order of Remand").

Reid originally filed his complaint over 12 years ago on July 1, 1993. The complaint was investigated by the Wage and Hour Division of the U.S. Department of Labor ("USDOL") which notified Reid by letter dated July 30, 1993 that his allegations could not be substantiated. Decision and Order of Remand at 1. The Wage and Hour Division informed Reid of his right to request a hearing before an Administrative Law Judge ("ALJ") if he disagreed with the determination. *Id*. Reid requested a hearing by facsimile on August 21, 1993 but not by telegram as provided in 29 C.F.R § 24.4(d)(2)(i) (1993). *Id*. at 2. The facsimile was sent to a machine located in the Office of Administrative Law Judges' administrative office, rather than in the docket section, and it appears that the hearing request never reached the docket section. *Id.* Consequently, the case was not docketed, and no hearing was scheduled. *Id*.

On April 26, 2000, Reid wrote to the Chief Administrative Law Judge inquiring as to the status of his appeal and attaching a copy of his hearing request and a facsimile transmission report reflecting that a document had been transmitted to OALJ on August 21, 1993. *Id*. at 2. On May 1, 2000, the Associate Chief Judge issued a Notice of Docketing, stating "Although OALJ has no record of having received the [hearing] request, the transmittal confirmation report is adequate proof to show that Reid's hearing request was timely filed before this Office." *Id*. at 3. Accordingly, the case was docketed and assigned to me to conduct a formal hearing. *Id*.

Following the issuance of a notice of hearing, Niagara Mohawk moved for an order to show cause why the Wage and Hour Division's determination of July 30, 1993 should not become the final decision of the Secretary of Labor in this matter. Decision and Order of Remand at 3. In support of its motion, Niagara Mohawk asserted that Reid had failed to request a hearing in the form and manner prescribed by the governing regulations and to diligently pursue his appeal resulting in a delay of almost seven years and potentially prejudicing Niagara Mohawk's ability to present a defense. *Id*. I granted Niagara Mohawk's motion, finding that it had raised a substantial question as to whether Reid was entitled to a hearing on the merits, and I ordered Reid to show cause why his complaint should not be dismissed. *Id*. In view of Reid's *pro se* status and the fact that a hearing had been scheduled for June 6, 2000, Reid was permitted to file his response on the record at the hearing prior to the introduction of any evidence. *Id.* After holding a hearing limited to the issues raised by Niagara Mohawk's motion, I issued a Recommended Decision and Order finding that Reid's request for a hearing was timely but that Reid had not diligently prosecuted his appeal. Recommended Decision and Order at 7. Consequently, I recommended that his complaint be dismissed. *Id.*

Reid appealed to the ARB which accepted my finding that "the complaint is not subject to dismissal based on an untimely or procedurally defective hearing request." Decision and Order of Remand at 7. However, the ARB rejected my finding that Reid had failed to diligently prosecute his complaint, noting that dismissal for failure to prosecute is an extreme sanction that

may only be applied in extreme cases after consideration of five factors identified by the United States Court of Appeals for the Second Circuit in whose jurisdiction this matter arises.[2] Decision and Order of Remand at 7-8. Upon consideration of the relevant factors, the ARB concluded,

> Thus, although the length of delay and potential prejudice to Niagara Mohawk's defense are certainly serious considerations, given Reid's *pro se* status, the fact that there is no evidence in the record that Reid's failure to proceed was an intentional ploy to avoid or prolong litigation, and the fact that Reid was given no warning, we reject the ALJ's recommendation that this case be dismissed for failure to diligently pursue the case.

Decision and Order of Remand at 9. Based on this determination, the ARB denied Niagara Mohawk's motion to dismiss and remanded the case for further proceedings in accordance with its decision. *Id*.

Upon receipt of the case file on remand from the ARB, a hearing was scheduled to convene on February 4, 2003. Thereafter, Reid was granted several continuances, frequently over Niagara Mohawk's objection, for various reasons including Reid's request for additional time to locate counsel, requests by prospective attorneys for additional time to review the matter, counsel's scheduling conflicts, and counsel's health issues. ALJ Exhibits ("ALJX") 8, 9, 13, 15, 19, 20, 23, 27, and 29. Additionally, Niagara Mohawk renewed its motion to dismiss Reid's complaint on grounds that Reid (1) failed to comply with orders issued by the presiding Administrative Law Judge and (2) failed to state an actionable claim under the ERA. ALJX 18. Niagara Mohawk's motion was denied by order issued on August 5, 2003, in which I found that the record did not establish a deliberate pattern of contumacious conduct sufficient to support dismissal as a sanction for failing to comply with the Court's orders and that Reid had alleged sufficient facts, when viewed in a light most favorable to him, to make out a *prima facie* claim of retaliation under the ERA. ALJ Exhibit 25.

Pursuant to notice, a hearing on remand was eventually held in Syracuse, New York on February 9, 2004 at which time Reid was afforded the opportunity to present argument and evidence. ALJX 29; Hearing Transcript ("TR") 1-226. Reid and Niagara Mohawk were both represented by counsel at the hearing. TR 4-5. Testimony was elicited from Mr. Reid and six witnesses called by his attorney. TR 3. Documentary evidence was admitted as ALJX 1-36,

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[2] The five factors cited by the ARB are:

> [1] the duration of the plaintiff's failures, [2] whether the plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4] whether the district judge has take[n] care to strik[e] the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard . . . and [5] whether the judge has adequately assessed the efficacy of lesser sanctions.

Decision and Order of Remand at 8, quoting *LeSane v. Hall's Security Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001).

Complainant Exhibits ("CX") 1-4 and 6-11, and Joint Exhibit ("JTX") 1.[3] Upon conclusion of Reid's case, Niagara Mohawk moved for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure and 29 C.F.R. Part 18, arguing that Reid had failed to meet his burden of proof and had failed to establish the necessary elements of his claim. TR 219. Niagara Mohawk's motion was taken under advisement, and the hearing was adjourned with leave granted to Reid to submit a written memorandum in support of his complaint by February 23, 2004 and Niagara Mohawk granted an additional seven days in which to respond. TR 223.

After the hearing, Reid's attorney withdrew her appearance, and Reid was granted an extension of time until March 22, 2004 to offer additional evidence.[4] In addition, Niagara Mohawk was granted leave to respond to any post-hearing submission from Reid. Reid offered a number of additional documents along with letters dated March 22, 2004 and March 31, 2002, and two letters dated April 6, 2004. Niagara Mohawk has responded, objecting to admission of Reid's post-hearing evidence and arguments on the ground that he failed to comply with the time frames established by the March 4, 2004 order.[5] Considering the withdrawal of Reid's attorney and the absence of any showing of prejudice to Niagara Mohawk which has been provided with an opportunity to respond to all of Reid's post-hearing submissions, Niagara Mohawk's objections are overruled, and Reid's additional evidence has been admitted as CX 12 (tabs 1-30), CX 13 (March 31, 2004 letter with attachment), CX 14-15 (first letter dated April 6, 2004 with attachments), CX 16 (corrected copy of letter dated April 6, 2004 with attachment), and CX 17 (additional letter dated April 6, 2004 with attachment).

Upon careful consideration of the entire record, I find for the reasons set forth below that Reid has failed to establish the necessary elements of his claim under the ERA, and I recommend that Niagara Mohawk's motion for judgment as a matter of law dismissing the complaint be granted.

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[3] Reid offered as CX 5 an organizational chart listing job titles and the names of employees at Nine Mile Point Nuclear Station number two ("Nine Mile II") for the purpose of showing positions to which Reid could have bumped to return to his previous job. TR 110-112. The Respondent objected that the document predates the period of time (April 1993) at issue in the matter. TR 111. After allowing *voir dire* during which Reid admitted that the document was dated March 1988 and that he had no separate knowledge whether any of the employees listed were in those same positions in 1993, I sustained Niagara Mohawk's objection and excluded CX 5 on the basis it failed to establish that there were jobs in existence in April 1993 to which Reid may have had the opportunity to bump. TR 114-115.

[4] Reid did not oppose his attorney's withdrawal as he had effectively terminated her representation after the February 9, 2004 hearing. *See* Reid Letter dated February 11, 2004.

[5] Niagara Mohawk also objects that Reid's post-hearing submissions were untimely and/or irrelevant because they concern job assignments in 1989 and 1991 and allegations of other forms of discrimination (race and disability) which are outside the scope of the matter before the Court. The objections were considered. However, Niagara Mohawk's concerns more appropriately address the weight afforded the evidence. Accordingly, the objections are overruled.

## II. Issue Presented

The issue presented by Niagara Mohawk's motion is whether Reid has met his burden of proof in regards to each element of his complaint in order to avoid judgment as a matter of law dismissing his complaint with prejudice.

## III. Discussion, Findings of Fact and Conclusions of Law

A. Background

Reid began his employment with Niagara Mohawk as a drafting technician in May 1985. TR 105. After approximately six months, he bid on a position as a Nuclear Auxiliary Operator B at Nine Mile II, where he remained for approximately four and a half years. *Id*. During his time in this position, Reid filed several complaints alleging several forms of discrimination with various state and federal agencies, including the New York State Human Rights Division, the United States Equal Employment Opportunity Commission, and the Department of Labor's Office of Federal Contract Compliance Programs. TR 105-106; JTX 1. On September 13, 1989, Reid and Niagara Mohawk entered into a settlement agreement providing for "full and complete resolution of all claims that Reid has, or may have, against Niagara Mohawk arising out of Reid's employment with Niagara Mohawk up to the date of this Agreement." JTX 1. Reid received compensation in exchange for agreeing to withdraw his complaints with the various state and federal agencies and signing a general release. *Id*. In addition, the agreement granted Reid the position of Drafting Technician C at the pay rate of grade eighteen so long as he continued in that position. *Id*. at 2. The agreement outlined specific procedures and timeframes for Reid to follow, if he elected to return to his former position at Nine Mile II as an Auxiliary Operator B at pay grade 13. *Id*. After approximately one and one half to two years in that position, Reid left work on a disability leave. TR 106-107. When he returned to work he was placed in a light duty position as a clerk in the accounts payable department. TR 107-108. Reid understood this to be a temporary assignment and wanted to return to his previous position in the electrical planning department. TR 108. Reid contends that he made several efforts to return to his former position. TR 108.

Between September 1992 and July 1993, Reid had contact with the Nuclear Regulation Commission ("NRC"), including the filing of a formal complaint on September 24, 1992 regarding his concerns about a crack discovered during "sound testing" in one of the main steam lines in late 1987 or early 1988. CX 6, 8. The NRC investigated Reid's concern by discussing the issue with the licensee and reviewing its own past inspection, and it notified Reid on January 12, 1993 that it determined that while there was a flaw in a main steam piping weld, the flaw was "dispositioned" by the licensee and the disposition of the flaw was found to be acceptable by the NRC. CX 8.

On September 17, 1992, Reid filed an ERA complaint in which he alleged that Niagara Mohawk had discriminated against him in processing his disability claims in retaliation for his protected whistleblower activities. On October 15, 1992, the Wage and Hour Division issued a determination that prohibited discrimination did not take place as alleged in the complaint. Reid requested a hearing which was held before Administrative Law Judge Ainsworth Brown on June

29, 1993. On August 9, 1993, Judge Brown issued a Recommended Order of Dismissal of Complainant Without Prejudice and Denial of Motion for Summary Decision, dismissing the complaint due to Complainant's failure to appear at the hearing. The Secretary of Labor affirmed Judge Brown's Order by Final Order of Dismissal issued on February 14, 1994. *Reid v. Niagara Mohawk Power Corp*., USDOL/OALJ Reporter (HTML), ALJ No. 1993-ERA-3 (Sec'y Feb. 14, 1994).

On April 5, 1993, Reid's grade and pay rate was reduced from a grade eighteen, step two to grade eleven step two. TR 139. On July 1, 1993, Reid filed the instant complaint, alleging that the change in his pay status was in retaliation for his earlier communication with the NRC regarding safety related concerns.

B. Analytical Framework

The standard for judgment as a matter of law in discrimination cases is whether a reasonable fact finder could, on the evidence presented, find in plaintiff's favor, resolving all doubts and credibility issues in his favor. *See Krulic v. Board of Ed. of City of New York,* 781 F.2d 15, 21 (2d Cir. 1986). In other words, Reid's case must be analyzed to determine whether he has presented evidence sufficient to prevail until contradicted and overcome by other evidence. *Carroll v. Bechtel Power Corp.*, USDOL/OALJ Reporter (HTML), 91-ERA-46 at 6 (Sec'y Feb. 15, 1995).

The ERA prohibits an employer from discharging or discriminating against an employee with respect to his compensation, terms, conditions, or privileges of employment because the employee notified his employer of an alleged violation of the Act, refused to engage in any practice made unlawful under the Act, testified regarding any provision of the Act, commenced any proceeding under the Act, testified in any proceeding or assisted or participated in any such proceeding. 42 U.S.C. § 5851(a)(1) (1995). Any employee who believes he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within 180 days after such violation occurs, file a complaint with the Secretary of Labor. 42 U.S.C. § 5851(b)(1). In particular, the ERA requires a complainant to demonstrate that protected activity was a contributing factor in the unfavorable personnel action that followed. 42 U.S.C. § 5851 (b)(3)(C); *Bourland v. Burns International Security Services*, USDOL/OALJ Reporter (HTML), ARB No. 99-124, ALJ No. 1998-ERA-32 at 3 (ARB Apr. 30, 2002); *Kester v. Carolina Power & Light Co.*, USDOL/OALJ Reporter (HTML), ARB No. 02-007, ALJ No. 2000-ERA-31 at 3 (ARB Sept. 30, 2003). "Demonstrate" in this context means to prove by a preponderance of the evidence. *Bourland* at 3, citing *Dysert v. Florida Power Corp.*, 93-ERA-21, slip op. at 3 (Sec'y Aug. 7, 1995), *aff'd sub nom. Dysert v. U. S. Secretary of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997); *Trimmer v. U. S. Dep't of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997). However, the Secretary may not grant relief if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected activity. *Kester* at 3. Accordingly, Reid must prove by a preponderance of evidence that (1) he engaged in protected activity under the ERA, (2) that Niagara Mohawk knew about his protected activity (3) Niagara Mohawk took adverse action against him, and (4)

that his protected activity was a contributing factor in the adverse action Niagara Mohawk took. *Kester* at 3.

C. Protected Activity

Reid has submitted uncontradicted evidence that he contacted the NRC with safety-related concerns between September 1992 and July 1993. CX 7, 8. The NRC evaluated, investigated, and responded to Reid's concerns. *See, e.g.,* CX 8. In addition, it is uncontested that Reid filed a whistleblower discrimination complaint under the ERA on September 17, 1992 and that Reid requested a hearing on his complaint which was eventually held on June 29, 1993. As a result, I conclude that Reid's commencement of contact with the NRC regarding his safety related and whistleblower concerns and his participation in an ERA whistleblower proceeding during this time period constitutes protected activity within the meaning of 42 U.S.C. § 5851(a)(1)(D) and (F) (1995). *See Williams v. Mason & Hanger Corp.*, USDOL/OALJ Reporter (HTML), ARB No. 98-030, ALJ No. 1997-ERA-14 at 15 (ARB Nov. 13, 2002), *aff'd Williams v. Administrative Review Board, USDOL*, 576 F.3d 471 (5th Cir. July 15, 2004) (discussing which activities qualify as protected activity under the ERA including communication and cooperation with regulators and other government officials regarding nuclear safety requirements under the ERA). Reid also submitted evidence after the hearing which shows that he made similar nuclear safety-related contacts with the NRC in 1988-1989. CX 12. Accordingly, I find that Reid has submitted sufficient evidence to demonstrate that he engaged in protected activity.

D. Niagara Mohawk's Knowledge of Reid's Protected Activity

Reid testified that during his time in the accounts payable department he communicated his concerns and complaints to Marshall Nelson in accordance with the September 13, 1989 settlement agreement. TR 160-161; JTX 1.[6] During the relevant period of time, Mr. Nelson was the Manager of Equal Employment Opportunity (EEO) at Niagara Mohawk. TR 83. Mr. Nelson testified that he was aware of different complaints that Reid had filed, that his responsibilities as EEO Manager included coordinating "as far as trying to get information from Jerome and from various departments about the occurrences", and that he dealt with Reid's city, state or federal agency complaints. TR 83-84. He further testified that he saw files sent to Niagara Mohawk by different agencies "if they came into the company or into the human resources." TR 84. However, he testified that he did not remember Reid raising any specific safety-related concerns and he did not remember Reid being referred to as whistlblower. TR 83-86. Reid also introduced a letter dated January 12, 1993 which he received from Roy Fuhrmeister, Senior Allegation Coordinator with the NRC, who stated that the NRC had discussed Reid's concerns with Nine Mile II which is operated by Niagara Mohawk. CX 8. Further, as discussed above, Reid filed a complaint against Niagara Mohawk on September 17, 1992 and, after the USDOL issued its determination on October 15, 1992 finding the claim of discrimination unsubstantiated, Reid timely requested a hearing, and Niagara Mohawk was notified and ultimately attended the hearing in June 1993. Recommended Decision and Order at 1-2, n.1; CX 12.

[6] In this regard, the September 13, 1989 Settlement Agreement provided that "[o]ver the next 6 months, Marshall Nelson will meet with Reid at least once a month to discuss any problems that Reid may have." JTX 1 at 2.

Niagara Mohawk asserts that Reid has failed to offer sufficient evidence to demonstrate that the Niagara Mohawk officials involved in the April 1993 adjustment to Reid's pay rate were aware of his claimed activity at the time. *See* Niagara Mohawk's Reply Memorandum of Law at 8-9. Niagara Mohawk has submitted an affidavit from William Lynn, Manager of Corporate Employee Relations, in support of its position. *Id*.; ALJX 18. However, the record shows that Niagara Mohawk was actively involved in Reid's earlier ERA complaint before the Department of Labor during the same time period (Fall of 1992 through Spring of 1993). Under these circumstances, and noting the letter from the NRC that it discussed Reid's concerns with Niagara Mohawk, I am persuaded that knowledge of Reid's protected activity may reasonably be imputed to responsible management at Niagara Mohawk including the Niagara Mohawk officials responsible for adjusting Reid's grade and pay rate in April 1993. *See Kester v. Carolina Power & Light Co.*, USDOL/OALJ Reporter (HTML), ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003). Accordingly, I find that Reid has presented sufficient evidence, when viewed in a light most favorable to Reid and without making any credibility determinations, to demonstrate that Niagara Mohawk was aware of his protected activity.

E. Adverse Employment Action

Reid alleges that on or about April 5, 1993 Niagara Mohawk reduced his grade and pay rate from grade eighteen step two to grade eleven step two in retaliation for his contacting the NRC regarding health and safety concerns. TR 139. Niagara Mohawk contends that it merely began to pay Reid at a rate commensurate with the work he was and had been performing and that the change in grade and pay rate, therefore, was not an adverse or otherwise inappropriate employment action. Niagara Mohawk's Reply Memorandum of Law at 8, n.4.

The September 13, 1989 settlement agreement states that Reid "shall be granted the position of Drafting Technician 'C' with Niagara Mohawk and shall be paid at the red circled rate of Pay Grade 18 *so long as he continues in such position*." JTX 1 at 2 (emphasis added). Reid testified that pursuant to the September 13, 1989 settlement agreement he was relocated from Niagara Mohawk's Nine Mile II facility to the electrical planning department as a Drafting Technician C at pay grade eighteen. TR 106. The settlement agreement further provided Reid with an option to return to his former position at Nine Mile II as an "Auxiliary Operator 'B' at Pay Grade 13" after a period of six months with the stipulation that he could only exercise this option by filing "a written request for such transfer with Niagara Mohawk Mohawk's Employee Relations Department during the month of March 1990" and by passing a medical and mental examination. JTX 1 at 2. Reid testified that he "communicated" his desire to return back to his job to Marshall Nelson, but he conceded that he never filed a written request as required by the settlement agreement. TR 176, 208.[7] Indeed, the earliest evidence offered by Reid that could be

[7] Reid stated that he never filed a written transfer request because he was discouraged from doing so by Nelson. TR 218. It is noted that any conduct by Niagara Mohawk in discouraging Reid from exercising his option under the settlement agreement to return to his former position at Nine Mile II could not form the basis of a finding of retaliation in violation of the ERA as any such conduct would have occurred prior to March 1990, placing it outside the ERA's 180 day limitation period since Reid's complaint was not filed until July 1, 1993.

construed as a transfer request is a "job vacancy bid" dated January 19, 1993, in which he applied for the position of Regional Control Operator A. CX 6. Reid testified that he was informed that he did not get that position because another employee with more seniority was selected, and he has not alleged or presented any evidence that he should have been selected. TR 118, 177, 190, and 192.[8] Reid also has not offered any evidence that he ever submitted to a medical and mental examination pursuant to the September 13, 1989 settlement agreement.

Reid further testified that in 1991 he left work on disability leave due to a herniated disc which required surgery on his neck. TR 107. Upon his return to work at Niagara Mohawk, he was placed in a light duty assignment in the accounts payable department. *Id*. He testified that he thought this assignment was temporary and as a result he tried to get his Drafting Technician "C" job back in the electrical planning department by submitting a letter to Mr. Grassi in the electrical planning department. TR 108. Reid testified that after receiving no response, he contacted Chuck Borell at his union, and he received a letter from Mr. Borell that the union had not been notified that the Drafting Technician C job had been abolished. *Id*. He stated that subsequently there were several meetings between the union and Niagara Mohawk management in regards to his employment, that he went out on disability leave again, and that when he returned to work he was given a letter by William Lynn stating that they had found a job which they wanted to discuss with him. TR 108-109.[9] Reid also testified that he initiated a grievance over elimination of the Drafting Technician C job and filed a discrimination complaint with the Equal Employment Opportunity Commission, alleging that he had been removed from his position in the electrical planning department due to a dispute with another employee. TR 179-181.[10] Reid also admitted that he was aware that the Drafting Technician C position was "gone" as early as March 1992. TR 183.

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[8] Reid has neither alleged nor offered any evidence that his non-selection for this position was discriminatory.

[9] It appears that most, if not all of the communications described by Reid in connection with his efforts to return to the Drafting Technician C position occurred after the allegedly discriminatory pay and grade change was effected in April 1993. For example, the letter from the Mr. Borell is dated August 26, 1993, four months after the reduction in pay rate and grade. CX 4. In addition, the letter from Mr. Lynn, dated November 10, 1993, was written seven months after the alleged adverse action. CX 3.

[10] Reid's discrimination allegations were investigated by the Department of Labor's Office of Federal Contract Compliance Programs which made the following finding:

> When Reid returned to work on December 2, 1991, he was assigned to the Accounts Payable department performing the duties of an Accounts Payable Clerk while being paid as a Drafting Technician C. The reason Reid was taken out of his position as a Drafting Technician C in the Electrical Planning department was because the work he had done (updating storm maps) was assigned to clerks in the line department while Reid was out on disability.

Reid testified that while he was out on disability leave during the calendar year 1991 he continued to receive full pay and benefits at pay grade eighteen. TR 166. He further testified that the work he was performing in the accounts payable department is normally paid at a lower rate than he was receiving for his work in that department. TR 166-167. He admitted that the reduction in his pay to a grade eleven was consistent with the pay rate for the work he was actually performing. TR 167. Reid has offered no evidence refuting Niagara Mohawk's contention that it pays employees who perform similar work in the accounts payable department at grade eleven.

A reduction in pay is normally considered an adverse action. *See, e.g., Carter v. Electrical District No. 2 of Pinal County*, USDOL/OALJ Reporter (HTML), ALJ No. 92-TSC-11 (Sec'y July 26, 1995). However, where it is undisputed in this case that Reid was only entitled under the terms of the settlement agreement to receive continued pay at the Grade 18 level as long as he occupied the Drafting Technician C position and that he was no longer occupying that position in April 1993 when Niagara Mohawk adjusted his pay to the appropriate level for the accounts payable work that he was actually performing, I conclude that the pay and grade change to the same level as other similarly situated employees did not constitute an adverse action affecting Reid's "compensation, terms, conditions, or privileges of employment" within the meaning of section 5851(a)(1) of the ERA. *Cf. Gutierrez v. Regents of the University of California,* USDOL/OALJ Reporter (HTML), ARB No. 99-116, ALJ No. 1998-ERA-19 at 7 (ARB Nov. 13, 2002) (affirming ALJ finding that complainant's receipt of lower pay increase than that received by other employees in his peer group constituted adverse action).

F. Causal Connection Between Protected Activity and Adverse Action

Assuming *arguendo* that the complained-of pay and grade change was an adverse employment action within the meaning of the ERA, Reid is required to demonstrate that his protected activity was a contributing factor to the adverse action. Reid was engaged in protected activity between the fall of 1992 and the summer of 1993, and the pay and grade change was effected in April 1993. In determining whether a complainant has demonstrated the requisite causal connection, temporal proximity between the protected activity and the adverse action is an important consideration. *Overall v. Tennessee Valley Authority*, USDOL/OALJ Reporter (HTML), ARB No. 98-111, ALJ No. 1997-ERA-53 at 15-22 (ARB Apr. 30, 2001*), aff'd sub nom Tenessessee Valley Authority v. United States Secretary of Labor*, 59 Fed. Appx. 732, No. 013724 (6th Cir. Mar. 6, 2003). However, temporal proximity is just one piece of evidence for the trier of fact to weigh in deciding the ultimate question whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action. *Thompson v. Houston Lighting & Power Co.*, USDOL/OALJ Reporter (HTML), ARB No. 98-101, ALJ No. 1996-ERA-34 at 6 (ARB Mar. 30, 2001). Although in any given case "a fact-finder might conclude that the temporal proximity between protected activity and adverse action establishes that the adverse action was motivated by the protected activity, such a conclusion is

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CX 9 at 2, Finding Number 6(b).

not ineluctable." *Id*. Here, the undisputed facts establish (1) that Reid voluntarily entered into the September 13, 1989 settlement agreement, (2) that the settlement agreement provided, *inter alia*, that Reid would be transferred to the Drafting Technician C position and be paid at the Grade 18 level as long as he remained in that position and that he could exercise an option to return to his former position as an Auxiliary Operator B at Nine Mile II only by filing a written transfer request during the month of January 1990 and by passing a medical and mental examination, (3) that Reid never filed a written transfer request during January 1990, (4) that Reid left the Drafting Technician C position on medical leave in 1991 to undergo cervical surgery, (4) that when Reid returned to work in December 1991, he was given a light duty assignment in the accounts payable department, (5) that during his medical absence his drafting technician duties were reassigned to other employees and that he was aware by March 1992 that the Drafting Technician C position no longer existed, (6) that Reid applied for a Regional Control Operator A position in January 1993 but was not selected because the successful applicant had more seniority, and (7) that Reid concedes that the pay he began receiving in April 1993 was the appropriate pay rate for the job that he was then performing in the accounts payable department. Other than timing, no evidence has been offered to establish a nexus between Reid's protected activity and the pay and grade change that he alleged to be retaliatory. On these facts, I conclude that temporal proximity alone is insufficient to demonstrate that the Reid's protected activity was a contributing factor in the April 1993 pay and grade change and that there is no other evidence suggestive of a causal relationship between his protected activity and the complained-of employment action.

In conclusion, I find that even when the evidence is viewed in a light most favorable to him, Reid has failed to demonstrate by a preponderance of the evidence that he suffered an adverse employment action when his pay grade and pay rate were adjusted to reflect the duties he was performing in the accounts payable department and that his protected activity was a contributing factor in Niagara Mohawk's decision to effect the pay and grade change. Consequently, I conclude that Reid cannot prevail on his claim of whistleblower retaliation, and I will recommend that the ARB grant Niagara Mohawk's motion for a judgment in its favor.

## V. Recommended Order

**IT IS RECOMMENDED** that the Niagara Mohawk's motion to for judgment in its favor be **GRANTED** and that Reid's complaint be **DISMISSED** with prejudice.

**SO ORDERED.**

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**DANIEL F. SUTTON**
Administrative Law Judge

Boston, Massachusetts