



In the Matter of:

SHERRIE G. FARVER,

ARB CASE NO. 03-088

COMPLAINANT,

**ALJ CASE NOS. 00-ERA-29
01-ERA-17**

v.

DATE: January 6, 2005

LOCKHEED MARTIN ENERGY SYSTEMS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Edward H. Slavin, Jr., Esq., St. Augustine, Florida

For the Respondent:

Robert M. Stivers, Jr. Esq., O'Neil Parker & Williamson, Knoxville, Tennessee

FINAL DECISION AND ORDER

Sherrie G. Farver filed a complaint alleging that Lockheed Martin Energy Systems terminated her employment in violation of the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003)¹, and its

¹ 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.A. § 2011 *et seq.* (West 2003)), 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].” 42 U.S.C.A. § 5851 (a)(1) (West 2003).

Continued . . .

implementing regulations at 29 C.F.R. Part 24 (2003).

After conducting a hearing, a Department of Labor Administrative Law Judge (ALJ) found that Farver failed to prove that Lockheed fired her in retaliation for her whistleblower activities.² Farver appealed the ALJ's Recommended Decision and Order (R. D. & O.). We have jurisdiction to decide this appeal.³

To prevail, Farver must prove by a preponderance of the evidence that she engaged in activities protected under the ERA, that Lockheed officials knew about this activity and took adverse action against her, and that her protected acts were a contributing factor in the adverse action.⁴

The ALJ found, and Lockheed conceded, that Farver's reports to Lockheed managers about the storage of PCB-contaminated waste in her building constituted protected activity and that Lockheed was aware of this activity. R. D. & O. at 19. The ALJ determined that only two of Lockheed's actions - a November 4, 1998 written reprimand and the March 26, 1999 termination from employment - constituted adverse action under this complaint.⁵

² Recommended Decision and Order dated April 9, 2003.

³ See 29 C.F.R. § 24.8. See also Secretary's Order No. 1-2002, 67 Fed Reg. 64272 (Oct. 17, 2002) (delegating to the Administrative Review Board (ARB) the Secretary's authority to review cases arising under the ERA). The Board reviews the ALJ's findings of fact and conclusions of law de novo. See 5 U.S.C.A. § 557(b) (West 1996); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 1995-WPC-1, slip op. at 7-8 (ARB Apr. 28, 2000) and authorities there cited.

⁴ See 42 U.S.C.A. § 5851 (b)(3)(C); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No 2000-ERA-31, slip op. at 6-8 (ARB Sept. 30, 2003).

⁵ R. D. & O. at 21. Only this complaint is before the Board. On October 20, 1998, Farver filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that Lockheed retaliated against her by conducting a desk audit of her position, demoting her, refusing to accommodate her disability, requiring her to submit to a psychiatric examination, denying her training, and creating a hostile work environment. RX 2. OSHA determined that discrimination was not a factor in Lockheed's personnel actions against Farver. She did not appeal OSHA's decision, which then became final. 29 C.F.R. § 24.4(d)(2). RX 5, R. D. & O. at 20.

We have deduced from Farver's Brief and Reply Brief⁶ that she argues that her cumulative protected activities during her 12-year career at Lockheed and her widely-known status as a whistleblower precipitated Lockheed's retaliatory termination of her employment. She asserts that Lockheed set her up for revocation of her security clearance and then used the revocation as an excuse to fire her.⁷

After considering the record, the ALJ found "absolutely no evidence of discrimination" by Lockheed, and concluded that Farver had failed to demonstrate by a preponderance of the evidence that her protected activity was a contributing factor in the unfavorable personnel actions against her. The ALJ acknowledged that because Farver's proof fell well short of establishing discrimination by a preponderance of the evidence, the burden of proof never switched to Lockheed to demonstrate by clear and convincing evidence that it would have fired Farver absent the illegal motive. Nevertheless, "to highlight the complete paucity of proof of illegal motive," the ALJ additionally found that Lockheed had proven by clear and convincing evidence that it fired Farver because the Department of Energy (DOE) had revoked her security clearance.⁸ R. D. & O. at 26; *see* 42 U.S.C.A. § 5851(b)(3)(D). As the ALJ recognized, this secondary finding was superfluous, given the ALJ's initial finding that Farver failed to carry her burden of establishing that her protected activity contributed to the unfavorable personnel actions Lockheed took against her.

⁶ Farver's counsel is Edward A. Slavin, Jr., whose license to practice law, the Supreme Court of Tennessee recently suspended for two years. *Board of Prof'l Responsibility of the Supreme Court of Tenn. v. Slavin*, No. M2003-00845-SC-R3-BP (Aug. 27, 2004). Subsequently, the Board imposed reciprocal discipline and suspended Attorney Slavin from practice before it. *In the Matter of the qualifications of Edward A. Slavin, Jr.*, ARB No. 04-172, slip op. at 14 (Oct. 20, 2004). In this case, we accept Attorney Slavin's Brief and Reply Brief because they were filed prior to the Board's October 20, 2004 order.

⁷ We have reviewed the pleadings Attorney Slavin filed on Farver's behalf and find that the record does not support his assertions of error by the ALJ. Complainant's Brief at 2. Accordingly, we reject Slavin's arguments regarding discovery, the dismissal of DOE, and the ALJ's credibility determinations. Once again, we note our disapproval of Slavin's extensive use of hyperbole, irrelevant string cites, and scurrilous attacks on both Lockheed and the ALJ. *See e.g.*, Complainant's Brief at 1-3, 6-8, 11-13, 16-20; Complainant's Reply Brief at 1, 5-7, 9-10.

⁸ The Department of Energy oversees nuclear facilities and solely determines who receives a security clearance and the status of that clearance. To determine an individual's eligibility for a clearance, DOE focuses on whether "the granting of access authorization would not endanger the common defense and security, and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a)(2004). *See* 42 U.S.C.A. § 2161 (West 1999).

The ALJ's Recommended Decision and Order fairly recites the relevant facts underlying this complaint. He thoroughly analyzed all of the evidence and correctly applied relevant law. We have examined the record and conclude that it fully supports the ALJ's finding that Farver failed to establish by a preponderance of the evidence that Lockheed discriminated against Farver in violation of the ERA. TR at 139, 148-49, 153, 258-63, 571, 575, 588, 642, 1225-26; CX 2-B, 2-C; RX 1, 3. Therefore, we attach and incorporate the Recommended Decision and Order. Accordingly, we **DENY** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge