



In the Matter of:

SYED M.A. HASAN,

ARB CASE NO. 01-004

COMPLAINANT,

ALJ CASE NO. 2000-ERA-12

v.

DATE: May 17, 2001

FLORIDA POWER AND LIGHT CO.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

Appearances:

For the Complainant:

Syed M.A. Hasan, *pro se*, Madison, Alabama

For the Respondent:

Carmen S. Johnson, Esq.; Steven D. Grimberg, Esq., *Muller, Mintz, Kornreich, Caldell, Casey, Crosland & Bramnick, P.A., Miami, Florida*

FINAL DECISION AND ORDER

BACKGROUND

This case arises under the employee protection provisions of the Energy Reorganization Act (“ERA”), which prohibit an employer from discriminating against or otherwise taking unfavorable personnel action against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in protected whistleblowing activity. 42 U.S.C.A. §5851 (West 1995). This case is one of many that Complainant Syed Hasan has filed against various companies for failing to hire, retain, or rehire him.^{2/}

^{1/} This appeal has been assigned to a panel of two Board members, as authorized by Secretary’s Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

^{2/} *Hasan v. Sargent & Lundy*, ARB No. 01-001, ALJ No. 2000-ERA-7 (ARB Apr. 30, 2001); *Hasan v. Commonwealth Edison Co.*, ARB Nos. 01-002, 01-003; ALJ Nos. 2000-ERA-8, 2000-ERA-11 (ARB Apr. 23, 2001); *Hasan v. Commonwealth Edison Co.*, ARB No. 01-005, ALJ No. 2000-ERA-13 (ARB Apr. 23, 2001); *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB Jan. 30, 2001); *Hasan v. Commonwealth Edison Co.*, ARB No. 00-028; ALJ No. 2000-ERA-1, (ARB Dec. 29, 2000); (continued...)

According to Hasan, in September, 1999, he applied for a job with Respondent as a “civil/structural/pipe support engineer.” On November 6, 1999, Hasan wrote to Respondent and essentially announced that he has a history of whistleblowing activity. When he did not receive a favorable reply to his application by November 19, 1999, Hasan filed a complaint with the Occupational Safety and Health Administration (“OSHA”)^{3/} alleging that Respondent refused to hire him because he was a whistleblower. OSHA found no merit to Hasan’s complaint. Hasan objected to that determination and the case was referred to an Administrative Law Judge (“ALJ”) for disposition.

After participating in discovery, Respondent advised the ALJ that “[n]owhere in Hasan’s Complaint does he allege, nor could he, that [Florida Power and Light] knew about his prior protected activity at the time that it allegedly made the decision to not hire him.” Respondent’s Motion to Dismiss with Incorporated Memorandum of Law at 2. Therefore, Respondent moved to dismiss this action on the grounds that Hasan had neither alleged a *prima facie* case nor stated a claim upon which relief can be granted. *Id.* at 2-3. Hasan responded by stating, among other things:

It is extremely important for This Court to note that the [Respondent’s counsel] has been representing Florida Power & Light Company, at least in ERA cases, FOR YEARS. I did sue, UNDER ERA, certain of my former employers/Prospective Employers FOR DEPRIVING ME OF MY LIVELIHOOD I found out that my name (HASAN —suing certain companies for ERA violations) IS ON THE INTERNET.^{4/}

Response to Respondent’s Motion and Complainant’s Motions at 2 (February 22, 2000).

The ALJ did not find Hasan’s response sufficient to state a claim of discrimination under the ERA. Therefore, by Order dated April 20, 2000, the ALJ noted that he had yet to receive any information to substantiate the claim and directed Hasan to show cause why his complaint should

^{2/}(...continued)

Hasan v. Intergraph Corp., ARB No. 97-016; ALJ No. 96-ERA-17, (ARB Aug. 6, 1997); *Hasan v. Bechtel Power Corp.*, No. 94-ERA-21 (Sec’y Mar. 16, 1995); *Hasan v. Bechtel Power Corp.*, No. 93-ERA-40 (Sec’y Feb. 13, 1995); *Hasan v. System Energy Resources, Inc.*, No. 89-ERA-36 (Sec’y Sept. 23, 1992); *Hasan v. Nuclear Power Services, Inc.*, No. 86-ERA-24 (Sec’y June 26, 1991); *Hasan v. Florida Power & Light Co.*, ALJ No. 2000-ERA-12 (ALJ Oct. 5, 2000); *Hasan v. Stone & Webster Engineers and Constructors, Inc.*, ARB No. 01-007, ALJ No. 2000-ERA-10 (ALJ Oct. 5, 2000); *Hasan v. Wolfe Creek Nuclear Operating Corp.*, ARB No. 01-006, ALJ No. 2000-ERA-14 (ALJ Oct. 5, 2000); *Hasan v. Sargent & Lundy*, No. 96-ERA-27 (ALJ Nov. 4, 1996); *Hasan v. Bechtel Power Corp.*, No. 93-ERA-22 (ALJ Dec. 8, 1994); *Hasan v. Nuclear Power Services Inc.*, No. 86-ERA-36 (ALJ July 27, 1989).

^{3/} OSHA is the agency within the Department of Labor (“DOL”) charged with investigating ERA whistleblower complaints. See 29 C.F.R. §§24.4, 24.5 (2000).

^{4/} We infer from this statement that Hasan is alleging that the employees responsible for making hiring decisions learned of his protected activity either from Respondent’s counsel or by reading decisions in previous *Hasan* cases published on the DOL Office of Administrative Law Judges’ web site.

not be dismissed. Hasan responded by, among other things, questioning the ALJ's integrity and complaining that Respondent had not fully cooperated in discovery. However, Hasan failed to allege that one or more of the employees who had substantial input in the decision not to hire him also had knowledge of his protected activity. Hasan also failed to allege that the position in question remained open and that Respondent continued to seek applicants with his qualifications. In the absence of such allegations, the ALJ found that Hasan had failed to state a *prima facie* case of retaliation and had failed to state a claim upon which relief can be granted. Consequently, by Order issued October 5, 2000 ("RD&O"), the ALJ recommended that the complaint be dismissed. This appeal followed.

JURISDICTION

We have jurisdiction pursuant to 42 U.S.C.A. §5851 and 29 C.F.R. §24.8.

STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions *de novo*. See 5 U.S.C.A. §557 (b) (West 1996); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

DISCUSSION

To state a claim under the ERA, the complainant must allege that: (1) complainant engaged in protected conduct; (2) the employer was aware of that conduct; (3) the employer took some adverse action against him; and (4) there is evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. *Carroll v. Bechtel Power Corp.*, No. 91-ERA-46, slip op. at 9 (Sec'y Feb. 15, 1995) (citing *Dartey v. Zack Co. of Chicago*, No. 82-ERA-2, slip op. at 7-8 (Sec'y Nov. 13, 1991), *aff'd sub nom*, *Carroll v. Department of Labor*, 78 F.3d 352 (8th Cir. 1996). See also *McCuistion v. TVA*, No. 89-ERA-6, slip op. at 6 (Sec'y Nov. 13, 1991); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983).

In this case, Hasan alleged that, while working for another employer, he reported safety concerns to the Nuclear Regulatory Commission. That allegation is sufficient to establish the first element of a *prima facie* case. However, he has not pled facts sufficient to establish the remaining elements.

To satisfy the second element, Hasan must allege that at least one of the employees responsible for, or having input in, the hiring practices of Respondent knew about his protected activity. See *Floyd v. Arizona Public Service Co.*, No. 90-ERA-39 (Sec'y Sept. 23, 1994). Rather than allege facts, Hasan merely speculated that either Respondent's counsel informed the hiring officials of his protected activity or the hiring officials discovered his activity themselves by reading the numerous decisions on his prior ERA complaints that are published on the DOL web site.^{5/}

^{5/} Hasan asserts on appeal that Respondent had to be aware of his protected activity because he disclosed it in his November 6, 1999 letter. However, Hasan did not raise this argument in response to either
(continued...)

According to Hasan, if the ALJ had granted him discovery and held a hearing, he would have been able to establish the facts in support of his claim.

Hasan must support his claim with more than sheer speculation. As we have held before, a complainant cannot simply “file a conclusory complaint not well-grounded in fact, conduct a fishing expedition for discovery, and only then amend his complaint in order to finally set forth well-pleaded allegations.” *Hasan v. Commonwealth Edison Co. and the Estes Group, Inc.*, ARB No. 00-028, ALJ No. 00-ERA-01, slip op. at 5 (ARB Dec. 29, 2000). Inasmuch as Hasan has not alleged that at least one of the employees responsible for making hiring decisions knew about his protected activity, he has not satisfied the second element of a *prima facie* case.

With regard to the third element, the Secretary has previously determined that there are four factors that must be considered in determining whether a refusal to hire constitutes an adverse action. *Samodurov v. Niagara Mohawk Power Corp. and General Physics Corporation*, No. 89-ERA-20 (Sec’y Nov. 16, 1993). Under *Samodurov*, the complainant must allege: 1) that he applied and 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 remained open and the employer continued to seek applicants with his qualifications. Although Hasan has alleged facts sufficient to satisfy the first two prongs of the *Samodurov* test, he has not alleged that, following his rejection, the position remained open and the employer continued to seek applicants with his qualifications. Thus, Hasan has failed to establish the third element of a *prima facie* case. In light of Hasan’s failure to allege two essential elements of a *prima facie* case, we concur with the ALJ that this complaint should be dismissed.^{6/}

SO ORDERED.

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member

^{5/}(...continued)

Respondent’s motion to dismiss or the ALJ’s show cause order. We decline to consider this argument for the first time on appeal and, instead, limit our review to the record established before the ALJ.

^{6/} Hasan has raised a number of other arguments in this case. The Board finds those arguments without merit and they do not warrant a separate discussion in this Order.