



In the Matter of:

SYED M.A. HASAN,

COMPLAINANT,

ARB CASE NOS. 01-002
01-003

ALJ CASE NOS. 2000-ERA-8
2000-ERA-11

v.

COMMONWEALTH EDISON CO.,

RESPONDENT,

and

SYED M.A. HASAN,

COMPLAINANT,

ARB CASE NO. 01-005

ALJ CASE NO. 2000-ERA-13

v.

DATE: April 23, 2001

COMMONWEALTH EDISON CO.,

and

WASHINGTON GROUP INT'L, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Syed M.A. Hasan, *Pro Se*, Madison, Alabama

For Respondent Commonwealth Edison Co.:

Robert E. Helfrich, Esq., *Commonwealth Edison Co., Downers Grove, Illinois*

Donn C. Meindertsma, Esq., Christine C. Stein, Esq., *Winston & Strawn, Washington, D.C.*

For Respondent Washington Group International, Inc.:

Robert L. Berlin, Esq., *Washington Group International, Inc., Boise, Idaho*

Donn C. Meindertsma, Esq., *Winston & Strawn, Washington, D.C.*

FINAL DECISION AND ORDER

These three cases arise 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). Each case was adjudicated separately below by the same Administrative Law Judge (“ALJ”). We consolidate the cases on appeal because they raise identical issues of law.

These are now the third, fourth, and fifth times (respectively) that Complainant Syed Hasan has filed a complaint against Respondent Commonwealth Edison, Co. (“ComEd”). In his first complaint, Hasan alleged that ComEd violated the employee protection provisions of the ERA by terminating his employment and refusing to re-employ him.^{1/} The basis for Hasan’s “refusal to hire” claim was that he forwarded his resume to ComEd, but the company did not hire him. Hasan then filed a second complaint against ComEd.^{2/} The only difference between his second complaint and the first was his assertion that he remained unemployed.

On November 15, 1999, Hasan filed a third complaint against ComEd again alleging that he has forwarded his resume to the company, but that it refuses to hire him because he engaged in protected activity. Two weeks later, on December 1, 1999, Hasan filed a fourth complaint against ComEd. The fourth complaint is identical to the third. Also on December 1, 1999, Hasan filed a fifth complaint. In his fifth complaint, Hasan named ComEd and Raytheon Engineers & Constructors as respondents, accusing both companies of illegally refusing to hire him.^{3/}

The complaints were investigated by the Occupational Safety and Health Administration, the agency charged with investigating ERA whistleblower complaints (29 C.F.R. §§24.4, 24.5 (2000)), which found all three complaints lacking in merit. Hasan objected to those determinations and the cases were referred to an ALJ for hearing. Based on the allegations in Hasan’s complaints, the ALJ found that Hasan failed to allege facts sufficient to establish a *prima facie* case, and therefore failed to state a claim upon which

^{1/} *Hasan v. Commonwealth Edison and The Estes Group*, ARB No. 00-043, ALJ No. 99-ERA-17 (ARB Dec. 28, 2000) (“*Hasan I*”).

^{2/} *Hasan v. Commonwealth Edison and The Estes Group*, ARB No. 00-028, ALJ No. 00-ERA-01 (ARB Dec. 29, 2000) (“*Hasan II*”).

^{3/} Raytheon Engineers & Constructors has been merged in Washington Group International, Inc., which we have substituted as the proper party-respondent.

relief can be granted. Consequently, in separate orders issued October 5, 2000, the ALJ recommended that all three complaints be dismissed. These appeals 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

A. Whether the ALJ erred in recommending that the complaints be dismissed for failure to state a claim.

Hasan, appearing *pro se*, contends that the ALJ erred in dismissing his complaints. Specifically, Hasan asserts that his allegations alone are sufficient to establish a *prima facie* case and, in any event, he would have been able to establish the facts in support of his claim if the ALJ had granted him discovery and a hearing. This is the same argument that we addressed in *Hasan II*.

As in the prior cases, Hasan has done nothing more than submit his resume to Respondents and then allege that the Respondents have discriminated against him because he remains unemployed. This naked allegation is insufficient to support a claim of discrimination under the ERA. A complainant cannot simply "file a conclusory complaint not well-grounded in fact, conduct a fishing expedition for discovery, and only then amend the complaint in order to finally set forth well-pleaded allegations." *Oreman Sales v. Matshushita Elec. Corp.*, 768 F. Supp. 1174 (E.D. La. 1991). If the complainant fails to allege a *prima facie* case, the matter is subject to immediate dismissal. See *Lovermi v. Bell South Mobility, Inc.*, 962 F.Supp. 136 (S.D. Fla. 1997). We find that Hasan has failed to allege a *prima facie* case and, therefore, concur with the ALJ that these frivolous complaints should be dismissed.

B. Whether the Board should strike Hasan's initial briefs.

Citing the ARB's recent Order striking an attorney's brief in *Pickett v. TVA*, ARB No. 00-076, ALJ Nos. 99-CAA-25, 00-CAA-9 (ARB Nov. 2, 2000), ComEd has moved to strike Hasan's initial briefs in these cases "because they are infected with abusive and impertinent attacks that have no place in settings before this Tribunal." Respondent Commonwealth Edison Company's Motion to Strike Complainant's Brief at 1. ComEd correctly notes that

Hasan's brief devotes significant text to heaping abuse on the Department of Labor, the ALJ, various attorneys and others.

In *Pickett*, we granted a motion to strike the complainant's brief and noted our concern that vitriolic attacks on administrative law judges are inconsistent with a lawyer's ethical obligations, and in any event cannot substitute for sound legal argument:

While counsel . . . has the right to criticize rulings of the ALJ with which his client disagrees, he has no right to engage in disrespectful and offensive personal attacks upon the ability and integrity of the ALJ; such attacks violate counsel's "professional obligation to demonstrate respect for the courts." [*Williams v. Lockheed Martin Corp.*, ARB Nos. 99-054/064, ALJ Nos. 98-ERA-40/42, (ARB Sept. 29, 2000)] at 6. *Accord* ABA Model Rules of Professional Conduct, Preamble, Rules 3.5 and 8.2 (1999).

The requirement that counsel refrain from immaterial, offensive excoriation of the ALJs before whom he appears, does not conflict with the counsel's ethical duty to represent his clients "with zeal and fidelity within the rules." Rhesa Hawkins Barkdale, *The Role of Civility in Appellate Advocacy*, 50 South Carolina Law Review, 573, 577 (1999). Quite to the contrary, "the use of odiums, sarcasm, and vituperative remarks have no place in a brief and are wholly unwarranted. Frankly, resort to the use of such statements is an indication of a lack of confidence in the law and the facts to support the position of the one using them." *State ex rel. Dyer v. Union Electric Co.*, 312 S.W.2d 151,154 (Mo. Ct. App. 1958). A brief containing such invective ordinarily should be stricken. *Accord Dranow v. United States*, 307 F.2d 545, 549 (8th Cir. 1962).

If Hasan's briefs in these cases had been filed by an attorney, we would not hesitate to strike them as inconsistent with a lawyer's ethical obligations. However, because Hasan is a *pro se* litigant and is not a lawyer, we allow him considerably more leeway, and therefore decline to grant ComEd's motion to strike his briefs in these cases. We agree with ComEd, however, that it is reasonable for a court to demand that all litigants – including *pro se* litigants – comport themselves with a measure of civility and respect for the tribunals that hear their cases. Among *pro se* litigants, this proposition applies particularly to litigants such as Hasan, who has significant litigation experience. Not only is vituperative behavior by a litigant unwarranted and inappropriate, it ultimately is self-defeating because it detracts from a complainant's ability to make a sound legal argument in support of his case.

CONCLUSION

For the reasons discussed above, we concur with the ALJ's Recommended Decision[s] and Order[s] Dismissing Claim[s] and find that these cases shall be **DISMISSED**.^{4/}

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member

RICHARD A. BEVERLY

Alternate Member

^{4/} Hasan has raised a number of other arguments in this case, including unsupported allegations of bias by the ALJ and misconduct by Respondents' attorneys. The Board finds those arguments without merit.