



In the Matter of:

SYED M.A. HASAN,

ARB CASE NO. 05-037

COMPLAINANT,

**ALJ CASE NOS. 2004-ERA-22
2004-ERA-27**

v.

DATE: July 31, 2007

ENERCON SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

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

For the Respondent:

**Terry M. Kollmorgen, Esq., *Moyers, Martin, Santee, Imel & Tetrick, LLP*;
Tulsa, Oklahoma**

FINAL DECISION AND ORDER

Syed M. A. Hasan filed two whistleblower complaints with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Enercon Services, Inc. violated the Energy Reorganization Act (ERA) when it refused to hire him because he had previously filed an ERA complaint against the company.¹ A Labor Department Administrative Law Judge (ALJ) granted Enercon's

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

Motion for Summary Decision. Hasan appealed. We, too, conclude that Enercon is entitled to summary decision.

BACKGROUND

Hasan's May 3, 2004 Complaint

Hasan is a civil/structural engineer with experience in the nuclear industry. Enercon is a consulting firm that employs engineers and other personnel and furnishes them to clients in the nuclear and other power generating businesses. Prior to filing the ERA complaints involved in this case, Hasan had filed an ERA whistleblower complaint against Enercon on May 21, 2003.²

On November 22, 2003, Enercon displayed a written advertisement on its website. The advertisement said that Enercon was “looking for” mechanical, electrical, nuclear, and structural engineers with commercial nuclear power experience for immediate “career opportunity” positions in its mid-Atlantic region and that “[a]vailable positions range from junior engineers to senior level engineers.”³ Two days later, on November 24, Hasan sent a letter to Enercon’s Rick McGoey, by mail and fax, in which he applied for the structural engineer position that the company had advertised on its website. Hasan’s letter began, “SUBJECT: POSITION FOR STRUCTURAL ENGINEER [AS ADVERTISED ON THE ‘INTERNET’ DATED: NOVEMBER 22, 2003].” He then wrote, “I am applying for the above position (I am fully qualified and experienced for the above position) with your company.” He also indicated that he was “genuinely interested in the above position” and was confident that he could “perform the job effectively.” The letter also advised Enercon that Hasan had previously filed a whistleblower complaint against the company and therefore “[p]lease do not Discriminate and Retaliate against me.” Hasan mailed the same letter to another Enercon office on the same day.⁴

employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), 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). The ERA covers applicants for employment, like Hasan, as well as employees. *Samodurov v. Gen. Physics Corp.*, No. 89-ERA-20, slip op. at 4 (Sec’y Nov. 16, 1993).

² In that case, this Board affirmed the ALJ’s recommended decision granting summary decision to Enercon. *Hasan v. Enercon Servs., Inc.*, ARB No. 04-045, ALJ No. 2003-ERA-31 (ARB May 18, 2005).

³ ALJ File, Tab 70 (Enercon’s Supplemental Motion for Summary Decision (Supp. Mot.)), Tab 3, Attachment 1, p. 4.

⁴ *Id.* at pp. 5-8.

Thereafter, on May 3, 2004, Hasan filed a whistleblower complaint with OSHA. He attached a copy of his November 24 application letter and a copy of the November 22 website advertisement to this complaint. Hasan alleged that Enercon violated the ERA by refusing to hire him “for the available/advertised engineering positions (Structural engineering positions).” He explained that he had seen the November 22 website advertisement about the structural engineering position, that he was qualified for the advertised position, and that it was “abundantly clear” that he had applied for the position, but that Enercon refused to hire him for the “available/advertised engineering positions” because he was a whistleblower.⁵

Hasan’s July 23, 2004 Complaint

On February 5, 2004, Enercon posted the same advertisement for engineers for its mid-Atlantic region that Hasan had seen on November 22, 2003.⁶ On that same day, Hasan again mailed and faxed a letter to McGoey in which he applied for the structural engineer position “AS ADVERTISED ON THE ‘INTERNET’ DATED FEBRUARY 5, 2004.” Hasan also mailed and faxed the same letter to two other Enercon offices. And he again reminded the company not to discriminate or retaliate because of his previous whistleblower complaint.⁷

Then, on July 23, 2004, Hasan filed another whistleblower complaint with OSHA and attached copies of the three application letters dated February 5 and a copy of the February 5 website ad. He noted that “this ERA complaint against Enercon pertains to Enercon’s advertisement of February 5, 2004.”⁸ He alleged that he was qualified for the position advertised on February 5 and that based on that ad, he had submitted application letters and his resume to McGoey and other Enercon officials and advised them not to discriminate. Nevertheless, Hasan claimed, Enercon refused to hire him for the “available/advertised engineering positions (mentioned above).”⁹ That same advertisement also appeared on Enercon’s website on February 21, 2003; March 17, 2003; November 22, 2003; March 27, 2004; June 27, 2004; and July 22, 2004. The June 27, 2004 and July 22, 2004 website ads also indicated that temporary positions at multiple locations were available for electrical, instrumentation and control, and civil structural engineers. Hasan also attached copies of these advertisements to this

⁵ Supp. Mot. Tab 3, pp. 1-3.

⁶ Supp. Mot. Tab 4, Att. 1, p. 4.

⁷ *Id.* at pp. 5-10.

⁸ Supp. Mot. Tab 4, p. 9.

⁹ *Id.* at pp. 1-3.

complaint.¹⁰ The ALJ later permitted Hasan to amend this July 23, 2004 complaint to include an allegation that Enercon refused to hire him for a temporary position as a structural engineer that it had advertised on its website on October 3, 2004.¹¹

After OSHA found that the May 3 complaint had no merit, Hasan appealed and requested a hearing before an ALJ. Eventually, the ALJ consolidated Hasan's complaints.¹²

Discovery

In August 2004, Hasan sought discovery of the "names, qualifications and experience, location, job requirement and clients of those civil/structural engineers [Enercon] hired nationwide from November 23, 2002 to present."¹³ The ALJ granted this discovery request.¹⁴ According to the ALJ, Enercon provided that information as well as resumes for 16 engineers it hired during that period in its civil/structural piping division. Enercon provided the names of the individuals who made the hiring decisions, the reason and procedure behind each new hire, the name of each client the new hires were sent to serve, and an explanation of why Hasan was not selected.¹⁵ The ALJ, however, did not order discovery of the entire personnel files of each new hire because to do so would constitute an "unwarranted fishing expedition."¹⁶

¹⁰ *Id.* at Att. 1, pp. 15-20.

¹¹ Supp. Mot. Tab 17; Nov. 2, 2004 Transcript (TR) 26.

¹² R. D. & O. at 2.

¹³ *Id.*

¹⁴ Aug. 17, 2004 TR 25.

¹⁵ R. D. & O. at 3.

¹⁶ *Id.* Hasan argued below, and to us as well, that the ALJ erred by not ordering Enercon to provide him with the "entire hiring records" and "other [unspecified] pertinent personnel documents" and "each and every document (in the possession of Enercon)" concerning the 16 engineers. ALJ File, Tab 71, p. 7; Brief at 1, 7, 8. Like the ALJ, we are not convinced that Hasan needed the entire personnel file of the newly hired engineers. The ALJ found that though the personnel files might contain relevant information, "disclosure of the entire files could easily disclose personal, medical, financial, or other similar data that would only serve to annoy or embarrass the new hire which cannot be condoned." R. D. & O. at 15. The ALJ did not abuse his discretion in denying Hasan's overly broad and unduly burdensome request. *See Hasan v. Burns & Roe Enters., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 3-4 (ARB Jan. 30, 2001).

Summary Decision Motions and Responses

Enercon moved for summary decision on September 13, 2004, and supported its motion with exhibits and an affidavit from its human resource manager. It argued that the purpose of the advertisements that Hasan had identified was not to hire engineers but to recruit currently employed engineers and enhance its data base of potential candidates. Furthermore, Enercon asserted, it did not hire any engineers who responded to the ads. Enercon therefore argued that it was entitled to summary decision because Hasan could not identify a particular position for which he was qualified and not hired. Nor could he prove that he was rejected and that Enercon hired someone else for the advertised positions.¹⁷ Hasan responded to Enercon's motion and attached his own affidavit. The gist of Hasan's response was that the advertisements clearly offered jobs, that he had applied, and that Enercon had refused to hire him. Therefore, summary decision was not appropriate.¹⁸

After Enercon complied with the ALJ's order to provide discovery pertaining to all civil/structural engineers it had hired between November 23, 2002, and August 17, 2004, the company filed a supplemental motion for summary decision. It repeated its earlier argument that the advertisements were placed only to recruit, not hire, engineers, and that it did not hire any engineer who responded to the ads. Moreover, Enercon argued that any claims Hasan might have with respect to the 16 engineers that it hired were time barred, that the company did not have knowledge of protected activity when it hired the engineers, and that it had legitimate, non-retaliatory reasons for hiring the 16 engineers.¹⁹ Hasan responded with assertions that Enercon had not complied with discovery orders, that Enercon employees and its lawyers lied to another ALJ in a previous proceeding, and that Enercon's reasons for not hiring him were a pretext for discrimination.²⁰

¹⁷ ALJ File, Tab 36.

¹⁸ ALJ File, Tab 39 at 5, 16-17.

¹⁹ Supp. Mot. at 3.

²⁰ ALJ File, Tab 71.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's recommended decision.²¹ We review an ALJ's recommended grant of summary decision de novo.²² Pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law.²³ Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.²⁴ At this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof.²⁵

If the non-moving party fails to establish an element essential to his case, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."²⁶ Accordingly, the Board will affirm an ALJ's recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law.²⁷

²¹ See 29 C.F.R. § 24.8 (2006); Sec'y's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.1(a), including the whistleblower protection provisions of the ERA).

²² *Seetharaman v. Gen. Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. 3 (ARB May 28, 2004); *Demski v. Ind. Mich. Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 3 (ARB Apr. 9, 2004).

²³ *Seetharaman*, slip op. at 4, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

²⁴ *Seetharaman*, slip op. at 4.

²⁵ *Id.*, citing *Anderson*, 477 U.S. at 256; see also Fed. R. Civ. P. 56(e).

²⁶ *Seetharaman*, slip op. at 4, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

²⁷ *Seetharaman*, slip op. at 4; *Demski*, slip op. at 3. See also *Hasan v. Southern Co., Inc.*, ARB No. 04-040, ALJ No. 03-ERA-32, slip op. at 3-4 (ARB Mar. 29, 2005) (*Hasan II*).

DISCUSSION

The Legal Standards for ERA Refusal to Hire

To prevail under the ERA, a complainant must prove by a preponderance of the evidence that he was an employee (or prospective employee) who engaged in protected activity, that the employer knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action the employer took.²⁸

Where a complainant like Hasan 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.²⁹

Hasan engaged in activity that the ERA protects when he filed the May 21, 2003 whistleblower complaint against Enercon. The Enercon officials who received Hasan's November 24, 2003 and February 5, 2004 application letters knew about this activity because the letters reminded them about the previous whistleblower complaint.

The ALJ's Recommended Decision

The ALJ found, as an uncontested fact, that though the website advertised immediate job openings, such openings did not exist. Rather, Enercon used this "tactic" to recruit, not to hire.³⁰ Therefore, as for the advertised positions, he concluded that Hasan's refusal to hire claim should be dismissed on summary decision because there were no job openings, and thus Enercon did not take adverse action against Hasan. As for the 16 non-advertised positions that Enercon filled, the ALJ found that Hasan did not demonstrate that Enercon refused to hire him because of his previous whistleblower complaint. According to the ALJ, Enercon had legitimate non-retaliatory reasons for hiring the 16 engineers, and Hasan did not produce evidence that refusing to hire him instead of the engineers was a pretext for retaliating because of his prior

²⁸ 42 U.S.C.A. § 5851(b)(3)(C); *Hasan II*, slip op. at 2, 4; *Demski*, slip op. at 3; *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 5-8 (Sept. 30, 2003).

²⁹ *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 No. 2000-ERA-7, slip op. at 3 (ARB July 30, 2004) (*Hasan III*); *Samodurov*, slip op. at 9-10 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

³⁰ R. D. & O. at 6.

whistleblowing.³¹ Consequently, the ALJ recommended that we dismiss Hasan's complaints, and Hasan appealed.

The ALJ's Discussion of Hasan's Burden on Summary Decision

At the outset we must note that the ALJ appears not to have applied the correct summary decision standard that we articulated above. He writes that Hasan "failed to establish any nexus between [his] protected activity and [Enercon's] refusal to hire him."³² Those words are imprecise and may be read to mean that the ALJ required Hasan to produce more evidence than necessary in defending against Enercon's summary decision motions. Likewise, the ALJ's finding that Hasan "failed to establish the essential elements of a *prima facie* case" concerns us because this statement also appears to saddle Hasan with too great a burden.³³

As just discussed, to ultimately prevail Hasan must prove by a preponderance of the evidence that his protected activity contributed to Enercon's refusal to hire him. But to avoid summary decision in Enercon's favor, Hasan does not have to show that he will ultimately preponderate on the elements essential of his claim. Once Enercon demonstrated that Hasan lacked evidence on any essential element of his claim, the only burden for Hasan was "to establish the existence of an issue of fact that could affect the outcome of the litigation." Hasan "may not rest upon mere allegations, speculation, or denials of [Enercon's] pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof." To say that Hasan "failed to establish the necessary elements of a *prima facie* case" or "failed to establish any nexus" between protected activity and adverse action suggests that the ALJ did not apply the summary decision standard which, again, requires only that Hasan demonstrate that a fact dispute concerning the elements of his claim entitles him to an evidentiary hearing. Under our *de novo* review authority, we will apply the correct summary decision standard.

Hasan's Claims Pertain Only to the Website Advertised Jobs

The ALJ noted that Hasan "argued that he applied for not only advertised internet civil/structural positions, but other unadvertised jobs with Respondent throughout the United States."³⁴ He then proceeded to discuss whether Enercon had discriminatorily refused to hire Hasan for the advertised positions and whether it refused to hire him

³¹ *Id.* at 16-17.

³² *Id.* at 16.

³³ *Id.* at 5, 17.

³⁴ R. D. & O. at 13.

instead of the 16 engineers it hired for unadvertised positions. The ALJ concluded that Enercon did not discriminate in either instance.³⁵

We will not examine whether Enercon discriminated when it hired the 16 engineers for the unadvertised positions because the scope of Hasan's claims is limited solely to the advertised positions. The job application letters that Hasan attached to both of his complaints stated that he was applying for the structural engineer position "as advertised on the internet."³⁶ Furthermore, Hasan attached the referenced website advertisements to his complaints. And the complaints allege that Enercon violated the ERA when it refused to hire him for the "available/advertised engineering positions."³⁷ And while the ALJ did permit him to discover information about the 16 engineers and the circumstances of their hiring, Hasan did not seek to amend his complaint to include allegations that Enercon refused to hire him for unadvertised positions. Therefore, since Hasan's argument to the ALJ that he applied for unadvertised jobs has no record support, we confine our discussion to Hasan's claims that Enercon discriminated when it did not hire him for the advertised positions.³⁸

Enercon's Website Advertisements Must Be Read As Offering Engineer Positions

In its summary decision motion, Enercon argued that its website advertisements were not placed to hire engineers for specific positions. Rather, the purpose of the ads was to "recruit currently employed engineers and to enhance Enercon's database of potential candidates."³⁹ Enercon's Human Resources Manager and Engineering Manager submitted affidavits supporting this argument.⁴⁰ Therefore, Enercon argued, since "there

³⁵ *Id.* at 16-17. Enercon filed a motion in limine on September 27, 2004, that requested the ALJ to exclude any evidence pertaining to the unadvertised positions because such evidence would not be relevant to the allegations in Hasan's complaints. ALJ File, Tab 45. Inexplicably, the ALJ did not rule on this motion.

³⁶ Supp. Mot. Tab 3, Att. 1, pp. 5-6; Tab 4, Att. 1, pp. 5-6.

³⁷ Supp. Mot. Tab 3, p. 1; Tab 4, p. 1.

³⁸ Indeed, Hasan has not asked us to examine whether Enercon refused to hire him for the 16 unadvertised positions it filled. Like his two complaints, Hasan's brief to us argues only that Enercon refused to hire him "for the available/ADVERTISED engineering positions." He writes, "It is abundantly clear that I applied for engineering jobs, based on Enercon's advertisements . . . on the 'Internet.'" And, "Enercon . . . [violated the ERA] by refusing to hire me . . . FOR THE ADVERTISED/AVAILABLE ENGINEERING POSITIONS." Brief at 4, 6, 7, 9.

³⁹ Supp. Mot. at 7.

was no existing position for which the internet advertisement was placed,” Hasan cannot, as he must, “identify any advertised position for which he was qualified and was not hired.”⁴¹ Thus, Enercon contended that it was entitled to summary decision.⁴² Hasan argued below, and to us, that the advertisements clearly offered jobs.⁴³

Despite Enercon’s argument and affidavits to the contrary, on their face these ads can be read as offering engineering jobs. The advertisements listed “career *opportunities* with Enercon.” The ads specifically announced that “*Immediate opportunities* exist for ... structural engineers” and that “*Available positions* range from junior engineers to senior level engineers.” The June 27 and July 22 ads also indicated that Enercon was “*seeking* experienced engineers” for “Temporary Positions.”⁴⁴ Since on summary decision we must view the evidence in the light most favorable to Hasan, we find that a fact dispute exists as to whether the advertisements offered jobs. Therefore, Enercon is not entitled to summary decision on the basis that the ads did not offer jobs.

Hasan Did Not Adduce Evidence That Enercon Refused To Hire Him for the Advertised Positions

In addition to its argument that the advertisements did not offer jobs, Enercon argued below and argues here that it is entitled to summary decision because in this refusal to hire case, Hasan must be able to prove the essential element that Enercon rejected him for the advertised engineer positions.⁴⁵ David Studley, Enercon’s Engineering Manager, submitted an affidavit supporting Enercon’s Supplemental Motion for Summary Decision. Studley asserted that the website advertisements were his idea and posted at his direction. His affidavit states that he “never really looked at any of the resumes submitted in response to the advertisement, except to scan the names on the resumes to see if I recognized the candidates as former coworkers.”⁴⁶ In her affidavit, Kim Cruise, Enercon’s Human Resource Manager, swore that the company did not hire a civil/structural engineer in response to the advertisements.⁴⁷ From this, Enercon argues that since Hasan has not and cannot produce any evidence that he was rejected, we must

⁴⁰ *Id.* Tab 14, 16.

⁴¹ Supp. Mot. at 44.

⁴² Enercon Brief at 26.

⁴³ ALJ File, Tab 39 at p. 5; Hasan Brief at 4.

⁴⁴ Supp Mot. Tab 3, Att. 1, p. 4; Tab 4, p. 19-20 (italics supplied).

⁴⁵ Enercon Brief at 26.

⁴⁶ Supp. Mot. Tab 16.

⁴⁷ Supp. Mot. Tab 14.

grant its motion for summary decision. In his responses to Enercon's motions for summary decision, Hasan presents no evidence that Enercon rejected him for the advertised civil/structural engineer positions. Nor does his brief to us specify record evidence that Enercon rejected him.

Therefore, Hasan has not demonstrated that an issue of fact exists about an essential element of his refusal to hire claim, that is, whether Enercon rejected him after he applied for the advertised civil/structural engineering positions. Consequently, Enercon is entitled to summary decision.

CONCLUSION

We grant summary decision to Enercon because Hasan did not establish, as he must, that an issue of fact exists as to whether Enercon rejected him after he applied for the advertised engineer positions. As a result, we **DISMISS** Hasan's complaints.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

A. Louise Oliver, Administrative Appeals Judge, dissenting:

With respect, I find that I am unable to agree with multiple points in the majority's analysis.

The majority diverges from federal court precedent by finding that Hasan did not show that Enercon rejected him for employment, and by finding (without citing any evidence or weighing the relative burdens) that Hasan's discovery request was "overly broad" and "unduly burdensome."⁴⁸ The majority inexplicably rules upon the scope of

⁴⁸ Majority at 4 n.16. Our precedent permits access to personnel files, *see Khandelwal v. S. Cal. Edison*, ARB No. 98-159, ALJ No. 1997-ERA-6, slip op. at 5 n.4 (ARB Nov. 30, 2000) (citing *Lyoch v. Anheuser-Busch Co., Inc.*, 164 F.R.D. 62, 68-69 (E.D.Mo. 1995)), and makes clear that "the most limiting alternative under the rules – preclusion of disclosure . . . altogether" should be "rare," and justified by good cause shown, *U.S. Dep't of Labor v. Nurses PRN of Denver*, ARB No. 97-131, ALJ No. 94-ARN-1, slip op. at 9-10 (ARB June 30, 1999) (analyzing objection to further discovery under rules for protective order under Federal Rule of Civil Procedure 26(c)); *see also Pac. Gas & Elec. v. United States*, 69 Fed. Cl. 323, 325 (Fed. Cl. 2005) ("[T]he proper standard for discovery requests is to balance the burden on the interrogated party against the benefit to the discovering party of having the information," and "while a court may limit discovery, the court should do so based on evidence of the burden involved, not on a mere recitation that the discovery request is unduly

Hasan's complaint even though the ALJ's assumption about the complaint's scope was not challenged by either party on appeal; and although unjustified sua sponte action can raise due process concerns,⁴⁹ the majority offers no justification for its action. Having reached the issue, the majority reasons from Hasan's putative failure to provide evidence for an aspect of his complaint (the "unadvertised" jobs) that Hasan did not include those jobs in the complaint at all – in other words, the majority does not distinguish what is necessary to bring a complaint from what is necessary in order to prove it.⁵⁰ The majority also omits important information from its analysis when it finds significance in Hasan's failure to amend his complaint to include the unadvertised jobs, yet does not acknowledge that both Hasan and the ALJ assumed that Hasan's complaint already included those jobs⁵¹; and the majority ignores our precedent (which requires us to

burdensome"); *Flanagan v. Wyndham Int'l, Inc.*, 231 F.R.D. 98, 102-03 (D.D.C. 2005) ("[C]ourts generally employ a balancing test, weighing the burdensomeness to the moving party against the deponent's need for, and the relevance of, the information being sought."); see also Fed. R. Civ. P. 26(b)(2) (requiring courts to balance "the burden or expense of the proposed discovery" against "its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues"). Because the majority does not state any good cause justifying total preclusion of access to these personnel files, the majority should have found that the ALJ's order was an abuse of discretion. Indeed, the ALJ could have given Hasan access to those items in the personnel file that Hasan actually requested – namely, those portions of the personnel file that pertained to the hiring process – without even risking disclosure of "personal medical, financial, or other similar data" relating to the hired engineers, data as to which Hasan expressed no interest in the first place.

⁴⁹ See, e.g., *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, Barry A. Miller, 39 SAN DIEGO L. REV. 1253, 1297 (2002) (surveying reasons courts offer for sua sponte rulings, and suggesting that "due process," or in any case "fairness," requires appellate bodies "to offer parties a meaningful opportunity to be heard before an issue is decided").

⁵⁰ Because a complainant is not required to include all his evidence in his complaint, any absence of evidence about the "unadvertised" jobs would not seem relevant to the determination whether the Hasan did, or did not, identify those jobs in his complaint(s) as a subject for legal action. In any case, and even if one were to accept the majority's distinction between the "advertised" and "unadvertised" jobs, Hasan's application letter of October 1, 2004 (attached to his last complaint) included a specific reference to the unadvertised jobs. Moreover, Enercon did not argue that Hasan did not apply for those jobs. See Enercon response brief at 30 ("Enercon is not asserting . . . that Complainant failed to apply"). Thus evidence that Hasan applied for those jobs was, in fact, included in the record; and Enercon has specifically waived any argument that it was not.

⁵¹ Hasan's motion to amend specifically stated that "I am requesting Enercon to consider me for engineering jobs (*whether advertised or not* (informal methods of hiring)) . . . I, very humbly, request this court to permit me, for judicial economy, to amend my ERA

construe pro se pleadings liberally⁵²) by contending that Hasan’s brief on appeal “has not asked us to examine whether Enercon refused to hire him for the 16 unadvertised positions it filled.” Majority at 9 n.38.⁵³ Finally, after acting inconsistently with normal appellate process and practice both by ruling on the scope of Hasan’s complaint, and by engaging in a very narrow reading of that pro se complaint, the majority additionally departs from our precedent by failing to give Hasan the opportunity to amend his complaint to encompass these “unadvertised” jobs. The majority’s decision in this last regard is especially puzzling not only because evidence was presented, argument made, and a ruling given by the ALJ about these jobs, but also because the logic of the majority’s opinion appears to suggest that it may not be possible to separate the “unadvertised” jobs from the advertised ones.

In the interests of brevity, I will confine further discussion to issues related primarily to the first and last of these points.

1. There is no foundation for the majority’s conclusion that Hasan was not rejected

In my view, the fact that Enercon did not hire Hasan is sufficient to prove that Enercon rejected him. There is no foundation for the majority’s conclusion that Hasan “has not demonstrated that an issue of fact exists [as to] whether Enercon rejected him.”

Federal courts, when formulating the elements of adverse action in failure-to-hire and failure-to-promote cases brought under various statutes, have used the terms

complaint . . . so that it covers the period from May 3, 2004 to the commencement of the hearing.” ALJX 53 (Complainant’s Motion to Amend the ERA Complaint) (emphasis added). Construing Hasan’s pleadings liberally, as required by our precedent, one easily could find here either a request to include the unadvertised jobs in the complaint, or at least a belief that the jobs already were covered.

⁵² See, e.g., *Hasan v. Sargent & Lundy*, ARB No. 01-001, ALJ No. 2000-ERA-7 (ARB Apr. 30, 2001) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972); see also *Smith v. W. Sales & Testing*, ARB No. 02-080, ALJ No. 2001-CAA-17, slip op. at 12 (ARB Mar. 31, 2004) (citing *Hasan v. Sargent & Lundy* and *Haines* for proposition that pro se complaints should be liberally construed).

⁵³ A liberal reading of Hasan’s reference to the “available/advertised” jobs would understand that phrase as shorthand for the two categories of jobs at issue: available (but unadvertised), and advertised. Indeed, Hasan uses the phrase in this manner in his August 2004 motion for default judgment, which states: “Enercon is not willing to provide [discovery including the names] of the Respondent’s officials/employees who refused to hire me for [i] the engineering positions that Enercon never advertises (informal advertising) and for [ii] the structural engineering positions advertised. . . . In short, Enercon is engaged in illegal fraud by telling, repeatedly, the U.S. government that there were no engineering positions available/advertised.” Motion at 3 (emphasis and numbering added).

“rejected” and “refused to hire” interchangeably with terms such as “not hired,” “not offered employment,” and “nonselected.”⁵⁴ Indeed, the majority does not cite *any* federal case that distinguished between “rejection” and “not being hired.”

Moreover, none of our own precedent appears to support the idea that there is any distinction in the ERA between being *not hired* and being *rejected*. ARB cases addressing failure-to-hire complaints under the ERA have used the same framework applied by federal courts with respect to other statutes. *See Samodurov*, slip op. at 9-10 (adopting *McDonnell Douglas* standard for failure-to-hire cases brought under ERA).

Yet the majority neither recognizes nor justifies the novel distinction it draws between “rejected” and “not hired.” The majority does not acknowledge any of the federal caselaw using these terms interchangeably, nor does it provide any policy reason for holding that rejection does or should mean something different in ERA cases. Although the majority’s analysis could allow employers to insulate themselves from failure-to-hire cases, by simply omitting position titles from job advertisements and then not contacting non-selected applicants, the majority does not acknowledge this consequence and thus does not explain whether it is intended or, if not, how it can be avoided.

2. *The majority’s distinction between “advertised” and “unadvertised” positions is not sustainable*

The majority found – and I agree – that whether the advertisements related to actual positions was a disputed question of fact. *See* Majority at 9 (rejecting Enercon’s argument that “there was no existing position for which the internet advertisements were

⁵⁴ *See, e.g., Furnco Constr. Co. v. Waters*, 438 U.S. 567, 576 (1978) (plaintiffs made prima facie case where they proved they were in a protected class, were qualified, “did everything within their power to apply for employment,” “*were not offered employment*,” and employer continued to seek persons with similar qualifications); *Velez v. Janssen Ortho, LLC*, 467 F.3d 802, 807 (1st Cir. 2006) (plaintiff alleging retaliatory *failure to hire* “must show that she was *not hired*”); *McLaren v. Morrison Mgmt. Specialists, Inc.*, 420 F.3d 457, 462 (5th Cir. 2005) (“in a *non-selection or failure to hire* case, [plaintiff] must show that . . . (3) he was *not selected*”); *Cichon v. Exelon Generation Co., LLC*, 401 F.3d 803, 812 (7th Cir. 2005) (plaintiff “produced sufficient evidence to make out a prima facie case on the failure to hire portion of his retaliation claim when he demonstrated that . . . 3) he was *not hired*”); *Cooper v. Southern Co.*, 390 F.3d 695, 724 n.16 (11th Cir. 2004) (in Title VII failure-to-promote case, plaintiff can establish prima facie case by showing “(3) he was *denied the position*”); *EEOC v. Joe’s Stone Crabs, Inc.*, 296 F.3d 1265, 1273 (11th Cir. 2002) (“In a traditional [Title VII] failure-to-hire case, the plaintiff establishes a prima facie case by demonstrating . . . (3) . . . she was *not hired*”); *Buchholz v. Rockwell Int’l Corp.*, 120 F.3d 146, 150 (8th Cir. 1997) (in ADEA (Age Discrimination in Employment Act) failure-to-hire case, referring both to defendant’s “*failure to hire*” and to defendant’s “*nonselection*” of plaintiff).

placed,” and concluding that the “ads can be read as offers of engineering jobs Therefore, Enercon is not entitled to summary decision on the basis that the ads did not offer jobs”).

The majority therefore must have rejected Enercon’s contention that it did not hire anyone in response to the advertisements, because this contention was entirely based upon Enercon’s assertion that the advertisements did not relate to actual positions. *See* Enercon Response at 26 (arguing that “there were no existing positions for which the internet advertisements were placed” and therefore that “[n]o engineer was hired for the positions described on the internet advertisements”).

Because Enercon admittedly hired 16 engineers during the time period covered by discovery, a factfinder who found that the advertisements did offer jobs could find that the jobs offered were those filled by the engineers Enercon hired. Because Enercon did not hire Hasan for any of these jobs, such a factfinder would be compelled also to find that Enercon both rejected Hasan and filled the positions and thus that Hasan had provided sufficient evidence to meet the rejection element.

In other words, the majority’s position that the advertisements may have offered jobs precludes any conclusion based upon the definitive absence of available jobs, and thus precludes the majority’s conclusion that Enercon did not reject Hasan because there were no jobs from which to reject him.⁵⁵

3. The evidence of protected activity, adverse action, and causation is sufficient to allow Hasan to survive summary decision

a. Adverse action

In order to prove adverse action in a failure-to-hire complaint, an ERA complainant must show (1) that he applied and was qualified for an available position; (2) that he was rejected (or not hired, as federal courts have put it); and (3) that others were hired, or the employer kept looking. *See Hasan v. Wolfe Creek Nuclear Operating Corp.*, ARB No. 01-006, ALJ No. 2000-ERA-14, slip op. at 5 (ARB May 31, 2001) (citing *Samodurov v. Gen. Physics Corp.*, 1989-ERA-20, slip op. at 6-7 (Sec’y Nov. 16, 1993); *Samodurov*, slip op. at 6-7 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973))).

With respect to elements (2) and (3), Hasan was rejected, as discussed earlier, and Enercon admittedly hired 16 engineers during the relevant time period. With respect to element (1), the majority agrees that Hasan “applied for the advertised civil/structural engineering positions.” Majority at 10; *see also* Majority at 8 (noting that Hasan

⁵⁵ Analysis of the majority’s conclusion that Enercon did not reject Hasan is made more challenging by the majority’s failure to provide its reasons for that conclusion. In the interests of brevity, I provide only this brief analysis and do not attempt to survey other possible reasons for the majority’s conclusion.

submitted “job application letters” that referenced Enercon’s advertisements), and the majority does not dispute Hasan’s contention that he was qualified for these jobs. (Neither does Enercon – perhaps because Hasan’s evidence included not only his resume and a reference letter, but also the undisputed fact that Enercon had interviewed him both by telephone and later in person for several jobs.)

b. Protected activity and causation

Enercon concedes both that Hasan engaged in protected activity, and that Enercon knew about it. Moreover, the majority did not accept Enercon’s proffered reason for not hiring Hasan. Enercon argued that it did not hire Hasan because there were no available jobs, because the advertisements did not offer jobs; but the majority determined that whether there were available jobs (i.e., whether the advertisements offered jobs) was a disputed issue of fact.⁵⁶

Because the record contains sufficient evidence for Hasan to prevail on all elements, it is not appropriate to dismiss the case on summary decision. I respectfully dissent.

A. LOUISE OLIVER
Administrative Appeals Judge

⁵⁶ Moreover, even if this issue is resolved against Hasan and the “unadvertised” jobs are treated separately, there is sufficient evidence for Hasan to survive summary decision. Enercon asserted that it did not hire Hasan for those jobs because it did not consider him, and that it did not consider him because it knew of qualified candidates who took precedence under its hiring preference system. But Hasan points to several pieces of evidence that, taken together, suggest that Enercon did not have (or did not follow) the rigid hiring preference system that it claimed. Although this evidence does not mandate a finding that Enercon’s reason was a pretext for discrimination, in my view it is sufficient to support such a finding; it therefore presents an issue of fact requiring a hearing.