



In the Matter of:

GLEND A K. MILLER,

ARB CASE NO. 98-006

COMPLAINANT,

ALJ CASE NO. 97-ERA-2

v.

DATE: September 29, 1998

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER OF DISMISSAL

This case arises under the employee protection provision of the Energy Reorganization Act (ERA), as amended, 42 U.S.C. §5851 (1994). Complainant, Glenda K. Miller (Miller), alleged that Respondent, Tennessee Valley Authority (TVA), unlawfully terminated her employment because she refused “to accept and sign off on untried and untested [computer-generated] security systems at the Browns Ferry Nuclear Plant” ALJX^{1/} 1 at 1.

The Department of Labor’s Wage and Hour Division rejected Miller’s claim, and she requested a hearing before an Administrative Law Judge (ALJ) in accordance with implementing regulations at 29 C.F.R. Part 24.^{2/} ALJX 2. After an evidentiary hearing, the ALJ issued a Recommended Decision and Order (R. D. and O.), holding that Miller was not terminated because of her protected activities. Instead, Miller was terminated after her security clearance had been revoked and restrictions had been placed on the types of jobs she could perform as a result of TVA-ordered psychological examinations. R. D. and O. at 13.

^{1/} The following abbreviations are used in this decision: Administrative Law Judge Exhibit (ALJX); Complainant’s Exhibit (CX); Respondent’s Exhibit (RX); Hearing Transcript (T.).

^{2/} 29 C.F.R. Part 24 recently was revised at 63 Fed. Reg. 6,614, Feb. 9, 1998.

The record fully supports the ALJ's holding that Miller's termination was unrelated to her protected activity. Accordingly, we shall dismiss the complaint.

BACKGROUND

At the time of her termination in 1995, Miller was a Systems Analyst, SC-3, in TVA's Plant Operating Systems (POS) organization in Chattanooga, Tennessee. POS is a small organization of engineers and systems analysts providing computer systems support to TVA's nuclear plants and its nuclear corporate staffs. These computer systems are used to monitor plant parameters and to control, operate, or support plant functions, including plant security systems. T. 271-73. Miller provided technical support for computer systems associated with plant security, and her work required that she have access to the secured areas of the plants. ALJX 11 at 1-2; T. 98. She provided assistance to the security project managers at the various sites by evaluating and testing computer software, identifying problems, and ensuring that the systems performed properly. T. 276.

Miller was POS's most experienced employee in plant security matters, including the Integrated Security System.^{3/} T. 326-27. TVA management decided to install a new "Hand Geometry System" of handprint identification which was to operate in conjunction with the Integrated Security System at the Browns Ferry Nuclear plant. Miller was concerned about the compatibility of the two systems, and she shared her concerns with various TVA personnel, including POS Manager Nolan Henrich and Ronald Golub, Browns Ferry Security System Upgrade Project Manager. T. 42, 50-54.

Notwithstanding Miller's concerns about the Hand Geometry System, her involvement in its implementation was brief and minimal. Her dealings with Golub (which were the focus of her Wage and Hour Division complaint) consisted of a few phone calls through December 1994, in which he solicited her views on the incorporation of the Hand Geometry System into the Integrated Security System in his plant. Miller told Golub that "it would probably be February or March before I could have an opportunity to give it the kind of review I needed to give it . . ." because of her work demands. T. 58. In order to maintain momentum on the project despite Miller's unavailability, Golub contacted Henrich to solicit his views. T. 218. Henrich responded with essentially the same concerns as those previously expressed to Golub by Miller. With Miller's input and assistance, Henrich sent Golub a memorandum on December 8, 1994, about these design issues. RX 4; ALJX 11 at 2; T. 84-85, 213, 219-20, 286-87.^{4/} The Hand

^{3/} The Integrated Security System was a local area network of several computer systems linked together to work as a unit to secure the plant. T. 36.

^{4/} These matters were subsequently discussed at a January 4, 1995 design organization meeting and were eventually resolved. POS was represented at the meeting by Henrich and Barbara McKenna, Miller's new supervisor. Although Miller was expected to attend and was sent a meeting notice, she did not attend because she was on annual leave. T. 220-22, 288-90; RX 5.

Geometry System subsequently was implemented at Browns Ferry and TVA's other nuclear plants and approved by the Nuclear Regulatory Commission. T. 224-26, 290-91.

The events leading to Miller's termination began on February 3, 1995. Miller had been ill and at home for most of the week of January 30, 1995. ALJX 11 at 1; T. 67, 291-92, 361-63. On February 3, in a phone conversation with her supervisor, Barbara McKenna, Miller mentioned her displeasure with Henrich for not upgrading her position. Then Miller told McKenna about an incident she had with a gun in her home earlier in the week. T. 364-65; R. D. and O. at 4. "Ms. Miller recounted an experience where she heard a noise in her house, became frightened, grabbed a gun, and then had strange thoughts running through her head while holding the gun." R. D. and O. at 9. McKenna also testified that Miller, in an apparent reference to workplace violence, stated "that she could understand how things like [what] happened at the post office could occur . . .," i.e., employees shooting co-workers. T. 365.

Miller's comments disturbed McKenna, who did not think they were made lightly. T. 365. She reported Miller's remarks to Henrich in accordance with TVA procedures for reporting aberrant worker behavior. R. D. and O. at 4; RX 6 at 13, RX 7 at 8, ALJX 11 at 1; T. 187-89, 366-67, 370-71. Henrich discussed the matter with McKenna, phoned Miller at McKenna's request, and sought guidance from Security Manager Chris Kelley. Henrich then decided to assess the situation further upon Miller's return. T. 293-95.

Miller returned to work on February 6. That day, in a private conversation with Laura Snyder, a student working in Miller's group, Miller continued to express negative views of Henrich and again made a veiled reference to workplace violence. T. 262-63. Snyder reported these comments to her supervisor, who in turn informed Henrich.^{5/} Henrich then obtained further details from Snyder herself. T. 295-97.

Henrich consulted McKenna and Human Resources Manager James Boyles, who in turn sought advice from the Nuclear Security, Health Services, and Nuclear Relations branches. T. 231, 297-98, 368-70. Because he feared that Miller might cause a dangerous worksite situation, Henrich, with McKenna's concurrence and the advice of Human Resources and Health Services, decided to refer Miller to Health Services for a psychological fitness for duty evaluation. RX 6 at 13, RX 7 at 9, 14, ALJX 11 at 1; T. 231-35, 297-98, 337-38, 369-71. As Henrich explained,

^{5/} The parties stipulated that:

When Ms. Miller returned to work on Monday, February 6, 1995, she made a remark to Laura Snyder, a cooperative student, that she could understand why someone would go into an office and blow everybody away. Ms. Snyder reported the remark to her supervisor, who reported the remark to Mr. Henrich.

R. D. and O. at 4.

“[w]e were very concerned for the safety and well-being of everybody in the work place.” T. 298.

Based on Miller’s fitness for duty examination, psychologist Thomas Sajwaj, Ph.D., TVA’s Manager of Psychology and Fitness for Duty, recommended that Miller’s security clearance for unescorted nuclear plant access be revoked. ALJX 11 at 3; T. 411. Dr. Sajwaj also recommended job constraints for the indefinite future, precluding Miller from projects involving plant or personnel safety. RX 16, RX 17, RX 18; T. 425-26, 453-54. Although she was not viewed as posing an overt threat of violent behavior, Dr. Sajwaj established these restrictions because Miller’s “duties with computer systems affecting safety would be especially vulnerable to any actions she might take in response to her anger and her exaggerated sense of victimization.” RX 15 at 14; T. 411-18, 439-41; R. D. and O. at 6-7, 10-11.

Miller appealed the decision to revoke her security clearance. RX 16, RX 18, RX 19, RX 20; T. 78. Following an independent review of Miller’s case, Health Services Manager Gary DePew upheld the recommendation, and Miller’s security clearance was finally denied on July 21, 1995. RX 24, RX 25; T. 202-03, 240-41.

TVA attempted to locate a suitable position for Miller consistent with Health Services’ employment restrictions and Miller’s lack of a security clearance. RX 26; T. 241-42. When no such work was identified, Miller was terminated on September 11, 1995. ALJX 11 at 3, RX 28; R. D. and O. at 7.

DISCUSSION

To prevail under the employee protection provision of the ERA, Miller must prove by a preponderance of the evidence that TVA’s decision to terminate her was based, at least in part, on Miller’s engaging in activities that are protected under the ERA. *See Dysert v. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386 (8th Cir. 1995). In this circumstantial evidence case, Miller may establish a violation of the ERA by proving that she engaged in protected activity, that TVA was aware of the protected activity when it decided to terminate her, and that TVA was motivated at least in part by the protected activity. *See Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572-73 (11th Cir. 1997); *Dysert v. Secretary of Labor*, 105 F.3d at 608-10; *Simon v. Simmons Foods, Inc.*, 49 F.3d at 389. If Miller were to establish by a preponderance of the evidence that the termination decision was based in part on her protected activity, TVA might nonetheless escape liability under the dual, or mixed, motive doctrine by proving by clear and convincing evidence that it would have taken the adverse action in the absence of Miller’s protected activity. 42 U.S.C. §5851(b)(3)(D) (1994); 29 C.F.R. §24.7 (1998); *Stone & Webster Engineering Corp.*, 115 F.3d at 1574; *Yule v. Burns International Security Service*, Case No. 93-ERA-12, Sec. Fin. Dec. and Ord., May 24, 1995, slip op. at 7-8.

Application of these standards to the facts of this case leads us to reach the same conclusion as the ALJ: Miller failed to prove that she was retaliated against for engaging in activity protected by the ERA.

The ALJ correctly held that Miller engaged in protected activity. R. D. and O. at 8-9. The protection afforded whistleblowers by the ERA extends to employees who, in the course of their work, must make recommendations regarding how best to serve the interest of nuclear safety, even when they do not allege that the *status quo* is in violation of any specific statutory or regulatory standard. See *Jarvis v. Battelle Pacific Northwest Laboratory*, ARB Case No. 97-112, ALJ Case No. 97-ERA-15, ARB Fin. Dec. and Ord., Aug. 27, 1998, slip op. at 8; *Boytin v. Pennsylvania Power and Light Co.*, Case No. 94-ERA-32, Sec. Dec. and Ord. of Rem., Oct. 20, 1995, slip op. at 1, 7-12; *Yule v. Burns International Security Service*, slip op. at 1, 6-7; R. D. and O. at 8-9. Miller's expressed security concerns to Henrich, Golub, and others regarding the proposed implementation and installation of the Hand Geometry System were protected activities because they affected nuclear safety matters.

However, we agree with the ALJ that Miller had not been retaliated against because of her protected activities. First, Miller presented no evidence to support a conclusion that her views regarding the Hand Geometry System played any role in the decision that she undergo a fitness for duty examination. Henrich did not dismiss, reject, downplay, or conceal Miller's opinions about the Hand Geometry System. Instead, he solicited her views for incorporation into his memorandum to Golub on the subject and subsequently met with Golub and others to discuss these concerns (and those of others as well) prior to implementation of the project.^{6/} These actions belie a discriminatory motive. *Dobreuenaski v. Associated Universities, Inc.*, ARB Case No. 97-125, ALJ Case No. 96-ERA-44, ARB Fin. Dec. and Ord. of Dism., June 18, 1998, slip op. at 10-11; *Acord v. Alyeska Pipeline Service Co.*, ARB Case No. 97-011, ALJ Case No. 95-TSC-4, ARB Fin. Dec. and Ord., June 30, 1997, slip op. at 10-11; *Ashcraft v. University of Cincinnati*, Case No. 83-ERA-7, Sec. Dec. and Fin. Ord., Nov. 1, 1984, slip op. at 18-19.

Second, while there is no evidence that Miller's protected activity motivated Henrich to request the fitness for duty examination, there is ample evidence that Henrich was motivated by Miller's troubling statements about workplace violence to McKenna and Snyder. As the ALJ explained, McKenna, Snyder, and Henrich "were merely following the requirements of the Fitness for Duty Program and the Continual Behavioral Observation Program. . . . Mr. Henrich complied with company policy by referring Ms. Miller for a fitness for duty examination when he questioned her ability to continue to work safely." R. D. and O. at 11.

Third, Miller offered no evidence that Health Services' psychological evaluation and recommended job constraints were fabricated in order to remove her from employment because of her protected activities. Rather, the evidence indicates that Health Services' evaluation

^{6/} Miller presented no evidence indicating that TVA managers intended to exclude her from the meeting, held while she was on annual leave. See n.4.

process was entirely *bona fide*, independent, and predicated solely on professional psychological considerations. Indeed, a second psychologist whom Miller chose to examine her concurred with Health Services' findings. R. D. and O. at 7, 11. Henrich and McKenna had no role in or influence on Health Services' decision to revoke Miller's clearance and impose constraints on her assigned duties. T. 115, 303, 376, 426-27. See *Timmons v. Mattingly Testing Services*, Case No. 95-ERA-40, ARB Dec. and Ord. of Rem., June 21, 1996, slip op. at 10-13 (determination of unlawful retaliatory intent requires careful evaluation of all evidence pertaining to the mind set of the employer and its agents).

We find that Henrich's subsequent decision to terminate Miller was based on lawful business considerations unrelated to her protected activity. TVA simply did not have work for her in view of the indefinite duration of her security clearance revocation and job constraints precluding her working with plant computer systems in secured areas. T. 244, 307, 309, 312, 322-23, 372-73; R. D. and O. at 11.^{7/}

Miller contends that TVA violated 10 C.F.R. §73.56(b)(3) by not considering all information about her in revoking her security clearance. Brief of Complainant, Glenda K. Miller, at 4. TVA's compliance with these Nuclear Regulatory Commission regulations for denial of her security clearance is beyond the scope of our subject matter jurisdiction and will not be considered. Our jurisdiction is limited to determining whether Miller's discharge was based on her protected activities, not whether her discharge was unreasonable or erroneous for other reasons. *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 280-81 (7th Cir. 1995); *Abraham v. Lawnwood Regional Medical Center*, ARB Case No. 97-031, ALJ Case No. 96-ERA-13, ARB Fin. Dec. and Ord., Nov. 25, 1997, slip op. at 5-6. See *Billings v. TVA*, Case No. 91-ERA-12, ARB Fin. Dec. and Ord. of Dism., June 26, 1996, slip op. at 13-14.^{8/}

^{7/} The ALJ also concluded that, even if Miller had established that retaliatory motives played a part in TVA's decision to terminate her, TVA proved by clear and convincing evidence that it would have terminated Miller because of her fitness for duty and security problems alone. R. D. and O. at 12-13. We agree with this alternative holding as well.

^{8/} TVA contends that the merits of its decision to revoke Miller's security clearance are not subject to review by the Board under *Department of Navy v. Egan*, 484 U.S. 518 (1988) (Merit Systems Protection Board does not have statutory authority under Civil Service Reform Act to examine merits of a security clearance denial). Respondent's Brief at 3 n.3, 11 n.7, and 16 n.9. TVA notes that *Egan* has been applied under the Rehabilitation Act to TVA decisions to revoke the security clearance necessary for unescorted nuclear plant access. *Mitchell v. Crowell*, 966 F. Supp. 1071 (N.D. Ala. 1996), *recons. denied*, 975 F. Supp. 1440 (1997); *Humm v. Crowell*, No. 1:96-CV-436 (E.D. Tenn. June 25, 1997). It is unnecessary to consider the applicability of *Egan* to this proceeding, and we decline to do so.

ORDER

For the foregoing reasons, the complaint is **DISMISSED**.

SO ORDERED.

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member