



In the Matter of:

RAMACHANDRAN SEETHARAMAN,

ARB CASE NO. 06-024

COMPLAINANT,

ALJ CASE NO. 2003-CAA-4

v.

DATE: August 31, 2007

STONE & WEBSTER, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Ramachandran Seetharaman, *pro se*, Ashland, Massachusetts

For the Respondent:

Paul J. Murphy, Esq.; Kevin P. Sweeney, Esq., *Menard, Murphy & Walsh LLP*, Boston, Massachusetts

FINAL DECISION AND ORDER

The Complainant, Ramachandran Seetharaman, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration alleging that his employer, the Respondent, Stone & Webster, Inc., retaliated against him in violation of the employee protection provisions of the Clean Air Act,¹ the Comprehensive Environmental Response, Compensation and Liability Act,² the Federal Water Pollution

¹ 42 U.S.C.A. § 7622 (West 2003).

² 42 U.S.C.A. § 9610 (West 2005).

Control Act,³ the Solid Waste Disposal Act,⁴ the Toxic Substances Control Act,⁵ (known collectively as the environmental acts), the Energy Reorganization Act (ERA)⁶ and their implementing regulations.⁷ In particular Seetharaman, who was employed by Stone & Webster as a principal engineer from March 2001 until May 2002, charged that Stone & Webster violated the whistleblower provisions of the environmental acts and the ERA when it: 1) refused to allow him to attend a seminar, 2) refused to pursue business opportunities that he brought to the company's attention, thereby denying him the opportunity for advancement, 3) transferred him from the Mechanical Engineering Group to the Heat Balance Group, and 4) terminated his employment during the course of a reduction in force (RIF).⁸

OSHA investigated Seetharaman's complaint and determined that it could not substantiate his allegations of unlawful reprisal. In particular, OSHA concluded that the allegations concerning the seminar and transfer were untimely and that Stone & Webster had articulated legitimate business reasons for all of its challenged actions.⁹

Seetharaman timely requested a hearing before a Department of Labor Administrative Law Judge.¹⁰ The ALJ presided over thirteen days of hearings, at which the parties were permitted to present evidence and legal argument. Both Seetharaman and Stone & Webster were represented by counsel. Seetharaman testified in support of his complaint; Stone & Webster called six witnesses in support of its defense.¹¹

³ 33 U.S.C.A. § 1367 (West 2001).

⁴ 42 U.S.C.A. § 6971 (West 2003).

⁵ 15 U.S.C.A. § 2622 (West 1998).

⁶ 42 U.S.C.A. § 5851 (West 2003). This statute has been amended since Seetharaman filed his complaint, but the amendments are not applicable to this case because Seetharaman's complaint was filed before the amendments' effective date, August 8, 2005. Energy Policy Act of 2005, Pub. L. 109-58, Title VI, § 629, 119 Stat. 785 (Aug. 8, 2005).

⁷ 29 C.F.R. Part 24 (2006). These regulations have been amended since Seetharaman filed his complaint, but the amended regulations are not implicated in this case. 72 Fed. Reg. 44,956 (Aug. 10, 2007).

⁸ *Seetharaman v. Stone & Webster, Inc.*, 2003-CAA-004, slip op. at 2 (ALJ Nov. 30, 2005)(R. D. & O.).

⁹ *Id.*

¹⁰ *See* 29 C.F.R. § 24.4(d)(3).

¹¹ R. D. & O. at 3.

After careful consideration of the entire record and the arguments advanced by the parties, the ALJ issued a Recommended Decision and Order in which he concluded:

Seetharaman's complaint is untimely with the exception of two allegations – namely, that S&W (1) refused to pursue business opportunities that he suggested and (2) terminated his employment, both allegedly in violation for his protected whistleblowing activities. The remaining allegations in the complaint are untimely and, therefore, cannot form the basis of a finding of unlawful discrimination, though they may be considered as relevant background evidence in support of the timely claims. Regarding the timely allegations, I concluded that S&W's failure to pursue business opportunities, even if true, did not constitute a prohibited adverse employment action. I further conclude that Seetharaman has not proved by a preponderance of the evidence that his protected activity contributed to his termination.^[12]

The environmental laws and the ERA authorize the Secretary of Labor to receive complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies.¹³ The Secretary has delegated the authority to the Administrative Review Board (ARB) to review Department of Labor Administrative Law Judges' initial decisions under the environmental acts and the ERA.¹⁴

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower provisions. The Board engages in de novo review of the ALJ's recommended decision.¹⁵ Accordingly, the Board is not bound by an ALJ's findings of

¹² *Id.* at 2.

¹³ 29 C.F.R. § 24.1(a).

¹⁴ *See* 29 C.F.R. § 24.8. *See also* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

¹⁵ *See* 5 U.S.C.A. § 557(b)(West 2000); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997).

fact and conclusions of law because the recommended decision is advisory in nature.¹⁶ Nevertheless, an ALJ's findings constitute a part of the record, and as such are subject to review and receipt of appropriate weight.¹⁷

In weighing a witness's testimony, the fact-finder considers the relationship of the witness to the parties, the witness's interest in the outcome of the proceedings, the witness's demeanor while testifying, the witness's opportunity to observe or acquire knowledge about the subject matter of the witness's testimony, and the extent to which other credible evidence supported or contradicted the testimony.¹⁸ We accord special weight to an ALJ's credibility findings that "rest explicitly on the evaluation of the demeanor of witnesses."¹⁹ This is so because the ALJ "sees the witnesses and hears them testify while . . . the reviewing court look[s] only at cold records."²⁰

We have carefully reviewed the record, the ALJ's R. D. & O., and the parties' briefs. The R. D. & O. is comprehensive and cogently reasoned and it is in accordance with the law and the facts of this case. Accordingly, we accept the ALJ's recommendation that we deny Seetharaman's complaint and we adopt his decision. Nevertheless we briefly discuss two arguments that Seetharaman has raised in his brief that were not directly addressed by the ALJ in his R. D. & O.

1. Whether the ALJ erred when he did not apply a dual motive analysis to Seetharaman's claims of retaliation.

Seetharaman contends, "[The] ALJ committed 'serious legal error' when he did

¹⁶ See Attorney Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). See generally *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), in rejecting argument that higher level administrative official was bound by ALJ's decision).

¹⁷ *Universal Camera*, 340 U.S. at 492-497; *Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991).

¹⁸ *Jenkins v. United States Env'tl. Pro. Agency*, ARB No. 98-146, ALJ No. 88-SWD-002, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted).

¹⁹ *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983); *Poll v. R.J. Vyhnalek*, ARB No. 98-020, ALJ No. 96-ERA-030, slip op. at 8 (ARB June 28, 2002).

²⁰ *Pogue*, 940 F.2d at 1289.

not use Mixed motive analysis in the ALJRDO and further used same legal standards under ERA and Environmental laws[.]²¹ Once a case has been tried on its merits, as here, the relevant question is whether the complainant has successfully met his or her burden of proof that the respondent discriminated.²² Therefore to prevail on his environmental and ERA whistleblower complaints, Seetharaman was required to establish by a preponderance of the evidence that he engaged in protected activity, that Stone & Webster was aware of the protected activity, that he suffered adverse employment action, and that Stone & Webster took the adverse action because of his protected activity.²³ If Seetharaman had met this burden, then we would have proceeded to determine whether Stone & Webster had demonstrated by a preponderance of the evidence (whistleblower acts)²⁴ or clear and convincing evidence (ERA)²⁵ that it would have taken the same unfavorable personnel action in the absence of the protected activity.²⁶ Examining whether a respondent has met this burden of proof is commonly referred to as the mixed or dual motive analysis. The respondent's burden under the dual motive analysis is in the nature of an affirmative defense and arises only if the complainant has proven that the respondent took adverse action in part because of the complainant's protected activity.²⁷ The ALJ found, and we agree, that Seetharaman "failed to introduce any credible evidence to rebut S&W's evidence that he was included in the RIF because he was the least productive member of the HB Group."²⁸ Because Seetharaman failed to establish by a preponderance of the evidence that his protected activity either motivated or contributed to the adverse action, neither the ALJ, nor we have reason to engage in dual

²¹ Appellant/Complainant's Initial Brief (I.B.) at 17 (footnote omitted).

²² *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op at 6-7 (ARB Sept. 30, 2003)(ERA); *Dierkes v. West Linn-Wilsonville School Dist.*, ARB No. 02-001, ALJ No. 2000-TSC-002, slip op. at 6 (ARB June 30, 2003)(environmental acts).

²³ In environmental act cases, the complainant must establish by a preponderance of the evidence that his or her protected activity was a motivating factor in the adverse action; in ERA cases the complainant must prove by a preponderance of the evidence that the protected activity was a contributing factor. See *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 04-CAA-005, slip op. at 4 n.6 (ARB Nov. 29, 2006).

²⁴ *Evans v. Baby-Tenda*, ARB No. 03-001, ALJ No. 2001-CAA-004, slip op. at 4 n.1 (ARB July 30, 2004).

²⁵ *Kester*, slip op. at 5-6.

²⁶ *Id.* at 7-8.

²⁷ *Id.* at 8.

²⁸ R. D. & O. at 24.

motive analysis.²⁹

2. Whether the Board should reconsider its Final Decision and Order in *Seetharaman v. Gen. Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021 (May 28, 2004).

In *Seetharaman v. Gen. Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021 (May 28, 2004)(*Seetharaman I*), the Board agreed with the ALJ that the Respondents, General Electric Company, Pacific Gas & Electric Company, Exelon Corporation, Mitsubishi Power Systems, Massachusetts Water Resources Authority, Nebraska Boiler Company, and English Boiler and Tube, Incorporated (the 03-029 Respondents) were entitled to summary dismissal of the complaints against them because Seetharaman “raised no genuine issue of material fact regarding an essential element of his claim: an employer-employee relationship with Respondents.”³⁰ Seetharaman, to date, has filed no motion requesting the Board to reconsider its decision. Instead, Seetharaman has urged the Board to reconsider its decision in his initial and rebuttal briefs in this case.³¹ Most significantly, Seetharaman has failed to serve the 03-029 Respondents with his request that we reconsider our decision in that case.

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued.³² In considering a motion for reconsideration, the Board has applied a four-part test to determine whether the movant has demonstrated:

- (i) material differences in fact or law from the presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court’s decision, (iii) a change in the law after the court’s decision, and (iv) failure to consider material facts presented to the court before its decision.[³³]

²⁹ *Kester*, slip op. at 8.

³⁰ Slip op. at 7.

³¹ I.B. at 4, 34; Rebuttal Brief at 2-3.

³² *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff’g Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 86-ERA-023, slip op. at 2-6 (ARB Nov. 20, 1998); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-006, slip op. at 1 (ARB Feb. 17, 2005). *See also Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

³³ *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 03-LCA-004, slip op. at 2 (ARB July 24, 2006); *Rockefeller v. U.S. Dep’t of Energy*, ARB Nos. 03-048, 03-184;

As an initial matter we note that Seetharaman has requested reconsideration more than two years after the Board issued its Final Decision and Order in *Seetharaman I*. Given the Board's recent decision in *Henrich v. Ecolab, Inc.*,³⁴ there is a substantial question whether the request for reconsideration, even if it had been properly filed would be timely. But even if it had been properly filed and was timely, upon consideration of the request's merits, we would nevertheless deny reconsideration.

Upon review of Seetharaman's reconsideration request, we conclude that he has failed to meet any of the provisions of the Board's four-part test for reconsideration. As was true when Seetharaman presented his original case in *Seetharaman I*, he has presented no facts, evidence or law that addresses the relevant issue: whether he had an employee-employer relationship with the 03-029 Respondents. Accordingly, even if Seetharaman had filed a proper and timely request for reconsideration, he would not be entitled to such relief.

Finally, we note that Seetharaman states in his I.B., "ALJRDO, page 7 FN 9 – incorrectly lists 6-3-2002 as date of the complaint. This is plain [sic] wrong. On 5-24-2002, complainant met John Sechovicz of USDOL, OSHA & personally filed charge orally/via letter dated the same day. Complainant cannot understand where ALJ got the 6-3-2002 date!" The Secretary of Labor's initial findings issued by the Occupational Safety and Health Administration investigator state, in reference to both the alleged denial of training and transfer from the Mechanical Engineering Department to the Heat Balance Group, that the complaint was filed on "June 3, 2002, more than 180 days after the occurrence of alleged violation."³⁵ Therefore, the basis for the ALJ's finding is clear. But there does seem to be some confusion over the filing date of the complaint, given that Stone & Webster stated in its Motion to Dismiss, filed with the ALJ, that Seetharaman filed a complaint on or about May 30, 2002.³⁶

In any event, Seetharaman has failed to argue the legal significance of this alleged error in his briefs to the Board and generally, the Board will not consider an issue that a

ALJ Nos. 2002-CAA-005, 2003-ERA-010, slip op. at 2 (ARB May 17, 2006); *Saban v. Morrison-Knudsen*, ARB No. 03-143, ALJ No. 03-PSI-001, slip op. at 2 (ARB May 17, 2006); *Halpern v. XL Capital, Ltd.*, ARB No 04-120, ALJ No. 2004 SOX-054, slip op. at 2 (ARB Apr. 4, 2006); *Getman v. Southwest Secs.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at (ARB Mar. 7, 2006); *Knox v. Dep't of the Interior*, ARB No. 03-040, ALJ No. 2001-LCA-003, slip op. at 3 (ARB Oct. 24, 2005).

³⁴ ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

³⁵ Administrative Law Judge Exhibit 1, at 1, 2.

³⁶ Respondent's Motion to Dismiss, or, in the Alternative, for Summary Decision at 1.

party has not raised and briefed and will consider any argument thereon waived.³⁷ Nevertheless, even if Seetharaman had properly preserved this objection to the ALJ's finding, the only issue to which it could potentially be relevant is the timeliness of Seetharaman's complaint regarding the transfer from the Mechanical Engineering Department to the Heat Balance Group. However, although Seetharaman did not comply with the order to transfer to Heat Balance until on or about February 6, 2002, there is evidence in the record establishing that he had unequivocal knowledge of the transfer no later than the second week in November 2001.³⁸ Thus because Seetharaman failed to file his complaint within 180 days of the alleged adverse action both his environmental act³⁹ and ERA complaints⁴⁰ based on the transfer were untimely. Therefore any error in the ALJ's finding that the complaint was file on June 3, 2002, was harmless.

CONCLUSION

The ALJ's Decision and Order is **AFFIRMED**. Finding no reason to depart from the ALJ's cogent opinion, we adopt and attach it.⁴¹

DAVID G. DYE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

³⁷ *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 2005-SDW-007, slip op. at 8 (ARB Sept. 29, 2006).

³⁸ Hearing transcript at 305-307 (Seetharaman). *See Lewis v. U.S. EPA*, ARB No. 04-117, ALJ Nos., 2003-CAA-005, 006, slip op. at 8 (ARB Mar. 30, 2007); *Swenk v. Exelon Generating Co.*, ARB No. 04-028, ALJ No. 2003-ERA-030, slip op. at 4 (ARB Apr. 28, 2005).

³⁹ 29 C.F.R. § 24.3(b).

⁴⁰ 29 C.F.R. § 24.3(b)(2).

⁴¹ *See, e.g., Kelley v. Heartland Express, Inc.*, ARB No. 00-049, ALJ No. 99-STA-29, slip op. at 3 (ARB Oct. 28, 2002). *See also Ondine Shipping Corp. v. Cataldo*, 24 F.3d 353, 355 (1st Cir. 1994) (“When a trial court produces a lucid, well-reasoned opinion that reaches an appropriate result, we do not believe that a reviewing court should write at length merely to put matters in its own words.”).