U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 April 2006

Case No.: 2006-ERA-00002

In the Matter of

CARLOS M. MUINO
Complainant

v.

FLORIDA POWER & LIGHT COMPANY
Respondent

RECOMMENDED ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION & DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Energy Reorganization Act, 42 U.S.C. § 5851 (hereinafter "the Act"). Complainant filed his claim on August 4, 2005, alleging Respondent retaliated against him for nuclear safety complaints he filed in November of 1994. The Occupational Safety and Health Administration ("OSHA") dismissed the claim on December 1, 2005, finding "Respondent's decision to prohibit Complainant from working on any of their sites was not in retaliation from his previous engagement in protected activity." (OSHA's 12/01/05 Letter to Respondent at 2). On December 7, 2005, Complainant requested a formal hearing. This matter was thereafter transferred to the Office of Administrative Law Judges and was assigned to me on December 12, 2005. The matter was set for March 6, 2006 trial by notice dated December 29, 2005, but continued without a new trial date.

On February 6, 2006, Respondent filed a motion for summary decision (hereinafter "Motion"). "When a motion for summary judgment is made and supported…a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). An administrative law judge may enter summary judgment "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d).

Respondent moves for summary decision on the following grounds:

(1) The complaint was not timely filed;

(2) Complainant is unable to establish a *prima facie* case of retaliation;

(3) Respondent had a legitimate, good faith reason for the adverse employment action taken against Complainant.

Respondent submitted Affidavits of the following individuals in support of its Motion: Tony Marco, Jim Gallagher, Robert Burgess, Diane Bryant, Dan Tomaszewski, John Zudans, Salvatore Campos and Terry Sopkin.[1] Respondent also relies on Complainant's deposition testimony in support of its Motion.[2]

Complainant filed his response ("Response") to Respondent's motion late, on March 23, 2006, and submitted eighteen documents in support of its Response, including an original report of discipline, his resignation letter and his performance appraisals.[3] Complainant's Response raises the following arguments:

(1) Complainant was not aware of the adverse action taken against him with respect to the Sargent & Lundy contract until June 6, 2005, and this portion of his claim was therefore timely filed;

(2) Complainant has established a *prima facie* case of discrimination;

(3) Respondent had no legitimate, good faith reason to take adverse employment action against Complainant.

On April 10, 2006, Respondent moved for the entry of an order striking Complainant's Response as untimely and improperly filed, moved to strike "certain previously undisclosed documents from the record," and filed a Reply Memorandum in support of its Motion. Complainant's Response to Respondent's Motion and the documents submitted by Complainant in support thereof are received over Respondent's objection. However, after considering the arguments of the parties, the evidence offered in support thereof and the applicable law, I find that there is no genuine issue of material fact remaining, and I therefore recommend summary decision be entered in favor of Respondent.

Findings of Fact

Complainant worked for Respondent from 1980 until 1993, initially as a clerk, then as an engineering technician in the Nuclear Energy Department. (Marco Aff. ¶ 2). In 1988, Complainant received a Report of Discipline ("ROD") for sexual harassment. (Marco Aff. ¶ 3). Complainant alleges he has the original copy of the ROD in his possession, and that Respondent agreed to purge all copies from his file, as the accusations contained within the ROD were found

[1] These Affidavits will be cited as "Author's last name Aff. ¶ --." The exhibits attached thereto will be cited as "Author's last name Aff. Ex. --."

[2] The transcript of Complainant's deposition will be cited as "Depo. at --."

[3] Complainant has marked these documents as Attachments 1 through 18. They will be cited herein as "CA-1" through "CA-18."

to be retaliatory.[4] (Depo. at 32-36; Response at 1; CA-1). However, the ROD clearly was not purged from Complainant's personnel file, and nothing in the file indicates the allegations of sexual harassment were unfounded. (Bryant Aff. ¶¶ 5-6; Marco Aff. ¶¶ 4-6).

On January 4, 1993, Complainant submitted a letter of resignation to Respondent, alleging demeaning work conditions, which were, in Complainant's opinion, motivated by racial discrimination.[5] (Marco Aff. Ex. 2; CA-2). On January 7, 1993, Complainant's supervisor completed a Release Questionnaire, which indicates Complainant voluntarily left Respondent's employ due to what Complainant viewed as unsatisfactory working conditions. This form also indicates Complainant was not recommended for rehire. (Marco Aff. Ex. 3).

Upon terminating his employment with Respondent, Complainant attended an exit interview with a division of Respondent referred to as Speakout[6] and allegedly voiced concerns regarding drawings and manuals that were not being properly updated. (Depo. at 62-63; Gallagher Aff. Ex. 4; CA-8; CA-15; CA-16). Complainant also allegedly voiced these concerns to a Mr. Hosmer, the Director of Nuclear Energy, while still working for Respondent. (Depo. at 59, 63). At that time, Mr. Hosmer allegedly asked Complainant if he was going to bring an attorney to his next evaluation. (Depo. at 59-60). Mr. Hosmer also said to Complainant, "Do your job and forget it." (Depo. at 69).

In May of 2003, Complainant was hired by Sun Technical to work as a contractor at Respondent's place of business, in support of the Life Cycle Management Group ("LCM Group"). (Tomaszewski ¶ 2). In March of 2004, Daniel Tomaszewski, a project manager for the LCM Group, selected Complainant for a position in which he would be working directly for Respondent, rather than through Sun Technical. (Tomaszewski Aff. ¶ 3). Respondent has a specific rehiring procedure, which provides the hiring manager must submit the name of a former employee to Human Resources, where the individual's performance appraisals, reports of discipline, notice of separation and any severance package is reviewed. The policy specifically indicates if adverse conditions are present, Human Resources must notify the Recruiter/HR Consultant of such findings and the Consultant and Hiring Manager must decide whether to proceed with the rehire. (Burgess Aff. Ex-1).

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[4] Complainant contends that he reported two individuals for carrying on a sexual relationship at work, and false accusations of sexual harassment were brought against him in retaliation for filing such a report. (Depo. at 35-36).

[5] According to Complainant's deposition testimony, one supervisor, Mr. Vogan, changed Complainant's name plate to read Carl Miller, and told Complainant it was because he did not like his Spanish name. (Depo. at 25-28; 56) Another supervisor, Mr. Custis, allegedly referred to Complainant as a "wetback," which Complainant's colleague explained was a term which referred to an illegal immigrant. (Depo. at 52-53).

[6] Nuclear Safety Speakout ("Speakout") was designed to allow Respondent's employees and contractors a venue for voicing nuclear safety concerns without having to fear retaliation, since the information provided to Speakout is confidential. (Gallagher Aff. ¶¶ 1-3).

Upon Mr. Tomaszewski's request for permission to rehire Complainant, Robert Burgess, a Recruiting Consultant in Respondent's Human Resources Department, asked Human Resources Consultant Diane Bryant to conduct a review of Complainant's file. (Burgess Aff. ¶¶ 1-4). On March 31, 2004, Ms. Bryant sent an e-mail to Mr. Burgess indicating Complainant was not eligible for rehire due to a disciplinary record for sexual harassment and a poor performance appraisal received when Complainant was initially employed by Respondent. (Bryant Aff. ¶¶ 4-5; Burgess Aff. Ex-2). Mr. Burgess then notified Mr. Tomaszewski of the outcome of Ms. Bryant's investigation (Burgess Aff. ¶¶ 6-7), and Mr. Tomaszewski thereafter informed Sun Technical that Complainant's services were no longer required and he was no longer permitted access to Respondent's property. (Tomaszewski Aff. ¶ 4). Mr. Tomaszewski also met with Complainant on April 11, 2004, to advise him that his contract with Sun Technical was being terminated. (Tomaszewski Aff. ¶ 5).

In early 2005, Complainant applied for a job with Sargent & Lundy. In this position, Complainant would again perform work for Respondent pursuant to a contract between Respondent and Sargent & Lundy. Complainant was interviewed by telephone for the position and was selected for an in-person interview. However, prior to the interview, Sargent & Lundy learned from Respondent's employee, Mr. Zudans, that Complainant was not permitted to work on Respondent's property, and so the interview was cancelled. [7] (Campos Aff. ¶¶ 1-4; Sopkin Aff. ¶¶ 1-4; Tomaszewski Aff. ¶ 7).

Analysis

I. Timeliness of the Claim

Complainant has filed this claim in response to two separate sets of circumstances: (1) events which occurred in April of 2004, including Respondent's refusal to rehire him and the subsequent termination of his employment with Sun Technical; and (2) the cancellation of the interview scheduled between Complainant and Sargent & Lundy in early 2005.[8]

In order to be considered timely, Complainant must have filed his claim within 180 days after the occurrence of the alleged violation. 29 C.F.R. § 24.3(b)(2). Respondent contends Complainant has admitted that his claim was filed on August 11, 2005. However, the record reveals Complainant originally filed his claim on August 4, 2005, and submitted additional information requested by OSHA on August 11, 2005. (Depo. Ex. 6; OSHA's 12/01/05

[7] It is clear that Complainant's interview with Sargent & Lundy was cancelled due to Mr. Zudans' learning from Mr. Tomaszewski that Complainant was no longer permitted to work on Respondent's property. Ms. Bryant, who made this decision, as well as Mr. Zudans and Mr. Tomaszewski had no knowledge of any nuclear safety concerns allegedly voiced to Speakout or otherwise made by Complainant. (Bryant Aff. ¶ 8; Tomaszewski Aff. ¶ 7; Zudans Aff. ¶¶ 2-4).

[8] Respondent's Motion addresses Complainant's contention that he was forced to resign from Respondent's employ in 1993. However, Complainant has not made a claim relating to this event. Instead, he uses the facts surrounding his resignation in support of the claims arising in 2004 and 2005.

Findings). Thus, any claim for discriminatory action which occurred within 180 days of August 4, 2005, is timely.

Because Respondent refused to rehire Complainant and Complainant was subsequently discharged from his employment with Sun Technical in April of 2004, this portion of his claim is time barred. However, it is clear that Complainant's interview with Sargent & Lundy was cancelled on February 11, 2005. (Response at 7; CA-9; Motion at 12). In addition, Complainant has alleged he was told Sargent & Lundy was "reassessing their manpower requirements," on February 11, 2005, and did not actually know adverse action had been taken against him until June 6, 2005, when he saw that Sargent & Lundy had again advertised the position he was supposed to interview for in February. Regardless, this portion of the claim was timely filed since both February 11 and June 6 fall within 180 days of August 4.

II. The Merits of the Claim

In order to establish a *prima facie* case of discrimination under the Act, Complainant must establish (1) he engaged in protected activity; (2) Respondent had knowledge of this activity; (3) Respondent took adverse employment action against him; and (4) sufficient evidence exists that at least raises an inference that the protected activity was the likely reason for such adverse action. *Harrison v. Stone & Webster Engineering Group*, 93 ERA 44 (11/8/94), and citations therein. However, the Administrative Review Board (ARB) has held that if the respondent produces evidence which shows the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it becomes unnecessary to determine whether the complainant presented a *prima facie* case.[9] *Eltzroth v. Amersham Medi-Physics, Inc.*, ARB No. 98-002, ALJ No. 1997-ERA-31 (ARB Apr. 15, 1999). Instead, the relevant inquiry becomes whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability, which is whether the complainant's protected activity was a contributing factor in the adverse action that was taken. *Paynes v. Gulf States Utilities Co.*, ARB No. 98-045, ALJ No. 1993-ERA-47 (ARB Aug. 31, 1999); *Eltzroth*, *supra.*

[9] Although the BRB has deemed it unnecessary to make such a finding, I note the *pro se* Complainant has failed to make out a *prima facie* case of discrimination. Complainant has failed to produce evidence which tends to establish that those who made the decision leading to the cancellation of Complainant's interview with Sargent & Lundy had any knowledge that Complainant had engaged in protected activity. In fact, none of Respondent's employees, including those who work in the Human Resources Department, has access to the Speakout files, except authorized members of Speakout. (Gallagher Aff. ¶ 3). In addition, Mr. Hosmer no longer worked for Respondent in 2005, when this claim arose, and in fact, he has not worked for Respondent since 1994. (Gallagher Aff. ¶ 9). Therefore, Complainant has failed to produce evidence which tends to establish that the employees who were involved in the decision making process had any knowledge that he had engaged in protected activity. In addition, Complainant has failed to offer any other evidence from which it can be inferred that the adverse employment action taken against Complainant was in any way motivated by Complainant's engagement in protected activity. Therefore, he has failed to establish a *prima facie* case. *See Shirani v. ComEd/Exelon Corp.*, 2000-ERA-28 (ARB Sept. 30, 2005).

Respondent has produced evidence sufficient to prove that Complainant was prevented from working on Respondent's property and therefore unable to secure employment with Sargent & Lundy due to prior allegations of sexual harassment filed against Complainant while he was previously employed by Respondent.[10] Furthermore, it is clear that Ms. Bryant adhered to Respondent's specific policy for determining whether a former employee can be rehired, and based on that policy, concluded that Complainant was not eligible for rehire due to adverse information contained in his personnel file.

It is clear from Complainant's deposition testimony that he too believed it was these sexual harassment charges which were preventing him from working in the engineering field. When asked if he was aware why he was not offered a professor position, Complainant answered:

> My assumption is simple, that they contacted Human Resources at FPL and look what they have in there, what they have built in, without knowledge at all. And they just start from a document that had been purged from my file.

(Depo. at 107). By a document that had been purged from his file, Complainant was clearly referring to the ROD for sexual harassment. I find that the adverse information contained in Complainant's personnel file amounts to a legitimate, nondiscriminatory reason for refusing to allow Complainant to work on Respondent's property.[11] Complainant has offered no evidence which tends to prove that Respondent's reason for the adverse employment action is pretextual.

Furthermore, Complainant has failed to introduce any facts which tend to establish a relationship between his alleged engagement in protected activity and the adverse employment action taken against him. Instead, Complainant has relied on naked allegations and unsupported theories as to why Respondent took adverse action against him.[12] Thus, I find no issue of material fact exists and Respondent is entitled to a judgment as a matter of law.

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[10] Other adverse employment actions allegedly taken against Complainant included Respondent's refusal to rehire Complainant and Complainant's employment with Sun Technical being terminated as a result of Respondent prohibiting Complainant from working at its place of business. However, I have hereinbefore found these claims to be time barred.

[11] This is not to suggest that I find the allegations of sexual harassment to be true. However, the fact remains that the ROD is still in Complainant's personnel file and those relying on this document to determine Complainant should no longer be permitted to work on Complainant's property had no reason not to accept the contents of Complainant's file as true.

[12] For example, Complainant has alleged the ROD was planted in his personnel file along with a negative performance evaluation and the Release Questionnaire indicating Complainant was not recommended for rehire, in retaliation for Complainant raising safety concerns to his superiors and to Speakout. (Response at 11-12, 14). However, Complainant submitted no Affidavits or other support for these allegations.

RECOMMENDED ORDER

Based on the foregoing, it is recommended that summary judgment be GRANTED in favor of Respondent and the complaint be DISMISSED.

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RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).