U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 April 2006

CASE NO.: 2006-ERA-00003

In the Matter of

JOHNNY F. NEAL
Complainant

v.

ENTERGY NUCLEAR OPERATIONS, INC.
Respondent

APPEARANCES:

Johnny Neal, pro se
Douglas E. Levanway, Esq., Wise Carter Child & Caraway, for Respondent

BEFORE: Colleen A. Geraghty
Administrative Law Judge

RECOMMENDED ORDER DENYING COMPLAINANT'S MOTION FOR SUMMARY DECISION AND GRANTING IN PART RESPONDENT'S MOTION FOR SUMMARY DECISION

I. Statement of the Case

This matter arises under the whistleblower protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 *et seq.* and the regulations promulgated at 29 C.F.R. Part 24. The ERA and implementing regulations protect employees from discrimination in retaliation for activities protected under the ERA. In his *pro se* claim, Johnny Neal alleges that his managerial level and compensation package were reduced after he signed a Settlement Agreement resolving a prior complaint filed in May 2002 alleging violations of the ERA.[1] The Complainant alleges these adverse actions were in retaliation for the initial complaint and

[1] On May 8, 2002 the Complainant filed a complaint alleging violations of the employee protection provisions of the ERA. The Respondent denied the allegations and the matter was set for hearing before Administrative Law Judge Daniel Sutton. On November 12, 2002 a Settlement Agreement, Release and Covenant Not to Sue was entered into by the parties and submitted for approval. Judge Sutton issued a Recommended Decision and Order Approving Settlement and Dismissing Complaint with Prejudice. OALJ No. 2002-ERA-00034 (November 29, 2002).

subsequent settlement. The Respondent denies retaliating against the Complainant and contends that the change in the Complainant's management level predated the settlement agreement involving the May 2002 complaint and that the Complainant accepted the change in his managerial level in the settlement agreement. The Respondent denies reducing the Complainant's compensation package and argues that the Complainant's merit raises prior to and after his 2002 complainant are comparable and that the Complainant is not entitled to stock options or an outage bonus in his position. The parties have each filed Motions for Summary Decision and responses to the opposing parties' requests for summary decision.[2]

II. Standard of Review

These proceedings are governed by the regulations the Secretary of Labor published at 29 CFR Parts 18 and 24. An Administrative Law Judge "may enter summary judgment for either party 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 CFR § 18.40(d). The party opposing the motion "may not rest upon the mere allegations or denials of such pleading….[but] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). This rule is modeled on Rule 56 of the Federal Rules of Civil Procedure. Under it a judge "does not weigh the evidence or determine the truth of the matters asserted, but only determines whether there is a genuine issue for trial" by viewing "all the evidence and factual inferences in the light most favorable to the non-moving party." *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21 at 6 (ARB Nov. 30, 1999), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985).

The party moving for a summary decision has the initial burden of showing that there is no genuine issue of material fact. This burden may be discharged by simply stating that there is an absence of evidence to support the nonmoving party's case. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). There is no requirement that the moving party support its motion with declarations, affidavits or similar material negating the opponent's claim. *Celotex*, 477 U.S. at 324; Fed. R. Civ. P. 56(b). When a motion is properly supported, the nonmoving party must go beyond the pleadings to overcome the motion. He may not merely rest upon allegations, but must set out specific facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 248.

In his motion for summary judgment and amended motion for summary judgment, the Complainant contends that he is entitled to summary judgment because he has shown that the Respondent violated the Act by covertly reducing his management level and his compensation, in the form of merit increases, stock options and an outage bonus, following a settlement

[2] On February 1, 2006, the Complainant filed a Motion for Summary Judgment. On February 2, the Respondent filed a Motion for Summary Decision. On March 15, the Complainant filed a document entitled Amended Motion for Summary Judgment which is, in part, a response to the Respondent's Motion for Summary Decision and, in part, an amendment and further support for his initial Motion for Summary Judgment, and I will treat it as both. On March 28, the Respondent filed a response to the Complainant's Motion for Summary Judgment and Amended Motion for Summary Judgment.

agreement resolving a prior complaint under the ERA in retaliation for his protected activity in 2002. C. Mot. for Summ. J. at 3-5, 8-12; C. Am. Mot. for Summ. J. at 5-11. The Respondent contends that it is entitled to Summary Decision as Mr. Neal can not establish that the company discriminated against him with regard to merits raises, stock options or outage bonuses in retaliation for any protected activity. R. Mot. for Summ. Decision at 1-5. The Respondent argues further that it is entitled to judgment as a matter of law because Mr. Neal's claims, with the exception of the allegations relating to the merit raise in 2005 and the outage bonus in 2005, are time barred. *Id*. at 5; R. Res. to Mot. for Summ. J. at 12. Finally, the Respondent asserts that it is entitled to summary decision because the Complainant has failed to demonstrate a nexus between his protected activity and the alleged discriminatory actions. R Mot. for Summ. Decision at 6-7; R. Res. to Mot. for Summ. J. at 12-13.

In response to Entergy's Motion for Summary Decision, the Complainant argues that the time limits for filing a complaint under the ERA are subject to equitable tolling and that he has satisfied the requirement by showing that the Respondent mislead or "fraudulently concealed" the fact that it lowered his management level. Am. Mot. for Summ. J. at 11-12. Neal further contends that the Respondent's proffered reason for the alleged adverse actions are not credible and are simply a pretext for retaliation for his 2002 protected activity. Am. Mot. for Summ. J. at 2, 15-16.

The Respondent responds to Mr. Neal's Motion for Summary Judgment and his Amended Motion for Summary Judgment by reiterating the assertions included in its own Motion for Summary Decision. Additionally, the Respondent denies that the company covertly reduced Neal's position and supervisory responsibilities after the settlement agreement resolving his initial ERA complaint, pointing out that the Complainant was reassigned from his position as security manager to a project manager position prior to the settlement of his initial complaint. The Complainant accepted a project manager position to settle his prior claim. R. Resp. to Mot. for Summ. J. at 1-4.

III. Timeliness of Complaint

In order to prevail on his claim, Neal must first show that his claims are timely. Complaints under the Energy Reorganization Act must be made to the Secretary of Labor "within 180 days after such violation occurs," 42 U.S.C. § 5851(b)(1); *see also*, 29 C.F.R. § 24.3(b)(2). The time begins to run when the complainant is informed of the adverse employment action. *Jenkins v. U .S. Envtl. Protection Agency*, ARB Case No. 98-146, ALJ Case No. 88-SWD-0002 (ARB Feb. 28, 2003) (applying statutes other than the ERA that have a 30 day period in which to present complaints to the Secretary of Labor). The Administrative Review Board (ARB) followed the holdings of the U.S. Supreme Court that limitations periods in employment discrimination statutes often begin to run before an aggrieved employee is fired or laid off. It explained in *Jenkins*:

> The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation. *See generally Chardon v. Fernandez,* 454 U.S. 6 (1981) (proper focus

> contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated). *Jenkins*, slip op. at 12.

The Board has applied this principle in a claim arising under the ERA, *Swenk v. Exelon Generation Co.*, ARB No. 04-028, slip op. at 4 (ARB Apr. 28, 2005).

The instant complaint was filed on September 6, 2005 and alleged that the Complainant has been denied stock options in 2003, 2004 and 2005, that his merit increases in the three years after his initial protected activity were less than the increases he received prior to the protected activity in 2002 and, finally, that he was denied an outage bonus in 2005. *See* Comp. Pursuant to the provisions of the ERA, allegations of adverse actions occurring prior to March 10, 2005 are untimely as they occurred more than 180 days before the complaint was filed. All of the adverse actions the Complainant alleges are untimely with the exception of the claim regarding the merit raise in April 2005 and outage bonus of August 2005. Nevertheless, the Complainant argues that the statute of limitations can and should be equitably tolled.

In *Hill v. United States Department of Labor*, 65 F.3d 1331, 1338 (6th Cir. 1995), the court held that the limitations period in Section 210 of the Energy Reorganization Act (now Section 211), is not jurisdictional, and may be extended when fairness requires. Equitable principles may be applied when a defendant fraudulently conceals its actions, misleading the plaintiff respecting his or her cause of action. To establish a fraudulent concealment to toll a statute of limitations, the plaintiff must prove (1) wrongful concealment by the defendants of their actions; (2) failure of the plaintiff to discover the operative facts that are the basis of the cause of action within the limitations period; and (3) the plaintiff's due diligence until discovery of the facts. The Court stated that the party relying on equitable tolling through fraudulent concealment has the burden of demonstrating its applicability; such an equitable remedy is narrowly applied because statutes of limitation are vital to society's welfare and are favored in the law.

The Administrative Review Board (ARB) has applied the principles of equitable tolling in determining whether to relax the limitations period in a specific case and permit an untimely complaint. *Santamaria v. U.S. Envtl. Protection Agency*, ARB No. 05-023, ALJ No. 04-ERA-25 (ARB Mar. 31, 2005). The ARB has stated that an untimely petition may be permitted when the respondent has actively misled the complainant respecting his rights to file a petition or the complainant has in some extraordinary manner been prevented from asserting his rights.[3] Neal bears the burden of justifying the application of equitable tolling principles.

With regard to the stock options in 2003, 2004 and 2005, the Complainant was aware in each of those years that he did not receive stock options in those years. Neal argues, however,

[3] *Accord School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981) (the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and therefore may be subject to equitable tolling).

that he was misled by his supervisor who told him that stock options were "no longer given or available." Am. Mot. for Summ. J. at 7. He also asserts that the Respondent fraudulently concealed the fact that his reassignment to a project manager non-managerial position pursuant to the 2002 settlement agreement removed him from the class of employees potentially eligible to receive stock options and that he did not learn of this until August 2005. *Id*. at 8; C. Mot. for Summ. J. at 11. I am not persuaded that Mr. Neal was misled by his supervisor regarding the stock options. Neal had received stock options in previous years and he was well aware of when those stock options were granted and he knew in 2003, 2004 and 2005 that he was not awarded stock options. In addition, as the Respondent points out, the company did not stop awarding stock options completely, and those stock options were reflected in the Company's publicly available annual reports.

Nor do I find that the Respondent fraudulently concealed the Complainant's re-assignment to a non-supervisory position. The Complainant alleges that this change in position resulted in lower compensation than that of his peers. C. Mot. for Summ. J. at 5. The evidence establishes that in 2001 Neal was the Security Manager at the Pilgrim site and as such, was responsible for supervising the entire security force at the facility. R. Mot. for Summ. Decision Attach. A. Prior to filing his initial complaint in 2002, he was removed from his position as Security Manager and reassigned to an individual contributor position as project manager on the Indian Point integration project and was relocated to the company's Northeast headquarters in White Plains, NY. *Id*. This involuntary reassignment was included as part of Neal's initial ERA complaint in 2002. C. Mot. for Summ. J. Attach. 1 (Settlement Agreement). As a result of the November 2002 settlement of his initial complaint, Neal accepted an individual contributor position as project manager for corporate security and was permitted to base his job out of the Pilgrim facility, although he reported to corporate security in White Plains, NY and not the Pilgrim site management. *Id*; R. Resp. to Mot. for Summ. J. Ex. A. An individual contributor project manager position is not a supervisory management position and it is not equivalent to a Security Manager's position. *Id*. Neal acknowledges that his job duties were diminished when he was reassigned to a project manager position after being removed from his position as security manager at Pilgrim. C. Mot. for Summ. J. at 5. When he entered the settlement agreement in 2002 he agreed to accept a project manager position. Therefore, his contention that the Settlement Agreement simply moved him from one management position as Security Manager, to another management position as Project Manager, is simply inaccurate.[4]

It appears the Complainant is asserting that he did not fully understand the implications of the settlement agreement when he agreed to accept the project manager for corporate security position. The settlement agreement specifically indicates that in exchange for dismissing his prior complaint the Complainant will be assigned to the position of project manager corporate security assessments and be permitted to base this position out of the Plymouth facility even

[4] Under the explicit terms of the Settlement Agreement, Neal accepted a project manager position knowing that project manager positions carried fewer responsibilities than security manager positions. The fact that the two position titles contain the term "manager" does not mean the positions are equivalent as is evident by the fact that the security manager position is a supervisory position with responsibility for security at a specific nuclear site. The project manager position has no supervisory responsibilities. The settlement agreement does not provide that the Complainant's future compensation package would be based upon the package offered to other security managers rather than the package offered to other project managers.

though the position reports to the White Plains, NY office where Neal had been transferred. C. Mot. for Summ. J. Attach. 1. Moreover, immediately prior to entering the settlement agreement the Claimant was in a project manager position for the Indian Point integration project and he was aware that project manager positions lacked supervisory responsibilities. Thus, the Complainant certainly knew, or should have known that a project manager position was a lower position than that of Security Manager. C. Mot. for Summ. J. at 5. That Neal now claims he did not appreciate all of the ramifications of his acceptance of the lesser project manager position when he settled his prior complaint is regrettable, but it does not establish that the Respondent fraudulently concealed the consequences of the change in position from him.[5] Accordingly, I conclude that the Respondent has demonstrated the allegations associated with the 2003-2005 stock options and the 2003 and 2004 merit increases are untimely and the Complainant has failed to carry his burden of establishing a basis for tolling the limitations period. Therefore, the Respondent is entitled to judgment as a matter of law on these allegations. Accordingly, allegations related to the stock options in 2003, 2004, and 2005 and the merit raises in 2003 and 2004 are dismissed as untimely.

IV. Establishing Claims of Discrimination – 2005 Merit Raise and Outage Bonus

This leaves the allegations regarding the 2005 merit pay increase and the outage bonus. In order to prevail on the remaining allegations, the Complainant must establish by a preponderance of the evidence that the Respondent took adverse employment action against him because he engaged in protected activity. *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and other anti-discrimination statutes. *See Overall v. Tennessee Valley Auth.*, ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001), citing, inter alia, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Ctr. v. Hicks*, 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097 (2000). Where there is direct evidence of discrimination, then the complainant prevails unless the respondent can establish an affirmative defense. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 997 (2002) (Title VII case); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-122 (1985) (Age Discrimination in Employment Act case). Neal has not offered direct evidence of discrimination in support of his claim.

When direct evidence of discrimination is not available, a complainant first must create an inference of unlawful discrimination by establishing that the respondent is subject to the Act; that the complainant engaged in protected activity; that he suffered adverse employment action; and that a nexus exists between the protected activity and adverse action. The complainant must show that the respondent had knowledge of the protected activity to establish a prima facie case. *See Bartlik v. U.S. Dep't of Labor*, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F. 2d 793, 796

[5] The Complainant was represented by counsel during the negotiation and preparation of the Settlement Agreement and I will not look behind that agreement.

(9th Cir. 1982); 29 CFR § 24.5(a)(2). The burden then shifts to the respondent to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. Under traditional Title VII analysis, the burden of persuasion remains at all times with the complainant, who must prove by a preponderance of the evidence that the respondent's proffered reasons were not the true reasons and constitute a pretext for discrimination. *Burdine*, 450 U.S. at 253.

In the present case, the Respondent does not dispute that it is governed by the ERA. Nor does the Respondent contest that Neal engaged in protected activity in May 2002 when he filed a complaint alleging violations of the ERA and in subsequently settling that claim in November 2002.

The Complainant alleges adverse action because his 2005 merit increase was less than the percentage merit raises he received prior to his 2002 protected activity and was less than the percentage increase received by similarly situated employees.[6] The Respondent contends that the difference in merit increase was minimal and does not rise to adverse discriminatory action. Neal also claims he was subject to adverse action because he was denied a 2005 outage bonus. The Respondent does not dispute the fact that Neal did not receive an outage bonus in 2005, but argues that he was not eligible for an outage bonus.

A. The 2005 Merit Raise

With regard to the merit raise for 2005, the Claimant contends that his raise of 2.2% is less than the increases he received prior to his protected activity in 2002 and less than the percentage merit increase received by his peers. C. Am. Mot. for Summ. J. at 5.[7] In 2001 and 2002 the Complainant received merit increases of 3.9% and 3.8%, respectively. R. Mot. for Summ. Decision Attach. A (Chart). Respondent represented that it annually budgets a specific percentage which is available for merit pay raises. These budgeted percentages are used as a guideline for awarding merit pay increases which occur on April 1 of each year. The Respondent has established that in 2001 and 2002 the Company set aside 4% for merit raises and the Complainant's merit increases in those two years were very close to the 4% set by the company. The Respondent states that the Complainant averaged 95.6% of the budgeted raise over that two year period. R. Mot. for Summ. Decision at 2-3. In the three years after the initial complaint, the company budgeted 3% for annual merit raises and the Respondent reports that the Complainant received 95.5% of the budgeted merit raise over those three years. R. Mot. for Summ. Decision at 3. Therefore, the Respondent argues the Complainant can not establish any

[6] The Complainant has elected to compare himself to other Security Managers, the position he no longer occupies, rather than to other project managers, the position he currently holds. The Respondent questions that choice but contends that even when comparing the Complainant to others in the company who occupy higher positions, the documents demonstrate that the company has not discriminated against the Complainant in terms of merit raises. R. Resp. to Mot. for Summ. J. at 9.

[7] To the extent that the Complainant contends that his merit increases in 2001 and 2002, which he asserts were reduced because of protected activity, are at issue, he is mistaken as those claims pre-date the Settlement Agreement in the case and are released by that Agreement. C. Am. Mot. for Summ. J. at 3-4. In addition, as discussed above, any claims involving merit increases in 2003 and 2004 are time barred.

adverse action with regard to the merit raises as a result of his filing his initial complaint with the Department of Labor in 2002.

The Complainant argues however, that in settling the 2005 merit increase, he was evaluated or rated as a "valuable contributor" and awarded a 2.2% raise, whereas, two peers, peers C and E, who were also rated as "valuable contributors" each received merit raises of 3%. R. Mot. for Summ. Decision Attach. A (Chart). A third peer, peer G, was rated a "valuable contributor" and received a 3.2% merit increase. R. Resp. to Motion for Summ. Decision Attach. The evidence indicates that the Complainant's merit increases have decreased. A change in compensation which results in a reduced merit raise is an adverse employment action. Therefore, I conclude that the Complainant has shown he experienced adverse action with regard to the 2005 merit increase.

B. The Outage Bonus

The parties do not dispute that Neal did not receive an outage bonus for 2005. Therefore, I find that Neal has shown he experienced adverse action when he was not awarded an outage bonus in 2005.

C. Nexus Between Protected Activity and Adverse Employment Action

Having shown he engaged in protected activity and suffered adverse employment actions, the Complainant must show that a reasonable fact finder could find that he established a relationship or nexus between the protected activity and the adverse action. Neal has not alleged direct evidence of discriminatory motive with regard to either the 2005 merit raise or the denial of an outage bonus. The Complainant can establish the required nexus through circumstantial evidence. Closeness in time between the protected activity and the adverse action can support an inference that the protected activity was the reason for the adverse action in an environmental whistleblower case. *See, e.g., Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). The ARB has generally concluded that adverse action occurring within one year from the date of protected activity provides a sufficient temporal proximity to infer that the adverse action resulted from the protected activity. In *Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993), sufficient temporal proximity of the protected activity and the adverse action to raise the inference of causation was found where about one year elapsed between the time the Complainant's supervisor learned of Complainant's safety concerns regarding procedures and equipment used for tracking valve testing, and where the Complainant's test certifications were suspended about three weeks after she made internal complaints about using non-approved criteria for certain testing. However, the ARB has held that passage of longer periods of time between the protected activity and any adverse action does not support a causal connection. *See Shusterman v. EBASCO Services, Inc.*, 87-ERA-27, slip op. at 8-9 (Sec'y Jan. 6, 1992), *aff'd mem., Shusterman v. Sec'y of Labor*, No. 92-4029 (2d Cir. Sept. 24, 1992) (four years from the time of Complainant's protected activity and alleged adverse action, establishes absence of causal connection between protected activity and adverse action); *Varnadore v. Oak Ridge Nat'l Lab.*, 92-CAA-2 and 5 and 93-CAA-1 (Secy Jan. 26, 1996), (gap of almost four years between alleged protected activity and adverse employment action was too extended a period to be considered temporally proximate).

Neal argues the required nexus is established by the "genesis" of the settlement agreement. Neal apparently argues that the Respondent has violated the settlement agreement which settled Neal's prior claim under the ERA in retaliation for the original protected activity. C. Am. Mot. for Summ. J. at 15-16.[8]

In any event, Neal can succeed by showing a connection between his protected activity in 2002 and the 2005 merit increase. In my view, this is a close question. If one were to consider only the 2002 protected activity and the 2005 merit increase, one could conclude that this three year gap in time is too remote to show the required nexus. On the other hand, Neal has alleged that his merit increase has decreased in each year after his 2002 protected activity. Although I have found that his allegations regarding the merit increases in 2003 and 2004 are untimely, those events may nonetheless be considered in supporting Neal's claim that the reduced merit increases awarded in each year following the exercise of protected activity, raise an inference that the protected activity is the reason for the ongoing lower merit increases with the 2005 increase representing the most recent manifestation of the required nexus. *See, Nat'l RR Passenger Corp. v. Morgan*, 536 U.S. 101, 112 (2002) citing *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977) (holding that time barred discrete adverse employment actions under Title VII may constitute relevant background evidence in a timely complaint of discrimination). Neal may be able to demonstrate that the basis for the Company's merit increase decisions in 2003 and 2004 support his assertion that the 2005 increase was the most recent instance in a series of actions which are sufficiently connected in time to support an inference that a lower percentage merit increase in 2005 is causally related to his 2002 protected activity. Under the circumstances, I find that there is a question of material fact as to whether there is a causal relationship between Neal's protected activity and the lower 2005 merit increase. Accordingly, Neal's Motion for Summary Decision on this issue is denied.[9]

Even assuming a finding that Neal had established the required nexus, the Respondent would be required to put forth a legitimate nondiscriminatory reason for the merit increase awarded in 2005. The Respondent has offered two explanations for the merit increases awarded

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[8] Neal argues that had he not engaged in protected activity that led to re-assignment, his job content would not have been reduced and his compensation would have stayed the same as other security managers. C. Mot. for Summ. J. at 5-6; C. Am. Mot. for Summ. J. at 5-6. The difficulty with this argument is that in settling the prior claim, the Complainant agreed to accept a project manager job which is indisputably a job with fewer responsibilities than the security manager position. One would reasonably expect that positions with greater responsibilities would command higher salaries, raises, and other inducements such as stock options. The evidence before me does not show that the Respondent has violated the settlement agreement. As discussed above, in exchange for dismissing his prior complaint, the settlement agreement explicitly indicates that Neal would be assigned to an individual contributor position as project manager for corporate security assessments. The agreement also provides that the new project manager position would be based out of the Plymouth Nuclear Power Station, meaning that Mr. Neal would be moved back to Plymouth, MA from White Plains, NY where he had been assigned prior to his initial complaint. The settlement agreement does not discuss the Complainant's compensation, his entitlement to merit increases, stock options or his participation in outage assignments. As the agreement is silent on these issues, I can not conclude the Respondent's failure to apply the compensation package of security managers to the Complainant establishes the required nexus.

[9] Respondent's attempt to show it is entitled to summary decision because the Complainant failed to show a nexus between his protected activity and the 2005 wage increase also fails.

the Complainant. First, it argues that in the two years prior to his 2002 complaint and settlement the Complainant received 95.6% of the budgeted increase and in the three years following his protected activity he received 95.5% of the budgeted increase. The Respondent contends that the difference in merit increase results from the fact that the Company budgeted 4% for merit raises in the years prior to the Complainant's 2002 protected activity and reduced the budgeted amount for merit raises to 3% in the years thereafter. This explanation would establish a business reason for part of the difference in the Complainant's wage increase. However, this rationale does not explain why the Complainant received 3.5% in 2003 when the budgeted guideline was 3%, a fact which suggests that an individual employee could be awarded a raise in excess of the Company's budgeted amount.

Second, in the period 2003 through 2005, the Company budgeted 3% for merit increases. For the 2005 merit increase, the Complainant was evaluated or rated as a "valuable contributor" and awarded a 2.2% raise. R. Mot. for Summ. Decision Attach. A (Chart). For this same period, two peers, peers C and E, who were also rated as "valuable contributors" each received merit raises of 3%. *Id*. A third peer, peer G, was rated a "valuable contributor" and received a 3.2% merit increase.[10] R. Resp. to Mot. for Summ. Decision Attach. The Respondent answers this clear difference in the percentage of merit awards by asserting that in terms of the actual dollar figure, the Complainant's raise was only $300 to $350 less than that received by two of his peers with the same rating, but that the Claimant's salary is higher than those peers. R. Resp. to Mot. for Summ. J. at 8-9. The fact that the Complainant's salary was higher than peers who received the same rating but a higher percentage merit increase does not explain the difference in percentage of salary increase. The Respondent's attempt to explain the difference in percentage increase by comparing percentage increases with the associated dollar figure is not an equivalent measure as it compares apples and oranges. This explanation for the difference in the percentage for the merit raise awarded Neal and that awarded three other similarly rated peers raises a question as to the basis for the Company's decision and is insufficient to establish at this point that the Company had a legitimate reason for the merit increase awarded Neal in 2005. Accordingly, as there is a question of fact as to the rationale for the Company's decision regarding the Complainant's 2005 merit increase, summary decision on this issue is inappropriate.

With regard to the outage bonus, the Respondent states that the Complainant was not given an outage bonus because he was not assigned to an outage team and did not participate in that effort. It appears that outage bonuses are awarded for work done during periods of refueling at the Pilgrim Nuclear Power Plant in Plymouth MA. R. Mot. for Summ. Decision at 4. The Respondent notes that although the Complainant works out of the Plymouth, MA Pilgrim station he is not an employee of the Pilgrim facility, but rather is an employee of the Corporate Security Organization and reports to the White Plains, NY headquarters office. R. Resp. to Mot. for Summ. J. at 11. As such, his normal job duties required him to be at other Entergy nuclear stations performing security assessments during part of the time the outage team work was

[10] The Respondent argues that the individual designated peer G is not a proper comparator as he works in an entirely different part of the organization and in a different role than the Complainant. R. Resp. to Mot. for Summ. J. at 9 n. 2. In light of the fact that all of the individuals designated "peers" for purposes of the motions for summary decision are in entirely different roles than the Complainant, as they are security managers and he is a project manager, this hardly seems a basis for excluding peer G from the analysis.

performed at the Pilgrim station. The Respondent also stated that three other individuals who are stationed at the Pilgrim facility but are not employees of Pilgrim, were not assigned to the outage team, and like Neal they did not receive outage bonuses. Entergy has put forth a legitimate nondiscriminatory reason for the fact that Neal was not awarded an outage bonus in 2005. The Complainant has not come forward with evidence demonstrating that the Company's proffered reason for not awarding a 2005 outage bonus is a pretext for unlawful discrimination. The Complainant has failed to show that Entergy discriminated against him in failing to award him an outage bonus in 2005. Consequently, I find that the Respondent has demonstrated that its proffered reason for not awarding Neal an outage bonus in 2005 was the actual reason for the decision. As there is not an issue of material fact on the question of whether the Respondent's proffered reason for not awarding an outage bonus was the true reason, the Respondent is entitled to judgment as a matter of law on this issue.

V. Conclusion

In sum, the Complainant's motion for summary judgment is denied. The Respondent's motion for summary decision is granted to the extent that the allegations related to merit raises in 2003 and 2004 and stock options in 2003, 2004, and 2005 are dismissed as untimely and the claim regarding the outage bonus is dismissed on the merits. In all other respects, Entergy's motion is denied.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

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).