



In the Matter of:

CARLOS M. MUINO,

**ARB CASE NOS. 06-092
06-143**

COMPLAINANT,

**ALJ CASE NOS. 2006-ERA-002
2006-ERA-008**

v.

**FLORIDA POWER & LIGHT
COMPANY,**

DATE: April 2, 2008

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Carlos M. Muino, *pro se*, Palm Beach Gardens, Florida

For the Respondent:

Mitchell S. Ross, Esq., and Kelly Cheary Sulzberger, Esq., *Florida Power & Light Company*, Juno Beach, Florida

FINAL DECISION AND ORDER

Carlos M. Muino filed two whistleblower complaints with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Florida Power & Light Company (Florida P & L) violated the Energy Reorganization Act (ERA) when it refused to allow a contractor, which had a contract with Florida P & L, to hire him because of his prior whistleblowing activity. The ERA protects whistleblowers from retaliation for engaging in protected activity related to

atomic energy safety concerns.¹ Because Muino failed to adduce evidence that Florida P & L refused to allow him to be hired because of his prior whistleblowing activity, an Administrative Law Judge (ALJ) granted summary judgment for Florida P & L on Muino's initial ERA complaint. For the reasons that follow, we accept that recommendation and deny Muino's initial complaint.

While Muino's appeal of his initial complaint was pending, Muino filed a second complaint with OSHA. Because Muino's second complaint involves the same parties, issues and alleged violations as set forth in his initial complaint, another ALJ dismissed Muino's second ERA complaint.² We agree with the ALJ in similarly concluding that the doctrine of collateral estoppel applies and therefore dismiss Muino's second complaint.

¹ The ERA provides, in pertinent part, that “[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . [notified a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), or refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists or participates in a proceeding under the ERA or AEA.]” 42 U.S.C.A. § 5851 (a)(1) (West 2007). The ERA has been amended since Muino filed this complaint. Energy Policy Act of 2005, Pub. L. 109-58, title VI, § 629, 119 Stat. 785 (Aug. 8, 2005). We need not decide here whether the amendments would apply to this case, which was filed before their effective date, because even if the amendments applied, they are not at issue in this case and thus would not affect our decision. The ERA's implementing regulations, found at 29 C.F.R. Part 24 (2007), have also been amended. 72 Fed. Reg. 44,956 (Aug. 10, 2007). It is unnecessary for us to determine whether the amendments apply to Muino's complaint because they are not implicated by the summary judgment issue presented and thus, even if the amendments were applicable to this complaint, they would not affect our decision. The ERA covers applicants for employment, like Muino, as well as employees. *Samodurov v. Gen. Physics Corp.*, No. 1989-ERA-020, slip op. at 4 (Sec'y Nov. 16, 1993).

² By order dated September 18, 2006, the Board granted Florida's Motion to Consolidate the appeals of the denials of Muino's two complaints for decision. *Muino v. Florida Power & Light, Co.*, ARB Nos. 06-092 and 06-143, ALJ Nos. 2006-ERA-002 and 2006-ERA-008 (ARB Sept. 18, 2006).

BACKGROUND

Muino's Initial ERA Complaint

Florida P & L is an electric power company that runs a nuclear power plant located in Juno Beach, Florida.³ Muino worked for Florida P & L at its Juno Beach plant as an engineering technician from 1980 until 1993.⁴ In 1988, Muino received a Report of Discipline (ROD) for sexual harassment.⁵ Muino alleges that only he has the original ROD in his possession and that Florida P & L agreed at that time to purge all copies of the ROD from his personnel file.⁶ On January 4, 1993, Muino submitted a letter of resignation to Florida P & L, stating that he was resigning due to alleged adverse working conditions arising out of his supervisor's racial discrimination against him.⁷ Upon Muino's resignation, one of Muino's supervisors completed a Release Questionnaire in January 1993, which indicated that Muino voluntarily resigned due to unsatisfactory working conditions and recommended that Muino not be rehired.⁸

In accordance with Florida P & L policy, Muino also attended an exit interview, upon his resignation, with the Nuclear Safety Speakout (Speakout) division of Florida P & L.⁹ Speakout was designed to allow Florida P & L employees to voice their nuclear safety concerns confidentially, without fear of retaliation.¹⁰ At his exit interview, Muino raised concerns regarding plant drawings and manuals which he alleged were not being properly updated that, he believed, related to nuclear safety at the plant.¹¹ Muino also alleges that he previously raised these same concerns with two of his supervisors, Robert Custis and John Hosmer.¹²

³ See Muino Jan. 23, 2006 Deposition at 16-17; Jim Gallagher Feb. 3, 2006 Affidavit at 1.

⁴ Muino Jan. 23, 2006 Deposition at 16; Defendant's Exhibit (DX) 2.

⁵ DX 1.

⁶ Muino Jan. 23, 2006 Deposition at 32, 36.

⁷ DX 2.

⁸ See Jan. 7, 1993 Release Questionnaire.

⁹ See DX 3-4; Jim Gallagher Feb. 3, 2006 Affidavit at 1-2.

¹⁰ Jim Gallagher Feb. 3, 2006 Affidavit at 1-2.

¹¹ DX 4; Muino Jan. 23, 2006 Deposition at 70-74.

¹² Muino Jan. 23, 2006 Deposition at 59, 63, 68, 113-114.

Ten years later, Muino was hired in 2003 to work as a contractor for Sun Technical, which had a contract with Florida P & L for work at its Juno Beach plant.¹³ In March 2004, Daniel Tomaszewski, a Florida P & L manager, sought to rehire Muino as an employee for Florida P & L.¹⁴ Pursuant to Florida P & L policy, Tomaszewski contacted Robert Burgess in Florida P & L's Human Resources department to determine whether Muino was eligible to be rehired.¹⁵ Burgess requested that Diane Bryant, a Human Resources employee, conduct a review of Muino's personnel file to make that determination.¹⁶ Upon reviewing Muino's file, Bryant found the 1988 ROD, a poor performance appraisal from Muino's supervisor in 1992 and the 1993 Release Questionnaire from Muino's supervisor recommending that Muino not be rehired.¹⁷ Consequently, Bryant informed Burgess that Muino was not eligible to be rehired.¹⁸ Accordingly, Burgess informed Tomaszewski that Muino was not permitted on Florida P & L property and Muino's contract with Sun Technical was terminated in April 2004.¹⁹

In January or February of 2005, Muino applied for a job as a contractor with Sargent & Lundy (S & L), which had a contract with Florida P & L for work at its Juno Beach plant.²⁰ Terry Sopkin, a manager for S & L, contacted John Zudans, a Florida P & L employee, regarding whether Muino should be hired.²¹ After Zudans learned from Tomaszewski, however, that Muino was not eligible to work at the Juno Beach plant, Zudans informed Sopkin that Muino could not be hired and, therefore, an interview that S & L had scheduled with Muino was cancelled on February 11, 2005.²²

¹³ Daniel Tomaszewski Feb. 3, 2006 Affidavit at 1.

¹⁴ Daniel Tomaszewski Feb. 3, 2006 Affidavit at 1-2.

¹⁵ Daniel Tomaszewski Feb. 3, 2006 Affidavit at 2.

¹⁶ Robert Burgess Feb. 2, 2006 Affidavit at 2.

¹⁷ Diane Bryant Feb. 2, 2006 Affidavit at 2.

¹⁸ *Id.*

¹⁹ Robert Burgess Feb. 2, 2006 Affidavit at 2; Daniel Tomaszewski Feb. 3, 2006 Affidavit at 2.

²⁰ Terry Sopkin Feb. 1, 2006 Affidavit at 1.

²¹ John Zudans Feb. 1, 2006 Affidavit at 1.

²² John Zudans Feb. 1, 2006 Affidavit at 2.

On August 4, 2005, Muino filed his initial complaint with OSHA. Because whistleblower retaliation complaints under the ERA must be filed with the Secretary of Labor “within 180 days after such violation occurs,”²³ the ALJ determined that Muino’s complaint was timely filed only in regard to the cancellation of his interview with S & L on February 11, 2005.²⁴ However, the ALJ determined that Muino failed to produce any evidence, other than “naked allegations and unsupported theories,” which could establish that those involved in the decision to cancel his interview with S & L had any knowledge that Muino had engaged in any protected activity.²⁵ Similarly, the ALJ determined that Muino failed to produce any evidence which could prove that the legitimate, nondiscriminatory reasons found in the record for refusing to allow Muino to work at the Juno Beach plant were pretextual.²⁶ Thus, the ALJ found that no issue of material fact exists regarding whether Florida P & L was aware of any protected activity at the time it informed S & L that he was not permitted to work on Florida P & L property and Muino’s interview with S & L was cancelled. Consequently, the ALJ held that Florida P & L was entitled to judgment as a matter of law.

Muino’s Second ERA Complaint

Muino appealed the ALJ’s decision denying his initial complaint. Subsequently, while his appeal was pending, Muino filed a second ERA complaint with OSHA on April 27, 2006. Muino contended that he did not become aware of the existence of the adverse contents of his personnel file at Florida P & L, including the 1988 ROD, the 1992 appraisal and the 1993 Release Questionnaire, until the day of his deposition on January 23, 2006, which was held in regard to his initial ERA complaint. The ALJ who considered Muino’s second ERA complaint issued an Order to Show Cause Why Summary Decision and Dismissal of Complaint Should Not Be Entered. Because the ALJ concluded that Muino’s second complaint involves the same parties, issues and alleged violations as set forth in his initial complaint, the ALJ ultimately dismissed Muino’s second ERA complaint. Muino has also appealed the ALJ’s decision denying his second complaint.²⁷

²³ See 42 U.S.C.A. § 5851(b)(1); see also 29 C.F.R. § 24.3(b)(2). The limitations period begins to run when the employee is notified of the adverse action. See *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 12 (ARB Feb. 28, 2003); see also *Chardon v. Fernandez*, 454 U.S. 6 (1981); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980).

²⁴ Recommended Order, Apr. 13, 2006, at 4-5.

²⁵ Recommended Order, Apr. 13, 2006, at 5-6.

²⁶ Recommended Order, Apr. 13, 2006, at 6.

²⁷ Recommended Order Dismissing Complaint, Aug. 2, 2006, at 3.

ISSUE

On appeal, we decide whether Florida P & L is entitled to summary decision on both Muino's initial complaint and his second complaint.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's recommended decision pursuant to 29 C.F.R. § 24.8 and Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.1(a), among which is the ERA).

Under the Administrative Procedure Act, the Board, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes.²⁸ In ERA cases, the Board engages in de novo review of the ALJ's recommended decision.²⁹

Likewise, the Board reviews an ALJ's recommended grant of summary decision de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary judgment governs our review.³⁰ Thus, pursuant to 29 C.F.R. § 18.40(d) (2007), the ALJ may issue summary decision "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." In considering a motion for summary decision, the Board reviews the evidence in the light most favorable to the nonmoving party.³¹ However, the nonmoving party may not rest upon the mere allegations, speculation or denials of his pleadings, but instead must set forth specific facts which could support a finding in its favor.³² In addition to determining the existence of any genuine issue of material fact, the Board must also determine whether the ALJ properly applied the applicable law.³³

²⁸ See 5 U.S.C.A. § 557(b) (West 2007).

²⁹ See *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 4 (ARB Sept. 30, 2003).

³⁰ *Santamaria v. United States Envtl. Prot. Agency*, ARB No. 04-063, ALJ No. 2004-ERA-006, slip op. at 4 (ARB May 31, 2006); *Demski v. Ind. Mich. Power Co.*, ARB No. 02-084, ALJ No. 2001-ERA-036, slip op. at 3 (ARB Apr. 9, 2004); *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ No. 2000-ERA-036, slip op. at 4 (ARB Mar. 25, 2003).

³¹ *Santamaria*, slip op. at 4.

³² 29 C.F.R. § 18.40(c).

³³ *Santamaria*, slip op. at 4.

DISCUSSION

Muino's Initial ERA Complaint

To prevail on an ERA whistleblower complaint, a complainant must allege and prove by a preponderance of the evidence that he was an employee (or prospective employee) who engaged in protected activity under the ERA, that the employer knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action.³⁴ However, “[r]elief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior [i.e., the protected activity].”³⁵

We have said that, to constitute protected activity under the ERA, an employee's acts must relate to nuclear safety “definitively and specifically.”³⁶ But the complainant need not prove an actual violation of a nuclear safety law or regulation. A reasonable belief of a violation is enough.³⁷

Muino has appealed the ALJ's recommended decision that Muino's initial complaint be dismissed because Muino did not establish an essential element of his case: that the Florida P & L employees who made the decision that S & L should not hire him were aware of his previous protected whistleblowing activities.³⁸ To ultimately prevail,

³⁴ 42 U.S.C.A. § 5851(b)(3)(C); *Hibler v. Exelon Generation Co., LLC*, ARB No. 05-035, ALJ No. 2003-ERA-009, slip op. at 19 (ARB Mar. 30, 2006); *Hasan v. Southern Co., Inc.*, ARB No. 04-040, ALJ No. 2003-ERA-032, slip op. at 2, 4 (ARB Mar. 29, 2005); *Demski*, slip op. at 3; *Kester*, slip op. at 5-8.

³⁵ 42 U.S.C.A. § 5851(b)(3)(D); *Hibler*, slip op. at 20; *Demski*, slip op. at 3; *Kester*, slip op. at 7.

³⁶ *Kester*, slip op. at 9.

³⁷ See, e.g., *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 10-11 (ARB July 14, 2000), and cases cited therein.

³⁸ See Recommended Order, Apr. 13, 2006, at 5-6. Florida P & L has not cross-appealed the ALJ's recommended decision. Thus, unlike the ALJ, we will assume that Muino created a fact dispute about whether he engaged in protected activity. At his Speakout exit interview, Muino raised concerns regarding plant drawings and manuals which he alleged were not being properly updated that, he believed, related to nuclear safety at the plant. Muino alleges that he also previously raised these same concerns with two of his supervisors. Viewed in the light most favorable to Muino, this evidence may be enough to establish a reasonable belief that nuclear safety under the ERA and AEA was at issue.

Muino must prove by a preponderance of the evidence that his protected activity contributed to Florida P & L's refusal to allow S & L to hire him.

But to avoid summary decision in Florida P & L's favor, Muino does not have to show that he will ultimately preponderate on the elements essential to his claim. To succeed on summary decision, Florida P & L need only demonstrate a failure of proof concerning an essential element of Muino's case, in this instance that Florida P & L was aware of his protected activity at the time it refused to allow S & L to hire him. Once Florida P & L demonstrated that Muino lacked evidence on an essential element of his claim, the only burden for Muino was to establish the existence of an issue of fact that could affect the outcome of the case. Muino "may not rest upon mere allegations, speculation, or denials of [Florida P & L's] pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof."³⁹ To say, as the ALJ did, in part, that Muino "failed to establish a prima facie case"⁴⁰ suggests that the ALJ did not apply the summary decision standard which, again, requires only that Muino demonstrate that a fact dispute concerning the elements of his claim entitles him to an evidentiary hearing. Under our de novo review authority, we apply the correct summary decision standard.

The ALJ found no evidence to support Muino's argument that the Florida P & L hiring officials had any knowledge of his protected activity when they refused to allow S & L to hire him.⁴¹ Those officials submitted affidavits wherein they swear that they were not aware of Muino's protected activity.⁴² In contrast, the ALJ found that Muino submitted no evidence, only conjecture and speculation, that the hiring officials were aware of his whistleblowing activities.⁴³ Furthermore, Muino himself testified in his deposition that he had no knowledge whether the Speakout division employees and

³⁹ 29 C.F.R. § 18.40(c).

⁴⁰ See Recommended Order, Apr. 13, 2006, at 5, n.9.

⁴¹ Recommended Order, Apr. 13, 2006, at 5, n.9, and at 6, n.12.

⁴² See Daniel Tomaszewski Feb. 3, 2006 Affidavit at 2-3; Robert Burgess Feb. 2, 2006 Affidavit at 2; Diane Bryant Feb. 2, 2006 Affidavit at 2; Terry Sopkin Feb. 1, 2006 Affidavit at 2; John Zudans Feb. 1, 2006 Affidavit at 2. Moreover, as the ALJ noted, none of Florida P & L's hiring officials has access to Muino's Speakout exit interview statements. See Jim Gallagher Feb. 3, 2006 Affidavit at 1; Recommended Order, Apr. 13, 2006, at 5, n.9. In addition, although Muino alleges that he also raised his concerns with two of his supervisors, Robert Custis and John Hosmer, neither is still employed with Florida P & L, as Hosmer left in 1994 and Custis left in 2000. See J. A. ("Tony") Marco Feb. 6, 2006 Affidavit at 3.

⁴³ Recommended Order, Apr. 13, 2006, at 6.

supervisors he told about his protected activity in turn told the human resources officials who reviewed his personnel file.⁴⁴

We have carefully examined the record herein and find that it supports the ALJ's findings. We agree with the ALJ that Muino has provided only speculation that his personnel file must have disclosed his earlier whistleblower activities. But Muino did not set forth specific facts on an issue upon which he would bear the ultimate burden of proof at trial, i.e., whether the Florida P & L hiring officials were aware of Muino's past whistleblowing when they decided that S & L should not hire him. As we have said, allegations, bare denials, or speculative theories do not create a genuine issue of material fact that would entitle the non-moving party to an evidentiary hearing.⁴⁵ At summary decision, Muino must produce affidavits or other admissible evidence that he suffered employment discrimination because of his safety complaints.

Therefore, in opposing the motion for summary decision, Muino has not carried his burden to produce sufficient evidence that establishes an essential element of his case: that Florida P & L's hiring officials knew about his protected activity. Furthermore, Muino's briefs to us contain only continued and additional speculation as to how the Florida P & L hiring officials must have known about his whistleblowing. We therefore reject his arguments and find that no genuine issue of fact exists as to whether the hiring officials knew about Muino's protected activity. Thus, the ALJ correctly concluded that Florida P & L was entitled to summary decision. As a result, Florida P & L's Motion for Summary Decision in regard to Muino's initial complaint must be granted.

Muino's Second ERA Complaint

As noted earlier, because the ALJ concluded that the allegations that Muino raised in his second complaint involve the same parties, issues and alleged violations as set forth in his initial complaint, he dismissed Muino's second complaint.⁴⁶ Collateral estoppel, or "issue preclusion," is a concept included within the doctrine of res judicata, which "refers to the effect of a judgment in foreclosing a relitigation of a matter that has been litigated and decided."⁴⁷ Collateral estoppel applies in administrative adjudication.⁴⁸

⁴⁴ See Muino Jan. 23, 2006 Deposition at 111-114, 116, 127-128, 130-131, 134.

⁴⁵ *Seetharaman*, slip op. at 6.

⁴⁶ Recommended Order Dismissing Complaint, Aug. 2, 2006, at 3.

⁴⁷ *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) (distinguishing issue preclusion and claim preclusion).

⁴⁸ See *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 797-799 (1986) (reasoning that when an administrative agency acts in a judicial capacity to resolve issues of fact which the parties before it have had an adequate opportunity to litigate, application of res judicata principles is appropriate).

Our jurisprudence holds that collateral estoppel applies when: 1) the same issue has been actually litigated and submitted for adjudication; 2) the issue was necessary to the outcome of the first case; and 3) precluding litigation of the contested second matter does not constitute a basic unfairness to the party sought to be bound by the first determination.⁴⁹

Muino alleged in both of his complaints that Florida P & L discriminated against him because of his protected activity. But again, Muino has not produced any evidence, other than speculation, that establishes this essential element of his case: that Florida P & L's officials were aware of Muino's protected activity when they took adverse action against him. Thus, the issue in both cases is whether Florida P & L took adverse action against him because of his safety complaints. Furthermore, the issue litigated and decided in Muino's initial complaint decided the outcome of that case. Moreover, because the issue was fully and fairly litigated both before an ALJ and before the Board, precluding Muino from litigating the issue again would not be unfair.⁵⁰ Therefore, we conclude that collateral estoppel precludes Muino's second ERA whistleblower complaint.

CONCLUSION

Because no genuine issue of fact exists as to whether the hiring officials knew about Muino's protected activity, an essential element of Muino's initial ERA complaint, Florida P & L is entitled to summary decision. As a result, Florida P & L's Motion for

⁴⁹ *Chao v. A-One Med. Servs., Inc.*, ARB No. 02-067, ALJ No. 2001-FLS-027, slip op. at 6 (ARB Sept. 23, 2004); *Otero County Hosp. Ass'n*, ARB No. 99-038, slip op. at 7-9 (ARB July 31, 2002); *Agosto v. Consol. Edison Co. of New York, Inc.*, ARB Nos. 98-007, 98-152, ALJ Nos. 1996-ERA-002, 1997 ERA-054, slip op. at 7 (ARB July 27, 1999) (requiring "full and fair opportunity" for the litigation of the issues in the prior proceeding). *See also Montana v. United States*, 440 U.S. 147, 155 (1979) ("To determine the appropriate application of collateral estoppel in the instant case necessitates three further inquiries: first, whether the issues presented by this litigation are in substance the same as those resolved [in the first proceeding]"); *Kidwell v. Dep't of Army*, 56 F.3d 279, 286-87 (D.C. Cir. 1995) ("When a court has decided an issue of fact or law necessary to its judgment, that decision precludes relitigation of an issue 'in substance the same' as that resolved in an earlier proceeding.").

⁵⁰ *See Montana*, 440 U.S. at 153-154 (precluding parties from contesting issues they have already had a full and fair opportunity to litigate "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."); *see also Agosto*, slip op. at 7 (holding that there must have been "full and fair opportunity" for the litigation of the issues in the prior proceeding).

Summary Decision of Muino's initial complaint must be granted and Muino's initial complaint is **DISMISSED**.

Because the issue in Muino's initial complaint and his second complaint is the same, and because that issue decided the outcome of his initial complaint, and because that issue was fully and fairly litigated in his initial complaint, we further conclude that collateral estoppel applies and that no other issue of material fact exists. Therefore, Florida P & L is entitled to summary decision on Muino's second complaint, and we **DISMISS** Muino's second complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge