U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

SYED M. A. HASAN,

COMPLAINANT,

v.

J. A. JONES, INC.; J. A. JONES SERVICES GROUP; LOCKWOOD GREEN TECHNOLOGIES; and LOCKWOOD GREENE ENGINEERING CONSTRUCTION,

RESPONDENTS.

ARB CASE NO. 02-123

ALJ CASE NO. 2002-ERA-5

DATE: June 25, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Syed M.A. Hasan, *pro se, Madison, Alabama*

For the Respondents:
Barbara G. Haynie, Esq., *Kingsmill Riess, L.L.C., New Orleans, Louisiana*

FINAL DECISION AND ORDER

Lockwood Greene Technologies (LGT) hired Syed M. A. Hasan as a lead designer at its Huntsville, Alabama, office in April 2000. LGT terminated Hasan in August 2001, a result of a company-wide reduction in force. Hasan then filed a complaint with the U. S. Department of Labor alleging that LGT, as well as the other Respondents named herein, retaliated against him because of his previous whistleblower activities. Specifically, he asserts that the Respondents violated the employee protection provision of the Energy Reorganization Act[1] (ERA) when they

[1] 42 U.S.C.A. § 5851 (West 1995) ("No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges

laid him off, refused to promote him, refused to increase his salary, and did not transfer or rehire him. A U. S. Department of Labor Administrative Law Judge (ALJ) heard the evidence and recommended that Hasan's complaint be dismissed.[2] Hasan appeals. We affirm.

The Administrative Review Board (ARB or the Board) has jurisdiction to review the ALJ's recommended decision.[3] The Board reviews the ALJ's findings of fact and conclusions of law *de novo*.[4]

We summarize the ALJ's findings. He found that LGT decision makers were not aware of Hasan's previous whistleblowing activities when they decided not to promote him. Moreover, he found that Hasan had produced no evidence that his whistleblowing had motivated the Respondents to take the other adverse actions, *i.e.* failing to increase his salary, laying him off, and refusing to transfer or rehire him.[5] Therefore, he concluded that Hasan's complaint should be dismissed.

We have carefully examined the entire record herein and find that it fully supports the ALJ's findings of fact. Furthermore, his recommended decision, which we attach and incorporate, correctly applies established legal precedent in concluding that the Respondents did not violate the ERA. We find no merit in Hasan's arguments to this Board.[6] Therefore, we

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of employment because the employee . . . [notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C.A. § 2011 *et seq*.), 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]."

[2] Recommended Decision and Order (R. D. & O.) dated September 17, 2002.

[3] *See* 29 C.F.R. § 24.8 (2002). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases arising under the ERA).

[4] *See* 5 U.S.C.A. § 557(b); *Masek v. Cadle Co.,* ARB No. 97-069, ALJ No. 1995-WPC-1, slip op. at 7-8 (ARB Apr. 28, 2000) and authorities there cited.

[5] R. D. & O. at 9-11.

[6] Hasan appears *pro se* and though we construe his brief liberally, he nevertheless must prove his claim of discrimination. *See Young v. Schlumberger,* ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-9 (ARB Feb. 28, 2003). Hasan also filed with the Board a "Motion To Include New Documents That Were Not Available Earlier." He asks that the Board include in the record an Order Granting Motion to Compel Discovery and an Order Denying Motion for Summary Judgment that ALJ Richard Mills issued in the unrelated case of *Hasan v. J. A. Jones, Inc., and its subsidiaries J. A. Jones Construction Company; J. A. Jones Services Group; and Lockwood Greene Engineers, et. al,* ALJ. No. 2003-ERA-7. This motion is more properly designated as a Motion to Reopen the Record, and in considering it, the Board relies upon the standard found in the Rules of Practice and Procedure

AFFIRM the Recommended Decision and Order and **DENY** the complaint.[7]

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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for Administrative Hearings Before the Office of Administrative Law Judges. 29 C.F.R. Part 18. *See* 29 C.F.R. § 18.54(c) ("Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record."). We have examined ALJ Mills' orders and find they are not materially relevant to this case. Therefore, Hasan's motion is denied. *See Foley v. Boston Edison Company,* ARB No. 99-022, ALJ No. 1997-ERA-56, slip op. at 2 (ARB Feb. 2, 1999).

[7] LGT and its attorney, individually, filed a Motion to Strike on or about June 10, 2003. They assert that certain portions of Hasan's "Response to Respondent's Reply of June 2, 2003" are irrelevant, reckless, baseless, and scandalous. We agree, and because we have recently put Hasan on notice that we will not tolerate vitriolic personal attacks, we grant the Motion to Strike. *See* Order Holding Motion to Strike Complainant's Motion in Abeyance and To Show Cause, *Hasan v. Sargent & Lundy,* ARB No. 03-078, ALJ No. 2002-ERA-32, slip op. at 2-3 (ARB March 28, 2003).

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Issue date: 17Sep2002

In the Matter of	)	**Case No.: 2002-ERA-00005**
SYED M. A. HASAN,	)	
Complainant,	)	
v.	)	
J.A. JONES - LOCKWOOD GREENE	)	
Respondents.	)	

RECOMMENDED DECISION AND ORDER

Syed M.A. Hasan (Complainant) filed a complaint pursuant to the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 et seq., and the governing regulations thereunder. This claim was filed against J.A. Jones Services Group, Lockwood Greene Technologies (LGT), Lockwood Greene Engineering and Construction (LGE&C) and J.A. Jones, Inc.

Complainant alleged Respondents violated the ERA between February 16, 2001, and August 16, 2001, when based on Complainant's prior whistleblowing activities 1) Respondents gave him a discriminatory/retaliatory layoff; 2) Respondents refused to promote him to Grade 15; 3) Respondents refused to increase his salary to the level his immediate boss recommended; and 4) Respondents refused to transfer/hire him.

On October 23, 2001, the Occupational Safety and Health Administration dismissed the complaint against Respondents finding that the complaint was without merit. Complainant appeals that decision. A hearing was held in Decatur, Alabama, on May 29 and 30, 2002.[1]

FINDINGS OF FACT

1. In March 2000, Complainant applied for a position as lead designer with LGT. Following an interview with Bill Bowers, Complainant was offered the position in the Huntsville, Alabama, office at a starting salary of $1000.00 per week. Thomas Glazener was the office manager at LGT's Huntsville office. (Tr. 137). He approved the hiring of Complainant. (Tr. 141). Glazener agreed that the position and salary were low for someone with Claimant's experience. But at the time Complainant was hired, Glazener needed and advertised for a Grade 14 lead designer. He already had four senior structural professional engineers (PEs) he could use and his office was top heavy. Complainant was aware of the position structure and the salary and Complainant indicated it was acceptable. (Tr. 207-09, 235, 273). The offer of employment was made on April 4, 2000, by Jewel Stallions, the Manager of Human Resources for LGT. Complainant began work on April 10, 2000. (Tr. 28-38, 311; CX. 1, att. p. 5). There is no evidence that anyone from LGE&C or any J.A. Jones company had any input or influence on the decision to hire Complainant.

2. Complainant had engaged in whistleblowing activity prior to his employment with LGT. (Tr. 63). There is no evidence that anyone associated with Respondents was aware of Complainant's whistleblowing activities when he was hired in 2000. Complainant never reported any safety violations while employed by any Respondent. (Tr. 269).

3. Based on his qualifications, Complainant was qualified to fill the position of lead designer or design specialist in the civil/structural departments, but not the mechanical, architectural, electrical or security departments. Complainant is a degreed engineer but is not considered in engineer status by LGT as he is not a PE. (Tr. 145, 312; RX. 1, pp. 14-15).

4. Bowers wrote Complainant's performance appraisal on January 31, 2001. Bowers noted that Complainant's performance is deserving of a significant pay increase. (Tr. 49; CX. 3, p. 6).

5. On February 19, 2001, Complainant faxed a missive to various management officials of Respondents advising them of his previous whistleblowing activity. (Tr. 64; CX. 1, att. pp. 8-17). There is no evidence that any of these management officials were aware of Complainant's whistleblowing activity prior to February 19, 2001.

6. Prior to sending the February 19, 2001 missive, Complainant was aware that he would not get a promotion (Tr. 66, 154-56) and suspected that he would be laid off because of the pending

[1] In addition to the exhibits admitted during the hearing, Complainant's Exhibits 4, 5 and 6, submitted post-hearing, are admitted.

merger. (Tr. 122). Glazener, Bowers and Rod Bridgeman had previously discussed Complainant's request for a promotion. These discussions were completed before Glazener knew of Complainant's whistleblowing activity. (Tr. 151). The office policy was that employees were not considered for promotion until they had at least one year in the office. (Tr. 154, 238).

7. Pay increases took effect at LGT in late March or early April. For LGT, the corporate office determined how much money would be allocated to individual offices each year to be dispersed amongst its employees for raises. The immediate supervisor would make a recommendation which would have to be approved by the office manager. Stallions would input the ratings and recommendations received from the local offices into a spreadsheet and any pay increase an employee would receive would be generated. Factors considered were the supervisor's input, the company's productivity, the local office's productivity and the employee's current salary and the range within the pay grade. There was no input from any J.A. Jones entity or from LGE&C regarding the pay raises for LGT employees for 2001. (Tr. 139-43, 247, 314-16).

8. Productivity at the Huntsville office was poor in 2000. Glazener was fired as the head of the Huntsville office of LGT in April 2001. (Tr. 72, 182). Rod Bridgeman became the office manager at the Huntsville office. (Tr. 324). Bridgeman was laid off when the Huntsville office closed in August 2001. Randy Enklebarger, the supervisor of the LGT office managers, was also laid off. (Tr. 325). Bowers resigned from LGT in 2001. (Tr. 78). Stallions lost her job with LGT during the 2001 reorganization. (Tr. 324).

9. In April 2001, Complainant received a 4.5% pay increase. This was the largest pay increase in the Huntsville office of LGT. Bowers recommended that Complainant receive an additional 3.5% increase. Bowers resigned from LGT shortly thereafter. (Tr. 73-78; CX. 1, att. p. 19). Employees other than Complainant were also recommended for larger pay increases. (Tr. 149). The salary range for Grade 14 at the Huntsville location was $47,846 to $79,744. (CX. 5). LGT salaries varied by geographic location, tenure with the company, professional licensing and prior experience. Complainant was the only Grade 14/15 lead designer or design specialist on LGT's payroll to receive a salary increase in 2001. (Tr. 255, 330-33). There is no evidence that anyone from LGE&C or any J.A. Jones company had any input or influence on Complainant's pay raise or promotion.

10. There were 19 Grade 14/15 civil/structural department lead designers or design specialists on the LGE&C payroll that received a salary increase in 2001. There was no evidence submitted as to the number that did not receive a pay increase. Of the nineteen who received salary increases, seven received a greater percent increase than Complainant and twelve received the same or a lesser increase. (CX. 3). Nobody within LGT had any input in the pay raises of the lead designers or design specialist at LGE&C. (Tr. 247; CX. 3, pp. 7-9).

11. Prior to 1993, Philip Holtzman was the parent company of LGE&C. Because of foreign ownership issues, in 1993 a separate corporation (LGT) with a separate board of directors was formed. This was required if the company was to do classified government work. The LGT board

of directors reported to government agencies. From 1993 until March 2001, LGE&C was a subsidiary of Philip Holtzman and LGT was a subsidiary of LGE&C. J.A. Jones was a separate subsidiary of Phillip Holtzman. Under J.A. Jones was J.A. Jones Services. J.A. Jones Services did classified work and was isolated from J.A. Jones. In March, 2001, Philip Holtzman was reorganized due to bankruptcy. J.A. Jones was made the parent of LGE&C. J.A. Jones Services was the parent of LGT. Because of the classified government work, J.A. Jones Services and LGT were separate, apart and autonomous from the parent company and J.A. Jones. (Tr. 137-39, 302-05; 354).

12. On March 9, 2002, the majority of the assets of LGT was sold to Professional Project Services, Inc. (Pro-2-Serve). LGT ceased to exist. There is no relationship between Pro-2-Serve and J.A. Jones. (Tr. 338; CX. 6).

13. Relocations within LGT are normally limited to managers and senior employees. (Tr. 323).

14. By letter dated July 16, 2001, Richard Pearson, Vice President of LGT, notified Complainant that due to a reduction in force within J.A. Jones Services Group, Complainant's last day of employment would be August 10, 2001. (RX. 1, p. 3).

15. Kevin McMahan was a human resource assistant at LGE&C from 1988 until 1993. From 1993, until March 2002, McMahan was a human resource assistant at LGT. McMahan first learned of Complainant's previous whistleblowing in July 2001. (Tr. 324; CX. 1, att. p. 34; RX. 3).

16. Complainant received all his paychecks for LGT. Complainant was not employed by any entity other than LGT from April 2000 to August 2001. (Tr. 328; RX. 1, pp. 25-50). While Complainant worked at LGE&C for a short period he was never employed by LGE&C. The situation was no different between LGT and LGE&C than any other corporation that LGT contracted with. (Tr. 203).

17. The decision to close the Huntsville office and reduce LGT staff was made because of lack of work. Prior to February 2001, LGT had approximately 120 employees. Between February and August 2001, LGT laid off approximately 45 employees. The Huntsville and Denver offices were closed. Tom Stricklin was the only Huntsville employee retained. He was transferred to the Augusta office of LGT. Stricklin was a business development manager. Curtis Robbins was the only Denver employee retained. He was transferred from the Denver office to Augusta. Robbins was a project manager for security systems projects. Complainant was not qualified for either of these positions. LGT has not rehired any of the Huntsville or Denver employees. (Tr. 318-22).

18. There is no evidence that any Respondent is a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954, an applicant for a license from the Commission or such an agreement State or a contractor or subcontractor of such a licensee or applicant.

19. There is scant evidence that any Respondent was a contractor or subcontractor of the Department of Energy. There is no evidence that any Respondent was indemnified by the Department of Energy under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. §§ 2210(d)).

20. Complainant never worked on any project for any Respondent that involved nuclear power or waste. (CX. 2, p. 1; CX. 3 p. 5,6).

21. I found the testimony of Glasener and McMahan to be credible.

DISCUSSION

Section 211 (formerly section 210) of the Energy Reorganization Act, 42 U.S.C. §§ 5851, encourages employees in the nuclear industry to report safety violations and provides a mechanism for protecting them against retaliation for doing so. *See English v. General Electric Co.*, 496 U.S. 72, 82 (1990). That section states:

> (a) Discrimination against employee.
>
> (1) No 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 (or any person acting pursuant to a request of the employee)--
>
> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. §§ 2011 et seq.);
>
> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
>
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
>
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

(2) For purposes of this section, the term "employer" includes–

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. §§ 2021);

(B) an applicant for a license from the Commission or such an agreement State;

(C) a contractor or subcontractor of such a licensee or applicant; and

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. §§ 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344 [Naval Nuclear Propulsion Program].

RESPONDENTS ARE NOT SECTION 5851 EMPLOYERS

Respondent argues that it is not an "employer" as defined by 42 U.S.C. § 5851, and therefore, is not subject to the ERA. Under 29 C.F.R. § 24.2(a), the complaining employee must establish that the alleged discriminating employer is an "employer" subject to the Acts. For the ERA to be applicable, it must be established that 1) the respondent is an "employer" and 2) there is a sufficient nexus of the complainant's protected activity and respondent's alleged adverse action to constitute a violation of the ERA. *McNeal v. Foley Co.*, 98-ERA-5 (ALJ July 7, 1998).

There is no evidence and it is not alleged that any Respondent is a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954, an applicant for a license from the Commission or such an agreement State or a contractor or subcontractor of such a licensee or applicant. While Complainant alleged that "J.A. Jones Services Group (Lockwood Greene Technologies) is, at least, a subcontractor of the U.S. Department of Energy" (CX.1), he has not produced any evidence of such a relationship. (Tr. 306, 138). McMahan testified that while LGT did work for the Department of Energy, LGT did not work in the nuclear power industry. (Tr. 368). There is no evidence that any Respondent was indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. §§ 2210(d)).

In *Adams v. Dole,* 927 F.2d 771 (4th Cir.), *cert. denied*, 502 U.S. 837 (1991), the United States Court of Appeals for the Fourth Circuit adopted the Secretary of Labor's interpretation of the definition of "employer". At the time *Adams v. Dole* was decided by the Fourth Circuit, 42 U.S.C. §§ 5851 provided in pertinent part: **(a) Discrimination against employee.** No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

In *Adams*, the petitioner was employed by B.F. Shaw Company which was under contract to operate the Department of Energy owned Savannah River Plant. The Secretary of Labor dismissed the complaint filed by Adams for lack of jurisdiction stating that the employee protection provisions of § 210 of the Energy Reorganization Act applied only to employees of Nuclear Regulatory Commission licensees, licensee applicants and their contractors. The Secretary stated that these provisions did not apply to employees of the Department of Energy contractors who operated facilities owned by the Department of Energy, noting that the Department of Energy had its own whistle-blower procedure. The Fourth Circuit discussed the matter at some length and affirmed the Secretary's interpretation that the "including" clause which follows the term "employer" at 42 U.S.C. § 5851 (a) is not meant to be illustrative, but rather definitional and concluded that Congress, by so defining "employer" intended to exclude all persons who do not fall within the specified categories from the application of the employee protection provisions, including employees of DOE contractors. *Adams*, 927 F.2d at 777.

In 1992, Congress amended 42 U.S.C. §5851. The amendment placed the definition of "employer" into four separate subsections. Added to the definition of "employer" at subsection 5851(a)(2) was: (D) a contractor or subcontractor of the Department of Energy that is *indemnified* by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)).

42 U.S.C. § 2210(d)(1)(A) provides as follows: (d) Indemnification of contractors by Department of Energy (1)(A). In addition to any other authority the Secretary of Energy may have, . . . the Secretary shall, until August 1, 2002, enter into agreements of indemnification under this section with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability and that are not subject to financial protection requirements under subsection (b) of this section or agreements of indemnification under subsection (c) or (k) of this section.

The Department of Energy Acquisition Regulation (DEAR) implementing Section 170(d) of the Atomic Energy Act defines "public liability" as: *Public liability* means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or precautionary evacuation), except: (1) Claims under State of Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (2) claims arising out of an act

of war; and (3) whatever used in subsections a., c., and k. of section 170 of the Atomic Energy Act of 1954, as amended, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. *Public liability* also includes damage to property of persons indemnified: Provided, that such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

In response to the Price Anderson Act, DOE drafted a Nuclear Hazard Indemnity Agreement mandating indemnification clauses in all DOE contracts involving the risk of public liability. *Department of Energy Acquisition Regulation* 952.250- 70(c)(1). In implementing the rule, which was subject to Notice and Comment per the Administrative Procedure Act, 5 U.S.C. 552 *et seq*, DOE wrote: "Generally, after the enactment of the PAAA, the indemnification applies mandatorily to DOE contractors and any other person who may be liable for public liability from a nuclear incident or precautionary evacuation arising out of contractual activities." *Acquisition Regulation: Nuclear Hazard Indemnity Clauses*, 56 Fed. Reg. 57824 (1991) (to be codified at 48 C.F.R. §§ 950, 952, 970).

I find that Complainant has failed to establish that any Respondent was a Department of Energy contractor or subcontractor at a Department of Energy nuclear facility. I further find that the Complainant has failed to show any relationship between any Respondent and the Department of Energy which might involve a risk of public liability. For these reasons I conclude that Complainant has not established that any Respondent is a covered employer under the Act.

LGT IS COMPLAINANT'S EMPLOYER

In order to prevail pursuant to the Act, Complainant must show that 1) Respondents were his employers; and 2) Respondent subjected him to adverse action with respect to his compensation, terms, conditions, or privileges of employment; and 3) that the alleged discrimination arose because he engaged in protected activity as defined by the Act. See generally *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). See also 42 U.S.C. § 5851(a)(1). See also *Saporito v. Florida Power & Light and Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, P.A.*, 94-ERA-35, (ARB, 7/19/96) (dismissing ERA complaint against an employer's law firm).

Complainant asserts that not only LGT, but all the J.A. Jones companies and LGE&C should be considered his employer. Complainant's only support for this assertion is that all the companies were under the umbrella of the parent company, J.A. Jones, Inc., and his unsupported assertion that J.A. Jones, Inc. has control of all the subsidiary companies, including the power to hire, promote, grant increases in salaries and fire or discipline employees of the subsidiaries. (Complainant's Brief, pp. 3-6).

A parent company acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment. For example, the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an "employer" for purposes of the whistleblower provisions. *See, e.g., Hill v. TVA and Ottney v. TVA (Hill and Ottney),* Case Nos. 87-ERA-23/24, Sec. Rem. Dec., May 24, 1989. The mere fact that one company is the parent of another company that employs a complainant does not make the parent an employer for purposes of the act. *See Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2 (ARB June 14, 1996). The issue of employment relationship necessarily depends on the specific facts and circumstances of the particular case. *Stephenson v. NASA*, 94-TSC-5 (ARB Feb. 13, 1997).

The facts and circumstances of this case do not support the assertions made by Complainant. Rather than showing that J.A. Jones, Inc. has control of all the subsidiary companies, including the power to hire, promote, grant increases in salaries and fire or discipline employees of the subsidiaries, the facts show that LGT was Complainant's sole employer. There is no evidence that anyone from LGE&C or any J.A. Jones company had any input or influence on Complainant's pay raise or promotion or that of any other LGT employee. The evidence shows the decision to hire Complainant was made internally by LGT and there is no indication that any hiring done by LGT was influenced in any way by any other J.A. Jones entity. No evidence has been presented that any other J.A. Jones entity took part in any disciplinary matters at LGT. While Complainant worked at LGE&C for a short period, he was never employed by LGE&C. The situation was no different between LGT and LGE&C than any other corporation with which LGT contracted.

I find that Complainant's employer was LGT.[2]

THE FAILURE TO PROMOTE

Complainant alleges Respondents failed to promote him because of his prior whistleblowing activities. However, the credible testimony of Glazener established that the decision to not promote Complainant was made before Complainant sent his missive disclosing his previous whistleblowing activity. The long standing policy was that no employee was considered for promotion until he had at least one year of employment. I believed Glazener's testimony that Complainant's previous whistleblowing played no part in the decision not to promote Complainant. Other than his own naked speculation, Complainant has produced no evidence even suggesting that the decision not to promote was motivated by Complainant's protected activity.

THE FAILURE TO GIVE A LARGER PAY INCREASE

[2] The Secretary has held that applicants for employment are covered employees. *Stultz v. Buckley Oil Co.*, 93-WPC-6 (Sec'y June 28, 1995). Accordingly, in relation to the allegations concerning failure to hire, all Respondents will be considered employers.

Complainant alleges that Respondents failed to give him the raise recommended by his boss because of his prior whistleblowing activities. Complainant seems to ignore the fact that 1) productivity for the Huntsville office had been poor the previous year; 2) the pool of money available for pay raises for the Huntsville office was therefore limited; 3) Complainant received the largest pay raise at the Huntsville office; 4) Complainant was the only Grade 14/15 lead designer or design specialist on LGT's payroll to receive a salary increase in 2001; and 5) while he was complaining about not getting a larger pay increase, others were losing their jobs. The amount of raises was dictated by the profitability of each LGT office and calculated using a set formula set out in a spreadsheet. Complainant has presented no evidence that his twenty year old protected activity involving another employer had even one iota of influence on the amount of pay increase he received. To the contrary, I find the weight of the evidence establishes that the Complainant's prior whistleblowing activities play no role whatsoever in the decision concerning his pay raise.[3]

THE DISCRIMINATORY/RETALIATORY LAYOFF

Complainant alleges he was given a discriminatory/retaliatory layoff because of his prior whistleblowing activities. I note that prior to making everyone aware that he was a whistleblower, Complainant suspected that he would be laid off. Other than his own spurious accusations, Complainant has presented no evidence that his whistleblowing had anything to do with the closing of the Huntsville office and the decision to layoff all the Huntsville employees, save Stricklin. Between February and August 2001, LGT laid off approximately 45 of its 120 employees. Glazener, Bridgeman, Bower, Enklebarger and Stallions were all no longer employed by LGT when Complainant was laid off. The Huntsville office was closed because of lack of work. The Denver office was also closed. Robbins was the only Denver employee to be transferred. Complainant was not qualified for either Robbins' or Stricklin's position. I find the overwhelming weight of the evidence establishes that the Huntsville office was closed and the Huntsville employees, including Complainant, were laid off because of a lack of work. Other than his own self-serving testimony, Complainant has presented no evidence that the decision to close the Huntsville office and lay off the Huntsville employees was motivated in any way by Complainant's protected activity.

THE FAILURE TO HIRE/REHIRE

In a case involving an alleged discriminatory failure to hire/rehire, a complainant must show that 1) he applied for a job; 2) he was qualified for a job; 3) for which the respondent was seeking

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[3] I further find that the decisions concerning promotions and pay increases were made entirely within LGT and that no one from LGE&C or any J.A. Jones company had any input or influence on Complainant's pay raise or promotion. I further find that the pay increases received by employees at LGE&C are not relevant as LGT promotions and pay increases were in no way connected with or influenced by promotions and pay increases at LGE&C. Even if I were to consider the pay increases at LGE&C, I note that while seven LGE&C employees received a greater percent increase than Complainant, twelve received the same or a lesser increase.

applicants; 4) despite his qualifications he was rejected; 5) that after the rejection, the position remained open; and 6) the respondent continued to seek applicants. *Samodurov v. General Physics Corporation*, Case No. 89-ERA-20 (Sec'y, Decision and Order, Nov. 16, 1993); *Hasan v. Florida Power and Light Co.*, 2000-ERA-12 (ARB May 17, 2001). A complainant who does nothing more than submit his resume to respondents and then alleges that they have discriminated against him because he remains unemployed has not supported a claim of discrimination under the ERA. *Hasan v. Commonwealth Edison Co.*, 2000-ERA-8 (ARB Apr. 23, 2001). The same standards apply in failure to hire and failure to rehire cases. *Tracanna v. Arctic Slope Inspection Service*, 1997-WPC-1 (ARB July 31, 2001).

As relates to LGT specifically, LGT was undergoing significant downsizing during 2001. The LGT workforce was reduced substantially. Of all the LGT employees subject to lay off, only two were transferred and kept on the payroll. Complainant was not qualified for either of these positions. No employee laid off by LGT during the 2001 downsizing has been rehired by LGT.

As to all the Respondents, Complainant has failed to show the existence of any jobs or their availability or that he applied for any specific job with any Respondent. As in his prior case against Commonwealth Edison Co., Complainant did nothing more than submit a resume to Respondents and then allege that he has been discriminated against because he remains unemployed. The same result was reached in *Hasan v. U.S. Department of Labor*, 10th Cir., No. 01-9521, 7/21/01, where the Court upheld dismissal of the case as Hasan failed to show that a position for which he was qualified was available and that the employer either filled the position or continued to search for applicants after refusing to hire him. Hasan's mere conclusion that such a large company always has positions open was deemed insufficient to state a claim. The same rational applies to the instant case.

In addition, Complainant has failed to produce any evidence that any personnel decisions made by any of the Respondents were motivated in any way by Complainant's protected activity.

RECOMMENDED DECISION AND ORDER

It is the recommendation of the Court to the Secretary of Labor:

1. That the complaint against Respondents be dismissed.

LARRY W. PRICE
Administrative Law Judge

LWP:bab
NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative

Law Judge. *See* 29 C.F.R. §§§§ 24.7(d) and 24.8.