



**In the Matter of:**

**MARK J. KELLY,**

**ARB CASE NO. 02-075**

**COMPLAINANT,**

**ALJ CASE NO. 2000-ERA-35**

**v.**

**DATE: March 31, 2004**

**LAMBDA RESEARCH, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Mark J. Kelly, *pro se*, Dillsboro, Indiana**

***For the Respondent:***

**Robert A. Dimling, Esq., Mekesha H. Montgomery, Esq.  
Frost Brown Todd, LLC, Cincinnati, Ohio**

**FINAL DECISION AND ORDER**

Mark J. Kelly filed a complaint against Lambda Research, Inc. (Lambda), under the employee protection provisions of the Energy Reorganization Act (ERA or Act), 42 U.S.C.A. § 5851 (West 1995)<sup>1</sup> alleging, inter alia, that Lambda constructively terminated his employment in retaliation for his having raised safety concerns. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R.

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<sup>1</sup> The statute 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 . . . [notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), 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].”

D. & O.) concluding that Kelly had failed to establish that Lambda retaliated against him, and Kelly appealed.

## **FACTS**

Lambda employed Mark Kelly as a lab technician beginning in June 1998 and as a lab supervisor beginning in December 1998. At all relevant times, Lambda, a research laboratory specializing in x-ray diffraction, provided materials testing services to governmental and industrial clients. Paul Prevey founded Lambda in 1997 and was its Director of Research, President, and Chairman of the Board.

Whenever a problem occurred with the testing of a client's materials, Lambda lab employees prepared a Quality Assurance Report (QAR), also referred to as a QA incident report. The QAR was an internal document kept permanently in Lambda's files, and while it was not presented to clients, outside parties could review it during any audit of the company's facilities. The QAR identified the nature and cause of the testing problem and contained a recommended solution.

On July 16, 1999, Kelly prepared a QAR addressing a problem with the testing of zirconium tubes for Lambda's client, GE Nuclear. GE Nuclear had already been informed of the testing problem and had been satisfied with Lambda's retesting of the materials. In the QAR, however, Kelly had recommended that GE Nuclear be further notified that past results from Lambda's tests may have been distorted, and that Lambda's procedures for handling these types of samples be modified. Kelly submitted the QAR to Paul Prevey for approval and signature.

Prevey returned this QAR to Kelly in August 1999. Prevey instructed Kelly to omit the noted recommendations because he did not want the procedures changed or the client further notified. Prevey pointed out to Kelly that the recommendation to change the procedure was not necessary because the testing error had occurred, not from an incorrect procedure, but because the procedure in the manual had not been followed. Prevey also told Kelly that the client needed no further notice regarding past test results because, had there been sample problems in the past, they would have been raised with the client at the time they happened. Thus, Prevey told Kelly to revise the QAR according to these instructions. But Kelly returned the draft QAR to Prevey in September 1999 without making the changes that Prevey had requested, that is, without removing the recommendations that Prevey had wanted omitted. After Kelly refused to make the changes to the QAR, Prevey reprimanded him, instructed him to stop wasting his time on the QAR, and told him not to speak to other lab personnel concerning it. Prevey also told Kelly that, if either of his instructions were ignored, he would be fired. Kelly resigned on February 25, 2000, later alleging that, because of this incident and other acts of discrimination, he had been constructively discharged.

## JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has authority to review an ALJ's recommended decision in cases arising under the ERA. *See* 29 C.F.R. § 24.8 (2000). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating the ARB authority to review cases arising under the environmental whistleblower statutes).

Under the Administrative Procedure Act, the ARB, as the designee of the Secretary, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. *See* 5 U.S.C.A. § 557(b) (West 1996). The ARB engages in de novo review of the ALJ's recommended decision. *See Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 4 (ARB Sept. 30, 2003).

## DISCUSSION

To succeed in an ERA case, the complainant must prove by a preponderance of evidence that he engaged in protected activity, that the employer knew about his activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action the employer took. If the complainant succeeds in making this showing, the employer may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *See Kester*, slip op. at 8.

The ALJ found that Kelly engaged in protected activity, known to Lambda, when he submitted the QAR in July 1999. R. D. & O. at 19-21. Furthermore, he found that Prevey's threat to fire Kelly was an adverse action. *Id.* at 30. Even so, the ALJ determined that Kelly did not demonstrate by a preponderance of evidence that submitting the QAR contributed to his termination of employment from Lambda. R. D. & O. at 31.

We have carefully reviewed the record and the R. D. & O. The ALJ's recitation of the facts is accurate, thorough, and fair, and the record supports his findings of fact. Furthermore, the ALJ has applied appropriate law to these findings. Accordingly, we adopt and append the ALJ's recommended decision and **DISMISS** the case.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**