



In the Matter of:

SYED M. A. HASAN,

ARB CASE NO. 03-030

COMPLAINANT,

ALJ CASE NO. 2000-ERA-7

v.

DATE: July 30, 2004

SARGENT & LUNDY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Syed M. A. Hasan, *pro se*, Madison, Alabama

For the Respondent:

Harry Sangerman, Esq., *McDermott, Will & Emory, P.C.*, Chicago, Illinois

FINAL DECISION AND ORDER

This case arose when Complainant, Syed M. A. Hasan, filed a complaint under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. §5851 (b) (West 2004), alleging that the Respondent, Sargent & Lundy, refused to hire him in retaliation for engaging in protected activity. Hasan worked as a contractor at the La Salle Nuclear Power Plant.¹ Commonwealth Edison, the plant's operator, had hired Hasan to assist with bringing the plant back on line. Commonwealth Edison assigned Hasan to review calculations performed by Sargent & Lundy, another contractor assisting with the project. Hasan discovered some safety-related concerns with one of

¹ Our summary of the facts is based upon the ALJ's complete findings of fact contained in his December 5, 2002 decision, an electronic copy of which is located at <http://www.oalj.dol.gov/public/wblower/decsn/00era07c.htm>.

Sargent & Lundy's calculations and reported this to Commonwealth Edison, the Respondent and the Nuclear Regulatory Commission. Hasan's temporary contract expired in March of 1999 and he thereafter applied for jobs with the Respondent. The Respondent refused to hire him, and, in December 1999, decided that it would never hire him.²

The Department of Labor's Occupational Safety and Health Administration investigated Hasan's complaint and found it lacked merit. Hasan requested a formal hearing. Prior to the hearing, the Administrative Law Judge determined, sua sponte, that Hasan had failed to establish the elements of his prima facie case because he had failed to submit evidence that demonstrated that any employee with responsibility for, or having input in, the Respondent's hiring practices had any knowledge of Hasan's protected activity. The ALJ issued a Recommended Decision and Order Dismissing the Claim. Hasan appealed to the Administrative Review Board.

Upon review the Board determined that the Respondent had conceded, in its response to Hasan's interrogatories, that an individual familiar with Hasan's safety concerns had participated in the decision not to hire him. The Board therefore remanded the case to the ALJ. *Hasan v. Sargent and Lundy*, ARB No. 01-001, ALJ No. 2000-ERA-7, slip op. at 4 (ARB Apr. 30, 2001).

After conducting a hearing, the ALJ recommended that Hasan's complaint be dismissed because he had not sustained his burden of proving that the Respondent failed to hire him because of his protected activity. Hasan appealed the ALJ's December 5, 2002 Recommended Decision and Order to this Board.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's recommended decision pursuant to 29 C.F.R. § 24.8 (2003) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (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 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 Board 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).

² At the formal hearing, the parties agreed to enlarge the complaint to include the Respondent's December 1999 decision to never hire the Complainant. Transcript of May 16, 2002 Hearing at 139-40.

DISCUSSION

To prevail under the ERA, a complainant must prove by a preponderance of the evidence that he was an employee who engaged in protected activity, 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 the employer took. 42 U.S.C.A. § 5851(b)(3)(C); *Kester*, slip op. at 5-8; *Paynes v. Gulf States Utilities*, ARB No. 98-045, ALJ No. 93-ERA-47, slip op. at 4-5 (ARB Aug. 31, 1999). 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].” 42 U.S.C.A. § 5851(b)(3)(D); *Kester*, slip op. at 7. Where a complainant alleges that the adverse action was the prospective employer’s refusal to hire him, the complainant must also establish:

- 1) that he applied and was qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected and 3) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Samodurov v. Gen. Physics Corp., Case No. 89-ERA-20, slip op. at 9-10 (Sec’y Nov. 16, 1993) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

The Board finds that the ALJ’s Recommended Decision and Order recites the relevant facts underlying this dispute. He thoroughly analyzed all of the evidence and correctly applied the relevant law.³ We have examined the record and find that it fully supports the ALJ’s findings. Hasan engaged in protected activity when he voiced safety concerns to his employer at the time, Commonwealth Edison, to the Respondent, Sargent & Lundy, and to the Nuclear Regulatory Commission. Sargent & Lundy was aware of this protected activity and then rejected Hasan’s application for employment. Sargent & Lundy continued seeking applicants with similar qualifications for the open positions. However, Hasan ultimately failed to demonstrate that he was qualified for the available positions.

³ We note however that as we stated in *Williams v. Baltimore City Pub. Sch. Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 3 n.7 (ARB May 30, 2003), “[A]fter a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity.” *See also Kester*, slip op. at 6 n.12.

Therefore, Sargent & Lundy had legitimate reasons for refusing to hire Hasan and these reasons were not pretext. We attach and incorporate the ALJ's Recommended Decision and Order.

Accordingly, we **DENY** the complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge