In the Matter of:

HUGH K. TURPIN, **ARB CASE NO. 02-101**

COMPLAINANT, **ALJ CASE NO. 01-ERA-37**

v.

LOCKHEED MARTIN CORP., LOCKHEED MARTIN ENERGY SYSTEMS, INC., AND BWXT Y-12, L.L.C.,

RESPONDENT.

and

HUGH K. TURPIN, **ALJ CASE NO. 02-ERA-22**

COMPLAINANT, **DATE: January 29, 2004**

v.

BWXT Y-12, L.L.C.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Esq., *St. Augustine, Florida*

For the Respondents:
Kenneth M. Brown, Esq., *Oak Ridge, Tennessee*

Edward G. Phillips, Esq., John C. Burgin, Esq., *Kramer, Rayson, Leake, Rodgers & Morgan, LLP, Knoxville, Tennessee*

FINAL DECISION AND ORDER

This case concerns the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C.A. § 5851 (West 1995). The Complainant, Hugh K. Turpin, filed two whistleblower complaints alleging that the Respondents, Lockheed Martin Energy Systems (LMES) and BWXT Y-12, L.L.C. (BWXT), violated the ERA.[1] A Department of Labor Administrative Law Judge (ALJ) recommended dismissal of the complaints. For the following reasons we affirm the ruling of the ALJ and dismiss the complaints.

BACKGROUND

The record fully supports the ALJ's fair and complete Factual Summary. We summarize.

Turpin began working at the Y-12 National Security Complex (Y-12), a nuclear weapons facility in Oak Ridge, Tennessee, in 1969. He became a radiological control technician at Y-12 in 1986. His duties included checking his co-worker's clothing for radiation. To carry out this task, he used radiation-measuring devices that had calibration expiration dates.

Between March 2 and March 15, 2000, Turpin violated safety and health standards when he used a radiation-measuring device with a calibration expiration date of March 1, 2000. Turpin was aware of this expiration date and the company policy prohibiting the use of equipment with expired calibration dates. As a result, on March 28, 2000, Turpin's supervisors placed him on "decision-making leave" (DML), which consisted of a single day off with pay followed by a probationary period during which Turpin's performance would be monitored. Management also required Turpin to meet with a staff clinical psychologist.

Both before and after Turpin's probation, he complained to LMES management about flaws in its radiation equipment recall notification system. He also filed radiological awareness reports apprising management of problems in the use of radiological controls. However, during his probation Turpin continued to make errors that jeopardized safety at Y-12. Thus, Turpin's supervisors and the staff psychologist referred him to a psychologist in private practice who diagnosed a brain dysfunction.

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[1] 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.A. § 2011 *et seq.* (West 2003)), 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]."

The psychologist recommended that Turpin attend weekly psychotherapy sessions to deal with this disorder. Thereafter, on September 16, 2000, Turpin filed a complaint with the Occupational Safety and Health Administration alleging that LMES violated the ERA when it placed him on DML and subjected him to a hostile work environment.

Turpin's illness led his supervisors to conclude that he was unable to work as a radiological control technician. Therefore, on October 18, 2000, they placed him on short-term disability leave (STDL), providing him with full pay. Turpin did not seek the recommended weekly psychotherapy while he was on STDL.

At the end of the STDL period, Turpin met with a third psychologist who concluded that Turpin could return to work immediately after beginning a course of weekly psychotherapy. However, Turpin again did not seek psychotherapy and was thereafter placed on long-term disability leave (LTDL) at sixty percent of his regular salary. On March 25, 2002, Turpin filed a second complaint alleging that BWXT, LMES' successor at Y-12, violated the ERA when it refused to allow him to return to work.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under the ERA. *See* 29 C.F.R. § 24.8 (2003). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

DISCUSSION

1. Merits

To prevail, Turpin must prove by a preponderance of the evidence that he engaged in protected activity under the ERA, that the Respondents knew about this activity and took adverse action against him, and that his protected activity contributed to the adverse action. *See Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 7-8 (ARB Sept. 30, 2003).

Turpin did not meet this burden of proof. He did not produce direct evidence that LMES or BWXT retaliated against him for making complaints about the recall

notification system or the use of radiological controls. And, as the ALJ found, Turpin did not demonstrate that the Respondents' reasons for placing him on DML, STDL, LTDL and refusing his return to Y-12 were pretextual. ALJ's Recommended Decision and Order at 7. The record fully supports this finding. Therefore, Turpin cannot prevail.

2. The Complainant's Additional Arguments

Turpin makes a general allegation that the ALJ erred by excluding evidence "by and about" Sherrie Graham Farver, a former LMES employee. But he does not specify the evidence the ALJ erroneously excluded. He merely complains that the ALJ "kept it [Farver's testimony] on a short leash, marginalizing both Mr. Turpin and Ms. Farver while ignoring the Board's holdings in *Seater, Timmons, Stephenson,* et al." Complainant's Brief at 6, 8. At the hearing Turpin's counsel made an offer of proof that Farver would "testify as to her treatment by the Respondents at Y-12, including her termination, and the behavior of Mr. – or Dr. Barker toward employees engaged in protected activity and his reputation for truthfulness and veracity and his behavior since he became a manager at Y-12." Transcript (Tr.) at 40.

The ALJ, concerned that some of Farver's testimony would not be relevant, was initially reluctant to permit Farver to testify, but Turpin's counsel persuaded him to do so. And although the ALJ ruled that Farver could testify "briefly and narrowly only with regard to Dr. Barker's treatment of her," Tr. at 48-49, he allowed Farver to testify about how LMES had treated her and her dealings with Barker. Specifically Farver testified about what Barker said to her, how he disparaged others, how he threatened her, how LMES ignored her medical conditions, how she was demoted and her employment terminated, and how Barker exhibited no caring or sympathy for her. Tr. at 50-66. Thus, the record clearly demonstrates that, contrary to Turpin's argument, the ALJ did not exclude evidence Turpin sought to introduce. Therefore, we find no error.

Turpin also contends that the psychological exams, leave periods, increased scrutiny, and seasonal work in a warehouse constituted a hostile work environment. Complainant's Brief at 8-9. The ERA has been construed to protect employees from a hostile work environment. *English v. Whitfield,* 858 F.2d 957, 963-64 (4th Cir. 1988); *Smith v. Esicorp, Inc.* No. 93-ERA-00016, slip op. at 23-24 (Sec'y Mar. 13, 1996); *Marien v. Northeast Nuclear Energy Co.,* No. 93-ERA-00049, slip op. at 7 (Sec'y Sept. 18, 1995). To establish liability for a hostile work environment, an employee must prove by a preponderance of the evidence (1) that he engaged in protected activity, (2) that he suffered intentional harassment related to that activity, (3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment, and (4) that the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9, slip op. at 16-17, 21-22. However, we find no record evidence that Respondents subjected Turpin to a hostile work environment because of his safety complaints. Therefore, Turpin's hostile work environment claim fails.

In addition, Turpin argues that the ALJ erred by "refusing to disqualify the joint defense by Respondents' counsel, failing to enforce the law." Complainant's Brief at 22. Since we find that the ALJ properly disposed of this same contention prior to the hearing, this argument has no merit. *See* November 29, 2001 Order Denying Complainant's Motion to Disqualify Respondents' Counsel and Granting Respondents' Motion to Compel Complainant's Deposition ("Complainant has not shown how he will be prejudiced if both Respondents have the same counsel, and I can find no justification for disqualifying counsel from representing two defendants in a proceeding such as the present case.").

Finally, Turpin contends that the ALJ erred by "defer[ing] scheduling of the trial date to Respondents, showing bias, prejudice and disrespect for Mr. Turpin's right to insist upon a speedy trial." Complainant's Brief at 29. The record does not support this argument. On November 9, 2001, the ALJ conducted a telephonic conference to schedule the hearing. Because of Respondents' counsel's schedule, the ALJ set the hearing for March 2002. Turpin has provided no reason why the ALJ's decision to schedule the hearing for March 2002 constituted error. Therefore, we reject this argument.

CONCLUSION

Accordingly, because Turpin has not proven by a preponderance of the evidence that Respondents retaliated against him for complaining about the recall notification system or the use of radiological controls, his complaints are **DENIED**. Moreover, his additional arguments have no merit.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge