



**In the Matter of:**

**WILLIAM D. HOOKER,**

**ARB CASE NO. 03-036**

**COMPLAINANT,**

**ALJ CASE NO. 01-ERA-16**

**v.**

**DATE: August 26, 2004**

**WESTINGHOUSE SAVANNAH RIVER,  
COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Berta E. (Robbie) Nichols, Esq., *Hilton Head, South Carolina***

*For the Respondent:*

**Michael L. Wamstead, Esq., *Westinghouse Savannah River Company, Aiken, South Carolina***

**Charles F. Thompson, Jr., Esq., *Malone & Thompson, LLC, Columbia, South Carolina***

**FINAL DECISION AND ORDER OF REMAND**

William Hooker filed a complaint against Westinghouse Savannah River Company (WSRC) under the employee protection provisions of the Energy Reorganization Act (ERA or Act) alleging that WSRC constructively discharged him, blacklisted him, and refused to rehire him because he engaged in activity the ERA

protects.<sup>1</sup> A United States Department of Labor Administrative Law Judge (ALJ) granted WSRC's motions for summary judgment and recommended that we dismiss Hooker's complaint. Hooker appealed. We reverse in part and remand to the ALJ for further proceedings. We affirm the remainder of the ALJ's recommendation.

## BACKGROUND

WSRC manages the United States Department of Energy's Savannah River Site (SRS), located near Aiken, South Carolina. SRS produces tritium and plutonium used in nuclear weapons.<sup>2</sup> WSRC employed Hooker as a Senior Work Control Planner responsible for mechanical planning and maintenance work.<sup>3</sup>

In addition to working for WSRC, Hooker owned GA Bowhunter Supply Co. This company contracted with the United States Forest Service (USFS) to trap beavers and feral hogs that created nuisances on the Savannah River Site. Hooker and his GA Bowhunter employees had performed these services since 1992. But in early 1999, Hooker became concerned that hazardous substances were in the areas where he and his men were trapping, and he complained about this to USFS.<sup>4</sup> Then, in June 1999, USFS informed Hooker that it would not renew the hog contract after October 1, 1999, and in November it informed Hooker that his beaver contract would not be renewed in 2000.<sup>5</sup>

After his USFS contracts ended, Hooker wrote a letter to the Centers for Disease Control and Prevention (CDC). The CDC is a division of the United States Department of Health and Human Services. In this letter, dated January 6, 2000, Hooker expresses concern that the streams where he and his GA Bowhunter employees had trapped the beavers and hogs contained

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<sup>1</sup> The statute provides, in pertinent part, that “[n]o employer may discharge 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.* (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].” 42 U.S.C.A. § 5851(a)(1) (West 1995).

<sup>2</sup> See [www.sro.srs.gov](http://www.sro.srs.gov).

<sup>3</sup> Deposition of William D. Hooker, June 8, 2001 (Depo.) at 12, 13, 14, 17.

<sup>4</sup> Depo. at 30-35.

<sup>5</sup> WSRC's July 2, 2001 Motion for Summary Judgment, Tab 9, Tab 5 at 13.

“hazardous chemicals,” “dumped/released” from SRS, that may have settled into the mud or sediment. Since he and the men had worked in the streams and the mud but had not worn protective equipment, Hooker was concerned that they had been exposed to the chemicals. He wanted to know what chemicals may have been “dumped/released” into the area where the men had worked and, in short, what the health hazards were. Hooker asserts that USFS should be liable for any damages because it neglected “to contact the proper departments at SRS prior to letting us work these . . . sites for the last 7 years.”<sup>6</sup>

Hooker did not want to involve WSRC in his concerns about the contamination. But after complaining about “sores” on his back as a result of the exposure to the chemicals, he showed the CDC letter to his supervisor, Kevin Bumpus, on January 12, 2000, in order to obtain permission to see the company medical staff. Bumpus then made higher management aware of the letter.<sup>7</sup> Meanwhile, CDC had referred Hooker’s letter to the National Institute for Occupational Safety and Health (NIOSH). NIOSH is part of the Department of Health and Human Services. It is a research agency established to help assure safe and healthful working conditions.<sup>8</sup> NIOSH investigated Hooker’s concerns and then visited SRS in March 2000. NIOSH called a meeting with Hooker and WSRC, USFS, and Department of Energy representatives who presented information about Hooker’s concerns. The conduct of the various representatives at this meeting upset Hooker and, the next day, March 23rd, he asked Bumpus for permission to take March 24th off. Bumpus, according to Hooker, refused because Hooker had not made his request at least 24 hours in advance, as company policy required. Hooker walked off the job on March 24 and resigned.<sup>9</sup>

Hooker filed a whistleblower complaint against WSRC on September 2, 2000. He claims that his resignation was due to “intimidation and discrimination by WSRC Management.” Among the examples of the way WSRC treated him, Hooker alleges that supervisor Bumpus required him to do electrical work for which he had no background, and that Bumpus called him a “stupid Son of Bitch” and unfairly refused to give him a day off on March 24th. Hooker also alleges that WSRC unjustifiably refused to give him a raise, denied him retirement benefits, did not protect him from contamination while he worked for USFS, and “blackballed” him.<sup>10</sup>

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<sup>6</sup> *Id.*, Tab 2.

<sup>7</sup> Depo. at 76-78.

<sup>8</sup> See 29 U.S.C.A. § 671 (West 1999); [www.cdc.gov/niosh](http://www.cdc.gov/niosh)

<sup>9</sup> Depo. at 101-123.

<sup>10</sup> See Hooker’s September 7, 2000 letter to the United States Department of Labor, OSHA. Motion for Summary Judgment, Tab 3. Persons alleging violations of the ERA whistleblower protections file written complaints with the United States Department of Labor’s Occupational Safety and Health Administration (OSHA). See 29 C.F.R. § 24.3. OSHA then investigates the complaint, determines whether the alleged violation occurred,

Continued . . .

After OSHA investigated Hooker's complaint and found no evidence that WSRC discriminated against him because of the letter he sent to CDC, a Department of Labor ALJ scheduled a hearing to begin on July 24, 2001.<sup>11</sup> WSRC then deposed Hooker and, on July 2, 2001, timely filed a Motion for Summary Judgment.<sup>12</sup> On August 3rd, Hooker, who was not represented by counsel until appearing before us, filed a timely written response to WSRC's motion. He also requested additional time to hire an attorney and to further answer WSRC's motion. The ALJ granted Hooker's requests and cancelled the scheduled hearing date.<sup>13</sup> Hooker, however, did not obtain an attorney and did not file a further response to WSRC's motion for summary decision. On February 4, 2002, the ALJ granted summary judgment to WSRC on two of Hooker's claims. On December 2, 2002, after a hearing in April, he granted summary judgment to WSRC on Hooker's remaining claim and recommended that we dismiss the complaint. Hooker appealed.

### 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 employee protection provisions of the ERA.<sup>14</sup> The ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the ERA. The ARB engages in de novo review of the ALJ's recommended decision.<sup>15</sup>

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and notifies the parties of its findings and conclusions. Either party may then request that a Department of Labor Administrative Law Judge hear the case. *See* 29 C.F.R. §§ 24.4, 24.5.

<sup>11</sup> May 8, 2001 Notice of Hearing and Pre-Hearing Order.

<sup>12</sup> The applicable rules of practice and procedure label motions for summary judgment "Motions for Summary Decision." *See* 29 C.F.R. §§ 18.40, 18.41.

<sup>13</sup> August 9, 2001 Order Granting Extension of Time.

<sup>14</sup> *See* 29 C.F.R. § 24.8 (2001); *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)).

<sup>15</sup> *See* Administrative Procedure Act, 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, 1571-72 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

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.<sup>16</sup> The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts.<sup>17</sup> Thus, pursuant to 29 C.F.R. § 18.40(d), 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." A "material fact" is one whose existence affects the outcome of the case.<sup>18</sup> And a "genuine issue" exists when the nonmoving party produces sufficient evidence of a material fact that a factfinder is required to resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence.<sup>19</sup>

Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.<sup>20</sup> The non-moving party may not rest upon mere allegations, speculation, or denials of his pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof.<sup>21</sup> If the non-moving party fails to sufficiently show an element essential to his case, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."<sup>22</sup>

Accordingly, the Board will grant summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without

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<sup>16</sup> *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB March 25, 2003).

<sup>17</sup> *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001).

<sup>18</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>19</sup> *Id.* at 249, citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-290 (1968).

<sup>20</sup> *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

<sup>21</sup> *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e).

<sup>22</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact.<sup>23</sup>

## DISCUSSION

### *The Legal Standard*

To prevail on his ERA whistleblower complaint, Hooker must prove four essential elements: that he engaged in ERA protected activity, that WSRC knew about that activity, that thereafter WSRC took an unfavorable personnel action (“adverse action”) against him, and that the protected activity contributed to the adverse action.<sup>24</sup>

The parties agree that Hooker engaged in ERA-protected activity and that WSRC knew about it. Hooker’s January 6, 2000 letter to the CDC expressing concern about contamination in the streams and mud where he and his GA Bowhunter employees had worked is action to carry out the purposes of the ERA and thus is protected activity.<sup>25</sup> WSRC concedes that the CDC letter is protected activity, and the ALJ therefore found it to be protected.<sup>26</sup> Hooker seems to contend on appeal that he also complained to WSRC about “pond contamination” before he wrote to CDC.<sup>27</sup> We find, however, that the record does not support this argument. And since the parties agree that Hooker gave supervisor Bumpus the letter and that Bumpus later reported Hooker’s concerns to upper management, WSRC had knowledge of the protected activity.<sup>28</sup>

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<sup>23</sup> See *Johnsen v. Houston Nana, Inc., JV*, ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003) (“[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.”) (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999).

<sup>24</sup> See *Carrol v. United States Dep’t of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Darty v. Zack Co. of Chicago*, 82-ERA-2, slip op. at 5 (Sec’y Apr. 25, 1983).

<sup>25</sup> 42 U.S.C.A. § 5851(a)(1)(F).

<sup>26</sup> Motion for Summary Judgment at 13; Order Granting In Part Respondent’s Motion for Summary Judgment at 4.

<sup>27</sup> Complainant’s Initial Brief at 11.

<sup>28</sup> Depo. at 76; Motion for Summary Judgment at 6.

In its motion for summary judgment, WSRC contends that Hooker cannot demonstrate that it took adverse action against him. To withstand summary judgment, Hooker needs only to present evidence sufficient to show that there is a genuine issue of fact as to whether WSRC took adverse action. He does not have to show adverse action by a preponderance of evidence at this stage of whistleblower litigation.<sup>29</sup> He alleges that WSRC took adverse action when it constructively discharged him, blacklisted him, and refused to rehire him.

### *Constructive Discharge*

The ERA prohibits employers from discharging or otherwise discriminating against employees who engage in certain protected activities.<sup>30</sup> Here, of course, WSRC did not directly discharge Hooker. Instead, according to Hooker, he “left the Savannah River Site on [March 24, 2000], turning in his keys at the gate and feeling he had no choice but to leave.”<sup>31</sup> Thus, says Hooker, WSRC constructively discharged him.

In *Martin v. Department of Army*, we held that to prevail on a constructive discharge claim, the complainant must prove that working conditions were so difficult or unpleasant that a reasonable person in the employee’s shoes would have found continued employment intolerable and would have been compelled to resign.<sup>32</sup> *Martin*, like this case, arose in the Fourth Circuit which requires an employee alleging constructive discharge to prove that the employer “intentionally render[ed] an employee’s working conditions intolerable, thus forcing the employee to quit.”<sup>33</sup> Intolerable working conditions must be sufficiently severe or pervasive that a reasonable person would find them intolerable.<sup>34</sup>

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<sup>29</sup> See *Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at n.7 (ARB May 30, 2003).

<sup>30</sup> See *supra* note 1.

<sup>31</sup> Complainant’s Initial Brief at 6.

<sup>32</sup> ARB No. 96-113, ALJ No. 93-SDW-1, slip op. at 7 (ARB July 30, 1999), citing *Bristow v. Daily Press*, 770 F.2d 1252, 1255 (4th Cir. 1985).

<sup>33</sup> *Id.*, citing *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1353-1357 (4th Cir. 1995).

<sup>34</sup> *Martin*, slip op. at 8, citing *Bristow*, 770 F.2d at 1255.

### *Blacklisting*

In his September 7, 2000 whistleblower complaint, Hooker alleges that WSRC “blackballed” him.<sup>35</sup> Like the ALJ, we take Hooker’s allegation of “blackballing” to be a claim that WSRC “blacklisted” him.<sup>36</sup> “Blacklisting occurs when an individual or group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment.”<sup>37</sup> Hooker must show that a specific act of blacklisting occurred. Furthermore, a whistleblower’s subjective feeling that an employer blacklisted him is insufficient to establish blacklisting.<sup>38</sup>

The ALJ granted summary judgment to WSRC because Hooker did not produce sufficient evidence that WSRC constructively discharged or blacklisted him. But since the ALJ committed a procedural error, we will not review whether he correctly determined that WSRC is entitled to summary judgment on Hooker’s constructive discharge and blacklisting claims.

In *Roseboro v. Garrison*, the Fourth Circuit Court of Appeals held that before entering summary judgment against a pro se litigant, the district court must advise the litigant “of his right to file counter-affidavits or other responsive material and [alert the litigant] to the fact that his failure to so respond might result in the entry of summary judgment against him.”<sup>39</sup> The court cited with approval the District of Columbia Circuit’s holding in *Hudson v. Hardy*:

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<sup>35</sup> Motion for Summary Judgment, Tab 3 at 0003 (“I know I have be black ball [sic] by USFS (SRI), WSRC, and DOE for standing up for the employee’s [sic] that work for Ga. Bowhunter’s at the SRS.”).

<sup>36</sup> In its motion for summary judgment, WSRC did not specifically address Hooker’s rather vague “black ball” claim. WSRC, however, did request summary judgment on “all claims.” The ALJ read Hooker’s mention of “black ball” as an allegation of blacklisting and also read WSRC’s motion as seeking summary judgment on “the claim of blacklisting.” February 4, 2002 Order at 16.

<sup>37</sup> *Pickett v. Tennessee Valley Auth.*, ARB Nos. 00-56, 00-59, ALJ No. 01-CAA-18, slip op. at 6 (ARB Nov. 28, 2003) (citations omitted).

<sup>38</sup> *Id.*, slip op. at 7.

<sup>39</sup> 528 F.2d 309, 310 (4th Cir. 1975).

We hold that before entering summary judgment against appellant, the District Court, as a bare minimum, should have provided him with fair notice of the requirements of the summary judgment rule. We stress the need for a form of notice sufficiently understandable to one in appellant's circumstances fairly to apprise him of what is required.<sup>40</sup>

Though *Roseboro* involved a pro se prisoner facing summary judgment, we note that the court there, and in later cases, has not held that the required notice applies only to pro se prisoners.<sup>41</sup>

The ALJ certainly advised Hooker that he needed to file a timely response to WSRC's July 2, 2001 motion for summary judgment. In fact, he advised Hooker of this necessity twice and twice extended the time for Hooker to respond.<sup>42</sup> Nevertheless, Hooker was pro se and the ALJ did not notify him pursuant to *Roseboro*. Therefore, because this case arises in the Fourth Circuit, we hold that the ALJ erred in granting summary judgment on the constructive discharge and blacklisting claims because he failed to notify Hooker that he had a right to file affidavits or "other responsive materials" and did not warn him that failing to respond could mean that his case would be over.

#### *Refusal to Rehire*

The ALJ determined that Hooker also alleged that WSRC had refused to rehire him, another adverse action. Though Hooker had not asserted this claim in his discrimination complaint, he testified in deposition that, in October 2000, he went to a South Carolina state employment office and applied for an estimator job opening up at WSRC. He said that he gave the state employment officer the application (and apparently his resume) and asked that it be stamped and forwarded to WSRC. He testified that he was qualified for the position. Furthermore, he later called WSRC,

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<sup>40</sup> 412 F.2d 1091, 1094 (1968) cited in *Roseboro*, 528 F.2d at 310.

<sup>41</sup> See *id.* ("Assuredly, a pro se plaintiff is entitled to such a reasonable safeguard when confronted with the possibility of summary disposition of his case."); *Davis v. Zahradnick*, 600 F.2d 458, 460 (4th Cir. 1979) (also involving a pro se prisoner but applying *Roseboro* notice to "pro se plaintiff" and "pro se litigant"); *Hummer v. Dalton*, 657 F.2d 621, 624 (4th Cir. 1981) ("pro se litigant").

<sup>42</sup> July 6, 2001 Order Canceling Hearing; August 9, 2001 Order Granting Extension of Time.

apparently to follow up on the job opening, but WSRC never returned his call. He thought the position was still open.<sup>43</sup> On his own motion, the ALJ, taking into account Hooker's pro se status, amended Hooker's whistleblower complaint to include the refusal to rehire allegation and scheduled a hearing but also gave leave to WSRC to move for summary judgment on that claim.<sup>44</sup>

WSRC did file a second summary judgment motion. It argued that since WSRC never received Hooker's application from the state unemployment office, it was not aware Hooker had applied for the estimator position. Therefore, it could not have refused to rehire him. Affidavits from WSRC hiring officials stating that the company had not received Hooker's application supported the motion.<sup>45</sup> Hooker responded to WSRC's motion on March 15, 2002. Though not in sworn affidavit form, Hooker recounted the process of applying for the estimator position. He explained that two days after he went to the state employment office and applied, he called Mr. Gilbert, the employment officer who had assisted him. According to Hooker, Gilbert told him that WSRC "would get in touch" with Hooker. Hooker also attached documents titled "Job Order Summary" and "Job Order Referral" to his response. These documents support Hooker's deposition testimony that he applied for the WSRC job through the state employment office.<sup>46</sup>

The ALJ did not give Hooker the *Roseboro* notice after WSRC filed its second summary judgment motion. But his failure to do so constitutes harmless error because, unlike WSRC's first summary judgment motion, here the ALJ denied summary judgment. The ALJ found that a genuine issue existed as to whether Hooker's application had been forwarded to WSRC and thus whether WSRC had received the application.<sup>47</sup> After an evidentiary hearing on the refusal to rehire claim in which Hooker testified, WSRC renewed its motion for summary judgment when Hooker could not establish that Gilbert had sent the application to WSRC. The ALJ granted the motion, finding that Hooker had not shown that the application was sent to WSRC and thus concluding that WSRC could not have refused to rehire Hooker.<sup>48</sup>

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<sup>43</sup> Depo. at 141-142, 174-175.

<sup>44</sup> February 4, 2002 Order at 16-17. WSRC does not contest the ALJ's sua sponte amendment. Neither do we, although we note that the grounds and procedure for amending whistleblower complaints is set out at 29 C.F.R. § 18.5(e), a regulation the ALJ ignored.

<sup>45</sup> See March 12, 2002 Motion for Summary Judgment.

<sup>46</sup> See March 15, 2002 Plaintiff's Answer to Respondents, para. 4 and Exhibit 4.

<sup>47</sup> March 21, 2002 Order Denying Respondent's Motion for Summary Judgment at 5.

<sup>48</sup> December 3, 2002 R. D. & O. at 3-4.

Hooker cannot prevail on his allegation that WSRC refused to rehire him because, although he submitted an application to Gilbert, he did not show that Gilbert sent the application to WSRC or that it otherwise received it. Thus Hooker did not actually apply for the position, because, even taking as true the fact that he gave his resume to Gilbert, and that Gilbert later assured him that WSRC would be in touch, Hooker did not sufficiently establish that the application process was complete.<sup>49</sup> Therefore, we agree with the ALJ and grant summary judgment on Hooker's refusal to rehire claim.

### *Hooker's Additional Arguments*

In addition to arguing that the ALJ erred in granting summary judgment to WSRC, Hooker advances two theories why the ALJ erred and he is therefore entitled to a hearing on the merits of his claims. We reject these arguments.

#### **1. The ALJ should have considered events prior to January 12, 2000, in evaluating Hooker's constructive discharge claim.**

Hooker contends, in essence, that the ALJ erred when he did not consider evidence that WSRC retaliated against Hooker before it learned about his January 6, 2000 complaint to the CDC concerning the contamination in the trapping and hunting areas where Hooker and his GA Bowhunter employees had worked. Hooker asserts that the ALJ should have considered his deposition testimony concerning Bumpus's arrogant behavior, Bumpus calling him a "son of a bitch," not allowing him to make a hardship withdrawal from his retirement account, and making him do electrical work for which he was unqualified. Furthermore, according to Hooker's deposition testimony, WSRC did not give him a raise, denied him retirement benefits, and did not protect him from the contamination while he worked for USFS. Hooker appears to argue that had the ALJ considered these incidents, he could not have granted summary judgment on the constructive discharge claim because Hooker would have shown intolerable work conditions that forced him to resign.<sup>50</sup>

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<sup>49</sup> When alleging that an employer refused to hire, a whistleblower must 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 with his qualifications. *See Samodurov v. General Physics Corp.*, 89-ERA-20, slip op. at 9-10 (Sec'y Nov. 16, 1993).

<sup>50</sup> Complainant's Initial Brief at 11-12.

But Hooker also testified in deposition that WSRC did not know about his contamination concerns until January 12, 2000, when he gave Bumpus a copy of his January 6, 2000 letter to CDC.<sup>51</sup> Since the ERA prohibits an employer from discharging or otherwise discriminating against an employee *because of* protected activity, WSRC's actions that occurred before Hooker's protected activity cannot be evidence of constructive discharge. Thus, as previously noted, the ALJ did not err in finding that WSRC's hostile or otherwise adverse acts prior to January 12 were not relevant to Hooker's constructive discharge claim.<sup>52</sup>

## 2. The ALJ did not treat Hooker fairly during the April 23, 2002 hearing.

Hooker, who was not represented at the hearing, contends that he did not understand the nature of the proceedings and was "silenced" by the court. He asserts that the ALJ ignored his exhibits and did not permit him to enter a critical document into evidence. But the record of the April 23 hearing does not support these arguments.

The ALJ allowed Hooker to testify fully and freely.<sup>53</sup> The ALJ repeatedly gave Hooker opportunities to provide additional relevant evidence concerning the refusal to rehire claim and gave Hooker the chance to argue at the close of the evidence.<sup>54</sup> Furthermore, contrary to Hooker's argument, the ALJ did not reject any relevant evidence Hooker sought to introduce.<sup>55</sup> Accordingly, we reject Hooker's assertions that the ALJ treated him unfairly.

## CONCLUSION

The ALJ did not notify Hooker that he had a right to file affidavits or other responsive materials in opposition to WSRC's July 2, 2001 Motion for Summary Judgment. Nor did he advise Hooker that failing to respond to the motion could mean that his case could be dismissed. Therefore, he erred in granting summary judgment on Hooker's constructive discharge and blacklisting claims. As a result we **REVERSE** the ALJ's recommendation that these claims be dismissed and **REMAND** the constructive

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<sup>51</sup> Depo. at 76-78.

<sup>52</sup> See *supra* note 35; February 4, 2002 Order Granting In Part Respondent's Motion For Summary Judgment at 8.

<sup>53</sup> See *generally* Transcript of April 23, 2002 hearing (TR).

<sup>54</sup> See, e.g., TR at 44, 56, 58-60.

<sup>55</sup> See, e.g., TR at 55-56.

discharge and blacklisting portions of Hooker's case for proceedings consistent with this opinion. We **AFFIRM** the ALJ's recommendation that the refusal to rehire claim be dismissed and therefore order that Hooker's refusal to rehire claim is **DENIED**.

**SO ORDERED.**

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

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