**In the Matter of:**

**SYED M. A. HASAN,** **ARB CASE NO. 03-058**

**COMPLAINANT,** **ALJ CASE NO. 00-ERA-10**

**v.** **DATE: June 27, 2003**

**STONE AND WEBSTER ENGINEERS AND CONSTRUCTORS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

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

***For the Respondent:***
**Joseph A. Capezzuto, Esq.*, Stone & Webster Engineers & Constructors, Inc., Boston Massachusetts***

**Gary A. Rubin, Esq.*, Skadden, Arps, Slate, Meagher & Flom, LLP, Wilmington, Delaware***

## FINAL DECISION AND ORDER

Syed M. A. Hasan has petitioned the Administrative Review Board (ARB) to review an Administrative Law Judge's (ALJ) decision and order recommending that Hasan's whistleblower complaint be dismissed.[1] We have jurisdiction to decide Hasan's appeal.[2] The Board reviews

[1] Hasan filed his complaint with the Secretary of Labor and alleged that Stone and Webster Engineers and Constructors, Inc. violated the employee protection provisions of the Energy Reorganization Act (ERA) when the company refused to hire him because he had previously engaged in activity protected by the ERA. The employee protection section of the ERA prohibits a covered employer from discharging or otherwise discriminating against an employee because of protected activity. *See* 42 U.S.C.A. § 5851 (West 1995).

[2] *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 ARB the Secretary's authority to review cases arising under the ERA).

the ALJ's findings of fact and conclusions of law *de novo*.[3]

The ALJ's Recommended Decision and Order fairly relates the underlying facts of the dispute and the proper legal framework. Therefore, we attach and incorporate the Recommended Decision and Order. We have thoroughly examined the record and the parties' briefs.[4] We find that the record supports the ALJ's findings of fact. Thus, because the ALJ correctly relied upon established legal precedent, we **AFFIRM** his conclusion that Hasan failed to state a claim upon which relief can be granted.[5] Likewise, we **AFFIRM** the ALJ's decision to deny Hasan's Motion for Recusal, Motion to Disqualify Respondent's Counsel, and Motion to Compel Discovery. Accordingly, Hasan's complaint is **DENIED.**

**SO ORDERED.**

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

**M. CYNTHIA DOUGLASS**
**Chief Administrative Appeals Judge**

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[3] *See* 5 U.S.C.A. § 557(b) (West 1996); *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.

[4] Hasan appears *pro se* and we have construed his briefs liberally. *See Young v. Schlumberger,* ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-9 (ARB Feb. 28, 2003). He contends that the ALJ erred in granting Stone and Webster's FRCP 12(b)(6) Motion to Dismiss because his ERA complaint does not have to allege specific facts establishing a prima facie case of discrimination. In making this argument Hasan relies upon *Swierkiewicz v. Sorema,* 534 U.S. 506 (2002). Like the ALJ, we reject this argument. The *Swierkiewicz* holding is confined to the application of FRCP 8(a)(2) to Title VII (42 U.S.C.A. § 2000e *et seq.*) and Age Discrimination In Employment Act (29 U.S.C.A. § 621 *et seq.*) cases. Furthermore, we agree with Stone and Webster that Congress expressly made the prima facie standard a pleading requirement for ERA complainants. *See* Brief of Respondent at 9; 42 U.S.C.A. § 5851 (b) (3) (A) ("The Secretary shall dismiss a complaint . . . unless the complainant has made a prima facie showing . . . ."). *See also Trimmer v. U.S. Department of Labor,* 174 F. 3d 1098, 1101(10th Cir. 1999) (explaining that Congress was concerned about stemming frivolous complaints and consequently amended § 5851 to include a gatekeeping function whereby the Secretary cannot investigate an ERA complaint unless the complainant has made a prima facie showing). Hasan's other arguments are without merit and we reject them without discussion.

[5] *See Hasan v. Wolfe Creek Nuclear Operating Corp.,* ARB No. 01-006, ALJ No. 2000-ERA-14 (ARB May 31, 2001), *aff'd* 298 F. 3d 914 (10th Cir. 2002); *Hasan v. Florida Power and Light Co.,* ARB No. 01-004, ALJ No. 2000-ERA-12 (ARB May 17, 2001); *Hasan v. Commonwealth Edison Co.,* ARB Nos. 01-002, 01-003, ALJ Nos. 2000-ERA-8, 2000-ERA-11 (ARB Apr. 23, 2001); *Hasan v. Commonwealth Edison Co.,* ARB No. 01-005, ALJ No. 2000-ERA-13 (ARB Apr. 23, 2001).

**U.S. Department of Labor**

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

**Issue Date: 06 February 2003**

CASE NO.: 2000-ERA-10

In the Matter of:

SYED M. A. HASAN,
Complainant

v.

STONE AND WEBSTER ENGINEERS
AND CONSTRUCTORS, INC.,
Respondent

## RECOMMENDED DECISION AND ORDER - DISMISSING CLAIM

### Procedural and Factual Background

Complainant filed the instant Complaint on December 1, 1999, alleging violations of Section 211 of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 (1988 and Supp. IV 1992) and the regulations promulgated thereunder at 29 C.F.R. Part 24 ("the Regulations"). Specifically, Complainant alleged that he was not re-hired by Respondent, Stone & Webster Engineers and Constructors, Inc., because he had engaged in activities protected under the provisions of the ERA.[1] Complainant alleged that on November 17, 1999, he applied "for a job as a civil/structural engineer" with Respondent. Approximately two weeks after Complainant applied for the position in 1999, he filed this Complaint with the Secretary of Labor alleging discrimination and retaliation, based on Respondent's failure to hire him.

The complaint was investigated and found to have no merit by the Secretary of Labor on January 5, 2000. Complainant filed objections and requested a hearing before an Administrative Law Judge on January 10, 2000. The case was referred to the Office of Administrative Law Judges on January 24, 2000.

The above-captioned case has not yet been scheduled for hearing. Respondent's counsel submitted a Motion To Dismiss on February 14, 2000. Respondent alleged that Complainant failed to state a claim upon which relief can be granted. Complainant was ordered by this Court to show cause why his complaint should not be dismissed. On August 7, 2000, Complainant submitted his Response to Show Cause Order, which included a Motion for Recusal. Complainant failed to submit evidence to this Court which alleged any set of facts upon which

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[1] Specifically, Complainant filed safety complaints against Commonwealth Edison, his former employer.

relief could be granted. Thus, on October 5, 2000, I issued a Recommended Decision and Order Dismissing the Claim ("RD&O"). Additionally, on October 5, 2000, I issued an Order Denying Motion for Recusal. In that Order, I noted that the Complainant had failed to provide any reason why I should recuse myself from this case.

The Complainant subsequently appealed the RD&O to the Administrative Review Board ("the Board"), asserting, in part, that the RD&O was issued in error because the Respondent had filed for bankruptcy. Mr. Hasan argued that the bankruptcy filing automatically stayed all proceedings against the company. The Board agreed, citing 11 U.S.C. § 362(a)(1). The Board noted that "[a]lthough the stay by its statutory terms operates against 'the commencement or continuation' of administrative proceedings, we have held that the automatic stay provisions of §362 also apply to the dismissal of the case." *Hasan v. Stone & Webster Engineers and Constructors, Inc.*, 2000-ERA-10 (ARB May 30, 2001)(citing *Haubold v. KTL Trucking Co.*, 2000-ERA-35, slip op. at 3-4 (ARB Aug. 10, 2000)).

Accordingly, the Board determined the RD&O to be null and void by operation of law due to the stay required by the bankruptcy claim. They noted that the case was thus still pending before this Court until the bankruptcy case was closed, dismissed, discharge was granted or denied, or the stay lifted by the bankruptcy court.

On September 25, 2002, U.S. Bankruptcy Judge Peter J. Walsh issued an Order modifying the automatic stay, in order to allow the administrative action to proceed and permit the Complainant to pursue the claims asserted and remedies sought by him in the above-captioned matter. *See* Order of Bankruptcy Judge, U.S. Bankruptcy Case No: 00-2142 (Sept. 25, 2002). On October 2, 2002, Mr. Hasan filed a Motion for Relief, asking this Court to proceed with this case in light of Judge Walsh's Order. By letter dated December 9, 2002, the Complainant also filed a Motion for Recusal with the Chief Administrative Law Judge.

The Respondent filed the Debtor's Answering Brief in Opposition to the Complainant's Motion for Relief and Motion for Recusal on December 30, 2002. First, the Respondent argued that this action was without merit, and that this Court properly dismissed the claim previously for a failure to state a claim upon which relief could be granted, because the Complainant had failed to satisfy all of the necessary elements for a *prima facie* case. Additionally, the Respondent asserted that, under the Administrative Procedures Act, a violation of a judge's standard of impartiality occurs "*only* where an individual actually participates in a single case as both a prosecutor and an adjudicator." Debtor's Answering Brief, at 8(citing *Greenberg v. Board of Governors*, 968 F.2d 164, 167 (2$^{d}$ Cir. 1992)). According to the Respondent, the Claimant had not alleged that this Court engaged in any prosecutorial functions; rather the basis for the recusal request is the previous dismissal of this claim. The Respondents, citing *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 327 (9$^{th}$ Cir. 1995), further noted that a motion for recusal must be filed before an ALJ renders a decision, so that a party cannot wait for the case's outcome before alleging bias by a judge.

The Complainant filed his response and several motions by facsimile on December 30, 2002. Submitted at that time were the Complainant's: (1) Response to Respondent's Submittal dated December 23, 2002; (2) Motion for the Disqualification of the Law Firm Representing the Respondent; and (3) Motion for Default Judgment Against the Respondent. Mr. Hasan stated that because the Respondent had failed to address all of the issued raised in his prior pleadings, this Court should rule in his favor. He further argued that the Respondent's counsel intentionally submitted false affidavits and pleadings to this Court, and thus, should be disqualified from further participation in this case.

On January 14, 2003, Chief Administrative Law Judge John M. Vittone issued an Order Denying Request to Remove Presiding Judge. In that Order, Judge Vittone, citing *Johnson v. Oak Ridge Operations Office*,[2] found that the Chief Administrative Law Judge has no authority to hear motions for recusal of another ALJ initially, or as a matter of appeal. He further noted that if a presiding judge declines to recuse, then the Complainant may challenge the ruling on appeal to the Administrative Review Board, but not with the Chief Administrative Law Judge.

The Respondent next submitted Debtor's Answering Brief in Opposition to Complainant's Motion for Disqualification of Debtor's Attorney and for Default Judgment. The answer, filed on January 15, 2003, first noted that attorney disqualification is proper only when a conflict arises from the attorney's representation of a client in a matter because the attorney represented the current client's adversary in another matter. Moreover, counsel asserted that there must be a clear showing of impermissible representation; vague allegations are insufficient to require disqualification.[3] Counsel stated that neither he nor his firm ever provided advice to the Complainant and does not have any conflicting interests. Counsel further argued that Mr. Hasan's alleged reasons for seeking disqualification are insufficient.[4] The Respondent also asserted that the Complainant's motion for default judgment is vague and improper, because they are not in default of any court order or rule.

On January 22, 2003, the Complainant filed his Response to Respondent's Submittal of January 13, 2003. In this filing, Mr. Hasan did not add new evidence or support. Instead, the Complainant reiterated his previous arguments and referred this Court to his previous pleadings.

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[2] 1995-CAA-20, 21 and 22 (ALJ Feb. 12, 1997).

[3] *See* Debtors' Answering Brief in Opposition to Complainant's Motion for Disqualification of Debtor's Attorneys and for Default Judgment (Jan. 15, 2003)(citing *Elonex I.P., Ltd. v. Apple Computer, Inc.*, 142 F.Supp.2d 579, 581 (D.Del. 2001)(quoting *Cohen v. Oasin*, 844 F.Supp. 1065, 1067 (E.D. Pa. 1994)).

[4] "Protecting the integrity of the judicial system ... is not a separate ground for disqualification." Debtors' Answering Brief at 5 (Jan. 15, 2003)(quoting *Wade v. Nationwide Mutual Fire Ins. Co.*, 225 F. Supp.2d 1323, 1331 (S.D. Ala. 2002)).

As in his August 7, 2000 Motion for Recusal, the Complainant continued to suggest that the undersigned cannot be impartial in deciding this case.[5] However, the Complainant also continuously failed to provide this Court with any basis or real ground for recusal. Thus, I reaffirm my October 5, 2000 Order, and deny the Complainant's request for recusal. Similarly, the Complainant has failed to provide any legitimate grounds for disqualifying the Respondent's counsel; therefore, that motion is denied. I will now turn to the substantive legal issues in this case.

## Applicable Law

Any employer who "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has: (1) Commenced or caused to be commenced...a proceeding under one of the Federal statutes listed in § 24.1(a)..." is deemed to have violated the federal law and regulations in Part 24. 29 C.F.R. § 24.2(b).

Neither 29 C.F.R. Part 24 (whistleblower proceedings) nor 29 C.F.R. Part 18 (procedures for administrative law judge hearings) address dismissal for failure to state a claim; therefore, the standards set out in the Federal Rules of Civil Procedure are applicable. *Glenn v. Lockheed*, 1998- ERA-35 and -50 (ALJ July 15, 1999). Under Federal Rule of Civil Procedure 12(b)(6), dismissal may be appropriate when the facts in the case fail to state a claim. *Id.* In considering whether a dismissal is appropriate, the facts alleged in the complaint are taken as true, and all reasonable inferences are made in favor of the non-moving party. If the factual allegations, after having been accepted as true and construed most favorably on behalf of the non-moving party, present a cognizable claim if proved by a preponderance of the evidence, dismissal is not proper. *Jones v. City of Lakeland, Tennessee*, 175 F.3d 410 (6th Cir. 1999). However, failure to allege a *prima facie* case is grounds for immediate dismissal. *See Lovermi v. Bell South Mobility, Inc.*, 962 F. Supp. 136, 139 (S.D. Fla. 1997); *Briggs v. Sterner*, 529 F. Supp. 1155, 1164 (S.D. Iowa 1981).

## Elements and Burden of Proof

Complainant has the initial burden of proof in an environmental whistleblower proceeding to make a *prima facie* case which shows that: (1) complainant engaged in a protected activity; (2) respondent knew or was aware that the employee engaged in protected activity; (3) complainant was subjected to adverse action; and, (4) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. 29 C.F.R. § 24.5(b)(2); *see also Glenn*, 1998-ERA at 7. If Complainant succeeds in establishing the foregoing, Respondent must produce evidence of a legitimate, nondiscriminatory reason for the adverse action. *Frady v. Tennessee Valley Authority*, 1992-ERA-19 (Sec'y Oct. 23, 1995). The

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[5] "I do not have even one per cent confidence in this court's ability to conduct this case fairly." *See, e.g.*, Complainant's Response to Respondent's Submittal of January 13, 2003 (Jan. 22, 2003).

complainant bears the ultimate burden of persuasion that respondent's reasons are not the true reasons for the adverse action, but a pretext for discrimination. *Id.* At all times, the complainant bears the burden of establishing, by a preponderance of the evidence, that the adverse action was in retaliation for the protected activity. *Id.*

Mr. Hasan alleged that he engaged in protected activity by his reporting of safety concerns to the United States Nuclear Regulatory Commission. Thus, Complainant has established the first element required for a *prima facie* case of retaliation.

In satisfaction of the second element, Complainant alleged that he was not hired by Respondent in retaliation for engaging in a protected activity. To meet the requirement for this element, Complainant must show that one or more employees of Stone and Webster who had substantial input in the hiring decision had knowledge of the protected activity during the relevant time period. *Id.* at 6-7; *Floyd v. Arizona Public Service Co.*, 1990-ERA-39, 5 (Sec'y Sept. 23, 1994). Complainant did not allege this. In his complaint, he alleged only that "[b]ased on my prior whistle blowing activities protected under ERA, STONE & WEBSTER ENGINEERS AND CONSTRUCTORS, Inc....[is] depriving me of my livelihood, FOR REFUSING TO REHIRE ME, IN RETALIATION for reporting the safety concerns to the United States Nuclear Regulatory Commission (NRC)...." Complainant, in his February 22, 2000 Response to Respondent's Motion to Dismiss, stated that counsel for Respondent had been representing Respondent in ERA cases "for years" and that Complainant had filed other complaints against Stone and Webster ( *e.g.*, 1986-ERA-24) under the ERA. Further, he stated that Vincent J. Dunn, Manager of Employee Relations of Stone and Webster "has to be aware of my prior protected activities." In addition, Complainant noted that his name is on the Internet at the Office of Administrative Law Judges web site as suing companies for ERA violations.

In my initial RD&O in this matter, dated October 5, 2000,[6] I found that Complainant's statements, even when taken as true, did not amount to a *prima facie* showing that Respondent had knowledge of Complainant's protected activity. I made a similar finding in *Hasan v. U.S. Dep't. of Labor,* 298 F.3d 914 (10th Cir., 2002), *cert. denied,* _____U.S. _____ (2003)(No. 02-592), which dealt with virtually identical facts. However, while the Board upheld my decision in that case, the Tenth Circuit found that Complainant's statements, when taken as true, amounted to a *prima facie* showing that Respondent had knowledge of Complainant's protected activity. Although Complainant in the instant case does not allege that any employee responsible for, or having input in, the hiring practices of Respondent had any knowledge of his protected activity, he did include this information is his application cover letters to Stone and Webster. Consequently, I find this action is sufficient to suggest an inference that the official knew of the Complainant's protected activity. *See, e.g., Hasan v. U.S. Dep't. of Labor*, 298 F.3d 914, 917 (10th Cir. 2002), *cert. denied,* ____ U.S. ____ (2003)(No. 02-592). Complainant thus has alleged facts to establish the second element for a *prima facie* case of retaliation.

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[6] As noted above, the Board determined my RD&O to be null and void by operation of law due to the stay required by the bankruptcy claim.

The third element for a *prima facie* case of retaliation requires adverse action on the part of the respondent. When determining whether a complainant has established an actionable adverse action in a failure to hire case, the framework of a *prima facie* case outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) applies. *Webb v. Carolina Power & Light Co.*, 1993-ERA-42, 12 (ALJ July 24, 1996), *aff'd*, (ARB August 26, 1997). In order to establish a *prima facie* case of discriminatory refusal to hire, the complainant must show: (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 that employer continued to seek applicants from persons of complainant's qualifications. *Id.*

In both his complaint and in his February 22, 2000 Response to Respondent's Motion to Dismiss, Complainant alleged that he mailed his resume to Respondent on November 17, 1999, in response to an Internet advertisement for an "Engineer 2" position. Complainant thus alleged the first requirement to establish a *prima facie* case of discriminatory refusal to hire. Complainant likewise alleged the second requirement, that he was not hired by Respondent. However, Complainant failed to allege the third requirement, that the position remained open and Respondent continued to seek applicants of Complainant's qualifications. In fact, in his Response to Respondent's Motion to Dismiss, Complainant speculated that "the respondent intentionally closed the position to deprive me of my livelihood," thereby acknowledging that the position did not remain open. Accordingly, Complainant has not alleged a *prima facie* case of discriminatory refusal to hire, and thus, has failed to establish the adverse action element.

The fourth element to allege a *prima facie* case of retaliation by Complainant is that there is sufficient evidence to raise a reasonable inference that the protected activity was the likely reason for the adverse action. Because Complainant has not made a *prima facie* showing of adverse action, he has not met this requirement.

Despite the failure to make a *prima facie* case of discrimination, Mr. Hasan, relying on the Supreme Court decision in *Swierkiewicz v. Sorema N.A.*, argued that his case should not be dismissed. *See, e.g.*, Complainant's Response to Respondent's Submittal of January 13, 2003. In *Swierkiewicz*, the Petitioner, a native of Hungary, was originally employed as a senior vice president and chief underwriting officer with the Respondent, a reinsurance company controlled by a French parent corporation. *Swierkiewicz v. Sorema N.A.*, 534 U.S. ____ (2002). After nearly six years, Petitioner was demoted, and ultimately fired after protesting several decisions by the company's management, including hiring a younger, less experienced French national to replace the Petitioner. (*Id.* at ____). Petitioner filed a lawsuit claiming that he had been terminated due to his national origin, a violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), and due to his age, a violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). (*Id.* at ____).

The Supreme Court noted that ordinary rules for assessing the sufficiency of a complaint applied; thus, under the federal standard of notice pleading, it was "not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." (*Id.* at ____). The Court held that an employment discrimination plaintiff was not required to plead a *prima facie* case of discrimination and that the complaint was sufficient to survive a motion to dismiss. (Id. at ____). The Petitioner alleged he had been terminated due to his national origin in violation of Title VII, and due to his age in violation of the ADEA. According to the Court, the Respondent had fair notice of the basis of the Petitioner's claims, thus the pleading requirements of Federal Rule 8(a) were satisfied. (*Id.* at ____).

The decision in *Swierkiewicz* states the pleading requirement in employment discrimination cases brought under the Federal Rules of Civil Procedure, such as those involving Title VII and the ADEA. Unlike the Petitioner in *Swierkiewicz*, the instant case involves a claim brought under the Energy Reorganization Act's whistleblower provision. In 1992, Congress amended the ERA to include a gatekeeping function, "which prohibits the Secretary from investigating a complaint unless the complainant establishes a prima facie case that his protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint." *Hasan v. U.S. Dep't. of Labor*, 298 F.3d 914, 917 (10th Cir. 2002)(citing 42 U.S.C. § 5851(b)(3)(A)), *cert. denied*, ____ U.S. ____ (2003). Here, the Complainant has failed to meet his burden. Moreover, the Complainant has a history of applying for jobs, then seeking broad discovery when he receives no response.[7] However, at no point does Mr. Hasan mention that the Seventh, Tenth and Eleventh Circuits recently affirmed dismissals of several of his ERA complaints that were substantially the same as the complaint at issue here.[8]

Finally, the Complainant requested numerous documents, alleging that he was entitled to extensive discovery. *See, e.g.*, Complainant's Motion to Compel (May 30, 2000). Mr. Hasan's requests included discovery of all documents in Respondent's possession that contained: mention of him; reports of verbal contacts with anyone about him; names, qualifications and experience of all civil/structural/pipe support engineers working for the Respondent; all contractors, subcontractors, and architectural and engineering firms contracting with the Respondent; and all information about any of the Respondent's employees or other job applicants who had filed whistleblower complaints. *See* Respondent's Answers to Complainant's Interrogatories, and Respondent's Response to Complainant's Request for Production of Documents (Feb. 14, 2000).

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[7] *See, e.g.*, Brief for the Federal Respondent in Opposition, *Hasan v. U.S. Dep't. of Labor*, ____ U.S. ____ (2003)(No. 02-592).

[8] *Hasan v. U.S. Dep't. of Labor*, 298 F.3d 914, 917 (10th Cir. 2002), *cert. denied*, ____ U.S. ____ (2003)(No. 02-592); *Hasan v. Florida Power & Light Co.*, 2000-ERA-12 (ARB May 17, 2001), *aff'd*, 35 F. Appx. 855 (11th Cir. 2002)); *Hasan v. U.S. Dep't. of Labor*, 31 Fed. Appx. 328 (7th Cir. 2002).

These requests for discovery were identical to requests in his other cases, including the matter recently decided by the Tenth Circuit Court of Appeals.[9] The Tenth Circuit concluded:

> None of this information would establish that respondent hired someone with Mr. Hasan's qualifications to fill an open position or that respondent continued to seek someone with Mr. Hasan's qualifications for an open position. Thus, the ARB's decision to dismiss this action prior to discovery did not affect Mr. Hasan's ability to state a viable claim.[10]

In the instant matter, the Complainant's requests for discovery would not yield information that would have assisted him in proving his *prima facie* case. Therefore, even had the Respondent provided the requested information, the Complainant still would have been unable to make a *prima facie* showing of discrimination.

Having thoroughly reviewed the entire record again, I find that the Complainant has failed to set forth a *prima facie* case of proscribed behavior, or provide a full statement of the acts and omissions, with pertinent dates, which are believed to constitute a violation. In addition, Complainant's complaint, as pleaded, has failed to state a claim upon which relief can be granted. Accordingly,

ORDER

It is ORDERED that the Complaint of Syed M A. Hasan be, and is hereby, dismissed.

ROBERT J. LESNICK
Administrative Law Judge

RJL/SR/dmr

**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. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

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[9] *Hasan v. U.S. Dep't. of Labor*, 298 F.3d 914, 917 (10th Cir. 2002), *cert. denied*, ____ U.S. ____ (2003)(No. 02-592).

[10] *Id.* at 917-918.