U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

OWEN McCAFFERTY, DENNIS MALONEY, SEAN KILBANE, TERRY McLAUGHLIN, SEAN McCAFFERTY, and ROBERT PROHASKA,
COMPLAINANTS,

v.

CENTERIOR ENERGY[1/]**,**

RESPONDENT.

ARB CASE NO. 96-144

ALJ CASE NO. 96-ERA-6

DATE: September 24, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND REMAND ORDER

This case was brought by six employees (Complainants) against Centerior Energy (Centerior) under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. §5851 (1994).[2/] Following an evidentiary hearing the Administrative Law Judge (ALJ) issued a decision in favor of all Complainants, and recommended various forms of relief, including "reinstatement" in accord with his instructions, back pay, removal of denial of access flags from the personnel records of Complainants, and

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[1/] Centerior Energy Corporation is the holding company of Cleveland Electric Illuminating Company, Toledo Edison Company and Centerior Service Company. Cleveland Electric Illuminating Company and Centerior Service Company are licensed by the Nuclear Regulatory Commission (NRC) to operate the Davis-Besse Nuclear Power Station. The ALJ referred to these companies collectively as "Centerior," and we will do the same.

[2/] Prior to 1992 the employee protection provision of the ERA was denominated Section 210. In 1992 the Comprehensive National Energy Policy Act (CNEPA), Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992), amended Section 210 and renumbered it as Section 211. For the sake of convenience we will refer to the provision as Section 211.

interest on the back pay awards. Recommended Decision and Order (R. D. and O.), June 11, 1996, at 21. Pursuant to the CNEPA amendments to the ERA, on July 15, 1996, the Administrative Review Board (the Board) preliminarily ordered Centerior to provide relief to Complainants in accordance with the ALJ's directives. Preliminary Order (P.O.), July 15, 1996, at 2-3.[3/] On October 22, 1996, the ALJ issued an order granting attorney's fees and expenses to the Complainants. Thereafter the Board preliminarily ordered Centerior to pay those fees and expenses. Supplemental Preliminary Order and Order Establishing Briefing Schedule (S.P.O.), December 3, 1996. We now address the merits of the case.

BACKGROUND

In 1994, Complainants Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty, and Robert Prohaska were all working as insulators[4/] for Gem Industrial Services, a contractor at Centerior's Davis-Besse Nuclear Plant, which was undergoing a refueling and maintenance outage. On October 7, 1994, Complainants were exposed to, and received an internal dose of radioactive materials, after removing a piece of insulation. The exposure was unplanned, as Centerior officials believed that there would be no exposure to radioactivity as a result of the task Complainants were performing.

Centerior immediately commenced its own investigation of the "unplanned intake event." Respondent's Exhibit (RX)-2, NRC Inspection Report No. 50-346/94010 (DRSS) at 5. The NRC also investigated and issued Centerior a notice of violation which asserted that Centerior did not perform an "evaluation of the contamination levels underneath insulation on the east once through steam generator hot leg . . . to determine whether engineering controls were required to control the concentration of radioactive material in air." RX-2, Notice of Violation, at 1. The NRC noted that "no regulatory dose limits were challenged" during this event -- in other words Complainants were exposed to radiation levels below the limits set by the NRC.

[3/] On July 25, 1996, Complainants filed an action in the United States District Court for the Northern District of Ohio Eastern Division, seeking enforcement of the Preliminary Order pursuant to Section 211(e) of the ERA, 42 U.S.C. §5851(e) (1994). The following day Centerior filed with the Board a Motion to Stay Preliminary Order. On October 16, 1996, the Board denied Centerior's motion. Nothing in the record of this case indicates the outcome of Complainants' district court litigation.

[4/] Complainants are members of Local 3 of the Heat and Frost Insulators and Asbestos Workers Union in Cleveland, Ohio. R. D. and O. at 3. There is a limited amount of evidence in the record regarding how union members are hired by contractors. It appears that employers request workers from Local 3, which refers qualified workers based upon a list of available union members. Workers rise to the top of the Local 3 list, and thus become eligible for placement, as workers higher on the list are placed in jobs. When there is more demand for insulators than are available locally, out of town insulators who are members of the Asbestos Workers Union ("travelers") are referred by the local. *See* Transcript (T.) 106-122 (Scarl); T. 38-40 (Maloney); T. 278-280 (Cline).

RX-2, Memorandum dated November 23, 1994, at 1. Centerior accepted responsibility for the violation. Complainants' Exhibit (CX)-D, at 2.

With the exception of Sean McCafferty, Complainants continued to work at Davis-Besse until they were laid off at the end of the outage in December 1994.[5/] R. D. and O. at 3.

In August 1995 Complainants filed a civil complaint against Centerior in the United States District Court for the Northern District of Ohio, alleging that Centerior breached its duty of care by failing to take necessary precautions to protect Complainants from an unwarranted exposure to radioactive materials. CX-A. Complainants alleged, among other things, that they were the victims of intentional and unintentional infliction of emotional distress. They asked for $30 million in damages. They asserted jurisdiction under the Price-Anderson Act, 42 U.S.C. §2210(n)(2) (1988), which is part of the Atomic Energy Act.[6/]

In September 1995, Complainant Dennis Maloney was hired by Fishbach Power Services to perform insulation work during an outage at another of Centerior's facilities, Perry Nuclear Power Plant (Perry). Either at, or shortly after his incoming radiological screening, Maloney asked the radiological protection staff to provide him with information regarding his incoming whole body count.[7/] The staff member notified Pat Volza, the site radiation protection manager at Perry, and mentioned Maloney's involvement in the unplanned intake at Davis-Besse. Volza then contacted his counterpart at Davis-Besse, who told Volza that Maloney had filed a lawsuit against Centerior. Volza testified that the two discussed whether they thought Maloney would suffer any emotional distress on the job or would find it difficult to comply with Centerior's radiation policies. T. 151-152. Volza then contacted Robert Schrauder, Director, Perry Nuclear Services Department, to express his concern that Maloney might have been attempting to obtain his whole body count in order to strengthen his case against Centerior, and that Maloney might not be willing to comply with Centerior's radiation policies.[8/] T. 152, 168 (Volza).

[5/] As we discuss below, Complainant Sean McCafferty was barred from the Davis-Besse site in November 1994 for reasons unrelated to the unplanned exposure.

[6/] Section 2210(n)(2) of the Price-Anderson Act provides in pertinent part:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy.

[7/] "Whole body count" is the result of a bioassay which determines the level of radioactive material, if any, a new worker is bringing with him to his job. It allows the employer to establish a baseline prior to the incoming employee being exposed to radioactivity. R. D. and O. at 5.

[8/] Centerior has a policy designed to reduce overall exposures of workers to radiation --

(continued...)

Schrauder then obtained a copy of Complainants' civil complaint. He subsequently contacted a Fishbach official and told him to remove Maloney from the Perry project and not to hire any of the Complainants for work at any Centerior facility. The Fishbach official requested those instructions in writing. Therefore, on October 13, 1995, Schrauder wrote to Fishbach:

> Due to the fact that Centerior is currently involved in litigation with the following six individuals we cannot, at this time, allow any one of them to work at any Centerior facility. [six Complainants named] Please insure none of these individuals are currently assigned to the Perry Nuclear Power Plant. In addition, please do not assign any of them to the Perry Plant at least until this litigation is resolved.

CX-B. Schrauder testified that he ordered that Complainants not work for Centerior during the pending litigation because he took them at their word when they claimed in their civil complaint that they were debilitated and suffered emotional distress as a result of their radioactive intake at Davis-Besse. T. 207-208. He further testified that he barred Complainants only until their litigation was resolved because he thought that by that time they might have overcome their concerns regarding the use of respirators. He did not interview Maloney or attempt to interview any of the other Complainants because:

> I didn't feel I had a need to. I read the complaint and I thought the complaint was clear enough that someone that needed 30 million dollars to compensate for a low level of radiation and that they had debilitating and emotional stress over that I didn't think I needed that kind of person working the outage for me.

T. 209-210.

On October 26, 1995, Complainants filed this suit, alleging that Centerior, in barring them from work at Centerior facilities, had retaliated against them for engaging in activity protected by the ERA's employee protection provision.

[8/](...continued)

> to identify the fact that in some cases at the discretion of the radiation protection manager if the use of respirators would impede and/or reduce the efficiency of workers from conducting their activities in an efficient manner to minimize dose that we can then require them not to wear respirators, but we would provide for appropriate engineering controls in all cases to insure that the exposure or the contact with the contaminants would be to the minimum possible.

T. 146-147 (Volza).

DISCUSSION

I. Liability

In order to prevail in a case brought under the employee protection provision of the ERA a complainant must establish by a preponderance of the evidence that he or she engaged in protected activity and that the protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. §5861(b)(3)(C) (1994). Whether Complainants engaged in protected activity by filing a civil action under the Price-Anderson Act presents a novel question of statutory interpretation which we discuss in Section A below. We discuss in Section B the question whether Respondent retaliated against Complainants for filing their Price-Anderson Act civil action.

A. Protected Activity

The action which Complainants here allege (and which the ALJ found) was protected is the filing of their civil complaint against Centerior under the Price-Anderson Act, which is part of the Atomic Energy Act. Section 211 of the ERA provides in pertinent part:

> (1) No 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 . . .
>
> * * * *
>
> (D) *commenced caused to be commenced or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954 as amended (42 U.S.C. §2011 et seq.)* or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (E) testified or is about to testify in any such proceeding or;
>
> (F) *assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding* or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C. §2011 *et seq.*).

42 U.S.C. §5851(a) (1994) (emphasis supplied). The question which we must answer is whether filing a civil complaint pursuant to the Price-Anderson Act constitutes "commenc[ing] a

proceeding under . . . the Atomic Energy Act of 1954 as amended" within the meaning of Section 211 of the ERA.

The ALJ found that the meaning of the ERA was clear: '[I]t would appear that there could be little room for argument that filing the complaint is protected activity under subsections (D) and (F) of §211 of the ERA, that is, that the civil action constitutes a proceeding, or "any other action" under the Atomic Energy Act.' R. D. and O. at 7. As we discuss below, we agree that a Price-Anderson Act civil action is a "proceeding" under the "Atomic Energy Act, as amended" within the meaning of Section 211 and therefore falls within its protective ambit.

A "familiar canon of statutory construction [is] that the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Refeh-Rafie Ardestani v. INS*, 502 U.S. 129, 134 (1991). There is '"no more persuasive evidence of the purpose of a statute than the words by which [Congress] undertook to give expression to its wishes."' *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (quoted citation omitted). In addition, the Supreme Court has held that if a term is not defined in a statute it should be given its common law or ordinary meaning. *Community for Creative Nonviolence v. Reid*, 490 U.S. 730, 739 (1989). Indeed, the plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute would produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). With these principles in mind, we analyze the relevant language of Section 211.

Complainants' civil action was brought pursuant to the "public liability" provision of the Price-Anderson Act, which is part of the Atomic Energy Act of 1954. A brief recitation of the origins of the Price-Anderson Act will aid our discussion.

Prior to 1954, the construction and operation of nuclear power facilities was entirely in the hands of the federal government. *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1095 (7th Cir. 1994). In that year Congress enacted the Atomic Energy Act of 1954, which created the Atomic Energy Commission and gave it power to regulate private nuclear energy production. *O'Conner,* 13 F.3d at 1095. However, members of the private sector were reluctant to enter the nuclear energy field because of their potential liability should there be a nuclear accident. Congress therefore passed the Price-Anderson Act:

> The Price-Anderson Act was enacted in 1957 as an amendment to the Atomic Energy Act. Recognizing a substantial federal interest in regulating the safety aspects of the nuclear power industry, Congress sought to encourage the involvement of the private sector in the development of nuclear power by limiting the liability which might be associated with a nuclear incident.[9/] In order to

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9/ A "nuclear incident" is defined in the Price-Anderson Act as:

(continued...)

> encourage private participation in the nuclear energy industry and to ensure that those who might be injured would be adequately compensated, Congress established a system of private insurance and government indemnity.

In re TMI Cases Consolidated II, 940 F.2d 832, 837 n.2 (3d Cir. 1991) *cert. denied*, 112 S.Ct. 1262 (1992).

In 1966 and 1975 the Price-Anderson Act was extended. The 1966 amendments, among other things, required those indemnified by the Price-Anderson Act to waive common law defenses in actions arising from an "extraordinary nuclear occurrence."[10/] The 1966 amendments "also provided for the transfer, to a federal district court, of all claims arising out of an extraordinary nuclear occurrence." *TMI II*, 940 F.2d at 852. In the Price-Anderson Amendments Act of 1988 Congress significantly broadened the reach of federal court jurisdiction to include all claims arising out of a "nuclear incident" as defined in the statute.

As a result of the passage of the Price-Anderson Amendments Act of 1988:

> [N]o state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all. Any conceivable state tort action which might remain available to a plaintiff following the determination that his claim could not qualify as a public liability action, would not be one based on "any legal liability" of "any person who may be liable on account of a

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[9/](...continued)

> any occurrence, including an extraordinary nuclear occurrence, . . . causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material . . . .

42 U.S.C. §2014(q) (1988).

[10/] An "extraordinary nuclear occurrence" is defined as:

> Any event causing a discharge or dispersal of source, special nuclear, or by-product material from its intended place of confinement in amounts offsite, or causing radiation levels offsite which the . . . Commission . . . determines has resulted or probably will result in substantial damages to persons offsite or property offsite . . . .

42 U.S.C. §2014(j) (1988).

> nuclear incident."[11/] It would be some other species of tort altogether . . . . [T]here can be no action for injuries caused by the release of radiation from federally licensed nuclear power plants separate and apart from the federal public liability action created by the Amendments Act.

TMI II, 940 F.2d at 854-855. Thus, as of 1988 the Price-Anderson Act provided the sole jurisdictional basis for damage actions arising out of nuclear incidents. Complainants' civil action, which in essence alleges that Centerior created a public liability by causing a nuclear incident which allegedly harmed Complainants, therefore was brought pursuant to "the Atomic Energy Act of 1954, as amended . . . ." We see no reason to give this phrase anything other than its ordinary meaning, and conclude that a Price-Anderson civil action is an action under the Atomic Energy Act for purposes of Section 211.

We also conclude that the plain meaning of "proceeding" includes Complainants' civil action under the Price-Anderson Act. "Proceeding" is defined as "[t]he taking of legal action." *Webster's New World Dictionary*, Third College Ed., 1988. Complainants' civil action in federal district court is clearly "legal action." Therefore it falls squarely within the plain meaning of the term "proceeding" as used in Section 211 of the ERA.

Relying primarily on the assertion that the term "proceeding" as used in Section 211 is ambiguous, Centerior argues that we should look beyond the plain meaning of Section 211 to its statutory construction and purpose. It is true that some courts have ruled that the term "proceeding" in Section 211 is ambiguous.[12/] However, these courts were evaluating various informal actions on the part of complainants, such as internal complaints to supervisors. Although we certainly agree that the meaning of the term "proceeding" is not entirely clear when viewed from the perspective of such informal actions as internal complaints,[13/] we do not find that ambiguity at the other, formal, end of the spectrum where Complainants' civil action lies. "Proceeding" can encompass many things, including NRC hearings, investigations, or congressional hearings. But the word most certainly includes a federal civil action, such as that brought by the Complainants. "It should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses . . . ." *Escondido Mutual Water v.*

[11/] 'Under the terms of the 1988 Amendments Act, the "public liability action" encompasses "any legal liability" of any "person who may be liable" on account of a nuclear incident.' *TMI II*, 940 F.2d at 854.

[12/] *See Kansas Gas & Electric Co. v. Brock*, 780 F.2d, 1505, 1510 (10th Cir. 1985) (meaning of "proceeding or any other action in §211 is unclear"). *See also Passaic Valley Sewerage Comm. v. U.S. Dept. of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) (meaning of "proceeding" under similar Clean Air Act provision ambiguous).

[13/] Congress partly resolved the ambiguity regarding internal complaints by amending the ERA to include a specific provision relating to those complaints. *See* 42 U.S.C. §5851 (1994).

LaJolla, 466 U.S. 765, 772 (1984). We therefore conclude that the term "proceeding" is not ambiguous in these circumstances, and clearly encompasses Complainants' civil action.[14/]

B. Retaliation

The other issues relevant to the question of Centerior's liability are: (1) whether Complainants established by a preponderance of the evidence that their protected activity was a contributing factor in Centerior's decision to revoke Complainant Maloney's access to Perry and to bar Complainants from working at Centerior's facilities, and if so; (2) whether Centerior demonstrated by clear and convincing evidence that it would have barred Complainants in the absence of their protected activity.[15/] 42 U.S.C. §5851(b)(3)(C) and (D) (1994).[16/] *See Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA-24, ARB Dec. and Rem. Ord., Feb. 14, 1996, slip op. at 5.

Because this is one of those rare cases in which there is direct evidence of retaliation, the answer to the first issue is patently clear. Complainants filed their civil action against Centerior. Centerior official Schrauder learned of the civil action and immediately revoked Complainant Maloney's access to Perry, which caused him to be laid off by his employer, Fishbach. In addition, Schrauder contacted Fishbach and ordered it not to place Maloney or any of the other five Complainants at "any Centerior facility" because "Centerior is currently involved in litigation" with them. CX-B. Schrauder added, "please do not assign any of them to the Perry Plant at least until this litigation is resolved." *Id.*

[14/] Indeed, Centerior concedes that "Section 211 can be read hyper-literally to apply to a claim under the Price-Anderson Act (because the Price-Anderson Act happens to be part of the Atomic Energy Act and 1988 amendments to Price-Anderson happened to allow consolidation of claims in federal court) . . . ." Brief of Respondent Centerior Energy (Res. Br.) at 5.

[15/] Section 211, as amended by the CNEPA, provides in pertinent part:

> (C) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (D) Relief may not be ordered under paragraph (2) 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.

42 U.S.C. §5851(C) and (D) (1994). For a discussion of the change in burden of proof contained in this statutory language, *see Dysert v. Florida Power Corp.*, Case No. 93-ERA-21, ARB Dec. and Ord., Aug. 7, 1995.

[16/] In this respect the ALJ has misarticulated the burdens of persuasion that are applicable in an ERA case. *See, e.g.,* R. D. and O. at 11

There can be no doubt that Centerior ejected and barred Maloney and barred the other five Complainants, at least in part, because of their protected Price-Anderson Act civil action. Schrauder's remarks and actions "speak directly to the issue of discriminatory intent, [and] relate to the specific employment decision in question." *Lederhaus v. Paschen and Midwest Insp. Serv., Ltd.*, Case No. 91-ERA-13, Sec. Dec. and Ord., Oct. 26, 1992, slip op. at 4, *quoting Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989). *See also Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991), and cases cited therein (comments by a manager or those closely involved in employment decisions may constitute direct evidence of discrimination). We think that Schrauder's actions and his memorandum clearly establish that retaliatory motives were a "contributing factor" in Centerior's decision to bar the six Complainants.

Thus, we turn to the second issue: whether Centerior proved by clear and convincing evidence that it would have taken the same "unfavorable personnel action" against Complainants even if they had not filed their Price-Anderson Act lawsuit. We conclude that Centerior failed to meet its heavy burden of persuasion on this issue.

Centerior argues that it would have fired Maloney and blacklisted the Complainants in any event, because the allegations in their Price-Anderson Act complaint revealed that they were not fit to work in a nuclear power facility:

> The record shows that Centerior had the following legitimate concerns: that Complainants were unwilling to work without respirators, that complainants were suffering severe and debilitating emotional distress resulting from radiation exposures the federal regulations allow and that they would likely receive again, that Complainants might refuse to perform certain work, and that such conduct would disrupt Centerior's strict outage schedule. These are business-related concerns, and none involves intent to retaliate against or punish Complainants for their tort lawsuit.

Res. Br. at 12. Centerior's assertions are largely unsupported by the record, and do not meet the high standard Congress has erected under the ERA amendments.

First, and most important for purposes of our analysis, is the fact that neither Schrauder nor any other Centerior official interviewed Maloney or any of the other five Complainants before Centerior acted. "Neither Volza nor Schrauder interviewed complainants, or in any other way attempted to determine if their past behavior was disruptive or predictive of disruptive behavior in the future." R. D. and O. at 12. Second, Centerior's bald assumptions about Complainants' future behavior are inconsistent with the uncontroverted evidence that all six Complainants continued to work in appropriate ways at Davis-Besse following the unplanned exposure to radiation there, and were told they would be welcomed back. *See* T. 27-30

(Maloney). Similarly, there is nothing in the record which indicates that at the time Centerior barred Complainants they were unwilling to work without respirators.[17/]

Third, Centerior generalizes about Complainants' future behavior based upon an *unplanned* exposure -- one that the NRC found was the result of Centerior's failure properly to survey the area in which Complainants were working. If those surveys had been taken, Centerior would have been required by NRC regulations to "use, to the extent practical, process or other engineering controls (e.g., containment or ventilation)" to control the concentrations of radioactive material in air to "values below those that define an airborne radioactivity area." 10 C.F.R. §§20.1701, 20.1702 (1997). Only if it were not practical to apply process or other engineering controls to control the concentrations of radioactive material in air would Centerior have been free to limit intake of radioactivity by "[l]imitation of exposure times," or use of respirators. 10 C.F.R. §20.1702 (1997). At the time it barred Complainants Centerior had no basis upon which to assume that they would refuse to follow work instructions in a properly surveyed and controlled environment.

Thus, Centerior's speculations about how Complainants would act in the future are simply that. As the ALJ found, "Centerior has not produced any evidence to support its contentions" regarding the unsuitability of Complainants to work the Perry outage. R. D. and O. at 12.

Finally, Centerior's speculation about Complainants' future behavior does not overcome Schrauder's explicit admission. When asked why he didn't seek to interview Maloney prior to revoking his access permit, Schrauder testified:

> I didn't feel I had a need to. I read the complaint and I thought the complaint was clear enough that someone that needed 30 million dollars to compensate for a low level of radiation and that they had debilitating and emotional stress over that I didn't think I needed that kind of person working the outage for me.

We conclude that Schrauder's real basis for barring the Complainants is clear: he did not want to provide work for persons who had filed suit against Centerior. Because Complainants' suit was protected activity, Schrauder's motive was retaliatory.

[17/] Centerior emphasizes that Maloney vacillated when asked at the hearing whether he agreed with Centerior's respirator philosophy, and indicated that he might ask for another assignment if asked to work in an area in which there would be a planned exposure to radioactivity. Res. Br. at 14. However, Maloney's testimony at hearing about how he feels now about radioactivity and Centerior's respirator policy cannot be used to prove that at the time it barred Maloney it had good reason to do so. The fact is that Centerior officials made no attempt to find out how Maloney or any of the other Complainants felt about working in radioactive atmospheres before they barred them.

Centerior also seeks to avoid liability regarding Complainants other than Maloney on the grounds that theirs is essentially a refusal to hire case, and they did not establish that they were qualified for the insulator positions at Perry. Res. Br. at 17. We need not address this issue, because Centerior stipulated that the evidence presented regarding Maloney would be applicable to the other Complainants:

MR. BELL [Complainants' Counsel]:

> Your Honor, I believe we've reached an agreement between counsel that with the exception of the worksheets that I'm going to have the Complainants prepare this evening showing the assumptions that they've used and other information as to lost wages, I believe we have agreed that Mr. Maloney's testimony is fairly representative. The direct, cross and redirect of the testimony that would be presented by any of the other Complainants and I believe we've agreed that his testimony will stand as the testimony on behalf of all the Complainants.

* * * *

ADMINISTRATIVE LAW JUDGE:

> So stipulated, Mr. Lewis?

MR. LEWIS [Centerior's Counsel]:

> Yes, sir, [where there is a difference are] the periods which they might have worked and the amount of money that they might have obtained from other employment . . . .

* * * *

> I was saying the remaining issues I believe relate to their worksheets which relate to what periods they were unemployed because of Centerior's position and what other employment opportunities they have. Those are the open issues.

T. 124-125. Centerior cannot now argue that Complainants other than Maloney failed to establish their qualifications for the insulator positions at Perry.[18/]

[18/] Apparently Centerior's Schrauder thought Complainants were qualified for insulator work at Perry, as he found it necessary explicitly to inform Fishbach that they should not be placed at Perry (continued...)

We therefore conclude, as did the ALJ, that Centerior retaliated against all six Complainants. However, we need to give separate attention to the case of Sean McCafferty.[19/] Centerior argues that Sean McCafferty was not qualified for a position at Perry (and therefore could not have been retaliated against) because he lied on a self-disclosure questionnaire about having been removed from a previous job because of a positive drug test. Res. Br. at 18. However, Centerior did not know of McCafferty's false statement at the time it retaliated against him.[20/] The Supreme Court in *McKennon v. Nashville Banner Pub. Co.*, 130 L.Ed.2d 852 (1995), dealt with the effect of after-acquired evidence in an age discrimination case. The Court ruled that after-acquired evidence could not be used to negate liability:

> The employer could not have been motivated by knowledge it did not have and cannot now claim that the employee was fired for the nondiscriminatory reason . . . . As we have observed, "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made."

McKennon v. Nashville Banner Pub. Co., 130 L.Ed.2d at 862. This leads us to conclude that, because it did not know of the nondiscriminatory reason to bar him, Centerior unlawfully retaliated against Sean McCafferty even though it would have had independent grounds to deny him access.

We do not end our inquiry about McCafferty here, however, for even though Centerior violated the ERA with regard to him, we must consider how the after-acquired evidence of McCafferty's wrongdoing bears on his remedy. We discuss this issue in the section on relief below.

II. Relief

The ALJ recommended that Complainants be awarded back pay and offered "reinstatement," as well as attorney's fees, costs, and interest. R. D. and O. at 21, Recommended Decision and Order Granting Attorney Fees (R. D. and O. II) at 4. He also recommended that the denial of access flags be removed from Complainants' personnel records. R. D. and O. at 21. In the main we are in agreement with the ALJ's determinations regarding relief. However, certain matters warrant our attention.

[18/](...continued)
because of their federal Price-Anderson Act litigation.

[19/] There are two McCafferty Complainants, Owen and Sean. We refer here to Sean.

[20/] It appears that Centerior learned of McCafferty's misrepresentation while preparing for hearing in this case.

A. Sean McCafferty

Sean McCafferty was denied access to Davis-Besse (and therefore was removed from his insulation position there) on November 28, 1994, because he had lied on a self-disclosure questionnaire. Centerior argues, therefore, that McCafferty would not have been eligible to be placed at Perry. The letter denying him access to Davis-Besse informed McCafferty that prior to being eligible for reinstatement:

> [A] professional assessment must be completed to determine whether or not a treatment program is required. If required, documentation regarding successful program completion must be submitted for review. If treatment is not required, the professional assessment documenting this fact must be submitted for review.

RX-5, p. 1. McCafferty testified that he had not made any effort to obtain the professional assessment. T. 267.

The ALJ found that this denial of entry did not disqualify McCafferty for work at Perry because the removal letter only referred to a "denial of access to Davis-Besse, not all of Centerior's nuclear plants or Perry." R. D. and O. at 15-16. Moreover, the ALJ ruled:

> McCafferty testified that he was eligible for reinstatement after a year from issuance of the November 28, 1994 letter, and was told by Centerior that he would be reinstated upon completion of a professional assessment to determine whether a treatment program is required.[21/] McCafferty has not requested the professional assessment because of Centerior's ban on his employment as a consequence of his lawsuit under the Atomic Energy Act.

R. D. and O. at 16. We disagree with this finding. First, Schrauder testified without contradiction that the November 1994 denial of access would be applicable at Perry as well as at Davis-Besse, and that a person in McCafferty's position would not have cleared the security screening. T. 213.

Second, the ALJ erroneously credited McCafferty's explanation that he did not seek the professional assessment because of the illegal denial of access at Perry.22/ For almost one year,

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21/ McCafferty testified: "That's what they told me upon leaving the [Davis-Besse] plant, if I had the assessment done that I would be reinstated." T. 268.

22/ The interchange which prompted the ALJ's conclusion on this point is:

> Q. If there were any work available at Centerior at wage rates from $30 to $60 an

(continued...)

between November 28, 1994 (when McCafferty was denied access at Davis-Besse), and October 13, 1995 (when Schrauder sent the denial of access letter to Fishbach (CX-B)), there was no denial of access at Perry in force. Yet McCafferty took no steps to remove this cloud over his employment. McCafferty's testimony that he would have pursued an assessment had he not been barred because of his lawsuit is contradicted by the facts.[23/]

Thus, we conclude that the unlawful denial of access did not interfere with McCafferty's ability to obtain a professional assessment, and that absent that assessment Sean McCafferty was ineligible for placement at Perry. Therefore, we must determine what relief is appropriate for McCafferty given that Centerior would have been able to bar him from Perry once it knew of the denial of access at Davis-Besse.[24/] As the Supreme Court stated in *McKennon*:

> Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court's formulation of a remedy should be calculation of back pay from the date of the unlawful discharge to the date the new information was discovered.

McKennon v. Nashville Banner Pub. Co., 130 L.Ed.2d at 864. *See James v. Ketchican Pulp Co.*, Case No. 94-WPC-4, ARB Final Dec. and Ord., Mar. 15, 1996, slip op. at 4-5.

Applying these principles to the facts relevant to Sean McCafferty, we conclude that McCafferty should be awarded back pay from the date the four other Complainants (other than

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[22/](...continued)

> hour and you knew that you hadn't had a flag put in your file denying you access to the plant because you filed a lawsuit, would you have gone through with the assessment?
>
> A. Most certainly.

T. 268 (Sean McCafferty).

[23/] As our finding here is based on the substance of McCafferty's testimony itself, as opposed to his demeanor, we do not need to accord the ALJ's contrary finding exceptional weight. *See Frady v. Tennessee Valley Authority*, Case Nos. 92-ERA-19, 92-ERA-34, Sec. Dec. & Ord. of Remand, Oct. 23, 1995, slip op. at 7.

[24/] As we discuss below, reinstatement is not appropriate for any of the Complainants in this case, so we need not discuss that form of relief here. However, as the Supreme Court has suggested in *McKennon*, reinstatement would not normally be appropriate in after-acquired evidence cases such as McCafferty's. *McKennon v. Nashville Banner Pub. Co.,* 130 L.Ed.2d at 863.

Maloney) would have been placed at Perry absent Centerior's retaliation (October 30, 1995, *see* below) until the date that Centerior knew of McCafferty's denial of access at Davis-Besse. Because Centerior failed to introduce evidence which might have established an earlier date upon which Centerior acquired this knowledge, we conclude that the appropriate end date for back pay liability for McCafferty is the date of the hearing before the ALJ (February 26, 1996). We will include the calculation of the amount due McCafferty in the back pay discussion below.

B. Removal of Denial of Access Flags

The ALJ correctly recommended that the denial of access flags which Centerior placed in Complainants' records be removed.[25/] As part of its retaliation, Centerior had written Fishbach, ordering it not to place any of the Complainants at any of Centerior's facilities at least until Complainants' federal district court litigation was completed; Local 3 was provided with a copy of that letter. Therefore, we also order Centerior to inform Fishbach and Local 3 in writing that its prior letter barring Complainants has been ruled to have been unlawful retaliation under the ERA, and that Fishbach and Local 3 should place the Complainants at Centerior projects in the same manner as if Centerior's retaliatory letter had never been issued.[26/] Of course, Centerior retains the right to require that Sean McCafferty satisfy the terms of reinstatement at Centerior applicable to him because of his misrepresentation regarding drug use.

C. "Reinstatement"

Only Complainant Maloney was actually ordered by Centerior to be removed from Perry; the other five Complainants were not working at a Centerior site at the time of Centerior's retaliatory action. However, the ALJ ordered a form of "reinstatement" for all the Complainants:

> Christopher Scarl is the business manager for the Asbestos Workers Heat and Frost Insulators Union, Local 3, of Cleveland Ohio. He testified that a refueling outage is scheduled to commence at Davis-Besse on April 8, 1996, as soon as Perry goes back on line, and the complainants would have been eligible to work that job but for the October 13, 1995 letter barring their employment pending the outcome of their [Price-Anderson Act] lawsuit. (TR. 112)

[25/] The Board ordered those flags removed. P. O., slip op. at 3. On October 30, 1996, Centerior notified the Board and the parties that the flags had been removed. Letter to Steven D. Bell from Mary E. O'Reilly, dated October 30, 1996.

[26/] Complainants are not entitled to preferential treatment, however they are entitled to be placed in accordance with normal union and contractor processes.

> If Centerior commenced the work at Davis-Bessie testified to by Scarl, or any work for which the six complainants would have been hired but for the October 13, 1995 letter barring their employment, the six complainants shall be immediately hired for those insulator positions as if Centerior had never issued the ban on their employment with Centerior.

R. D. and O. at 15. Centerior objects to the ALJ's recommended reinstatement order because "the Complainants are temporary outage workers and there is currently no outage . . . ." Res. Br. at 18-19.

Whatever "reinstatement" rights the Complainants had, those rights have become moot with the passage of time. The outage during which the ALJ ruled that Complainants were entitled to be placed at Perry has ended. Evidently so has the outage at Davis-Besse.[27/] In any event, Complainants do not have an enduring right to be placed at Centerior projects; what they do have is a right, protected by order of this Board (in both the Preliminary Order and this Order), not to be barred from work at Centerior's nuclear projects in retaliation for their protected activity. In this respect this case is similar to *Van Beck v. Daniel Construction Co.*, Case No. 86-ERA-26, Sec. Dec. and Rem. Ord., Aug. 3, 1993. There, the ALJ recommended as part of the relief that if the type of work for which Complainant had been hired had been completed at the nuclear site under construction, Daniel Construction was to employ the Complainant at the site "in another position within his capabilities . . . ." Slip op. at 5. The Secretary reversed this holding, agreeing with Respondent's argument that the recommended remedy "effectively provides Complainant with permanent employment, whereas his employment as a construction worker for a contractor hired during the construction of the nuclear plant would have ended with completion of plant construction." *Id.* Here Complainants were entitled, at most, to employment during the 1995-96 Perry outage and the 1996 Davis-Besse outage. Thus, there are now no positions to which Complainants are entitled to be "reinstated."

D. Back Pay

It is well established that "the goal of back pay is to make the victim[s] of discrimination whole and restore [them] to the position that [they] would have occupied in the absence of the unlawful discrimination." *Blackburn v. Martin*, 982 F.2d 125, 129, citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). With this principle in mind we evaluate the back pay due Complainants.

[27/] Neither Complainants nor Centerior explicitly address this issue. Centerior stated in its Motion to Stay Preliminary Order dated July 26, 1996, that "[t]here is no ongoing or scheduled outage at either of Centerior's nuclear power plants . . . ." Motion to Stay at 12. Complainants did not respond to this claim. Complainants' Brief in Opposition to Centerior Energy's Motion to Stay Preliminary Order, August 14, 1996.

The ALJ recommended significant amounts of back pay for the Complainants.[28/] Centerior criticizes these recommendations on several grounds. Of greatest significance is Centerior's argument that the ALJ erred in resolving in favor of the Complainants doubts about when each of them would have begun and ceased work on the Perry outage. In order to evaluate Centerior's objection we must discuss the facts relevant to the back pay issue.

Centerior began needing insulators for the Perry outage in mid-October 1995. A Fishbach official testified that prior to October 30, 1995, six Fishbach insulators (including Maloney) had begun work at Perry. T. 278 (Cline). On October 30 that number was increased to 11. *Id.* On December 22, 1995, the eleven insulators were laid off for a holiday break in work at the facility. *Id.* at 279.[29/] These insulators were brought back on January 2, 1996. *Id.* Between January 2 and February 11, 1996, the number of insulators increased to 60. *Id.* at 280. Cline predicted that by March 11, 1996, gradual layoffs of insulators were to have begun and there were to have been 48 insulators remaining. *Id.* at 281. By March 18 that number was to have been reduced to 36. By March 25 there were to have been 18 insulators remaining. Those remaining 18 were to have been laid off by April 6, 1996. *Id.* at 280-281 (Cline).

The ALJ concluded that "[a]s Maloney was the fourth [insulator] hired it can reasonably be assumed that he would have been one of the last eighteen on the job." R. D. and O. at 17. Centerior does not challenge this finding, and we agree with it. The ALJ also concluded that the other five complainants would have been among the first 11 insulators to be hired and the last 18 to be laid off:

> Cline testified that six insulators worked on site until October 30, 1995 when the number was increased to eleven. It is assumed that the other five complainants would have been brought on at that time. There is no way of determining from the record whether the seniority of the complainants would have enabled them to be hired on October 30 or on December 19, 1995 when an additional 19 insulators were hired . . . . Under the same reasoning, the five complainants were considered to be among the eighteen insulators who worked until April 6, 1996. Accordingly, the five banned complainants [other than Maloney] are considered to have lost work at Perry from October 30, 1995 until April 6, 1996, when all the insulators were laid off.

[28/] The Board preliminarily ordered that relief pursuant to the amended provisions of Section 211. P. O. at 2-3.

[29/] Centerior asserts that "the ALJ erred in assuming that insulators hired in October 1995 would have worked through December 22 . . . . The record shows that insulators who were hired in October were laid off on December 18." T. 278. In fact, Cline, Centerior's witness, used both dates. *See* T. 278 (December 18) and T. 279 (December 22). In light of this contradictory testimony it was reasonable for the ALJ to select the December 22 date, which fell at the end of a workweek.

R. D. and O. at 18-19. Centerior asserts the ALJ erroneously assumed that "Complainants would always be the first insulators hired and the last laid off."[30/] Res. Br. at 19. Such an assumption would be appropriate, Centerior argues, if the employer were in possession of evidence that would --

> precisely establish hiring and lay off priorities and thus individual employment schedules. However, here, Complainants' union contract and their union hall manager provide the keys to determining when and for how long Complainants would have been employed by Centerior. Complainants could have put on evidence answering these questions, but did not. Because Complainants control the necessary evidence, and because it is their burden to establish their damages, it was error for the ALJ to fill gaps in Complainants' evidence and resolve any doubts in their favor.

Res. Br. at 19 (footnote omitted). We think that Centerior has misapprehended the appropriate evidentiary burdens under the circumstances presented in this case.

It has repeatedly been held that uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party:

> Because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay, and "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party]." *EEOC v. Enterprise Assn. Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977), quoting *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975). *See NLRB v. Browne*, 890 F.2d 605, 608 (2d Cir. 1989) (once the plaintiff established the gross amount of back pay due, the burden shifts to the defendant to prove facts which would mitigate that liability).

Lederhaus v. Paschen and Midwest Inspection Service, Ltd., Case No. 91-ERA-13, Sec. Dec. and Ord., Oct. 26, 1992, slip op. at 6. *See also, Creekmore v. ABB Power Systems Energy Service*, Case No. 93-ERA-24, ARB Dec. and Rem. Ord., Feb. 14, 1996, slip op. at 11; *Hoffman v. Bossert*, Case No. 94-CAA-4, ARB Dec. and Ord., Jan. 22, 1997, slip op. at 2 (ALJ's conclusion that Complainant was entitled to back pay reflecting layoff on earlier of two possible dates rejected because ALJ failed to apply the principle that any uncertainties in calculating back pay are resolved in favor of the complainant); *Johnson v. Bechtel Constr. Co.*, Case No. 95-

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[30/] This claim is not quite accurate. Complainants (other than Maloney) were assumed to be among the early hires and late layoffs.

ERA-0011, Sec. Final Dec. and Ord., Sept. 25, 1995, slip op. at 3; *Nichols v. Bechtel Constr. Co.*, Case No. 95-ERA-0044, Sec. Final Dec. and Ord., Nov. 18, 1993, slip op. at 5-6, *aff'd sub nom. Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995)(Complainant entitled to the presumption that he would have been the last worker laid off from Respondent's crew).

Here we know that but for Centerior's retaliation Complainants would have been placed at Perry some time in the late fall and would have been laid off some time after mid-March (when layoffs began). Centerior seeks to place the blame for the lack of certainty as to when Complainants would have worked at Perry on Complainants, asserting that evidence which could have resolved that uncertainty was in Complainants' control. However, it is unlikely that evidence establishing when each Complainant would have been placed at Perry absent discrimination even exists. Insulators are referred to jobs by the Local 3 Business Manager based upon an ever-changing list that he keeps. It is not clear how the list is maintained, but it does not appear that it is based upon seniority. In order to determine precisely when each of the Complainants would have been referred to Perry it would be necessary to reconstruct the Business Manager's list, inserting each Complainant in the list in the position each would have occupied had Centerior not sent its retaliatory letter to Fishbach. Even if it were possible to reconstruct the records, it was Centerior's burden to elicit the information relevant to that effort.[31/] Therefore, we do not hesitate to agree with the ALJ's recommendation that October 30, 1995, be used as the starting date for purposes of calculating back pay for the five Complainants other than Maloney.

We turn next to the end date for purposes of back pay calculation. The ALJ recommended back pay up to April 6, 1996; that portion of his order is amply supported by the record. He also recommended back pay beyond that date. The R. D. and O. recommended that Centerior be ordered to pay each Complainant "any wages he would have earned from Centerior after April 6, 1996[,] but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses)." R. D. and O. at 18-20. The foundation for this order was a finding that, but for Centerior's retaliatory barring of Complainants, they would have been placed at Davis-Besse to work on the next outage. R. D. and O. at 15.[32/] We are in agreement with the ALJ that if an outage began at Davis-Besse on or about April 8, 1996, as scheduled (*see* T. 112 (Scarl)), Complainants (other than Sean McCafferty) would have been eligible to work

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[31/] The Union local's business manager testified and could have been cross examined on this point.

[32/] This finding also formed the basis for the ALJ's order of "reinstatement":

> If Centerior commenced the work at Davis-[Besse] testified to by Scarl, or any work for which the six complainants would have been hired but for the October 13, 1995 letter barring their employment, the six complainants shall be immediately hired for those insulator positions as if Centerior had never issued the ban on their employment with Centerior.

R. D. and O. at 15.

that outage absent Centerior's retaliation. However, there is no evidence in the record from which we can determine whether the planned Davis-Besse outage occurred, how many Local 3 and other insulators worked that outage, and when it ended.

Other assertions further cloud the picture of Complainants' employment after April 6, 1996. On September 17, 1997, Complainants filed a Motion for Supplemental Proceedings with the ALJ, alleging that insulators worked at Perry at least until September 13, 1996, and requesting that further proceedings be scheduled "for the purpose of calculating the amount of back pay due to each of the Complainants for the period commencing April 7, 1996 and ending September 13, 1996." Motion at 2. The ALJ denied that motion on the grounds that "a calculation of additional damages now would necessarily lead to repetitive proceedings as additional calculations would be necessary when the Administrative Review Board . . . finally ruled." Order Denying Motion for Supplemental Proceedings, October 22, 1996, at 1. Moreover, the ALJ ruled, jurisdiction over all aspects of the case other than attorney's fees issues was at that time vested in the Board. *Id.* The ALJ advised Complainants to request the Board to remand the matter to the ALJ for a hearing on supplemental damages after the Board issued its decision on the merits. *Id.* Rather than requesting a remand for calculation of supplemental damages, Complainants assert on review that insulators worked at Perry at least until September 13, 1996, and that Complainant's back pay awards should be amended accordingly. Complainants' Reply Br. at 18.

In retaliation cases such as this, "[t]he period of an employer's liability ends when the employee's employment would have ended for reasons independent of the violation found." *Artrip v. Ebasco Services, Inc.*, Case No. 89-ERA-23, ARB Dec. and Ord., Sept. 27, 1996, slip op at 3. *See also, Blackburn v. Martin*, 982 F.2d at 129; *Blake v. Hatfield Elec. Co.*, Case No. 87-ERA-4, Sec. Dec., Jan. 22, 1992; slip op. at 14; *Francis v. Bogan, Inc.*, Case No. 86-ERA-8, Sec. Dec., Apr. 1, 1988, slip op at 6. We cannot determine based upon this record when, after April 6, 1996, Complainants would have been lawfully terminated from their employment with Centerior. It is impossible without additional facts to determine whether Complainants would have continued to work at Perry after April 6, 1996, as they currently allege, or would have been placed at the Davis-Besse outage, as the ALJ found. We concur with the ALJ's order of October 22 that the appropriate means to deal with this issue is to remand the case to him for further proceedings on the issue of damages, if any, to be awarded for the period following April 6, 1996. Therefore, on remand the ALJ shall allow the parties to submit evidence regarding what back pay, if any, the Complainants (other than Sean McCafferty) are entitled to for the period following April 7, 1996. If the ALJ determines that any Complainants would have been placed at the Davis-Besse outage or would have continued working at Perry, back pay for those Complaints shall continue until the date Complaints would have been layed off.

The back pay ordered here, together with the October 30, 1996 removal of denial of access flags, places the Complainants in the position they would have been in absent Centerior's retaliation. They will have received back pay for the period they were unlawfully barred from Centerior's nuclear facilities, and they are eligible for future placement at these facilities. *See Van Beck v. Daniel Construction Co.*, slip op. at 5. We find one other significant problem

with the ALJ's calculation of back pay. The ALJ found that the average insulator at the Perry outage from January 2, 1996, until February 11, 1996, worked "29 straight time hours, 9 time and a half hours, and one double time hour per week." R. D. and O. at 16. Yet he assumed that Maloney "would have worked a full 40 hour straight time week and would have earned the overtime the average insulator earned during that period, that is, 9 time and a half hours and one double time hour per week. . . ." *Id.* at 16-17. He applied that formula to the other Complainants as well.

The Secretary of Labor has approved using the average number of hours worked by persons in similar positions as a basis upon which to calculate back pay. *See Hoffman v. Bossert*, Case No. 94-CAA-4, ARB Dec. and Ord., Jan. 22, 1997, slip op. at 2-3. However, that is not what the ALJ recommends here, because he would award Complainants 40 straight time hours, whereas the average insulator would have worked 29 straight time hours. We can find no basis, either in the case law or in the facts of this case, for the type of award calculation used in the R. D. and O. It appears from the uncontroverted evidence in the record that the average insulation worker at the Perry Nuclear Plant worked a total of 39 hours per week -- nine of which were at time and a half, and one of which was double time -- between January 1 and February 11, 1996. That is all that the Complainants are due for that time period. To award them more is to grant them a windfall which is not supported by evidence in the record. We adjust the back pay awards accordingly.

Taking into account the issues we have dealt with above we provide below the total back pay due each Complainant for the period October 1995 through April 6, 1996. Additional amounts of back pay may be due Maloney, Prohaska, Owen McCafferty, McLaughlin, and Kilbane based upon the ALJ's recommendations regarding the period following April 6, 1996.

1. Dennis Maloney

Had Maloney not been terminated on October 16, 1995, he would have worked from that date until the projected end of the Perry outage, April 6, 1996. The R. D. and O. correctly calculated that Maloney would have earned $12,592.00 for the period October 16 through December 22. Maloney would have been laid off from December 23, 1995, until January 1, 1996. From January 2, 1996, through February 11, 1996, Maloney would have worked six weeks. He would have earned a total of $8,405.16 for that period.[33/] For each of the eight weeks between February 12 and April 6, 1996, Maloney would have worked 40 hours of straight time and 20 hours of time and a half, for a total of $17,628.80.[34/] So Maloney would have earned a total of $38,625.96 ($12,592.00 + $8,405.16 + $17,628.80 = $38,625.96) from October 16,

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[33/] Maloney would have worked 29 straight time hours at $31.48 for six weeks ($5,477.52); nine time and a half hours at $47.22 for six weeks ($2,549.88); and one double time hour at $62.96 for six weeks ($377.76).

[34/] Maloney would have worked 40 straight time hours at $31.48 for eight weeks ($10,073.60); and twenty time and a half hours at $47.22 for eight weeks ($7,555.20).

1995, until April 6, 1996. Additional amounts of back pay may be due Maloney, Prohaska, Owen McCafferty, McLaughlin, and Kilbane based upon the ALJ's recommendations regarding the period following April 6, 1996.

We must subtract from that amount Maloney's earnings during that period. Between October 1995 and February 1996 Maloney had earnings amounting to $16,152.64. As the ALJ recognized (R. D. and O. at 17), Maloney's earnings from the date of the hearing (February 27, 1996) until April 6, 1996, must also be subtracted. Maloney incurred $3,150 in travel expenses he would not have otherwise incurred. That must be added to the sum owed Maloney. Thus, for the October-April period Maloney is entitled to a net of $25,623.32 ($38,635.96 - $16,152.64 + $3,150.00) minus the amount he earned between February and April 1996. On remand the ALJ shall obtain documentation from Maloney regarding his earnings for that period.

2. Robert Prohaska, Owen McCafferty, Terry McLaughlin, Sean Kilbane

The ALJ correctly found that Prohaska, Owen McCafferty, McLaughlin, and Kilbane would have worked at Perry from October 30, 1995 until at least April 6, 1996. The ALJ correctly found that these four Complainants would have earned $10,073.60 each for the eight weeks between October 30, 1995, and December 22, 1995.[35/] These four Complainants would have been laid off from December 23, 1995, until January 1, 1996. From January 2, 1996, through February 11, 1996, these four Complainants would have worked six weeks, earning a total of $8,405.16 each for that period.[36/] For the eight weeks between February 12 and April 6, 1996, each of these four Complainants would have worked 40 hours of straight time and 20 hours of time and a half, for a total of $17,628.80.[37/] So each would have earned a total of $36,107.56 ($10,073.60 + $8,405.16 + $17,628.80 = $36,107.56) from October 30, 1995 until April 6, 1996.

We must subtract from that amount the four Complainants' earnings, which were as follows for the period October 30, 1995-February 27, 1996: Prohaska, $19,139.84 (minus living expenses of $3,000.00); Owen McCafferty, $20,147.20; McLaughlin, $13,599.56; Kilbane, $24,176.64. Thus, for the October-April period Prohaska is entitled to $19,967.72 ($36,107.56 - $19,139.84 + $3,000.00) minus the amount he earned between February and April 1996. For the October-April period Owen McCafferty is entitled to $15,960.36 ($36,107.56 - $20,147.20) minus the amount he earned between February and April 1996. For the October-April period

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[35/] These four Complainants would have worked 40 straight time hours at $31.48 for eight weeks ($10,073.60).

[36/] Each of them would have worked 29 straight time hours at $31.48 for six weeks ($5,477.52); nine time and a half hours at $47.22 for six weeks ($2,549.88); and one double time hour at $62.96 for six weeks ($377.76).

[37/] Each of them would have worked 40 straight time hours at $31.48 for eight weeks ($10,073.60); and twenty time and a half hours for eight weeks ($7,555.20).

McLaughlin is entitled to $22,508.20 ($36,107.56 - $13,599.56) minus the amount he earned between February and April 1996. For the same period Kilbane is entitled to $11,930.92 ($36,107.56 - $24,176.64) minus the amount he earned between February and April 1996. On remand the ALJ shall obtain documentation from Prohaska, Owen McCafferty, McLaughlin, and Kilbane regarding their earnings for the February - April 6, 1996 period.

3. Sean McCafferty

Sean McCafferty is entitled to back pay for the period October 30, 1995 through February 26, 1996, when Centerior is determined to have learned of McCafferty's misrepresentation on his self-disclosure form. For the period October 30 through December 22 he would have earned $10,073.60.[38/] He would have been laid off from December 23, 1995, until January 1, 1996. Between January 2 and February 11, 1996, he would have earned $8,405.16.[39/] For the period February 12 through February 26, 1996, McCafferty is entitled to $4,407.20.[40/] Thus, Sean McCafferty is entitled to a total of $22,885.96 ($10,073.60 + $8,405.16 + $4,407.20). From that amount must be subtracted McCafferty's earnings of $6,552. His net back pay due for the period October 30 through February 26, 1996, therefore is $16,333.96.

4. Effect of the Preliminary Order on Back Pay Award

When determining on remand the amount each Complainant is due in back pay for the entire period, the ALJ must take into account that pursuant to the Preliminary Order issued July 15, 1996, Centerior has paid to Complainants a total of $138,012.16 in back pay (plus interest of $8,289.72). Letter from Mary E. O'Reilly to Steven D. Bell, October 30, 1996, and letter from Mary E. O'Reilly to Steven D. Bell, November 6, 1996. Thus, $138,012.16 should be subtracted from the total back pay owed by Centerior.[41/]

[38/] Sean McCafferty would have worked 40 straight time hours at $31.48 for eight weeks ($10,073.60).

[39/] Sean McCafferty would have worked 29 straight time hours at $31.48 for six weeks ($5,477.52); nine time and a half hours at $47.22 for six weeks ($2,549.88); and one double time hour at $62.96 for six weeks ($377.76).

[40/] Forty straight time hours at $31.48 for two weeks, ($2,518.40); plus 20 time and a half hours at $47.22 for two weeks ($1,888.80).

[41/] In the event that no additional back pay is owed by Centerior for the period following April 6, 1996, the ALJ should determine the amount, if any, that Centerior has overpaid the Complainants and recommend that amount be repaid.

E. Interest

Interest shall be assessed on any additional back pay due. Interest shall be calculated in accordance with 26 U.S.C. §6621 (1988). *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Sec. Dec. and Ord., Oct. 30, 1991. As noted above, Centerior has already payed $8,289.72 in interest. That amount should be subtracted from the total interest owed by Centerior.[42/]

F. Attorney's Fees

The ALJ recommended that Centerior pay Complainants' counsel $36,063.00 for attorney's fees and $1,867.43 for expenses.[43/] According to the uncontested testimony of Complainant Maloney, each of the Complainants agreed to pay Complainants' counsel $5,000.00 in attorney's fees in return for counsels' handling of the case from filing the administrative complaint through any appeal to the U. S. Supreme Court. T. 56-57. Thus, Complainants as a group obligated themselves to pay $30,000 in attorney's fees for litigation of this case. Centerior argues that the wording of the ERA employee protection provision requires that Complainants' agreement operate as a cap on fees that Centerior is required to pay, and that therefore the attorney's fees award should be reduced from $36,063 to $30,000. Supplemental Brief of Respondent Centerior Energy on Award of Attorney Fees (Res. Supp. Br.) at 3-4. The ALJ rejected this claim. Order Regarding Attorney Fee Application, August 20, 1996 (O. R. A.) at 3-4. For reasons discussed below, we think Centerior has the better argument.

Centerior bases its position on the language of the ERA employee protection provision, which states in pertinent part:

> If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

42 U.S.C. §5851(b)(2)(b) (1994). Centerior urges that because Complainants had agreed to pay a maximum of $30,000 for the handling of their case, attorney's fees above that agreed-upon

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[42/] In the event that no additional interest is owed by Centerior for the period following April 6, 1996, the ALJ should determine the amount, if any, that Centerior has overpaid the Complainants and recommend that amount be repaid.

[43/] In its December 3, 1996 Supplemental Preliminary Order, the Board preliminarily ordered Centerior to Pay to Complainants' counsel the sum of $37,930.43.

amount cannot be expenses "reasonably *incurred . . . by the complainant[s]*". Res. Supp. Br. at 3.

The "reasonably incurred . . . by the complainant" language contained in the ERA is also found in the employee whistleblower provisions of the Toxic Substances Control Act, 15 U.S.C. §2622(b)(2)(B)(1988); the Safe Drinking Water Act, 42 U.S.C. §300j-9(a)(2)(B)(ii) (1988); and the Clean Air Act, 42 U.S.C. §7622(b)(2)(B) (1988). Similar language is found in the Water Pollution Control Act, 33 U.S.C. §1367(c) (1988); the Solid Waste Disposal Act, 42 U.S.C. §6971(c) (1988); and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610(c) (1988).[44/] Many other attorney's fees provisions contained in federal statutes simply award reasonable attorney's fees without reference to whether the fees were *incurred by the complainant*. In interpreting those provisions the courts have held that reasonable attorney's fees are to be awarded to the prevailing complainant without regard to the private fee arrangement between complainant and his or her attorney. *See Blanchard v. Bergeron*, 489 U.S. 87 (1989). The question we must resolve here is whether, because Congress in the ERA used the limiting language "incurred . . . by complainant," the fee arrangement between the Complainants and their counsel operates as a cap on the fees award.

We think the rules of statutory construction dictate that we read "incurred . . . by complainant" to act here as a ceiling on the award of fees. As we have emphasized elsewhere in this decision, the plain meaning of a statutory provision almost always controls. Here we have a phrase which is not open to two equally plausible interpretations. The ordinary meaning of "incur" is "to come into or acquire" or to "become liable or subject to through one's own action." *Webster's New World Dictionary*, Third College Ed., 1988. Here Complainants have only become liable or subject to $30,000 in attorney's fees, win or lose, no matter how much their case is litigated. We would have to ignore the specific language in the statute to reach the conclusion that Centerior is liable to pay more than Complainants can ever be liable for.

There is no easy explanation for Congress' choice of words in this provision. There is no apparent reason for Congress to limit attorney's fees awards under some circumstances in environmental and nuclear whistleblower cases and not in civil rights cases, for example.[45/] And we are mindful that statutory provisions such as this are to be liberally construed. However, when the language of a provision is as clear as it is here, and where giving that language its ordinary meaning is not totally at odds with the purpose of the statute, we are constrained to

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[44/] These statutes refer to "reasonably incurred by the applicant."

[45/] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1988), and the Civil Rights Attorney's Fees Act, 42 U.S.C. §1988 (1988), for example, do not contain this limiting language.

follow it. Therefore, we conclude that the attorney's fees award in this case has a ceiling of $30,000.[46/]

We conclude that the reasonable attorney's fees in this case are over the $30,000 fee agreed upon by the Complainants and their counsel. "The most useful starting point for determining a reasonable fee," the Supreme Court said in *Hensley v. Echerhart*, 461 U.S. 424, 433 (1983), "is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." This is generally referred to as the "lodestar." *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980). Complainants requested attorney's fees at the rate of $250.00 per hour for attorney Bell, $120.00 per hour for attorney Rogozinski, and $80.00 per hour for paralegal Schultz, based upon an affidavit of attorney Bell that attorneys in Cleveland, Ohio, are customarily compensated at those rates, and that Bell's current billing rate for certain matters is $250.00 per hour.[47/] Centerior initially objected to the hourly rates before the ALJ because it argued that there was insufficient support in the record for the hourly rates proposed by Complainants. In response to that objection the ALJ ordered Complainant to submit additional evidence on the appropriate hourly rate. Complainant then submitted the affidavit of another Cleveland, Ohio, attorney which affirmed that "the hourly rate of each attorney and paralegal as represented in the Invoice is consistent with the hourly rates charged by other law firms for attorneys and paralegals of similar levels of experience." Supp. Mat. Tab D. Based upon that affidavit the ALJ accepted the requested hourly rates. Centerior has not here renewed its objection to the hourly rates requested by Complainants, and we accept them.

Centerior objected to several of the specific fees requests, and the ALJ granted some of those objections. *See* R. D. and O. II at 2-3. Centerior objected below to the assessment of 23.4 hours for reviewing the transcript after the hearing. The ALJ overruled that objection, stating that although "the time on its face appears excessive, it may not be if the time was devoted to preparation of the post hearing brief." R. D. and O. II at 3. We disagree with this conclusion. Complainants' counsel separately accounted for hours spent preparing the post hearing brief. Therefore we must assume that the 23.8 hours were actually spent on reviewing the transcript. The hearing in this case lasted approximately six and one half hours. We conclude that time in excess of 13 hours to review the transcript is not reasonable. We therefore reduce attorney Bell's hours by 2.5, and attorney Rogozinski's hours by 7.5.

Centerior also objected to the ALJ's award of attorney's fees relating to a meeting with the Nuclear Regulatory Commission. The ALJ ruled that it was not evident that the meeting, for which 3.6 hours of attorney's fees were claimed, was not related to this case. R. D. and O.

[46/] Although our holding will affect Complainant's counsel in this case, we do not foresee this decision having wide ranging effect. Complainants and their counsel will be able to establish fee arrangements which avoid the possibility of fees being limited.

[47/] Complainants later sought fees at the rate of $125.00 per hour for attorney Mischka. Supplemental Materials in Support of Motion for Award of Attorney Fees and Expenses (Supp. Mat.), September 4, 1996.

II at 2. Centerior argues that there is no "proof that this time related to the Department of Labor proceeding." Res. Supp. Br. at 5.

We agree with Centerior's contention. Attorney's fees are to be awarded for expenses reasonably incurred "for, or in connection with, the bringing of the complaint upon which the order was issued." 42 U.S.C. §1561(b)(2)(B) (1994). Complainants were moving on several fronts in late October and early November 1995, bringing their action at the Department of Labor, pursuing a union grievance, and proceeding with their Price-Anderson Act claim in federal district court. It was incumbent upon them to articulate the connection between their NRC meeting and this litigation. In the absence of a showing of that connection we disallow 2.3 hours of attorney Bell's time and 1.3 hours of attorney Rogozinski's time.

Finally Centerior objects to the "3.2 hours claimed for the drafting [of] a three sentence letter. Res. Supp. Br. at 5. We agree with the ALJ on this claim, that research regarding the filing of the letter might have accounted for the time allotted.

In summary, we conclude that the reasonable attorney's fees earned in this case is $33,807.00 ($36,063.00 recommended, minus $1200.00 for attorney Bell [4.8 hours x $250.] and minus $1056.00 for attorney Rogozinski [8.8 hours x $120.]). Because that amount is over the cap, we reduce the award to $30,000. In addition reasonable expenses in the amount of $1,867.43 are awarded, consistent with the ALJ's recommendation.

ORDER

1. Centerior shall remove the denial of access flags placed on Complainants' records as a result of their protected activity.[48/]

2. Centerior shall notify Fishbach Power Services and Local 3 in writing that its letter dated October 13, 1995, barring Complainants from work at Centerior's nuclear facilities at least until Complainants' federal district court litigation was completed has been ruled by this Board to have been unlawful retaliation under the ERA. Centerior shall inform Fishbach and Local 3 that they should place the Complainants at Centerior projects in the same manner as if Centerior's retaliatory letter had never been issued.

3. Centerior shall pay Complainant Dennis Maloney back pay for the period October 16, 1995, through April 6, 1996, in the amount of $25,623.32, minus the amount he earned between February and April 1996, plus interest calculated according to 26 U.S.C. §6621 (1988).

[48/] Centerior has removed these flags pursuant to our Preliminary Order. *See* n. 25 above. This order finalizes our earlier order.

4. Centerior shall pay Complainant Robert Prohaska back pay for the period October 30, 1995, through April 6, 1996, in the amount of $19,967.72, minus the amount he earned between February and April 1996, plus interest calculated according to 26 U.S.C. §6621 (1988).

5. Centerior shall pay Complainant Owen McCafferty back pay for the period October 30, 1995, through April 6, 1996, in the amount of $15,960.36, minus the amount he earned between February and April 1996, plus interest calculated according to 26 U.S.C. §6621 (1988).

6. Centerior shall pay Complainant Terry McLaughlin back pay for the period October 30, 1995, through April 6, 1996, in the amount of $22,508.20, minus the amount he earned between February and April 1996, plus interest calculated according to 26 U.S.C. §6621 (1988).

7. Centerior shall pay Complainant Sean Kilbane back pay for the period October 30, 1995, through April 6, 1996, in the amount of $11,930.92, minus the amount he earned between February and April 1996, plus interest calculated according to 26 U.S.C. §6621 (1988).

8. Centerior shall pay Complainant Sean McCafferty back pay for the period October 30, 1995, through February 26, 1996, in the amount of $16,333.96, plus interest calculated according to 26 U.S.C. §6621 (1988).

9. Centerior is liable to Complainants' attorneys for $30,000.00 in attorney's fees and $1,867.43 in expenses. Centerior apparently has already paid Complainants $37,930.43 in attorney's fees and expenses in compliance with our Supplemental Preliminary Order. Letter from Mary E. O'Reilly to Steven D. Bell, December 11, 1996. If this is the case, Complainants' attorney shall return to Centerior $6,063.00.

10. This case is remanded to the ALJ to determine the amount of back pay plus interest, if any, due Complainants Maloney, Prohaska, Owen McCafferty, McLaughlin, and

Sean Kilbane for period following April 6, 1996. The parties shall have an opportunity to submit evidence on the remanded issues.[49/]

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[49/] Centerior has already paid $146,301.91 in back pay and interest in compliance with the Board's Preliminary Order. On remand, should the total back pay and interest as calculated by the ALJ amount to more than $146,301.91 Centerior will be liable to Complainants for the difference. Should the total amount to less than $146,301.91 Complainants will be liable to Centerior for the difference.