



In the Matter of:

JAMES P. PARKER,

ARB CASE NO. 99-123

COMPLAINANT,

ALJ CASE NO. 99-ERA-13

v.

DATE: June 27, 2002

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

James P. Parker, *Pro se*, Lexington, Alabama

For the Respondent:

Edward S. Christenbury, Esq., Thomas F. Fine, Esq., Brent R. Marquand, Esq., Barbara S. Maxwell, Esq., *Tennessee Valley Authority, Knoxville, Tennessee*

FINAL DECISION AND ORDER

This case arises under Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C.A. § 5851 (1995). Complainant James P. Parker (Parker) filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent Tennessee Valley Authority (TVA) discriminated against him in violation of the ERA. The case is before the Board pursuant to Parker's appeal of the Administrative Law Judge's (ALJ) Order Granting Respondent's Motion for Summary Judgment (Order).

We have jurisdiction to decide this appeal pursuant to the employee protection provision of the ERA, 42 U.S.C. § 5851 (1995), and its implementing regulation, 29 C.F.R. § 24.8 (2001). *See also* Secretary's Order No. 2-96, 61 Fed. Reg. 19,978 (May 3, 1996) (delegating Secretary of Labor's authority to review cases arising under, *inter alia*, the statutes listed at 29 C.F.R. § 24.1(a), which includes the ERA). For the following reasons we affirm the ALJ's Order, but on different grounds, and dismiss the case.

BACKGROUND

Stone & Webster Construction Company (Stone & Webster) hired Parker on August 18, 1998, to work as a pipefitter welder at Browns Ferry Nuclear Plant Unit 3 (Browns Ferry). Stone & Webster contracts with TVA to perform work during Browns Ferry plant outages. Prior to an outage, TVA and Stone & Webster schedule the tasks that will be performed. Stone & Webster creates a staffing plan, subject to TVA approval, detailing the number and type of workers who will perform the work. TVA and Stone & Webster review and schedule work as the outage progresses, and both are involved in adjusting staff levels as necessary. Stone & Webster hires temporary employees to work during the outage, and at the conclusion of the outage, Stone & Webster releases these workers in accordance with a predetermined staffing plan. TVA has submitted a chart showing the planned staffing levels for the outage relevant to this case. Declaration of Jeffery L. Nauditt (Nauditt Declaration), 2-3, Exhibit 1.

To determine which individuals will be laid off to meet the reduced staffing requirements as an outage progresses, Stone & Webster foremen rank workers according to their performance in a list known as an "Order of Value." Some of the factors considered in creating this list are skill level, specialized experience, attendance, and motivation. Declaration of Robert Kent Ryan (Ryan Declaration) at 2. Stone & Webster had 103 pipefitters and pipefitter welders on staff at the beginning of the outage. In May 1998 TVA and Stone & Webster had planned to lay off all pipefitter welders in Parker's workgroup by October 11, 1998. Nauditt Declaration at 3.

It is uncontroverted that an Order of Value for pipefitters and pipefitter welders was prepared on October 7, 1998, by Joseph Darmer, Parker's foreman, who was a Stone & Webster employee. Parker was ranked 31st out of 53 pipefitters and pipefitter welders still employed. Ryan Declaration, Exhibit 2. It is also uncontroverted that twenty-three pipefitter and pipefitter welder positions were available at the end of the outage, and the top 23 individuals on the Order of Value list accepted those positions. Respondent's Brief at 5, Ryan Declaration at 3.

On October 10, 1998, Stone & Webster laid off Parker from his position as a pipefitter welder. Parker alleges that the layoff was in retaliation for, among other reasons, his October 10, 1998 request for a fire extinguisher and inquiry regarding a fire permit. Complaint at 1-2. OSHA investigated Parker's allegations and dismissed his complaint.

Parker requested a hearing before an ALJ, but before a hearing was held, TVA filed a Motion for Summary Decision. On July 30, 1999, the ALJ issued his Order Granting Respondent's Motion for Summary Judgment. In addressing the *prima facie* elements of Parker's case, the ALJ found that "the seminal issue is whether or not the complainant engaged in protected activity. Only if the activity is deemed to be protected are the other elements of a *prima facie* case addressed." Order at 2. Using this rationale, the ALJ held that Parker "made no allegation related to nuclear or radiation safety. Thus, because [his] safety-related activity is not related to nuclear safety it is unprotected under the Act." Order at 1-2.

On appeal to the Board, Parker argues that (1) his actions constituted protected activity; (2) TVA cannot prove that his layoff would have occurred absent his protected activity; and (3) “even if T.V.A. could prove that the initial layoff was not a result of the incident of October 10, the actions since that date have been clearly reprisals.” August 10, 1999 Letter in support of Motion to Reconsider (attached to Notice of Appeal). TVA contends that (1) it was neither Parker’s employer nor involved in the layoff decision; (2) Parker did not engage in protected activity; (3) there is no causal connection between Parker’s layoff and his fire safety concerns; and (4) Parker was laid off for a legitimate, nondiscriminatory reason. Brief of Respondent TVA at 9-21. We need only address those issues that are necessary for summary disposition.

ISSUE

The issue before the Board is whether Parker raises an issue of material fact that precludes judgment for TVA.

STANDARD OF REVIEW

The Board reviews an ALJ’s grant of **summary decision** de novo; thus our review is governed by the same standard used by the ALJ. *Williams v. Lockheed Martin Corp.*, ARB Nos. 99-054/064, ALJ Nos. 98-ERA-40/42, slip op. at 3 (ARB Sept. 29, 2000).

DISCUSSION

To establish a case of discriminatory discharge an ERA complainant must show that he engaged in protected activity of which the respondent was aware and that the respondent took some adverse action against him. The complainant must also show that his protected behavior was a contributing factor in the adverse action taken. 42 U.S.C. § 5851(b)(3)(C); *see, e.g., Carroll v. Bechtel Power Corp.*, 1991-ERA- 46, slip op. at 9-11 (Sec’y, Feb. 15, 1995), *aff’d Carroll v. U.S. Dept. of Labor*, 78 F.3d 352 (8th Cir. 1996). TVA’s motion for summary decision is based on its contention that Parker cannot make out one or more of the elements required to succeed in his claim.

The governing regulations permit summary decision for either party when “the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40(d) (2001). The party opposing a motion for summary decision “may not rest upon the mere allegations or denials” of the motion, but instead “must set forth specific facts showing that there is a genuine issue of fact for the hearing.” 29 C.F.R. § 18.40(c). TVA is entitled to summary decision if, on the undisputed record, Parker cannot establish one or more elements of his case. *See Merriweather v. TVA*, 91-ERA-51 (Sec’y Feb. 4, 1994); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The record indicates that Parker was laid off by his employer, Stone & Webster, on October 10, 1998. Parker has failed to adduce evidence showing that TVA played any role in the creation of the Order of Value or the decision to lay him off. Parker also has not countered TVA’s affidavits

that the Order of Value determined the order of layoff and was established prior to his protected activity. Ryan and Nauditt Declarations, described, *supra*. As a consequence, we find that the material facts as to the creation of the Order of Value are not in dispute, and determine that Parker has failed to set forth proof as to essential elements of his case, to wit, (1) that TVA took an adverse action against him, and (2) that his protected activity motivated the adverse action. “A complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial. The moving party is ‘entitled to a judgment as a matter of law’ because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” *Celotex Corp.*, 477 U.S. at 323.

Here, the fact that Parker was laid off after requesting a fire extinguisher and inquiring about a fire permit might raise the inference that he was laid off because of protected activity, for purposes of making a *prima facie* case. However, Parker has the burden of ultimately proving causation as an element of his case on the merits. That element of the claim is defeated because the uncontroverted evidence is that the Order of Value was created before the alleged protected activity and the layoff occurred in accordance with the Order of Value. Therefore the protected activity could not have caused his layoff. It is therefore not necessary for us to address any of the other issues relating to Parker’s October 10 layoff, including whether the ALJ was correct in determining that Parker did not engage in protected activity.

In his appeal to the Board, Parker also alleges that, following the October 10 layoff, TVA subjected him to various reprisals. We note that these additional allegations are not properly before the Board, as they have not been investigated by OSHA or adjudicated before an ALJ.

DECISION AND ORDER

We therefore conclude that TVA is entitled to summary decision as a matter of law and Parker’s complaint is hereby **DISMISSED**.

SO ORDERED.

JUDITH S. BOGGS

Administrative Appeals Judge

WAYNE C. BEYER

Administrative Appeals Judge

OLIVER M. TRANSUE

Administrative Appeals Judge