

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 June 2005

CASE NO.: 2004-ERA-23

In the Matter of:

HEATHER J. ADDIS
Complainant

v.

EXELON NUCLEAR GENERATION CO., LLC
Respondent

APPEARANCES:

M. Megan O'Malley, Esq.
John P. Madden, Esq.
For the Complainant

Donn C. Meinderstma, Esq.
Gina M. Petro, Esq.
For the Respondent

Before: DANIEL L. LELAND
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 (ERA or the Act), as amended, 42 U.S.C. § 5851 *et seq* and its implementing regulations at 29 CFR Part 24. The ERA protects employees of Nuclear Regulatory Commission licensees and their contractors and subcontractors from employment discrimination for engaging in protected activity. A formal hearing was held before the undersigned on February 1-4, 2005 in Chicago, IL. At the hearing, Complainant's exhibits (CX) 1-61 (except CX 6, 12, 14, 15, 16, 17, 25, 34, 35, 36, 38, 50, and 53), and Respondent's exhibits (RX) 1-45 (except RX 7 and 26) were admitted into evidence. Complainant and Respondent filed timely post-hearing briefs.¹

¹ Briefs were originally due on April 20, 2005. Complainant requested an extension of time until April 25, 2005 which was granted.

PROCEDURAL HISTORY

Heather J. Addis (Addis or Complainant) filed a complaint with the Occupational Safety and Health Administration on April 5, 2004 alleging that she was not allowed to rescind her September 29, 2003 resignation because she made safety complaints to Respondent's Employee Concerns Program. After completing an investigation of Complainant's allegations, Charles J. Shields, Area Director of OSHA, issued his findings that Complainant had not sustained her burden of proving that Respondent discriminated against her because of her protected activity. Complainant requested a hearing and the case was referred to the Office of Administrative Law Judges.

ISSUE

Did Respondent terminate Complainant because of her protected activity?

SUMMARY OF THE EVIDENCE

Exelon Nuclear Generation Co. operates the Dresden Nuclear Power Station located near Morris, IL about sixty miles south of Chicago. (TR 508). The Dresden station consists of two nuclear reactors. Id. Addis began working at Exelon on May 19, 1997 and received her senior reactor license in July 2002. (TR 53). In September or October 2002, she became a shift supervisor, also known as a unit supervisor, the lowest level of management on shift. (TR 142). When she became a shift supervisor, Complainant's supervisor was David Throne whose title was shift manager. He was succeeded by Glen Morrow in March 2003. (TR 803). Morrow's immediate supervisor was Rich Gadbois, the shift operations superintendent, and Gadbois' immediate supervisor was Jim Henry, the operations director. (TR 663, RX 3, RX 4).

A shift supervisor was required to complete working files and scorecards on their subordinates. Working file entries were designed to document the performance of subordinates to ensure that they were performing their jobs in a proper manner. (TR 672). They were part of the Operations Fundamentals in which Exelon set forth the standards that their employees in the Operations Department were expected to meet. (TR 668-669, RX 17). Scorecards were similar to working file entries but related more to specific tasks. (TR 673). As far back as December 2002, Addis was criticized for producing an insufficient number of scorecards. (RX 23). By June 2003 her production of scorecards was improved but was still marginal. (RX 24, TR 213-214). Complainant's scorecard production continued to be unacceptable as of August 2003. (RX 16). Working file entries were supposed to have a ratio of 80% positive comments to 20% negative comments. (TR 805). Annual bonuses were dependent on meeting this requirement. (TR 76). Throne commented unfavorably on Complainant's working file entries in November 2002. In a review of Addis' performance, Throne characterized her working file entries as "weak", and in a February 22, 2003 performance review Throne gave Addis below average grades in providing critical feedback to her subordinates. (TR 189-190, RX 9). She received a "D" in the areas of building relationships and developing others in a leadership assessment in May 2003. (RX 10).

A Management Review Meeting was held on July 24, 2003 in which Morrow, who was now Addis's supervisor, informed her that her working file entries did not meet the 80/20 critical requirements and that she was "not engaged enough" to make good working file entries. (TR 84-85, 808-809, RX 16). Gadbois was also present at the MRM and agreed that Complainant's working file entries were deficient. (TR 558, 559). All but one of the unit supervisors had deficient working file entries and Morrow informed them that they would be on a specific development plan unless there was marked improvement. (TR 84-86, 811, CX 39, RX 25).

Gadbois and Morrow continued to discuss the need for Complainant to improve her working files following the MRM of July 24, 2003. (TR 558, 812). Morrow required Addis to submit her working file entries to him so that they could be critiqued. (TR 210, 813-814). See RX 28. Gadbois informed Henry of Complainant's deficiencies and said that he was considering putting her on a performance improvement plan. (TR 690-691). Although Morrow testified that Complainant was technically competent, he cited other problems in her overall performance. On May 16, 2003, Addis failed to complete an equipment evaluation in a timely manner. (TR 816, RX 16). She failed to timely complete a bargaining unit evaluation on August 26, 2003. (TR 816-817, RX 16). On September 25, 2003, Complainant did not respond promptly to an alarm in the control room. (TR 817, RX 16). Morrow accused her of "a lack of passion for the operation of the plant." (TR 819). On the same day, Complainant failed to write a clearance order for the next shift and did not complete a housekeeping "walkdown". (TR 820, RX 16). Morrow noted that this was a "poor use of resources". Id.

On September 28, 2003, Morrow noted that Complainant had not submitted her working files for review or updated her fundamentals matrix, and that she had completed only ten of the nineteen scorecards she was expected to complete. (TR 821-822, RX 16). Morrow had a meeting with Addis on September 28 to discuss her performance. He asked her what her primary focus as a shift supervisor should be and she responded that it was to operate the plant safely. (TR 93, 825-826). He replied that her primary focus should be to develop others to operate the plant safely. (TR 828, 891). Morrow told Addis that she exhibited an inability to follow directions and a lack of alignment with the department. (TR 830, RX 16). Addis responded that Morrow's emphasis on working files detracted from concentrating on plant safety. (TR 95). Morrow felt that he was unable to motivate her by requests to perform her specific duties. (TR 834, RX 16). Complainant became frustrated with Morrow's critique of her job performance and told him that she would resign. (TR 98). She submitted her letter of resignation the following day, September 29, 2003, stating that she was resigning effective October 10, 2003. (TR 100). See CX 10. Henry, who was informed of her resignation, testified that he decided to accept her resignation but did not tell Complainant or document his decision. (TR 690, 695).

On October 1, 2003, Complainant contacted Respondent's Employee Concerns Program (ECP) and spoke to Robert Speek. (TR 104). Her concerns were: (1) that upper management operations did not focus on reactor safety; and (2) that operations supervisors are not allowed to express concerns without retaliation leading to a potentially chilled environment. See CX 11. Speek informed management that a complaint had been filed but did not identify who made the complaint. (TR 375). However, Henry assumed that it was Addis who had made the complaint. (TR 685). The next day, October 2, 2003, Addis wrote a letter to Morrow rescinding her

resignation stating that her resignation was in error and that she enjoyed working at Exelon and looked forward to a long and fulfilling career there. (TR 113, CX 13). She presented this letter to Henry and told him that she and Morrow would “work out their differences”. (TR 699-700, RX 33).

A telephone conference call was held on October 2, 2003 with Ruth Dillon of the human resources department, Speek, Thomas O’Neill, Exelon’s in house counsel, and others, to discuss Complainant’s ECP concerns. (TR 343, 385, CX 18). A second telephone conference call was conducted on October 7, 2003 with Dillon, O’Neill, Gadbois, Danny Bost, the plant manger, and Jerry Ellis to determine whether to accept Complainant’s rescission letter. (TR 393, 456-457). See CX 20. O’Neill wanted to make sure that a refusal to accept her rescission would not be construed as discriminating against her because of her expressed concerns to ECP. (TR 460-461, 477). After this discussion, Respondent’s management decided to accept Complainant’s resignation effective October 10, 2003. (TR 704). On October 10, 2003, Complainant was called to Gadbois’ office with Dillon and he read a prepared statement that her working file entries were deficient, and that if she had remained with Exelon she would have been placed on a performance improvement plan. (TR 119). She was then told that she was terminated.

CONCLUSIONS OF LAW

As this case has been fully tried on the merits, the relevant inquiry is whether the complainant has prevailed on the ultimate question of liability. To be entitled to relief, Complainant must prove, by a preponderance of the evidence, that she engaged in protected activity, that Respondent knew about the protected activity and took adverse action against Complainant, and that the Complainant’s protected activity was a contributing factor in the adverse action. 42 U.S.C. § 5851(b)(3)(C); *Kester v. Carolina Power & Light Co.*, 2000-ERA-31 (ARB Sept. 30, 2003), *Paynes v. Gulf States Utilities Co.*, 1993-ERA-47 (ARB Aug. 31, 1999), *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 (Sec’y Feb. 15, 1995), *aff’d Carroll v. U. S. Dep’t of Labor*, 78 F. 3d 352 (8th Cir. 1996). If Complainant meets her burden, Respondent must demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity. § 5851(b)(3)(D); *see also Kester, supra*.

There is no dispute in this case that Complainant engaged in protected activity and that Respondent knew of her protected activity. Addis’ complaints to ECP regarding Exelon’s lack of focus on reactor safety and a potential chilling effect on supervisor complaints unquestionably implicated safety. *American Nuclear Resources v. U. S. Dep’t of Labor*, 134 F. 3d 1291, 1295 (6th Cir. 1998). The record also clearly demonstrates that Henry was either informed of her complaints to ECP or figured out that Addis made these complaints, and that he was therefore aware of her protected activity when he made the decision to terminate her.²

An adverse action is “simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory.” *Stone & Webster Engineering Corp. v.*

² Henry testified that he had already decided to terminate Complainant before he was aware of her protected activity, but as there is no documented evidence that he had made that decision prior to learning of her protected activity, I do not credit his testimony in this regard.

Herman, 115 F. 3d 1568, 1573 (11th Cir. 1997). A complainant's discharge, or a change in his compensation, terms, conditions, or privileges of employment constitute an adverse action. *DeFord v. Secretary of Labor*, 700 F. 2d 281, 286 (6th Cir. 1983).

Complainant submitted her letter of resignation on September 29, 2003 and then had a change of heart and wrote a letter rescinding her resignation on October 2, 2003. Complainant maintains that the rescission of her resignation letter effectively restored her employment status quo and that Respondent's termination of her employment was an adverse employment action. Respondent argues that it had no legal obligation to allow Complainant to rescind her resignation and that it was free to reject her rescission letter and accept her resignation. Therefore, Respondent maintains that it did not discharge Complainant and that there was no adverse employment action.

Although I have found no case under the ERA on point, Respondent's decision to accept Complainant's resignation after she rescinded it differs substantially from a discharge, demotion or other actions normally recognized as adverse employment actions.³ Had it not been for Complainant's resignation, Respondent would have allowed her to remain as an employee and done nothing more severe than place her on a performance improvement plan. Ignoring Complainant's rescission letter merely fulfilled Complainant's original intent to resign, an action she took of her own free will and without prodding or pressure from Respondent. Therefore, I do not construe Respondent's refusal to accept Complainant's rescission of her resignation as an adverse employment action. However as the law is unsettled I will assume that Respondent's action was an adverse employment action and proceed to determine if Complainant's protected activity was a contributing factor in Respondent's decision.

Complainant must prove by a preponderance of the evidence that her protected activity was a contributing factor in her termination. *Kester, supra*. A complainant can meet this burden by direct or circumstantial evidence of discriminatory intent. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F. 2d 1159 (9th Cir. 1984). Although the temporal proximity of a complainant's protected activity and an employer's adverse employment action raises an inference of discrimination, it is only one factor in deciding the ultimate question of whether there was a retaliatory motive. *Jackson v. Ketchikan Pulp. Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996), *Tricanna v. Arctic Slope Inspection Service*, 1997-WPC-1 (ARB July 31, 2001). *See also Couty v. Dole*, 886 F. 2d 147, 148 (8th Cir. 1989).

Although Complainant was terminated on October 10, 2003, eight days after she reported her concerns to ECP, this temporal proximity standing alone is insufficient to meet her burden of proof. *Jackson v. Ketchikan, supra*. Complainant must provide additional direct or circumstantial evidence of Respondent's discriminatory intent in order to prevail in this proceeding. I conclude that she has failed to do so.

³ *Becker v. West Side Transp., Inc.*, 2000-STA-4 (ARB Feb. 27, 2005) and *Bettner v. Daymark, Inc.*, 2000-STA-41 (ARB Oct. 31, 2003), cited by Respondent, do not directly address the question of whether an employer's refusal to allow an employee to rescind a resignation constitutes an adverse employment action and therefore do not aid me in resolving the issue in this case.

Complainant's problems in promptly and properly completing working file entries and scorecards were first noted in December 2002, only two or three months after she became a unit supervisor. Her original supervisor, Throne, and his successor, Morrow, repeatedly commented unfavorably on Complainant's failure to keep up with the production of working files and scorecards and her inability to follow the 80/20 positive to negative requirement. Complainant's deficiencies regarding working files and scorecards and her overall deficiencies as a unit supervisor were documented by Morrow well before she engaged in protected activity. He had considered putting her on a performance improvement plan after the MRM meeting of July 24, 2003. Morrow also informed Gadbois and Henry of Complainant's inadequate performance and they were aware of the need for Complainant to improve the performance of her supervisory duties. Morrow also cited and documented other defects in Complainant's job performance, e. g., not completing assigned tasks in a timely manner, failure to respond promptly to an alarm in the control room. All of the problems with Complainant's job duties were well known to Gadbois and Henry before she reported her concerns to ECP.

Moreover, contrary to Complainant's assertion, the proper completion of working file entries and scorecards was not a mindless administrative task that had no relation to reactor safety. Working files were part of the Operation Fundamentals that employees in the Operations Department were required to follow and they directly implicated safety. Addis expressed dismay that Morrow allegedly told her in their meeting on September 28, 2003 that her primary duty was to develop others rather than to operate the plant safely, but Morrow actually said that her primary duty was to develop others "to operate the plant safely" which is clearly the role of a supervisor in a nuclear power facility. I do not find any basis for concluding that Morrow was any less concerned with nuclear safety than Complainant.

I have listened to the testimony and observed the demeanor of Gadbois and Henry and I find that these men were dedicated to the safety of the Dresden nuclear facility. I am not persuaded that they had a cavalier attitude toward plant safety or that they were uninterested in safety complaints made to the ECP. The record does not show that they had a retaliatory animus toward whistleblowers in general or Complainant in particular. I conclude that their decision to terminate Complainant was based on her substandard performance as a unit supervisor and not her protected activity. I also find that although other unit supervisors were cited for poor performance on working file entries and scorecards, none of them resigned and therefore they were not similarly situated to Complainant.

Complainant points to Dillon and O'Neill's notes from the October 7, 2003 conference call as evidence of Respondent's discriminatory intent against Complainant. In Dillon's notes of the conference (CX 20), Gadbois is reported to have said that the reasons for denying her rescission request are: "1. Statements she made against our fundamental (sic) of documentary performance, 2. Argues w/mgr on log entries also." Gadbois did not mention Complainant's ECP complaints. O'Neill was quoted as saying that "Will not allow an allegation to drive an employment decision. We will just take a different approach in addressing her allegation." This comment suggests that O'Neill wanted to make sure that there were reasons for terminating Complainant that had nothing to do with her safety complaints. Neither of these statements exhibits a retaliatory animus toward Complainant. O'Neill's notes of the conference call (CX 58) state:

Danny (Bost): She's a performance problem, based on her refusal to do admin. work.
If she had not filed allegation would we take her back?
Danny not sure.
Will get back.

This is the closest indication of any retaliatory animus on the part of Respondent's management but it is hardly a "smoking gun". Bost only queried whether he would take Complainant back absent her ECP complaints; he did not state that he would not take her back because of them. His comment is not proof that her ECP complaints contributed to her termination. The evidence of record in its entirety demonstrates that Exelon accepted Complainant's resignation because of her performance deficiencies and that her ECP complaints were not a contributing factor in its decision.

Complainant included as an attachment to her April 5, 2004 complaint a list of miscellaneous safety issues that she claimed she brought to the attention of Respondent. However, there is no evidence that any member of Respondent's management expressed any hostility or resentment against her for reporting these matters and no evidence that Respondent's decision to accept her resignation was in any way motivated by them. Complainant did not include these issues in her ECP complaint and she compiled the list after her employment was terminated. She also acknowledged that these issues had been resolved by the time she left Exelon. None of these issues was mentioned in the October 7, 2003 conference call. I find that, as with her ECP complaints, the miscellaneous safety issues raised by Complainant did not contribute to Respondent's decision to accept her resignation.

After reviewing all of the evidence, I find that Complainant has failed to sustain the burden of proving that her protected activity was a contributing factor in her termination. Her complaint will therefore be dismissed.

RECOMMENDED ORDER

IT IS RECOMMENDED THAT the complaint of Heather J. Addis be DISMISSED.

A

DANIEL L. LELAND
Administrative Law Judge

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. §§ 24.7(d) and 24.8.