

**U.S. Department of Labor**

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**Issue Date: 10 February 2010**

**CASE NOS.: 2004-ERA-22  
2004-ERA-27**

**IN THE MATTER OF**

**SYED M.A. HASAN,  
Complainant**

**v.**

**ENERCON SERVICES, INC.,  
Respondent**

**APPEARANCES:**

**SYED M. A. HASAN  
Pro Se**

**TERRY M. KOLLMORGEN  
On behalf of Respondent**

**Before: CLEMENT J. KENNINGTON  
ADMINISTRATIVE LAW JUDGE**

**DECISION AND ORDER GRANTING RESPONDENT'S  
MOTION FOR SUMMARY JUDGMENT**

Although the parties have filed many pleadings since the inception of this case, procedurally this case is still in its initial stages, with motions for summary judgment filed by Respondent on September 10, 2004 and November 27, 2004, which now requiring further ruling. Respondent's motion for summary judgment comes under the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 *et seq.*, and the regulations promulgated at 29 C.F.R. Part 24, which prohibit an employer from discriminating against, or taking unfavorable personnel action against, an employee concerning compensation, terms, conditions, or privileges of employment because the employee engages in protected whistleblowing activity. To establish a *prima facie* case for a violation of the ERA, a complainant such as Hasan is required to show: (1) he engaged in protected activity; (2) the employer was aware of that activity; (3) the employer took some adverse action against him; and

(4) the circumstances were sufficient to permit the inference that the protected activity was a contributing factor in the adverse action. *Syed M.A. Hasan v. United States Department of Labor*, 545 F.3d 248 (3rd Cir. 2008); *See* 29 C.F.R. 24.5 (b)(2)(i)-(iv). Further, where Hasan alleges a refusal to hire, he must also establish: (5) that he applied and was qualified for the job Respondent was seeking applicants; (6) that despite his qualifications he was rejected and that after his rejection, the position was either filled or remained open; (7) and Respondent continued to seek applicants from persons of Hasan's qualifications. *Hasan v. United States Department of Labor*, 298 F.3d 914, 916-917 (10th Cir. 2002).

On September 25, 2008, the United States Third Circuit Court of Appeals in *Syed M.A. Hasan v. United States Department of Labor*, 545 F.3d 248 (3rd Cir. 2008), in a Per Curiam opinion, held that the ARB erred when it dismissed, on summary judgment, Hasan's claim and concluded that there was enough evidence to infer Hasan was rejected or subjected to adverse action when Respondent did not hire him for an internet advertised civil/structural engineering position. The Third Circuit remanded the case to the ARB so as to afford the ARB, "...the opportunity of examining the evidence and finding the facts as required by law." On May 29, 2009, the ARB remanded the case to the undersigned to consider "whether Hasan established a question of material fact regarding retaliation, i.e., whether Hasan's protect activity was a contributing factor in Enercon's failure to hire him for the advertised positions." In remanding this case, the ARB noted that the Third Circuit did not discuss the issue of whether the undersigned had properly limited Hassan's discovery request or the ARB's finding Hasan's complaint was limited to only the non-advertised job openings and thus, the ARB would not revisit its holdings on these issues.

Accordingly, the undersigned will not revisit those issues on remand despite Hasan's repeated requests to do so, noting only that Respondent initially provided the names of all structural/civil engineers it had hired between November 23, 2002, and August 2004, whether these positions were advertised or not and upon remand provided additional names of civil/structural engineers it hired after 2004 for positions advertised in 2003 and 2004. Indeed, there does not appear to be any reason such as a change in law to require Respondent to provide additional discovery following delays by the ARB or Third Circuit in reviewing the motion for summary judgment. *See Level 3 Communications v. City of St. Louis, Missouri*, 540 F.3d 794 (8th Cir. 2008).

Further, the undersigned notes that in granting Hasan's petition for review, the Third Circuit did not express any opinion on the merits or lack of merit of Hasan's claim. Thus, subsequent attempts by Hasan to demand reinstatement and backpay based upon Third Circuit ruling were misplaced, for such remedies can only come only after a full and successful trial on the merits in which Hasan proves, by a preponderance of evidence, the elements of a *prima facie* case.

### **I. Parties Position**

The parties presented extensive briefs in support of their respective positions. On December 30, 2009, Hasan submitted a 148-page brief in opposition to Respondent's motion for summary judgment. This brief, contrary to specific instruction, contained multiple fonts, making it difficult at times to read. Rather than focusing on the central issue of retaliation, Hasan

proceeded: (1) to complain about lack of discovery, noting he requested Respondent not to discriminate and requested a ruling on his motion to compel before ruling on Respondent's motion for summary judgment; (2) reminded the undersigned he was not an attorney and that the ARB construed the pleadings liberally; (3) declared without proof that Respondent had a past history of illegal refusal to hire which conduct they engaged in again in repeatedly refusing to hire him; (4) accused Respondent and its attorney of engaging in fraud upon the court and of presenting shifting defenses; (5) requested I view all evidence in the light most favorable to him and infer from Respondent's falsehood [which Hasan never explained except to refer the Third Circuit's rejection of Respondent's attempt to disclaim offering engineering jobs on the internet] that Respondent had refused to hire him in part because of his protected activities; and (6) accused Respondent's agent, David Studley, of participating in Respondent's discriminatory hiring practice and attempting to cover up the illegal motivation by asserting he was only interested in hiring former coworkers and increasing Respondent data base while falsely denying knowledge of Hasan's resume. Hasan's declaration that the reviewing of resumes of only former employees is unworthy of credence and is of sufficient relevance to defeat Respondent's motion for summary judgment, since he must have apparently reviewed Hasan's resume as McGoeys did. *See* Hasan's response to Respondent's motion for summary judgment at pp. 41, 42.

Hasan declared that if I "remove the falsehood from this case" and I would see "a very straightforward case of intentional and illegal blacklisting against him is proven." *See* Hasan's response to Respondent's motion for summary judgment at pp. 36, 52, 64. Hasan then attacked the ALJ/ARB for excluding evidence and then falsely concluded since David Studley claimed Respondent was committed to the equitable treatment of all employees, he had a duty to review Hasan's resume and hire him for the position of structural engineer, for which Hasan alleged he was qualified. *See* Hasan's response to Respondent's motion for summary judgment at pp 37, 38. Further, Hasan claimed pre-text by Studley's October 30, 2009 affidavit, wherein Studley asserted Hasan never submitted a resume. Hasan claimed Studley stated such while knowing Hasan's resume needed not be re-filled since Respondent's counsel informed Studley that Hasan's resume could be pulled at any time.

Throughout the complaint process, Hasan asserted that since he was not a trained attorney but only a pro se litigant, his pleadings should be liberally construed, and that if his pleadings were liberally construed, they would show Respondent discriminatorily refused to hire him for advertised civil/structural engineering positions because of his protected whistleblowing activities in filing complaints against Respondent and other employers. Hasan argued that Respondent engaged repeatedly in shifting explanations, "offering lie after lie" for not hiring him, and asserted he has proved retaliation by Respondent's past practice of blacklisting, submitting fraudulent affidavits, and engaging in shifting defenses. However, Hasan presented no evidence of such conduct other than to swear such existed. Indeed, Complainant's only response to Respondent's motion for summary judgment is to make unfounded accusation of dishonesty by Respondent and the relevant judiciaries.

Hasan pointed out that Respondent, as early as February 3, 2003, was impressed with his capabilities and interest in their employment opportunities, and for that reason, kept his resume on file for potential future employment. Yet, the evidence shows Respondent never contacted him to fill advertised positions or, for that matter, unadvertised positions, apparently hiring other engineers at various times and locations. Those engineers included the following: Penacerrada,

Shakibnia, Brady, Sand, Goel, Markowski, Dinesh Patel, Ying, Rollins, Nalin Patel, Arun Pal, Ashwin Patel, Kotwani, Bagdasarian, and Stroup. Hasan argues that since Respondent knows he is qualified and has applied for advertised positions, and that since they never interviewed him, they must be retaliating against him for engaging in protected activities.

Respondent, on the other hand, submitted a 21-page brief on February 1, 2010, with 11 exhibits marked A through K. Respondent asserted it has shown that Hasan's protected activities were not a factor in Hasan's failure to be hired, but rather, Hasan was not hired for non-retaliatory reasons. Concerning the advertised positions of November 22, 2003 and February 5, 2004, for structural/civil engineering positions in Respondent's Germantown, Maryland office, it appears Respondent hired no engineers, including Hasan, for these positions, or for subsequent, temporary positions involving the design and installation of nuclear power plant security systems. Respondent claimed Hasan provided no facts creating an inference of retaliation, i.e., that Hasan's protected activities were a contributing factor in his failure to be hired. Rather, Hasan merely provided speculation and conjecture along with self-serving proclamations that Respondent retaliated against him when it refused to hire him for advertised structural/civil engineering positions.

Regarding the advertised Germantown position which appeared from 2002 through 2004, David Studley, manager of Respondent's Germantown office, was responsible for placing the alleged advertisement. Studley had been the Director of Utility Engineering for Scientech and was responsible for successfully bidding jobs at Beaver Valley and Perry Nuclear Power Plants, which were owned and operated by First Energy Nuclear Operating Corporation (FENOC) prior to his employment with Respondent in July 2002. Studley believed that Scientech would lose this work with FENOC when its General Services Agreement was under rebid. Studley believed that Respondent provided him with the opportunity to open and grow a new engineering office in Germantown which could successfully win the rebid at FENOC, especially since the advertisement was designed to recruit former co-workers at Scientech whom he knew and trusted. Studley periodically scanned the résumés submitted in response to the advertisement. Hasan was not a former co-worker of Studley and Studley did not recall reviewing either Hasan's letter or resume. Rick McGoey, manager of Respondent's Mount Arlington, New Jersey office, who also received a letter and résumé from Hasan, had nothing to do with either the Germantown advertisement or its hiring. Studley did not hire any structural/civil engineers who submitted résumés. The advertisement remained on the website through 2004, and was thereafter removed. Studley denied Hasan's protected activities played any factor in not hiring Hasan.

The advertisement for a temporary engineering position appeared on Respondent's website on January 7, 2004, and was placed there by Respondent in anticipation of securing additional security system work from NMC, Energy North at the Fitzpatrick Plant, and Florida Power and Light at the Turkey Point Plant. In October 2004, Hasan sent a letter to Respondent responding to the temporary position advertisement. By the time the letter was received, Respondent learned that no one would be hired for these positions because the additional work was not secured. Thus, Hasan's protected activity was not a factor in his not being considered for these positions, which ultimately never materialized.

Respondent contends that Hasan as the non-moving party may not, under CFR Section 18.40(d), rest upon mere allegations, speculation, or denials, but must set forth specific facts on

each issue upon which he would bear the ultimate burden of proof. If Hasan cannot do this and thus fails to establish an element essential to his case, which Respondent insisted he cannot, there cannot be any genuine issue of material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Thus, summary decision must be granted in Respondent's favor.

Respondent contends that Hasan has failed to establish the existence of a question of fact regarding retaliation on any engineering position for which he applied, including those subsequent engineering positions in filled in 2008 and 2009 with the hiring of Karl Rainey in 2008, and Ernest Enriches, Laura Malay, J. Clayton Mc Connell, Danny Lee, and George Thasher in 2009, all of which were hired by Studley. Further, Hasan's accusation of blacklisting, pattern or practice, or disparate treatment has no application in this case. Respondent further argues Hasan's motions to compel also have no merit because Hasan has been provided with ample discovery. As Respondent succinctly stated at page 20 of its brief in support of motion for summary decision:

It is undisputed that no individual was hired by Enercon as a result of their response to either the Germantown Advertisement or the Advertisement for Temporary Positions. It is also undisputed that Hasan was treated exactly the same as all other individuals who submitted resumes and or letters in response to these advertisements. Neither Hasan nor any other individual responding to the advertisements was hired by Enercon for these positions. Contrary to Hasan's irresponsible and unsupported allegations, the undisputed facts establish that Hasan's protected activities were not considered by Enercon as a factor in these employment decisions.

On February 3, 2010, Hasan submitted a 100 page reply brief, opposing Respondent's attempt to secure summary judgment in these proceedings. In his reply brief, Hasan: (1) swears that his protected activity was a contributing factor in Respondent's refusal to hire him; (2) demands additional discovery and immediate relief; (3) contends that Respondent's continual refusal to hire for civil/structural engineering positions for which he is qualified constitutes evidence from which an inference of retaliation can be made; (4) on January 2, 2003, Whitmore verbally, but never in writing, offered Hasan a temporary nuclear engineering position; (5) renews previous attacks upon Respondent's attorney as repeatedly lying to the court and not providing Hasan with a true and correct copy of Respondent's 2004 motion for summary judgment, obstructing justice, and committing fraud upon the court; (6) alleges, without proof, Respondent's past illegal practice of refusing to hire him because he was a whistleblower, (7) attacks the undersigned for requiring Respondent to only update information on whom it hired in 2008 and 2009 based upon advertisements it published in 2003 and 2004 for Germantown and temporary positions, and refusing to compel Respondent to produce data on additional hires in 2008 and 2009; (8) accuses judges and ARB members of illegally favoring Respondent; (9) states the undersigned should not follow the illegal directions of the ARB concerning discovery, and should have held a hearing to take testimony on thee issues raised by Hasan.

## II. Substantive Law and Procedure

Considering Respondent's motion for summary judgment and Hasan's opposition the undersigned is reminded of the underling purpose of summary judgment as set forth in Rule 56 of the Federal Rules of Civil Procedure, which states as follows:

The purpose of summary judgment is to isolate, and then terminate, claims and defenses that are factually unsupported. The Supreme Court has emphasized that summary judgment is not to be viewed as a disfavored technical shortcut, but rather as an integral component of the Federal Rules. Summary judgment motions must be resolved not only with appropriate regard for the rights of those asserting claims and defenses to have their positions heard by the factfinder, but also with due regard for the rights of persons opposing such claims and defenses to demonstrate under this Rule and *before* trial, that the claims and defenses have no factual basis. Thus a party moving for summary judgment forces the opponent to come forward with at least one sworn averment of facts essential to the opponent's claims or defenses before the time consuming process of litigation will continue. The non moving party must do this by setting forth "specific facts" that there is a genuine issue requiring a trial. If that party is unable to make that showing, the law requires entry of a judgment in favor of the moving party. Thus as one court has ably described it, a rule 56 motion is "essentially "put up or shut up "time for the non-moving party.

Fed. Civ. Pro. R. 56.

In a case such as this, an ALJ cannot summarily try the facts. Rather, the ALJ must apply the law to the facts that have been established by the parties. *See* 10 Wright and Miller, Federal Practice and Procedure, § 2725 at 104. A motion cannot be granted merely because the movant's position appears more plausible or because the opponent is not likely to prevail at trial. *Id.* at 104-105. In short, the trier of fact has no discretion to resolve factual disputes on a summary decision motion. *Id.* at 186. Accordingly, "if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men might differ on its significance, summary judgment is improper." *Id.* at 106, 109. Once it is determined that a triable issue exists, the inquiry is at an end and summary decision must be denied. *Id.* at 187.

The standard for granting summary judgment or decision is set forth at 20 C.F.R. Section 18.40(d), which is derived from Federal Rules of Civil Procedure Rule 56. Section 18.40(d) permits an Administrative Law Judge to enter summary judgment for either party, "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision." If the moving party meets the initial burden of showing no genuine issue of material

fact, the burden shifts to the non-moving party to produce evidence or designate facts showing the existence of genuine issue(s) for trial with doubts and reasonable inferences resolved in favor of the non-moving party. *Reves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2110 (2000); *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 587 (1986). *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 278 (5th Cir. 2004)

An issue is material if the alleged facts are such as to constitute a legal defense or are of such nature as to affect the result of the action. A fact is material and precludes a grant of a summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Section 18.40(c) provides that when a motion for summary judgment is made and supported by appropriate evidence, the non-movant or party opposing the motion may not rest upon mere allegations or denials of such pleading, but must set forth specific factors showing there are genuine issues of material facts. As the Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), the non-movant must present affirmative evidence in order to defeat a properly supported motion for summary judgment, even where the evidence is within the possession of the moving party, as long as the non-movant had a full opportunity to conduct discovery. In reviewing a request for summary decision, all evidence and inferences must be viewed in the light most favorable to the nonmoving party. *Id.* at 262.

The non-movant's evidence, if accepted as true, must support a rational or reasonable inference that the substantive evidentiary burden of proof could be met. Where the non-movant presents admissible direct evidence such as affidavits, answers to interrogatories or depositions, the judge must accept the truth of the evidence set forth without making credibility or plausibility determinations. *T.W. Electric Service v. Pacific Electric Contractors* 809 F.2d 626, 631 (9th Cir. 1987). Allegations that are unreasonable, improbable, conclusory, or based upon rank speculation cannot defeat a properly drawn motion for summary judgment. *See Caban Hernandez v. Philip Morris USA, Inc.* 486 F.3d 1, 8-9 (1st Cir, 2007); *Mulloy v. Acushnet Co.*, 1141 (1st Cir., 2006).

In like manner, a mere promise by the non-moving party that he will later demonstrate the falsity of the moving party's facts will not defeat an appropriately supported summary judgment motion. *See Island Software & Computer Serv., Inc. v. Microsoft Corp.* 413 F.3d 257, 261-62 (2nd Cir. 2006) .Conversely, if the non-movant fails to make a showing sufficient to establish the existence of an element essential to his case and on which they bear the burden of proof at trial, there is no genuine issue of material fact and the movant is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. *Catrett*, 477 U.S. at 322. Once the moving has met its burden of production, the non-moving must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. The non-movant's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. Where the non-moving presents admissible direct evidence such as affidavits, answers to interrogatories or depositions, the judge

must accept the truth of the evidence set forth without making credibility or plausibility determinations. *T.W. Electric Service v. Pacific Electric Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). If the non-moving fails to sufficiently show an essential element of his case, there can be “no genuine issue as to any material fact,” entitling the moving is entitled to summary judgment, since a complete failure of proof concerning an essential element of the non-movant’s case necessarily renders all other facts immaterial.” *Id.* at 322-323; *Catrett*, 477 U.S. at 322-323.

Concerning the use of discovery, Hasan had previously been advised that discovery has reasonable limits in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, and the undersigned has an obligation to prevent discovery abuse. *Hasan v. Burns & Roe, Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. (ARB, Jan.30, 2001). In *Hasan*, the Board stated the Secretary’s Rules governing the scope of discovery are substantially the same as those of Federal Rules of Civil Procedure Rule 26. In *Herbert v Lando*, 441 U.S. 153 (1979), the Supreme Court noted that Rule 26 gives district judges ample authority to prevent abuse of the discovery process and encouraged judges to use that authority when necessary, specifically the Court stated:

The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to affect their purpose of adequately informing litigants in civil trials.

...But the discovery provisions, like all Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they “be construed to secure the just, speedy and inexpensive determination of every action...” To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be “relevant” should be firmly applied, and the district courts should not neglect their power to restrict discovery where “justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense...” With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.

The purpose of the employee protection provisions of the ERA is to protect whistleblowers who act in prescribed ways to ensure safety from employer retaliation. *Stone & Webster Engineering Corp. v. Herman*, 1997 U.S. App. LEXIS 16225, No. 95-6850 (11th Cir. July 2, 1997). In so doing, the ERA promotes a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publically asserting company violations of statutes protecting the environment. *Passaic Valley Sewerage Comm’rs v. Department of Labor*, 992 F 2d 474, 478 (3rd Cir. 1993). The ERA is not designed to shield employees from the consequences of their own misconduct or failures. See *Kahn v. Secretary of Labor*, 64 F. 3d 271, 279 (7th Cir. 1995). Neither is it designed to afford an employee preferential hiring status when new positions become available.

### **III. Discussion.**

In this case, the Board on remand has asked the undersigned to determine whether Hasan has establish facts from which reasonable inferences can be drawn that Respondent refused to hire him in retaliation for his whistle blowing action. Transcribed oral testimony may be used to support a motion for summary judgment, but live oral testimony, which Hasan demands of Respondents supervisors, is rarely authorized and is not appropriate here, where Hasan has merely promised but failed to produce any evidence or establish any facts from which reasonable inferences could be drawn in support of his opposition to Respondent's motion for summary judgment. *See Geake & Sons, Inc., v. NLRB*, 103 F. 3d 1366, 376 (7th Cir. 1997); *Roche v. John Hancock Mutt. Life Ins. Co.*, 81 F.3d 49, 253 (1st Cir. 1996).

Respondent asserts, and the record supports the contention, that Hasan produced no facts from which reasonable inference could be drawn to show that Hasan protected activities were in any way connected to or contributed in any manner to Respondent's refusal to hire him. Contrary to Complainant's assertions, there is no evidence of pre-text or lying by Respondent so as to raise an inference of discrimination in the hiring process. Respondent had legitimate reasons for hiring all of the engineers it hired from November 23, 2002, to the present, which included the applicant's formal training, knowledge, skills, prior work experience, demands of the job, requests of the client, and location of new hires near jobsites.

While there may be a dispute regarding which supervisors knew and when they knew of Hasan 's protected activity, there is no question that Hasan failed to show any facts from which reasonable inferences of retaliation can be shown. It is understood Hasan may protest this finding and accuse the undersigned of being aligned with other alleged corrupt or incompetent officials. However, the truth is that Hasan, who had more than adequate discovery, never possessed or showed any facts from which reasonable persons may infer discriminatory retaliation. In the final analysis, Hasan's contentions amount to nothing more than conjecture or speculation in an attempt to secure what has apparently escaped him to the present, i.e., employment as a structural or civil engineer. Hasan's affidavit is a statement of allegations rather than specific facts from which reasonable inferences can be drawn to show retaliation.

Respondent did not refuse to hire him because of his whistle blowing activities. Respondent hired no engineers in 2003 and 2004 based upon ads for its Germantown office or temporary engineering positions. The temporary jobs for which Hasan complains about never materialized. The Germantown advertisement was designed to attract former Scientech engineers with whom David Studley had worked, and were known and like by FENOC, so as to secure a rebid of their work at Beaver Valley and Perry Nuclear Power Plants. Studley took two years, or until 2008, before he was successful in hiring his previous lead, Don McGuigan, to lead and manage this work. Studley had no knowledge of Hasan's protected activities and did not review his resume.

Since the non-moving party, Hasan, failed to sufficiently show an essential element of his case, there can be "no genuine issue as to any material fact," entitling the moving party, Respondent, to summary judgment, since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Catrett*, 477

U.S. at 322-323. Accordingly, I find Respondent entitled to summary judgment and dismiss the instant complaints as lacking merit.<sup>1</sup>

## ORDER

Based on the foregoing, Respondent's Motion for Summary Decision, filed in 2004, is **HEREBY GRANTED**, and the above claims are **DISMISSED WITH PREJUDICE**.

**A**  
**CLEMENT J. KENNINGTON**  
**ADMINISTRATIVE LAW JUDGE**

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109

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<sup>1</sup> Concerning Hasan's motions to compel, I find no merit to grant them, since Respondent has provided more than adequate discovery, indentifying all engineers hired in 2003 and 2004, and thereafter showing those hired at Respondent's Germantown office in 2008 and 2009.