

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 06 June 2014**

Case No: 2013-ERA-00014

In the Matter of:

ANTHONY FLEMING, *pro se*,

Complainant,

v.

THE SHAW GROUP AND JAMIE MORRIS,

Respondents.

APPEARANCES: Anthony Fleming  
*Pro Se*

Karen Faye McTavish  
Daryl Shapiro  
Attorneys for the Respondent

BEFORE: ALAN L. BERGSTROM  
Administrative Law Judge

**ORDER DISMISSING INDIVIDUAL AS NAMED RESPONDENT  
AND  
ORDER DENYING COMPLAINT**

This case arises under the employee “whistle blower” protection provisions of the Energy Reorganization Act of 1974, U.S. Code, Title 42, § 5851 (“ERA”). The claim was referred to the Office of Administrative Law Judges for formal hearing on appeal by Complainant of the Occupational Safety and Health Administration July 5, 2013, determination that there is no reasonable cause to believe that Respondent violated the ERA.

Pursuant to ERA implementing regulations at 29 CFR §24.107(a), a formal hearing was held on April 30, 2014, in Savannah, Georgia, at which time the parties were afforded full opportunity to present evidence and argument as provided in the ERA and applicable regulations. At the hearing, Administrative Law Judge exhibit 1 through 11 and Complainant exhibits 1 through 4

were admitted without objection (TR<sup>1</sup> 10-16, 51-56, 120-124). Respondent did not submit exhibits for consideration. At the hearing the Complainant proceeded without a personal representative which this presiding Judge found to be an informed, willful and voluntary act (TR 6-10). In the initial stages of the hearing, named Respondent Jamie Morris was found to be an individual and not an employer within the meaning of the ERA and was dismissed as a named Respondent. At the close of the Complainant's case-in-chief, Respondent Employer made motion for a directed verdict for failure of the Complainant to demonstrate that the alleged protected activity was a contributing factor to the alleged adverse employment actions. The specific deficiency was explained to the Complainant and he was granted an opportunity to introduce additional evidence, including the opportunity to testify in his own behalf and to make a statement as to why his complaint should not be dismissed. The Complainant declined to testify (TR 116, 124) or produce additional evidence beyond CX 4, though he did make an unsworn statement as argument which was considered. The Respondent's Motion for a Directed Verdict was granted and the complaint dismissed. (TR 117-129)

On May 19, 2014 the Complainant filed a two paragraph letter alleging that he was denied the foreman position by Respondent The Shaw Group "because I was black." At the hearing the Complainant was advised that only complaints arising under the ERA were within the jurisdiction of the Court (TR 6-7, 12, 60, 107-108).

The findings of fact and conclusions which follow reflect the complete review of the entire record, the argument of the parties, as well as applicable statutory provisions, regulations and pertinent precedent that was considered in dismissing Jamie Morris as a named Respondent and in dismissing the complaint upon granting the Respondent Employer's Motion for a Directed Verdict.

### **STIPULATIONS**

The parties orally stipulated to, and this Administrative Law Judge finds, the following as facts in this case (TR 19-41):

1. The Complainant was employed by Respondent, The Shaw Group, as an electrician from November 11, 2011 at the Mixed Oxide (MOX) Fuel Fabrication Facility at the Savannah River Site in Akin, South Carolina.
2. During the period November 11, 2011 through June 8, 2012, Respondent, The Shaw Group, was a corporation which performed contract work activities at the Mixed Oxide Fuel Fabrication Facility at the Savannah River Site in Akin, South Carolina.
3. At all times relevant to the proceeding, Respondent, The Shaw Group, was an "employer" within the meaning of the "whistleblower" protection provisions of the Energy Reorganization Act of 1974, 42 U.S. Code, Section 5851.
4. At all times relevant to the proceeding, the Complainant was an "employee" within the meaning of the Energy Reorganization Act.

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<sup>1</sup> The following exhibit notation applies: JX - joint exhibit; ALJX – Administrative Law Judge exhibit; CX – Complainant exhibit; EX – Employer exhibit; TR – transcript page

5. At all times relevant to the proceeding, the Respondent, Jamie Morris, was an individual employed by Respondent as general superintendent by The Shaw Group at the Mixed Oxide Fuel Fabrication Facility at the Savannah River Site in Akin, South Carolina.
6. Prior to beginning work for Respondent, The Shaw Group, the Complainant had filed a complaint under the Energy Reorganization Act against his then employer Alberici Constructors, Inc., on May 5, 2010, which complaint was resolved by a settlement agreement approved on April 29, 2012 (ALJX 8).
7. The May 5, 2010, complaint filed by the Complainant against Alberici Constructors, Inc., involved events known to Complainant and Respondent Jamie Morris due to Respondent Jamie Morris' position as Complainant's second-line supervisor at the time of those alleged 2010 events.
8. The current complaint was timely filed by Complainant on March 12, 2012 and was timely amended on June 8, 2012.
9. The Complainant filed a timely request for hearing on July 23, 2013.

#### **I. DISMISSAL OF JAMIE MORRIS AS A NAMED RESPONDENT (TR 41-46)**

On April 9, 2014 Respondents' counsel filed a "Motion to Dismiss" Respondent Jamie Morris from the complaint "because he is not an employer under the Energy Reorganization Act of 1974." (ALJX 10) Respondent's counsel renewed the Motion at the formal hearing.

The ERA provides that at "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" engaged in statutorily defined protected activity. 42 U.S.C. §5851(a)(1) The ERA defines "employer" to include licensees of the Nuclear Regulatory Commission; applicants for such licenses and their contractors and subcontractors; contractors and subcontractors of the Department of Energy, except those involved in naval nuclear propulsion work under Executive Order 12344; licensees of an agreement State under Section 274 of the Atomic Energy Act of 1954; applicants for such licenses and their contractors and subcontractors; contractors and subcontractors of the Nuclear Regulatory Commission; and contractors and subcontractors of the Department of Energy. 42 U.S.C. §5851(a)(2)

All Parties agreed by stipulation and on the record that named Respondent Jamie Morris did not employ the Complainant but was employed by, and worked as a general foreman for, Respondent, The Shaw Group, during the period the Complainant worked for Respondent, The Shaw Group.

A necessary element of a valid ERA claim is that the party charged with discharging or discriminating against an employee is in fact an "employer" within the meaning of the ERA. See *Billings v. OFCCP*, No. 91-ERA-35 (Sec'y Sept. 24, 1991). "Persons who are not 'employers' within the meaning given that word in the ERA may not be held liable for whistleblower violations." *Varnadore v. Oak Ridge Nat'l Lab. et. al.*, ARB Case No. 92-CAA-2, 92-CAA-5, 93-CAA-1, 94-CAA-2, 94-CAA-3, 95-ERA-1, 1996 WL 363346, \*23 (Jun. 14, 1996), *aff'd and req. en banc denied*, 141 F.3d 625 (6<sup>th</sup> Cir. 1998). Additionally, "employees are not employers within the meaning of §5851 even if they are supervisory employees." *Bath v. Nuclear Regulatory Commission*, ARB Case No. 02-041, 2003 WL 22312721, \*3 (Sep. 29, 2003).

Since named Respondent Jamie Morris was employed by The Shaw Group as a general foreman over the employees who supervised the Complainant during the relevant period, he is not an “employer” within the meaning of the ERA. Accordingly, Jamie Morris must be dismissed as a named Respondent in this case.

The Motion to Dismiss Jamie Morris as a named Respondent was granted and he was dismissed as a named Respondent in this case during the initial stages of the formal hearing (TR 45-46).

## **II. COMPLAINT OF DISCRIMINATION UNDER THE ERA**

The events underlying the complaint occurred at the Mixed Oxide (MOX) Fuel Fabrication Facility at the Savannah River Site in Akin, South Carolina. Accordingly, the precedents of the U.S. Court of Appeals for the 11<sup>th</sup> Circuit apply.

### **ISSUES**

The issues remaining to be resolved are (TR 7-8, 119):

1. Whether the Complainant’s protected activity of filing a whistleblower complaint against Alberici Constructors in May 2010 was a contributing factor to the Complainant not being promoted to night electrician foreman positions on or about January 12, 2012; February 6, 2012; and/or June 6, 2012 ?
2. Whether the Complainant’s protected activity of filing a whistleblower complaint against Alberici Constructors in May 2010 was a contributing factor to the Complainant being laid off of night shift electrician work the summer of 2012 ?
3. If there is a prima facie showing that the Complainant’s protected activity of filing a whistleblower complaint against Alberici Constructors in May 2010 was a contributing factor to the alleged adverse employment actions, has the Respondent Employer established by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity ?

### **PARTY CONTENTIONS**

#### *Complainant’s Contentions:*

The Complainant submitted that “I feel I am owed back pay, reimbursement and other expenses due to defamation of character, abuse of authority, violation of my rights, family hardship, disrespect to me as a human being, and denying my rights as an employee.”<sup>2</sup> He seeks an award of \$300,000.00.

The Complainant submits that he worked directly for Jamie Morris when employed by Alberici Constructors in 2010 when he was discharged following conversations with an NRC

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<sup>2</sup> The Complainant was repeatedly advised that only discharge and discrimination related to the alleged whistleblower activity under the ERA could be addressed as a complaint in the proceeding.

representative about wiring work in a junction box and he subsequently filed a whistleblower complaint under the ERA for the discharge. He submits that when he came to work for The Shaw Group as a night shift electrician he was approached by his immediate supervisor and local union representative about becoming an electrician working-foreman on the night shift but was not promoted to the position because Janie Morris knew about his protected activity of filing a whistleblower complaint against Alberici Constructors and did not want him to become a foreman. He submits that he suffered emotional and medical problems and that his reputation as a general labor electrician has been ruined.

*Employer's Contentions:*

Employer's counsel submits that the Complainant has failed to establish that his protected activity of filing a whistleblower complaint against Alberici Constructors in 2010 was a contributing factor in the decisions not to advance the Complainant to working night shift electrician foreman. She argues that Jamie Morris may have had knowledge of the protected activity but never communicated that knowledge to the decision makers, was several layers of supervision above the Complainant, and did not provide any input into the decision making process not to advance the Complainant to working night shift electrician supervisor.

**SUMMARY OF RELEVANT EVIDENCE**

*Testimony of Patricia Fleming (TR 62-75)*

Ms. Fleming testified that she met the Complainant while employed at the Savannah nuclear site and subsequently married the Complainant in June 1990 and raised two children together. She stated that she and the Complainant divorced in September 2011 or 2012 after he left Alberici Constructors. She stated that after the Complainant left Alberici Constructors he became a different person and their lifestyle changed. She stated the Complainant's attitude changed, he would call home with a lot more stress and financially things were not right.

Ms. Fleming testified that she thought she had seen J. Morris one time at the IBEW union local hall and on another occasion he had called the house to tell the Complainant to come pick up a check.

On cross-examination Ms. Fleming testified that she separated from the Complainant in 2010 or 2011 for multiple reasons, including his demeanor and financial reasons. She stated that she had driven the Complainant to an agency called Stepping Stone which was a substance abuse treatment center sometime after 2010. She was not aware that the Complainant had a problem with alcohol until the formal hearing.

*Testimony of Jamie Morris (TR 75-116)*

Mr. Morris testified that he did not have any decision making input for the Complainant being made a foreman while employed at The Shaw Group. He stated that during the November 11, 2011 to June 8, 2012 timeframe he was the general superintendent of the entire electrical department on day shift and that he reported to the Vice President of Construction for The Shaw

Group. He stated that for electricians on the night shift there would be electricians who reported to night shift working-foremen who reported to a night shift general foreman who would report to the junior superintendent of the night shift (W. Stampling) who reported to the senior superintendent on night shift (P. Benning) who would report to him as general superintendent. He stated that for the day shift there were four superintendents who reported to a lead superintendent who would report to him as general superintendent.

Mr. Morris testified that during the November 11, 2011 to June 8, 2012 timeframe there was a need to fill vacancies for night shift working-foreman positions in the electrical shop at different points of time and that those positions were filled in the regular course of business. He reported that the apprentice electrician, journeyman electrician, working-foreman, and general foreman positions were union positions and that the superintendent positions were company management positions. He stated that the electricians were hired out of the union hall on an as needed basis for an indefinite period of time.

Mr. Morris testified that he allows his superintendents to set up their general foreman, which lets the superintendents set themselves up for success, and he holds them accountable for their selections. Then the superintendents are encouraged to let their general foremen select their own working-foremen for the same reasons. He reported that he had no knowledge of how working-foremen on the night shift were picked; but suspected that the selection was made by the general foreman. He testified that neither the night shift supervisor or night shift general foreman asked him for input on the Complainant becoming a working-foreman on night shift and that he did not have any other type of influence on the Complainant not becoming a night shift working-foreman.

Mr. Morris testified that during the November 11, 2011 to June 8, 2012 timeframe he never told anyone in management at The Shaw Group that the Complainant had filed a whistleblower complaint while at Alberici Constructors because "I didn't know about a whistleblower at Alberici. That was all handled by the lawyers. They never told me what he filed under or what he did."

Mr. Morris testified that he knew that the night shift union steward was Angie and that the union steward has no influence over management. He reported he had no personal knowledge of conversations between the Complainant and Angie or R. Barton.

Mr. Morris testified that there budget restraints in the mid to late summer of 2012 and high-level management at the vice presidents of construction and company presidents level asked for a reduction in force on the MOX facility project. He stated E. DeMona, the Vice President of Construction, directed "x" number of people had to be cut in each division and to "go back and rank all our people [and] in that ranking we'll pick 'x' amount of people that's got to go." He reported the ranking was performed when the union hall called and objected to that process. He testified the union asked "to lay off the entire night shift. So between the Union and Ed DeMona, them [sic] two agreed to lay off, RIF, the entire night shift. I had no decision making whatsoever in none of that." He reported that the Vice President of Construction directed to lay everybody on night shift off, so that's what we did.

Mr. Morris testified that he has been in the union since 2000 and that typically during local layoffs, those union members who travel and are not local to the job are laid off first, depending on where you are at in the country and who is running the show. He stated that a union member would be referred to night shift and when night shift work is done the member would go back to the union hall and no transfer to a day position. He reported he had no knowledge if the Complainant or union steward Angie were transferred to day shift after the night shift employees were laid off.

On cross-examination, Mr. Morris testified that he did not have any input with respect to who was made foreman and that he always accepted the recommendations of the general foremen and superintendents on who should be made foreman. He reported that no one discussed with him whether the Complainant should be made foreman and that he had no interaction or discussions with the Complainant while at The Shaw Group. He testified that he had no role in selecting the Complainant for the layoff and that the layoff was dictated by the union.

On re-direct examination, Mr. Morris testified that when he stated that the Complainant was “hired back” he meant that the Complainant had been hired back as an electrician onto the MOX project by The Shaw Group after being let go from the same project by Alberici Constructors. He reported that he had no influence on the hiring of R. Barton as general foreman but that the decision was probably made by his superintendent. He stated he assumed that W. Holclaw was made general foreman by his superintendent. He testified that “I’m at a high level of management ... I try not to get down into the details of the foremen and general foremen.”

Mr. Morris testified that The Shaw Group is no longer a company and has changed its name to “CBI”. He reported that the project is now called “SPSG” and that CBI has changed into CBI Project Services Group (CPSG). He reported that Wise Electrical is a subcontractor of CPSG.

Mr. Morris testified that during the November 11, 2011 to June 8, 2012 timeframe the company EEO officer, D. Sailor, talked to him about the Complainant but that he could not recall the reason for the conversation or the details of the conversation. He reported he did not recall if the brief discussion with D. Sailor involved the Complainant’s failure to be made a working-foreman.

Mr. Morris testified that “the night shift basically ran by the lead superintendents on nights. And maybe once a month I came in and had a safety topic speak with the night shift as a group, a whole. ... We had a one-minute meeting a week, maybe a two-minute meeting every two weeks, about how progress was going on the night shift, quantities and expectations. Other than that, I didn’t have any dealings with night shift. We had a schedule. We presented the schedule. They worked by the schedule. ... Any problems [the night shift foremen] would have had would have just been from the steward to me ... [and] me and the steward didn’t have very many conversations on night shift.”

Mr. Morris testified that he would not have had any problem if the Complainant had been made a working-foreman; that he had no problem with the Complainant being hired onto the project; and that the Complainant is “allowed to come back anytime he feels free.”

*May 7, 2013 Declaration of Richard Barton (CX 4)*

Mr. Barton stated that during the period from December 2011 to early 2012 he was the night shift general foreman at the MOX facility and as such he was responsible for the selection and appointment of an employee to the position of foreman on night shifts. He reported that during that period Jamie Morris was in a more senior position of general manager at the MOX facility. He stated that “Mr. Morris was not involved in the selection and appointment process for the position of foreman on the night shifts.”

Mr. Barton stated that he did not appoint the Complainant to the position of foreman for a crew for temporary power in December 2011, with the primary reason being he knew the Complainant did not desire to work on the crew for temporary power. He reported that he filled four other foreman positions in 2012. One was to the welding crew in January 2012 where he “was not aware that [the Complainant] had relevant experience.” Another January 2012 appointment was as foreman to a temporary power crew which “I knew that [the Complainant] did not want to work in the temporary power crew.” A person with recent experience involving NRC-regulated conduit work was appointed foreman of the conduit crew in February 2012, while “I was not aware that [the Complainant] had any relevant experience on NRC-regulate conduit work.” The fourth foreman appointment in early 2012 also involved the temporary power crew where the individual selected had recent experience in the work and “I knew the [the Complainant] did not want to work in the temporary power crew.” He also reported “In addition, I did not believe that [the Complainant] possessed the leadership qualities required of the position of foreman.”

With respect to the 2012 layoff of electricians, Mr. Barton stated MOX facility management decided to combine the day and night shift crews into a single crew, thereby reducing the number of employees by approximately half. Originally, MOX facility management intended to determine which employees would be laid off through a forced ranking; but, before MOX management proceeded with a forced ranking, the collective bargaining unit requested that MOX lay off all the personnel on the night shift instead. MOX accepted this request. As a result, all employees on the night shift were released from employment. [The Complainant] was assigned to the night shift and, as a result, his employment was terminated with the rest of the members of the night shift. The termination decision was a consequence of the union’s request.”

### **STATUTORY FRAMEWORK**

The “whistleblower protection” provisions of §1581 of the ERA provide, 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 (or person acting pursuant to a request of the employee) –

- (A) Notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 USC 2011 et seq.);
- (B) Refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

- (C) testified before Congress or any Federal or State proceeding regarding any provision or proposed provision) of this chapter or the Atomic Energy Act of 1954;
- (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, 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.

(2) ...

(3) (A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the

investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by

subparagraph (A), no investigation required under paragraph (2) shall be conducted 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.”

Additionally, “it is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee because the employee has” engaged in any activity set forth above in subsections (A) through (F) of paragraph (1) of §1581 of the ERA, 29 CFR §24.102(b) and (c).

In order to state a general claim under ERA upon which relief may be granted, the Complainant must allege with specificity the existence of facts that make a prima facie showing that protected activity was at least a motivating factor in an adverse action. The complaint must establish by a preponderance of the evidence that –

1. the Complainant engaged in a protected activity;
2. the Respondent knew or suspected that the Complainant engaged in protected activity;
3. the Complainant suffered an adverse action; and,
4. the protected activity was a contributing factor in the adverse action(s) alleged in the complaint.

## **DISCUSSION**

*a. The Complainant has established by a preponderance of the evidence that he engaged in protected activity under the ERA involving Alberici Constructors as alleged.*

During his oral complaint to the investigating officer the Complainant alleged that his protected activity under the ERA involving Alberici Constructors in 2010 was known by J. Morris and

contributed to his being denied a promotion to vacancies for electrician working-foreman on several occasions during the November 11, 2011 through June 8, 2012 timeframe (ALJX 4, 6). Based on testimony at the formal hearing this presiding Judge, in the interest of justice under the ERA, amended the complaint to include the termination of the Complainant's employment as an electrician on the night shift in the summer of 2012 as an adverse employment action (TR 119).

The Parties have stipulated that prior to beginning work for Respondent, The Shaw Group, the Complainant had filed a complaint under the Energy Reorganization Act against his then employer Alberici Constructors, Inc., on May 5, 2010, which complaint was resolved by a settlement agreement approved on April 29, 2012 (ALJX 8).

Accordingly, the Complainant has established by a preponderance of the evidence that he engaged in protected activity under the ERA involving Alberici Constructors as alleged.

*b. The Complainant has established by a preponderance of the evidence that Respondent Employer had knowledge of the protected activity.*

The Parties have stipulated that the May 5, 2010, ERA complaint filed by the Complainant against Alberici Constructors, Inc., involved events known to Complainant and J. Morris due to J. Morris' position as Complainant's second-line supervisor at the time of those alleged 2010 events.

The Complainant has established by a preponderance of the evidence that J. Morris was a high-level management employee of Respondent The Shaw Group during the period from November 11, 2011 to June 8, 2012 and during the Complainant's layoff from the night shift in the summer of 2012. He functioned as the general manager at the MOX facility during that period and supervised all day and night shift lead superintendents, with reporting subordinate superintendents, general foremen and working-foremen. He reported directly to the Vice President of Construction who reported to the company President.

In view of the foregoing, the Complainant has established that by a preponderance of the evidence that Respondent Employer had knowledge of the alleged ERA protected activity involving Alberici Constructors.

*c. The Complainant has established by a preponderance of the evidence that he suffered an adverse employment action by not being promoted by Respondent Employer to a working-foreman night shift position during the November 11, 2011 to June 8, 2012 timeframe.*

The Complainant introduced CX 4 into evidence without objection. This exhibit is a declaration by R. Barton, the general foreman for electricians on the night shift working for Respondent Employer at the MOX facility. His uncontradicted statement is that there were four working-foreman vacancies on the temporary power crew, conduit crew and welding crew during the November 11, 2011 to June 8, 2012 period and that he filled those positions with electricians on the night shift that did not include the Complainant.

In view of the foregoing, the Complainant has established by a preponderance of the evidence that he suffered an adverse employment action by not being promoted by Respondent Employer to a working-foreman night shift position during the November 11, 2011 to June 8, 2012 timeframe.

*d. The Complainant has failed to establish by a preponderance of the evidence that his protected activity was a contributing factor to his not being promoted by Respondent Employer to a working-foreman night shift position during the November 11, 2011 to June 8, 2012 timeframe.*

The testimony of J. Morris, who had personal knowledge of the Complainant's ERA protected activity involving Alberici Constructor, was that he did not impart that knowledge to any individual of Respondent Employer and that he did not influence nor discuss the selection or non-selection of the Complainant to the positions of working-foreman on the night shift. R. Barton also states that J. Morris was not involved in any way with the selection of working-foremen on the night shift during the November 11, 2011 to June 8, 2012 timeframe.

Here the Complainant has failed to produce any evidence that the decision maker who decided on the selection of individuals other than the Complainant to be a working foreman on the night shift, R. Barton, had personal knowledge of the Complainant prior ERA protected activity with Alberici Constructors. The Complainant did produce evidence that other persons were promoted to the working-foreman on night shift positions for reason unrelated to his prior ERA complaint involving Alberici Constructors.

After deliberation on the evidence of record, this presiding Judge finds that the alleged protected activity cannot be considered a contributing factor in R. Barton's decision on whom he promoted to the working-foreman positions on night shift instead of the Complainant during the November 11, 2011 to June 8, 2012 timeframe. Accordingly, the Complainant has failed to establish by a preponderance of the evidence that his protected activity was a contributing factor to his not being promoted by Respondent Employer to a working-foreman night shift position during the November 11, 2011 to June 8, 2012 timeframe.

*e. The Complainant has established by a preponderance of the evidence that he suffered an adverse employment action by being laid off by Respondent Employer in the summer of 2012.*

The uncontradicted testimony of J. Morris and R. Barton is that the entire night shift of electricians were laid off in the summer of 2012 and that the Complainant was among those night shift employees laid off.

Accordingly, the Complainant has established by a preponderance of the evidence that he suffered an adverse employment action by being laid off by Respondent Employer in the summer of 2012.

*f. The Complainant has failed to establish by a preponderance of the evidence that his protected activity was a contributing factor to his being laid off by Respondent Employer in the summer of 2012.*

The testimony of J. Morris, who had personal knowledge of the Complainant's ERA protected activity involving Alberici Constructor, was that he did not impart that knowledge to any individual of Respondent Employer. He also testified that the determination for a reduction in force was made at a management level above his position and that union action resulted in direction from the Vice President of Construction to lay off the entire night shift in the summer of 2012.

R. Barton also stated that the determination to lay off the entire night shift of electricians was due to the proposal of such action by the union as an alternative to combining the day and night shifts and reducing the number of employees based on management's ranking of the union employees.

After deliberation on the evidence of record, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that his ERA protected activity involving Alberici Constructors was a contributing factor in his being laid off by Respondent Employer in the summer of 2012.

*g. The Complainant is not entitled to relief under the ERA.*

In order to be entitled to relief under the whistleblower provisions of the ERA, the alleged protective activity must be a contributing factor in the alleged adverse discharge or employment discrimination, 42 U.S.C. §5851(b)(3).

Here the Complainant has failed to establish that his ERA protected activity involving Alberici Constructors was a contributing factor to any of the non-selections to working-foreman on the night shift during the November 11, 2011 to June 8, 2012 timeframe or to the Complainant's termination of employment by the layoff of the entire night shift of electricians in the summer of 2012. Accordingly, he is not entitled to relief under the whistleblower provisions of the ERA and his complaint against Respondent The Shaw Group must be dismissed.

This dismissal effectively granted the Respondent's Motion for Directed Verdict made at the formal hearing (TR 117-129).

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After deliberation on the evidence of record, this presiding Judge enters the following findings of fact and conclusions of law:

1. The Complainant was employed by Respondent, The Shaw Group, as an electrician from November 11, 2011 at the Mixed Oxide (MOX) Fuel Fabrication Facility at the Savannah River Site in Akin, South Carolina.
2. During the period November 11, 2011 through June 8, 2012, Respondent, The Shaw Group, was a corporation which performed contract work activities at the Mixed Oxide Fuel Fabrication Facility at the Savannah River Site in Akin, South Carolina.

3. At all times relevant to the proceeding, Respondent, The Shaw Group, was an “employer” within the meaning of the “whistleblower” protection provisions of the Energy Reorganization Act of 1974, 42 U.S. Code, Section 5851.
4. At all times relevant to the proceeding, the Complainant was an “employee” within the meaning of the Energy Reorganization Act.
5. At all times relevant to the proceeding, the Respondent, Jamie Morris, was an individual employed by Respondent as general superintendent by The Shaw Group at the Mixed Oxide Fuel Fabrication Facility at the Savannah River Site in Akin, South Carolina.
6. Prior to beginning work for Respondent, The Shaw Group, the Complainant had filed a complaint under the Energy Reorganization Act against his then employer Alberici Constructors, Inc., on May 5, 2010, which complaint was resolved by a settlement agreement approved on April 29, 2012 (ALJX 8).
7. The May 5, 2010, complaint filed by the Complainant against Alberici Constructors, Inc., involved events known to Complainant and Respondent Jamie Morris due to Respondent Jamie Morris’ position as Complainant’s second-line supervisor at the time of those alleged 2010 events.
8. The current complaint was timely filed by Complainant on March 12, 2012 and was timely amended on June 8, 2012.
9. The Complainant filed a timely request for hearing on July 23, 2013.
10. Respondent Jamie Morris was employed by The Shaw Group as a general foreman over the employees who supervised the Complainant during the relevant period and is not an “employer” within the meaning of the ERA.
11. The Complainant has established by a preponderance of the evidence that he engaged in protected activity under the ERA involving Alberici Constructors as alleged.
12. The Complainant has established that by a preponderance of the evidence that Respondent Employer had knowledge of the alleged ERA protected activity involving Alberici Constructors.
13. The Complainant has established by a preponderance of the evidence that he suffered an adverse employment action by not being promoted by Respondent Employer to a working-foreman night shift position during the November 11, 2011 to June 8, 2012 timeframe.
14. The Complainant has established by a preponderance of the evidence that he suffered an adverse employment action by being laid off by Respondent Employer in the summer of 2012.
15. The Complainant has failed to establish by a preponderance of the evidence that his protected activity was a contributing factor to his not being promoted by Respondent Employer to a working-foreman night shift position during the November 11, 2011 to June 8, 2012 timeframe.
16. The Complainant has failed to establish by a preponderance of the evidence that his ERA protected activity involving Alberici Constructors was a contributing factor in his being laid off by Respondent Employer in the summer of 2012.
17. The Complainant is not entitled to relief under the ERA.

## ORDER

It is hereby **ORDERED** that –

1. **Named Respondent Jamie Morris is DISMISSED as a named party** in this complaint.
2. **The Complaint** filed on March 12, 2012 and timely amended on June 8, 2012 **is DISMISSED.**

ALAN L. BERGSTROM  
Administrative Law Judge

ALB/jcb  
Newport News, Virginia

**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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages. With your supporting legal brief you may also submit an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages. In addition, an appendix (one copy only) may be submitted with the opposing legal brief consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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(e) and 24.110.