



Issue Date: 26 June 2015

Case No.: 2013-ERA-18

In the Matter of:

PRIMO C. NOVERO,
Complainant,

v.

DUKE ENERGY, URS ENERGY AND CONSTRUCTION, INC., and
CDI CORP.,
Respondents.

**DECISION AND ORDER GRANTING RESPONDENTS' MOTION
FOR SUMMARY DECISION, DISMISSING THE CLAIM**

This proceeding arises from a claim of whistleblower protection under the Energy Reorganization Act ("ERA"), as amended.¹ The statute and implementing regulations² prohibit retaliatory or discriminatory actions against employees who engage in activity protected by the Act. In this case, the Complainant, Primo C. Novero, has requested review by the Office of Administrative Law Judges ("OALJ") of a finding by the Occupational Safety and Health Administration ("OSHA") that the Respondents, Duke Energy, URS Energy and Construction, Inc., and CDI Corp, did not violate the ERA when they terminated his employment.

The claim is before me on Respondent's Motion for Summary Decision ("the Motion") filed on April 10, 2015. Respondents submitted a memorandum in support of the motion, and exhibits numbered 1–26, five affidavits, and six excerpts from Mr. Novero's deposition transcript. Mr. Novero responded with an affidavit from himself ("the Response"). Respondent's replied to Mr. Novero ("the Reply"), and submitted one additional excerpt from Mr. Novero's deposition transcript.

Being duly advised, I find that Mr. Novero cannot establish a *prima facie* case, because he cannot establish that he engaged in protected activity of which his employer had knowledge. Thus, protected activity played no role in his termination. There are no genuine issues of material fact on this issue, and the Respondents are entitled to judgment as a matter of law.

¹ 42 U.S.C. § 5851 (2013).

² 29 C.F.R. Part 24 (2014).

I. PROCEDURAL HISTORY

Mr. Novero filed a complaint with OSHA on January 31, 2013, under the employee protection provisions of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851, alleging that the Respondents terminated his employment in violation of Section 211 of the ERA. OSHA found that Mr. Novero was terminated as a result of a legitimate business decision predicated upon Mr. Novero's work being completed at the worksite and not in reprisal for protected activity. OSHA also found that Respondents were unaware of any nuclear safety complaints Mr. Novero made while working on the project. Mr. Novero objected to OSHA's findings, and the case was referred to OALJ for hearing. During a telephone conference held on March 12, 2014, the parties agreed on a schedule to conduct discovery and file dispositive motions. After extensions, briefing on the motion was completed on May 27, 2015.

II. APPLICABLE STANDARDS

The standard for summary decision under the OALJ Rules is similar to the standard that governs summary judgment in federal courts under Fed. R. Civ. P. 56.³ The Administrative Law Judge "shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."⁴ A material fact is one whose existence affects the outcome of the case.⁵ The nonmoving party creates a genuine issue of fact by producing sufficient evidence to require a hearing to resolve the parties' differing versions.⁶ The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case."⁷ The burden then shifts to the nonmoving party, who must go beyond the pleadings and present affirmative evidence to show a genuine issue of material fact exists.⁸ If I find that there is a genuine issue of material fact, I must deny the motion and conduct a hearing. In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party.⁹

In order to prevail on his case Mr. Novero must show that: 1) he engaged in protected activity; 2) his employer had knowledge of the protected activity; 3) he suffered an adverse action; and 4) the protected activity was a contributing factor in the adverse action.¹⁰ If these elements are satisfied, the burden shifts to the Respondents to show that there is clear and convincing evidence that the adverse action would have been taken regardless of the protected activity. Thus, the Respondents can prevail if they demonstrate either that Mr. Novero cannot establish one of the four listed elements, or that they would have taken the action they did regardless of his protected activity. In their motion, Respondents contend that the Complainant

³ See 29 C.F.R. § 24.104(f).

⁴ 29 C.F.R. § 18.72(a), 80 Fed. Reg. 28800 (May 19, 2015); see also Fed. R. Civ. P. 56(c), incorporated by reference into the OALJ Rules by 29 C.F.R. § 18.10, 80 Fed. Reg. 28785 (May 19, 2015).

⁵ *Reddy v. Medquist, Inc.*, ARB No. 04-123, slip op. at 4 (Sep. 30, 2005) (SOX) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

⁶ *Id.*

⁷ *Celotex v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

⁸ *Anderson, supra*, 477 U.S. at 257.

⁹ *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

¹⁰ 49 U.S.C. §42121(b)(2)(B)(i)

cannot establish that he engaged in protected activity, or that protected activity was a contributing factor to his termination.

III. DISCUSSION AND FINDINGS

The underlying facts of this case are largely undisputed. The U.S. Nuclear Regulatory Commission (“NRC”) issued a 10 C.F.R. § 50.54(f) letter requesting nuclear power plant licensees to conduct seismic hazard walkdowns (“Walkdowns”) to verify their current plant configurations with their current licensing bases. The NRC also endorsed documentation regarding how the walkdowns were expected to be conducted. Progress Energy, later acquired by Duke Energy Corporation, contracted with URS to perform the requested Walkdowns. To staff the project URS hired contractors through CDI, a professional staffing organization, as Seismic Walkdown Engineers (“SWE”). Mr. Novero was hired as one of the SWEs. It was conveyed to each SWE that their employment would not extend beyond the completion of the Walkdowns. SWEs worked in teams of two and were responsible for looking for and evaluating potential seismic vulnerabilities. SWEs also performed Walk-Bys, which consisted of inspecting the areas around designated equipment. SWEs were tasked with identifying and evaluating “housekeeping items” that could potentially cause adverse seismic interactions. The results of the Walkdowns and Walk-Bys were recorded by the SWEs in checklists. Before performing any Walkdowns or Walk-Bys, SWEs were required to complete training and testing. After completing his training, Mr. Novero performed Walkdowns at the Robinson Nuclear Plant. After Mr. Novero finished his Walkdowns at the Robinson Nuclear Plant in July 2012, he took a one-week hiatus and then proceeded to the Crystal River Nuclear Plant (“Crystal River”). Bill Alumbaugh, URS’s Project Manager, informed Mr. Novero on or about September 28, 2012, that his employment was ending. Mr. Novero received a full-body dose count and handed in his thermos-luminescent dosimeter (“TLD”) and security badge. Respondents allege that his employment ended because he had finished his tasks. Mr. Novero stated “[i]n my understanding of ‘between-the-lines’ of our conversation, I was fired [and] blacklisted. . . per customers request.” Mr. Novero surrendered his TLD and badge and was escorted off the site. Thereafter, Mr. Novero filed complaints with OSHA and the NRC.

In their motion, the Respondents assert that Mr. Novero did not engage in protected activity and that none of the acts he alleges as protected activity contributed to his termination. By its terms, the ERA prohibits retaliation against “any employee” for engaging in protected activity. An employee’s activity is protected under the ERA if the employee:

- (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 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 at 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.

42 U.S.C. § 5851(a)(1)(A)-(F). At no time did Mr. Novero engage in any conduct in any of these categories. Mr. Novero never asserted that he notified his employer of any alleged violations, refused to engage in any unlawful practices, commenced, testified at, assisted with, or participated in any proceeding under the ERA or the Atomic Energy Act before he was terminated. Nor is there any evidence that the Respondents believed that Mr. Novero was about to commence, testify in, assist with or participate in any proceeding under the ERA or the Atomic Energy Act when they terminated his employment. Mr. Novero therefore cannot establish a *prima facie* case.

In his complaint and in other correspondence with OSHA and the NRC, Mr. Novero alleges that he performed protected activities as SWE in implementing the requirements of the NRC at Crystal River. He alleges that there were violations committed by the Licensee “not limited to: interference and discrimination (i.e., firing, blacklisting and intimidation.)” Mr. Novero references four events, which he claims substantiate the violations that occurred during his assignment at Crystal River. Mr. Novero refers to the events as Event A, B, C, and D. None implicate nuclear safety.

A. Event A

George Murphy, Assistant to the Project Manager, asked Mr. Novero to provide a “spectra” to determine seismic movements at the point of interaction contact between some firewater piping and a raw water strut support. Mr. Novero had previously concluded on a Walk-By checklist that the potential interaction contact posed “no operability issue.” Mr. Novero told Mr. Murphy that it was “laborious, time consuming, and might take several days to achieve the end result of no concern.” Mr. Novero used a “write-up” method based on his “engineering judgment” which he deemed sufficient. After 30 minutes, Mr. Novero presented the draft to Mr. Murphy so that it could be sent to Tom Worthington, Supervisor of Design Engineering. Mr. Murphy did not forward Mr. Novero’s draft to Mr. Worthington because it was not what Mr. Worthington had requested. Mr. Novero informed Mr. Murphy that “such decision to ‘block’

[his] technical communications ... could be a violation of NRC requirements.” Mr. Novero then sent his draft via e-mail to Mr. Worthington.

Mr. Novero does not claim that his refusal to provide a “spectra” has anything to do with safety or compliance issues. By his own admission he refused to provide the spectra because it was time consuming. Neither Mr. Novero’s Walk-by checklist nor his “write-up” raised any safety concerns nor alleged any violations, nor does Mr. Novero assert that they did. He admitted had he performed the “spectra” the result would have been “of no concern.” Mr. Murphy’s decision not to forward Mr. Novero’s “write-up” was within Mr. Murphy’s discretion, as the conclusion was the same as Mr. Novero’s previous assessment and there are no alleged violations in the “write-up.” Mr. Novero’s assertion that he told Mr. Murphy that blocking technical communications might violate NRC “requirements” is not sufficient to establish that he was reporting a safety violation or any other violation of the ERA or the Atomic Energy Act.

B. Event B

Mr. Novero asserts that the final report to the NRC will be inaccurate and incomplete because of a disagreement about who was responsible for writing down his “minor findings” in a notebook. Mr. Novero believed that it was William Finlayson’s job to write down his minor findings. Mr. Murphy told Mr. Novero that he should write down his own minor findings on a separate sheet of paper. Mr. Novero said this process was not in accord with established procedures and said “I told [Mr. Murphy] in summary that I will not follow his “recommendation”; and I will document all my ‘minor’ concerns in the checklist only.”

Mr. Novero’s assertion that the report to the NRC will be inaccurate and incomplete is unsupported by facts. The only minor finding that Mr. Novero reported that he asked Mr. Finlayson to write down was a concern about electrical cables that were not sufficiently tie wrapped. However, Mr. Novero admits that Mr. Finlayson did eventually write it down. Notably, Mr. Novero’s checklist also documented the condition of the electrical cables. Mr. Novero never identified any specific piece of safety related information that Mr. Finlayson failed to record. Mr. Novero does not claim that he ever communicated any safety or compliance concerns in connection with this issue.

C. Event C

Mr. Novero and Mr. Finlayson disagreed over an issue with a battery storage rack. Mr. Novero’s original assessment of the battery storage rack from his checklist was “no operability concern.” Mr. Worthington requested a more thorough analysis of the battery storage rack and Mr. Novero concluded “[t]he existing rack is operable and will perform its intended safety function.” He concluded the same three weeks later on another Walkdown checklist. In his complaint Mr. Novero stated that the battery storage rack did “not meet the original qualifying design basis calculation because the calculation has some errors.” Mr. Novero’s three prior operability determinations about the battery storage rack contradict his subsequent allegation about seismic requirements not being met and posing a safety issue. Mr. Novero never communicated any potential violation during his employment. In fact, on multiple occasions, he

communicated the opposite. Mr. Novero cannot fabricate protected conduct where none previously existed.¹¹

D. Event D

Mr. Novero had a meeting with Mr. Murphy and others about missing tie rods on the battery storage racks. Mr. Novero was asked to perform additional research because his previous short assessment and conclusion could be wrong. Mr. Novero stated that after the additional research his original conclusion remained the same. Mr. Novero asserted both on his Checklist and in his engineering judgment that there were no operability issues related to the missing tie rods on the battery storage racks. Mr. Novero cannot assert that his finding of no operability issues posed a safety or compliance issue, nor does he.

E. Conclusion

The ERA prohibits employers from discharging any employee because the employee notified it of an alleged violation of the ERA or the Atomic Energy Act, or participates in any other action to carry out the purposes of those laws.¹² The ERA “is designed to protect workers who report safety concerns and to encourage nuclear safety generally.”¹³ To be protected, an individual’s acts must implicate nuclear safety “definitively and specifically.”¹⁴ Concerns about regulatory violations must be “reasonable for an individual in the same circumstances with the same training and experience.”¹⁵ None of the events described above raise a concern implicating nuclear safety or a reasonably perceived regulatory compliance issue. Additionally, Mr. Novero offers nothing to establish that he engaged in any protected activity during his employment at Crystal River, or that the Respondents perceived that he was about to engage in such activities. He has not substantiated that he notified his employer of any alleged violations or participated in any other actions to carry out the purposes of the ERA. Mr. Novero never reported any nuclear safety concerns or compliance issues, nor has he shown in his opposition to the Respondent’s motion that any genuine issue of material fact exists. I find that the Respondent’s motion for summary decision should be granted because Mr. Novero cannot establish a *prima facie* case.

¹¹ See *Macktal v. Brown & Root, Inc.*, ARB No. 86-ERA-23, slip op. at 5 (ARB Jan. 6, 1998), *aff’d*, *Macktal v. US. Dep’t of Labor*, 171 F.3d 323 (5th Cir. 1999).

¹² 42 U.S.C. § 5851(a); 29 C.F.R. § 24.102.

¹³ *American Nuclear Resources, Inc. v. U.S. Department of Labor*, 134 F3d 1292, 1295 (6th Cir. 1998).

¹⁴ *Am. Nuclear Res., Inc. v. US. Dep’t of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998).

¹⁵ *Carpenter v. Bishop Well Servs. Corp.*, ARE No. 07-060, AUJ No. 2006-ERA-035, slip op. at 6 (ARB Sept. 16, 2009).

IV. ORDER

IT IS THEREFORE ORDERED that the Respondents' Motion for Summary Decision filed on April 10, 2015, is **GRANTED**. This claim is **DISMISSED**.

Alice M. Craft
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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellittrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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 filing paper copies, 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, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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.