

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

**Issue Date: 11 August 2015**

CASE NO.: 2015-ERA-00005

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*In the Matter Of:*

**ADAM P. MCNIECE,**  
*Complainant,*

v.

**DOMINION NUCLEAR CONNECTICUT, INC.,**  
*Respondent.*

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

This matter arises from a complaint of discrimination filed under Section 211 of the Energy Reorganization Act of 1974 (the "ERA" or the "Act"), 42 U.S.C. § 5851 and the procedural regulations found at 29 C.F.R. Part 24 (2013), brought by Complainant, Adam McNiece ("McNiece" or "Complainant") against Respondent Dominion Nuclear Connecticut, Inc. ("DNC" or "Respondent").<sup>1</sup> On February 26, 2015, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), found that there was no reasonable cause to believe DNC violated the ERA, and dismissed the case without an investigation. On March 18, 2015, McNiece filed objections to the Secretary's Findings and requested a hearing before the Office of Administrative Law Judges ("OALJ"). A formal evidentiary hearing before the undersigned is scheduled for September 10, 2015, in New London, Connecticut.

**I. Procedural History**

On April 16, 2015, DNC filed a Motion to Dismiss ("Mot. Dismiss"), seeking dismissal on three grounds: (1) McNiece was not an employee of DNC; (2) McNiece has not alleged that

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<sup>1</sup> McNiece previously filed an ERA whistleblower complaint against DNC in 2009, which resulted in a Confidential Settlement Agreement approved by Administrative Law Judge ("ALJ") Jonathan Calianos on February 3, 2010. *See* Decision and Order Approving Settlement and Dismissing Complaint With Prejudice, ALJ No. 2009-ERA-00015 (ALJ Feb. 3, 2010). McNiece's wife, Edwina Collins, also filed an ERA whistleblower complaint against Respondent on August 15, 2011 & October 2, 2011, which resulted in a settlement agreement approved by ALJ Timothy McGrath on October 28, 2014. Decision and Order Approving Settlement Agreement and Order Dismissing Complaint with Prejudice, 2014-ERA-00005 (ALJ Oct. 28, 2014).

he suffered an adverse action as contemplated under the ERA; and (3) the complaint is untimely. DNC submitted exhibits (“EX”) A-D in support of its motion. On April 24, 2015, McNiece filed an Objection to the Motion to Dismiss (“Obj. Mot. Dismiss”), with attached exhibits (“CX”) A-C. DNC filed a Motion for Leave to file Reply and Reply in Support of Motion to Dismiss (“Reply”) on May 8, 2015, with additional exhibits, EX E-H, and McNiece filed a Response to the Reply (“Resp.”) on May 16, 2015.

On May 20, 2015, I held a conference call on the record and notified the parties that I would treat the Motion to Dismiss as a Motion for Summary Decision, as evidence outside the pleadings was submitted for my consideration. 5/20/15 Conf. Call Transcript (“TR”) 6-7; *see Evans v. U.S.E.P.A.*, ARB No. 08-059, ALJ No. 2008-CAA-003, PDF at 10 (ARB July 31, 2012); *Erikson v. U.S.E.P.A.*, ARB No. 99-095, ALJ No. 1999-CAA-0002, HTML at 3 n.3 (ARB July 31, 2001). McNiece was allowed 30 days to conduct limited discovery pertaining to the issues raised in DNC’s motion; specifically, his status as an employee, the timeliness of his complaint, and any alleged adverse actions occurring within 180 days of the date he filed his complaint. Pursuant to an Order Rescheduling Hearing and Setting Discovery Schedule issued on May 21, 2015, McNiece was granted until June 22, 2015, to conduct the limited discovery and submit any evidence and additional arguments as to why summary decision was not appropriate.<sup>2</sup>

On June 5, 2015, McNiece filed a Motion for Continuance, requesting an extension of the deadline for conducting discovery, and DNC filed an objection to the motion on June 12, 2015. On June 18, 2015, I issued an Order Granting in Part Complainant’s Motion for Continuance, extending the deadline to July 22, 2015 to submit evidence and arguments in opposition to summary decision. DNC was directed to respond to Complainant’s submissions by August 3, 2015.<sup>3</sup>

The deadline of July 22, 2015 for McNiece to submit evidence and arguments in opposition of summary decision following the limited discovery period has passed without any submission from McNiece. The only evidence received by the parties during the discovery period were the prior settlement agreements between McNiece and DNC in 2010, and between Complainant’s wife, Ms. Collins, and DNC in 2014, which were submitted *in camera* for my

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<sup>2</sup> Attached to the May 21, 2015 Order was relevant information for *pro se* litigants on responding to a motion for summary decision.

<sup>3</sup> On June 3, 2015, DNC filed a Motion for Protective Order in response to discovery propounded by McNiece, and McNiece objected to the motion on June 11, 2015. On June 25, 2015, I issued an Order Granting in Part Respondent’s Motion for Protective Order, concluding that McNiece’s discovery requests, with four identified exceptions, were not reasonably related to the limited issues raised in the Motion for Summary Decision and exceeded the scope of discovery permitted. On July 10, 2015, McNiece filed a Motion to Reconsider and DNC filed a response on July 15, 2015. McNiece did not allege any errors in my order granting the protective order but rather argued generally that discovery should not be limited. On July 16, 2015, I issued an Order Denying Complainant’s Motion to Reconsider, reiterating that discovery was properly limited at this stage in the proceeding to the issues raised in the Motion for Summary Decision.

review.<sup>4</sup> Without any timely response from McNiece, I will decide the Motion for Summary Decision based on the evidence currently before me.

## **II. Standard of Review – Summary Decision**

A motion for summary decision under the Act is governed by the regulations found at 29 C.F.R. § 18.72. Pursuant to Section 18.72, any party may “move for summary decision, identifying each claim or defense – or the part of each claim or defense – on which summary decision is sought.” 29 C.F.R. § 18.72(a). Summary decision may be entered “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.” *Id.* A fact is material and precludes a grant of 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).

In determining whether there is a genuine issue for trial, the court must view all the evidence and factual inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the non-moving party produces enough evidence to create a genuine issue of material fact, it defeats the motion for summary decision. *CelotEr. Ex.Corp. v. Catrett*, 477 U.S. 317, 322 (1986). However, if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial, there is no genuine issue of material fact and the moving party is entitled to summary decision. *Id.* at 322-23. The non-moving party must go beyond the pleadings, by either his or her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, to establish that there is a genuine issue for trial. *Id.* at 324.

## **III. Factual Findings**

### **I. McNiece’s Complaint**

McNiece’s ERA whistleblower complaint, received by OSHA on January 22, 2015,<sup>5</sup> alleged that following a settlement in 2010 with DNC, McNiece continued to report safety violations to DNC and the Nuclear Regulatory Commission (“NRC”) and as a result, DNC “has retaliated against me by willfully and knowingly creating a hostile environment for my wife,” including “public belittling to lower evaluations and a sideline position.” 1/22/15 Compl. He alleged his wife was “forced to retire rather than endure the environment of everyday harassment and intimidation that Dominion has created, fostered and condoned.” *Id.* He stated that DNC

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<sup>4</sup> McNiece asserted in the May 20, 2015 conference call that he had requested from DNC a copy of his occupational exposure history, which he alleged would establish his employment status. TR 9. DNC indicated it had sent McNiece the occupational exposure history, but such records were never submitted to my office for review. TR 19; see Motion to Obtain Occupational Exposure History (5/26/15).

<sup>5</sup> Attached to his ERA complaint filed with OSHA was an unsigned draft complaint to be filed with the U.S. District Court for the District of Connecticut. During the May 20, 2015 conference call, McNiece stated that his intent in attaching the draft complaint was to notify OSHA that if it did not investigate the matter, he would file the complaint with the district court. TR 5-6.

breached the 2010 settlement, which contained express language allowing McNiece to continue to report violations to the NRC without retaliation, and the adverse action taken against his wife caused him “great duress.”<sup>6</sup> *Id.*

McNiece submitted his own affidavit with his Objection to the Motion to Dismiss, restating his allegations that after his 2010 settlement with DNC, he continued to report nuclear safety violations occurring at DNC’s facility, and DNC responded by retaliating against his wife, an employee of DNC, “in an effort to dissuade me from making further reports of nuclear safety violations.” CX B.

## **II. McNiece’s Past Employment**

DNC submitted an affidavit of Patricia P. Bazzle, the Human Resources Administrator for Dominion Resources Services. EX A. Ms. Bazzle stated that Dominion Resources Services, Inc., and DNC are both affiliates of Dominion Resources, Inc. (collectively, “Dominion”) and there is no record showing McNiece was ever an employee of DNC or any other Dominion company. EX A. In contrast, McNiece’s own affidavit stated: “Beginning in 2000 or thereabouts, I worked for the Respondent, Dominion Nuclear Connecticut, Inc., as a Supplemental Employee at their service station in Virginia and also held positions in the Respondent’s facility located in Waterford, Connecticut.” CX B.

Additional evidence submitted by both DNC and McNiece establish that McNiece was employed at the Millstone Nuclear Power Station (“Millstone”) in Waterford, Connecticut, in the 1990’s as an employee of Bartlett Nuclear, Inc., a contractor for Millstone’s then-owner and operator, Northeast Utilities, and again from 1999-2000 as an employee of Northeast Utilities. EX-E; CX-B; CX-C. DNC states that it did not become the owner and operator of Millstone until March 31, 2001, and McNiece during the conference call held on May 20, 2015, acknowledged that he was employed at Millstone before DNC owned the plant. Mot. Dismiss 5-6 & n.16; Reply at 6-7; TR 9, 10-11.

Evidence presented by DNC further establishes that from September to October 2000, McNiece worked as a temporary outage worker for Numanco, LLC, an independent contractor, at Surry Nuclear Power Station (“Surry”) in Virginia, which was owned and operated by Virginia Power, an affiliated company of DNC. *See* EX-E; EX-F; EX-G; Obj. Mot. Dismiss 5; Reply at 10-11, 14. McNiece was an employee of Numanco, not Virginia Power. EX-G.

In 2008, McNiece applied for a position at Millstone with DNC without success, and as a result McNiece filed an ERA complaint against DNC. Mot. Dismiss 6; Reply at 7; *see also* Mot.

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<sup>6</sup> Although McNiece alleges a “breach of contract” of the 2010 settlement, I do not have the authority to enforce settlement agreements under the ERA. *See* 42 U.S.C. § 5851(e); *Thompson v. Houston Lighting & Power Co.*, ALJ No. 96-ERA-34, ARB No. 98-101 (ARB Mar. 30, 2001) (“the Department [of Labor] has no authority, either express or implied, to enforce a settlement agreement in an ERA case.”); *Williams v. Metzler*, 132 F.3d 937 (3d Cir. 1997) (“[W]e hold that the Secretary of Labor does not have the authority. . . to enforce a settlement agreement resolving a retaliation claim brought by an employee/whistleblower against his employer under the Energy Reorganization Act.”).

to Recon. 2 (July 10, 2015) (Complainant stated his 2010 settlement was “a discrimination complaint in response for not getting hired . . . .”); Resp. at 1 (“Had Dominion not blacklisted me for hiring . . . then I would have been a DNC employee.”). The case was ultimately settled in 2010. There is no indication in the parties’ settlement agreement that McNiece was an employee of DNC at the time of the settlement or any time before the settlement.

There is no dispute that McNiece’s wife, Ms. Collins, was an employee of DNC at Millstone, and while employed, she filed a whistleblower complaint against DNC in 2011, which was settled in October 2014. EX B; EX C; EX D; Mot Dismiss 6.

#### IV. Legal Analysis

In order to establish a whistleblower claim under the ERA, a complainant must file a complaint alleging a *prima facie* showing that he engaged in protected activity, the respondent knew he engaged in protected activity, he suffered an adverse action, and the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action. 24 C.F.R. § 24.104(f). To be considered timely under the Act, an employee must file a complaint under the ERA within 180 days of the alleged adverse action. 42 U.S.C. § 5851(b).

McNiece alleges he engaged in protected activity by continuing to report safety violations under the ERA after his 2010 settlement with DNC. He alleges that as a result of this protected activity, DNC retaliated against him by taking adverse action against his wife, Ms. Collins. McNiece’s complaint alleged DNC created a hostile work environment for Ms. Collins, including “public belittling to lower evaluations and a sideline position,” culminating with Ms. Collins’ “dismissal” on October 7, 2014. 1/22/15 Compl. In his Objection to DNC’s Motion to Dismiss, McNiece wrote:

Respondent’s management officials began retaliating against my wife, including making threatening and harassing remarks to dissuade her from reporting safety concerns, they reassigned her to less favorable duties, they isolated her from her peers, they denied her access to trainings and programs that were necessary for professional development although her immediate counterparts continued to participate in those same trainings and programs without disruption, and they unjustifiably began documenting her every step as evidence by notes in her personnel file, and as of 2011, my wife began receiving low ratings on her performance appraisals. My wife filed complaints with the DOL on August 15, 2011 and October 2, 2011. . . . While those matters were pending, the retaliation, harassment and mistreatment of my wife by the Respondent escalated simultaneous with my continuing to report safety violations occurring at the Respondent’s facility . . .

Obj. Mot. Dismiss. 3-4.

Without deciding the issue of whether adverse action taken against Ms. Collins can constitute adverse action against McNiece, I find that McNiece has not presented any facts establishing that the alleged adverse actions taken against his wife occurred within the required

180 day period preceding the filing of his complaint, that is, from July 24, 2014 to January 22, 2015.

McNiece's allegations of adverse action that occurred prior to the filing of Ms. Collins' ERA complaint in 2011 exceed the 180-day period by several years. Ms. Collins' alleged lower appraisal scores, which occurred in 2011 through 2013, and her alleged "sideline position," which occurred in February 2013, are also well outside the 180-day period. *See* EX B. While McNiece alleged that "retaliation, harassment, and mistreatment" of his wife continued while her claim was pending before OALJ, he did not provide any specific dates or evidence of adverse action occurring on or after July 24, 2014.

McNiece's affidavit states after his 2010 settlement with DNC, he continued to report nuclear safety violations occurring at the DNC's facility, and DNC responded by retaliating against his wife. CX B. While a non-moving party's own affidavit can be sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, McNiece's affidavit is not sufficient to create a genuine issue of material fact as his statement does not identify any specific alleged adverse action that occurred from July 24, 2014 to the filing of his complaint on January 22, 2015. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) (stating that a non-moving party's allegations in affidavits must be "sufficiently precise" to overcome summary judgment); *see Danzer v. Norden Sys.*, 151 F.3d 50, 57 n.7 (2d Cir. 1998)(stating that an affidavit that is conclusory is insufficient to defend against a motion for summary judgment).

The only adverse action McNiece has alleged that occurred within the 180 day period is what he falsely characterizes as his wife's "dismissal" or "forced" resignation from DNC on October 7, 2014. Obj. Mot. Dismiss at 12; *see also* TR 25; Mot. to Recon. 1, 2. Ms. Collins was neither dismissed nor forced to retire from DNC. Ms. Collins knowingly and voluntarily entered into a settlement agreement with DNC on October 20, 2014, with the advice of counsel and through a voluntary Settlement Judge Proceeding. As part of the agreed-upon settlement, Ms. Collins "voluntarily elected to end her employment relationship with Dominion" in exchange for a lump sum payment and other consideration. The settlement was approved by ALJ McGrath as fair, adequate and reasonable. Ms. Collins' voluntary decision to leave employment with DNC as part of a negotiated settlement agreement with assistance of counsel does not constitute adverse action. *See Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995) (*quoting Johnson v. Old Dominion Security*, Nos. 86-CAA-3-5 (Sec'y May 29, 1991) (stating that a resignation needs to be involuntary to constitute adverse action)).<sup>7</sup>

I find that DNC is entitled to summary decision based on McNiece's untimely complaint. *See* 42 U.S.C. § 5851(b). Because I grant summary decision on the issue of

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<sup>7</sup> To the extent that McNiece contends that the provision in his 2010 settlement agreement with DNC stating he would not apply for employment with DNC or any of its affiliates, constitutes an adverse action, this allegation in addition to being untimely, is entirely without merit. McNiece voluntarily entered into the settlement agreement with assistance of counsel, and the settlement was approved by ALJ Calianos as fair, adequate and reasonable. The provision stating McNiece would not seek employment with DNC was a negotiated term for which consideration was exchanged.

untimeliness, I need not address the alternative reasons for summary decision put forth by DNC in its Motion for Summary Decision.

**ORDER**

Viewing all the evidence and factual inferences in the light most favorable to McNiece, the non-moving party, I find that Respondent has established that there is no genuine issue of material fact as to an essential element of McNiece's claim – the timeliness of his complaint under the ERA.

Accordingly, it is hereby **ORDERED** that Respondent's Motion for Summary Decision is **GRANTED**, Complainant's claim is **DISMISSED WITH PREJUDICE**, and the hearing scheduled for September 10, 2015 is **CANCELED**.

**SO ORDERED.**

**COLLEEN A. GERAGHTY**  
Administrative Law Judge

Boston, Massachusetts

**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.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto: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.