



**Issue Date: 01 February 2019**

CASE NO.: 2018-ERA-00012

*In the Matter of:*

GARY E. ROSS,  
*Complainant,*

v.

DUKE ENERGY CAROLINAS, LLC,  
*Respondent.*

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

This matter arises under the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (“ERA” or “the Act”) and its implementing regulations, 29 C.F.R. Part 24. In this case, Gary Ross (“Complainant” or “Mr. Ross”) alleges Duke Energy Carolinas, LLC (“Respondent” or “Duke Energy”) terminated his employment in violation of the employee protection provisions of the Act. For the reasons stated below, Respondent’s motion for summary decision is granted and Mr. Ross’s complaint is dismissed.

**Procedural History**

Mr. Ross worked for Duke Energy for over 30 years prior to voluntarily retiring at the end of December 2004. He was retired for approximately six years prior to returning to work for Allied Technical Resources (ATR), a supplier of contracted services to the power industry. Mr. Ross returned to Duke Energy through a contract with ATR and his first assignment began in July 2011.

On April 7, 2016, Duke Energy released and returned Mr. Ross back to ATR.

On May 16, 2016, Mr. Ross filed a complaint with the United States Department of Labor alleging that Duke Energy unlawfully terminated his employment. The Occupational Safety and Health Administration (OSHA) investigated Mr. Ross’s complaint. On June 25, 2018, OSHA sent a letter to Mr. Ross informing him it concluded the complaint was meritless.

On July 23, 2018, Mr. Ross objected to the findings and filed a request for a formal hearing before the Office of Administrative Law Judges (OALJ), and the case was assigned to me on August 22, 2018. A formal hearing into this matter was scheduled to commence on February 11, 2019 in Greenville, South Carolina. On January 11, 2019, Duke Energy filed a motion for summary decision, and Mr. Ross filed responses on January 23, 2019 and January 28, 2019.

## Statement of Undisputed Facts

Mr. Ross began working for Duke Energy in March 1971.<sup>1</sup> In 1976, Mr. Ross was transferred to the Catawba Nuclear Station.<sup>2</sup> While working as a welding inspector there, Mr. Ross raised concerns to supervisors about faulty work. His supervisors refused to support his findings and eventually Mr. Ross filed a complaint with the Nuclear Regulatory Commission (NRC).<sup>3</sup> The NRC sent a team of inspectors to investigate and determined Mr. Ross's allegations were true.<sup>4</sup>

In 1982 and 1983, Mr. Ross testified at the Catawba Nuclear Station licensing hearing.<sup>5</sup> In 1985, the NRC sent to Duke Energy a Notice of Violation and Proposed Imposition of Civil Penalty.<sup>6</sup> In a letter dated June 30, 1986, the NRC informed Duke Energy it had determined that: "Duke Power Company discriminated against Gary E. 'Beau' Ross, who was engaging in a protected activity as a licensee quality control inspector. Mr. Ross had been given low November 1982 interim and 1982-83 performance ratings because of his efforts to bring safety concerns to the attention of Duke Power Company's management."<sup>7</sup>

In August 1984, Mr. Ross was transferred to the Oconee Nuclear Station (ONS), where he supervised a team of welding inspectors.<sup>8</sup> Mr. Ross experienced hostile treatment from his coworkers and had to contact the NRC on multiple occasions while working at ONS.<sup>9</sup> "The last time [Mr. Ross] blew the whistle on Duke as an employee was about early 2000."<sup>10</sup> Mr. Ross contacted the NRC because Maintenance Manager Phillip Culbertson planned to "black ball" a vendor employee named Johnny Peeler for finding unacceptable work.<sup>11</sup> The NRC contacted Duke Energy and the QC/QA departments had to have a training session to explain that no inspector could be terminated for reporting bad work.<sup>12</sup>

In December 2004, Mr. Ross voluntarily retired from Duke Energy.<sup>13</sup>

In 2010, Scott Wiley called and offered Mr. Ross a Mechanical Planner job through a vendor with Duke Energy.<sup>14</sup> Mr. Ross expressed concern that Duke Energy would not allow him to return because there were people still mad for his reporting things to the NRC, and asked

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<sup>1</sup> Job History of Gary E. "Beau" Ross (filed January 9, 2019).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* It is not clear what Mr. Ross testified about at the hearings.

<sup>6</sup> Figure 1: Employee Protection From Employer for Revealing Safety Violations (filed January 9, 2019).

<sup>7</sup> *Id.*

<sup>8</sup> Job History of Gary E. "Beau" Ross.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Joint Stipulation of Agreed Facts (filed January 16, 2019).

<sup>14</sup> Job History of Gary E. "Beau" Ross.

whether anyone would harass him or attempt to get him fired to get even for his previous whistleblowing.<sup>15</sup> Mr. Wiley spoke with Scott Lynch about Mr. Ross's concerns.<sup>16</sup> Mr. Lynch advised Mr. Wiley that Mr. Ross would not have any problems like that.<sup>17</sup> Mr. Wiley called Mr. Ross a day or two later to relay Mr. Lynch's assurances.<sup>18</sup> With those assurances in place, Mr. Ross agreed to return to work with Duke Energy.<sup>19</sup>

In late March 2016, Mr. Ross reported the failure to follow asbestos program guidelines at Oconee Nuclear Station on the actuator job and the destruction of PACM<sup>20</sup> wall up in the plant and individuals were being exposed to asbestos as a result.<sup>21</sup>

Around that same time, Mr. Ross was assigned as the lead mechanical planner for Work Order Task 20005557-59.<sup>22</sup> The work order task was for the removal of screen actuators and linkages on the outside of the 3C1 water box.<sup>23</sup> On March 22, 2016, while the task was being performed, a worker discovered that the actuators were being removed prior to the necessary asbestos abatement.<sup>24</sup> The work task was stopped; however, three screen actuators had already been removed.<sup>25</sup> Duke Energy immediately assembled a Prompt Investigative Response Team (PIRT) to investigate the incident.<sup>26</sup> The PIRT determined that Mr. Ross had made multiple significant performance errors, including failing to identify that the work order task would be disturbing the water box coating that contained asbestos.<sup>27</sup>

Following the investigation, Scott Lynch instructed Michael Hassell (Manager Nuclear Major Projects Work Integration and Scheduling) to assess individual accountability in connection with incident.<sup>28</sup> Mr. Hassell discussed the incident with Mr. Ross's supervisor, William Brackett (ONS Supervisor Nuclear Planning and Scheduling), and David Day (Technical Support Supervisor of ONS Work Integration and Scheduling).<sup>29</sup> After consulting with Mr. Brackett and Mr. Day, Mr. Hassell recommended to Mr. Lynch that Mr. Ross be released back to his employer.<sup>30</sup> Mr. Lynch concurred with their recommendation and informed Mr. Ross of his decision to return and release him back to his employer ATR on April 7, 2016.<sup>31</sup> Mr. Ross denies that he was responsible for checking coatings on components in the field.<sup>32</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See 29 C.F.R. § 1926.1101(b) ("PACM means 'presumed asbestos containing material.'")

<sup>21</sup> Complainant's Response to Motion for Summary (filed January 23, 2019).

<sup>22</sup> Affidavit of Scott Lynch ¶ 14.

<sup>23</sup> *Id.* at ¶ 15.

<sup>24</sup> Affidavit of William Oakley ¶ 4.

<sup>25</sup> *Id.* at ¶ 5.

<sup>26</sup> *Id.* at ¶ 4.

<sup>27</sup> *Id.* at ¶ 14.

<sup>28</sup> Affidavit of Scott Lynch ¶ 21.

<sup>29</sup> *Id.* at ¶ 22.

<sup>30</sup> *Id.* at ¶ 23.

<sup>31</sup> *Id.* at ¶ 24; Job History of Gary E. "Beau" Ross.

<sup>32</sup> *Id.*

## Discussion

The ERA prohibits an employer from discharging or otherwise discriminating against an employee because 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).

To prevail on his ERA whistleblower complaint, Complainant must prove (1) he engaged in activity protected by the ERA; (2) the employer subjected him to an unfavorable personnel action; and (3) the employee's ERA-protected activity was a contributing factor in the unfavorable personnel action. *Bobreski v. J. Givoo Consultants, Inc.*, ARB Case No. 13-001, ALJ Case No. 2008-ERA-003, slip op. at 16 (Aug. 29, 2014). However, the Secretary is prohibited from ordering relief for a proven whistleblower violation "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." 42 U.S.C. § 5851(b)(3)(D).

Respondent has filed a motion for summary decision. Respondent will succeed on its motion if it proves there is no genuine dispute as to any material fact and it is entitled to decision as a matter of law. 29 C.F.R. § 18.72(a). At this stage of the proceedings, I must view the evidence in the light most favorable to Complainant as the non-moving party, and draw all inferences and construe all ambiguities in his favor. *Cobb v. FedEx Corp. Serv.*, ARB No. 16-030, ALJ No. 2010-AIR-024, slip op. at 4 (Sept. 29, 2017) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

### A. Protected Activity

Complainant alleges three separate instances of protected activity. First, he testified at the Catawba Nuclear Station licensing hearings in 1982 and 1983. Second, he contacted the NRC in 2000 to report an alleged plan to blacklist a vendor employee for finding unacceptable work. And third, in later March 2016, shortly before he was released from Duke Energy and returned to his employer ATR, he reported that employees were failing to follow asbestos program guidelines at Oconee Nuclear Station on the actuator job and the destruction of PACM wall and that employees were exposed to asbestos as a result.

For purposes of ruling on this motion for summary decision, I find that Complainant's first two actions – testifying at the Catawba Nuclear Station licensing hearings in 1982-1983 and reporting to the NRC an alleged scheme to blacklist a vendor employee in 2000 – qualify as ERA-protected activities. However, the ERA does not protect Complainant's reports relating to improper asbestos handling.

The Administrative Review Board (ARB) has held that non-nuclear related safety complaints are not protected by the ERA. *Hoffman v. Nextera Energy, Inc.*, ARB No. 12-062, ALJ No. 2010-ERA-011, slip op. at 8 (Dec. 17, 2013) (“The ERA does not define the phrase ‘any other action to carry out the purposes of this chapter’ as set forth in subsection (F). Courts, however, have construed the phrase as requiring, in light of the ERA’s overarching purpose of protecting acts implicating nuclear safety, that an employee’s actions must implicate safety ‘definitively and specifically’ to constitute whistleblower protected activity under subsection (F).”);<sup>33</sup> see also *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). Because asbestos is not regulated under the Atomic Energy Act, 42 U.S.C. § 2011 et seq., and asbestos handling does not implicate nuclear safety, I conclude that Complainant's reports relating to improper asbestos handling are not protected by the Act.

#### B. Unfavorable Personnel Action

For purposes of ruling on this motion, I will consider Respondent's decision to release and return Complainant back to his employer ATR to be an unfavorable personnel action.

#### C. Contributing Factor

Complainant must demonstrate that Respondent released and returned him to his employer ATR *because* (a) he testified at the Catawba Nuclear Station licensing hearings in 1982 and 1983, or (b) he reported to the NRC an alleged plan to blacklist a vendor employee for finding unacceptable work in 2000.

To determine whether a complainant's protected activity was a contributing factor to the unfavorable personnel action, the administrative law judge must consider all evidence relevant to causation. *Bobreski v. J. Givoo Consultants, Inc.*, ARB Case No. 13-001, ALJ Case No. 2008-ERA-003, slip op. at 17 (Aug. 29, 2014). It is not necessary for a complainant to submit direct evidence of discrimination; he may sustain his burden of proof through circumstantial evidence. *Keener v. Duke Energy Corp.*, ARB Case No. 04-091, ALJ Case No. 2003-ERA-12, slip op. at 10 (July 31, 2006) (citing *Desert Palace v. Costa*, 539 U.S. 90, 99-100 (2003)). “Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence.” *Bobreski*, ARB Case No. 13-001, slip op. at 17.

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<sup>33</sup> In *Hoffman*, the ARB expressed concern over the “definitively and specifically” test but declined to address that issue in the decision. *Hoffman*, ARB No. 12-062, slip op. at 8, n.16. See also *Sylvester v. Parexel Int'l LLC*, ARB No. 01-123, ALJ Nos. 2007-SOX-039, 042, slip op. at 15 (May 25, 2011) (expressly abrogating the “definitively and specifically” test for claims arising under the employee protection provisions of the Sarbanes-Oxley Act).

Even when looking at the evidence in the light most favorable to Complainant, the evidence is insufficient to find that Complainant's protected activities played any role in Respondent's decision to release and return him back to his employer. As a matter of law, too much time has passed between Complainant's protected activities and the unfavorable personnel action to reasonably infer a causal connection. The ARB has held that a lapse as short as one year between a complainant's protected activity and the unfavorable personnel action was too long a period for an inference of a causal relationship. *See Evans v. Washington Public Power Supply System*, ARB Case No. 96-065, ALJ Case No. 95-ERA-52 (July 30, 1996); *Keener*, ARB Case No. 04-091, slip op. at 11-13 (13 month lapse); *see also Bonnano v. Stone & Webster Engineering Corp.*, ARB Case Nos. 96-110, 165, ALJ Case Nos. 95-ERA-54 and 96-ERA-7 (Dec. 12, 1996) (3 year lapse). Here, Complainant's protected activities occurred 33 years and 16 years, respectively, before the unfavorable personnel action. In addition to the sheer length of time, the chain of causation is further severed by the fact that Complainant worked for more than 20 years after his first protected activity, and more than four years after his second, before voluntarily retiring from Duke Energy in 2004. And then he was permitted to return to Duke Energy as a contractor employee in 2010, which further militates against any finding of contribution.

There is evidence that Scott Lynch – who ultimately decided to release and return Complainant back to his employer – was at least generally aware of Complainant's previous protected activities.<sup>34</sup> Before returning to Duke Energy, Complainant sought assurances that Duke Energy employees would not harass him or otherwise attempt to get him fired for his previous whistleblowing, and those assurances were granted by Mr. Lynch in an effort to get Complainant to return to Duke Energy as a contractor employee.<sup>35</sup>

Mr. Lynch did not unilaterally make the decision to release and return Complainant back to his employer. Immediately after the March 22, 2016 incident, the Prompt Investigative Response Team investigated the circumstances leading to the incident and determined Complainant had made multiple significant performance errors, including a failure to identify that the work order task would be disturbing the water box coating that contained asbestos. After the investigation concluded, Mr. Lynch instructed Michael Hassell to assess individual accountability in connection with the incident. Mr. Hassell discussed the incident with William Brackett and David Day. After consultation with Mr. Brackett and Mr. Day, Mr. Hassell recommended to Mr. Lynch that Mr. Ross should be released. Mr. Lynch agreed and followed through with the recommendation.

Although Complainant generally denies that he was responsible for the March 22, 2016 incident and has filed a number of documents deflecting blame onto other employees, the key inquiry here is whether Respondent considered Complainant's decades-old protected activities in its decision to return and release him back to his employer. Complainant has failed to put forth any evidence to suggest that his protected activities played any role in that decision. Accordingly, I find and conclude that Complainant has failed to raise a genuine dispute as to any material fact and Respondent is entitled to decision as a matter of law.

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<sup>34</sup> Affidavit of Scott Lynch ¶ 25.

<sup>35</sup> *Id.* at ¶ 27.

## ORDER

Based on the foregoing, IT IS ORDERED:

1. Respondent's motion for summary decision is GRANTED;
2. Gary E. Ross's complaint is DENIED; and
3. The hearing scheduled to commence on February 11, 2019 in Greenville, South Carolina is CANCELED.

**SO ORDERED.**

PAUL C. JOHNSON, JR.  
District Chief Administrative Law Judge

PCJ, Jr./PML/ksw  
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 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.