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Issue Date: 06 May 2005

Case No. 2002-ERA-0032

In the Matter of:

SYED HASAN,
Complainant,

v.

SARGENT & LUNDY,
Respondent.

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

PROCEDURAL BACKGROUND

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974, ("ERA") 42 U.S.C. § 5851, *et seq*., which prohibit an employer from discriminating against or otherwise taking unfavorable personnel action against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in protected activity. The implementing regulations are found at 29 C.F.R. Part 24. The ERA affords protection from employment discrimination to employees in the nuclear industry who commence, testify at, or participate in proceedings or other actions to carry out the purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2011, *et seq*. The law is designed to protect "whistleblower" employees from retaliatory or discriminatory actions by the employer. To succeed, the complainant must demonstrate that his or her protected activity was a contributing factor in the unfavorable personnel action. 42 U.S.C. § 5851(b)(3)(C); 29 C.F.R. § 24.7(b).

On June 7, 2002, Complainant, Syed M. A. Hasan, filed his ERA complaint against Sargent & Lundy, Respondent, with the Occupational Safety and Health Administration ("OSHA"), alleging that Respondent refused to hire him because he had previously raised safety concerns. Following a rejection of his complaint by OSHA, Complainant filed his complaint with the Office of Administrative Law Judges on July 23, 2002. A previously filed complaint between the instant parties was pending before Administrative Law Judge Robert J. Lesnick, *Hasan v. Sargent & Lundy*, ALJ No. 2000-ERA-7 (hereinafter "*Hasan I*"). This is the third ERA complaint filed by Complainant against this respondent, and one of many cases that he has filed

against companies for failing to hire, retain, or rehire him.[1] The first case, involving similar issues, was more remote in time, and will not be further discussed herein.

On August 26, 2002, Respondent submitted to this court a motion to dismiss the instant complaint (hereinafter "*Hasan II*"), or, in the alternative, to place the case in abeyance pending the resolution of *Hasan I* before Administrative Law Judge Robert J. Lesnick. On September 11, 2002, I ordered this case held in abeyance until resolution of *Hasan I*.[2] After a hearing on the merits in *Hasan I*, Judge Lesnick found that Hasan engaged in protected activity when he voiced safety concerns to his employer at the time to Respondent, Sargent & Lundy, and the Nuclear Regulatory Commission ("NRC"). Sargent & Lundy was aware of this protected activity and then rejected Hasan's application for employment. Sargent & Lundy continued seeking applicants with similar qualifications for the open positions. However, Hasan ultimately failed to demonstrate that he was qualified for the available positions. Therefore, the judge found that Respondent had legitimate reasons for refusing to hire Hasan and these reasons were not pretext. On December 5, 2002, Judge Lesnick issued a Recommended Decision and Order dismissing the claim in *Hasan I* and on January 8, 2003 I issued a second order, following this decision, continuing to hold the instant case in abeyance.

On July 30, 2004, the ARB issued a final order affirming Judge Lesnick's recommended order to dismiss.[3] The Board found that Judge Lesnick's Recommended Decision and Order "recites the relevant facts underlying this dispute. He thoroughly analyzed all of the evidence and correctly applied the relevant law." *Hasan v. Sargent & Lundy,* ARB No. 03-030, ALJ No.

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[1] *Hasan v. Enercon Services, Inc.,* 2004-ERA-22 (Dec. 22, 2004), 2004-ERA-27 (Dec. 22, 2004), 2003-ERA-31(Jan. 15, 2004); *Hasan v. Southern Company, Inc.,* 2003-ERA-32 (Jan. 6, 2004); *Hasan v. Stone & Webster Engineering Corp.*, 2000-ERA-10 (Feb. 6, 2003); *Hasan v. J.A. Jones-Lockwood Greene,* 2002-ERA-18 (Sept. 19, 2002), 2002-ERA-5 (Sept. 17, 2002), 2003-ERA-7, 2003-ERA-33; *Hasan v. WolfCreek Nuclear Operating Corp.,* 2002-ERA-29 (July 17, 2002), 2000-ERA-14 (Oct. 5, 2000); *Hasan v. Commonwealth Edison Company,* 2000-ERA-13 (Oct. 5, 2000), 2000-RA-8 (Oct. 5, 2000), 2000-ERA-11 (Oct. 5, 2000), 2000-ERA-12 (Oct. 5, 2000); *Hasan v. Florida Power & Light Company,* 2000-ERA-12 (Oct. 5, 2000); *Hasan v. Burns & Roe Enterprises, Inc.,* 2000-ERA-6 (Sept. 1, 2000); *Hasan v. Commonwealth Edison, The Estes Group,* 1999-ERA-17 (Feb. 18, 2000), 2000-ERA-1 (Jan. 10, 2000); *Hasan v. Intergraph Corp.,* 1996-ERA-17 (Jan. 22, 1997); *Hasan v. Sargent & Lundy,* 1996-ERA-27 (Nov. 4, 1996); *Hasan v. Bechtel Power Corp.,* 1994-ERA-21 (Jan. 25, 1995), 1993-ERA-40 (Dec. 9, 1994), 1993-ERA-22 (Dec. 8, 2002); *Hasan v. System Energy Resources, Inc.,* 1989-ERA-36 (Aug. 2, 1989); *Hasan v. Nuclear Power Systems Inc.,* 1986-ERA-24, (Oct. 21, 1987).

[2] In response to my Order Holding the Case in Abeyance, Complainant filed an Emergency Motion requesting the Board to vacate my Order. Respondent filed a response in opposition and Complainant filed a reply. On March 28, 2003, the ARB issued an Order Holding Motion to Strike Complainant's Motion in Abeyance and to Show Cause, noting that Complainant's appeal appeared to be interlocutory in nature and, more importantly, my January 8, 2003 order did not resolve the issues in the instant case. Following the Board's issuance of the Secretary's final decision in *Hasan I*, the Board dismissed Complainant's appeal, returning *Hasan II* to the undersigned for adjudication. *Hasan v. Sargent & Lundy*, ARB No. 03-078 (August 24, 2004).

[3] It is also noteworthy that the United States Supreme Court denied review of another of Mr. Hasan's claims that a potential employer refused to hire him because of his prior whistleblower activities. *Hasan v. United States Dep't of Labor,* U.S., No. 02-592, *cert denied* 1/21/03. The Court let stand the panel decision that had affirmed an Occupational Safety and Health Administration administrative ruling that Hasan failed to satisfy the pleading requirements of the Energy Reorganization Act (42 U.S.C. § 5851) in his retaliation claim. The DOL stated the Hasan "had a history of applying for jobs and then filing complaints and seeking broad discovery when he receives no response."

2000-ERA-7, (July 30, 2004). On August 17, 2004, Respondent again requested the undersigned administrative law judge grant its motion to dismiss. Complainant filed an appeal with the United States Court of Appeals for the Seventh Circuit (*Syed M. A. Hasan v. United States Department of Labor*, ALJ Case No. 2000-ERA-7, ARB No. 03-030 (July 30, 2004)). However, in an Order dated March 14, 2005, the Seventh Circuit denied Complainant's petition for review. *Syed M. A. Hasan v. United States Department of Labor*, Nos. 04-3030, 04-3157, 04-3836 (7th Cir. 2005). On March 29, 2005, the Complainant petitioned the Seventh Circuit for rehearing *en banc*, which was again denied by the Court on April 25, 2005. *Syed M. A. Hasan v. United States Department of Labor*, No. 04-3030 (7th Cir. 2005).

ANALYSIS

The allegations of *Hasan II* are subject to collateral estoppel. In *Montana v. United States*, 440 U.S. 147, 153 (1979), the Supreme Court stated: "[u]nder collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits . . . ." The Court went on to state that precluding parties from contesting issues they have already had a full and fair opportunity to litigate "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-54.

The United States Supreme Court further held that principles of issue preclusion also apply to "the fact-finding of administrative bodies acting in a judicial capacity...." *Id.* The Court reasoned that, when an administrative agency acts in a judicial capacity to resolve issues of fact which the parties before it have had an adequate opportunity to litigate, application of *res judicata* principles is appropriate. Consequently, federal courts are to afford fact-finding decisions of administrative agencies the same preclusive effect to which the decision would be entitled in state or federal courts. *Hasan II*, therefore, is eligible for collateral estoppel.

Collateral estoppel or "issue preclusion" is a concept included within the doctrine of *res judicata,* which "refers to the effect of a judgment in foreclosing a relitigation of a matter that has been litigated and decided." *Migra v. Warren City School District Board of Education,*465 U.S. 75, 77 n.1 (1984) (*Warren City*). Issue preclusion may be applied "where the identical issue sought to be litigated was actually determined and necessarily decided in a prior proceeding in which the litigant against whom the doctrine is asserted had a full and fair opportunity to litigate the issue." *N.L.R.B. v. Master Slack and/or Master Trousers Corp.,* 773 F.2d 77, 81 (6th Cir. 1985)(*Master Slack*), citing, *inter alia*, *Montana v. U.S.* 440 U.S. 147, 153 (1979) and *Park Lane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979). Whether a factual finding is given preclusive effect in a subsequent action depends upon whether "the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." *Lupo v. Voinovich,* 858 F.Supp. 699, 703 (S.D.Ohio 1994), quoting *Cooper v. City of North Olmstead,* 795 F.2d 1265, 1268 (6th Cir.1986).

In his response to the Order to Show Cause, Complainant states that the instant case was filed because of subsequent job postings after the date of the hearing before Judge Lesnick.

However, although Complainant's allegations arise from a subsequent date, the issues are ultimately identical and Complainant recites allegations and complaints from *Hasan I*.

Also, in his response to the Order to Show Cause, Complainant asserts that reference to *Billings v. Tennessee Valley Authority,* 91-ERA-12 (ARB June 26, 1996) is inapplicable because "he did not violate any Order of this court." The question of whether Complainant violated an Order is not at issue; rather, the issue of dismissal based on claim preclusion is supported by *Billings.* In *Billings*, the dismissal was proper because "the basis of [Billing's] complaint was the subject of the [previous] complaints…and further litigation is barred by the principles of res judicata." *Id.* at 8. Therefore, *Billings* was not cited for the purpose of alleging that Complainant has violated any order, but rather to support the principle that a claim may be dismissed where there has been a judgment on the merits of a complaint based on the identical issues and between the identical parties.

When a court has decided an issue of fact or law necessary to its judgment, that decision precludes relitigation of an issue "in substance the same" as that resolved in an earlier proceeding. *See Kidwell v. Dept of Army, et al.,* 56 F.3d 279, 286-87 (D.C.Cir.1995). If the issue was litigated in a prior proceeding, actually and necessarily determined by the court and the application of the doctrine does not create unfairness to the litigant, collateral estoppel will bar relitigation of the issue. *See SEC v. Bilzerian,* 29 F.3d 689, 693 (D.C.Cir.1994). Therefore, in the instant case, the first inquiry is whether the issues at stake in *Hasan II* are identical to the issues alleged in *Hasan I*.

In *Hasan I*, Complainant alleged retaliation under the whistleblower protection provisions of the ERA when Respondent failed to hire him. In the second complaint, Complainant made the same allegations of retaliation as set forth in *Hasan I* and against the identical party, Sargent and Lundy. Complainant alleged that Respondents' actions were an obstruction of his Whistleblower rights and a violation under the ERA. In examining the record, it is apparent from the allegations in Complainant's first and second complaints that the issues at stake are identical. Complainant does not assert a new valid cause of action; rather, he simply rehashes his allegations of retaliation already adjudicated in *Hasan I*. Accordingly, I find that the issues at stake in the instant litigation are identical to the issues alleged in the prior litigation.

The second inquiry is whether the issues were actually litigated by Complainant in prior litigation. An issue is directly or actually litigated when it is contested by the parties and submitted for determination by the court. *Otherson v. Department of Justice, I.N.S.*, 711 F.2d 267, 273 (D.C. Cir. 1983). The original allegations of retaliation under the ERA were contested and submitted to Judge Lesnick for determination in *Hasan I*. The parties contested the issues during the hearing. Therefore, I find that the issues raised in *Hasan II* were directly litigated in prior litigation.

The third inquiry is whether the determination of the issues in the prior litigation was an essential part of the judgment in the earlier action. An issue is not essential to the judgment in the prior action if the previous decision could have been rationally grounded on an issue other than that which the respondent seeks to foreclose from determination. *Little v. United States*, 794 F.2d 484, 487 (9th Cir. 1986). In *Hasan I*, the only issue for determination was whether

Complainant satisfied the requirements of the Whistleblower provisions of the ERA. In *Hasan II*, the issues for determination are identical. Therefore, I find that the issues of *Hasan I* were critical and necessary to my decision in *Hasan II*.

Accordingly, since all three elements of collateral estoppel are satisfied, I find that the allegations of *Hasan II* are subject to issue preclusion. However, assuming this court found it appropriate to base the decision herein on its own review of the record as presented in this case, *Hasan II* also warrants dismissal for failing to prove the essential elements of a violation of the employee protection provisions of the ERA. Therefore, even if the doctrine of collateral estoppel is not applied in the instant case, the reasons set forth below justify dismissal of the whistle-blower claims of *Hasan II*.

In nuclear whistleblower cases, the complainant has an initial burden of proof to make a prima facie case by showing: (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; and (3) the evidence is sufficient to raise a reasonable inference that the protected activity was a contributing factor in the adverse employment action. 42 U.S.C. §5851(b)(3)(A); 29 C.F.R. §24.5(b)(3). When the complaint reaches the hearing stage, Complainant must demonstrate, by a preponderance of the evidence, that he engaged in protected activity which was a contributing factor in the employer's alleged unfavorable personnel decision. 42 U.S.C. §5851(b)(3)(C); 29 C.F.R. §24.7(b); *see also Trimmer v. United States Department of Labor*, 174 F. 3d 1098, 1101-02 (10th Cir. 1999)(discussing distinct analytical model utilized under 42 U.S.C. §5851 (1992), as opposed to traditional burden-shifting framework established under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973)). Only if the complainant meets his burden, does the burden then shift to the employer to demonstrate 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); 29 C.F.R. §24.7(b).

Here, when Complainant reported his disagreements with Respondent to the NRC, he engaged in "protected activity." Thereafter, Complainant was subjected to adverse employment action when Respondent rejected the Complainant for rehire, while Respondent continued to seek applicants with qualifications similar to those of the Complainant. Ultimately, however, the Complainant fails to demonstrate that he was qualified for the available positions and the evidence is insufficient to raise a reasonable inference that the protected activity was a contributing factor in the adverse employment action. Furthermore, as shown in *Hasan I*, Respondent had shown legitimate, nondiscriminatory reasons for its action. Therefore, like *Hasan I*, *Hasan II* warrants dismissal for failing to prove the essential elements of a violation of the employee protection provisions of the ERA.[4]

[4] It is noteworthy that a court has an obligation to protect the orderly administration of justice and can issue an injunction to discharge that duty. *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C. Cir. 1985). Sanctions also are appropriate when a *pro se* litigant has a history of submitting multiple frivolous claims. *See* Fed. R. Civ. P. 11; *In re Green*, 669 F.2d 779, 787 (D.C.Cir. 1981). Appropriate sanctions may include restriction on the ability to file future lawsuits without leave of court and monetary sanctions. *See generally, McCampbell v. KPMG Peat Marwick,* 982 F.Supp. 445, 4448-449 (N.D. Tex. 1997) (discussing sanctions available to deter and punish *pro se* litigants for abusing the judicial system by filing multiple frivolous lawsuits). The range of appropriate sanctions depends on the unique circumstances of each case. *Id.* at 447.

In light of the denials of review of *Hasan I* by the Seventh Circuit Court of Appeals, the undersigned now determines that dismissal of the instant case based on the principles of collateral estoppel is appropriate.

RECOMMENDED ORDER

Accordingly, IT IS RECOMMENDED that the above captioned matter, case number 2002-ERA-0032, is DISMISSED.

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JOSEPH E. KANE
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.