U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 November 2004

CASE NO.: 2003-ERA-00018

In the Matter of

DAVID A. HANNUM,
Complainant,

v.

DETROIT EDISON COMPANY,
Respondent,

Appearances:

David A. Hannum, in *propria persona*,
For Complainant

Douglas W. Crim, Esq.
Polly Ann Synk, Esq.
Miller, Canfield, Paddock and Stone, P.L.C.,
For Respondent

Before: GERALD M. ETCHINGHAM
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arose when the complainant, David A. Hannum ("Complainant"), filed a complaint under the employee protection provisions of section 210 of the Energy Reorganization Act of 1974, as amended, 42 United States Code ("U.S.C.") Section 5851 (the "ERA" or the "Act"), alleging that his employer, Detroit Edison Company ("Employer" or "Respondent") retaliated against him by involuntarily terminating his employment and illegally blacklisting him by placing his name and information concerning revocation of his unescorted access privilege into the Personnel Access Data System ("PADS") in retaliation of Complainant pointing out deficiencies in Respondent's operator training program.

The Act protects employees who assist or participate in actions to carry out the purposes of the federal statutes regulating the nuclear energy industry. Section 210 provides, inter alia, that "no employer may discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy

Act of 1954 (42 U.S.C. § 2011, et seq.)." 42 U.S.C. § 5851(a)(1)(A). The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission (the "NRC") who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

An Occupational Safety and Health Administration ("OSHA") investigation determined that Complainant's June 4, 2003 complaint, after alleging that Respondent terminated and blacklisted him in retaliation of his alleged whistleblowing activity, showed that he had failed to meet the requirements for the timely filing of his complaint. As a result, OSHA dismissed the complaint as untimely under the ERA on June 26, 2003. Complainant filed a timely request for hearing with the Office of Administrative Law Judges ("OALJ"). This case was assigned to me on July 14, 2003.

On October 1, 2003, I issued an order dismissing with prejudice Complainant's claim of retaliatory termination as untimely pursuant to 42 U.S.C.§ 5851(b)(1); 29 C.F.R. § 24.3(b)(2) (ALJX 3) in response to the parties' filings as requested by my earlier Order to Show Cause concerning the issue of the timeliness of Complainant's complaint.

On May 12 and 13, 2004, a formal hearing was held before me in Ann Arbor, Michigan. The parties were afforded a full opportunity to adduce testimony, offer evidence and submit post-hearing briefs. Complainant, whom represented himself in *pro se*, testified on his own behalf and cross-examined several of Respondent's employees including Kirk Snyder, Larry Sanders, and Richard Fitzsimmons.

Respondent was represented by counsel who cross-examined Complainant and called the same Respondent employees referenced above. The following exhibits were admitted into evidence: Complainant's Exhibits ("CX") 1–22, 24–32, 34-35, and 134; Respondent's Exhibits ("RX") 1-29; and Administrative Law Judge Exhibits ("ALJX") 1-8. Complainant's Exhibits CX 23, 33, 45, and 86 were not admitted into evidence having either been withdrawn or denied for reasons referenced in the record. TR pp. 6-8,16-25, 33, 43-44, 65, 628, and 629. The parties submitted post-hearing briefs on July 19, 2004, the record closed, and this Court took the matter under submission. Complainant and Respondent's closing briefs are marked as ALJX 9 and ALJX 10, respectively. Both exhibits are admitted into evidence as part of the record.

Complainant contends that because he raised a "safety concern" regarding the operator training program, Employer subjected him to adverse employment actions. Respondent argues that Complainant's action is time-barred, and that even if Complainant's complaint was timely, Complainant never raised safety concerns and therefore did not engage in any "protected activity" under the Act. Finally, Respondent contends that it did not subject Complainant to any adverse action or retaliatory discrimination because he engaged in protected activity.

After reviewing all of the evidence, I hold that the complaint in this case be dismissed as untimely as there are no equitable reasons for tolling the 180 day statute of limitations. I further find that Complainant did not take part in any protected activity when working for Respondent.

Complainant raised issues concerning non-ERA employment matters and did not file his ERA complaint until his complaint, alleging sexual harassment, age discrimination, and related employment issues, was denied by the Michigan Department of Civil Rights in May 2003. In addition, I hold that Respondent's decision to place Complainant's name in PADS was dictated by Respondent's termination of Complainant, Complainant's unprotected conduct, involving his enraged reaction to the extension of his probationary period, and Complainant's specific reference to guns, weapons, and workplace violence.

ISSUES TO BE RESOLVED

1. Whether Complainant filed a timely complaint with regard to Respondent's allegedly discriminatory adverse actions.

2. Whether Complainant's expressions of concern regarding the Respondent's operator training program constitute protected activities under the ERA.

3. Whether Respondent's allegedly discriminatory acts violate the ERA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary Of The Evidence

STIPULATIONS

The parties stipulate, and I accept that:

1) Complainant was employed by Respondent as a Senior Nuclear Instructor at the Fermi 2 nuclear power plant from March 2000 through August 16, 2000.
2) On June 4, 2003, Complainant filed a complaint against Respondent with the U.S. Department of Labor in Lansing, Michigan.
3) On June 26, 2004, Cynthia Lee of the Department of Labor sent a letter to Jeff Bourdie at Respondent notifying him that Complainant's complaint appeared untimely under the ERA and therefore was dismissed.
4) Complainant filed an appeal with the OALJ in Washington, D.C. on or about July 1, 2003.
5) On or about July 17, 2003, I issued an Order to Show Cause Why Case Should Not Be Dismissed For Untimely-Filed Complaint.
6) Complainant responded to the Order To Show Cause on or about August 12, 2003.
7) Respondent responded to the July 17 Order To Show Cause on September 5, 2003.
8) On October 1, 2003, I held that Complainant's claims related to retaliatory employment termination by Respondent were dismissed with prejudice as untimely [*see ALJX 3*].

9) I ordered an evidentiary hearing to consider (1) the timeliness of Complainant's retaliatory blacklisting claim and (2) the merits of the retaliatory blacklisting claim.
10) Complainant worked at the Quad Cities nuclear plant in Illinois from January 1978 to September 1985.
11) Complainant worked at the Grand Gulf nuclear plant in Mississippi from September 1985 to November 1987.
12) Complainant worked at the Shoreham nuclear plant in New York from November 1987 to December 1990.
13) Complainant worked at the Brookhaven National Laboratory from December 1990 to April 1997.
14) Complainant worked at the Millstone nuclear power plant in Connecticut from October 1997 to approximately January or February 1998.
15) Complainant worked at the Peach Bottom nuclear power plant in Pennsylvania from approximately March 1998 through approximately June 1998.
16) Complainant worked at the Perry nuclear power plant in Ohio from approximately October 1998 to approximately December 1998.
17) Complainant worked at Computer Associates in Long Island, New York from approximately March 1999 to approximately July 1999.
18) Respondent's application forms for in-processing of prospective employees included questions about past denials of unescorted access.
19) Complainant signed a consent form that described the use and purpose of the PADS, gave Complainant's consent to the use of his access information in the PADS, and released Respondent from any and all liability based on the disclosure or use of information obtained pursuant to the Consent.
20) Complainant acknowledged that he signed the PADS consent and release.
21) In his April 15, 2002 letter to Respondent appealing the denial of his unescorted access authorization, Complainant stated "I have evidence to support my belief that background checks conducted since I left [Respondent's] Fermi [nuclear power plant], have resulted in an accumulation of derogatory information. This information has and continues to be used against me [Complainant] and has severely damaged my ability to gain access and employment in other areas of the nuclear industry."
22) Complainant began working for Master-Lee Hanford at the Hanford Reservation government facility on or about March 1, 2001.
23) Complainant received records from Respondent regarding his access authorization on or about April 8, 2002.
24) [Omitted as disputed]
25) [Omitted as disputed]
26) [Omitted as disputed]
27) On the afternoon of August 15, 2000, Complainant was called into a meeting with supervisors Kirk Snyder and Tim Barrett.
28) At the August 15, 2000, meeting, Kirk Snyder reviewed his expectations of Complainant as an instructor, pointed out some conduct issues that had been called to his attention, and stated that on the basis of those problems, Respondent would extend Complainant's probation period for six months.

29) [Omitted as disputed]
30) Complainant acknowledged at his deposition that he understood that the purpose of the August 15, 2000, meeting was to extend his probation, and that termination was never mentioned in the meeting.
31) [Omitted as disputed]
32) During the August 15, 2000, meeting, Complainant felt "enraged" and "confused."
33) [Omitted as disputed]
34) [Omitted as disputed]
35) Federal regulations require that all nuclear power facilities enforce an unescorted access authorization program that includes background checks, psychological assessments, and a system of ongoing behavioral observation by supervisors and management personnel.
36) Respondent's Conduct Manual has a chapter on Access Control that states in section 2.4.2: "Authorization for unescorted access may be denied, suspended, or, with the approval of the Plant Manager or delegate, revoked as the result of … Behavior indicating untrustworthiness or unreliability… Behavior not suitable for work at a nuclear power plant."
37) Enclosure A to MGA 09 of Respondent's Conduct Manual states: "Individuals who have their unescorted access denied or revoked are normally outprocessed."
38) Enclosure A to MGA 09 of Respondent's Conduct Manual states that security clearance information is input into PADS as appropriate.
39) Respondent has written procedures governing entry of information into PADS, which states that potentially disqualifying information must be entered into the database within one day of receipt of the information.
40) [Omitted as disputed]
41) Following the August 15, 2000, meeting, Complainant's supervisors made notes that reflected their observations and conclusions that Complainant's behavior was inconsistent with the required behavior standards for access authorization at a nuclear power facility.
42) [Omitted as disputed]
43) Mr. Sanders' notes from August 14, 2000, directed Kirk Snyder to take action to extend Complainant's probation.
44) Respondent has a written policy, MGA 016, that governs behavioral observation requirements and sets forth steps that must be followed when unusual behavior is observed by management.
45) Respondent has a written procedure that governs its use of the PADS database, designated as SEP-SE1-05.

TR, at 11, ALJX 8; RX 2; RX 3; RX 6; RX 7; RX 9; RX 10; RX 13; RX 16; RX 17; RX 19; RX 21; and RX 24 - RX 29. Because there is substantial evidence in the record to support the foregoing stipulations, I accept them.

FINDINGS OF FACT

This case involves the Fermi II Nuclear Power Plant operated by Respondent Detroit Edison Company located in Newport, Michigan. RX 15. Complainant David Hannum was

interviewed by Respondent in late 1999 or early 2000. TR at 389. Respondent had two instructor vacancies which it needed to fill. *Id*. Complainant was the only qualified candidate who interviewed for one of two positions in Respondent's training department. TR at 434.

Complainant had a twenty year history in the nuclear industry. ALJX 8, Fact Nos. 10-16. Prior to his work at Respondent, Complainant had not had one year of full-time work, however, since April of 1997, when he was laid off from Brookhaven National Laboratory. RX 16 at B[1]48. Complainant was unemployed from June 1999 until Respondent hired Complainant on March 6, 2000 to become an instructor of nuclear power plant operators. TR at 390; ALJX 8, Fact No.1; RX 16 at B42; RX 24 at B84, B89. In order for Complainant to qualify for the position, he needed to go through plant-specific training, which was not set to start until May 2000. TR at 94 and 392. Prior to that time, Complainant was to familiarize himself with Respondent and its procedures. RX 24 at B89-90.

Kirk Snyder was Complainant's general supervisor of training in 2000 while Complainant worked at Respondent. TR at 388-89, 394-95. Mr. Snyder had worked at Respondent since 1983 and was a senior reactor operator. *Id.* Mr. Snyder supervised both Complainant and his "lead" Tim Barrett, who was directly responsible for supervising Complainant's day-to-day work assignments and work direction. *Id*.

Before training classes began, Complainant was given a specific assignment to review a task list that was acknowledged to be cumbersome and redundant. TR at 390-391, 526; CX 2-CX 4. Complainant reviewed the task list and was commended in identifying the redundancies and other issues. TR at 392 and 522; RX 16 at B42-43; RX 24 at B90-91. There was a substantial amount of work to be performed in order to address the redundancies/embedded tasks identified by Complainant in the task list. TR at 393. Respondent assigned a group to work on the task list project. TR at 393. Complainant was scheduled to start his operator training classes so he could have the knowledge necessary to be an instructor and had to abandon the task list project before completion. TR at 394 and 526-27.

Complainant testified that while working on the task list project with fellow employee Geary Goodman, Complainant felt totally embarrassed and sexually harassed by Mr. Goodman's statements concerning sex. RX 16 at B43. Also, sometime between March and May 2000, Complainant testified that he was initiated and exposed to offensive sex jokes at Respondent by Tim Barrett and Mr. Goodman . RX 16 at B43*;* RX 24 at B107. Complainant did not report these alleged sexual harassment incidents until the August 15, 2000 meeting discussed below.

Soon after starting his operator training classes in May 2000, Complainant began to have problems with fellow employees, classmates and instructors. TR at 395-396. Complainant would ask questions of his instructors on various aspects of the covered materials taking up large blocks of class time. TR at 396-97 and 535-36. Sometimes Complainant's disagreement was caused by his lack of knowledge of the Fermi II Plant. TR at 535. One incident involved Complainant arguing with an instructor in class about an inaccurate color drawing. RX 19 at B55.

[1] Bate stamped numbers are designated throughout this decision as B___.

In or after May 2000, Complainant described three other incidents of sexual harassment by Len Barker, an instructor, and Ed Thisius, another instructor, involving physical touching and computer pornography that infuriated Complainant. RX 16 at B43-44. Complainant did not report these incidents until an August meeting referenced below.

Regardless of the source of the disagreement, Complainant's challenging of instructors in a class of operator trainings was a problem to Respondent's management. Complainant was told that if there was an issue with the course material, he was not to challenge and debate with the instructor about it during operator training class time, but instead he was to discuss it outside of class so not to take time away from the operator trainees. TR at 528. The reason for this was that instructors were supposed to set an example for operator trainees. TR at 400-01, 405, 519-20, 535. Complainant was told that instructors were not to argue about training materials in front of trainees because arguing in front of trainees diminished instructors' credibility – something deemed by Respondent to be essential to effective nuclear power plant training. *Id*. and TR at 397-99.

Complainant stated that he wanted to "be acknowledged as being right … [s]ort of like getting a brownie point from the instructor," and when he did not feel that he received enough credit from his instructors, he would get disruptive in class rather than to take his questions outside of class afterwards. TR at 97-98; RX 4.

On June 14 or 15, 2000, after receiving complaints from instructors about Complainant, Mr. Snyder called Complainant for a performance discussion as part of Respondent's positive discipline program. TR at 395-96. A written document was prepared for this discussion. RX 4. The matters addressed with Complainant included being disruptive in class, argumentative with instructors and not following expectations. *Id.* Another issue of less importance was Complainant's low test scores on several tests relating to Respondent's operations.[2] TR at 399; RX 5; RX 24 at B128-29.

In the June 2000 performance evaluation discussion, Complainant was told about his conduct and the need for a change in his conduct. Mr. Snyder specifically outlined what Complainant needed to do to correct the problems. TR at 404-06. Complainant was specifically told that if his conduct did not change that there was a possibility for him to be discharged before his six months probation period had expired. TR at 401; RX 4. Complainant reacted to this criticism with anger and uneasiness. RX 16 at B45.

At the June 2000 performance evaluation, Complainant admitted that he was under a lot of stress due, in part, to the fact that he had changed jobs numerous times and his need to maintain healthcare for his daughter. TR at 404; RX 16 at B45. Mr. Snyder referred Complainant to the Respondent's Employee Assistance Program, a voluntary, confidential program designed to help employees deal with personal problems. TR at 477. Complainant also

[2] While Complainant had considerable prior experience in nuclear power plants, he was not scoring as well as expected on the tests. Complainant's testing deficiencies were not the biggest issue, although if he failed to achieve certification, he would not be allowed to train operators. TR at 401. Rather, his conduct in class and the inappropriate example he was setting for operator trainees were of most concern to Mr. Snyder. TR at 398, 428.

disclosed that he had not been sleeping very well and inquired about a referral to a doctor. TR at 403. Mr. Snyder suggested Complainant see a doctor and Complainant agreed he would. *Id.*

At the end of the mid-June 2000 meeting, Mr. Snyder set up a follow-up meeting to determine Complainant's progress in fulfilling the expectations set forth in the meeting as Mr. Snyder would attend some of the classes and inquire of students and instructors to determine if Complainant's behavior had improved. TR at 403-04.

Complainant saw a physician about his stress and lack of sleep on June 16, 2000. RX 16 at B45. The physician prescribed Complainant anti-stress medication, Paxil (20mg), and sleep medication, Lorazepan (.5mg), at this time. *Id.* Complainant returned to work on June 19, 2000, and, following security procedures, reported his psychotropic medication to security and his supervisor, Tim Barrett. RX 16 at B45; RX 24 at B104-105. Complainant became infuriated and angered and felt violated when Mr. Barrett read the medications out loud as Complainant believed everyone around his office cubicle could hear that he was taking these medications. *Id.*

The follow-up meeting occurred in late June 2000, and it was noted that Complainant's classroom behavior had improved. TR at 406.

On the same day as the follow-up meeting, Complainant appeared to Mr. Snyder to be very agitated, red in the face, neck muscles bulging, and fists clenched when he repeatedly told Mr. Snyder that Mr. Snyder "needed to fire everyone." TR at 408-09. When Complainant calmed down, he told Mr. Snyder that he was complaining about class members who had been "belching' and "farting" in class, and Mr. Snyder assured Complainant that he would address the matter and did so later. TR at 409; RX 16 at 46.

After this incident, Complainant's behavior and test scores continued to improve and by early August 2000, Mr. Snyder indicated to Complainant that he understood that Complainant was doing a good job, his test scores were improving, and Complainant was getting along better with his classmates. TR at 410; RX 16 at B46.

In early August 2000, however, an incident occurring on August 9, 2000, involving Complainant, came to Mr. Snyder's attention and led to another performance evaluation discussion. TR at 410-11. At this time, Complainant was not taking his psychotropic medication as it had run out and his physician had not returned Complainant's call for a re-fill. RX 16 at B46-47. The incident reported to Mr. Snyder involved Complainant becoming very upset because trainees and the instructor were talking in the simulator and Complainant told the instructor to "shut up" or "quiet down." TR at 410-11; RX 16 at B46; RX 24 at B100; RX 25 at B161. The trainees immediately got quiet in response to Complainant's statement to the instructor. TR at 327.

This incident, along with another, in which Complainant told a person that he was being yelled at by instructors, caused Mr. Snyder to become concerned about Complainant's behavior again. TR at 410; RX 25 at B161. Mr. Snyder questioned whether Complainant understood how he was to interact with other instructors in front of trainees and/or whether Complainant could control his emotions and actions. *Id.* As a result of these two incidents and after talking with

instructors, Mr. Snyder decided in early August 2000, to have another performance discussion with Claimant on August 15, 2000. TR at 411-12.

On August 13, 2000, Complainant had an encounter with another instructor, Mike Doucet, who Complainant testified stated to him that "Some day you will realize how handsome I am." RX 16 at B47; RX 24 at B121. Complainant became very aggravated by this comment and felt sexually harassed and intimidated. *Id*.

Before meeting again with Complainant, Mr. Snyder contacted Respondent's Human Relations department and discussed Complainant's performance and status with them. TR at 412. It was decided that, based on Complainant's behavior, that his probationary period of six months was being extended for another six months. *Id*. A Performance Discussion Guide was drafted for the performance meeting with Complainant. RX 6 at B28-29. Mr. Snyder explained how the Performance Discussion Guide outlined the problems with Complainant and how they were a continuation of problems addressed at the June 2000 performance meeting. TR at 412-14.

Mr. Snyder explained his hope that Complainant would work out his behavior problems during the extended probationary period and display the proper demeanor in the classroom and toward other instructors. TR at 412-13. Complainant was still seen as the only qualified candidate who interviewed for one of two positions with Respondent's training department that was in need of help. TR at 434. In order to get past the extended probationary period, Complainant had to exhibit behavior, however, that portrayed the proper demeanor and respect for other instructors. TR at 414.

On August 15, 2000, Mr. Snyder met with Complainant and Tim Barrett, Complainant's immediate supervisor. Fact #27; TR at 140; RX 16 at B47. Complainant was informed of the decision to extend his probation. TR at 136; ALJX 8, Fact #28.

Complainant reacted by becoming very upset to the point that he was enraged. ALJX 8, Fact #32, RX 16, B48. Complainant also described his mood at that time as "infuriated." RX 16 at B41. Complainant next began to express his feelings in a loud manner that a separate set of standards existed at Respondent – one for Complainant and one for everyone else at Operations Training. RX 25 at B161. Mr. Barrett had just an hour earlier told Complainant that there was not a separate set of standards. Complainant next finally disclosed the alleged sexual harassment involving the off-color jokes told by Mr. Barrett and other employees at Respondent. *Id.*

Complainant, at this meeting, was described as becoming louder and showing signs of changing emotions with redness in the face, bulging of his neck muscles, clenching of his fists, sliding back of his chair, and making statements, in mostly the third person, about how everyone at Respondent's workplace was out to get him. TR at 415-16; RX 25 at B161-62. Complainant spoke of workplace violence and the use of guns. TR at 416; RX 25 at B162; RX 24 at B124-25. Specifically, Mr. Snyder credibly testified that Complainant had stated "in the violent times of our society, if I was a different person or if I owned a gun, this would have a different outcome." TR at 417.

These statements from Complainant caused Mr. Snyder and Mr. Barrett to become fearful that Complainant could become violent and Mr. Snyder felt threatened almost to the point of calling security into the meeting. TR at 417-19; RX 25 at B161-62. Mr. Snyder next told Complainant that their meeting was over. TR at 417. Complainant refused to leave the meeting when asked. *Id; See also* RX 24 at B126. Complainant continued to allege acts by other employees at Respondent involving serious improprieties such as pornography on computers. TR at 418. Mr. Snyder told Complainant that he would look into these matters, but Complainant would have to leave the meeting at that time. *Id.*

Complainant finally left the meeting after about one hour and ten or fifteen minutes from its start. TR at 418-19. At no time during the August 15 meeting was termination of Complainant's employment mentioned. Fact #30.

After Complainant left the meeting, Mr. Snyder and Mr. Barrett discussed Complainant's behavior and agreed that Complainant's behavior was disconcerting and caused them to be in fear of what actions Complainant might take in the future. TR at 419; RX 25 at B161-62. As a result of Complainant's "aberrant behavior," Mr. Snyder immediately called Respondent's security department and had Complainant's access to the nuclear power plant temporarily suspended pending review by security as required by Respondent's established procedures. TR at 419, 542. Mr. Snyder filled out a Supervisory Observation Report and submitted it to Respondent describing Complainant's behavior. RX 7 at B30.

Mr. Snyder next called his supervisor, Larry Sanders and told him what had happened at the performance meeting with Complainant. TR at 419. Mr. Sanders had worked at Respondent since 1996 as a nuclear training manger, oversaw the training organization and supervised Mr. Snyder, Mr. Barrett, and Complainant. TR at 516-18. Mr. Snyder recommended that Complainant be terminated as having violated Respondent's zero tolerance for workplace violence. TR at 419; 543-44; CX 9. Mr. Sanders was at home when Mr. Snyder called him concerning Complainant's behavior on August 15, 2000 and he testified that he knew Mr. Snyder well and could tell from his voice that Mr. Snyder was very concerned. TR at 541-42.

On August 16, 2000, Mr. Sanders met with Mr. Snyder, Mr. Barrett and representatives from the security department and went over the events of the prior day involving Complainant. TR at 544. Mr. Sanders decided that based on Complainant's behavior at the August 15, 2000 meeting, his employment with Respondent would be immediately terminated and completed a section of the Supervisory Observation Report reflecting this decision. TR at 419, 542-43; RX 7 at B30. Next, Mr. Sanders discussed the recent course of events involving Complainant with Respondent's Human Resources department, and got concurrence from them on the decision to terminate Complainant. TR at 544. Respondent's security department was contacted by Mr. Sanders to discuss what had happened the prior day with Complainant and they also concurred that Complainant posed a threat by his behavior at the meeting. *Id*.

Mr. Sanders next discussed with security the procedures for escorting Complainant off site and inspecting his vehicle for weapons immediately following notification of termination of his employment. TR at 544. Later that morning on August 16, 2000, Complainant was called from his class and met with Mr. Sanders and was told of his termination of employment at

Respondent for his aberrant behavior. TR at 204-05, 545; RX 16 at B41. Complainant was instructed not to try to regain access to Respondent's facility without advance permission from the security department and that he was not to have any contact with the training organization. *Id*; RX 12 at B36

Complainant was also provided with information from Human Resources concerning his benefits as he was concerned about continued medical benefits and his daughter needing growth hormone. TR at 545. At this point, Complainant was becoming distraught and started to refer to himself in the third person stating "Dave doesn't like it when you do this to him," and "What's Dave going to do for health insurance." TR at 545-46. Complainant then repeated the problems involving pornography on computers and inappropriate jokes as he had done the day before to Mr. Snyder and Mr. Barrett at their meeting. TR at 546. Mr. Sanders responded by asking for the names of these instructors so he could look into it, but Complainant did not disclose their names. *Id.* The meeting concluded with Mr. Sanders telling Complainant that Complainant's employment termination was specifically based on Complainant's behavior while at Respondent and at the August 15th meeting and not on any investigation looking into Complainant's allegations of improper behavior on the part of Respondent's instructors. *Id*. Mr. Sanders handed Complainant a letter dated August 16, 2000, stating that his employment with Respondent was terminated effective immediately due to unacceptable conduct over the six-month probationary period. RX 9 at B31; RX 16 at B41, B48.

Complainant was escorted from Respondent by security representatives. TR at 544-45. After reviewing the circumstances leading to Complainant's termination and following established procedures, Complainant's security access was revoked on August 17, 2000 and Respondent's security department placed the date that Complainant's unescorted access was revoked in the PADS. TR at 623-27; RX 26; RX 27; RX 28; and RX 29.

Respondent mailed a letter dated August 17, 2000 stating that Complainant's unescorted access was revoked due to issues of reliability. TR at 591. The letter informed Complainant of his appeal rights as to the revocation of his unescorted access clearance giving him five days from August 17, 2000 to submit his written appeal to Respondent. RX 9. The letter was sent to the last address that Complainant had given Respondent. RX 9 at B32-33. The letter was returned to Respondent and they were informed by the post office that there was no forwarding address on file. TR at 548-49. Complainant testified that he had no direct recollection of placing a change of address with the post office. TR at 68. Complainant testified that he recalled picking up his checks at work rather than having them mailed to him. TR at 71.

Soon after Complainant was terminated by Respondent, he suspected that a significant reason for his termination related not to his behavior or any alleged protected activity but to the fact that his daughter needed expensive growth hormone costing approximately $15,000. TR at 206-07; RX 16 at B45. He had submitted a claim to Respondent in June 2000, received approval for the hormone on his medical insurance provided by Respondent and was terminated in August 2000. TR at 207-08. Complainant further testified that this was not the first time that submitting a medical claim to his employer resulted in his termination shortly thereafter as he indicated that it had happened three times to him by the time of the hearing. *Id*.

Respondent investigated Complainant's disclosures about pornography on computers and off-color jokes and reprimanded three employees as a result. TR at 495-98.

In March 2001, Complainant took a job developing training and instructing nuclear chemical operators for Master-Lee at the Hanford reservation in Washington and worked there as a contractor until July 12, 2001. Fact #22; RX 24 at B85.

Complainant did not file his complaint with the Michigan Department of Civil Rights and the U.S. Equal Employment Opportunity Commission (EEOC) until April 2, 2001. TR at 251-52; RX 14. At that time, Complainant's allegations were limited to claims of age discrimination, sexual discrimination, sexual harassment, and Title VII and Michigan civil rights violations. *Id.*

Complainant learned of his revoked access authorization and placement on these lists on April 8, 2002 when he received his personnel file. RX 16 at B41. He then wrote to Respondent on April 15, 2002 acknowledging his awareness of having had his unescorted access revoked due to issues of reliability, having information about his termination entered into PADS, and his belief that this information had and continued to have damaging consequences against Complainant including the prevention of Complainant gaining access and employment in the nuclear industry. Fact Nos. 21 and 23; RX 16 at B41; RX 19 at B59.

On January 24, 2003, Complainant received a letter from Respondent stating that his appeal of the revocation of his unescorted access clearance had been denied. RX 18; RX 19 at B59.

Complainant further testified that this alleged discrimination complaint was investigated by the Michigan Department of Civil Rights and denied by a decision issued on May 30, 2003. TR at 253; CX 31 at p.5. On June 4, 2003, Complainant filed the instant ERA complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") in Lansing, Michigan alleging that he was terminated because he reported safety violations. Fact #2; ALJX 8, RX 19.

DISCUSSION

Witness Credibility

With respect to Complainant not receiving the August 17, 2000 notice of appeal rights concerning his revoked unescorted access authorization, Complainant testified that he had never received any mail from Respondent at the address in the company's database. TR at 363. Complainant stated that Respondent should have known of his move because he notified his Respondent supervisor, Tim Barrett, of his change of address. TR at 69; RX 16 at B41. Complainant stated that he was sure he provided verbal notification to Respondent. TR at 361. Despite these statements, Complainant also testified that he had no direct recollection of placing a change of address with the post office. TR at 68. Complainant testified that he "thinks" he picked up his checks at work rather than having them mailed to him. TR at 71. As a result, I find Complainant's statements that he informed Respondent of his change of address not credible, as Complainant did not properly notify anyone in writing at either Respondent or the U.S. Postal

Service of his change of address. As a result, I find that Respondent acted in good faith when it mailed the August 17, 2000 notice of appeals rights to Complainant's last known address.

Complainant denied that he ever made any reference to guns at the August 15th meeting during his State of Illinois Department of Employment Security Appeal hearing on December 21, 2000. CX 12 at 1; RX 19 at B60. Also, Complainant's June 4, 2003 ERA complaint omits reference to this material fact which led to his employment termination at Respondent. RX 19. Nowhere in the factual history contained in the complaint concerning the August 15, 2000 meeting leading to his termination of employment does Complainant reference his statements involving workplace violence and the use of guns (TR at 416; RX 25 at B162) or his statement to Mr. Snyder and Mr. Barrett that "in the violent times of our society, if I was a different person or if I owned a gun, this would have a different outcome." (TR at 417). I find Complainant not credible due to his omission in his complaint of these material facts leading to his work termination, however admitting them at trial. *See TR at 189-91*.

Also, I observed and found telling, Complainant's volatile personality at hearing as his face turned bright red during Respondent counsel's opening statement. In contrast, Complainant appeared pleasant and courteous when he presented his case on direct examination. Early on the second day of hearing, during cross-examination, Complainant appeared very uncomfortable and evasive with labored breathing. He was much more short-tempered and impatient during his cross-examination. He was very argumentative and did not recall events as easily as the day before, even though they involved many of the same events and time periods. Complainant would be sarcastic at times, turn red in the face, and be confrontational with adverse witnesses Mr. Sanders and Mr. Snyder.

All-in-all, Complainant's demeanor was consistent at hearing as it was represented to be while working at Respondent. That is, when things did not go Complainant's way, he would become red-faced and scowling, argumentative and lacking focus, with extreme mood changes ranging from laughing to crying.

In contrast, I found Mr. Sanders and Mr. Fitzsimmons to be credible witnesses. I also found Mr. Kirk Snyder to be very credible, especially organized, and quite responsive to all questions from both sides. Moreover, having had the opportunity to observe the demeanor of Complainant, Mr. Snyder, Mr. Sanders, and Mr. Fitzsimmons, I find Mr. Snyder, Mr. Sanders, and Mr. Fitzsimmons' testimony more credible on the issues concerning the events at the August 15, 2000 meeting, Respondent's policies for placing someone on revoked unescorted access status, and entering information concerning a terminated employee into PADS.

Based on the foregoing inconsistencies and contradictions in Complainant's testimony and behavior, I find that he was not a credible witness and accord little weight to his testimony. I find it more likely than not that Complainant's true claims against Respondent involved age discrimination, sexual harassment and civil rights violations as contained in his complaint with the Michigan Department of Civil Rights. It was not until that complaint was dismissed in May 2003 that Complainant altered his claims to fit this proceeding filing his ERA complaint in June 2003.

With the foregoing determinations in mind, I turn to the remaining issues in this case:

I. The Complaint Was Untimely Regarding Respondent's August 2000 Actions

In order for Complainant to avoid a dismissal of his complaint before me on grounds that it was untimely filed, he would need to have had filed his complaint with the Occupational Safety and Health Administration ("OSHA") of the U.S. Department of Labor (the "DOL") within the ERA's 180-day statute of limitation period. *See 42 U.S.C. § 5851(b)(1); 29 C.F.R. § 24.3(b)(2).* Statutes of limitation in environmental whistleblower cases begin to run on the date when facts supporting a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights. *Ross v. Florida Power & Light Co*., 96-ERA-36, slip op. at 4 (ARB Mar. 31, 1999); *McGough v. U.S. Navy*, Nos. 86-ERA-18/19/20, slip op. at 9-10 (*Sec'y* June 30, 1988).

"Strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980); *Prybys v. Seminole Tribe of Florida*, 95-CAA-15 (ARB Nov. 27, 1996) (The brief filing period in environmental whistleblowing was the mandate of Congress and the limitations cannot be disregarded even though it bars what might otherwise be a meritorious case). Discrete acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *United Air Lines Inc. v. Evans*, 431 U.S. 553, 558 (1977) (finding that acts falling outside the prescriptive period may constitute relevant background evidence where current conduct is at issue).

As stated above, any complaint under the ERA shall be filed within 180 days after the occurrence of the alleged violation or adverse act. 42 U.S.C. § 5851(b)(1); 29 C.F.R. § 24.3(b)(2). Complainant's alleged adverse acts of having his unescorted access authorization revoked and having information entered into the PADS both occurred on August 17, 2000. TR at 600; RX 9-11. Complainant should have known of these actions shortly after the August 17, 2000 notice of appeals rights (RX 9) was mailed to him on August 17, 2000. Complainant admits having notice of these acts after receiving his personnel file from Respondent on August 8, 2002. Facts Nos. 21, 23; RX 16 at B41; RX 19 at B59. Complainant filed his ERA complaint on June 4, 2003, more than 180 days later. Fact #2; ALJX 8, RX 19.

Complainant has failed to show that his June 4, 2003 complaint was timely filed, unless there is some equitable reason to excuse his untimely filing.

Complainant Has Not Satisfied His Burden of Establishing His Entitlement to Equitable Tolling.

Equitable Exceptions General Background

Prescriptive periods are subject to equitable doctrines such as estoppel, tolling, and waiver. *Morgan,* 536 U.S. at 2076. The standard for equitable tolling of limitations, however, is a high one and cannot be granted absent "evidence that [the employee] was misled by his

employer or was prevented in some 'extraordinary' way from timely filing his claim." *Arcega v. Dickinson*, 1994 WL 139266, *4 (N.D. Cal. April 8, 1994) (Title VII action involving pro se litigant). Restrictions on equitable tolling must be "scrupulously observed." *School District of City of Allentown v. Marshall,* 657 F.2d 16, 19 (3d Cir. 1981).

Complainant claims that he did not receive Respondent's August 17, 2000, letter (RX 9) informing him that his unescorted access clearance had been revoked and of his appeals rights regarding the revocation determination until he obtained a copy of his personnel file on April 8, 2002. RX 16 at B41. As a result, Complainant argues that his untimely filing be excused because it was Respondent's fault that the complaint was not filed timely. *Id*. I am guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4; *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 2.

In *School District of the City of Allentown v. Marshall*, 657 F.2d at 18, the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § § 2622(b)(1976 & Supp. III 1979), providing that a complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling. The court recognized three situations in which tolling is proper:

> (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
> (2) the plaintiff has in some extraordinary way been prevented from asserting her rights, or
> (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Id. at 20 (citation omitted).

Complainant's inability to satisfy one of these elements is not necessarily fatal to his claim. Courts, however, "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Wilson v. Sec'y, Dep't of Veterans Affairs,* 65 F.3d 402, 404 (5th Cir. 1995), *quoting Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). *See also Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984) (pro se party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence). Furthermore, while we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period once the party requesting tolling identifies a factor that might justify such tolling, "[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin*, 446 U.S. at 152.

Complainant bears the burden of justifying the application of equitable tolling principles. *See Wilson*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling); *see also Ross v. Buckeye Cellulose Corp*., 980 F.2d 648, 661 (11th Cir. 1993). Ignorance of the law will generally not support a finding of entitlement to equitable tolling. *Wakefield v. Railroad Retirement Board*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4-5.

For the reasons that follow, Complainant has not satisfied his burden of justifying the application of the equitable tolling principles.

Respondent Did Not Actively Mislead Complainant Respecting the Cause of Action

A complainant alleging equitable tolling must present evidence that the defendant "affirmatively sought to mislead the charging party." *Villasenor v. Lockheed Aircraft Corp*., 640 F.2d 207, 208 (9th Cir. 1981)(emphasis added.) By Order issued April 19, 2004, I found that there was a factual dispute as to the date of Respondent's final and unequivocal notification that Complainant's unescorted access had been revoked and his name had been entered into PADS as a terminated employee. Similarly, a factual issue existed regarding the motivation of Respondent in mailing the August 17, 2000 notice of Respondent's revocation of his security access clearance and corresponding appeal rights to an alleged stale address for Complainant and whether equitable tolling was applicable. Furthermore, an evidentiary hearing was necessary to determine whether Respondent's January 24, 2003 letter denying Complainant's appeal of the decision to revoke his security access clearance with corresponding entry into PADS was final, definitive, and unequivocal notice of a separate and discrete adverse act against Complainant.

Complainant claims that Respondent intentionally intended to mislead him by mailing the August 17 letter to Complainant's former address, an address the company knew to be invalid. ALJX 1 at 6. The letter was returned to Respondent and Mr. Sanders credibly testified that Respondent was informed by the post office that there was no forwarding address from Complainant on file. TR at 548-49. Complainant also had no direct recollection of placing a change of address with the post office. TR at 68. Complainant testified that he "thinks" he picked up his checks at work rather than having received them in the mail at any time. TR at 71. Complainant stated that he had never received any mail from Respondent at the address in the company's database. TR at 363.

Complainant also argues that Respondent should have known of his move because he told his Respondent supervisor, Tim Barrett. TR at 69. Complainant stated that he is sure he provided verbal notification to Respondent. TR at 361. Additionally, Mr. Sanders stated that other documents mailed to Complainant after his termination, were returned. TR at 549.

I find that there has been no showing that Respondent engaged in any affirmative form of wrongdoing to either mislead or lull Complainant into inaction by mailing the August 17, 2000, letter to Complainant's former address. Respondent sent the information to the only address on file and the post office did not have Complainant's new mailing address. Additionally, Complainant's statement that he verbally notified his supervisor that he was moving was insufficient notification to Respondent. Complainant should have taken affirmative steps to inform the appropriate department at Respondent of his change of address, or Complainant should have provided a forwarding address with the U.S. Postal Service.

Furthermore, Complainant has not been in some extraordinary way prevented from asserting his rights. Complainant filed complaints with the Michigan Department of Civil Rights and the Equal Employment Opportunity Commission following his termination (CX 14).

Therefore, since Complainant filed in other venues, he cannot demonstrate any extraordinary circumstances that prevented him from filing with the Department of Labor.

The Continuing Violations Doctrine Does Not Make Complainant's Filing Timely

The continuing violations doctrine, if applicable, permits a complainant to include discriminatory actions that fall outside the limitations period. *Burzynski v. Cohen*, 264 F.3d 611, 617-18 (6th Cir. 2001). In a recent case, the United States Supreme Court limited the application of the continuing violations doctrine. *Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). In *Morgan*, the Supreme Court applied the continuing violations doctrine to a racial discrimination complaint brought under Title VII. The plaintiff in that case alleged three types of discrimination: discrete, retaliatory, and hostile work environment. *Id*. at 107-08. The Court determined discrete and retaliatory discrimination to be similar in that each occurs on a specific date. *Id*. at 110. In contrast, hostile work environment discrimination by its "very nature involves repeated conduct" and can take place over a series of days or years. *Id.* at 115.

In addition, the Court explained that the separate instances comprising the hostile work environment claim may not be actionable individually. *Id*. Regarding application of the continuing violations doctrine, the Court held,

> Discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed.

Id. at 113.

Therefore, in *Morgan*, the Court determined that the continuing violations doctrine could not apply to include discrete or retaliatory acts of discrimination that occurred outside the Title VII statutory limitations period[3]. *Id*. at 122. In contrast, the Court concluded that a hostile work environment claim would not be time barred "so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Id* The Sixth Circuit addressed *Morgan* in *Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003). *Sharpe* involved an employment discrimination claim brought under 42 U.S.C. section 1983, the Civil Rights Act of 1871. *Id.* at 260. The court found that the holding in *Morgan* should not be restricted only to Title VII claims and applied the holding to the section 1983 claim. *Id.* at 267.

Morgan has been applied in other cases. In *Ford v. Northwest Airlines, Inc*., 2002-AIR-21 (ALJ Oct. 18, 2002), the *Morgan* rationale was applied to bar alleged discriminatory acts

[3] After *Morgan*, the earlier cases cited by Complainant of *Garn v. Benchmark Technologies, 88-ERA-21 (Sec'y Sept. 25, 1990),* and *Egenreider v. Metro Edison Co., 85-ERA-23 (Sec'y Apr. 20, 1987)*, while being factually distinguishable from this case, are no longer viable authorities helpful to Complainant here.

falling outside the limitations period. *Id*. at 7. It was held that the complainant had not presented evidence of a hostile work environment; therefore, the continuing violations doctrine did not apply. In *Trechak v. American Airlines, Inc.,* 2003-AIR-5 at 7 (ALJ Aug. 8, 2003), I likewise applied the holding in *Morgan* to find the complainant's action to be time-barred.

Complainant argues that the continuing violations doctrine should be applied to his complaint filing so that acts occurring outside the 180-day limitations period may be included. Complainant contends that the adverse employment actions formed a pattern of discrimination beginning in April 2000 and continuing through February 2003, as he could not find work in the nuclear industry. Respondent argues that the adverse employment actions occurring prior to December 4, 2002 are discrete acts and therefore, the continuing violations doctrine is inapplicable.

Complainant filed his complaint on June 4, 2003. Therefore, alleged discriminatory actions occurring between December 4, 2002 and June 4, 2003 are within the 180-day limitations period and are actionable. Actions falling outside of that time period are barred, unless an exception is applicable. Complainant has not alleged and provided admissible evidence that show any discriminatory actions that took place during the 180-day limitations period. To begin with, he claims that he was terminated on August 16, 2000 from his work with Respondent. The next day on August 17, 2000, Respondent placed Complainant on the "Stop Access" or "Denial of Site Access" list, and refused to re-hire Complainant based on his unreliable conduct on August 15, 2000. Complainant learned of his placement on these lists in April 2002 when he received his personnel file and wrote to Respondent on April 15, 2002, acknowledging his awareness of having had his unescorted access revoked due to issues of reliability, having information about his termination entered into PADS, and his belief that this information had and continued to have damaging consequences against Complainant, including the prevention of Complainant gaining access and employment in the nuclear industry. RX 16 at B41 and B49.

I find that Complainant knew or should have known Respondent had taken the questioned actions it did in August 2000 no later than April 8, 2002, the date Complainant received and reviewed his copied personnel file containing the August 17, 2000 notice of appeal rights. TR at 245; RX 16 at B41. At this point, Complainant had final and unequivocal notice of his entry into PADS. "Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. *Larry v. Detroit Edison Co*., 86-ERA-32 (*Sec'y* June 28, 1991). As soon as a decision is "final," Complainant has 180 days to submit a complaint to the Department of Labor. *Id.*

In this case, Complainant had "final" and "definitive" notice of the adverse personnel action, at the latest, in April 2002. TR at 244-45. Complainant could have filed within 180 days following the date he knew the employer was engaging in alleged blacklisting[4]. Here, Complainant knew or should have known of Respondent's actions in April 2002 when he received a copy of his personnel file.

[4] I am not convinced that Respondent's actions in revoking Complainant's unescorted access and entering information about him into PADS constitutes "blacklisting" as that term is used in whistleblower cases rather than simple compliance with Respondent's policies and procedures in the normal course of its business after and employee is terminated for unreliable behavior.

In this circumstance, Complainant's letter appealing Respondent's decision to place Complainant in PADS did not halt the 180 days limitation period. The period for filing a whistleblower complaint commences on the date the complainant receives unequivocal notice of his or her suspension. *Tracy v. Consolidated Edison Co. of New York, Inc.***,** 89-CAA-1 (*Sec'y* July 8, 1992). The internal appeals process was not intended to halt the statutory filing period. The Supreme Court stated that an internal review does not necessarily foreclose the tolling period of a separate grievance. *Electrical Workers v. Robbins & Myers, Inc*., 429 U.S. 229, 236 (1976).

All evidence points to Respondent's decision being "final" unless Complainant appealed within 5 days of receiving the notice. Complainant did not fulfill these requirements. This fact could have given Complainant the impression that the internal appeals process was still available to him. However, since Complainant received the letter from Respondent approximately one year and eight months after his termination, Complainant should have easily determined that the five days allotted to him were in August of 2000, and had long since expired.

Therefore, Complainant's internal appeal to Respondent should not be allowed to toll the filing period. In addition, Complainant did not demonstrate that any discriminatory acts occurred between December 4, 2002 and June 4, 2003. As a result, the continuing violations doctrine does not apply to his claim and Complainant's claim to the Department of Labor was not timely filed. I find that Complainant has not alleged any adverse act on the part of Respondent that was directed at him from December 4, 2002 through the filing of his ERA complaint on June 4, 2003.

Finally, Complainant admitted that he filed only with the Department of Labor after the Michigan Department of Civil Rights denied his claim in May 2003. TR at 248-253. I hold that he untimely filed his ERA complaint in June 2003 in response to the denial of his civil rights complaint. There is no evidence that Complainant was attempting to file within the ERA's statutory guidelines. Complainant's filing of his complaint with OSHA in June 2003 was well beyond the applicable statute of limitations.

Complainant Has Not Timely Raised the Statutory Claim At Issue In the Wrong Forum

As referenced above, equitable tolling may be appropriate "only" when the complainant "has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *School District of the City of Allentown*, 657 F.2d at 20, *quoting Smith v. American President Lines*, *Ltd.*, 571 F.2d 102 (2nd Cir. 1978); *see also Rockefeller v. CAO, U.S. Dept. of Energy*, 1998-CAA-10 (ARB Oct. 21, 2000), p. 7; *Harrison v. Stone & Webster Engineering Corp.,* 91-ERA-21 (Oct. 6, 1992), p. 2.

Complainant did not demonstrate that he mistakenly filed in the incorrect forum. Complainant did not raise the "same statutory claim" of protected activity safety claims referenced in ERA in those forums. In place of retaliatory whistleblowing activities related to alleged safety or ERA statute violations, Complainant alleged age discrimination, sexual discrimination and harassment, and Title VII and Michigan civil rights violations in his

complaint with the Michigan Department of Civil Rights and the EEOC filed in April 2001. RX 14. Complainant raised issues which are not under my jurisdiction in this case. Therefore, Complainant has not demonstrated that he mistakenly filed his claim in the incorrect forum. Instead, not until the Michigan Department of Civil Rights formally denied Complainant's allegations in May 2003, did Complainant attempt to file the instant action under ERA in June 2003. See RX 19.

Complainant has been unable to demonstrate bad faith on the part of Respondent in notifying Complainant about their employment decisions.

The above considered, on the issue of equitable tolling, I find against the Complainant and for the Respondent. The principle of equitable tolling does not apply. The instant ERA complaint shall be dismissed as untimely filed.

II. Complainant Did Not Engage In Protected Activities

Alternatively, even if the instant ERA complaint was timely filed, Complainant did not engage in protected activities under the ERA. ALJX 1 at 2. Respondent contends that his concerns do not constitute a violation of statutes or regulations protecting nuclear safety and the environment rising to the level of a safety concern and therefore, are not protected activities under the Act. ALJX 10 at 25-35.

The purpose of the Act is to encourage the reporting of matters involving or relating to nuclear safety. The Act must be read broadly because a narrow hypertechnical reading of section 5851 will do little to affect the statute's aim of protecting. *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied* 478 U.S. 1011 (1986). Protected activity encompasses internal complaints, either oral or written, regarding safety and environmental concerns. *Id*. The Act has a "broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984)

Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear statutes. S. Kohn, *The Whistleblower Litigation Handbook*, 35-47 (1990). In order to establish a prima facie case of discrimination under the ERA, a complainant's charge must relate to some aspect of nuclear safety. *Decresci v. Lukens*, 87-ERA-13 (Sec'y Dec. 16, 1993). In *Jarvis v. Battelle Pacific NW Laboratory*, 97-ERA-15 (ARB Aug. 27, 1998), the Administrative Review Board (the "ARB") held that "[t]he protection afforded whistle-blowers by the ERA extends to employees who, in the course of their work, must make recommendations regarding how best to serve the interest of nuclear safety, even when they do not allege that the status quo is in violation of any specific statutory or regulatory standard."

Complainant lists the following seven alleged protected activities while employed at Respondent. ALJX 1 at 2. Respondent counters each of the alleged protected activities as follows:

1. *Reporting that learning objectives for safety related systems that protected health and safety of the general public were not being covered in the Fermi nuclear operator training classes during the time frame of May 17, 2000 to June 15, 2000* - Complainant admitted at trial that the objectives were handed out to students in the nuclear operator training classes on a separate sheet. TR at 366; CX 5. Complainant stated, however, that the students would have "no idea of where those objectives were identified throughout the body of the material." TR at 366. On cross-examination, Complainant stated that the instructors of the course "covered some [objectives] and skipped the rest." TR at 358. Complainant stated that he believed it would be a "stronger approach" to include the objectives in the material. TR at 374. Complainant reported the matter to the NRC for investigation. TR at 550.

According to Mr. Sanders, a training manager at Respondent, two individuals independent from Respondent's training organization conducted an investigation after Complainant filed a claim with the NRC. TR at 550. These individuals did extensive interviews with students in Complainant's class. TR at 550. They also pulled materials used in the Complainant's class and from the courses preceding and following Complainant's class. TR at 550. These individuals found that the objectives were being covered in class, and that the students were using the objectives to study for examinations[5]. TR at 550.

I find that Respondent did not remove the objectives from the student materials. Respondent included the objectives as a separate handout. (*See* CX 5). It is Complainant's opinion that the materials would be stronger if integrated, and this is not required by the NRC. The NRC conducts its own examinations prior to licensing individuals to work as an operator in nuclear plants. Therefore, Complainant's statement that the training objectives were not covered in the course is incorrect and unsupported by evidence.

2. *Identifying and reporting programmatic problems related to the Fermi nuclear operator training programs to include, but not limited to, deficiencies related to operator training task lists*- Complainant reported this issue to the Nuclear Regulatory Commission ("NRC"). TR at 550 and ALJX 2, Ex. 20, B 000468. The Secretary of Labor has interpreted a protected activity as one that is related to nuclear safety. *See DeCresci v. Lukens Steel Company*, 87-ERA-13 (Sec'y Dec. 16, 1993). The NRC responded to Complainant's complaint by stating that it "determines the adequacy of the facility's licensee's training program based on the overall results of operator performance." In other words, the NRC waits to see if operators pass certification tests rather than getting involved with monitoring specific training programs. The NRC also concluded that though the examples of the "job task analyses" provided may have been "cumbersome to follow or may be inefficient to track," there were no missing or inappropriate tasks analysis in the task lists. (RX 23 at B71; ALJX 2, Ex. 20, B 000468-000469). Therefore, the NRC did not find that there were any problems with the tasks set forth by Respondent.

As a result, I find that to qualify as a protected activity, the complaint must implicate safety and environmental concerns. Though the task list may have been "cumbersome," it was

[5] In order to qualify as an operator in a nuclear power plant, the NRC conducts a sequence of examinations. TR at 551.

adequate and did not implicate safety or environmental concerns. Operator certification tests were an adequate check on the proficiency of Respondent's training program. Therefore, reporting problems with the task list in this case does not qualify as a protected activity.

3. *Complaining to management about the overloading of simulator training with an excessive number of trainees during training exercises and the negative impact of overcrowding on effective simulator instruction for trainees.* - The incident in the simulator occurred on August 9, 2000. TR at 132. Complainant testified that he and his partner were the final group to participate in the simulator training exercise. TR at 102. Complainant stated that during his exercise the instructor, Mike Doucet, started the next round of training. TR at 103. Complainant apparently said, "Mike [Doucet], can you tone it down? I can't hear my R.O." TR at 103.

Once again, I find that Complainant did not offer any evidence that the overcrowding of the simulator was a safety or environmental concern. Though the number of students in the simulator and the fact that the instructor moved on to the next topic while Complainant completed his session distracted Complainant, it does not have a relationship to safety. There is no evidence presented of any safety regulations limiting the number of students allowed in the simulator. Additionally, there are no limitations on the method of instruction in the simulator. Therefore, Complaint's complaint to management about overcrowding in the simulator does not constitute a protected activity.

4. *Complaining about overtime pay for license operators in training and alerting Respondent of Department of Labor litigation concerning licensees that did not pay overtime to nuclear licensee operator trainees on or about July 28, 2000 to other Respondent employees* - There is no testimony or evidence to support this allegation. Furthermore, as is required for whistleblower actions, the protected report must implicate safety definitively. I hold that complaining about overtime pay does not have a direct relationship to safety.

5. *Resisting discrimination and retaliatory actions committed by Respondent on August 16, 2000* - On August 16, 2000, Respondent terminated Complainant's employment. TR at 203-205. It is unclear from Claimant's testimony how this claim differs from his sixth alleged protected activity reference immediately hereafter (making complaints to federal and state agencies <u>after</u> being terminated by Respondent on August 16, 2000.) I will address both allegations below.

6. *Making complaints to federal and state agencies after being terminated by Detroit Edison on August 16, 2000* – In April 2001, Complainant filed claims with the NRC and the Michigan Department of Civil Rights and Equal Employment Opportunity Commission ("EEOC") following his termination by Respondent. RX 14. Complaints filed <u>after</u> the adverse employment action are not considered to be protected activities. *Kahn v. Commonwealth Edison Co*., 92-ERA-58 (*Sec'y* Oct. 3, 1994), p.3.

Complainant took the actions described in paragraphs 5 and 6 ***<u>after</u>*** his termination and entry of his name into the PADS system. Complaints filed with the federal and state agencies after the termination and entry into PADS do not qualify as protected activities.

7. *Inquiring about allegations by supervisors that favors were exchanged in order to get a license for a Fermi license operator candidate on or about August 8, 2000* - The only evidence provided by the Complainant at trial was that the operator candidate was ultimately allowed to re-take their licensing examination. TR at 360.

I find this evidence is insufficient to demonstrate that there were any issues of safety related to this issue. An example of a possible safety violation would be if an individual received a license without taking the necessary examinations. Absent such a relationship implicating safety, the inquiry raised by Complainant does not qualify as a protected activity.

Based on the foregoing, I find that none of the above-referenced concerns of Complainant constitute protected activity under the ERA.

III. In the Alternative, Complainant Has Not Proven That Respondent's Actions Of Revoking Complainant's Unescorted Access Authorization and Submittal of Information Into PADS Were Adverse Acts to Present a Prima Facie Case

Assuming *arguendo*, that Complainant was able to establish that he filed within the statutory filing period and that there was some actual protected activity by Complainant, he must demonstrate that he was subject to an adverse employment action. To establish a *prima facie* case of retaliation or discriminatory motivation under the whistleblower provision invoked in this case, a complainant must show, among other things, the employer took some adverse action against the complainant and the complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Zinn v. University of Missouri*, 93-ERA-34 and 36 (*Sec'y* January 18, 1996); *Dartey v. Zack Co. of Chicago*, 82-ERA-2 (*Sec'y* April 25, 1983). As will be discussed below, Complainant has failed to establish that Respondent took adverse action against him.

As referenced above, I previously held that as a result of Complainant's untimely filed complaint, he was barred from alleging that his August 16, 2000 termination of employment from Respondent was an adverse act. *See* ALJX 3. In addition, I find that all other alleged adverse acts involving Complainant taking place *prior* to his August 16, 2000 termination date are also untimely and fully barred from Complainant's prima facie case because they occurred well beyond 180 days before Complainant filed his ERA complaint on June 4, 2003. As a result, Complainant's allegations that revocation of his unescorted access credentials at Respondent and the inputting of information into PADS about his termination of employment due to issues of reliability in August 2000 are the two remaining adverse acts alleged by Complainant. ALJX 1 at 5-7.

The revocation of Complainant's unescorted access authorization was merely the natural effect of Complainant's unchallengeable termination of employment at Respondent. Respondent was required by federal law to maintain a database in August 2000 of personnel information on the revocation of unescorted access authorization. See Fact Nos. 35-37 and RX 29 (10 C.F.R. § 73.56(b)(2)(iii)(3) (The licensee shall base its decision to grant, deny, revoke, or continue an unescorted access authorization on review and evaluation of all pertinent information developed.))

In addition, the inputting of information into PADS about Complainant's termination from Respondent due to issues of reliability in August 2000 was not an adverse action but also a natural effect of Complainant's unchallengeable termination of employment. Fact Nos. 38-39. In August 2000, it was Respondent's regular policy to enter information into PADS if an individual was denied unescorted access into the facility. TR at 626. Complainant even acknowledged his acquiescence to this practice by signing Respondent's waiver and agreement allowing such information to be entered into PADS. TR at 615-16, 627; RX 24 at B128; ALJX 2, EX 5 at B257. Furthermore, I find that the information in PADS about Complainant did not change after August 2000 concerning his reliability. TR at 585 and 616.

I conclude that Complainant neither pled nor presented any evidence from which one could conclude that Respondent committed an act of retaliation against Complainant within 180 days prior to the filing of his June 4, 2003 ERA complaint. Even so, I find that Complainant has failed to establish that any protected activity contributed to the decision to revoke his unescorted access authorization or the submission of information into PADS about him.

Finally, I find that Respondent has presented legitimate non-discriminatory reasons for any adverse action it took after Complainant's termination on August 16, 2000, and Complainant has not shown by a preponderance of the evidence that these reasons were pretext. Accordingly, because Complainant has failed to present sufficient evidence to carry his ultimate burden of establishing that Respondent took adverse action against him in retaliation for any protected activity, this complaint must be dismissed.

CONCLUSION

Having considered all of the evidence, having read the parties' briefs and being otherwise fully informed, I recommend that the instant complaint, filed on or about June 4, 2003, by Complainant, be dismissed for the reasons stated herein.

RECOMMENDED ORDER

IT IS RECOMMENDED that the ERA complaint filed by David A. Hannum be dismissed.

A

Gerald M. Etchingham
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: 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.