



In the Matter of:

**RAMACHANDRAN SEETHARAMAN,**

**ARB CASE NO. 03-029**

**COMPLAINANT,**

**ALJ CASE NO. 02-CAA-21**

**v.**

**DATE: May 28, 2004**

**GENERAL ELECTRIC COMPANY,  
PACIFIC GAS AND ELECTRIC COMPANY,  
EXELON CORPORATION,  
MITSUBISHI POWER SYSTEMS,  
MASSACHUSETTS WATER RESOURCES AUTHORITY,  
NEBRASKA BOILER COMPANY, and  
ENGLISH BOILER AND TUBE, INC.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

*Ramachandran Seetharaman, pro se, Ashland, Massachusetts.*

*For the Respondents, General Electric Company and Mitsubishi Power Systems:*

*Neil Stekloff, Esq., and Bonnie Pierson-Murphy, Esq., Paul, Hastings,  
Janofsky & Walker, LLP, Stamford, Connecticut*

*For the Respondent, Pacific Gas & Electric Company:*

*William B. Koffel, Esq., Foley Hoag, LLP, Boston, Massachusetts*

*For the Respondent, Exelon Corporation:*

*Donn C. Meindertsma, Esq., Winston & Strawn, Washington, D.C.*

*For the Respondent, Massachusetts Water Resources Authority:*

*John S. Chinian, Esq., Boston, Massachusetts*

*For the Respondent, Nebraska Boiler Company:*

*Heather M. Tiltmann, Esq., Whyte Hirschboeck Dudek SC, Milwaukee, Wisconsin.*

## **FINAL DECISION AND ORDER**

Ramachandran Seetharaman filed a complaint under the whistleblower protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 1995); the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. § 6971 (West 2003); the Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367 (West 2001); the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998) (collectively the environmental whistleblower statutes); and the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 1995), as implemented by the regulations at 29 C.F.R. Part 24 (2003).<sup>1</sup> Seetharaman alleged that the Respondents, General Electric Company (GE), Pacific Gas & Electric Company (PG&E), Exelon Corporation, Mitsubishi Power Systems, Massachusetts Water Resources Authority (MWRA), Nebraska Boiler Company, and English Boiler and Tube, Incorporated, conspired to discriminate against him from 1986 to 2002 for participating in activities that these statutes protect.

The Respondents each filed motions for summary decision pursuant to 29 C.F.R. § 18.40(a), seeking their dismissal as parties. The Administrative Law Judge (ALJ) concluded that there was no genuine issue of material fact and dismissed Seetharaman's complaint against each Respondent with prejudice. We affirm.

## **BACKGROUND**

Seetharaman is a mechanical engineer with more than 20 years of experience. In his May 24, 2000 complaint filed with the Department of Labor's Occupational Safety and Health Administration (OSHA), Seetharaman listed his employment history. He worked for GE starting in 1984 and was discharged in November 1986. From March until August 1987, Seetharaman worked for a contractor for PG&E. Seetharaman started work for the Commonwealth Edison Company, now known as Exelon, in June 1989 and was fired in August 1992. Seetharaman worked for the MWRA for six years until January 2000 when he was discharged. He then obtained work with Stone & Webster

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<sup>1</sup> These statutes generally prohibit employers from discharging or otherwise discriminating against any employee "with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activities such as initiating, reporting, or testifying in any proceeding regarding environmental and nuclear safety or health concerns. See 29 C.F.R. § 24.2.

Incorporated (Stone) in March 2001 and was discharged in a company-wide reduction in force on May 2, 2002.<sup>2</sup> Complainant's May 24, 2002 Letter to OSHA.

In his complaint, Seetharaman alleged that his former employers and the other Respondents, the Nebraska and English boiler firms, PG&E, and Mitsubishi, adversely affected the terms and conditions of his employment at Stone through their business transactions with Stone and acted as agents of Stone in its transfer of Seetharaman to another department and the later termination of his employment. Complainant's May 24, 2002 Letter to OSHA. These transactions involved the Covert, Badger, and Goose Lake power plants in Michigan, Wisconsin, and Illinois, formaldehyde emissions from Mitsubishi's gas turbines, and an online auction between Nebraska and English to provide boilers to Stone. Seetharaman was involved in these projects while Stone employed him. *See* Mitsubishi Motion to Dismiss, Exhibits A, B; English Boiler Motion to Dismiss; Complainant's Pre-hearing Reports Regarding GE et al, dated July 12, 2002.

OSHA investigated Seetharaman's complaint and determined that he had failed to state a claim under the whistleblower statutes because he had presented no evidence that the Respondents conspired with Stone to discriminate against him. Therefore, a connection between Stone's termination of Seetharaman's employment and the protected activities he alleged could not be inferred. June 10, 2002 Letter from OSHA. Accordingly, OSHA dismissed the seven Respondents in this case.

Seetharaman requested a hearing. The ALJ scheduled a pre-hearing conference on July 17, 2002, to resolve the "substantial confusion" over the status of the case, the issues, and the parties involved. Hearing Transcript (TR) at 5. Subsequently, each of the Respondents filed motions for summary decision, contending that Seetharaman had failed to state a claim under the whistleblower protection provisions and that they were not Seetharaman's employers and had no employment relationship with him.

The ALJ issued a Recommended Decision and Order (R. D. & O.) granting the Respondents' motions. He found that Seetharaman had alleged no facts that would directly or circumstantially show that any of the Respondents had any influence or control over the terms and conditions of Seetharaman's employment with Stone. R. D. & O. at 15. The ALJ concluded that there was no genuine issue of material fact pertinent to the essential element of a whistleblower case-the existence of an employer-employee relationship between respondent and complainant-and, therefore, dismissed the complaint. *Id.* at 16.

In his brief to the ARB, Seetharaman argues that the Respondents affected the terms and conditions of his employment with Stone, resulting in his discharge, because

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<sup>2</sup> Seetharaman has a claim against Stone, ALJ No. 03-CAA-004, which is pending before the ALJ and is not part of this case. Seetharaman also settled a previous claim against MWRA. *Seetharaman v. Massachusetts Water Res. Auth.*, ALJ No. 00-CAA-18 (ALJ Oct. 23, 2001). MWRA Motion for Summary Decision, Exhibit 6.

they had mutual business dealings as vendors, contractors, lenders, or partners, which rendered them “a joint enterprise” that conspired to violate the environmental protection laws and blacklist him. Complainant’s Initial Brief of Appeal at 2, 4 10-11. Respondents generally argue that they had no employment relationship with Stone affecting Seetharaman.

### ISSUE PRESENTED

We examine whether the Respondents are entitled to summary decision because the record establishes that they had no employment relationship with Seetharaman.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ’s recommended decision in cases arising under the environmental and nuclear whistleblower statutes. *See* 29 C.F.R. § 24.8 (2002). *See also* Secretary’s Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary’s authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)). The ARB reviews an ALJ’s recommended grant of summary decision de novo. *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003).

Pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *Flor v. United States Dep’t of Energy*, ALJ No. 93-TSC-0001, slip op. at 10 (Sec’y Dec. 9, 1994), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party has demonstrated an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

At this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party’s pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e). If the non-moving party fails to establish an element essential to his case, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Accordingly, the Board will affirm an ALJ’s recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-

moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Johnsen v. Houston Nana, Inc., JV*, ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21 (ARB Nov. 30, 1999).

## DISCUSSION

To prevail on a complaint of unlawful discrimination under the whistleblower protection provisions, a complainant must establish that he is an employee and the respondent is an employer. *Demski v. Indiana Michigan Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 4 (ARB Apr. 9, 2004). *See also Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 01-103, ALJ No. 97-SDW-7, slip op. at 8 (ARB May 29, 2003) (noting that SWDA, SDWA, CERCLA, FWPCA, TSCA and ERA, require complaining employee to have an employment relationship with respondent employer). A complainant must also show that he engaged in protected activity of which the respondent was aware, that he suffered adverse employment action, and that the protected activity was the reason for the adverse action, i.e., that a nexus existed between the protected activity and the adverse action. *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). *See also Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1, slip op. at 5 (ARB Apr. 30, 2004).

The crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions, or privileges of the complainant's employment. *See Lewis v. Synagro Technologies, Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 8 n. 14, 9-10 (ARB Feb. 27, 2004) and cases cited therein. Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is essential for a whistleblower respondent to be considered an employer under the whistleblower statutes.<sup>3</sup> *Id.*, slip op. at 7. If a complainant is unable to establish the requisite control and thus an employer-employee relationship, the entire claim must fail. *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 9 (ARB Jan. 31, 2001).

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<sup>3</sup> The ARB has held that the use of "person" in the FWPCA, RCRA, and CERCLA in place of "employer," which is used in the other environmental statutes, nevertheless requires that the responding "person" have an employment relationship with the complainant or act in the capacity of an employer, that is, exercise control over the terms, conditions, or privileges of the complainant's employment. *Lewis v. Synagro Technologies, Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 10-14 (ARB Feb. 27, 2004).

In this case, four of the Respondents submitted affidavits in support of their motions for summary decision showing that they either never employed Seetharaman or had no influence or control over his subsequent employment with Stone.<sup>4</sup> Each asserted that it had nothing to do with Stone's reassignment of Seetharaman in February 2002 or his discharge in May 2002.<sup>5</sup> For example, Mitsubishi, which supplied turbines and generators for the Covert power plant in Michigan, stated that its only connection to Seetharaman was an employee's two or three conversations with him about the mechanical engineering aspects of the Covert power plant. Mitsubishi's Motion to Dismiss, Exhibit B. Mitsubishi declared that neither it nor its employees had affected Seetharaman's employment at Stone.

Further, Jason Jacobi of Nebraska Boiler stated in an affidavit that he and another application sales engineer had several conversations with Seetharaman over five months about the design and price of boilers Nebraska wanted to supply to Stone. He swore that neither he nor anyone else at Nebraska had any involvement with Seetharaman's employment at Stone or ever caused Seetharaman's employer to discriminate or otherwise retaliate against him. Nebraska's Motion to Dismiss and Exclude Evidence, Attachment.

Similarly, John English, vice president and general manager of English Boiler, disclaimed all knowledge of Seetharaman until he received OSHA's June 10, 2002 letter dismissing his claim against English. He declared that English had no involvement with Stone beyond bidding for a boiler contract and had never caused anyone at Stone to discriminate against Seetharaman. English Motion to Dismiss, Exhibit A. Finally, Donald P. Cahill, senior project manager for PG&E, averred that he and his company had no knowledge or information about Stone's discharge of Seetharaman and no control over internal employment at Stone. PG&E Motion to Dismiss, Attachment.

Because the Respondents submitted admissible evidence that they did not employ Seetharaman or control his employment with Stone, the burden shifted to Seetharaman to produce enough evidence to create a triable issue of fact regarding the employer-employee relationship. In other words, he had to submit facts—through affidavits, depositions, or other evidence—that refuted, disputed, or otherwise challenged the Respondents' proof. Mere allegations, bare denials, or speculative theories do not create a genuine issue of material fact. *See Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 12 (1st

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<sup>4</sup> The remaining Respondents based their motions for summary decision in part on Seetharaman's failure to state a claim against them. *See* General Electric Company's Motion to Dismiss, MWRA's Motion for Summary Decision, and Exelon's Motion to Dismiss.

<sup>5</sup> The only alleged adverse actions that occurred within the time frames for filing a complaint are Seetharaman's transfer to another department in February 2000 and his discharge from Stone on May 2, 2000; the others are untimely. *See, e.g.*, 42 U.S.C.A. § 5851(b)(1) (ERA) (180 days); 42 U.S.C.A. § 7622(b)(1) (CAA) (30 days). *See also* 29 C.F.R. § 24.3(b)(1-2).

Cir. 1994) (“conclusory allegations, improbable inferences, and unsupported speculation” are insufficient to avoid summary judgment even where discriminatory intent is an issue).

Seetharaman submitted no affidavits or other documents demonstrating that the Respondents exerted any control over the terms and conditions of his employment with Stone. In fact, Seetharaman produced no evidence whatsoever addressing the Respondents’ contention that they had no influence or effect on his employment with Stone. He did not dispute Respondents’ statements that they had no knowledge of his transfer or discharge by Stone. He did not allege one specific incident of influence or control from which any inference could be drawn.

The evidence he did submit (a January 17, 2000 memorandum from Stone’s President, Charles Moore, regarding the company’s nuclear services; MWRA’s March 19, 2001 verification of Seetharaman’s employment there; other internal memoranda; and copies of numerous newspaper and Internet articles describing Respondents’ projects, court cases, and environmental studies) does not address the issue of an employer-employee relationship, and therefore does not create a triable issue of material fact.

Seetharaman generally accused his three former employers, GE, Exelon, and MWRA, of blacklisting him in the power industry since he left GE in 1987 because, despite his contention that he had excellent qualifications, he has never been “promoted even once anywhere.” The lack of promotion, according to Seetharaman, is consistent with a “threat” from a GE employee in 1986 that Seetharaman would “never get anywhere” if he went against GE. Complainant’s Motion to Oppose Summary Judgment regarding GE, Exelon, MWRA; Complainant’s Pre-hearing Reports regarding GE.

The Complainant submitted no facts supporting this bare allegation of conspiracy. Further, he produced no evidentiary support for how or when which Respondent allegedly blacklisted him. As the ALJ noted, Seetharaman’s own evidence showed that he was repeatedly able to obtain employment after being discharged. R. D. & O. at 16.

Seetharaman had four opportunities to support his theory of the Respondents’ conspiracy to blacklist him and adversely affect his employment with Stone: the complaint, the pre-hearing reports, the pre-hearing conference, and the responses to summary decision motions. His submissions are bereft of the required factual statements or evidentiary affidavits supporting his allegations. *See* Complainant’s Motions to Oppose Summary Judgment/Motion to Dismiss, regarding Defendant PG&E et al, dated September 29, 2002.

While we are cognizant of the Complainant’s pro se status, *see Young v. Schlumberger*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-9 (ARB Feb. 28, 2003), and have reviewed each of Seetharaman’s pleadings, we conclude that Seetharaman’s unsupported assertions of Respondents’ conspiracy to discriminate against him fail to create a genuine issue of material fact. Because Seetharaman failed to adduce evidence countering Respondents’ affidavits and pleadings, he has raised no genuine issue of material fact regarding an essential element of his claim: an employer-employee

relationship with Respondents. Therefore, all other facts alleged by Seetharaman are immaterial, and Respondents are entitled to summary decision.

### **CONCLUSION**

We have thoroughly examined the record and find that the ALJ's recitation of the facts is accurate, thorough, and fair. The evidence supports his findings of fact and he has articulated the proper legal framework. Therefore, because the ALJ correctly relied upon established legal precedent, we **AFFIRM** his conclusion that the Respondents are entitled to summary decision, and **DISMISS** the case.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**