In the Matter of:

NITA BAUER, **ARB CASE NO. 01-056**

COMPLAINANT, **ALJ CASE NO. 2001-ERA-9**

v. **DATE: May 30, 2003**

UNITED STATES ENRICHMENT CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
John Frith Stewart, Esq., Jeffrey Trapp, Esq., *Segal, Stewart, Cutler, Lindsay, Janes & Berry, PLLC Louisville, Kentucky*

For the Respondent:
Shahram Ghasemian, Esq., Assistant General Counsel, David M. Thompson, Esq., United States Enrichment Corporation, *Paducah, Kentucky*; Mark C. Whitlow, Esq., Whitlow, Roberts, Houston & Straub, PLLC, *Paducah, Kentucky*

FINAL DECISION AND ORDER

Nita Bauer claims that her employer, United States Enrichment Corporation (USEC), violated the employee protection provision of the Energy Reorganization Act of 1974 (ERA), as amended and codified at 42 U.S.C.A. § 5851 (West 1995), when it discharged her during an involuntary reduction in force. Bauer's claim rests on her allegation that she was selected for the reduction in force because of her sex and because of her prior complaints of sexual harassment. After investigating Bauer's complaint, the Department of Labor's Occupational and Safety and Health Administration (OSHA) rejected it on the basis that Bauer failed to establish a violation of § 5851. Bauer then requested a hearing before an Administrative Law Judge (ALJ). The ALJ, acting on USEC's Motion for Summary Decision, issued a Recommended Decision and Order dismissing Bauer's complaint on the grounds that the United States Department of Labor (DOL) does not have jurisdiction under the ERA to adjudicate claims of sexual harassment, sex

discrimination, or age discrimination. Bauer appealed to this Board. For the reasons set forth below, we affirm the recommended dismissal of Bauer's complaint.

BACKGROUND

According to the complaint Bauer filed with OSHA in December 2000, Respondent USEC employed Bauer as a quality analyst in its Nuclear Regulatory Affairs (NRA) department.[1] After Larry Jackson became Bauer's supervisor in February 1998, she received performance evaluations of "meets expectations" rather than her customary evaluation of "exceeds expectations." During this period, according to Bauer, she also had problems with a co-worker who frequently made lewd and harassing comments. She states that she complained about the situation to her office manager, but he took no real corrective action. Bauer claims that her job responsibilities then began to decline and that because of her complaints of sexual harassment she was further ostracized from the rest of the department. Bauer was discharged on July 14, 2000, during an involuntary reduction in force (IRIF)[2] and was not thereafter offered another position in the plant. Bauer believes she was selected for the IRIF because of her sex and her complaints of sexual harassment. She also states that younger, less experienced, lower performing members of her department were not selected for IRIF, indicating age discrimination and a violation of protected ERISA rights.

In a letter dated January 21, 2001, OSHA informed Bauer that it was dismissing her complaint because it did not find discrimination under § 5851. This determination was made, in part, because Bauer had not responded to OSHA's January 3, 2001 letter requesting additional information.

Bauer then requested a formal hearing. USEC filed a Motion for Summary Decision, arguing that Bauer had not raised any safety concerns or specific nuclear or radiological concerns. USEC also contended that Bauer's complaints of sex discrimination and sexual harassment were not actionable under the ERA. Respondent's Motion for Summary Decision at 4. USEC's motion was accompanied by an affidavit from Bauer's supervisor, Jackson, which stated: "At no time did Mrs. Bauer raise any nuclear or radiological safety concern to me or, as far as I am aware, to any other manager. Nor did she raise any issues to me about a co-worker's supposed lewd or harassing comments." Respondent's Motion for Summary Decision Exhibit 1. Bauer did not counter the statements made in Jackson's affidavit.

On April 23, 2001, the ALJ issued a Recommended Decision and Order Granting Summary Decision (R. D. & O.) which recommended that Bauer's case be dismissed because

---

[1] The recital of facts in this paragraph is based on Bauer's December 19, 2000 complaint to OSHA.

[2] Although Bauer's complaint states that she was discharged on July 14, 2000, her Response to Motion for Summary Decision states that she was selected for the IRIF on June 30, 2000, and officially discharged on August 14, 2000. Complainant's Response to Motion for Summary Decision at 1.

DOL does not have jurisdiction under § 5851 to adjudicate sexual harassment, sex discrimination, or age discrimination claims:

> The ERA is a statute of circumscribed jurisdiction. Jurisdiction under the ERA may be established by some nexus between the activity for which protection is claimed and a goal, objective or purpose of the Atomic Energy Act or the chapter of which Section 5851 is a part. The Secretary has determined that the goals, objectives, and purposes of this statute relate to nuclear safety, therefore, there is no jurisdiction under this Act for sexual harassment, sex discrimination, or age discrimination.

R. D. & O. at 3.

Bauer appealed to this Board.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's recommended decision pursuant to 29 C.F.R. § 24.8 (2002) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under inter alia, the statutes listed in 29 C.F.R. § 24.1(a), including 42 U.S.C.A. § 5851, the whistleblower protection provision of the Energy Reorganization Act). The Board reviews an ALJ's recommended grant of summary decision de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary judgment governs our review. *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB March 25, 2003). 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 that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law.

ISSUE

Whether the Secretary of Labor may adjudicate Bauer's complaint, brought under 42 U.S.C.A. § 5851, that USEC discriminated against her because of her sex and subjected her to sexual harassment.

POSITIONS OF THE PARTIES

Bauer argues that Subchapter 4 of the ERA, specifically 42 U.S.C.A. § 5891, recognizes a cause of action for sex discrimination. Therefore, according to Bauer, since she established that USEC is a covered employer and has set forth the elements of a prima facie case of sex discrimination and sexual harassment, the ALJ erred in granting the Motion for Summary

Decision. Complainant's Petition for Review at 4-5 (Pet. Rev.), Complainant's Memorandum of Law in Support of Petition for Review at 4-5 (Mem. Pet. Rev.), Complainant's Rebuttal Brief In Support In Support of Petition for Review (Reb. Br.) at 3. Bauer also contends that her complaints of a hostile and abusive working environment affected nuclear safety and security. Pet. Rev. at 5, Mem. Pet. Rev. at 5.[3]

USEC submits that Bauer did not engage in any activity protected under § 211 of the ERA (42 U.S.C.A. § 5851) because she did not raise nuclear safety concerns, and therefore protected activity could not have motivated USEC to terminate Bauer's employment. Respondent's Reply Brief at 5-11 (Resp. Rep. Br.). USEC also argues that the ERA did not create a cause of action under § 211 to address allegations of sex discrimination. While USEC concedes that § 5891 may bar sex discrimination under certain conditions, it takes the position that § 211 is not the enforcement mechanism for § 5891. USEC points out that § 5891 itself

---

[3] This is also the position Bauer took in responding to USEC's summary decision motion. In addition, in her Rebuttal Brief submitted to this Board, Bauer for the first time raises the argument that "Subchapter 4 'bars sex discrimination in connection with any license, activity, or Federal assistance under this act[ERA].' The enforcement mechanism is the same mechanism that protects whistleblowing related to other protected activities, since sex discrimination is an 'alleged violation of this chapter' as contemplated by Section 211 of the ERA." Reb. Br. at 3. Bauer raises this argument in the context of her continuing assertion that the whistleblower provision is a mechanism for enforcing the § 5891 prohibition on sex discrimination.

> The question must arise (and was never answered by the ALJ) of what Subchapter 4 of the ERA means. If it does not create a cause of action for agency enforcement of sex discrimination claims under the ERA, what is it there for? … According to Senate Report 93-980 regarding the ERA, Subchapter 4 "bars sex discrimination in connection with any license, activity, or Federal assistance under this act [ERA]." The enforcement mechanism is the same mechanism that protects whistleblowing related to other protected activities, since sex discrimination is an "alleged violation of this chapter" as contemplated by Section 211 of the ERA … For some reason, one which is not our business to second guess, Congress has decided that sex discrimination in federally funded nuclear defense facilities is a cognizable cause of action under the ERA. Neither the respondent nor the ALJ has disputed that Ms. Bauer has shown a prima facie case of sex discrimination and sexual harassment in her complaint. Such a complaint is cognizable under the ERA, particularly Section 211.

Reb. Br. at 2-3. Section 211 of the ERA, of course, is codified as 42 U.S.C.A. § 5851. We decline to consider this newly raised argument because it appears for the first time in Bauer's rebuttal brief and was neither raised below nor included in Bauer's petition for review. *See Duprey v. Florida Power & Light Co.*, ARB No. 00-070, ALJ No. 2000-ERA-5, slip op. at 11 n.54 (Feb. 27, 2003) (and authorities cited there).

clearly states that "[I]t will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under Title VI of the Civil Rights Act of 1064." (Resp. Rep. Br. at 12).

DISCUSSION

Bauer takes the position that the Secretary of Labor has jurisdiction to adjudicate § 5891 claims in addition to her jurisdiction to adjudicate § 5851 claims. The Secretary of Labor's jurisdiction under the ERA and, by extension, this Board's jurisdiction as the Secretary's delegatee, is limited to adjudicating claims under 42 U.S.C.A. § 5851. Bauer has failed to demonstrate otherwise. Moreover, even if Bauer's § 5891 claim could somehow be construed as a § 5851 claim, Bauer's argument that the requirements of § 5851 have been met by establishing that USEC is a covered employer and setting forth a prima facie case of sex discrimination and sexual harassment fails. As explained in greater detail below, the elements of a § 5851 claim and those of a sex discrimination and sexual harassment claim simply are not the same.

Bauer argues that the ALJ's summary decision recommendation was error because she demonstrated a prima facie case of sex discrimination and sexual harassment. Bauer cites as the elements of a prima facie case of sex discrimination: "1) she is a member of a protected class; 2) she was subjected to an adverse employment action; 3) she was qualified; and 4) she was treated differently than similarly-situated male employees for the same or similar conduct." Mem. Pet. Rev. at 1, 4-5, citing *Jacklyn v. Schering-Plough Healthcare Prod. Sales Corp.*, 176 F.3d 921, 928 (6th Cir. 1999). In addition, she cites as the elements of a prima facie case of sexual harassment: "1) she is a member of a protected class; 2) she was subjected to unwelcome harassment; 3) the harassment complained of was based on sex; 4) the harassment unreasonably interfered with the complainant's work performance or created a hostile or offensive work environment that was severe and pervasive; and 5) the employer knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and appropriate corrective action." Mem. Pet. Rev. at 5, citing *Fenton v. Hisan, Inc.*, 174 F.3d 827, 829-830 (6th Cir. 1999).

However, the requirements Bauer outlines are not those, which must be met to establish a prima facie case of discrimination under § 5851. Under § 5851 a complainant makes a prima facie case by showing that: 1) the complainant engaged in protected activity; 2) the respondent employer was aware of complainant's engagement in protected activity; 3) the respondent employer subjected complainant to an adverse employment action with respect to her compensation, terms, conditions, or privileges of employment; 4) the respondent is within the term "employer" as defined by ERA § 5851(a)(2) and 5) a nexus exists between the protected activity and the adverse employment action. *See Bartlik v. United States Dep't of Labor*, 73 F.3d 100, 103 n.6 (6th Cir. 1996). *Accord Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 480-81 (3d Cir. 1993); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Overall v. Tennessee Valley Auth.*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001), *aff'd sub nom. Tennessee Valley Auth.* v. *United States Sec'y of Labor*, 59 Appx. 732 (6th Cir. 2003) (table);

Scerbo v. Consol. Edison Co. of New York, Inc., 89-CAA-2 (Sec'y Nov. 13, 1992); *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y June 28, 1991); *Dartey v. Zack Co. of Chicago*, 82-ERA-2 (Sec'y Apr. 25, 1983). Thus, with the possible exception of showing the existence of an adverse employment action, the elements required to establish a prima facie case under § 5851 are substantively different from those elements required for a sex discrimination or sexual harassment claim. Therefore, we reject Bauer's argument that by establishing the elements of a prima facie case of sex discrimination and sexual harassment she satisfied the requirements for setting forth a prima facie case under § 5851, and therefore, summary decision against her was error.

We also reject Bauer's argument that § 5851 is a mechanism for enforcing § 5891. As USEC notes, § 5891 specifies that it is to be enforced through agency provisions and rules similar to those established under Title VI. Those agency provisions and rules are entirely separate from § 5851 and the rules implementing § 5851.

Section 5891 (Sex discrimination prohibited) reads as follows:

> No person shall on the ground of sex be excluded from participation in, be denied a license under, be denied the benefits or, or be subjected to discrimination under any program or activity carried on or receiving Federal assistance under any subchapter of this chapter. **This provision will be enforced through agency provisions and rules similar to those already established with respect to racial and other discrimination, under Title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq. (West 1994)].** However this remedy is not exclusive and will not prejudice or cut off any other legal remedies available to the discriminatee.[4]

42 U.S.C.A. § 5891 (Pub. L. 93-438, title IV, § 401, Oct. 11, 1974, 88 Stat. 1254) (emphasis added).

Title VI prohibits discrimination under Federally assisted programs on grounds of race, color, or national origin. 42 U.S.C.A. § 2000d. To effectuate this goal Title VI provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or

[4] The language pertaining to other legal remedies appears to contemplate other provisions, which make remedies available for sex discrimination. It does not turn § 5851 into an additional enforcement mechanism for § 5891.

> guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C.A. § 2000d-1.

Pursuant to this authority, the Atomic Energy Commission (AEC), the predecessor of the Nuclear Regulatory Commission, published regulations to implement Title VI. 29 Fed. Reg. 19,277 (Dec. 31, 1964). Consistent with the statutory language, the regulations state: "This part applies to any program for which Federal financial assistance is authorized under a law administered by AEC." 10 C.F.R. § 4.2(a), 29 Fed. Reg. 19,277 (Dec. 31, 1964).

When the ERA was passed, the AEC's Title VI regulations were updated to, among other things, effectuate the provisions of Title IV of the ERA and change the term "AEC" to read "NRC" where it appeared. 40 Fed. Reg. 8,774, 8,778 (March 3, 1975). Section 4.1 of the NRC's regulations was revised to read:

> The purpose of this part is to effectuate the provisions of Title VI of the Civil Rights Act of 1964 **and Title IV of the Energy Reorganization Act of 1974** (hereafter collectively referred to as the "Act") to the end that no person in the United States shall on the ground of **sex**, race, color, or national origin be excluded from participation in, be denied the benefits of or be otherwise subjected to discrimination – under any program or activity receiving Federal financial assistance from the NRC.

Id. (emphasis added).

In 1987, the NRC revised its regulations once again, to implement the provisions of the Age Discrimination Act of 1975. This revision also reorganized the NRC's regulations, in 10 C.F.R. Part 4 – Nondiscrimination in Federally Assisted Programs, into several subparts. Subpart A implemented Title VI of the Civil Rights Act of 1964 and Title IV of the Energy Reorganization Act of 1974. Regarding Part 4, the regulations provide, generally: "This part applies to any program for which Federal financial assistance is authorized under a law administered by the NRC. The programs to which this part applies are listed in appendix A of this part." 10 C.F.R. § 4.3.

Bauer has put forward an additional argument, that her complaints of a hostile and abusive working environment affected nuclear safety and security within the plant. We take this as an argument that Bauer's complaints of sexual harassment were complaints about a hostile

and abusive working environment, that such an environment affects nuclear safety and security, and therefore Bauer's sexual harassment complaints are protected under § 5851. Bauer relies upon language from a Fourth Circuit case, *Blackburn v. Reich*, 79 F.3d 1375, 1378 (1996), commenting that the purpose of the statute militates against an interpretation that would make anti-retaliation actions more difficult[5] and an Eighth Circuit case, *Haley v. Retsinas*, 138 F.3d 1245, 1250 (1998), noting that when the meaning of the statute is unclear from the text, courts tend to construe it broadly in favor of protecting the whistleblower.[6] Pet. Rev. at 6, Mem. Pet. Rev. at 6. In making this argument, Bauer has cited no language in § 5851 which is arguably ambiguous and therefore requires interpretation. Bauer's argument was well addressed by the ALJ's R. D. & O. and the cases cited therein. A complaint about sexual harassment or age discrimination, per se, does not specifically relate to nuclear safety. However, even assuming that Bauer's statement is true, Bauer has nevertheless failed to set forth a prima facie case of discrimination under § 5851 (see discussion at 5-6, *supra*).

In summary, the elements which Bauer sets forth as necessary to establish a prima facie case of sex discrimination might satisfy the requirements of § 5891 (when supplemented to cover the requirements of that provision which relate to Federally-assisted programs), but they are not the elements necessary to set forth a prima facie case under § 5851. Moreover, the plain language of § 5891 specifies the procedures by which it will be enforced, *to wit* agency provisions and rules similar to those established under Title VI. The procedures for enforcing § 5891 thus are not the procedures of § 5851. The NRC has issued rules to implement § 5891. The Secretary of Labor and this Board have no jurisdiction with respect to § 5891 enforcement.

CONCLUSION

For the reasons set forth above, we find that the Secretary of Labor does not have authority under 42 U.S.C.A. § 5851 to adjudicate Bauer's complaint that USEC discriminated against her because of her sex and subjected her to sexual harassment. Moreover, we find that in

---

[5] That court was considering whether under the ERA the Secretary could award attorney's fees for work performed before the Court of Appeals, and saw the appellate review as simply a continuation of the action before the Secretary. The quoted remark is dictum. Even so, it does not constitute a license for turning § 5851 into an enforcement mechanism for § 5891 as Bauer suggests.

[6] This case involved the whistleblower provision of the Federal Deposit Insurance Act. The court was interpreting statutory language that prohibited a Federal banking agency from discharging an employee because the employee (or any person acting *pursuant to the request* of the employee) provided information regarding a possible violation of any law. There a building and loan association's managing officer turned over to the FDIC a memorandum outlining activities of the Office of Thrift Supervision (OTS) which potentially violated federal banking laws and regulations. The association's officer acted based on an OTS employee's request that he use the memo to save the association from OTS's improper conduct. The court noted that the first step in determining the issue was to look to the language of the statute itself, and, if the statute was ambiguous, to consider the purpose, subject matter, and condition of affairs which led to its enactment.

relying upon the elements of a prima facie case of sex discrimination and sexual harassment, Bauer has not established the elements of a prima facie case of discrimination under § 5851. Therefore, summary decision against Bauer is appropriate. Accordingly, we order her complaint **DISMISSED**.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge