In the Matter of:

MARK PAFFORD and
PHILLIP PAUL HUSKY,

COMPLAINANTS,

v.

DUKE ENERGY CORPORATION,

RESPONDENT.

ARB CASE NO. 02-104

ALJ CASE NO. 2001-ERA-28

DATE: January 30, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
John W. Gresham, Esq., ***Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sunter, P.A., Charlotte, North Carolina***

For the Respondent:
Donn C. Meindertsma, Esq., Gina M. Petro, Esq., ***Winston & Strawn, Washington, D.C.***

FINAL DECISION AND ORDER

Mark Pafford and Paul Husky worked as electricians for Duke Energy Corporation. In July 2000 an accidental electrical fire and small explosion occurred at Duke's Catawba (S.C.) nuclear power plant. Duke investigated the accident. Shortly thereafter, it terminated the employment of Pafford and Husky after concluding that they had made false and misleading statements about their role in the accident. But Pafford and Husky contend that Duke fired them because they engaged in protected activity. Therefore, they filed whistleblower complaints alleging that Duke violated the employee

protection provisions of the Energy Reorganization Act (ERA).[1]

After conducting a hearing, a Department of Labor Administrative Law Judge (ALJ) recommended that the complaints be dismissed because Pafford and Husky did not prove that Duke fired them because of their protected acts. Pafford and Husky appeal the ALJ's Recommended Decision and Order (R. D. & O.). We have jurisdiction to decide this appeal.[2]

To prevail, Pafford and Husky must prove by a preponderance of the evidence that they engaged in activity protected under the ERA, that Duke officials knew about this activity and took adverse action against them, and that their protected acts were a contributing factor in the adverse action Duke took.[3] Pafford and Husky did not adduce direct, "smoking gun" evidence that Duke terminated their employment because of their protected acts. Rather, they rely upon the pretext, or indirect, method of proving discrimination. They contend that they proved their case because the record demonstrates that Duke's investigation into their role in the electric explosion and fire was a "sham" and that firing them for giving false information to the investigators was a pretext for Duke's real motivation--their protected activity.[4]

The ALJ found that the investigation into the accident was "thorough and fair" and that Duke management sincerely and reasonably relied upon it in finding that Pafford

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[1] The ERA provides, in pertinent part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . [notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C.A. § 2011 *et seq.* (West 2003)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists or participates in a proceeding under the ERA or AEA]." 42 U.S.C.A. § 5851 (a)(1) (West 1995).

[2] *See* 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed Reg. 64272 (Oct. 17, 2002) (delegating to the Administrative Review Board (ARB) the Secretary's authority to review cases arising under the ERA). The Board reviews the ALJ's findings of fact and conclusions of law de novo. *See* 5 U.S.C.A. § 557(b) (West 1996); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 1995-WPC-1, slip op. at 7-8 (ARB Apr. 28, 2000) and authorities there cited.

[3] *See* 42 U.S.C.A. § 5851 (b)(3)(C); *Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No 2000-ERA-31, slip op. at 6-8 (ARB Sept. 30, 2003).

[4] Complainant's Brief at 18, 27. The ALJ found that Husky, but not Pafford, engaged in protected activity. R. D. & O. at 13, 15. For purposes of this opinion, we have assumed, without finding, that both Husky and Pafford engaged in ERA-protected activity.

and Husky had lied to and misled the investigators. R. D. & O. at 14-16. Therefore, since Pafford and Husky did not prove Duke's reason for terminating them was a pretext, the ALJ concluded that they had failed to prove that Duke fired them because of protected activity.

The ALJ's Recommended Decision and Order fairly recites the relevant facts underlying this dispute. He thoroughly analyzed all of the evidence and correctly applied relevant law. We have examined the record and find that it fully supports the ALJ's finding that Duke's reasons for terminating Pafford and Husky were legitimate, not a pretext. *Compare, e.g.,* Transcript at 73, 158, 163, 189, 211, 302, 381, 436; Respondent's Exhibit 2, at 000059 *with* Transcript at 55, 149. Therefore, with the exception noted below, we attach and incorporate the Recommended Decision and Order.[5] Accordingly, we **DENY** the complaints.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

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[5] The ALJ stated: "Where the [ERA] complainant produces direct evidence of discrimination, and the employer does not effectively rebut this evidence, the employer can avoid liability only by showing by clear and convincing evidence that it would have taken the same action in the absence of protected activity." R. D. & O. at 13. The ALJ is referring to the so-called "dual motive" analysis. *See* 42 U.S.C.A. § 5851 (b)(3)(D). We recently held that, to trigger dual motive analysis, the ERA "requires only that the complainant prove by a preponderance of sufficient evidence, *direct or circumstantial,* that the protected activity contributed to the employer's decision." *Kester v. Carolina Power and Light Co.,* ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. n. 19 (ARB Sept. 30, 2003) (emphasis added). *Cf. Desert Palace Inc. v. Costa,* 123 S. Ct. 2148 (2003) (Title VII plaintiff not required to present direct evidence of discrimination in order to obtain a mixed-motive [dual motive] jury instruction).