In the Matter of:

SYED M. A. HASAN, **ARB CASE NO. 02-121**

COMPLAINANT, **ALJ CASE NO. 2002-ERA-18**

v. **DATE: June 25, 2003**

J. A. JONES, INC.; J. A. JONES SERVICES GROUP, INC.; LOCKWOOD GREENE ENGINEERS, INC.; LOCKWOOD GREENE TECHNOLOGIES, INC.; and LOCKWOOD GREENE E&C LLC,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Syed M.A. Hasan, *pro se, Madison, Alabama*

For the Respondents:
Stephanie H. Burton, Esq., *Gibbes Burton, LLC, Greenville, South Carolina*

FINAL DECISION AND ORDER

On January 16, 2002 Syed M. A. Hasan applied, via email, to Lockwood Greene Engineers, Inc. (LGE) for the position of "Piping Group Leader." In the e-mail cover letter accompanying his resume, Hasan requested that the recipients not discriminate and retaliate against him "for being a Truthful and Honest Whistleblower of this Country and for filing a [previous] Whistleblower complaint against J. A. Jones, Inc., and its subsidiaries." When LGE did not hire Hasan, he filed a discrimination complaint with the U. S. Department of Labor on February 16, 2002. He alleged that the Respondents did not hire him for the piping group leader position and will not hire him for other unspecified "available jobs" because of his previous whistleblowing activity. Thus, according to Hasan, the Respondents have violated the employee

protection provision of the Energy Reorganization Act. (ERA).[1] After hearing both sides present evidence, a U.S. Department of Labor Administrative Law Judge (ALJ) recommended that Hasan's complaint be dismissed.[2] Hasan appeals. We affirm.

The Administrative Review Board (ARB or the Board) has jurisdiction to review the ALJ's recommended decision.[3] The Board reviews the ALJ's findings of fact and conclusions of law *de novo.*[4]

We summarize the ALJ's findings. He found that LGE hiring officials did not consider Hasan qualified for the piping group leader position and that his previous whistleblowing had no effect on that determination. The ALJ himself found Hasan was not qualified for the position.[5] Therefore, since a complainant who alleges a discriminatory refusal to hire must prove that he was qualified for the position sought,[6] and Hasan failed to do so, the ALJ concluded that Hasan's complaint should be dismissed.

We have carefully examined the entire record herein and find that it fully supports the ALJ's findings of fact. Furthermore, his recommended decision, which we attach and incorporate, correctly applies established legal precedent in concluding that the

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[1] 42 U.S.C.A. § 5851 (West 1995) ("No 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*.), 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].")

[2] Recommended Decision and Order (R. D. & O.) dated September 19, 2002.

[3] *See* 29 C.F.R. § 24.8 (2002). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases arising under the ERA).

[4] *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.

[5] R. D. & O. at 5.

[6] *Id.* citing *Samodurov v. General Physics Corp.*, 1989-ERA-20 (Sec'y Nov. 16, 1993) and *Hasan v. Florida Power and Light Co.*, ARB No. 01-004, ALJ No. 2000-ERA-12 (ARB May 17, 2001).

Respondents did not violate the ERA. Hasan's arguments concerning the merits of his case are not persuasive and we reject them.[7] Accordingly, we **AFFIRM** the Recommended Decision and Order and **DENY** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[7] In his Initial Brief, Hasan also emphasizes and reargues his previous objections to the ALJ's orders denying his Motion to Compel, Motion to Amend Complaint, and Motion Requesting a Continuance. Complainant's Initial Brief at 4-5, 9-10, 13. Hasan appears *pro se* and we will construe his brief liberally. *See Young v. Schlumberger,* ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-9 (ARB Feb. 28, 2003). Therefore, we interpret Hasan's arguments as asserting that the ALJ erred, and "[w]e review allegations of procedural errors by the ALJ under the abuse of discretion standard." *Cox v. Lockheed Martin, et al.,* ARB Case No. 99-040, ALJ No. 1997-ERA-17, slip op. at 5 (ARB March 30, 2001) *citing Khandelwal v. Southern California Edison,* ARB No. 98-159, ALJ No. 1997-ERA-6 (ARB Nov. 30, 2000) and *Malpass v. General Elec. Co.,* 1985-ERA-38, slip op. at 5-6 (Sec'y March 1, 1994) (discussing ALJ's authority to conduct trial hearings under 5 U.S.C.A. § 556(c)). However, because we find nothing in this record that would support a finding that the ALJ abused his discretion in denying Hasan's motions, we reject Hasan's argument.

Hasan has also filed a "Motion To Include New Documents That Were Not Available Earlier." This motion is identical to the one we denied today in *Hasan v. J.A. Jones-Lockwood Greene, et. al* ARB No. 02-123, ALJ No. 2002-ERA-5, slip op. at n.6. We therefore deny this motion for the same reasons.

U.S. Department of Labor

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Issue date: 19Sep2002

In the Matter of	)	**Case No.: 2002-ERA-00018**
SYED M. A. HASAN,	)	
Complainant,	)	
v.	)	
J.A. JONES, INC.; J.A. JONES SERVICES GROUP, INC. LOCKWOOD GREENE ENGINEERS, INC.; LOCKWOOD GREENE TECHNOLOGIES, INC. LOCKWOOD GREENE E&C LLC	)	
Respondents.	)	

RECOMMENDED DECISION AND ORDER

Syed M.A. Hasan (Complainant) filed a complaint pursuant to the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 et seq., and the governing regulations thereunder. This claim was filed against J.A. Jones, Inc., J.A. Jones Services Group, Inc., Lockwood Greene Technologies, Inc., (LGT), Lockwood Greene Engineers, Inc. (LGE) and Lockwood Greene E&C LLC.

Complainant alleged he applied for a position of piping group leader on January 16, 2002, and that Respondents violated the ERA when based on Complainant's prior whistleblowing activities

Respondents refused to hire him. Complainant also makes a general allegation that Respondents will never hire him for available positions.[1]

BACKGROUND

Complainant previously filed an ERA whistleblower complainant against these same Respondents. That case (2002-ERA-00005) was set for hearing on February 14, 2002. On January 19, 2002, Complainant requested permission to amend his complaint to include the allegations now before the Court in case 2002-ERA-00018. Complainant also requested permission to continue to amend his complaint up to the date of the scheduled hearing. The request to amend was denied and Complainant filed the complaint in 2002-ERA-00018 which is now before the Court.

On April 10, 2002, the Occupational Safety and Health Administration dismissed the complaint against Respondents finding that the complaint was without merit. Complainant appeals that decision. A hearing was held in Huntsville, Alabama, on July 18, 2002.

FINDINGS OF FACT

1. Trudy Wofford is the HR manager for the Spartanburg office of LGE. (TR. 91). In 2001, Wofford attended a meeting with the pharmaceutical focus industry group within LGE. The purpose of the meeting was to discuss ways to secure more pharmaceutical business. It was determined that a strategic position of piping group leader should be advertised. The position was typically identified in proposals submitted to potential pharmaceutical clients. A pharmaceutical background was required for the position. (TR. 93-95).

2. As a result, LGE posted an opening for piping group leader on its website. The posting was listed in the pharmaceutical section of the website. To reach the posting, you had to first click on pharmaceutical industry. (TR. 96, 110; RX. 1).

3. Wofford was assigned the responsibility to pre-screen all applications. (TR. 105). On January 16, 2002, Complainant applied for the position by emailing a cover letter and his resume. In the cover letter, Complainant asked that he not be discriminated or retaliated against because of his prior

[1]As to all the Respondents, other than the piping group leader position, Complainant has failed to allege or show the existence of any jobs or their availability or that he applied for any specific job with any Respondent. As in his prior case against these same Respondents (2002-ERA-00005) Complainant did nothing more than submit a resume to Respondents and then allege that he has been discriminated against because he remains unemployed. The same result was reached in *Hasan v. U.S. Department of Labor*, 10th Cir., No. 01-9521, 7/21/01, where the Court upheld dismissal of the case as Hasan failed to show that a position for which he was qualified was available and that the employer either filled the position or continued to search for applicants after refusing to hire him. Hasan's mere conclusion that such a large company always has positions open was deemed insufficient to state a claim. The same rationale applies to the instant case.

whistleblowing activity. Prior to receiving the email, Wofford was not aware of Complainant's previous whistleblowing activity. Wofford pre-screened the application and rejected it as Complainant did not have any pharmaceutical experience and did not qualify for the position. (TR. 97-99, 105; RX. 2).

4. The pre-screening was no different than the other twenty applications that were rejected. (TR. 127). Three applicants had pharmaceutical experience and Wofford did not reject these in the pre-screening. But because LGE did not get the proposed work, no hires were made for the position. (TR. 134).

5. Prior to 2000, most of Complainant's experience was in the nuclear power industry. Complainant had no experience in the pharmaceutical industry. (TR. 73-76; RX. 2).

6. I found the testimony of Wofford to be credible.

DISCUSSION

Section 211 (formerly section 210) of the Energy Reorganization Act, 42 U.S.C. § 5851, encourages employees in the nuclear industry to report safety violations and provides a mechanism for protecting them against retaliation for doing so. *See English v. General Electric Co.*, 496 U.S. 72, 82 (1990). That section states:

> (a) Discrimination against employee.
>
> (1) No 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 (or any person acting pursuant to a request of the employee)--
>
> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. §§ 2011 *et seq.*);
>
> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
>
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
>
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

WHO IS COMPLAINANT'S EMPLOYER

In order to prevail pursuant to the Act, a complainant must show that 1) the respondent is his employer; 2) the respondent subjected him to adverse action with respect to his compensation, terms, conditions or privileges of employment; and 3) that the alleged discrimination arose because he engaged in protected activity as defined by the Act. *See generally Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). See also 42 U.S.C. § 5851(a)(1). *See also Saporito v. Florida Power & Light and Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, P.A.*, 94-ERA-35, (ARB, 7/19/96) (dismissing ERA complaint against an employer's law firm).

The Secretary has held that applicants for employment are covered employees. *Stultz v. Buckley Oil Co.*, 93-WPC-6 (Sec'y June 28, 1995). The evidence clearly shows that the position that Complainant applied for was advertised by LGE. Accordingly, LGE will be considered Complainant's employer for purposes of this case.

Complainant asserts that not only LGE, but all Respondents should be considered his employer. Complainant's only support for this assertion is that all the companies were under the umbrella of the parent company, J.A. Jones, Inc., and his unsupported assertion that J.A. Jones, Inc. has control of all the subsidiary companies, including the power to hire, promote, grant increases in salaries and fire or discipline employees of the subsidiaries. (Complainant's Brief, p. 3).

A parent company acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment. For example, the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an employer for purposes of the whistleblower provisions. *See, e.g., Hill v. TVA and Ottney v. TVA (Hill and Ottney)*, Case Nos. 87-ERA-23/24, Sec. Rem. Dec., May 24, 1989. The mere fact that one company is the parent of another company that employs a complainant does not make the parent an employer for purposes of the act. *See Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2 (ARB June 14, 1996). The issue of employment relationship necessarily depends on the specific facts and circumstances of the particular case. *Stephenson v. NASA*, 94-TSC-5 (ARB Feb. 13, 1997).

The facts and circumstances of this case do not support the assertions made by Complainant. There is no evidence that J.A. Jones, Inc. exercised the power to hire, promote, grant increases in salaries and fire or discipline employees of the subsidiaries. There is no evidence that anyone from any Respondent other than LGE had any input or influence on the decision to advertise for the piping

group leader position or the decision not to hire Complainant. I find that for purposes of this case, LGE was Complainant's only employer.

COMPLAINANT WAS NOT QUALIFIED FOR POSITION

In a case involving an alleged discriminatory failure to hire, a complainant must show that 1) he applied for a job; 2) he was qualified for a job; 3) for which the respondent was seeking applicants; 4) despite his qualifications he was rejected; 5) that after the rejection, the position remained open; and 6) the respondent continued to seek applicants. *Samodurov v. General Physics Corporation*, Case No. 89-ERA-20 (Sec'y, Decision and Order, Nov. 16, 1993); *Hasan v. Florida Power and Light Co.*, 2000-ERA-12 (ARB May 17, 2001). A complainant who does nothing more than submit his resume to respondents and then alleges that they have discriminated against him because he remains unemployed has not supported a claim of discrimination under the ERA. *Hasan v. Commonwealth Edison Co.*, 2000-ERA-8 (ARB Apr. 23, 2001).

I found Wofford to be a very credible witness. While Complainant repeatedly alleges that Wofford "LIED under OATH" (Brief at 3, 4, 6, 9) it appears that Complainant views any testimony that is contrary to his position as perjury. (Tr. 160). Wofford's testimony left no doubt in my mind that during the pre-screening process she found Complainant not qualified for the position. I am convinced that Complainant's prior whistleblowing activity had no effect on her decision that Complainant was not qualified for the position. Wofford was given the responsibility to pre-screen the applications to insure that basic qualifications were met. The most basic qualification was that the applicant must have a pharmaceutical background. Like the other applicants that were rejected during pre-screening, Complainant did not have this qualification and he was rejected. I find that Complainant was not qualified for the position of piping group leader as advertised by LGE.

RECOMMENDED DECISION AND ORDER

It is the recommendation of the Court to the Secretary of Labor:

That the complaint against Respondents be dismissed.

LARRY W. PRICE
Administrative Law Judge

LWP:bab

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