



**In the Matter of:**

**SYED M. A. HASAN,**

**ARB CASE NO. 04-040**

**COMPLAINANT,**

**ALJ CASE NO. 03-ERA-32**

**v.**

**DATE: March 29, 2005**

**SOUTHERN COMPANY, INC., et al.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Syed M. A. Hasan, pro se, Madison, Alabama**

*For the Respondents:*

**Lindsay S. Marks, Esq., Laura H. Kriteaman, Esq., Troutman Sanders, LLP,  
Atlanta, Georgia**

**FINAL DECISION AND ORDER**

**BACKGROUND**

In January 2003 Syed M.A. Hasan applied to Southern Company for a temporary position as a Senior Structural Engineer, a position for which he claims he was qualified. Shortly thereafter, Hasan was notified that Southern had filled the position with another person. Hasan then filed a complaint with the U.S. Department of Labor's Occupational and Safety Administration (OSHA) against Southern and all of its subsidiaries.<sup>1</sup> Hasan

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<sup>1</sup> Southern Company (Southern) is a holding company made up of subsidiary

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claims that in 1997, in the process of applying for a job at Alabama Power Company, he called a human resources employee there and, in effect, requested that the company not discriminate against him because of his previous whistleblowing activities.<sup>2</sup> Hasan contends that since Alabama Power is a subsidiary of Southern, Southern “was aware (had the knowledge) that [he] was a whistleblower.” Complaint at 3. Therefore, Hasan asserts that Southern violated the Energy Reorganization Act’s employee protection provisions when, because of his previous whistleblower activities, it refused to hire him for the structural engineer position and instead hired a less qualified applicant.<sup>3</sup>

After OSHA dismissed Hasan’s complaint, he requested a hearing before a Department of Labor Administrative Law Judge (ALJ).<sup>4</sup> Prior to trial, Southern filed a “Motion to Dismiss Or, In the Alternative, Motion for Summary Decision.” Southern argued that most of its subsidiaries are not covered employers under the ERA, that all but one of Hasan’s claims are time-barred, and that Hasan had not alleged a prima facie case

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companies. Georgia Power Company and Alabama Power Company are Southern subsidiaries that own Southern’s nuclear facilities. Another subsidiary, Southern Nuclear Operating Company, Inc., is licensed by the Nuclear Regulatory Commission and operates the Georgia and Alabama Power companies. Southern Company Services, Inc. (SCS) is also a subsidiary and a sub-contractor to the U. S. Department of Energy. It functions as a service company to the other subsidiaries. Respondent’s Brief in Support of Their Motion to Dismiss at 4-5.

<sup>2</sup> Hasan’s complaint does not indicate the specific whistleblowing activity he discussed with the human resources employee at Alabama Power. Later in his complaint, Hasan alleged that he had engaged in whistleblowing activity at the Comanche Peak nuclear power plant in 1984-85 and had also, at an unspecified time, reported safety issues at the LaSalle nuclear power plant to the Nuclear Regulatory Agency. Complaint at 8-10. In his deposition testimony, Hasan stated that he applied for a position at Southern’s Vogtle nuclear power plant in 1998-99 and also informed a man there that he was a whistleblower. October 15, 2003 Deposition of Syed Mohammed Aziz Hasan at 77-83.

<sup>3</sup> See 42 U.S.C.A. § 5851(a)(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 . . . [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].”)

<sup>4</sup> See 29 C.F.R. § 24.4 (d) (2) (2004).

of retaliation.<sup>5</sup> Hasan filed a timely “Response In Opposition” to Southern’s motion. The ALJ granted Southern’s motion and recommended that we dismiss Hasan’s complaint.<sup>6</sup> Hasan appealed. We affirm.

### 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 employee protection provisions of the environmental and nuclear whistleblower statutes.<sup>7</sup> The ARB, as the Secretary’s designee, acts with all the powers the Secretary would possess in rendering a decision under the statutes. The ARB engages in de novo review of the ALJ’s recommended decision.<sup>8</sup>

Likewise, 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 decision governs our review.<sup>9</sup> The standard for granting summary decision is

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<sup>5</sup> Southern argued that since its other subsidiaries (Mississippi Power Co., Savannah Electric and Power Co., Gulf Power Co., and Southern Energy, Inc.) are not nuclear licensees, or applicants for a license, or contractors or subcontractors of an applicant or licensee or of the Department of Energy, they are not covered under the Energy Reorganization Act (ERA) and the complaint should be dismissed as to them. *See* 42 U.S.C.A. § 5851(a) (2) (West 2003). Southern contended that only SCS, whose employees made the employment decision at issue here, fits the definition of “employer” under the ERA and should be included as a respondent. Respondent’s Brief in Support of Their Motion to Dismiss at 10-12. The ALJ did not address this argument or the time-bar defense.

<sup>6</sup> Southern cited portions of Hasan’s deposition and submitted exhibits and affidavits to support its Motion To Dismiss Or, In The Alternative, Motion For Summary Decision. Therefore, that motion must be treated as a Motion for Summary Decision under 29 C.F.R. § 18.40. *See Erickson v. United States Env’tl Prot. Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2, slip op. at 3 (ARB July 31, 2001).

<sup>7</sup> *See* 29 C.F.R. § 24.8 (2004); *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)).

<sup>8</sup> *See* Administrative Procedure Act, 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1571-72 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

<sup>9</sup> *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003).

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essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts.<sup>10</sup> Thus, pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” A “material fact” is one whose existence affects the outcome of the case.<sup>11</sup> And a “genuine issue” exists when the nonmoving party produces sufficient evidence of a material fact that a fact finder is required to resolve the parties’ differing versions at trial. Sufficient evidence is any significant probative evidence.<sup>12</sup>

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.<sup>13</sup> The non-moving party may not rest upon mere allegations, speculation, or denials of his pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof.<sup>14</sup> If the non-moving party fails to sufficiently show 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.”<sup>15</sup>

Accordingly, the Board will grant summary decision 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.<sup>16</sup>

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<sup>10</sup> *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001).

<sup>11</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>12</sup> *Id.* at 249, citing *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-290 (1968).

<sup>13</sup> *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

<sup>14</sup> *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e).

<sup>15</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

<sup>16</sup> *See Johnsen v. Houston Nana, Inc., JV*, ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003) (“[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in

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## DISCUSSION

To prevail on his claim, Hasan must prove that he engaged in activity that the ERA protects, that Southern knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action.<sup>17</sup> The ALJ recommended that Hasan's complaint be dismissed because Hasan did not establish an essential element of his case: that the Southern Company Services employees who made the decision not to hire him were aware of his previous protected whistleblowing activities. Recommended Decision and Order (R. D. & O.) at 5. The ALJ found "not a scintilla of evidence to support [Hasan's] argument that [the Southern hiring officials] had any knowledge of protected conduct" when they chose not to hire him in 2003. R. D. & O. at 3. Those officials submitted affidavits wherein they swear that they had never heard of Hasan or his protected conduct. In contrast, the ALJ found that Hasan's "Response In Opposition" contains no evidence, only conjecture and speculation, that the hiring officials were aware of his whistleblowing activities. R. D. & O. at 5. Furthermore, the ALJ points out, Hasan himself testified in his deposition that he had "no way of knowing" whether the human resources persons he told about his protected activity in turn told the Southern hiring officials. *Id.*; Hasan Deposition at 74, 80.

We have carefully examined the record herein and find that it supports the ALJ's findings. We agree with the ALJ that Hasan's "Response In Opposition" contains only speculation, rather than specific facts, concerning whether the Southern hiring officials were aware of Hasan's past whistleblowing when they decided not to hire him. Therefore, in opposing the motion for summary decision, Hasan has not carried his burden to produce sufficient evidence that establishes an essential element of his case: that Southern's hiring officials knew about his protected activity.<sup>18</sup> Furthermore, Hasan's

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the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.") (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999).

<sup>17</sup> See *Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 7-8 (ARB Sept. 30, 2003).

<sup>18</sup> Although Hasan is a pro se litigant, he is quite experienced at litigating whistleblower cases under the ERA. The Office of Administrative Law Judges, the Administrative Review Board and the federal Courts of Appeals have repeatedly instructed him on the elements necessary to prove unlawful retaliation under the ERA. See e.g., *Hasan v. Sargent & Lundy*, ARB No. 03-030, ALJ No. 2000-ERA-7 (ARB July 30, 2004), *aff'd sub nom.*, *Hasan v. United States Dep't of Labor*, No. 04-3030, 2005 WL 578791 (7th Cir. Mar. 14, 2005); *Hasan v. Stone & Webster Engineers & Constructors, Inc.*, ARB No. 03-058, ALJ No. 2000-

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briefs to us contain only continued and additional speculation as to how the Southern hiring officials must have known about his whistleblowing. Hasan also makes unsupported, scurrilous allegations that Southern's affiants committed perjury. We therefore reject his arguments and find that no genuine issue of fact exists as to whether the hiring officials knew about Hasan's protected activity. As a result, Southern's Motion for Summary Decision must be granted and Hasan's complaint is **DISMISSED**.<sup>19</sup>

**SO ORDERED.**

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

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

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ERA-10 (ARB June 27, 2003), *aff'd sub nom.*, *Hasan v. Secretary of Labor*, No. 03-1981, 2004 WL 574520 (1st Cir. Mar. 24, 2004); *Hasan v. J.A. Jones, Inc.*, ARB No. 02-121, ALJ No. 2002-ERA-18 (ARB June 25, 2003), *aff'd sub nom.*, *Hasan v. United States Dep't of Labor*, No. 03-1852, 2004 WL 1539635 (4th Cir. July 9, 2004); *Hasan v. J.A. Jones, Inc.*, ARB No. 02-123, ALJ No. 2002-ERA-5 (ARB June 25, 2003), *aff'd sub nom.*, *Hasan v. United States Dep't of Labor*, No. 03-15469, 2004 WL 1121580 (11th Cir. May 11, 2004); *Hasan v. Florida Power & Light Co.*, ARB No. 01-004, ALJ No. 2000-ERA-12 (ARB May 17, 2001), *aff'd sub nom.*, *Hasan v. United States Dep't of Labor*, No. 01-12953, 2002 WL 833328 (11th Cir. Apr. 11, 2002); *Hasan v. Wolfe Creek Nuclear Operating Corp.*, ARB No. 01-006, ALJ No. 2000-ERA-14 (ARB May 31, 2001), *aff'd sub nom.*, *Hasan v. United States Dep't of Labor*, 298 F.3d 914 (10th Cir. 2002); *Hasan v. Commonwealth Edison Co.*, ARB Nos. 01-002, 01-003, 01-005, ALJ Nos. 2000-ERA-8, 11, 13 (ARB Apr. 23, 2001), *aff'd sub nom.*, *Hasan v. United States Dep't of Labor*, No. 01-1130, 2002 WL 448410 (7th Cir. Mar. 19, 2002); *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB Jan. 30, 2001), *aff'd sub nom.*, *Hasan v. United States Sec'y of Labor*, No. 01-1322, 2004 WL 1055257 (3d Cir. Apr. 23, 2004); *Hasan v. Intergraph Corp.*, ARB Nos. 97-016, 97-051, ALJ Nos. 1996-ERA-17, 27 (ARB Aug. 6, 1997), *aff'd sub nom.*, *Hasan v. Director*, 190 F.3d 544 (11th Cir. 1999); *Hasan v. Commonwealth Edison Co.*, ARB No. 00-028, ALJ No. 2000-ERA-1 (ARB Dec. 29, 2000), *aff'd sub nom.*, *Hasan v. United States Dep't of Labor*, No. 01-1131, 2002 WL 448410 (7th Cir. Mar. 19, 2002); *Hasan v. Commonwealth Edison Co.*, ARB No. 00-043, ALJ No. 1999-ERA-17 (ARB Dec. 29, 2000), *aff'd sub nom.*, *Hasan v. United States Dep't of Labor*, No. 01-2177, 2002 WL 448410 (7th Cir. Mar. 19, 2002).

<sup>19</sup> The ALJ also denied Hasan's motion to disqualify Southern's counsel and motion for default judgment and sanctions because they lacked merit. R. D. & O. at 5. We find nothing in the record or in Hasan's arguments to us which support these motions. Therefore, the ALJ correctly denied the motions.