RICHARD O. DEVINE, **ARB CASE NO. 04-109**

COMPLAINANT, **ALJ CASE NO. 04-ERA-10**

v. **DATE: August 31, 2006**

BLUE STAR ENTERPRISES, INC.
and FLUOR HANFORD, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Richard DeVine, *pro se,* Richland, Washington

For the Respondents:
Lucinda J. Luke, *Cowan Walker, P.S.*, Richland, Washington
Larry E. Halvorson, *Attorney at Law,* Richland, Washington

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003), and implementing regulations at 29 C.F.R. Part 24 (2005). Richard DeVine complains that Blue Star Enterprises, Inc. (BSE) and Fluor Hanford, Inc. (Fluor) violated the ERA when BSE laid him off as a hazardous waste truck driver after he reported that he did not have the safety training required for the job. On May 21, 2004, a Labor Department Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.), recommending the granting of Fluor's Motion for Summary Decision and the dismissal of DeVine's complaint. We concur and dismiss the complaint.

BACKGROUND

At all relevant times, DeVine was a truck driver and a Teamster Union member. DeVine Complaint to United States Department of Labor (DOL), October 6, 2003, para. 1-3, Motion for Summary Judgment (MSJ), Attachment F. His employer was BSE, a Fluor subcontractor. Fluor was a contractor performing environmental restoration and waste management for the United States Department of Energy (DOE) at the Hanford Nuclear Site. *Id.* DOL, Notice of Determination, January 15, 2004, MSJ, Attachment D. BSE was an environmental drilling company and Fluor subcontractor that performed services at the site. *Id.* The site contained underground nuclear waste tanks, which, DeVine alleged, leaked and contaminated the groundwater. Complaint, para. 5.

In February 2003 Fluor requested BSE to provide a driver for a water purge truck. BSE faxed this request to the local Teamsters Union on February 27, 2003. The fax included training requirements for the driver and a start date of March 3, 2003, with a duration of "1 to 2 days off and on." Complainant's Opposition to Summary Judgment, attachment N. The Teamsters local dispatched DeVine. Complaint, para. 3; Declaration of Robert Dobush, MSJ, Attachment A, para. 2; Declaration of Darwin Tenney, MSJ, Attachment B, para. 2. DeVine alleges that BSE required the following training and certifications for the job: "a 40-Hour Hazardous Waste Course; and 8 Hour Hazardous Waste Refresher; Radiation Worker II; II-GET; Class A Commercial Driver's License with Tanker and Hazardous Materials Endorsement; Hazardous Material General Awareness; and First Aid/CPR." Complaint, para. 8. DeVine says he met the requirements, except that his First Aid/CPR had expired. *Id.*, para. 9.

DeVine commenced work on March 3 or March 4, 2003. Complaint, para. 3; Dobush Declaration, para. 2; Tenny Declaration, para. 2. According to Fluor, BSE notified DeVine on April 3, 2003, that his work driving the purge water truck would be completed on April 7, and that he would be laid off sometime after April 8. Dobush Declaration, para. 3; Tenny Declaration, para. 4. Although DeVine disputes that he was laid off due to lack of work, his Opposition to the Motion for Summary Judgment does not contest that he was notified of the layoff, but says the date was April 4, 2003. Opposition to Summary Judgment, Section III at 3.

DeVine contends he learned of the CPR requirement on April 4, 2003. Complaint, para. 10. He contacted Fluor, which informed him of an additional training requirement: introduction to Federal Motor Carrier Safety Regulations. Complaint, para. 11. DeVine alleges that he then informed BSE of what he had learned from Fluor and expressed concern that BSE did not know the training requirements for hauling hazardous material in tanker trucks and claimed that BSE failed to verify that personnel had the requisite training for assigned tasks. *Id.*, para. 12.

DeVine contends that, on April 7, despite his expression of concerns about his lack of training, BSE ordered him to continue to haul hazardous material in tanker trucks. *Id.*, para. 13. DeVine used his "Stop Work Authority" to shut down the job. That night BSE sent him to First Aid/CPR training. *Id.*, para. 13. On April 8 and 9, there was no

work for him, and on April 10, BSE laid him off because he lacked the required training. *Id.*, para. 14-18. But he observed that the rest of the BSE crew was still working, *id.*, para. 18, and Fluor told him he was laid off because his Commercial Driver's License was invalid and he was not authorized to haul hazardous material. *Id.*, para. 19.

Fluor's version of events is not materially different. After DeVine stopped work on April 7, a Fluor employee who was First Aid/CPR certified offered to ride with DeVine, but DeVine refused. Dobush Declaration, para. 3; Tenny Declaration, para. 6. On April 8, DeVine told Fluor managers that he lacked three training courses that were required for his job as a purge water truck driver. Dobush Declaration, para. 4; Tenny Declaration, para. 7. Although BSE had believed that DeVine was fully certified when the Teamsters dispatched him, BSE confirmed had DeVine did not have the necessary training, and that three courses at issue were not available for three weeks. Dobush Declaration, para. 4; Tenny Declaration, para. 7. Fluor only needed a purge water driver for one more day, so it deleted that requirement from its contract with BSE, had one of its own drivers complete the work, and BSE laid DeVine off on April 10, as anticipated. Dobush Declaration, para. 4-5; Tenny Declaration, para. 7.

On October 6, 2003, DeVine filed a complaint with the Occupational Safety and Health Administration (OSHA), DOL, alleging that BSE and Fluor violated the whistleblower protection provisions of the ERA when they laid him off on April 10, in retaliation for complaining about his lack of training to perform his job as a hazardous waste truck driver, and for issuing a stop work order and refusing to drive. OSHA denied DeVine's complaint on the ground that the training concerns he raised did not amount to violations of nuclear laws or regulations. Notice of Determination at 2.

DeVine requested a hearing before an ALJ. On March 11, 2004, Fluor moved for summary judgment on DeVine's claims. DeVine filed an opposition on March 22, 2004, and the ALJ issued the R. D. & O. on May 21, 2004. The R. D. & O. recommended summary decision because: (1) DeVine did not file his complaint within 180 days of learning that he was to be laid off and therefore his complaint was untimely under the ERA; (2) if DeVine's complaint that he was not First Aid/CPR certified implicated nuclear safety, then he was unqualified for the job and should have been laid off; or (3) if being First Aid/CPR certified did not implicate nuclear safety, then DeVine did not bring himself under the ERA's whistleblower protection provision. R. D. & O. at 4-8.

On June 3, 2004, DeVine filed a Petition for Review of the ALJ's decision. He submitted his initial brief on July 7, 2004. Both contained attachments that he had not previously submitted. Fluor and BSE have filed briefs and objections to DeVine's submission of additional exhibits.

ISSUES

On appeal, we decide whether to consider DeVine's additional documents and then whether Fluor and BSE are entitled to summary decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Board. 29 C.F.R. § 24.8; *see* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). We review a recommended decision granting summary decision de novo, thereby applying the same legal standards that governed the ALJ's decision-making process. *Santamaria v. United States Envtl. Prot. Agency*, ARB No. 04-063, ALJ No. 2004-ERA-6, slip op. at 4 (ARB May 31, 2006). Pursuant to 29 C.F.R. § 18.40(d) (2005), summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." In considering a motion for summary decision, the Board reviews the evidence in the light most favorable to the nonmoving party. *Santamaria*, slip op. at 4. However, the nonmoving party may not rest upon the mere allegations or denials of its pleadings, but instead must set forth specific facts which could support a finding in its favor. 29 C.F.R. § 18.40(c). In addition to determining the existence of any genuine issue of material fact, the Board must also determine whether the ALJ properly applied the applicable law. *Santamaria*, slip op. at 4.

DISCUSSION

1. ARB will not consider new evidence

With his June 3, 2004 Petition for Review of the ALJ's R. D. & O., DeVine submitted Appendices A-M. On July 7, 2004, DeVine submitted his initial brief to the ARB and asked us to accept Exhibits 1-15 that were attached. At least some of these documents were not previously submitted to the ALJ in conjunction with the motion for summary decision. Fluor objected and moved to strike exhibits that were not part of the record. We consider the issue of additional evidence first.

When deciding whether to consider new evidence, the Board ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2005), which provides that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c); *see, e.g., Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2003-SOX-15 , Order Denying Stay, slip op. 5-6 (ARB June 9, 2006).

DeVine has not established that his additional exhibits were not available at the time of the ALJ's consideration of Fluor's motion for summary decision. We therefore do not consider them in our review.

2. DeVine's complaint was untimely

According to Fluor, DeVine was notified on April 3, 2003, that he would be laid off. Dobush Declaration, para. 3; Tenny Declaration, para. 4. In his opposition, DeVine notes that BSE/Fluor represented to the DOE that Blue Star Management told him on April 4, 2003, that his position of purge water driver was coming to an end. Opposition to Summary Judgment, Section III, at 3. Although DeVine disputes that there was a lack of work, his opposition does not contest that he was notified of the lay off on April 4. *Id.*

Whistleblower retaliation complaints under the ERA must be filed with the Secretary of Labor "within 180 days after such violation occurs." 42 U.S.C.A. § 5851(b)(1); *see also* 29 C.F.R. § 24.3(b)(2). The limitations period begins to run when the employee is notified of the adverse action, not when it actually takes effect. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-002, slip op. at 12 (ARB Feb. 28, 2003). *See also Chardon v. Fernandez*, 454 U.S. 6 (1981); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980).

DeVine did not file his complaint until October 6, 2003. Complaint at 4; Notice of Determination at 1. Taking the evidence in the light most favorable to DeVine, he did not receive notice of his layoff until April 4, 2003. He would have 180 days from that date, October 1, 2003, to file his complaint. Since it is undisputed that he did not file the complaint until October 6, 2003, he missed the 180-day deadline. His complaint was untimely and BSE and Fluor are entitled to summary decision on that issue.

3. Merits of the complaint

We reach the merits of DeVine's complaint. The ERA provides in relevant 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" . . . notified 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 1995), or refuses to engage in a practice made unlawful by the ERA or AEA. 42 U.S.C.A. § 5851(a)(1)(A)-(B). To prevail on an ERA whistleblower complaint, the complainant must allege and prove that: (1) he engaged in activity the ERA protects; (2) the employer was aware of the protected activity; (3) the employer subjected him to an unfavorable personnel action; and (4) the protected activity was a "contributing factor in the unfavorable personnel action." § 5851(b)(3)(C); *see also Hibler v. Exelon Generation Co., LLC*, ARB No. 05-035, ALJ No. 2003-ERA-9, slip op. at 19 (ARB Mar. 30, 2006); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 6-7 (Sept. 30, 2003). However, "[r]elief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the

same unfavorable personnel action" in the absence of the complainant's protected activity. § 5851(b)(3)(D); *Hibler*, slip op. at 20; *Kester*, slip op. at 7.

We have said that, to constitute protected activity under the ERA, an employee's acts must relate to nuclear safety "definitively and specifically." *Kester*, slip op. at 9. But the complainant need not prove an actual violation of a nuclear safety law or regulation. Our cases say that a reasonable belief of a violation is enough. *See, e.g.*, *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-6, slip op. at 10-11 (ARB July 14, 2000), and cases cited therein.

Unlike the ALJ, we will assume that DeVine created a fact dispute about whether he engaged in protected activity. DeVine was dispatched to drive a purge water truck at a nuclear site containing contaminated groundwater. BSE required training in hazardous waste, radiation, and transportation of hazardous materials, in addition to first aid and CPR. DeVine's complaint about lack of training and qualifications dealt not only with his own lack of first aid and CPR training, which arguably did not relate to nuclear safety "definitively and specifically," but also with his lack of training for other courses, and the lack of knowledge and training of other BSE employees. Viewed in the light most favorable to DeVine, this evidence may be enough to establish a reasonable belief that nuclear safety under the ERA and AEA was at issue.

Yet that is not fatal to Fluor's motion for summary decision. Fluor also argued that BSE laid DeVine off for legitimate, non-discriminatory reasons: there were only a few days remaining on his assignment, and he admitted that he lacked the requisite qualifications for the job. Motion for Summary Judgment, C, at 12-13. We agree. Although determining whether an adverse personnel action was taken for legitimate or illegitimate reasons most often involves a factual determination that makes summary judgment impossible, in this case the facts are undisputed.

Here, DeVine's protected activity included his complaint that he was unqualified for the position of purge water truck driver at a nuclear waste site. The need for a purge water driver was to end within a few days of April 3 or 4, and did end on April 10. BSE was not required to retain an unqualified employee until he could be trained for a position they no longer needed. The fact that DeVine claims to have seen other BSE workers on the site after that, Complaint, para. 18, does not create a triable issue of fact.

Thus, it is not necessary to weigh the evidence to see whether DeVine showed that his protected activity was a factor and whether BSE would have laid him off anyway. The evidence is undisputed that a job he lacked qualifications to perform had come to an end. Fluor and BSE are entitled to summary decision.

CONCLUSION

To the extent DeVine's submissions to us contain new evidence that was not before the ALJ, but was available at the time, we do not consider them. We affirm the grant of summary decision on these grounds: Devine's complaint is untimely; and he

was laid off because his assignment had come to an end and because he lacked the necessary qualifications for the position. We therefore **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge