



**In the Matter of:**

**SYED M. A. HASAN,**

**ARB CASE NO. 05-037**

**COMPLAINANT,**

**ALJ CASE NOS. 2004-ERA-022  
2004-ERA-027**

**v.**

**DATE: May 29, 2009**

**ENERCON SERVICES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

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

***For the Respondent:***

**Terry M. Kollmorgen, Esq., *Moyers, Martin, Santee, Imel & Tetrick, LLP*,  
Tulsa, Oklahoma**

**ORDER OF REMAND**

Syed M. A. Hasan filed two whistleblower complaints with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Enercon Services, Inc. violated the Energy Reorganization Act (ERA) when it refused to hire him because he had previously filed an ERA whistleblower complaint against the company.<sup>1</sup> In a Final Decision and Order (F. D. & O.), the Administrative

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<sup>1</sup> 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

Review Board (the Board) upheld a Department of Labor Administrative Law Judge's (ALJ) Recommended Decision and Order (R. D. & O.) granting Enercon's Motion for Summary Judgment.<sup>2</sup> On appeal, the United States Court of Appeals for the Third Circuit granted Hasan's petition for review, vacated the Board's decision, and remanded the case for further proceedings.<sup>3</sup> In accordance with the court's decision and for the following reasons, we remand this case to the ALJ for further proceedings in accordance with this order.

## BACKGROUND

Hasan is a civil/structural engineer with experience in the nuclear industry. Enercon is a consulting firm that employs engineers and other personnel and furnishes them to clients in the nuclear and other power generating businesses. In November 2003 and February 2004, Enercon posted advertisements on its website stating that it was "looking for" mechanical, electrical, nuclear, and structural engineers with commercial nuclear power experience for immediate "career opportunity" positions in its mid-Atlantic region and that "[a]vailable positions range from junior engineers to senior level engineers."<sup>4</sup>

Hasan sent letters by mail and facsimile to an Enercon employee, Rick McGoey, and several Enercon offices indicating his interest in securing a structural engineering position as described in the website advertisements.<sup>5</sup> In his application letters, Hasan reminded Enercon that he had previously filed a whistleblower complaint against the company and asked it not to discriminate against him.<sup>6</sup>

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employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), 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 2003). The ERA covers applicants for employment, like Hasan, as well as employees. *Samodurov v. Gen. Physics Corp.*, No. 1989-ERA-020, slip op. at 4 (Sec'y Nov. 16, 1993).

<sup>2</sup> *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027 (July 31, 2007) (F. D. & O.).

<sup>3</sup> *Hasan v. United States Dep't. of Labor*, 545 F.3d 248 (2008).

<sup>4</sup> ALJ File, Tab 70 (Enercon's Supplemental Motion for Summary Decision (Supp. Mot.)), Tab 3, Attachment 1, pp. 1- 4.

<sup>5</sup> *Id.* at 5-10.

<sup>6</sup> *Id.*

When Hasan did not receive a job offer in response to his applications for employment, he filed the aforementioned complaints with OSHA alleging that Enercon retaliated against him in violation of the ERA's whistleblower protection provision.<sup>7</sup>

After OSHA found that the May 3 complaint had no merit, Hasan appealed and requested a hearing before an ALJ. Eventually, the ALJ consolidated Hasan's complaints.<sup>8</sup>

In August 2004, Hasan sought discovery of the "names, qualifications and experience, location, job requirement and client of those civil/structural engineers [Enercon] hired nationwide from November 23, 2002 to present."<sup>9</sup> According to the ALJ, Enercon provided that information as well as resumes for 16 engineers it hired during that period in its civil/structural piping division.<sup>10</sup>

Enercon moved for summary judgment before the ALJ and, then, after Enercon complied with the ALJ's order to provide discovery pertaining to all civil/structural engineers it had hired between November 23, 2002, and August 17, 2004, the company filed a supplemental motion for summary decision. The ALJ granted Enercon's motion.

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<sup>7</sup> Hasan filed these complaints on May 3, and July 23, 2004. Supp. Mot. Tab 3, pp. 1-3; Tab 4, p. 9. The same advertisement also appeared on Enercon's website on February 21, 2003; March 17, 2003; November 22, 2003; March 27, 2004; June 27, 2004; and July 22, 2004. The June 27, 2004 and July 22, 2004 website ads also indicated that temporary positions at multiple locations were available for electrical, instrumentation and control, and civil structural engineers. Hasan also attached copies of these advertisements to this complaint. *Id.* at Att. 1, pp. 15-20. The ALJ later permitted Hasan to amend this July 23, 2004 complaint to include an allegation that Enercon refused to hire him for a temporary position as a structural engineer that it had advertised on its website on October 3, 2004. Supp. Mot. Tab 17; Nov. 2, 2004 Transcript (TR) 26.

<sup>8</sup> *Hasan v. Enercon Servs., Inc.*, 2004-ERA-022, -027, slip op. at 2 (ALJ Dec. 22, 2004) (R. D. & O.).

<sup>9</sup> *Id.*

<sup>10</sup> In our original decision and here we refer to the positions for which Enercon hired the 16 engineers as the "non-advertised positions" and to the openings indicated in the website advertisements as the "advertised positions." In response to the ALJ's discovery order, Enercon provided the names of the individuals who made the hiring decisions for the unadvertised positions, the reason and procedure behind each new hire, the name of each client the new hires were sent to serve, and an explanation of why Hasan was not selected. R. D. & O. at 3. The ALJ, however, did not order discovery of the entire personnel files of each new hire because to do so would constitute an "unwarranted fishing expedition." *Id.* We upheld the ALJ's decision stating, "The ALJ did not abuse his discretion in denying Hasan's overly broad and unduly burdensome request. *See Hasan v. Burns & Roe Enters., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-006, slip op. at 3-4 (ARB Jan. 30, 2001)." F. D. & O. at 4 n.16.

The ALJ found, as an uncontested fact, that although the website advertised immediate job openings, such openings did not exist. Rather, Enercon used this “tactic” to recruit, not to hire.<sup>11</sup> Therefore, as for the advertised positions, he concluded that Hasan’s refusal to hire claim should be dismissed on summary decision because there were no job openings, and thus Enercon did not take adverse action against Hasan.<sup>12</sup> As for the 16 non-advertised positions that Enercon filled, the ALJ found that Hasan did not demonstrate that Enercon refused to hire him because of his previous whistleblower complaint. According to the ALJ, Enercon had legitimate non-retaliatory reasons for hiring the 16 engineers, and Hasan did not produce evidence that refusing to hire him instead of the engineers was a pretext for retaliating because of his prior whistleblowing.<sup>13</sup> Consequently, the ALJ recommended that we dismiss Hasan’s complaints, and Hasan appealed.

On appeal, we held that we would not examine whether Enercon discriminated when it hired the 16 engineers for the non-advertised positions because the scope of Hasan’s claims is limited solely to the advertised positions.<sup>14</sup> We also rejected the ALJ’s finding that despite the fact that the website advertised immediate job openings, such openings did not exist because the website advertisements were mere recruiting tools to enhance Enercon’s database of potential candidates.<sup>15</sup> We concluded that on their faces these advertisements can be read as offering engineering jobs. Viewing the evidence in the light most favorable to Hasan, we found that a fact dispute existed as to whether the advertisements offered jobs. Therefore, we held that Enercon was not entitled to summary decision on the basis that the ads did not offer jobs.<sup>16</sup>

Nevertheless, we held that Enercon was entitled to summary judgment because Hasan failed to raise a question of material fact regarding whether Enercon rejected him for the advertised positions. Since Enercon averred that it did not hire any applicants for the advertised civil/structural engineer positions and Hasan indentified no evidence that Enercon rejected him for the positions, we determined that Hasan did not demonstrate that an issue of fact exists about an essential element of his refusal to hire claim, that is, whether Enercon rejected him after he applied for the advertised civil/structural engineering positions. Consequently, we held that Enercon was entitled to summary decision.<sup>17</sup>

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<sup>11</sup> R. D. & O. at 6.

<sup>12</sup> *Id.* at 17.

<sup>13</sup> *Id.* at 16-17.

<sup>14</sup> F. D. & O. at 8.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.*

<sup>17</sup> F. D. & O. at 10.

Hasan appealed our decision to the United States Court of Appeals for the Third Circuit. The court held that given our finding that for purposes of summary judgment the internet advertisements offered actual job openings and the undisputed fact that Enercon did not hire Hasan for any position, it could not affirm our ultimate conclusion that Hasan failed to make a sufficient showing that his employment applications were rejected.<sup>18</sup> Accordingly, the court vacated the Board's decision and remanded the case to the Board "for further proceedings in conformance with this opinion."<sup>19</sup>

Following the court's decision, Enercon moved the Board to affirm the ALJ's R. D. & O. on the grounds that 1) there were no existing positions for which the recruiting advertisements were placed and no engineer was hired in response to the recruiting advertisements, 2) Hasan cannot and did not establish that Enercon had knowledge of his alleged protected activity, 3) Enercon established legitimate non-retaliatory business reasons for selecting the individuals hired for the available engineer positions during the relevant time period.<sup>20</sup> Hasan filed a response requesting the Board to immediately rule in his favor and award him back pay and damages. Alternatively, he asks that we remand this case to an ALJ who has not previously been involved in one of his cases with detailed instructions to provide him with complete discovery.<sup>21</sup>

## DISCUSSION

To prevail under the ERA, a complainant must prove by a preponderance of the evidence that he was an employee (or prospective employee) who engaged in protected activity, that the employer knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action the employer took.<sup>22</sup> Where a complainant like Hasan alleges that the adverse action was the prospective employer's refusal to hire him, he must also establish: 1) that he applied and was qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected and 3) that, after his rejection, the position was either

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<sup>18</sup> 545 F.3d at 251.

<sup>19</sup> *Id.* The court noted that in so doing, it offered no opinion on the merits of Hasan's claims.

<sup>20</sup> Respondent, Enercon Services Inc.'s Motion for Order Affirming the Recommended Decision and Order of Administrative Law Judge Granting Summary Decision and in Opposition to Complainant's Claims for Relief and Brief in Support at 4.

<sup>21</sup> Pro Se Complainant's Emergency Motion for Default Judgment [Motion for Immediate Relief] and Pro Se Complainant's Response to Respondent's Spurious Motion . . .

<sup>22</sup> 42 U.S.C.A. § 5851(b)(3)(C); *Demski v. Ind. Mich. Power Co.*, ARB No. 02-084, ALJ No. 2001-ERA-036, slip op. at 3 (ARB Apr. 9, 2004).

filled or remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>23</sup>

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, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law.<sup>24</sup>

The court reversed our holding that Hasan did not adduce evidence that he was rejected for the advertised positions. But the court's holding does not compel a decision at this juncture denying Enercon's Motion for Summary Judgment. The ALJ found that Hasan "failed to show adverse employment concerning the internet advertisements because contrary to what the advertisement depicted, there were no job openings."<sup>25</sup> Therefore, because the ALJ found that there were no advertised job openings, he did not consider whether Hasan established a question of material fact regarding retaliation, i.e., whether Hasan's protected activity was a contributing factor in Enercon's failure to hire him for the advertised positions. This is an issue that the ALJ, rather than the Board, should consider in the first instance, and we therefore remand this case to the ALJ for his further consideration.

Additionally, we note that the court did not discuss either the issue whether the ALJ properly limited Hasan's discovery requests or our finding that we would not address the non-advertised job openings because they were not the subject of Hasan's whistleblower complaint. Thus, we do not revisit our holdings on these issues.

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<sup>23</sup> *Hasan v. U.S. Dep't of Labor*, 298 F.3d 914, 916-917 (10th Cir. 2002); *see also Hasan v. Sargent & Lundy*, ARB No. 03-030, ALJ No. 2000-ERA-007, slip op. at 3 (ARB July 30, 2004) (*Hasan III*); *Samodurov*, slip op. at 9-10 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

<sup>24</sup> *Seetharaman v. Gen. Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004); *Demski*, slip op. at 3. *See also Hasan v. Southern Co., Inc.*, ARB No. 04-040, ALJ No. 2003-ERA-032, slip op. at 3-4 (ARB Mar. 29, 2005) (*Hasan II*).

<sup>25</sup> R. D. & O. at 17.

Therefore, in accordance with the appellate court's order vacating our previous decision, we **REMAND** this case to the ALJ for further proceedings consistent with this order.<sup>26</sup>

**SO ORDERED.**

**OLIVER TRANSUE**  
**Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Chief Administrative Appeals Judge**

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<sup>26</sup> As indicated above, the court's remand to us is predicated, in part, on our finding, for purposes of summary judgment, that the website advertisements offered actual jobs. Because Enercon has proffered no convincing grounds for us to depart from that finding, we **DENY** its motion to affirm the ALJ's R. D. & O.

Further, given our decision above concluding that this case is not in posture for decision, we **DENY** Hasan's motion for immediate relief. In addition, the only reason Hasan has proffered for remanding this case to a new judge on remand is that the ALJ erred in applying the summary judgment standard. We presume that an ALJ is unbiased unless a party alleging bias can support that allegation; and a party generally cannot demonstrate bias without proof of an extra-judicial source of bias. *See, e.g., Matter of Slavin*, ARB No. 04-088, ALJ No. 2004-MIS-002, slip op. at 15-18 (ARB Apr. 29, 2005); *Eash v. Roadway Express, Inc.*, ARB No. 00-061, ALJ No. 1998-STA-028, slip op. at 8 (ARB Dec. 31, 2002). Unfavorable rulings and possible legal errors in an ALJ's orders generally are insufficient to prove bias. *Powers v. PACE*, ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 16 (ARB Rev. Dec. 21, 2007). Therefore, we **DENY** Hasan's motion to remand this case to a different judge on remand.