



In the Matter of:

RODNEY VAL BENSON,

ARB CASE NO. 08-037

COMPLAINANT,

ALJ CASE NO. 2006-ERA-017

v.

DATE: April 9, 2010

**NORTH ALABAMA
RADIOPHARMACY, INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD:

Appearances:

For the Complainant:

Rodney Val Benson, *pro se*, Huntsville, Alabama

For the Respondent:

**David B. Walston, Esq., Michael A. Vercher, Esq., *Christian & Small LLP*,
Birmingham, Alabama**

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act (ERA).¹ Rodney Val Benson filed a complaint alleging that his former employer, North Alabama Radiopharmacy, Inc. (NARP), violated the ERA by discharging him from employment. A Department of Labor Administrative Law Judge

¹ 42 U.S.C.A. § 5851 (West 2003 & Supp. 2009). Regulations implementing the whistleblower protection section of the ERA are found at 29 C.F.R. Part 24 (2009).

(ALJ) dismissed the complaint. Benson appealed the ALJ's ruling to this Board. For the following reasons, we deny the complaint.

BACKGROUND

NARP is a pharmacy that compounds and dispenses nuclear pharmaceuticals. The company employs nuclear pharmacists, pharmacy technicians, clerks, and drivers. On March 8, 2004, Benson began working as a delivery driver for NARP out of its Huntsville, Alabama pharmacy.²

NARP's pharmacists prepare and package the pharmaceuticals for transport by placing them in lead-shielded containers. In some cases, a small amount of radioactive material may contaminate the exterior of the containers. NARP's drivers measure the amount of radiation the containers emit with a device known as a well counter.³ This is done to ensure that the containers do not emit radiation above a level that would disrupt the diagnostic equipment NARP's customers used.⁴ NARP provided Benson with the necessary training for handling and decontaminating these containers.⁵

On December 8, 2004, Benson tested a container prepared by Steve Justice, one of NARP's nuclear pharmacists. The test revealed that the container had a well counter reading of 48,000.⁶ Benson informed Justice about the high well counter reading, but he did not report the incident to Justice or NARP as an intentional contamination. Benson decontaminated the container, and he was not instructed to seek medical attention for his exposure.⁷

That same day, Benson reported the high well counter reading to Nuclear Regulatory Commission (NRC) representative Oscar DeMiranda. According to Benson, DeMiranda told him to contact the Alabama Office of Radiation Control (AORC).⁸

² Hearing Transcript (Tr.) at 58, 69, 120-121.

³ *Id.* at 123, 125-28.

⁴ *Id.* at 133-34.

⁵ Respondent's Exhibit (RX) 1.

⁶ Tr. at 62. The nuclear components of NARP's pharmaceuticals are measured in units called curies. A typical dose NARP dispensed contains about 40 millicuries, which is equivalent to 40,000 microcuries. *Id.* at 128-129.

⁷ *Id.* at 29-32.

⁸ *Id.* at 106. DeMiranda did not testify at the hearing.

Benson spoke to David Turberville, an inspector with AORC, and told him that he had received an “excessive exposure” to radiation.⁹ Turberville concluded that Benson’s exposure was not harmful or severe, and that the alleged contamination had been properly handled and contained. He also told Benson to monitor his dosimeter badge results.¹⁰

On September 12, 2005, Benson submitted a letter to Max Akin, NARP’s President and CEO. In the letter, Benson accused Andy Lewallen, another NARP driver, of sexually assaulting him. Benson also accused Justice of intentionally contaminating him in December 2004.¹¹ Benson submitted a second letter to Akin on September 19, 2005, to which he attached “a list of high readings since [his] employment.”¹² According to Benson, he also contacted Myron Riley, an inspector at AORC, on October 4, 2005, to report that “safety and health violations were occurring at the Huntsville facility, including [his] intentional severe radiation contamination” on December 8, 2004.¹³

On October 25, 2005, Benson met with Akin. He accused other NARP employees of failing to take proper radiation readings, falsifying documents, and failing to follow safety procedures.¹⁴ That same day, Akin initiated an investigation of Benson’s concerns. He interviewed NARP employees and reviewed the radiation reports and delivery records relevant to Benson’s allegation of intentional contamination. Akin concluded that Benson had not received any harmful exposure to radiation.¹⁵

Akin contacted Riley and asked him to come to NARP to review the reports and records. According to Akin, Riley did not inform him that Benson had already contacted AORC. After his inspection, Riley concluded that NARP’s “facilities, organization, administrative controls, procurement and use of radioactive materials, employee radiation exposure records and radiation safety and training were in compliance with the Alabama State code.”¹⁶

⁹ *Id.* at 183.

¹⁰ *Id.* at 185. A dosimeter badge is a piece of x-ray film, encapsulated in plastic that is used to measure an individual’s exposure to radiation over time. *Tr.* at 137.

¹¹ RX-2.

¹² *Id.* He did not indicate that these high readings constituted intentional or excessive contamination.

¹³ *Tr.* at 50.

¹⁴ *Id.* at 38.

¹⁵ *Id.* at 164.

¹⁶ D. & O. at 35; *see also* *Tr.* at 164-65.

In January 2006, the Tennessee Pain Treatment Center, one of NARP's clients, complained about Benson's behavior during his deliveries. NARP stopped dispatching Benson to this customer.¹⁷ According to Akin, the company also lost a customer on Benson's route, which reduced the number of deliveries Benson could complete. As a result, Akin gave Justice the authority to reduce Benson to part-time status.¹⁸ On February 8, 2006, Justice informed Benson of the reduction. Benson expressed his dissatisfaction with the reduction, and Justice told Benson that he could verify the decision with Akin if he wished to do so. That same day, Benson spoke to Akin, and Akin verified the decision.¹⁹

On February 9, 2006, Benson told Justice that he had spoken to Akin. Benson told Justice that Akin knew nothing about the reduction in hours. He also challenged Justice's authority to reduce his hours.²⁰ Justice thereafter dispatched Benson to his delivery route. Justice spoke to Akin later that day about his conversation with Benson. When Akin determined that Benson had lied to Justice, he instructed Justice to discharge Benson.²¹

Benson filed a complaint with the Occupational Safety and Health Administration (OSHA) on March 27, 2006. He alleged that NARP discharged him in retaliation for "complaints [he] made to NARP management about wrongful acts and safety violations at the NARP Huntsville facility."²² OSHA investigated and concluded that the complaint was without merit. Benson requested a hearing before the ALJ. The ALJ conducted the hearing on February 1, 2007. Benson appeared pro se.

Following the hearing, the ALJ issued a Decision and Order (D. & O.) dismissing Benson's complaint. The ALJ held that "[Benson] has not met his burden to prove that he engaged in protected activity within the meaning of the ERA since his allegations were not reasonably based and/or supported by credible evidence."²³ The ALJ also held that, even if the ERA protected Benson's alleged activities, he failed to prove that they

¹⁷ RX-9.

¹⁸ Tr. at 167.

¹⁹ *Id.*

²⁰ RX-9; Tr. at 169, 236.

²¹ Tr. at 169.

²² Complaint (as attached to OSHA Determination) at 1.

²³ D. & O. at 34.

were a contributing factor in his discharge. Benson appealed the ALJ's ruling to this Board.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review the ALJ's decision.²⁴ Under the Administrative Procedure Act, the Board, as the Secretary of Labor's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes.²⁵ We review questions of law de novo.²⁶

When the parties filed their briefs with the Board, we reviewed findings of fact under the ERA de novo.²⁷ The current regulations call for substantial evidence review.²⁸ Neither party has requested leave to supplement or amend its brief in light of the change in the standard of review for questions of fact. We therefore assume that neither party considers the change in standard of review material to this case.²⁹ In any event, applying either standard of review, we conclude that NARP did not violate the ERA, and Benson's complaint must be denied.

DISCUSSION

A. The Legal Standard

The ERA provides, in pertinent part, that:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his

²⁴ Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 24.110.

²⁵ See 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.1(a).

²⁶ 5 U.S.C.A. § 557(b).

²⁷ See *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 4 (ARB Sept. 30, 2003).

²⁸ 72 Fed. Reg. 44,956 (Aug. 10, 2007), codified at 29 C.F.R. § 24.110(b)(2009).

²⁹ Cf. Fed. R. App. P. 28(j) (the parties have the burden of calling the court's attention to any pertinent and significant authorities that came to the parties' attention after their briefs have been filed).

compensation, terms, conditions, or privileges of employment because the employee (or 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.^[30]

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 had knowledge 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.”³¹

We have said that, to constitute protected activity under the ERA, an employee’s acts must relate to nuclear safety “definitively and specifically.”³² But the complainant need not prove an actual violation of a nuclear safety law or regulation. A reasonable

³⁰ 42 U.S.C.A. § 5851(a).

³¹ 42 U.S.C.A. § 5851(b)(3)(C); *see also Hibler v. Exelon Generation Co., LLC*, ARB No. 05-035, ALJ No. 2003-ERA-009, slip op. at 19 (ARB Mar. 30, 2006); *Kester*, slip op. at 6-7.

³² *Kester*, slip op. at 9.

belief of a violation is enough.³³ A whistleblower complaining about an employer's violation of the ERA, AEA, or their implementing regulations must therefore have actually believed that the employer was in violation, and that belief must be reasonable for an individual in the same circumstances with the same training and experience.³⁴

Additionally, “[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.³⁵

B. Protected Activity

The ALJ concluded that Benson “has not sustained his burden of persuasion by a preponderance of the evidence that he engaged in protected activity for [sic] which Respondent had knowledge.”³⁶ We agree, but we conclude that Benson’s December 8, 2004 phone calls to the NRC and AORC constitute ERA-protected activity even though NARP had no knowledge of those calls.

On December 8, 2004, Benson discovered that a test on one of the containers resulted in a well counter reading of 48,000. Justice testified that it took three cycles of washing to get the count down to an acceptable level.³⁷ Following his discovery, Benson contacted the NRC and AORC to complain about what he characterized as a “severe intentional contamination.”³⁸

An employee has engaged in ERA-protected activity if he has “commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding” under the ERA or AEA.³⁹ By contacting the NRC and AORC to complain about a severe contamination, Benson was about to commence a proceeding under the ERA. He therefore engaged in ERA-protected activity.⁴⁰ Benson did not file written

³³ See, e.g., *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 10-11 (ARB July 14, 2000), and cases cited therein.

³⁴ *Id.* at 27-28.

³⁵ 42 U.S.C.A. § 5851(b)(3)(D); *Hibler*, slip op. at 20; *Kester*, slip op. at 7.

³⁶ D. & O. at 39.

³⁷ Tr. at 229.

³⁸ *Id.* at 28.

³⁹ 42 U.S.C.A. § 5851(a)(1)(D).

⁴⁰ See *Hale v. Baldwin Assocs.*, 1985-ERA-037, (Sec’y Sept. 29, 1989) (adopting ALJ R. D. & O., slip op. at 18) (“Under the plain language of the statute, an employee is protected

complaints with the NRC and AORC, but his oral complaints qualify for protection under the ERA⁴¹

Although Benson commenced a proceeding against NARP on December 8, 2004, Turberville informed him that same day that his exposure was not harmful or severe and that the alleged contamination had been properly handled and contained. The ALJ found that Justice did not intentionally contaminate Benson.⁴² And Benson did not present evidence proving that his exposure was harmful or a violation of any state or federal law.

In contrast, NARP presented evidence indicating that Benson's radiation exposure while he was employed at NARP was well below the radiation limits set by the NRC.⁴³ Justice testified that, because of the type of radioactive material used at NARP, he had never seen any contamination that would be considered harmful.⁴⁴ Akin testified that the well counter Benson used was not designed to detect radiation levels that would be harmful to human health.⁴⁵ And Gilbert Stone, President of Muscle Shoals Rad Physics, a medical consulting company, testified that "absolutely no harm" could result from the exposure alleged by Benson.⁴⁶

Benson did not inform NARP that he believed the December 8, 2004 incident constituted a nuclear safety violation until September 12, 2005. By that date, Turberville had informed Benson that the incident had been properly handled. Turberville told Benson to present his allegations in writing, but Benson never did so. And although he now contends that the exposure made him ill, he never sought medical attention for the exposure.⁴⁷

if he is 'about to commence,' 'about to testify,' or 'about to assist or participate' in a proceeding before the Nuclear Regulatory Commission.").

⁴¹ See, e.g., *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-014, slip op. at 25 (ARB Nov. 13, 2002) ("Complaints to government agencies, whether written or oral, are covered by the [ERA].")

⁴² D. & O. at 33.

⁴³ RX 4-5; Tr. at 191.

⁴⁴ Tr. at 269.

⁴⁵ *Id.* at 125-26.

⁴⁶ *Id.* at 263; see also RX-8 (Stone letter to OSHA) ("The 'high readings' the complainant cited are not high in fact, but are representative of the typical radiation survey instrument readings that are required of all licensed radiopharmaceutical suppliers before the doses are packaged and delivered to the requesting medical facility.").

⁴⁷ Tr. at 105.

By the time he complained to Akin on September 12, 2005, Benson did not have a reasonable belief that Justice had subjected him to a severe intentional contamination. We therefore agree with the ALJ's conclusion that, when Benson informed Akin of the December 8, 2004 incident, he "could not have rationally perceived a reasonable belief that he was intentionally or coincidentally contaminated and for that reason his complaint [to Akin] does not constitute protected activity within the meaning of the ERA."⁴⁸

Although Benson engaged in ERA-protected activity by contacting the NRC and AORC, he failed to prove that he engaged in any other ERA-protected activities during his employment at NARP. The ALJ concluded that Benson voiced internal complaints to Akin on September 12, 2005, and October 25, 2005, but these complaints "did not rationally constitute protected activity since they were not reasonably perceived."⁴⁹ We agree.

The record supports the ALJ's finding that "no specific nuclear safety violations were articulated by [Benson] nor substantiated by the record."⁵⁰ Benson did not prove that, during his employment at NARP, he complained about not having a dosimeter badge or a lab coat. He also failed to show that NARP failed to maintain safety manuals or post employee procedures for decontamination and filing grievances.

Benson's own deposition testimony refutes his assertion that he did not receive training during his employment.⁵¹ He also failed to prove that NARP employees failed to take radiation readings, falsified documents, or failed to follow safety procedures. In contrast, NARP presented testimony and record evidence supporting its contention that it did not commit the safety violations alleged by Benson.⁵²

We agree with the ALJ's conclusion that Benson's complaints to Akin about nuclear safety violations by NARP were not reasonable, and therefore do not constitute protected activity. But Benson engaged in ERA-protected activity by contacting the NRC and AORC on December 8, 2004.

⁴⁸ D. & O. at 34.

⁴⁹ *Id.* at 33.

⁵⁰ *Id.*

⁵¹ RX-14, pp. 55-56.

⁵² RX 5 (dosimetry reports), 7 (Turberville Affidavit, with attachments), 8 (Stone letter to OSHA); Tr. at 202-03, 210, 217-18, 281.

C. Knowledge

The only ERA-protected activities in which Benson engaged were his discussions with the NRC and AORC on December 8, 2004. The ALJ found that NARP had no knowledge that Benson engaged in discussions with anyone at these agencies prior to his discharge. The record supports this finding.⁵³

It therefore follows, as stated by the ALJ, that Benson failed to prove that he engaged in protected activity of which NARP had knowledge.⁵⁴ However, we will proceed, as did the ALJ, to consider whether Benson proved by a preponderance of the evidence that any of his allegedly protected activities were contributing factors in his discharge.

D. Causation

Employees alleging employer retaliation in violation of the ERA must file their complaints with OSHA within 180 days after the alleged unfavorable personnel action has occurred.⁵⁵ Benson filed his complaint on March 27, 2006. The only allegedly discriminatory act Benson pled is his discharge.⁵⁶ As indicated above, an employer may not discharge an employee for engaging in activity the ERA protects.

To establish discrimination under the ERA, Benson would need to prove by a preponderance of the evidence that his complaints regarding the alleged intentional contamination were “contributing factors” in NARP’s decision to terminate his employment.⁵⁷ Benson need not provide direct proof of discriminatory intent but may instead satisfy his burden of proof through circumstantial evidence of discriminatory intent.⁵⁸

⁵³ D. & O. at 32-33; Tr. at 144, 188.

⁵⁴ D. & O. at 39.

⁵⁵ 42 U.S.C.A. § 5851(b)(1).

⁵⁶ Complaint (as attached to OSHA Determination) at 1; *see also* ALJX-4 (Complainant’s Formal Complaint without attachments).

⁵⁷ *Tipton v. Ind. Mich. Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-030, slip op. at 5 (ARB Sept. 29, 2006).

⁵⁸ *Pierce v. U.S. Enrichment Corp.*, ARB Nos. 06-055, -058, -119, ALJ No. 2004-ERA-001, slip op. at 12-13 (ARB Aug. 29, 2008).

The ALJ concluded that, even assuming that Benson engaged in ERA-protected activities prior to his discharge, and that NARP had knowledge of those activities, Benson “has not presented sufficient evidence to meet his burden of proving, by a preponderance of the evidence, that his alleged protected activity was a contributing factor in the adverse action taken against him by [NARP].”⁵⁹ We agree with this conclusion.

Akin investigated Benson’s allegations in October 2005, and he reported the allegations to Riley at the AORC. The AORC informed Akin that NARP was operating in compliance with the law. NARP did not subject Benson to any change in his working conditions until February 2006, when Akin and Justice decided to reduce his hours.

The ALJ found that NARP reduced Benson’s hours because the company had lost a customer and decided to refrain from dispatching Benson to the Tennessee Pain Treatment Center. The record supports this finding. Benson argued that the rationale presented by NARP was a pretext for discrimination, but as noted by the ALJ, the reason for reducing his hours is irrelevant in light of the fact that NARP discharged Benson for insubordinate behavior.

Even if an employee engages in activity protected by a whistleblower statute, an employer may discipline that employee for insubordination.⁶⁰ Furthermore, when the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation becomes less likely because the intervening event also could have caused the adverse action.⁶¹

At the hearing on his complaint, Benson presented documents and testimony challenging NARP’s decision to reduce his hours. But he failed to adequately address the rationale for his discharge, i.e., his insubordinate behavior on February 9, 2006. The ALJ concluded that NARP decided to discharge Benson because he lied to Justice about his discussion with Akin regarding his schedule. The record supports this conclusion.

In sum, we conclude that Benson has failed to prove by a preponderance of the evidence that his allegedly protected activities were a contributing factor in his discharge.

⁵⁹ D. & O. at 38.

⁶⁰ See, e.g., *Abraham v. Lawnwood Reg’l Med. Ctr.*, ARB No. 97-031, ALJ No. 1996-ERA-013, slip op. at 4 (ARB Nov. 25, 1997), citing *Kahn v. U.S. Sec’y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995); *Adjiri v. Emory Univ.*, ARB No. 97-135, ALJ No. 1997-ERA-036, slip op. at 6-7 (ARB July 14, 1998).

⁶¹ *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-024, slip op. at 5 (ARB Jan. 31, 2007), citing *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 1996-ERA-034, -038, slip op. at 6-7 (ARB Mar. 30, 2001).

E. Post-Hearing Submissions

At the end of the hearing, the ALJ closed the record after asking the parties if they wished to add “anything else” to the record.⁶² Neither party indicated that they wished to do so. Benson thereafter submitted exhibits to the ALJ marked as Complainant’s Exhibit (CX) 36 and CX 38-51. The ALJ rejected these exhibits. In his brief before the Board, Benson argues that the ALJ erred by rejecting these exhibits.⁶³

We will reverse an ALJ’s evidentiary rulings only when they are proven to be arbitrary or an abuse of discretion.⁶⁴ The applicable Rule of Practice states: “[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.”⁶⁵

CX 38-41 are letters from the NRC and State of Alabama discussing general procedures applicable to the processing of Benson’s accusations against NARP. CX42 is a poster from the Alabama Department of Public describing the standards for protection against radiation. CX 50 is a letter from a former NARP customer regarding its use of NARP services. And CX 36, 43-49, and 51 are documents prepared by Benson containing his interpretation of events.

None of these documents contain information material to Benson’s discharge from employment at NARP. Because they did not constitute material evidence that was unavailable to Benson prior to the hearing on his complaint, the ALJ did not err by rejecting these proposed exhibits.

⁶² Tr. at 289.

⁶³ Complainant’s Initial Brief at 1.

⁶⁴ *Khandelwal v. Southern Calif. Edison*, ARB No. 98-159, ALJ No. 1997-ERA-006, slip op. at 2 (ARB Nov. 30, 2000).

⁶⁵ 29 C.F.R. § 18.54(c)(2009).

CONCLUSION

Benson failed to prove that NARP had knowledge, prior to his discharge, that he engaged in ERA-protected activity. He also failed to prove that his alleged protected activities contributed to his discharge. We therefore **DENY** Benson's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge