



**In the Matter of:**

**SYED M.A. HASAN,**  
**COMPLAINANT,**

**ARB CASE NO. 10-061**

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

**v.**

**DATE: July 28, 2011**

**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, LLP*, Tulsa, Oklahoma**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge***

**DECISION AND ORDER OF REMAND**

Syed Hasan filed two complaints alleging that the Respondent, Enercon Services, Inc., refused to hire him in violation of the employee protection provisions of the Energy Reorganization Act (ERA)<sup>1</sup> and its implementing regulations.<sup>2</sup> A United States Department of

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<sup>1</sup> 42 U.S.C.A. § 5851 (West 2007). Congress has amended the ERA since Hasan filed this complaint. Energy Policy Act of 2005, Pub. L. 109-58, Title VI, § 629, 119 Stat. 785 (Aug. 8, 2005). We need not decide whether the amendments would apply to this case, which was filed before their enactment date, because even if the amendments applied, they are not at issue in this case and thus would not affect our decision.

<sup>2</sup> 29 C.F.R. Part 24 (2010).

Labor (DOL) Administrative Law Judge (ALJ) granted Enercon's motion for summary decision and dismissed Hasan's complaint because he found that Hasan failed to raise the inference that Enercon violated the ERA when it failed to hire him. For the following reasons we reverse and remand.

## INTRODUCTION

This matter involves Enercon's alleged retaliatory refusal to hire Hasan after he attempted to apply for employment with Enercon on numerous occasions over a two-year period. This is the second time that this matter has come before the Board by way of summary decision, the first time resulting in a remand from the Third Circuit Court of Appeals. Despite its long procedural journey and convoluted factual record, the issue on appeal is essentially a narrow one. Enercon did not focus on the issues of protected activity and adverse action, focusing only on the issue of causation. The issue of causation is generally a difficult issue to resolve by summary disposition because it often involves factual questions of motivation and intent. If there is a genuine dispute of material fact as to motivation and intent, the ALJ must conduct an evidentiary hearing to resolve those disputes.

In this case, the undisputed facts raise a genuine dispute as to material facts regarding causation requiring the ALJ to decide this matter after a hearing followed by the ALJ's findings of fact and conclusions of law. More specifically, the undisputed facts show that Hasan responded to Enercon's 2002 "Mid-Atlantic" job vacancy announcement in November 2002, was rejected, and the job remained open. The Respondent explained that nobody was hired pursuant to the November 2002 job announcement, and the job announcement allegedly was not used to actually hire people. Hasan then argues, based on undisputed facts, that: (1) he continued to respond to additional job announcements without success, (2) offered to work in any job anywhere, and (3) the Respondent did in fact hire several individuals during the time that Hasan was applying for a job. The combination of multiple job announcements left open, conflicting evidence, the Respondent's multiple rejections of Hasan, and multiple hires during the same two-year period, raises a sufficient factual dispute requiring the ALJ to hold an evidentiary hearing.

## PROCEDURAL HISTORY

Hasan filed his complaints on May 3, 2004, and July 23, 2004. After the Occupational Safety and Health Administration dismissed the May 3, 2004 complaint, Hasan appealed and requested an ALJ hearing.<sup>3</sup> Eventually, the ALJ consolidated Hasan's complaints. *Id.*

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<sup>3</sup> *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022,-027; slip op. at 2 (ALJ Dec. 22, 2004).

After discovery, Enercon moved to dismiss the case. The ALJ granted summary decision on Hasan's claims concerning advertised positions because there were no actual job openings and on the claims concerning unadvertised positions because Hasan failed to show that Enercon refused to hire him because of his protected activity.<sup>4</sup>

Hasan appealed to the Board. On appeal, the ARB limited Hasan's claims to those for advertised positions, and affirmed the summary decision on the different ground that Hasan failed to show a genuine issue of material fact as to whether Enercon took adverse action against him when it did not hire him.<sup>5</sup>

Hasan appealed to the Third Circuit. The Third Circuit concluded that the law did not support the Board's conclusion that Hasan failed to show that he was rejected when he was not hired for an employment position and remanded the case to the Board.<sup>6</sup>

On remand from the Third Circuit, the Board remanded to the ALJ to consider whether Hasan established a genuine issue of material fact regarding whether Hasan's protected activity was a contributing factor in Enercon's failure to hire him for advertised positions.<sup>7</sup>

On remand, the ALJ again granted summary decision in Enercon's favor, concluding that Hasan "failed to sufficiently show an essential element of his case" that Enercon retaliated against him because he engaged in protected activity.<sup>8</sup>

#### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated authority to the Administrative Review Board (Board) to issue final agency decisions in cases arising under the ERA's employee protection provisions.<sup>9</sup>

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<sup>4</sup> *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 16-17 (ALJ Dec. 22, 2004).

<sup>5</sup> *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 11 (ARB July 31, 2007).

<sup>6</sup> *Hasan v. U.S.D.O.L.*, 545 F.3d 248, 252 (3d Cir. 2008).

<sup>7</sup> *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 6 (ARB May 29, 2009).

<sup>8</sup> *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 9 (ALJ Feb. 10, 2010). Hasan timely appealed to the ARB.

<sup>9</sup> Secretary's Order 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.

The Board reviews de novo an ALJ's grant of summary decision pursuant to 29 C.F.R. Part 18.40 (2010).<sup>10</sup> Pursuant to that regulation, summary decision is appropriate "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."<sup>11</sup> The first step is to determine whether there is any genuine issue of a material fact. If the pleadings and documents the parties submitted demonstrate the existence of a genuinely disputed material fact, then summary decision cannot be granted. Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.

Determining whether there is an issue of material fact requires several steps. First, the ALJ must examine the elements of the complainant's claims to sift the material facts from the immaterial.<sup>12</sup> Once materiality is determined, the ALJ next must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. The party moving for summary decision bears the burden of showing that there is no genuine issue of material fact.<sup>13</sup> When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the non-moving party, the complainant in this case.<sup>14</sup> The moving party must come forward with an initial showing that it is entitled to summary decision.<sup>15</sup> The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim.<sup>16</sup>

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<sup>10</sup> *Holland v. Ambassador Limousine/Ritz Transp.*, ARB No. 07-013, ALJ No. 2005-STA-050, slip op. at 1 (ARB Oct. 31, 2008); *King v. BP Prod. N. Am., Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4-5 (ARB July 22, 2008).

<sup>11</sup> 29 C.F.R. § 18.40(d).

<sup>12</sup> *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit" preclude summary judgment.).

<sup>13</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

<sup>14</sup> *Santamaria v. United States Env'tl. Prot. Agency*, ARB No. 04-063, ALJ No. 2004-ERA-006, slip op. at 4 (ARB May 31, 2006) (citations omitted).

<sup>15</sup> 29 C.F.R. § 18.40(d) (derived from Rule 56 of the Federal Rules of Civil Procedure.). See *Pickett v. Tennessee Valley Auth.*, ARB No. 00-076, ALJ No. 2000-CAA-009, slip op. at 3 (ARB Apr. 23, 2003).

<sup>16</sup> *Holland*, ARB No. 07-013, slip op. at 2 (citation omitted).

In responding to a motion for summary decision, the nonmoving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts which could support a finding in his favor. *See* 29 C.F.R. § 18.40(c). If the moving party presented admissible evidence in support of the motion for summary decision, the non-moving party must also provide admissible evidence to raise a genuine issue of fact. In reviewing an ALJ's summary decision, we do not weigh the evidence or determine the truth of the matters asserted.<sup>17</sup> The Board "construe[s] complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude."<sup>18</sup>

### FACTUAL ALLEGATIONS

Hasan has submitted the following factual allegations and evidence in support of his case, some of which are undisputed. The Respondent, Enercon, is a national firm with fifteen offices throughout the United States. Attachment 1 to Hasan's OSHA complaint (May 3, 2004) (Tabs 2, 36B).<sup>19</sup> Hasan is a structural engineer with at least twenty-five years of experience. (Tabs 2, 13, 28, 36B, 53). He has expertise in the design of reinforced concrete and structural steel structures, pipe supports, and structural analysis/design foundations. (Tab 28). He was admitted to the degree of Bachelor of Science in the University of Karachi in 1962 and admitted to the degree of Bachelor of Engineering in the University of Karachi in 1965. (Tab 26). He has experience working for various companies between 1969 and 1999 including Stone & Webster, various nuclear reactor plant projects, and Bechtel Corporation. (Tabs 28, 36E).

On October 29, 1999, the Nuclear Regulatory Commission (NRC) informed Hasan in a letter that they were reviewing employee discrimination concerns he had at the D.C. Cook Nuclear Plant. (Tabs 2, 13). On May 9, 2000, the NRC notified Hasan that they had completed their review of his discrimination claim. (Tabs 2, 13). Based on its investigation, the NRC concluded that the American Electric Power Company had discriminated against him because of his previous whistleblower activities. (Tabs 2, 13). The NRC issued a violation of NRC requirements to American Electric Power Company because of the discrimination. (Tabs 2, 13).

Beginning July 2002, Enercon advertised job openings for "Mechanical, Electrical, Nuclear, and Structural Engineers" in the "Mid-Atlantic" region. *See* Respondent's Reply Brief

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<sup>17</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 6 (ARB May 29, 2009) (citation omitted); *Seetharaman v. G.E. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004) (citations omitted).

<sup>18</sup> *Hyman v. KD Res. L.L.C., et al.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 8 (ARB Mar. 31, 2010) (citations omitted).

<sup>19</sup> The ALJ file contains a compilation of tabbed documents 1 through 75; where referenced they are identified as "Tab(s);" the references to "A" refer to attachments A1 through A63 to Hasan's initial brief to the Board filed March 17, 2010.

at 10. By a letter dated November 24, 2003, Hasan responded to that advertisement and applied for a job. See Reply Brief, at 12.

On February 5, 2003, Rick McGoey, the Director of Enercon in New Jersey, sent Hasan a letter and a check for expenses for an interview Hasan had with Enercon. (A1; Tabs 2, 36B). The letter stated that Enercon was impressed with Hasan's capabilities but Enercon did not have an opportunity matching his skills. The letter further stated that the Respondent was interested in possible employment opportunities for Hasan and that Enercon would keep Hasan's resume on file and hoped to identify a work opportunity for him in the future. (Tabs 2, 36B).

On February 21, 2003, Enercon posted an internet advertisement for job openings including a "continuing need for degreed and experienced engineers" in mechanical, electrical, and civil engineering disciplines. (A12-13; Tabs 36B, 36D). The positions required four-year degrees and substantial engineering experience in the commercial nuclear power industry and were temporary positions at various nuclear power plants. (A12-13; Tabs 36B, 36D).

On March 17, 2003, Enercon posted an internet advertisement for "immediate opportunities . . . for mechanical, electrical, nuclear, and structural engineers with commercial nuclear power experience." (A14-A15; Tabs 36B, 36D). The advertisement stated that Enercon was looking for engineers for its Germantown, Maryland engineering office. (A14-A15; Tabs 36B, 36D). On March 19, 2003, Hasan applied for the internet advertised positions in a letter to McGoey, which listed his experience. (A4-A5; Tab 13). Hasan stated that he was willing to work for Enercon at any place, for any shift, and for any salary that Enercon deemed reasonable. (A4-A5; Tab 13). He asked that Enercon "[p]lease . . . not Discriminate and Retaliate against me for being a Truthful and Honest Whistleblower of this Country," and stated that he had repeatedly informed the NRC and others about serious safety concerns regarding nuclear power plants that the NRC substantiated. (A4-A5; Tab 13).

On November 22, 2003, Enercon posted an internet advertisement for "immediate opportunities . . . for mechanical, electrical, nuclear, and structural engineers with commercial nuclear power experience." (A26; Tabs 2, 36B, 74F). The advertisement stated that Enercon was looking for engineers for its Germantown, Maryland engineering office. (A26; Tabs 2, 36B, 74F). On November 24, 2003, Hasan applied for the internet advertised positions in two letters to McGoey and to "Sir/Madam," respectively, which listed his experience. (A8-A11; Tabs 2, 28). Hasan stated that he was willing to work for Enercon at any place, for any shift, and for any salary that Enercon deemed reasonable. (Tabs 2, 28). Again he requested that Enercon "[p]lease . . . not Discriminate and Retaliate against me for being a Truthful and Honest Whistleblower of this Country," and stated that he had repeatedly informed the NRC and others about serious safety concerns regarding nuclear power plants that the NRC substantiated. (Tabs 2, 28).

On December 15, 2003, McGoey addressed a letter to Hasan informing Hasan that he received his November 24, 2003 letter concerning employment with Enercon and that his resume and letter were being reviewed against company needs. (A19; Tabs 39, 75). The letter was copied to "J. Richardson" and "K. Cruse." (A19, A50; Tabs 39, 75).

On February 5, 2004, Enercon posted an internet advertisement for “immediate opportunities . . . for mechanical, electrical, nuclear, and structural engineers with commercial nuclear power experience.” (A27; Tabs 12, 13, 36B). The advertisement stated that Enercon was looking for engineers for its Germantown, Maryland engineering office. (A27; Tabs 12, 13, 36B). On February 5, 2004, Hasan applied for the internet advertised positions in three letters to McGoey, John Corn, and to “Sir/Madam,” respectively, which listed his experience. (Tabs 12, 13, 36B). Hasan stated that he was willing to work for Enercon at any place, for any shift, and for any salary that Enercon deemed reasonable. (Tabs 12, 13, 36B). He repeated his request that Enercon “[p]lease . . . not Discriminate and Retaliate against me for being a Truthful and Honest Whistleblower of this Country,” and stated that he had repeatedly informed the NRC and others about serious safety concerns regarding nuclear power plants that the NRC substantiated. (Tabs 12, 13, 36B).

At least four more times over the next five months, Enercon posted an internet advertisement for “immediate opportunities . . . for mechanical, electrical, nuclear, and structural engineers with commercial nuclear power experience” in the Germantown, Maryland engineering office.<sup>20</sup> (A28-31; Tabs 12, 13, 36B).

On October 1, 2004, Hasan again applied for internet positions he referenced as advertised on September 29, 2004, and October 1, 2004, in a letter to Kim Cruse that listed his experience. (A23-25; Tab 53). He noted that Enercon frequently used informal methods of hiring without advertisements and stated that his resume had been with Enercon for years. (A23-25; Tab 53). He asserted that Enercon was obligated to hire him for available jobs for which he was qualified and that he did not have to apply formally for the job in question. (A23-25; Tab 53). Hasan stated that he was willing to work for Enercon at any place, for any shift, and for any salary that Enercon deemed reasonable. (A23-25; Tab 53). Once again he asked that Enercon “[p]lease . . . not Discriminate and Retaliate against me for being a Truthful and Honest Whistleblower of this Country,” and stated that he had repeatedly informed the NRC and others about serious safety concerns regarding nuclear power plants that the NRC substantiated. (A23-25; Tab 53).

On October 3 and November 2, 2004, Enercon again posted an internet advertisement for “electrical, instrumentation & control engineers, and civil structural engineers” in multiple locations. (Tab 59).

Enercon never hired Hasan for any position.

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<sup>20</sup> Those postings occurred on March 27, June 27, and July 22 and 24, 2004. (Tabs 12, 13, 22, and 36B).

During the two years that Hasan responded to various Enercon job advertisements for structural engineers, Enercon hired at least fifteen (15) individuals, many of which were “civil/structural engineers.”<sup>21</sup>

## DISCUSSION

### 1. The Legal Standard

Section 211 of the ERA provides, in pertinent part, that “No employer may discharge or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.).”<sup>22</sup>

To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action taken against him.<sup>23</sup> If the complainant’s protected activity was a contributing factor in the adverse action, the employer may avoid liability only if it demonstrates “by clear and convincing evidence that it would have taken the same unfavorable personnel action” in the absence of the protected activity.<sup>24</sup> When a respondent seeks summary dismissal as a matter of law and asserts legitimate, non-discriminatory reasons for its actions, the employee must point to specific evidence that demonstrates a dispute still exists in spite of the respondent’s proffered reasons.<sup>25</sup> Specific evidence means evidence that: (1) the respondent’s reasons are “unworthy of credence” or (2) the protected activity was at least a contributing factor even if the respondent’s reasons are true.<sup>26</sup> Evidence of inconsistencies in the respondent’s reasons could support a finding of pretext.<sup>27</sup>

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<sup>21</sup> See D. & O. at 3-4; Enercon’s Supplemental Discovery Responses (Tab 74A); Respondent, Enercon Services, Inc.’s Amended Response to Request for Copies of Documents and Answers to the Interrogatories (Tabs 74E, 74A).

<sup>22</sup> 42 U.S.C.A. § 5851(a)(1)(A).

<sup>23</sup> 42 U.S.C.A. § 5851(b)(3)(C).

<sup>24</sup> 42 U.S.C.A. § 5851(b)(3)(D).

<sup>25</sup> 29 C.F.R. § 18.40 (nonmoving party may not rest on general allegations and denials).

<sup>26</sup> *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981) (after the employer presents legitimate, non-discriminatory reasons, the factual question goes to a “new level of specificity”); *Shusterman v. Ebasco Servs., Inc.*, 1987-ERA-027 (Sec’y Jan. 6, 1992) (relying on the same principle).

<sup>27</sup> *Hoffman v. Bossert*, 1994-CAA-004, slip op. at 5 (Sec’y Sept. 19, 1995) (“A respondent’s shifting explanations about the reason for taking an adverse action often reveal that the real motive



## 2. Existence of Genuine Dispute Requiring an Evidentiary Hearing

In granting Enercon's motion for summary decision, the ALJ found that "there was no evidence of pretext or lying by Respondent so as to raise an inference of discrimination in the hiring process." D. & O. at 9. The ALJ ruled that the reason Enercon did not hire Hasan was because it "hired no engineers in 2003 and 2004 based upon ads for its Germantown office or temporary engineering positions." However, in reaching these conclusions, the ALJ viewed Hasan's claim too narrowly.<sup>28</sup> In addition, the ALJ essentially engaged in improper factfinding, sifting through evidence and disregarding evidence that could allow (if credible and persuasive) a finding of pretext. It may be that the ALJ will come to the same conclusion after an evidentiary hearing, but there is contradictory evidence that requires factual determinations after allowing Hasan to call witnesses and challenge the credibility of Enercon's proffered reasons. Therefore, solely because of the conflicting evidence raising questions of material fact regarding causation, we reverse the ALJ's dismissal.

Hasan's claim is not based on one application to one advertisement for one job vacancy whereupon his application was filed away and forgotten, as likely occurs to thousands of applicants each day across the county. Rather, Hasan's claim is that he repeatedly applied for positions at Enercon, and Enercon refused to hire him at any point at least partly due to his whistleblower activities. Hasan's letters to Enercon expressed that he was willing to work for Enercon "at any place, for any shift and for any salary" that Enercon deemed was reasonable. (*See, e.g.*, February 21, 2003 Letter). Hasan sent more than one letter making this statement. He sought employment with Enercon numerous times over the course of two years. In a letter dated February 5, 2003, Enercon expressly told Hasan that it would keep his resume "on file and hope to identify a work opportunity in the future." (Tab 36B). Enercon admittedly hired more than a dozen civil/structural engineers after its February 5, 2003 letter to Hasan. So Hasan's claim is that Enercon repeatedly rejected him, and he believes it was because of his whistleblowing activities.

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was unlawful retaliation." (citing *Hobby v. Georgia Power Co.*, 1990-ERA-030, slip op. at 21 (Sec'y Aug. 4, 1995) (finding no legitimate, nondiscriminatory reason for a supervisor's rating the complainant's performance as "excellent" and "commendable," but testifying later that he never had a high opinion of the complainant's skills) and *Edwards v. United States Postal Serv.*, 909 F.2d 320, 324 (8th Cir. 1990) ("[i]n light of this record, filled with changing and inconsistent explanations, we can find no legitimate, non-discriminatory basis for the challenged action that is not mere pretension."))).

<sup>28</sup> In the Board's July 31, 2007 Decision and Order, the Board limited Hasan's claims to positions advertised on the internet and excluded claims for failure to hire for unadvertised positions. This limitation is not consistent with facts Hasan presented in this case and must be rejected. *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 9 (ARB July 31, 2007).

Recognizing Hasan’s claim as a claim of repeated rejections over a two-year period, there are sufficient documents and facts to allow (but not require) a factfinder to believe that Enercon’s proffered reasons are pretext or that Hasan’s protected activity was a contributing factor in Enercon’s failure to hire Hasan. Enercon asserts that: (1) the jobs in its advertisements never materialized; (2) the advertisements were used to find former Scientech engineers; (3) the job vacancies were for the Germantown office; or (4) the advertisements never resulted in any hires. Yet, the advertisements on their faces were for “immediate opportunities” throughout 2003 and 2004 and expressly described the “available positions.” Enercon’s February 5, 2003 letter expressly told Hasan he would be considered for future opportunities. The existence of future vacancies was repeatedly confirmed by the dozen engineers hired in 2003 and 2004. The advertisements only expressed a preference for “local candidates” and had no reference to Scientech employees. This is not to say that Enercon’s reasons will not prove to be true or legitimate. However, to choose Enercon’s assertions in its motions over its contradictory advertisements is to engage in factfinding without an evidentiary hearing. These factual contradictions, even though created by Enercon’s own choices, must be resolved in an evidentiary hearing.<sup>29</sup> In remanding this case for hearing, we emphasize that we have reached no conclusion regarding the merits of Hasan’s complaint.

#### **CONCLUSION**

For the reasons discussed above, we reject the ALJ’s recommendation that Enercon’s motion for summary decision be granted and that this case be dismissed. This case is remanded to the ALJ for further proceedings consistent with this decision.

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

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<sup>29</sup> *U.S. v. Shumway*, 199 F.3d 1093, 1104 (9th Cir. 1999).