In the Matter of:

THOMAS SAPORITO, **ARB CASE NO. 11-040**

COMPLAINANT, **ALJ CASE NO. 2011-ERA-006**

v. **DATE: November 17, 2011**

PROGRESS ENERGY SERVICE COMPANY, PROGRESS ENERGY, INCORPORATED, and PROGRESS ENERGY FLORIDA,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Thomas Saporito, *pro se*, Jupiter, Florida

***For the Respondents*:**
Douglas E. Levanway, Esq., *Wise Carter Child & Caraway, P.A.*, Jackson Mississippi

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER

Thomas Saporito filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the named

Respondents (hereinafter, Progress Energy) violated the employee protection provisions of the Energy Reorganization Act of 1974, as amended.[1] Specifically, Saporito's complaint alleges that Progress Energy retaliated against him when it refused to hire him for any of fifteen job positions for which he applied. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Saporito's complaint in regard to Progress Energy's refusal to hire him for eight of the positions on the grounds of timeliness. In addition, the ALJ dismissed the complaint in regard to the remaining seven positions pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) for failure to state a claim upon which relief could be granted. Saporito has appealed the dismissal of his complaint. We affirm the ALJ's decision in part, vacate it in part, and remand the case for further consideration consistent with this opinion.

BACKGROUND

Saporito filed an initial complaint on July 27, 2010 (the "Initial Complaint"), specifically identifying four unsuccessful job applications in 2010. He filed a supplemental complaint on August 17, 2010 (the "Supplemental Complaint"), which included the same four applications but added eleven more unsuccessful job applications. For the sake of clarity, those fifteen applications relate to the following job numbers:

Job 1 - 96270
Job 2 - 96918
Job 3 - 96928
Job 4 - 90BR
Job 5 - 131BR
Job 6 - 162BR
Job 7 - 386BR
Job 8 - 387BR
Job 9 - 435BR
Job 10 - 505BR
Job 11 - 710BR
Job 12 - 738BR
Job 13 - 863BR
Job 14 - 914BR
Job 15 - 1141BR

Saporito's complaints allege that Progress Energy refused to hire him because the company knew he had raised safety concerns to it and the Nuclear Regulatory Commission (NRC) regarding operations at its Crystal River nuclear plant when he was previously employed there. He also alleges that after his employment with Progress Energy ended, the company was aware that he filed numerous nuclear safety complaints with the NRC concerning the Crystal River nuclear plant, and other ERA whistleblower complaints with OSHA. On December 2, 2010, OSHA found that there was "no

[1] 42 U.S.C.A. § 5851 (Thomson/West 2010) (ERA).

reasonable cause" of an ERA whistleblower violation and dismissed Saporito's claims. Saporito objected, requested a hearing, and this matter was assigned to an ALJ.

On January 28, 2011, before either party filed a motion to dismiss, the ALJ acted on his own initiative and ordered the Complainant "to show cause why his complaint should not be dismissed . . . for failure to state a claim upon which relief can be granted."[2] After briefing by the parties, the ALJ dismissed the entire complaint. More specifically, the ALJ determined that Saporito's complaint as to eight of the fifteen jobs was untimely. The ALJ noted that Saporito's complaint indicated that, from May 13, 2009 to January 20, 2010, he learned that he was not hired for eight jobs (Jobs 1, 2, 4, 6 through 10) for which he had applied, more than 180 days prior to the filing of his Supplemental Complaint.[3] Thus, because a complainant must file an ERA complaint for illegal retaliation within 180 days after the alleged violation, the ALJ determined that any complaint of alleged adverse employment action regarding these eight jobs was untimely under the ERA and must be dismissed.[4]

Next, the ALJ determined that Saporito failed to state a claim for four of the jobs (Jobs 11-14) for which he was not hired because Progress Energy filled the jobs with other applicants.[5] The ALJ determined that for Saporito to state his claim, he had to show that the positions remained open, and that Progress Energy continued to seek applications from persons with Saporito's qualifications. Based on the parties' pleadings, the ALJ determined that Progress Energy filled the four jobs and, therefore, Saporito failed to state a "refusal to hire" claim under the ERA with regard to those positions.[6]

Finally, as to three jobs (Jobs 3, 5 and 15) for which Saporito applied, the ALJ determined that Saporito failed to expressly allege that his application had been rejected

---

[2] Order Dismissing Complaint (Order) at 2.

[3] Order at 7. *See* Aug. 17, 2010 Supplemental Complaint at 6-10; Complaint Exhibit (CX) 3 (rejected for Job Opening 96270 on May 13, 2009); CX 6 (rejected for job opening 96918 on June 29, 2009); CX 9 (job 90BR canceled on August 10, 2009); CX 11 (rejected for job 162BR on August 31, 2009); CX 22 (job 435BR rejected on November 16, 2009); CX 24 (job 386BR rejected November 17, 2009); CX 29 (job 387BR rejected December 14, 2009); CX 32 (job 505BR rejected January 20, 2010). None of these eight jobs were included in his initial complaint.

[4] *See* 42 U.S.C.A. § 5851(b)(1); 29 C.F.R. § 24.103(d)(2).

[5] Order at 7. *See* Aug. 17, 2010 Complaint at 10-12; CX 36 (rejected for job 738BR on March 15, 2010); CX 38 and Progress Energy Response to Complaint at 4 (job 863BR filled by other individuals); CX 42 (rejected for job 710BR on May 10, 2010); CX 44 (job 914BR canceled on May 21, 2010).

[6] Order at 8.

by the company, and thus failed to state a claim for a refusal to hire. The ALJ observed that while Saporito had generally alleged that he was not hired, he failed to specifically state that he had been rejected for these positions, that they remained open, and that Progress Energy continued to seek applicants from persons with Saporito's qualifications.[7] Based on that failure, the ALJ determined that Saporito failed to state a "refusal to hire" claim under the ERA in regard to the three remaining positions, and dismissed Saporito's complaint. Saporito has appealed the ALJ's order.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to issue final agency decisions in cases arising under the ERA's employee protection provisions.[8]

The ARB reviews an ALJ's determinations on procedural issues under an abuse of discretion standard, i.e., whether, in ruling as he did, the administrative law judge abused the discretion vested in him to preside over the proceedings.[9] The ARB reviews the ALJ's legal conclusions de novo.[10]

DISCUSSION

A. The ALJ Correctly Determined that Eight of Saporito's Claims Are Untimely

A complaint for illegal retaliation under the ERA must be filed within 180 days after the alleged violation.[11] It is well established that a "refusal to hire constitutes a separate actionable 'unlawful employment practice.'"[12] The ALJ correctly determined

---

[7] *Id*.; *see* Aug. 17, 2010 Complaint at 6, 12; CX 4 (applied for job 96928); CX 1 at 1, 8 (applied for job 131BR and job 1141BR).

[8] 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.

[9] *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, -115; ALJ Nos. 2004-SOX-020, -036, slip op. at 8 (ARB June 2, 2006) (citations omitted).

[10] *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

[11] *See* 42 U.S.C.A. § 5851(b)(1); 29 C.F.R. § 24.103(d)(2).

[12] *Sasse v. Dep't of Labor*, 409 F.3d 773, 783 (6th Cir. 2005), *quoting National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002).

that Saporito's claims regarding eight jobs (Jobs 1, 2, 4 and 6 through 10) for which he applied and was aware that he was not hired involved actions that occurred more than 180 days prior to the filing of his complaint.[13] Based on the undisputed facts and Saporito's admissions, these claims are untimely. Because Saporito failed to file separate complaints for these earlier, alleged refusals by Progress Energy to hire him, he "has lost the ability to recover for it."[14] Consequently, we affirm the ALJ's dismissal of these eight claims.

B. Prima Facie Elements Merely Provide Guidance for Establishing a Sufficient Inference in Whistleblower Allegations

Next, we consider the ALJ's determination that Saporito failed to state an ERA "refusal to hire" claim in regard to seven jobs (Jobs 3, 5, 11 through 15) for which he applied. Because the rules governing hearings in whistleblower cases contain no specific provisions for dismissing complaints for failure to state a claim upon which relief may be granted,[15] the ALJ applied Federal Rule of Civil Procedure 12(b)(6).[16]

In 1992 Congress amended ERA § 5851 to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-805 (1973).[17] "Although Congress desired to make it easier for whistleblowers to prevail in their discrimination suits, it was also concerned with stemming frivolous complaints."[18]

---

[13] *See supra* at 2, n.1.

[14] *Sasse*, 409 F.3d at 783.

[15] *See* 29 C.F.R. Part 18 (2011).

[16] 29 C.F.R. § 18.1(a); *see, e.g., High v. Lockheed Martin Energy Sys.*, ARB No. 98-075, ALJ No. 1996-CAA-008, slip op. at 1, 6 (ARB Mar. 13, 2001), (applying Fed. R. Civ. P. 12(b)(6) standard to complaint brought under the environmental whistleblower statutes, and the ERA); *but see Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 12-13 (ARB May 25, 2011) (noting that complaints filed under Section 806, the employee protection provision, of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (Thomson/West 2010), are rarely suited for dismissals pursuant to Fed. R. Civ. P. 12 and that the heightened pleading standards established in federal courts do not apply to SOX complaints).

[17] *Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir.1999); *see* Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(d), (i), 106 Stat. 2776, 3123-25 (amending 42 U.S.C.A. § 5851(b)).

[18] *Trimmer*, 174 F.3d at 1101, n.5 (noting the amendment to § 5851 adding the new burden-shifting framework was titled "Avoidance of frivolous complaints." Pub. L. 102-486, 106 Stat. 2776, 3123.).

"Consequently, § 5851 contains a gatekeeping function, which provides that the Secretary cannot investigate a complaint unless the complainant has established a prima facie case that his protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint."[19] In deciding motions to dismiss for failure to state a claim, the ALJ certainly may use the "gatekeeping" rules as guidance.[20] An ALJ should not apply such standards inflexibly.[21] The focus should be on whether the complainant's allegations, in the absence of contrary allegations and information, allows for an inference that protected activity more likely than not played some part in the employer's hiring decision.[22]

A complainant bringing a whistleblower claim under 42 U.S.C.A. § 5851 must assert and ultimately prove the following:

> (1) the complainant engaged in protected conduct; (2) the employer took some adverse action against him; and (3) there are circumstances that raise an inference that the protected activity was the likely reason for the adverse action.[23]

In refusal to hire cases such as this, to properly assert and prove adverse action in the second prong, the complainant must assert and ultimately prove that the complainant applied for a job, met the job qualifications and was rejected. In this case, the ALJ framed that showing as follows:

> (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 remained open and the employer

---

19 *Id*. at 1101; *see* 42 U.S.C.A. § 5851(b)(3)(A).

20 *See, e.g., Trimmer*, 174 F.3d at 1101 (court expressly approved the use of the prima facie elements).

21 *See, e.g., Furnco Constr.Corp. v. Waters*, 438 U.S. 567, 584 (1978) (a prima facie case for a hiring discrimination claim "was not intended to be an inflexible rule").

22 *Id.*

23 *Hasan v. U.S. Dep't of Labor*, 298 F.3d 914, 916-917 (10th Cir. 2002); *see also Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 355 (8th Cir. 1996).

> continued to seek applicants from persons of complainant's qualifications.[24]

The overly restrictive standard the ALJ applied for satisfying the third prima facie element for a refusal to hire claim is error.

In *Hasan v. U.S. Dep't of Labor*, the court of appeals ruled in an ERA "refusal to hire" case that the third prong, requiring a showing that the employer left the position open and continued to seek applicants, was "too limited."[25] The court stated that rather than show that the position remained open, a complainant can either show that the position "was filled *or* remained open" and the employer continued to seek applicants with complainant's qualifications.[26] This showing for complainants in refusal to hire cases – that a position remained open *or* was filled – is well settled and applies in ERA cases pursuant to *Hasan*, as it has applied in refusal to hire cases in other contexts.[27]

Even if a complainant makes a showing of adverse action, he or she must still assert facts supporting the element of causation to maintain a whistleblower claim under the ERA, i.e., that "there are circumstances that raise an inference that the protected activity was the likely reason for the adverse action."[28] In the case of a refusal to hire claim, a causation showing that satisfies prong three may be met in a situation where the fact that a vacancy stayed open raised suspicion. If an employer continues to seek applicants with the same qualifications as the complainant, an inference of improper motive could arise related to the reason the employer provided for rejecting the complainant. Yet, it is also true that an inference of causation could arise because of the manner in which the job is filled. If it is filled with a substantially less qualified individual, again, an inference of improper motive could arise. But, again, to satisfy the

---

[24] Order at 6, *quoting Hasan v. Sargent & Lundy*, ARB No. 03-030, ALJ No. 2000-ERA-007, slip op. at 3 (ARB July 30, 2004).

[25] 298 F.3d at 917, n.3.

[26] *Id*.

[27] *See, e.g.*, *Amro v. Boeing Co.*, 232 F.3d 790, 796 (10th Cir. 2000) (clarifying that a complainant may establish third prong by showing that "the position from which he or she was discharged or into which he or she was not hired was filled *or* remained available following the plaintiff's discharge or failure to hire.") (emphasis added); *see also E.E.O.C. v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1273 (11th Cir. 2002) (setting out prima facie showing for refusal to hire case in context of claims brought under Title VII); *Lindsey v. Prive Corp.*, 987 F.2d 324, 326-327 (5th Cir. 1993) (setting out prima facie showing for refusal to hire case in Age Discrimination in Employment Act case, 29 U.S.C.A. § 621 *et seq.*).

[28] *Hasan*, 298 F.3d at 916-917.

causation element required under ERA, the key question is whether the allegations allow for an inference of a causal link between the protected activity and the employer's refusal to hire. Making allegations that track or fail to track the exact language of the previously mentioned prima facie elements may not be the determining factor in every case.

In this case, as to seven jobs (Jobs 3, 5, 11 through 15), we conclude that Saporito's allegations failed to raise an inference of a violation of the ERA whistleblower laws. Repeatedly and mechanically, Saporito alleged that he was a nationally known whistleblower, he applied for various and diverse jobs for which he was qualified, and he was not hired. Tracking the language of the prima facie elements, Saporito alleged in his original and supplemental complaints; that after [his] employment rejection by Respondents, one or more of the positions remained open; and that Respondents continued to seek applicants from persons of Complainant's qualifications."[29] He alleged that he "has (1) not received any offer of employment by Respondents; (2) not been interviewed . . . ; and (3) has obviously been rejected . . . ; (4) Respondent continues to seek applicants with similar qualifications of Complainant for the advertised jobs that Complainant made application."[30] However his allegations in this particular case are nothing more than cookie cutter assertions falling short of the allegations sufficient to support an inference that actions were taken partly or entirely because of protected activity. Being a known whistleblower and a failed attempt at getting a job does not automatically translate into an inference of whistleblower retaliation. We do not require the "facial plausibility standards" used in the federal courts,[31] but a bit more is needed in this particular case. It is impossible to identify exactly how much more is needed, because there are too many variables. But some examples include a good faith assertion that he was more qualified than someone who was hired, or he was ranked among the top three candidates for one of the jobs, or the employment pool for a particular job was very small, or that the urgency to find someone was very high and yet the employer rejected an available and qualified applicant, etc. This showing may also be satisfied where there is temporal proximity between proceedings associated with one of his whistleblower complaints, and when he applied for a job.[32]

---

[29] July 27, 2010 Complaint at 5; Aug. 17, 2010 Complaint at 5-6.

[30] July 27, 2010 Complaint at 5-6; Aug. 17, 2010 Complaint at 13.

[31] *Compare Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) *and Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (establishing heightened "facial plausibility" pleading standard) *with Swierkiewicz v. Sorema*, 534 U.S. 506 (2002) (setting forth the pleading standard in an employment discrimination case).

[32] *See, e.g., Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 278 (7th Cir. 1995). The ALJ on various occasions concluded that Saporito "acknowledged" or "agreed" to a particular fact, but the ALJ did not provide citations in support of these conclusions. In addition, our review of Saporito's response to the order to show cause demonstrates that he often said he was unable to respond to the Respondent's assertions. *See* Complainant's Response to Order to Show Cause Why Complaint Should Not Be Dismissed, Attachment, pp. 4, 5.

In addition to the previous deficiencies, the status of the job search was unclear for three jobs (Jobs 3, 5, and 15).[33] It is unclear from the allegations whether Progress Energy is still considering applicants, including Saporito, or whether Saporito was rejected. In other words, claims based on these jobs may not be ripe for litigation. If Saporito was rejected, a question may arise as to the timeliness of Saporito's claim for at least two of the jobs where the applications were submitted in 2009 (Jobs 3 and 5). In sum, we disagree with the ALJ's reasons for dismissing Saporito's entire complaint, but we affirm for different reasons the ALJ's ruling that Saporito failed to state a sufficient claim for an ERA whistleblowing violation. Nevertheless, we conclude that a remand is necessary as to the claims based on seven job applications (Jobs 3, 5, 11 through 15).

Saporito argued that he was denied due process because he was not given notice of what he was required to do or permitted discovery to collect evidence. We view this argument liberally and construe it as a request to supplement his allegations. It is well accepted in the federal courts that plaintiffs are to be freely given an opportunity to amend deficient complaints.[34] We believe complainants in the administrative process should be entitled to no less. Consequently, we remand this matter to allow Saporito to amend his allegations and add information that supports an inference of an ERA whistleblower claim. We appreciate that Saporito is pro se, and purports to be a novice with respect to whistleblower litigation. Nevertheless, we require him to add more factual assertions beyond those he has already asserted to support an inference of an ERA whistleblower claim. Progress Energy is not foreclosed from reasserting a motion to dismiss for failure to state a claim if it believes such a motion expedient. Neither party is foreclosed from pursuing motions under 29 C.F.R. § 18.40 or seeking limited discovery needed to respond to such motions. Most importantly, and to be clear, the ALJ has discretion to manage this case consistent with this order, including as to discovery, pre-hearing, and evidentiary hearing matters.

---

[33] With respect to these three jobs, it is also unclear whether the ALJ focused on the issue of ripeness or if he dismissed these three jobs because he believed a complainant must be rejected and that deliberate failure to hire is not sufficient. The court of appeals in *Hasan v. Dep't of Labor* held that a "failure to hire a qualified individual for a position is a 'rejection' for purposes of establishing a prima facie case" of a retaliatory refusal to hire under the ERA. 545 F.3d 248, 251 (3d Cir. 2008). To the extent the ALJ's legal holding conflicts with *Hasan*, such a ruling would be error and is vacated.

[34] *See* Fed. R. Civ. P. 15(a).

CONCLUSION

Accordingly, the ALJs' Order Dismissing Complaint is **AFFIRMED** in part, **VACATED** in part, and the case is **REMANDED** for further proceedings consistent with this opinion. All pending motions are deemed moot and, therefore, **DENIED**.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge