



In the Matter of:

SYED M.A. HASAN,

ARB CASE NO. 12-063

COMPLAINANT,

ALJ CASE NO. 2012-ERA-003

v.

DATE: August 20, 2013

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*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Syed M.A. Hasan filed this complaint on November 14 and 15, 2011, with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Enercon Services, Inc., violated the employee protection provisions of the Energy Reorganization Act of 1974, as amended.¹ A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Hasan's complaint in an Order on Respondent's Motion to Dismiss.²

¹ 42 U.S.C.A. § 5851 (West 2003 & Supp. 2012) (ERA).

² *Hasan v. Enercon Servs. Inc.*, ARB No. 12-063, ALJ No. 2012-ERA-003 (ALJ Apr. 10, 2012) (ALJ Order).

Hasan has appealed the dismissal of his complaint to the Administrative Review Board (ARB).³ We affirm.

BACKGROUND

This claim represents the fourth complaint Hasan has filed against Enercon. Hasan filed his first complaint on May 21, 2003, alleging that Enercon discriminated against him when it failed to hire him for positions he applied for.⁴ Hasan filed his second and third complaints on May 3, 2004, and July 23, 2004. In these complaints Hasan alleged that Enercon discriminated against him and blacklisted him when it failed to hire him for advertised and non-advertised positions.⁵ In this present complaint, Hasan alleged that Enercon discriminated against him and blacklisted him through its ongoing refusal to hire him.⁶

Hasan applied for jobs with Enercon several times between 2002 and 2004.⁷ Hasan asserts that he stopped submitting applications for employment in October 2004 because Enercon blacklisted him and it would have been totally futile.⁸ Enercon informed Hasan on several occasions that Hasan's resume would be kept on file and/or reviewed against company needs.⁹

PROCEEDINGS BELOW

OSHA investigated Hasan's complaint and, on December 11, 2011, dismissed it as untimely. Hasan filed a request for a hearing. On February 15, 2012, Enercon filed a motion to dismiss arguing that Hasan's complaint is duplicative of his prior complaints and was untimely.

³ See 29 C.F.R. § 24.110(a) (2012).

⁴ *Hasan v. Enercon Svcs. Inc.*, ARB No. 04-045, ALJ No. 2003-ERA-031 (ARB May 18, 2005).

⁵ *Hasan v. Enercon Svcs. Inc.*, ARB Nos. 10-061, 12-096, ALJ Nos. 2004-ERA-022, -027; slip op. at 6, 18 (ALJ July 30, 2012).

⁶ ALJ Order at 1, 3.

⁷ *Id.* at 1.

⁸ *Id.* at 2.

⁹ *Id.* at 1, 2. Hasan alleged that "he applied and was interviewed by Respondent in January 2003 and was informed in December 2003 that he would be reviewed and considered for future needs, which he argues extends to the present." *Id.* at 2. See also Hasan's Initial Brief to the Board, at 3 (May 5, 2012), in which he asserted that "Enercon, even in 2009, continued to represent to ALJ Kennington and the higher courts that I would be considered for the available civil/structural engineering positions . . .".

Hasan responded on March 1, 2012. Hasan argued as to timeliness that he was entitled to equitable estoppel because Enercon never gave him notice that it was blacklisting him. He stated that he was filing this fourth “complaint because judges refused to formally consider his claims and illegally denied him discovery.”¹⁰

The ALJ analyzed Enercon’s Motion to Dismiss applying Federal Rule of Civil Procedure 12(b)(6), basing the decision only on the pleadings and making all reasonable inferences in Hasan’s favor.¹¹ The ALJ dismissed the complaint because Hasan failed “to state a claim upon which relief can be granted because the adverse action he alleges took place in 2004 and is duplicative” of Hasan II and III.¹² In a footnote, the ALJ noted that aside from the complaint being duplicative, it was untimely.¹³ Hasan filed a petition for review with the ARB. Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under ERA and issue the agency’s final decision.¹⁴ We review the ALJ’s decision to grant Enercon’s motion to dismiss de novo.

DISCUSSION

A. Timeliness

Under the ERA, an employee who believes that he has been discriminated against for engaging in protected activities may file a complaint within 180 days after an alleged violation.¹⁵ Hasan argues that the statute of limitations does not begin to run until he receives final, definitive, and unequivocal notice that an adverse action was made and that since Enercon never informed him that it was blacklisting him, that he never got such notice.¹⁶ Hasan also alleges that Enercon engaged in continuous violations against him. However, Hasan asserts that he

¹⁰ ALJ Order at 3-4.

¹¹ *Id.* at 4, 6.

¹² *Id.* at 8.

¹³ *Id.* n.38.

¹⁴ Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012).

¹⁵ 42 U.S.C.A. § 5851(b)(1); 29 C.F.R. § 24.103(d)(2)(2012).

¹⁶ Complainant’s Brief at 10.

believed it was futile for him to apply for positions with Enercon after October 3, 2004, because Enercon would not hire him for any positions.¹⁷ It is also undisputed that he stopped filing applications with Enercon in October 2004.¹⁸ Thus, even viewing the facts in the light most favorable to Hasan, filing this action seven (7) years after he stopped applying for jobs with Enercon is untimely as a matter of law. We can see no grounds for equitable tolling where Hasan allowed seven (7) years to pass before filing this action.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's decision and **DISMISS** Hasan's complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

¹⁷ Hasan asserted to the ALJ that “[h]e stopped submitting applications after 3 Oct 2004, explaining that it would have been totally futile to reapply, because he had been blacklisted by Respondent.” ALJ Order at 2-3. See also Hasan’s post-hearing brief to the ALJ dated February 28, 2012, in which he stated that “. . . it was totally futile for me to apply again and again (after October 3, 2004) for civil/structural advertised engineering positions,” and that he “would have applied again and again (as [he] did before October 3, 2004) after October 3, 2004, . . . but for Enercon’s continuous, intentional, illegal retaliatory practices” of automatically rejecting him for positions. Hasan Br. to the ALJ at 20-21. Hasan also submitted to the Board that he would have applied for positions continually after October 3, 2004, if it were not for Enercon’s continuous, intentional, and illegal retaliatory practice of automatically rejecting him for positions. Hasan’s Initial Br. to the Board at 22.

¹⁸ See ALJ Order at 2-3 and Hasan’s briefs, *supra* n.17.