

In the Matter of:

ADAM McNIECE,

COMPLAINANT,

v.

**DOMINION NUCLEAR CONNECTICUT,
INC.,**

RESPONDENT.

ARB CASE NO. 15-083

ALJ CASE NO. 2015-ERA-005

DATE: November 30, 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Adam McNiece, *pro se*, East Lyme, Connecticut

For the Respondent:

Charles C. Thebaud, Jr., Esq. and Anna V. Jones, Esq.; *Morgan, Lewis & Bockius, LLP*; Washington, District of Columbia

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Adam McNiece alleged, in a complaint filed under the whistleblower protection provisions of the Energy Reorganization Act of 1974,¹ that because he reported safety violations to Respondent Dominion Nuclear Connecticut (DNC) and the Nuclear Regulatory Commission (NRC), DNC “has retaliated against me by willfully and knowingly creating a hostile environment for my wife,’ including ‘public belittling to lower evaluations and a sideline

¹ 42 U.S.C.A. § 5851 (Thomson Reuters 2012) (ERA).

position.”² McNiece filed the complaint on January 22, 2015. A Department of Labor Administrative Law Judge (ALJ) concluded that, “Viewing all the evidence and factual inferences in the light most favorable to McNiece, the non-moving party, I find that Respondent has established that there is no genuine issue of material fact as to an essential element of McNiece’s claim—the timeliness of his complaint under the ERA.”³ The ALJ granted Respondent’s Motion to Dismiss and dismissed McNiece’s complaint with prejudice.⁴ McNiece filed a timely petition for review with the Administrative Review Board.⁵

PROCEDURAL HISTORY⁶

In response to McNiece’s complaint, the Regional Administrator for Occupational Safety and Health issued Secretary’s Findings concluding that there was no reasonable cause to believe that DNC violated the ERA. Complainant filed objections to the Findings and requested a hearing before a Department of Labor ALJ. Shortly thereafter, DNC filed a Motion to Dismiss, supported by exhibits, seeking dismissal on three grounds: (1) Complainant was not DNC’s employee; 2) Complainant did not allege that he suffered an adverse action recognized by the ERA; 3) the complaint was untimely. Complainant filed an Objection to Respondent’s Motion, also supported by exhibits; Respondent filed a sur-reply with exhibits; and Complainant filed a response to the reply.⁷

The ALJ informed the parties that because they had submitted evidence outside the record in support of their positions, she would treat the Motion to Dismiss as a Motion for Summary Decision. The ALJ granted Complainant thirty days to conduct limited discovery pertaining to the issues raised in DNC’s motion; “specifically, his status as an employee, the timeliness of his complaint, and any alleged adverse actions occurring within 180 days of the date he filed his complaint” and to submit any additional arguments as to why summary decision was not appropriate.⁸

² *McNiece v. Dominion Nuclear Conn., Inc.*, ALJ No. 2015-ERA-005, slip op. at 3 (Aug. 11, 2015) (ALJ Ord.).

³ *Id.* at 7.

⁴ *Id.*

⁵ The Secretary of Labor has delegated to the Administrative Review Board authority to issue final agency decisions under the ERA. Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378-69-380 (Nov. 16, 2012); 29 C.F.R. § 24.110(a)(2016).

⁶ Unless otherwise specified, the “Procedural History” is based on the ALJ’s section “I. Procedural History” (pages 1-3).

⁷ ALJ Ord. at 1-2.

⁸ *Id.* at 2.

On June 3, 2015, DNC filed a Motion for Protective Order in response to discovery Complainant propounded, and Complainant filed an objection to the motion. The ALJ issued an Order Granting in Part Respondent’s Motion for Protective Order, finding that Complainant’s discovery requests, with four identified exceptions, were not “reasonably related to the limited issues raised in the Motion for Summary Decision and exceeded the scope of discovery permitted.”⁹ McNiece filed a Motion for Reconsideration, in which he did not allege any errors in the ALJ’s order, but rather argued generally that discovery should be unlimited. The ALJ denied McNiece’s motion for reconsideration, stating that “discovery was properly limited at this stage in the proceeding to the issues raised in the Motion for Summary Decision.”¹⁰

McNiece subsequently obtained an enlargement of time to conduct discovery and submit additional argument. Nevertheless, he failed to submit any additional evidence or argument to the ALJ. The only additional evidence submitted to the ALJ consisted of copies of a 2010 settlement between Complainant and DNC, and a 2014 settlement between Complainant’s wife, Edwina Collins, and DNC.

BACKGROUND

McNiece alleged, “Beginning in 2000 or thereabouts, I worked for the Respondent, Dominion Nuclear Connecticut, Inc., as a Supplemental Employee at their service station in Virginia and also held positions in the Respondent’s facility located in Waterford, Connecticut.”¹¹ McNiece subsequently conceded that he worked at the Millstone Nuclear Power Station in Waterford before DNC owned it.¹²

Patricia P. Bassle, Human Resources Administrator for Dominion Resources Services¹³ averred that there is no record demonstrating that McNiece was ever an employee of DNC or any other Dominion company.¹⁴ DNC did submit evidence that from September to October 2000, McNiece worked as a temporary outage worker for Numanco, LLC, an independent contractor at Surry Nuclear Power Station in Virginia, that was owned and operated by Virginia Power, an affiliated company of DNC.¹⁵

⁹ *Id.* at 2 n.3.

¹⁰ *Id.*

¹¹ ALJ Ord. at 4.

¹² *Id.*

¹³ Dominion Resources Services, Inc., and DNC are both affiliates of Dominion Resources, Inc. *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

In 2008, McNiece applied for a position at Millstone with DNC, but was not hired.¹⁶ He filed an ERA complaint against DNC that was resolved by a settlement in 2010.¹⁷ McNiece alleged that after settling with DNC, he continued to report safety violations to DNC and the NRC, and as a result, DNC retaliated against him to dissuade him from making further reports by creating a hostile working environment for his wife.¹⁸ He further stated that his wife was, “forced to retire rather than endure the environment of everyday harassment and intimidation that Dominion has created, fostered and condoned.”¹⁹ He contended that the actions DNC took against his wife caused him “great distress.”²⁰

McNiece’s wife, Edwina A. Collins, while employed at DNC, filed an ERA whistleblower complaint in 2011.²¹ The complaint was settled in October 2014.²² As a provision of the settlement, Collins agreed to end her employment relationship with DNC in exchange for a lump sum payment and other consideration.²³

STANDARD OF REVIEW

We review a grant of summary decision de novo under the same standard that ALJs must apply.²⁴ An ALJ shall grant summary decision “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.”²⁵

¹⁶ *Id.*

¹⁷ *Id.* at 4-5.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.* at 4.

²¹ *Id.* at 5.

²² *Id.*

²³ *Id.* at 6.

²⁴ *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 5 (ARB Sept. 26, 2012).

²⁵ 29 C.F.R. § 18.72(a) (2016).

DISCUSSION

A timely ERA complaint must be filed within 180 days of an alleged adverse action taken against an employee, in retaliation for protected activity.²⁶ The ALJ reviewed McNiece's allegations of adverse actions. She noted that McNiece's allegations of adverse action that occurred prior to the date on which Collins filed her ERA complaint in 2011 exceeded the 180-day limitations period by several years. Further Collins's alleged lower appraisal scores, which occurred in 2011 and 2013, also fell significantly outside the limitations period. The ALJ determined that although McNiece alleged that DNC retaliated, harassed and mistreated his wife while her claim was pending before the Office of Administrative Law Judges, McNiece failed to provide any specific dates or evidence of adverse action occurring on or after July 24, 2014. Further, the ALJ found that while a party's own affidavit may be sufficient to rebut a motion to dismiss, McNiece's affidavit was insufficient to do so because he failed to "identify any specific alleged adverse action that occurred from July 24, 2014 to the filing of his complaint on January 22, 2015."²⁷

The ALJ determined that the only adverse action McNiece alleged that happened within the 180-day period was what McNiece characterized as his wife's "dismissal" or "forced" resignation from DNC on October 7, 2014.²⁸ But the ALJ found that this allegation was insufficient to raise a material fact question because, "Ms. Collins was neither dismissed nor forced to retire from DNC. Ms. Collins knowingly and voluntarily entered into a settlement agreement with DNC on October 20, 2014, with the advice of counsel and through a voluntary Settlement Judge Proceeding." The ALJ continued, "As part of the agreed-upon settlement, Ms. Collins 'voluntarily elected to end her employment relationship with Dominion' in exchange for a lump sum payment and other consideration. The settlement was approved by ALJ McGrath as fair, adequate and reasonable."²⁹ Accordingly, the ALJ concluded that McNiece had failed to present any facts establishing that the alleged adverse action occurred within the required 180-day period preceding the filing of his complaint, i.e., from July 24, 2014, to January 22, 2015.³⁰

McNiece has not appealed the ALJ's conclusion that he failed to raise an issue of material fact concerning the timeliness of his complaint. In fact, he appears to concede that the

²⁶ 42 U.S.C.A. § 5851(b)(1), 29 C.F.R. § 24.103(d)(2).

²⁷ ALJ Ord. at 6. In support of this finding the ALJ cited to *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)("stating that a non-moving party's allegation in affidavits must be 'sufficiently precise' to overcome summary judgment).

²⁸ ALJ Ord. at 6.

²⁹ *Id.* In support of this finding, the ALJ cited *Nathaniel v. Westinghouse Hanford Co.*, 1991-SWD-002 (Sec'y Feb 1, 1995)("stating that a resignation needs to be involuntary to constitute adverse action.").

³⁰ *Id.* The ALJ noted that he was not deciding the issue whether adverse action taken against Collins could constitute adverse action against McNiece. *Id.*

record contained no evidence sufficient to raise a material fact.³¹ Instead, McNiece has limited his appeal to the issue whether the ALJ abused her discretion in restricting McNiece's discovery.

Parties may obtain discovery concerning any nonprivileged matter that is relevant to any party's claim or defense, unless otherwise limited by a judge's order.³² A party from whom discovery is sought may file a motion for a protective order.³³ For good cause shown, the ALJ may issue an order "to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense . . ."³⁴ ALJs have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion.³⁵

On May 21, 2015, the ALJ issued an Order Rescheduling Hearing and Setting Limited Discovery Schedule. The ALJ explained that given DNC's Motion to Dismiss, supported by exhibits and McNiece's response to it, also supported by exhibits, she would treat DNC's motion as a Motion for Summary Decision. Accordingly, she granted McNiece "30 days to conduct discovery limited in scope to the issues raised in the Respondent's motion, namely evidence establishing whether Complainant was an employee of the Respondent and the timeliness of his complaint."

McNiece filed a discovery request consisting of a set of Interrogatories, numbered 1-14, and Requests for Production of Documents, numbered 1-47. Respondents objected to the discovery requests and sought a protective order for Interrogatories 1-14 and Requests for Production 1-44. DNC argued that McNiece's discovery requests pertain to Collins and her settled complaint against DNC and that they "have no conceivable connection to the questions of whether Mr. McNiece was an employee of DNC or whether his complaint against DNC is

³¹ See Complainant's Opening Brief at 4 ("essentially making it impossible for me to prove the allegations of adverse action, including ongoing and recurring retaliatory conduct, and further, that my complaint was timely filed"), 6 ("The ALJ prevented me from obtaining the evidence necessary to refute the Respondent's claim of untimeliness in the first place"), 10 ("Yet the ALJ's own decision *significantly* limiting my discovery requests directly prevented me from meeting this burden. The record is scant with proof on the issue of when the last adverse action against my wife and I actually occurred.").

³² 29 C.F.R. § 18.51(a)(2016).

³³ 29 C.F.R. § 18.52(a).

³⁴ *Id.*

³⁵ *Friday v. Northwest Airlines, Inc.*, ARB No. 03-132, ALJ No. 2003-AIR-020, slip op. at 4 (ARB July 29, 2005). See also 29 C.F.R. § 18.51(b)(4) ("[T]he judge must limit the frequency or extent of discovery . . . where (i) The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; . . . (iii) The burden of expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, . . . the importance of the issues at stake in the action and the importance of the discovery in resolving the issues.").

timely.”³⁶ In response McNiece filed an objection to the motion for a protective order alleging that DNC’s objection to his discovery requests was “a form of corruption through concealment.”³⁷ He did not raise any specific objections in response to the motion but averred that, “[a]ny attempt to limit open and honest discussion of defects or events would be a valid cause of action.”³⁸

The ALJ found that McNiece’s Interrogatories 1-14 were identical to the discovery request Collins propounded in her ERA case against DNC. The ALJ noted that she had previously informed McNiece, in a conference call, that his wife had entered into a voluntary settlement agreement and that he could not re-litigate her complaint. Upon review of the interrogatories, the ALJ concluded that McNiece had requested answers that exceeded the scope of discovery that she had previously established.³⁹ In support of this conclusion, the ALJ then examined each of the interrogatories, in turn, and explained why she found it subject to the protective order. Ultimately, she found that McNiece had failed to explain how the interrogatories fell within the limits of discovery she had previously established. Lacking any explanation, she found that DNC was entitled to a protective order precluding McNiece from obtaining answers to Interrogatories 1-14.

The ALJ also found that the Requests for Production 1-20 and 22-44 were identical to the discovery requests Collins submitted in her case against DNC. The ALJ examined each request and explained how each request exceeded her order providing for limited discovery. Given that McNiece had not explained how his Request for Production of Documents related to the limited issues presented in the Motion for Summary Decision, she found that DNC was entitled to a Protective Order for McNiece’s Request for Production of Documents, with the limited exceptions for Requests 1, 31, 40, and 43.⁴⁰

To establish that the ALJ abused her discretion in limiting discovery, McNiece must, at a minimum, show how further discovery could have permitted him to rebut DNC’s contentions that he failed to timely file his complaint.⁴¹ But other than general arguments that limiting discovery made it “impractical” for McNiece to obtain crucial evidence, he failed to address specifically how the rejected interrogatories or documents would have led to evidence that would have raised a material fact question regarding the timeliness of his complaint. The ALJ reviewed

³⁶ Motion for Protective Order at 2-3.

³⁷ Objection to Corruption via Concealment at 1.

³⁸ *Id.*

³⁹ Order Granting in Part Respondent’s Motion for Protective Order at 2 (June 25, 2015).

⁴⁰ *Id.* at 5-6.

⁴¹ *Coates v. Southeast Milk, Inc.*, ARB No. 05-050, ALJ No. 2004-STA-060, slip op. at 12 (ARB July 31, 2007).

each of the interrogatories and document requests and explained why she rejected them. McNiece failed to address, much less rebut, any of her reasons.

Further, McNiece's track record for determining what documents would lead to the discovery of admissible evidence is poor. He admits that of the four documents the ALJ ordered DNC to provide, upon his request, "[n]one of those specific items were probative in demonstrating the continuous, recurring retaliation against me and my wife, and as a result, were not at all useful to demonstrate that my complaint was timely."⁴² McNiece has proffered no argument that convinces us that the interrogatories he propounded and remaining documents he requested would have been any more probative of the timeliness question at issue here.⁴³

Accordingly, as McNiece has not challenged the ALJ's finding that DNC is entitled to summary decision on the timeliness question as a matter of law, and as we conclude that the ALJ did not abuse her discretion in limiting discovery in this case, we **AFFIRM** her Order Granting Respondent's Motion for Summary Decision and **DISMISS** this case.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

⁴² Complainant's Initial Brief at 8-9.

⁴³ McNiece avers that his complaint is based on retaliatory actions DNC took against Collins that caused him distress. McNiece has failed to explain why Collins did not simply submit an affidavit providing the dates of the alleged retaliatory actions DNC took against her, which caused McNiece to become distressed. If Collins did not even know when DNC took any such actions, it would be very difficult to credit that McNiece could have been distressed by actions that neither Collins, nor he, knew about.