**In the Matter of:**

**VI TRAN,**

**COMPLAINANT,**

**v.**

**SOUTHERN CALIFORNIA EDISON COMPANY,**

**RESPONDENT.**

**ARB CASE NO. 2018-0024**

**ALJ CASE NO. 2017-ERA-00008**

**DATE: October 24, 2019**

**Appearances:**

***For the Complainant*:**
**Vi Tran; *pro se*; San Clemente, California**

***For the Respondent*:**
**Jacob W. Daniels, Esq.; Rosemead, California**

**Before: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie, *Administrative Appeals Judges***

## FINAL DECISION AND ORDER

PER CURIAM. The Complainant, Vi Tran, filed a retaliation complaint under the employee protection provision of the Energy Reorganization Act (ERA), as

amended,[1] with the Department of Labor's Occupational Safety and Health Administration (OSHA). Tran alleged that he was retaliated against following his report of data falsification at the San Onofre Nuclear Generation Station (SONGS). OSHA dismissed the claim as it was not filed within 180 days of the alleged adverse action and no equitable tolling exceptions apply. Thus, the claim was untimely.

The case was referred to the Office of Administrative Law Judges (OALJ) per Tran's request of July 28, 2017. Respondent moved for summary decision which Tran opposed. The Administrative Law Judge (ALJ) issued an Order Granting Summary Decision on January 8, 2018, concluding the claim was untimely and that the OALJ does not have jurisdiction to consider a claim for benefits under Respondent's employee welfare benefit plan. Complainant requested that the Administrative Review Board (ARB) review the ALJ's order. We affirm.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions in review or on appeal of matters arising under the ERA and its implementing regulations at 29 C.F.R. Part 24.[2] The ARB will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo. Summary decision is permitted where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a) (2018). On summary decision, we review the record on the whole in the light most favorable to the non-moving party. *Micallef v. Harrah's Ricon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015-SOX-00025, slip op. at 3 (ARB July 5, 2018).

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[1] 42 U.S.C. § 5851 (2005). The ERA's implementing regulations are found at 29 C.F.R. Part 24 (2011).

[2] Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (April 3, 2019); 29 C.F.R. § 24.110(a).

## BACKGROUND

The following facts are undisputed. Tran was employed by Southern California Edison Company (SCE) from approximately 1982 to 2003. In 2003, he left work due to physical and emotional disability, for which he received long-term disability benefits under a plan administered by a contractor for SCE. Under the plan, Tran received benefits based on 50 percent of his salary. He disputed this benefit computation and claimed that he was entitled to 70 percent of his salary and filed an appeal with the Benefits Committee. This appeal was denied by letter dated June 2, 2004, was sent to Tran on that date. This letter specifically states that ERISA[3] "provides [Tran] the right to bring an action under section 502(a) thereof."

On November 9, 2016, Tran sent a letter to SCE's CEO explaining his position that he had been underpaid long-term disability benefits since 2003 based on the allegation that they should have been calculated at 70 percent of his former salary. He does not mention whistleblower protection in this letter. By letter dated November 28, 2016, the Principal Manager, John Smolk, replied that this issue had been considered and rejected previously and would not be reopened. On December 1, 2016, Tran sent a letter to SCE's CEO, noting the letter from Smolk and contending that this action was taken as a result of his reporting data falsification at the San Onofre Nuclear Generating Station (SONGS) which affected the release of radiation waste into the ocean. SCE's General Counsel Russell Swartz sent Tran a letter dated May 19, 2017, stating that the long-term disability benefits were properly administered and that his appeal rights of this issue expired. Tran filed a claim under the ERA by letter dated July 6, 2017, contending that he was harassed at work until his "health collapsed," and he received lower long-term disability payments due to his reporting data falsification at SONGS. This claim was denied by OSHA as it was untimely.

## DISCUSSION

Section 211 of the ERA provides, in pertinent part, that "No employer may discharge or otherwise discriminate against any employee with respect to his

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[3] Employee Retirement Income Security Act, 29 U.S.C. § 1132 (2014) (ERISA).

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. § 5851(a)(1)(A). Subsection 5851(a)(1)(F) contains a catchall provision that prohibits discrimination against an employee who "assisted or participated or is about to assist or participate . . . in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended." A timely ERA complaint must be filed within 180 days of an alleged adverse action taken against an employee, in retaliation for protected activity.[4]

To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, suffered an unfavorable personnel action, and that his protected activity was a contributing factor in the unfavorable personnel action taken against him. 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.[5]

Contrary to Tran's contention on appeal, requesting in 2016 a correction of his disability benefits did not raise a new claim under the ERA. This request was considered and rejected 12 years previously and his alleged protected activity occurred in 2002-2003. As the ALJ correctly found, Tran should have filed a complaint under the ERA alleging whistleblower protection within 180 days of the June 2, 2004 letter denying Tran's request to calculate long-term disability benefits to award him 70 percent rather than 50 percent of his salary. Moreover, Tran did not raise the issue of reporting data falsification as possible protected activity until December 1, 2016, long after he had been denied a re-calculation of benefits. Thus, we affirm the ALJ's conclusion that the claim filed on July 6, 2017, was untimely.[6]

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[4] 42 U.S.C. § 5851(b)(1).

[5] 42 U.S.C. §§ 5851(b)(3)(C), (D); 29 C.F.R. § 24.109(b)(1).

[6] Lastly, we agree with the ALJ's conclusion that any contention regarding the merits of the claim for benefits under SCE's employee welfare benefit plan was not properly before the ALJ.

## CONCLUSION

Accordingly, we **AFFIRM** the ALJ's dismissal on summary decision as the claim was untimely and the ALJ did not have the jurisdiction to consider Tran's contentions regarding the claim for benefits under the employee welfare benefit plan.

**SO ORDERED**.