



In the Matter of:

ROBERT FUGATE,

ARB CASE NO. 96-100

Complainant,

ALJ CASE NO. 95-ERA-50

v.

DATE: December 12, 1996

TENNESSEE VALLEY AUTHORITY,

Employer/Respondent.

Before: The Administrative Review Board¹

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 (1988). Before this Board for review is the Administrative Law Judge's (ALJ) Recommended Decision Granting Employer's Motion for Summary Judgment, Dismissing Claim, and Striking Hearing Date (R. D.) issued on April 5, 1996. We adopt the ALJ's recommendation to grant Summary Judgment and dismiss the complaint with prejudice for the reasons stated below.

BACKGROUND

The ALJ accurately sets forth the facts and procedural history of this case. R. D. at 1-3, 6-8. In brief, Complainant was removed from a position as a fire protection foreman by the Respondent (TVA) at its Watts Bar Nuclear Plant, because his placement in that job contravened the negotiated collective bargaining agreement between TVA and the Tennessee Valley Trades and Labor Council which represents TVA's trades and labor employees. Complainant does not dispute the basis of his removal, nor does he allege that his removal was occasioned by a safety concern regarding the plant. He continues to seek relief from the Board even though he understands that the Department of Labor does not have jurisdiction

¹ On April 17, 1996, Secretary's Order 2-96 was signed delegating jurisdiction to issue final agency decisions under this statute and pertinent regulations to the Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). The Order also contains a comprehensive list of the statutes, executive order and regulations under which the Board now issues final agency decisions.

over this matter, because he believes that his removal was discriminatory based on his job classification schedule. See Complainant's telefax to the Board, August 12, 1996.

DISCUSSION

For a complainant to prevail under the employee protection provisions of the ERA, he must make a *prima facie* case by establishing that he engaged in protected activity, that he was subjected to adverse action, that the respondent was aware of the protected activity when it took the adverse action, and that the adverse action was retaliatory in response to the protected activity. *Zinn v. University of Missouri*, Case Nos. 93-ERA-34, 93-ERA-36, Sec. Dec. and Order, Jan. 18, 1996, slip op. at 6-8. In this case, the Complainant concedes that he was not engaged in a protected activity, therefore there is no basis for finding that Respondent engaged in a retaliatory action.

A motion for summary judgment is governed by 29 C.F.R. § 18.40(d), which provides that an ALJ may enter summary judgment for a party if the pleadings before him show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary decision. Here there are no disputed material facts and the ALJ correctly concluded that the Complainant is engaged in a labor-management dispute with TVA, and not an environmental safety dispute. R. D. at 9.

ORDER

The ALJ's Recommended Decision awarding summary judgment to Respondent and dismissing the complaint is affirmed. Complainant's complaint IS DISMISSED WITH PREJUDICE.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member