



In the Matter of:

DR. SAMUEL A. AGBE,

ARB CASE NO. 98-072

COMPLAINANT,

ALJ CASE NO. 97-ERA-13

v.

DATE: July 27, 1999

TEXAS SOUTHERN UNIVERSITY,

RESPONDENT,

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Complainant Dr. Samuel Agbe filed a complaint under the employee protection provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (1994) and several of the environmental whistleblower protection statutes.^{1/} Complainant alleged that he was offered a position as a full time research associate, but that the offer was withdrawn in retaliation for his repeated complaints about the unsafe handling of radioactive materials in one of the Respondent Texas Southern University's (TSU) laboratories. The Administrative Law Judge (ALJ) submitted a Recommended Decision and Order (R. D. and O.) finding that Respondent discriminated against Complainant and recommending that Respondent reinstate Complainant to his former or a substantially equivalent position with back pay and interest; that Respondent reimburse Complainant for costs incurred for health insurance and other benefits; that Respondent expunge any negative comments from Complainant's employment record; and that Respondent pay Complainant \$10,000 in compensatory damages. R. D. and O. at 31. In addition, the ALJ submitted a Recommended Supplemental Decision and Order Awarding Attorney's Fees in which he made some reductions in the number of hours claimed and recommended an award of \$33,183.75 in attorney's fees and \$6,268.49 in costs.

The record in this case has been reviewed, and we find that it fully supports the ALJ's thorough, well reasoned recommended decisions and, with one minor exception discussed below, we adopt them in all respects.

^{1/} The Toxic Substances Control Act, 15 U.S.C. §2622 (1994); the Water Pollution Control Act, 33 U.S.C. §1367; the Clean Air Act, 42 U.S.C. §7622; and the Solid Waste Disposal Act. 42 U.S.C. §6971.

The ALJ carefully set forth the legal standards governing proof of discrimination in cases arising under the employee protection statutes in 29 C.F.R. Part 24 (1996). *See* R. D. & O. at 21-22. However, later in the decision when discussing the motivation of Complainant's supervisor, the ALJ said "Respondent has not met its burden to show that Complainant's internal safety complaints did not motivate Dr. Milton to withdraw the offer of employment to Complainant." R. D. & O. at 26. Respondent does not carry the burden of proving a negative proposition, that it was not motivated by Complainant's protected activities when it took the adverse action. Throughout, Complainant has the burden of proving that the employer was motivated, at least in part, by Complainant's protected activities. *Zinn v. University of Missouri*, Case Nos. 93-ERA-34,36, Sec'y. Dec. Jan. 18, 1996, slip op. at 7. We find, however, that this isolated misstatement of the burdens of proof did not affect the outcome of the R. D. & O. which we adopt in all other respects.

We also find that the Recommended Supplemental Decision and Order Awarding Attorney Fees carefully examined all the requested hours and made appropriate reductions for hours which were duplicative, excessive, unreasonable or unnecessary, and we adopt it in all respects. We attach both recommended decisions.

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member