U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

PATRICK A. HIGGINS, **ARB CASE NO. 01-022**

COMPLAINANT, **ALJ CASE NO. 99-TSC-5**

v. **DATE: June 27, 2003**

ALYESKA PIPELINE SERVICE CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
A. Alene Anderson, Esq., *Seattle, Washington*; Robert C. Seldon, Esq., Project on Liberty and the Workplace, *Washington, D. C.*,

For the Respondent:
Charles P. Flynn, Esq., Thomas P. Owens III, Esq., Burr, Pease & Kurtz, *Anchorage, Alaska*.

FINAL DECISION AND ORDER

Patrick A. Higgins filed a complaint of unlawful retaliation against respondent, Alyeska Pipeline Services Company (Alyeska), under the employee protection provisions of the the following environmental whistleblower statutes: Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); the Federal Water Pollution Control Act (WPCA), 33 U.S.C.A. § 1367 (West 2001); the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 1995); the Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (West 1995); and the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 1995),[1] as implemented by the regulations at 29 C.F.R. Part

[1] The ALJ did not address coverage under the ERA. Our review of the record shows that the Complainant was not entitled to protection under the ERA, which is limited to employers who are licensees, applicants for licenses from the Nuclear Regulatory Commission, or specified contractors or subcontractors. 42 U.S.C.A. § 5851(a)(2).

24 (2002).

Higgins, a former employee of Alyeska, alleged that the company's failure to rehire him was an adverse action motivated by his previous protected activities. The Administrative Law Judge (ALJ) determined that Alyeska established a legitimate non-discriminatory reason for not hiring Higgins. *Higgins v. Alyeska Pipeline Services Corp.*, 1999-TSC-0005 (ALJ Dec. 12, 2000) (R. D. & O.). The ALJ further found that even if discrimination played a role in the non-hiring, Alyeska proved that it would not have hired Higgins in any event. R. D. & O, at 35. Therefore, Higgins failed to meet his burden of proof in establishing that he was retaliated against in violation of the employee protection provisions of the environmental statutes. *Id.* at 36. Higgins appealed to the Administrative Review Board (ARB). We affirm the ALJ's decision.

BACKGROUND

Higgins worked for Alyeska's human resources department from 1990 through 1998. JX 1.**2** Alyeska operates the trans-Alaska pipeline system, stretching more than 800 miles from the North Slope to Valdez, Alaska, as a common agent of the seven oil companies that own the pipeline. CX 2, 11.

Alyeska is regulated by the Joint Pipeline Office (JPO), comprised of representatives of the various federal and state governmental bodies and agencies involved in the pipeline. Following a federal audit of its operations by the Bureau of Land Management, TR at 33, 441-42, Alyeska started an employee concerns program**3** (ECP), as part of its open work environment, to afford employees a way to raise safety and environmental issues independent of the usual chain of command. TR at 205; CX 11.

Higgins began work as an ECP investigator in April 1995. After receiving notice that he would be laid off, Higgins filed complaints on April 4 and June 10, 1997 with the Occupational Safety and Health Administration (OSHA) alleging a retaliatory discharge for his role in trying to protect employees who reported safety, environmental and regulatory compliance violations. RX 1, 2.

On April 20, 1998, Higgins signed a settlement agreement with Alyeska regarding his complaints, which was approved by an Administrative Law Judge, 97-CAA-13 (ALJ 20, 1998); JX 6. The agreement provided that: Higgins would remain on Alyeska's payroll until December 26, 1998;4 his separation would be characterized as a layoff due to downsizing, and not for

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2 The following abbreviations will be used: Joint Exhibit, JX; Complainant's Exhibit, CX; Respondent's Exhibit, RX; hearing transcript, TR.

3 Higgins testified that the word, concerns, was a term of art referring to any type of issue that an employee believed was improper, unfair, or dangerous. TR at 32-33.

4 In June 1998 Higgins started work as a human resources contractor for the Millstone Nuclear

misconduct or other good cause; copies of his 1996 performance appraisal would be destroyed; and he would be eligible to apply for future employment with Alyeska or its contractors. *Id.*, TR at 41.

Subsequently, Higgins applied for one of three ECP representative positions posted by Alyeska in February 1999. JX 22, RX 17. He was one of twelve candidates selected as qualified from more than 100 applicants, and was interviewed by telephone on April 14, 1999. RX 29, TR at 70. The interviewing panel consisted of Cynthia Wick, Kathy LaForest, and Edward Morgan, all of whom had previously worked with Higgins. RX 38.

After the interviews, Robert Shoaf, senior executive in charge of the open work environment program, decided to interview the top four candidates in person, based on their composite scores from the telephone interviews, which ranged from 25.5 to 26.75. Higgins scored 18 and was not selected to advance. Shoaf relied on the fact that the overall scoring showed a "natural break" between the top four candidates and the rest of the field. After face-to-face interviews of the top four candidates, the top three were hired. TR at 536-44.

Higgins filed a complaint on May 26, 1999, alleging unlawful retaliation under the employee protection provisions of the environmental statutes. RX 37, CX 1. On August 23, 1999, OSHA determined that Higgins had not demonstrated that discrimination was a motivating factor in Alyeska's decision not to hire him. RX 46, CX 1. Higgins requested a formal hearing, CX 2, which was held on April 24-26, 2000.

On March 10, 2000, Higgins amended his complaint, alleging that Alyeska engaged in a separate adverse action by breaching the 1998 settlement agreement, specifically that an Alyeska employee made statements that violated the intent of the agreement to Morgan, one of the interviewers. CX 7.

In his decision dated December 20, 2000, the ALJ found that Higgins' prior 1997 complaint invoked the employee protection provisions of the CAA, CERCLA, TSCA, and the CWA. *See* JX 6. While working at Alyeska, Higgins filed a concern against Wick because she allegedly collaborated in avoiding further review of an investigative report involving serious environmental issues. TR 36-37, 42; RX 63. Wick later raised harassment and intimidation charges against Higgins, whose reports on employees' concerns she reviewed. TR at 421-51. The ALJ concluded that the professional history between Wick and Higgins resulted in the "distinct possibility" of conscious bias on Wick's part against Higgins. R. D. & O. at 29.

The ALJ also found that Higgins' mediation efforts at Millstone involving Morgan were protected because Morgan had threatened to retaliate against another investigator if he didn't back down on quality control issues. The ALJ determined that Higgins' comments disparaging Alyeska during the telephone interview were not protected activity because Higgins was not filing a complaint but only recounting a past situation to show his investigative experience. R.

Facility in Waterford, Connecticut. TR at 47.

D. & O. at 21.

Higgins alleged four adverse actions in his complaint: First, he alleged that he was not rehired because of his previous protected activities. Second, he claimed that Alyeska breached the settlement agreement when Sweeney, Higgins' former supervisor at Alyeska, provided panelist Morgan with negative information about Higgins' prior employment. Third, Higgins asserted that Alyeska denied him an opportunity to compete for a generalist human resources position. Fourth, Higgins alleged that Alyeska instructed staff not to talk to him about other positions that were open.

The ALJ found that the generalist position and silent treatment complaints were untimely filed, and even if considered as continuing violations, had no merit because these were discrete incidents at a point in time. R. D. & O. at 24-25.

Further, the ALJ found that the settlement agreement was not intended to gag all employees from talking among themselves about their interactions with Higgins during his former employment. R. D. & O. at 23. The agreement covered Alyeska's contact with outsiders concerning Higgins' previous employment and stated that Alyeska would not "make representations to prospective employers or others, which are inconsistent with the letters of recommendation" written by Alyeska's president and its ECP manager. JX 6-8. The ALJ found it unreasonable to construe the settlement agreement to prevent all discussion of Higgins' former work within the company.

Finally, the ALJ found that Higgins had engaged in protected activities and had suffered adverse action, but determined that Alyeska had rebutted Higgins' *prima facie* case of discrimination by establishing a legitimate, non-discriminatory reason for not hiring Higgins, namely, his poor performance in answering questions during the telephone interview. R. D. & O. at 25-36. The ALJ concluded that, even if discrimination was a factor in Higgins' non-selection, Alyeska had met its burden of proof by showing that it would not have hired Higgins anyway because of his poor performance during the interview. Therefore, Higgins had failed to meet his burden of proof to establish that he was retaliated against in violation of the employee protection provisions of the environmental whistleblower statutes.

STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's recommended decision under 29 C.F.R. § 24.8. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, *inter alia*, the statutes listed at 29 C.F.R. § 24.1(a)). Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in *de novo* review of the recommended decision of the ALJ. *See* 5 U.S.C. § 557(b); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

DISCUSSION

To show discrimination under the environmental whistleblower statutes, a complainant initially must show that the employer is subject to the statutes, that the complainant engaged in protected activity of which the employer was aware, that he suffered adverse employment action and that a nexus existed between the protected activity and adverse action. *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 18 (ARB Feb. 28, 2003); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995). The burden then shifts to the employer to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Jenkins*, slip op at 18. *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Where a complainant establishes that an unlawful reason was a motivating factor in the employment decision ("mixed motive"), the employer must prove by a preponderance of the evidence that it would have made the same decision absent the unlawful reason. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion). *See Desert Palace, Inc., dba Caesars Palace Hotel & Casino v. Costa*, ___ U.S. ___, No. 02-679, slip. op at 8 (June 9, 2003), *aff'g sub nom. Costa v. Desert Palace, Inc.*, 299 F.3d 838 (2000) (direct evidence of discrimination is not required in mixed-motive cases under Title VII of the Civil Rights Act). *See also Combs v. Lambda Link*, ARB No. 96-066, ALJ No. 95-CAA-18 (ARB Oct. 17, 1997).

On appeal, Higgins argues that the ALJ erred as a matter of law in finding that Alyeska articulated a legitimate, non-retaliatory reason for not hiring Higgins because the ALJ's conclusion was based on the composite scores of two panelists. Thus, Higgins did not have an interview by three unbiased interviewers, as the other candidates did. Therefore, Higgins argues, Alyeska failed to prove that a legitimate reason, standing alone in the same circumstances, would have produced the same decision.

Our review of the record convinces us that Higgins did so poorly in the interview that he would not have advanced to the next level under any variation of the scoring by the three panelists.[5] Overall, the three interviewers scored Higgins' responses to the four questions lower than they scored those of the top four candidates. RX 29, 66-67; *see* Exhibits H, I, and J, Alyeska's Response Brief. If Wick's scores were replaced by the higher figure of Morgan and LaForest, Higgins would have come in seventh. *See* Exhibit I 1-5. If LaForest's scores—which were the highest by far for all candidates—were used instead of Wick's, Higgins' total would again result in seventh place. See Exhibit J-5.

Even if Wick's scores were hypothetically replaced by the top score of three for each of

[5] We note that Higgins did not object to Wick and Morgan being part of the interviewing panel, which he knew several weeks before the interview. TR at 76-85.

the questions—which is highly unlikely since neither Morgan nor Wick awarded threes to any of the candidates—the cumulative score for Higgins would still have only tied him with the fourth-place candidate, who did not receive a job offer.

We have carefully reviewed the record and find that it supports the ALJ's findings of fact. His recommended decision, attached and incorporated herein, correctly applies established legal principles in concluding that Alyeska's decision not to hire Higgins was based on a legitimate non-discriminatory rationale and that Higgins had failed to establish by a preponderance of the evidence that he had suffered retaliatory discrimination. Further, the ALJ properly determined that, even if discriminatory animus was a factor in Higgins' non-selection, Alyeska established that he would not have been hired anyway based on his poor interview. Therefore, we **AFFIRM** the ALJ's decision and **DENY** Higgins' complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge