



In the Matter of:

PATRICIA A. BOOKER,

ARB CASE NO. 2017-0038

COMPLAINANT,

ALJ CASE NO. 2016-ERA-00012

v.

DATE: July 31, 2019

EXELON GENERATION COMPANY, LLC,

RESPONDENT.

Appearances:

For the Complainant:

Patricia A. Booker; *pro se*; Delta, Pennsylvania

For the Respondent:

**Talib N. Ellison, Esq.; *Exelon Business Services Company*;
Philadelphia, Pennsylvania**

BEFORE: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*

DECISION AND ORDER OF REMAND

PER CURIAM. This case arises under the whistleblower protection provision of the Energy Reorganization Act (ERA), as amended, and its implementing regulations.¹ On June 25, 2014, Patricia A. Booker filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Exelon

¹ 42 U.S.C. § 5851 (2005); 29 C.F.R. Part 24 (2018).

Generation Company, LLC retaliated against her by harassing her and revoking her Unescorted Access Authorization (UAA) after she engaged in protected activity, in violation of the ERA. OSHA found that, although Complainant had proven she engaged in protected activity, employer had knowledge of her protected activity, and adverse action (i.e., her UAA revocation), there was no reasonable cause to believe that Respondent violated the ERA because the evidence failed to show that 1) Respondent harassed Complainant or 2) her protected activity was a contributing factor to the decision to revoke her UAA.

Complainant filed objections and a request for hearing before an Administrative Law Judge (ALJ). Respondent filed a motion with the ALJ for summary decision. Both parties filed briefs with supporting documentation.² On April 4, 2017, the ALJ issued an order granting Respondent's motion for summary decision and dismissing the complaint. After making extensive findings of fact,³ the ALJ found that 1) the alleged harassment was not sufficiently threatening to constitute a hostile work environment, and 2) the record showed that the persons responsible for revoking Complainant's UAA were required to do so because Complainant's actions called her emotional or mental condition into question.⁴ Complainant appealed the ALJ's decision to the ARB. For the following reasons, the Board vacates the ALJ's order and remands the case for the ALJ to proceed to an evidentiary hearing on the merits.

BACKGROUND⁵

Respondent hired Complainant as a clerical employee in 1984 at the Peach Bottom Atomic Plant in Delta, Pennsylvania.⁶ Over the years Complainant was

² Order Granting Motion for Summary Disposition (Order) at 2.

³ *Id.* at 2-12.

⁴ *Id.* at 7, 12.

⁵ The background is meant to summarize the most significant aspects of this matter and we derived it from the ALJ's April 4, 2017 order. Nothing in this background section should be considered as constraining any fact findings the ALJ makes on remand after a hearing.

⁶ The references in this paragraph are to Order at 2.

promoted to positions of greater responsibility, ultimately obtaining the position of Administrative Coordinator.

In September 2013, Complainant reported inappropriate backdating of safety-related procedure documents to various persons, including Respondent's Nuclear Oversight (NOS), the Maintenance Planning Manager, the Maintenance Director, and the Plant Manager.⁷ She informed several of these persons that if the issue was not resolved, she would report it to the Nuclear Regulatory Commission (NRC).⁸ Complainant also initiated an Issue Report (IR) regarding the backdating. When she saw no reaction to her reports, Complainant contacted Mathew Miller, an NOS employee, to follow up on the status of her IR. Miller looked into the matter and found that her IR had been closed with no actions taken to address the concern. Because Miller discovered that the IR had been addressed to Thomas Powell, Complainant's supervisor, Miller discussed the matter with Powell, who reopened the IR. When Complainant tried to discuss the IR with Powell, he shut down the conversation and stated that "the person should have brought it to us instead of taking to NOS." Complainant also discussed the issue with Charles Breidenbaugh, the Maintenance Director, in January 2014, and, after the IR was reopened, with plant manager Pat Nevin and the Peach Bottom Vice-President in February 2014.

On February 7, 2014, Complainant reported the back-dating of maintenance work orders to the NRC.⁹ She also filed a separate complaint with the NRC on the same day alleging retaliation from Respondent for her earlier complaints about the issue.

Alleged Adverse Actions

On February 1, 2014, Complainant sent two emails to Laura Rush, a Senior Human Resources Generalist, and another to her supervisor complaining of specific

⁷ The references in this paragraph are to Order at 3-4.

⁸ Respondent's Brief at 9 (citing Exhibit 10 at Interrogatory Response No. 5).

⁹ The references in this paragraph are to Order at 7.

instances of retaliation for her protected activities, including a loss of access to her supervisor's email account and job responsibilities that were taken from her.¹⁰

Complainant also later alleged that John Connelly, her supervisor after April 2014, had yelled at, intimidated and threatened her on September 25, 2014, and on October 3, 2014, entered her cubicle in an intimidating manner, came within one foot of her chair and put his arm up on a riser behind Complainant.

On September 2, 2014, Respondent's Security Access and Access Authorization department notified Connelly that the annual Behavior Observation Program (BOP) Supervisory Review for his subordinates was due.¹¹ Connelly's BOP review for Complainant indicated that she spent time talking to herself and went out of her way to avoid certain people. Kevin Concannon, the Senior Authorization Reviewer of Connelly's BOP reviews, sent a copy of the BOP review to Susan Techau, Manager of Fitness for Duty/Access and In-Processing in the Access Authorization Group and contacted Respondent's Medical Review Officer (MRO), Dr. Barbara Pohlman. Dr. Pohlman was responsible to determine whether an employee had an impairment that could affect the safe operation of the plant and to recommend whether such a person's UAA should be denied or placed on hold. Based on the information in Complainant's BOP, Dr. Pohlman ordered that Respondent's Employee Assistance Program (EAP) evaluate Complainant by September 25, 2014. But Dr. Pohlman did not recommend that Complainant's UAA be revoked at that time.

Concannon notified EAP and Connelly of the mandatory referral. Connelly scheduled a meeting on September 16, 2014,¹² with Complainant and Rush to discuss Complainant's BOP review and notify Complainant about her referral to the EAP. Before the meeting was to take place, Complainant notified Connelly that she was meeting with the NRC that morning. Thereafter, Connelly and Rush met with

¹⁰ The references in this paragraph are to Order at 4-6.

¹¹ The references in this paragraph are to Order at 7-9.

¹² The ALJ indicated that this meeting took place on September 26, 2014 (Order at 8-9), but it appears that it actually took place on September 16, 2014, as Complainant asserted (Complainant's Brief at 9.) and in the Declaration of Laura M. Rush Respondent's Exhibit (RX) 27.

Complainant that afternoon. After Connelly told Complainant about her BOP review and her referral to the EAP, Complainant stated that she was not surprised because she had met with the NRC that morning. Connelly responded that the one was not related to the other and that her BOP review and mandatory referral to the EAP had both occurred before her meeting with the NRC.

Subsequently, on October 7, 2014, Complainant met with Connelly, Rush, Techau, Brian Zukauckas, the Manager of Site Human Resources, Matthew D. Smith, Respondent's Director of Human Resources, Barbara Stevens, Respondent's Director of Occupational Health and Regulatory Medical Services, and corporate legal counsel about her BOP review.¹³ After the conference, Techau authorized that Complainant's UAA be placed on administrative hold while Complainant continued her EAP evaluation sessions. Without a UAA, Complainant was unable to work within the protected area of Peach Bottom, where she was ordinarily assigned to work.

Complainant continued attending her EAP evaluation sessions.¹⁴ The EAP referred Complainant to Dr. Mary Lou Kunkle, a psychologist, who recommended that Complainant remain off work, attend outpatient counseling, and that Complainant's UAA continue to be placed on temporary administrative hold. On December 13, 2014, a status report from the EAP to Bob Pilkey, the Peach Bottom site nurse, Concannon and Dr. Pohlman recommended that Complainant be returned to work with nuclear access starting December 9, 2014, with accommodations for a three-month period providing that Complainant be able to report to a female manager, her desk be moved near that female manager, and she continue with outpatient counseling upon her return to work. Subsequent status reports continued to recommend a return to work with the same accommodations.

Dr. Pohlman rejected the EAP recommendations on February 27, 2015, because she considered the recommended accommodation of Complainant reporting to a specific female manager unacceptable as it would be impossible to guarantee that manager's presence at all times.¹⁵ Zukauckas then wrote to Complainant on

¹³ The references in this paragraph are to Order at 9.

¹⁴ The references in this paragraph are to Order at 9-10.

¹⁵ The references in this paragraph are to Order at 11.

February 27, 2015, informing her that Dr. Pohlman did not accept the recommendation that she return to work because the accommodation of reporting to a specific female manager was unacceptable. Thereafter, Complainant went on short-term disability followed by long-term disability, and after one year on long-term disability, pursuant to Respondent's employment practice, Respondent terminated Complainant's employment.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to conduct appellate review of ALJ decisions in cases arising under the ERA and to issue final agency decisions in these matters.¹⁶ The ARB reviews an ALJ's grant of summary decision de novo, applying the same standard that ALJs employ under 29 C.F.R. § 18.72 (2018).¹⁷

DISCUSSION

Pursuant to 29 C.F.R. § 18.72(a), upon a motion for summary decision, 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." In deciding on such a motion, all evidence is viewed in the light most favorable to the nonmoving party.¹⁸ When deciding whether to grant a motion for summary decision, the adjudicator does not weigh the evidence to determine the truth of the matters asserted.¹⁹ We have held that "a genuine issue exists if a fair-

¹⁶ See Secretary's Order No. 1-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019).

¹⁷ *Franchini v. Argonne Nat'l Lab.*, ARB No. 13-081, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept. 28, 2015) (citations omitted).

¹⁸ *Id.* (citations omitted).

¹⁹ *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 9 (ARB Oct. 26, 2012); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("it is clear . . . that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.").

mindful fact-finder [] could rule for the nonmoving party after hearing all the evidence, recognizing that in hearings, testimony is tested by cross-examination and amplified by exhibits and presumably more context.”²⁰ Denying summary decision because there is a genuine dispute as to a material fact simply means that an evidentiary hearing is required to resolve those issues; it is not an assessment on the merits of any particular claim or defense.²¹ Again, the analysis performed is the threshold matter “of whether there is the need for a trial—whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.”²²

Applying this standard to the instant case, we vacate the ALJ’s order and remand the case because the ALJ committed reversible error. Namely, he improperly weighed the evidence and made findings of fact as if he was resolving the case on its merits based on the record before him in the absence of a hearing.²³

Harassment

The ERA prohibits employers from “discharg[ing] any employee or otherwise discriminat[ing] against any employee with respect to his compensation, terms, conditions, or privileges of employment.”²⁴ The regulations specify that employer actions that constitute violations if done because of an employee’s protected activity include actions “to intimidate, threaten, restrain, coerce, blacklist, discharge,

²⁰ *Henderson*, ARB No. 11-013, slip op. at 7-8; see *Anderson*, 477 U.S. at 248 (summary decision cannot be granted if there is a genuine dispute about a material fact, “genuine” meaning “if the evidence is such that a reasonable [fact finder] could [decide in favor of] the nonmoving party.”).

²¹ *Henderson*, ARB No. 11-013, slip op. at 9.

²² *Anderson*, 477 U.S. at 250.

²³ *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 7 (ARB Sept. 26, 2012) (“In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted.”).

²⁴ 42 U.S.C. § 5851(a)(1).

discipline, or in any other manner retaliate against any employee.”²⁵ Here, Complainant alleged that Respondent threatened, intimidated, and harassed her in various ways, including removing her access to emails, reassigning her duties to other employees and sending her harassing emails requiring work that was no longer her responsibility to perform.²⁶ If supported by admissible evidence, these allegations would qualify as discrete acts of discrimination under the ERA and its implementing regulations.²⁷

Turning to the evidentiary submissions supporting Complainant’s allegations, there is Complainant’s emails to her employer’s agents in which she complained about her loss of access to emails, the reassignment of her job duties, and retaliation after she had engaged in protected activity.²⁸ On summary decision, viewing the evidence in the light most favorable to Complainant, the emails alone raise genuine issues of material fact as to whether Respondent harassed her by intimidating, threatening, or otherwise retaliating against her in violation of the ERA and its implementing regulations because she engaged in protected activity. The ALJ erred by weighing the additional evidence Respondent proffered on these issues and then determining which party he believed. While such fact-finding may be necessary and appropriate when adjudicating other types of motions or the merits of a complaint, it is not appropriate when resolving a motion for summary decision. For this reason, we reverse the ALJ’s order with respect to the allegations of harassment and remand the case for reconsideration of this issue after an evidentiary hearing on the merits.

²⁵ 29 C.F.R. § 24.102(a) and (b).

²⁶ This list is not intended to be exhaustive but merely states instances of harassment alleged that survive summary decision. Complainant’s other allegations, including that Connelly intimidated or threatened her, may also be considered on remand and determined to be adverse actions under the ERA. *See* Order at 4-6.

²⁷ It is not necessary that employer actions constitute a prima facie case of hostile work environment to be considered as adverse personnel actions under the ERA. All that need be alleged and proven is that employer has intimidated, threatened, coerced, blacklisted, discharged, disciplined, or *in any other manner retaliated against an employee* because the employee has engaged in protected activity. 29 C.F.R. § 24.102(b) (emphasis added).

²⁸ Order at 4 (citing RX 15-16); *see* Respondent’s Reply Brief at 10-11.

Loss of UAA Badge/Status/Employment

The ALJ made a similar error in his conclusions concerning the suspension of Complainant's UAA and ultimate termination. After analyzing and weighing the evidence the parties proffered, the ALJ reached the following conclusion:

Complainant's argument that her protected activity caused or contributed to Respondent's withdrawal of her UAA is not supported by the record. Rather, the record shows that the UAA was placed on temporary hold by Dr. Barbara Pohlman, Respondent's MRO, the person responsible for reviewing information on Respondent's employees with regard to their fitness for duty and their eligibility for UAA, and the person responsible under the BOP program for determining if the BOP review reveals an impairment that could affect safe operation of the plant. The record shows that the persons responsible for withdrawal of Complainant's UAA were not only authorized but were required by regulation to do so as her actions called into question her emotional or mental condition.

Order at 12. Even if the ALJ is correct about the mandatory nature of the withdrawal of Complainant's UAA,²⁹ his analysis overlooks a key fact: Complainant's supervisor, John Connelly, set in motion the process for the withdrawal of Complainant's UAA. Notwithstanding the apparent objectivity of the individuals who executed the suspension of Complainant's UAA and ultimately terminated Complainant's employment, summary decision is not appropriate if there is any evidence of record that tends to establish that Connelly made his submissions concerning Complainant's BOP review with retaliatory animus and the adverse actions ultimately taken as a result of his observations were foreseeable. *See Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011).

²⁹ Respondent asserts on appeal that the decision to revoke Complainant's UAA is unreviewable because such a decision relates to national security clearances. We need not resolve this issue in light of our disposition of the instant appeal, but we note that even if the Department of Labor cannot review the substance of the decision to revoke a UAA, the Department may lawfully examine the reasons that the action was taken in the context of whistleblower retaliation allegations.

On this point, we note the following evidence of record in a light most favorable to Complainant:

- Complainant asserts the actions Connelly reported in her BOP review did not indicate changed behavior and were not different than those of her peers (Complainant's Response to the Motion for Summary Decision at 20v, 21x, 35, Order at 8);
- Connelly did not discuss his putative observations with Complainant before submitting them under the BOP (RX 27, Order at 8-9 (implicit));
- Connelly was aware of Complainant's previous protected activity and troubled interactions with Powell, her previous supervisor, but did not restore her previous email access nor reinstate her previous job responsibilities, which actions were taken, Complainant asserts, because of her protected activity (RX 5; Complainant's Brief on Appeal at 8);
- Connelly's action took place no more than seven months after Complainant's protected activity of complaining to the NRC (Order at 7);
- Connelly's action took place at the first regularly-scheduled BOP reporting cycle after Complainant's protected activity (Order at 7 (implicit));
- Complainant asserts that Connelly engaged in harassing behavior toward her after he learned of her meeting with the NRC on September 16, 2014 (Order at 5-6, Complainant's Exhibits 3, 4, 15, 35, 56 at 5).

Even assuming that Respondent disputes each of these points, it is nevertheless incontrovertible that there is some evidence—when viewed in a light most favorable to Complainant—that Connelly was acting with retaliatory intent when he complained of Complainant's talking to herself and her actions toward her former supervisor, Powell.³⁰ As such, there remains a genuine dispute as to

³⁰ Order at 8-9; see *Brucker v. BNSF Ry. Co.*, ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 9 (ARB July 29, 2016) (in which the ALJ overlooked the complainant's evidence that created a material issue of fact as to whether the respondent would have fired the complainant if the complainant had not engaged in protected activities).

material facts concerning the role, if any, Complainant's protected activity had in causing the adverse actions she subsequently endured.³¹

CONCLUSION

Complainant, the nonmoving party below, has submitted enough evidence to raise questions of material fact on the issue of whether Respondent harassed Complainant and revoked her UAA status because she engaged in protected activity. Therefore, the ALJ's Order Granting Motion for Summary Disposition is **VACATED** and this matter is **REMANDED** for an evidentiary hearing on the merits.

SO ORDERED.

³¹ We take this opportunity to recall that adjudicating the issue of whether there is contributing-factor causation is a fact-intensive determination, often involving complex and subtle questions of intent and motivation, which is usually challenging to resolve by summary decision. *Henderson*, ARB No. 11-013, slip op. at 14. And even if the ALJ determines that summary decision is appropriate, one must still take care not to conflate the decisional standards appropriate for summary decision, 29 C.F.R. § 18.72(a), with those for a decision on the record. *Id.* § 18.70(d). The former does not allow for weighing the evidence, while the latter does.