



UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

MAY 25 1994

Docket Nos. 50-390
50-391
(10 CFR 2.206)

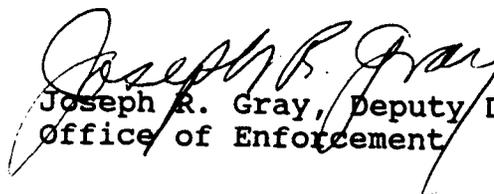
George M. Gillilan
Route 2 Box 262-1
Decatur, Tennessee 37322

Dear Mr. Gillilan:

On April 7, 1994, you were notified that the NRC had received your Petition under 10 CFR 2.206 dated February 25, 1994. The April 7 letter also advised you that a copy of your Petition would be forwarded to the Tennessee Valley Authority (TVA), inviting them to respond if they desire.

This is to advise you that TVA has filed a response, dated May 20, 1994, a copy of which is enclosed. If you have any comments on TVA's response, please provide them not later than June 8, 1994.

Sincerely,


Joseph R. Gray, Deputy Director
Office of Enforcement

Enclosure: As Stated

cc: Tennessee Valley Authority

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PDR ADOCK 05000390
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U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: July 3, 1991
CASE NO. 90-ERA-24

IN THE MATTER OF

G. RICHARD HOWARD,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER OF DISMISSAL

Before me for review is the Recommended Decision and Order (R.D. & O.) of the Administrative Law Judge (ALJ), issued on September 4, 1990, in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982). The ALJ recommended granting the Motion for Summary Judgment filed by Respondent (TVA), and dismissing the complaint. The ALJ concludes that any allegation of discriminatory discharge raised by Complainant is untimely, and that Complainant failed to allege a prima facie case of blacklisting in retaliation for protected conduct. Both parties have filed briefs before the Secretary.^{1/}

^{1/} I note that although Complainant has been represented by counsel throughout this ERA case, his briefs before the Secretary are filed pro se.

Based on a review of the ALJ's R.D. & O. and the record before me, including the submissions of the parties, I accept the ALJ's factual findings as fully supported by the record and I agree with the ALJ's decision to grant Respondent's Motion for Summary Judgment and dismiss the complaint.

DISCUSSION

Based on my review of the complaint filed on August 24, 1989, I conclude that Complainant did not raise any allegation of discriminatory discharge therein. I agree with the ALJ, however, that to the extent Complainant intended to raise the allegation of discriminatory discharge, his complaint was untimely. Under the ERA and its implementing regulations, a complaint must be filed within thirty days after the occurrence of the alleged violation. See 42 U.S.C. § 5851(b); 29 C.F.R. § 24.3(b) (1990). The record here establishes that TVA notified Complainant on June 8, 1987, that he was being discharged effective July 9, 1987,^{2/} and Complainant filed the complaint on August 24, 1989.

^{2/} The thirty day filing period actually commenced on the date that Complainant was informed of the challenged employment decision, rather than at the time the effects of the decision were ultimately felt. See generally Rainey v. Wayne State University, Case No. 89-ERA-8, Sec. Final Dec. and Order, May 9, 1991, slip op. at 2-3; Nunn v. Duke Power Co., Case No. 84-ERA-27, Dep. Sec. Dec. and Order of Remand, July 30, 1987, slip op. at 14-17; English v. General Electric Co., Case No. 85-ERA-2, Dep. Sec. Final Dec. and Order, Jan. 13, 1987, slip op. at 4-11, aff'd sub nom. English v. Whitfield, 858 F.2d 957 (4th Cir. 1988). In the instant case, however, because the undisputed effective date of Complainant's discharge falls outside of the statutory filing period, it is unnecessary for purposes of this decision, to discern the actual date when Complainant was notified of Respondent's decision to discharge him, and the filing period commenced.

Accordingly, with respect to any allegation of discriminatory discharge, there is no genuine issue of material fact concerning Complainant's failure to satisfy the statutory requirement of filing his complaint within thirty days of the alleged violation. Additionally, I reject Complainant's arguments that equitable tolling is warranted in this case, as the record does not support Complainant's allegations of being actively misled by TVA or of having filed the exact claim in the wrong forum. See School District of the City of Allentown v. Marshall, 657 F.2d 16, 19-21 (3d Cir. 1981).^{3/}

The remaining issue in this case is whether it is appropriate to grant Respondent's Motion for Summary Judgment with respect to the blacklisting allegation made by Complainant. In his complaint, Complainant generally alleges a continuing pattern of discrimination by TVA over a period of several years; Complainant specifically alleges that a memorandum from TVA's General Counsel to TVA's Vice President for Nuclear Power, dated May 25, 1989, with an attached status report on ERA cases, is a "blacklist" in violation of the ERA.^{4/} The status report on TVA

^{3/} As this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, I note that the ALJ did not consider the criteria provided by that court for determining whether to apply equitable tolling in cases filed under Title VII. See Andrews v. Orr, 851 F.2d 146, 151 (6th Cir. 1988). Complainant has also failed to present a case for application of equitable tolling under the five factors deemed pertinent in Andrews.

^{4/} Blacklist. A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate; as
(continued...)

cases contains a brief summary of 26 ERA cases, and 6 non-ERA cases, including one brought by Complainant, alleging retaliation by TVA. The challenged memorandum and status report allegedly appeared in local newspaper articles on July 26, 1989, and was disseminated to some extent outside of TVA management.

The regulations at 29 C.F.R. §§ 18.40, 18.41 (1990), provide that a summary judgment is appropriate if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact. As Respondent's motion with supporting affidavits, was filed in accordance with the provisions found at 29 C.F.R. § 18.40, Complainant's response in opposition to the motion, "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c).

In the instant case, Complainant has failed to show that a genuine issue of material fact exists with respect to the allegation of blacklisting, such that a hearing is required. Although Complainant alleges that TVA's issuance of the May 25 memorandum and status report is a blacklist, no specific facts were set forth to show adverse action against Complainant based on this memorandum and status report. Complainant has not demonstrated that TVA used this memorandum and status report for

^{4/}(...continued)

where a trades-union "blacklists" workmen who refuse to conform to its rules, or where a list of insolvent or untrustworthy persons is published by a commercial agency or mercantile association.

Black's Law Dictionary 154 (5th ed. 1979).

any purpose other than the stated purposes: to apprise TVA management of the status of ERA cases and civil actions against TVA; to assist managers in responding to inquiries by NRC and others; and to clarify the procedure for handling ERA complaints. Moreover, the record contains no evidence that TVA disseminated these documents to the newspaper or to other outside sources. Without further indications of specific adverse action, the existence of the TVA memorandum and status report which contain no language or instructions detrimental to Complainant, is not sufficient to establish the requisite elements of a prima facie case of blacklisting.^{5/} See generally Doyle v. Bartlett Nuclear Services, Case No. 89-ERA-18, Sec. Dec. and Order of Dismissal, May 22, 1990, slip op. at 4-6 (dismissal of complaint of blacklisting for failure to allege any discriminatory conduct by named Respondent); Doyle v. Alabama Power Co., Case No. 87-ERA-43, Sec. Final Dec. and Order, Sept. 29, 1989, slip op. at 2-3, appeal docketed, No. 89-7863 (11th Cir. Nov. 28, 1989) (dismissing a claim of blacklisting for failure to allege an act of discrimination within 30 days prior to the filing of the complaint).

Consequently, I conclude that although Complainant was afforded the opportunity for discovery, he failed to allege sufficient facts, which if established at a trial, would support a finding that the General Counsel's memorandum of May 25, 1989,

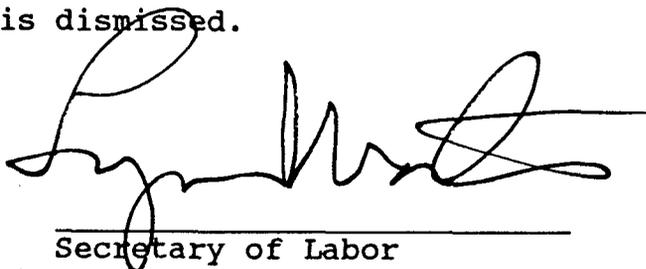
^{5/} As TVA correctly points out, the General Counsel has a duty to keep his client informed about these cases and there is no reason that he should be constrained from doing so in writing.

together with the attached status report of ERA complaints, constitutes discriminatory action or was used for a discriminatory purpose. As Complainant has not shown any genuine issue of material fact concerning whether TVA took any adverse action against him, TVA's motion for summary judgment is granted. This decision is consistent with pertinent caselaw on granting summary judgment motions. See Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476-1481 (6th Cir. 1989).

In Street, the court held, inter alia, that the granting of summary judgment is appropriate where the parties have been afforded the opportunity for discovery and the non-moving party is unable to demonstrate that he will be able to produce sufficient evidence at trial to withstand a motion for directed verdict. 886 F.2d at 1478. The instant Complainant was represented by counsel in the preparation of his complaint and throughout the proceedings before the ALJ, and was afforded an opportunity to conduct discovery. Nevertheless, he failed to amend or seek to amend his complaint, or to produce evidence that TVA used the challenged documents against him.

Accordingly, the case is dismissed.

SO ORDERED.



Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: G. Richard Howard v. Tennessee Valley Authority

Case No. : 90-ERA-24

Document : Final Decision and Order of Dismissal

A copy of the above-referenced document was sent to the following persons on Jul 3 1991.

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