



Issue Date: 18 July 2006

CASE NO.: 2006-ERA-00004

In the Matter of

JOHN JASINSKI,
Complainant

v.

**WACKENHUT CORPORATION, and
EXELON CORPORATION,**
Respondents

**ORDER DENYING RESPONDENT EXELON'S
MOTION FOR SUMMARY DECISION
AND RESERVING RULING ON RESPONDENT WACKENHUT'S MOTION
FOR PARTIAL SUMMARY DECISION**

The current claim was brought under the Energy Reorganization Act of 1974 ("the Act"). This Act contains an employee protection provision to shield employees from discrimination based upon protected activities (ie. "whistleblowing"). Complainant brought this claim against his employer Wackenhut Corporation, and Exelon Corporation, which Complainant alleges is also his employer. Respondent Exelon now moves for summary decision, asserting that there is no genuine issue to any material fact. (Respondent Exelon's Motion for Summary Decision received June 28, 2006). Respondent asserts that there is no genuine issue as to whether it is Complainant's employer or whether it subjected Complainant to any adverse employment action. Respondent Wackenhut also moves for Partial Summary Decision arguing that no genuine issues of material fact exist with respect to Complainant's claims under the Toxic Substances Control Act and the Safe Drinking Water Act. (Respondent Wackenhut's Motion for Partial Summary Decision received on June 28, 2006). Complainant was entitled to fifteen days response time, per 29 C.F.R. § 18.40(a) and § 18.4(c)(3), and he submitted such responses to both Motions. (Complainant's Responses received July 12, 2006).

The applicable section of the Energy Reorganization Act reads:

§ 5851. Employee Protection

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee);

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

(2) For purposes of this section, the term "employer" includes--

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);

(B) an applicant for a license from the Commission or such an agreement State;

(C) a contractor or subcontractor of such a licensee or applicant; and

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344.

42 U.S.C. § 5851 (1974).

The following is an excerpt from the complaint filed with this Court. The parts that pertain to Exelon, on their face, are noted in bold:

3. Complainant John Jasinski was an employee of the respondent **WACKENHUT CORPORATION, and was assigned to work as director of nuclear operation for respondent EXELON CORP.** Complainant worked for Wackenhut for about 13 years. **Complainant's duties included supervision of security at four nuclear power plants operated by respondent EXELON CORP.**
4. Complainant engaged in protected activity. Jasinski's protected activities include, but are not limited to, **raising compliance issues with management**

- of both respondents as part of his duties, collecting evidence of violations and calling appropriate enforcement authorities to report violations. During relevant times, respondents either knew of complainant's protected activity, or suspected him of engaging in protected activity.
5. Respondents have discriminated against Jasinski and maintained a hostile work environment for Jasinski on account of his protected activities. Such hostility, discrimination and retaliation includes, but is not limited to:
- A. Denying complainant an annual raise in January 2005.
 - B. Reducing complainant's bonus.
 - C. Imposing discipline on Complainant on March 11, 2005, for reporting nuclear safety concerns to Exelon management.
 - D. Subjecting complainant to hostile interrogation about his protected activities on March 18, 2005, by Bohdan Neswiachny
 - E. Giving complainant a poor performance evaluation on March 31, 2005.
 - F. Relieving complainant of duties and placing complainant on paid administrative leave on April 13, 2005.
 - G. Confiscating the laptop computer, microcassette recorder, and two microcassette tapes from me on or about April 13, 2005.
 - H. Revoking complainant's access to Exelon nuclear locations.
 - I. Damaging Jasinski's reputation and future employment opportunities.
 - J. Respondent had restrained complainant and other employees from engaging in protected activity.
 - K. Discharging Jasinski from employment effective June 10, 2005.
6. Respondents maintained a hostile work environment for complainant, and otherwise harassed complainant on account of his protected activities

...

(Complaint filed on January 7, 2006).

Initially, Respondent Exelon's Motion to Dismiss in this case was denied. Now, with additional supporting affidavits procured since, Respondent Exelon moves for summary decision in its favor. The prima facie case standard acts in whistleblower cases as a gate-keeping function; while initially Complainant was allowed to proceed on assertions alone, he can not do so in response to a motion for summary decision.

The standard for summary decision is found in the regulations of the Office of Administrative Law Judges at 29 C.F.R. § 18.40 and 18.41 and Rule 56 of the Federal Rules of Civil Procedure, as well as in relevant case law. The standard is that summary judgment may be rendered in cases where "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 ..." 29 C.F.R. § 18.40(d). Where one party has moved for summary decision, the party opposing the motion "may not rest upon the mere allegations or denials of such pleading," but rather "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 reviewing the evidence, I must read the factual evidence in the light most favorable to the nonmoving party, and draw all reasonable inferences in the nonmoving party's favor.

There are two material facts that Exelon argues the Complainant can not put forth sufficient evidence in order to establish there is a genuine issue: an employer-employee relationship between Complainant and Exelon, and an adverse employment action taken by Exelon against Complainant. Where a party fails to make a sufficient showing to establish one of the elements essential to their case, there is no genuine issue of any material fact because that party will be unable to prove that element at trial, rendering the rest of their case immaterial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). A material fact is one whose existence affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Again, Complainant does not need to prove these elements by a preponderance of the evidence at this point, he only has to produce sufficient evidence that a genuine issue exists with respect to these elements. Rockefeller v. U.S. Department of Energy, ARB Case No. 03-048, ALJ No. 2002-CAA-0005 (ARB August 31, 2004). Reading the evidence in the light most favorable to Complainant, I find that Complainant has made a prima-facie case because there is sufficient evidence from which one could reasonably find an employer-employee relationship and an adverse employment action undertaken or influenced by Exelon.

Recently, there has been whistleblower case law that allows for non-employers to be liable, finding the existence of an employer-employee relationship. See Walters v. Travelspan, Inc., ALJ Case No. 2005-AIR-00016 (June 23, 2006); Fullington v. AVSEC Services, L.L.C. and Southwest Airlines Co., et al., ARB Case No. 04-019, ALJ Case No. 2003-AIR-30 (ARB October 26, 2005). Until now, Complainant had not asserted the basis of Respondent's liability. Complainant states that the basis is one of "joint-employment."

One can only hold a non-employer liable for the adverse action that the non-employer took or caused to be taken. In other words, there must be an employment relationship between the complainant and the non-employer, and the non-employer must have taken an adverse employment action against the complainant, or influenced the complainant's employer to take such action. As summarized in Fullington:

We therefore conclude that there must be an employer-employee relationship between an air carrier, contractor or subcontractor employer who violates the act and the employee it subjects to discharge or discrimination, **but that the violator need not be the employee's immediate employer under the common law.**

Fullington, slip op. at 6 (emphases added); and See Walters v. Travelspan, slip op. at 15.

In Walters v. Travelspan, complainant was a pilot for TMA, a charter airline with a contract with Travelspan to provide flights, and brought suit against Travelspan after his employer went bankrupt. Walters v. Travelspan, Inc., ALJ Case No. 2005-AIR-00016 (June 23, 2006). Complainant Walters successfully argued that Travelspan directly influenced his employer in taking an adverse employment action against him. Evidence consisted of phone calls placed by the CEO of the respondent expressing displeasure over the complainant's decision to remove bags from an aircraft for fear the plane was too heavy. This assertion was enough to initially establish a prima facie case, and ultimately, post-hearing, to establish by a preponderance of the evidence that the respondent was liable under the AIR 21 statute.

Certainly, one is not prevented by whistleblower statutes from hiring independent contractors. On paper, this is the relationship that Exelon and Wackenhut purport to have, as Exelon contracts their security to Wackenhut. In dicta, “[C]ontrolling the quality of a contractor’s employee’s work performance under the contract is not tantamount to having ‘the ability to hire, transfer, promote, reprimand, or discharge’ that employee, as our case law requires.” Fullington, slip op. at 7. The question remains as to whether this is the relationship that actually existed with respect to Complainant’s work.

Complainant has made several allegations. These allegations include that Complainant’s salary was provided directly by Exelon, that Mr. McNally from Exelon interviewed and hired Complainant, and that Exelon told Wackenhut to place Complainant on administrative leave. With regard to the last allegation, Mr. Jasinski first alleged that two Exelon officials, Mr. Kaegi and Mr. McNally, directed Wackenhut officials to place him on administrative leave. However, at his deposition, Complainant conceded that he has no evidence to support such a contention and is not aware of the existence of any such evidence.

With all of that said, there is some evidence from which I can draw an inference that Exelon’s relationship with Wackenhut went beyond controlling the quality of a contractor’s work. The evidence includes a team building activity in which Wackenhut employees were directed to participate with Exelon employees, against the wishes of Complainant. And while one would expect conversations and interaction between a company providing security at nuclear facilities and the management of those facilities, there is some evidence here of an inordinate amount of conversation and control on a day-to-day basis concerning one another’s employees. There is evidence of investigations initiated by both Respondents; Exelon’s investigations address personnel issues, such as the meeting between Complainant and Ms. Taylor, and meetings with Exelon Human Resources to address issues between Complainant and Mr. McNally and Mr. Supplee, both Exelon employees. In fact, the investigations initiated by Wackenhut versus Exelon are difficult to distinguish; however, one might expect that between two such companies. Furthermore, the fact that Complainant’s termination letter references accusations about security concerns being ignored, and Complainant had discussed such concerns in the course of meetings with Exelon management, allows me to infer that there is a genuine issue of material fact as to the employment relationship among the parties and the involvement of Exelon in the adverse employment actions allegedly taken against Complainant.

The genuine issue that exists here is the level of involvement between the two Respondents: was it simply that of an independent contractor, or was Respondent Exelon so involved in Complainant’s work as to establish an employer-employee relationship, and to create/influence adverse action against him? These are issues that must be reserved for trial, and therefore Respondent Exelon’s Motion for Summary Decision is denied.

With regard to the Motion for Partial Summary Decision submitted by Respondent Wackenhut, I feel that that is a Motion better addressed at trial.

SO ORDERED.

A

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

SERVICE SHEET

Case Name: JASINSKI JOHN v. WACKENHUT CORP & EXELON CORP.

Case Number: 2006ERA00004

Document Title: ORDER

I hereby certify that a copy of the above-referenced document was sent to the following this 18th day of July, 2006:

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