

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5170
(Summary Calendar)

SYED M A. HASAN

Petitioner,

versus

ROBERT B REICH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent,

ENERGY OPERATIONS, INC.,

Intervenor.

On Petition for Review of an Order
of the United States Department of Labor
89 ERA 36

(May 4, 1993)

BEFORE KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:*

Petitioner Syed M.A. Hasan appeals the final decision and order of the Secretary of Labor (Secretary), dismissing Hasan's claim that he had been discharged by his employer, System Energy Resources, Inc. (SERI) for making safety complaints to the Nuclear

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Regulatory Commission (NRC). As we find in the record sufficient evidence to support the Secretary's findings and conclusion, we affirm.

I

FACTS AND PROCEEDINGS

Hasan, a civil and structural engineer with significant experience, is an employee of Bechtel Power Corporation (Bechtel), a company which periodically contracts to supply qualified employees to work at the Grand Gulf Nuclear Station at Port Gibson, Mississippi, owned by SERI. Once assigned to SERI, Bechtel employees are subject to the full supervision of SERI management, even though they continue to be paid by Bechtel. The contracted or "seconded" workers fall into one of two categories: (1) permanent, seconded personnel and (2) temporary, seconded personnel. Permanent, seconded personnel are those Bechtel employees who were stationed at the Grand Gulf facility prior to the time SERI developed its own engineering organization. Temporary, seconded employees, by contrast, are those Bechtel employees contracted to work on specific projects. Hasan falls into the latter category. He was assigned to SERI on May 31, 1988 specifically to design the pipe supports of a new heat removal system (ADHRS).

As this project neared completion, Hasan met with and informed his supervisor, Rabindra Dubey, that he (Hasan) was concerned about the methods used to calculate torsional stresses on the pipe supports. Although Hasan disputes Dubey's version of his own reactions at this meeting, the Administrative Law Judge (ALJ)

credited Dubey's testimony that he duly considered Hasan's information, which was contained in a memorandum, and thereafter informed his staff to consider the torsional stresses.¹ Dubey assumed that this action adequately addressed Hasan's concerns, and did not forward the memorandum to his superiors.

After the ADHRS project was complete, Dubey was asked by Hasan to allow him to remain on site to assist in "scoping out" a project involving the design of platforms and ladders in the facility. Hasan's request was granted, and his assignment was extended accordingly. While working on this new project, Hasan wrote to the Chairman of the NRC, raising his prior concerns with the calculation of torsional stresses on the pipes of the ADHRS project. Hasan did not inform anyone at Grand Gulf that he had communicated his concerns to the NRC. The NRC responded to Hasan's letter by instituting an audit of these torsional stresses. Nyan Deshpande, another supervisor who was aware of Hasan's earlier concerns, assigned Hasan to compute the extra stresses and to develop corrective measures.

During his work on these calculations, Hasan noticed another problem involving pipe support stiffness, and he notified Deshpande of these new concerns. Hasan testified that Deshpande instructed him to continue work on the torsional stresses issue; consequently, Hasan wrote a second letter to the NRC.

¹ Hasan alleged that Dubey tore up the memorandum and was very upset with Hasan. The ALJ found this reaction inconsistent with subsequent favorable reviews and extensions of Hasan's assignments at Grand Gulf.

In December 1988, Deshpande requested that Hasan's assignment to SERI again be extended, this time through March of 1989. Deshpande wanted Hasan to be available during the construction phase of the ADHRS project.

In January, 1990, the NRC conducted its audit of the warping torsion calculations for the ADHRS pipe supports. Hasan attended the audit meetings at Deshpande's request.² At the conclusion of the audit, the NRC required SERI manually to calculate torsional stresses under circumstances involving shear stresses of small magnitude. SERI assigned several engineers to this task including Hasan.

Following the January 1990 audit, Hasan again wrote to the NRC, this time expressing concerns about both the audit and the flexibility of the pipe supports. The NRC responded with a second audit on March 20-23 to conduct, in part, pipe support stiffness calculations. Again Hasan met with the NRC auditor this time privately. Hasan testified that Deshpande was angry with Hasan and stated that Hasan should be fired. The ALJ, however, credited Deshpande's testimony, denying that he ever made such a statement.

Grand Gulf was scheduled to be closed for refueling outage beginning in March and continuing through April. The decreased manpower requirements of the facility were evaluated throughout January and early February. Late in March Hasan was asked to remain at Grand Gulf through the outage, but was advised that he

² Hasan testified that the NRC demanded his presence and Deshpande had no discretion in the matter. Either way, the point is insignificant to our determination.

would be released on April 28, 1989, at the end of the outage. Hasan requested permission to remain an additional few weeks until the end of his children's school year, but his request was denied by SERI management. All in all, Hasan's assignment period was extended four times.

In a comprehensive and thoughtful opinion, the ALJ addressed each of Hasan's claims, making credibility determinations and factual findings. The ALJ concluded that there was no evidence indicating that SERI terminated Hasan because of his "whistle-blowing" letters to the NRC. In support of his conclusion, the ALJ noted that no one at SERI knew of these letters until February, after which Hasan was asked to extend his assignment. Moreover, the ALJ concluded that Hasan's belief that his supervisors and colleagues were upset over his communications with the NRC was inconsistent with his supervisors' requests for Hasan's assistance on the torsional stresses calculations and with their request for his assignments to be extended. The ALJ concluded that Hasan's who? SERI never intended to retain as a permanent employee who was released to coincide with SERI's diminished manpower needs at the end of the refueling outage in April 1989.

On appeal, the Secretary adopted all of the ALJ's findings except one who the record indicated that SERI was unaware of Hasan's communications with the NRC until late March, not early in February as the ALJ had found. In his appeal, Hasan made four factual arguments, essentially the same ones he presents in the instant appeal: that the ALJ erred in finding that (1) the ladders and

platforms project ended in December, 1988; (2) SERI discovered his communications with the NRC in February, not during the March 20-23 audit; (3) Deshpande arranged for Hasan to talk privately to the NRC auditors; and (4) Hasan's supervisors knew that he was not satisfied with their responses to his safety concerns. The Secretary left the first three of these ALJ's findings undisturbed. Of these three findings, the first was adopted by the Secretary and the next two were considered irrelevant.

The Secretary did overturn the ALJ's fourth finding, the one regarding the timing of SERI's discovery of Hasan's communications to the NRC. The Secretary concluded, as Hasan urged, that SERI management first learned of Hasan's actions at the March audit. In the Secretary's view, however, this revised finding was harmful rather than helpful to Hasan's case, as SERI's decision to let his employment expire after the end of the refueling outage had been made before SERI learned of Hasan's complaints to the NRC. The Secretary agreed with the ALJ's conclusion that there was no evidence to support Hasan's claim that SERI discriminated against him for his communications with the NRC.

II

ANALYSIS

A. Standard of Review

We review the Secretary's decision to determine whether it is supported by "substantial evidence," which is "something less than the preponderance of the evidence . . . but is more than a

scintilla."³ The ALJ's credibility findings expressly adopted by the Secretary deserve special deference on appeal,⁴ as it "is not the function of this Court to decide the credibility of conflicting witnesses."⁵

B. Discrimination Claim

The Energy Reorganization Act of 1974 (ERA) prohibits the discharge of an employee in retaliation for the employee's assistance or participation in proceedings or any other action that furthers the purposes of the ERA or the Atomic Energy Act of 1954.⁶ To prove his discrimination claim under the ERA, the employee must demonstrate that:

1. The party charged with discrimination is an employer subject to the ERA;
2. The employee engaged in protected conduct;
3. The employer took some adverse action against the employee; and
4. The protected conduct was the likely reason for the adverse action.⁷

It is only the final, nexus requirement that is in dispute here. Both the ALJ and the Secretary found that there was no evidence indicating that Hasan's release was a result of his "whistle-blowing" activities. Both concluded, to the contrary, that Hasan's

³ Dunham v. Brock, 794 F.2d 1037, 1040 (5th Cir. 1986) (citations omitted).

⁴ NLRB v. Gulf States United Tel. Co., 694 F.2d 92, 96 (5th Cir. 1982).

⁵ NLRB v. Varo, Inc., 425 F.2d 293, 297-98 (5th Cir. 1970).

⁶ 42 U.S.C. §§ 5801-5891.

⁷ DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983).

assignment was not extended as a result of a manpower determination made by SERI prior to its discovery of Hasan's protected activities. We agree.

On appeal Hasan, proceeding pro se,⁸ alleges a variety of challenges to the ALJ's factual findings. Essentially, Hasan reiterates his allegations that Dubey, Deshpande, and other Bechtel employees lied on critical issues.⁹ Giving deference to the ALJ's credibility determinations, we can find no compelling evidence that they are incorrect.

Hasan also alleges that the Secretary erred in finding that the ladders and platform project was substantially finished in December, 1989. The record is uncontroverted, however, that this project was entrusted to outside contractors and Hasan's work, which involved evaluating the scope of the project, was finished sometime in December. Hasan's allegation to the contrary is a mere reiteration that the Bechtel employees are trained liars and not

⁸ Although proceeding pro se in the instant appeal, Hasan was represented in his administrative proceedings.

⁹ Hasan also raises two other issues. In his first point, Hasan asserts that the Secretary's rejection of the ALJ's finding as to when SERI became aware of Hasan's activities indicates that other findings made by the ALJ were incorrect. This is simply a non-sequitur. In addition, Hasan apparently contends that the Secretary erred in ruling in favor of SERI even after concluding that SERI discovered Hasan's activities in March and that such a finding hurt Hasan's case. This too is a non-sequitur. Once the Secretary concluded (with irrefutable logic, we might add) that the new finding hurt Hasan's case, the logical conclusion was to rule against Hasan, not in his favor. In his second point, Hasan focuses on an irregularity in the ALJ's opinion, which mentions two factual findings numbered 24 and 30. These findings were apparently omitted from the list of findings. This typographical error or inadvertent omission does not alter the substance of the opinion.

worthy of credence. We have concluded otherwise. Moreover, Hasan states that his safety concerns were substantiated by the NRC. Although this is probative of his expertiseSOa fact recognized by his supervisorsSOit has no bearing on the amount of work available in the ladders and platforms project. Accordingly, we find sufficient evidence to support the Secretary's findings on this issue.

Finally, Hasan insists that the Secretary fails to observe the timing between SERI's acts of discrimination and his communications with the NRC. He emphasizes that SERI discovered his activities at the March 1989 audit and he was fired shortly thereafter. Despite Hasan's allegations, however, the Secretary did address this point. In fact, the Secretary concluded that this doomed Hasan's complaint, as SERI's decision regarding his employment was made prior to the discovery during the March auditSOa fact eschewing any possible nexus between Hasan's "whistle-blowing" letters and his discharge by SERI. We agree.

For the foregoing reasons, the decision of the Secretary is AFFIRMED.