



In the Matter of:

SHANNON DOYLE,

COMPLAINANT,

v.

**WESTINGHOUSE ELECTRIC CO. LLC,
HOPE COMISKY, ESQ.,
PEPPER HAMILTON LLP,**

RESPONDENTS.

**ARB CASE NOS. 01-073
01-074**

ALJ CASE NO. 2001-ERA-13

DATE: June 30, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Shannon T. Doyle, *pro se*, Dothan, Alabama

For Respondent Westinghouse Electric Company LLC:

**Thomas A. Schmutz, Esq., David R. Lipson, Esq., *Morgan, Lewis & Bockius LLP,*
*Washington, D.C.***

For Respondents Hope Comisky, Esq. and Pepper Hamilton LLP:

**Barbara W. Mather, Esq., Michael H. Rosenthal, Esq., *Pepper Hamilton LLP,*
*Philadelphia, Pennsylvania***

FINAL DECISION AND ORDER

These cases arise under the employee protection provision of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 (2000)¹ and United States Department of Labor implementing

¹ The statute provides, in pertinent part, that “[n]o 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 . . . [notifies a covered employer about an alleged

regulations, 29 C.F.R. Part 24 (2002). Complainant Shannon Doyle alleges that Respondents Westinghouse Electric Co., Hope Comisky, Esq., and Pepper Hamilton, LLP violated the ERA by creating and distributing documents indicating that Doyle engaged in activity protected by the ERA. The Administrative Law Judge (ALJ) recommended that the motions for summary decision that Hope Comisky, Esq. and Pepper Hamilton LLP, and Westinghouse filed be granted. (Recommended Orders) Doyle now appeals the ALJ's rulings to the Board. We **AFFIRM**.

BACKGROUND AND CASE HISTORY

In 1988 Doyle applied for a position at Hydro Nuclear Services which then was a division of Westinghouse. Hydro required Doyle to complete both a training program and an employment application. The application included an "Authorization for Release of Information and Records." Doyle signed the authorization after crossing out the following sentence:

Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing [sic] or receiving any information pertaining to me from any and all liability or claim as results [sic] of furnishing or receiving such information pursuant to this authorization.

Recommended Orders at 2. Doyle told a Hydro manager that he believed the sentence constituted a waiver of his rights under the ERA and that he would refuse to sign the form if it contained the language to which he objected. Hydro did not hire Doyle because he refused to sign the authorization as it was written. Hydro then notified Equifax Corporation that it had denied Doyle unescorted access to its nuclear facilities.²

Doyle filed a complaint with the Secretary of Labor alleging that Hydro's refusal to hire him violated the ERA. On July 17, 1989, an ALJ issued a Recommended Decision and Order (R. D. & O.) recommending that Doyle's complaint be dismissed. On March 30, 1994, the Secretary of Labor issued a Final Decision and Order in Doyle's favor and on May 26, 1994, Hydro petitioned the United States Court of Appeals for the Third Circuit for review of that Order. On July 27, 1994, the parties moved jointly to have the case remanded to the Department of Labor for proceedings regarding damages, and the case was remanded on August 24, 1994. On September 7, 1994, the Secretary of Labor issued an order remanding the case to an ALJ for

violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 et seq.(2000)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists or participates in a proceeding under the ERA or AEA]."

² At the time Doyle was denied unescorted access, Equifax was a credit reporting agency that maintained and sold, among other products, employment reports to prospective employers.

further proceedings. On July 16, 1996, the ALJ issued the final R. D. & O.

On May 17, 2000, the Board issued a Final Decision and Order on Damages & Denial of Stay Pending Judicial Review, ordering Hydro to “send a notice to Equifax Corporation correcting [Hydro’s] earlier notice that it had denied [Doyle] unescorted access to a nuclear plant” and “provide neutral employment references.” *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 89-ERA-22, slip op. at 27, (ARB May 17, 2000). Hydro appealed the Board’s decision to the United States Courts of Appeals for the Third and Sixth Circuits; those appeals were consolidated in the Third Circuit.³

On May 25, 2000, pursuant to the Board’s order, Westinghouse sent a letter to Choice Point, the successor corporation of Equifax, stating that:

On November 22, 1988, Hydro Nuclear Services provided information to your employee, Chris, that Shannon Doyle was disqualified from his position at D.C. Cook nuclear power plant. The reason for the disqualification was the cancellation of the full background investigation. A copy of the Unescorted Access Authorization Log Sheet is attached hereto for your information. By a final decision and order dated May 18, 2000, the Administrative Review Board of the Department of Labor directed Hydro Nuclear Services to notify Equifax Corporation that this disqualification was improper. Although Hydro Nuclear Services is appealing the decision of the Administrative Review Board, it is complying with the directive in the May 18, 2000 order by sending you this notification. Please correct your records.

Brief of Respondent Westinghouse Electric Company LLC in Support of Recommended Decision and Order Granting Respondent’s Motion for Summary Decision, Exhibit F. Westinghouse also placed in its files the aforementioned “neutral employment reference,” which states that:

Shannon Doyle was in training to work as a Decontamination Technician for Hydro Nuclear Services from November 4, 1988 to November 22, 1988. His rate of pay was \$6.50 per hour. Although Mr. Doyle did not work as a Decontamination Technician, his performance in the training was satisfactory.

Id., Exhibit G. On June 1, 2000, Comisky, an attorney with Pepper Hamilton (representing Hydro/Westinghouse), forwarded to Doyle’s attorney copies of the Choice Point letter and

³ On March 27, 2002, the United States Court of Appeals for the Third Circuit held that Doyle’s refusal to sign the waiver did not constitute protected activity under the ERA. *See Doyle v. United States Sec’y of Labor*, 285 F.3d 243 (3d Cir. 2002), *cert. denied*, *Doyle v. Hydro Nuclear Servs.*, 123 S.Ct. 620 (2002).

employment reference, along with a cover letter stating:

As you know, the Administrative Review Board issued its Final Decision and Order on Damages on May 17, 2000. Hydro Nuclear Services has now complied with the portions of that Order directing it to take certain actions. Enclosed you will find: 1. a copy of the letter sent to Choice Point (formerly Equifax) stating that Mr. Doyle's disqualification was improper; and 2. a letter of reference for Mr. Doyle. There is no derogatory or negative information in Mr. Doyle's personnel records related to the failure to hire him, except for the report to Equifax which has now been "corrected", as required by the May 17, 2000 Order.

Brief of Hope Comisky, Esq. and Pepper Hamilton LLP, Exhibit 1.

On April 24, 2001, Doyle filed a second complaint alleging that the letters to Choice Point and his own counsel violated the ERA because they identified him as having engaged in protected activity. The ALJ granted summary decision for the three Respondents in two separate orders. *See Doyle v. Westinghouse Co.*, ALJ No. 2001-ERA-13, Order Granting Motion By Respondents Hope Comisky, Esq. and Pepper Hamilton LLP For Summary Decision (ALJ June 27, 2001) and Order Granting Motion by Respondent Westinghouse Electric Co. For Summary Decision (ALJ June 27, 2001).

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to decide these appeals pursuant to 29 C.F.R. § 24.8 (2002). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the ARB the Secretary of Labor's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a), which includes the ERA).

We review a grant of summary decision *de novo*, i.e., under the same standard employed by ALJs. Set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision." "[I]n ruling on a motion for summary decision, we . . . do not weigh the evidence or determine the truth of the matters asserted . . ." *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6-7 (ARB Nov. 30, 1999). Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact. We also must determine whether the ALJ applied the relevant law correctly. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith*, 475 U.S. 574 (1986); *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099 (9th Cir. 2000) (summary judgment under Rule 56, Fed. R. Civ. P.).

CONCLUSION

We have thoroughly reviewed the record and concur with the ALJ's finding that there are no genuine issues of material fact in dispute. We also conclude that the ALJ's well-reasoned Orders Granting Summary Decision for Respondents Hope Comisky, Esq. and Pepper Hamilton and for Respondent Westinghouse Electric Co., which we attach and incorporate, correctly apply established legal precedent. Accordingly, we **AFFIRM** the ALJ's denial of Doyle's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge



Issue date: 27Jun2001

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SHANNON DOYLE,
Complainant

v.

WESTINGHOUSE ELECTRIC CO.,
HOPE COMISKY, ESQ.,
PEPPER HAMILTON, L.L.P.,
Respondents.

**ORDER GRANTING MOTION BY RESPONDENT
WESTINGHOUSE ELECTRIC CO. FOR SUMMARY DECISION**

Shannon Doyle (Complainant) filed a complaint pursuant to the Employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 *et seq.*, (hereinafter the Act) and the governing regulations thereunder. This claim was filed against Westinghouse Electric Co. (Employer)¹, Hope Comisky, Esq. (Comisky) and Pepper Hamilton, LLP (Pepper Hamilton).

Complainant alleged Employer violated the Act when it 1) wrote a letter to Choice Point advising that Complainant had engaged in protected activity and 2) wrote a “neutral” reference letter, which he alleges is not neutral. Complainant also alleged Employer violated the Act when its attorney, Comisky, and her employer, Pepper Hamilton, sent a cover letter with copies of both the letter to Choice Point and the reference letter to Complainant’s attorney. On March 1, 2001, the Occupational Safety and Health Administration dismissed the complaint against Employer finding that (1) the letter to Choice Point was provided in accordance with a May 18, 2000 final decision of the Administrative Review Board (ARB); (2) there was no evidence of retaliatory animus; and (3) there was no evidence that Complainant has or will suffer any adverse action as a result of the information Employer indicated would be provided to inquires from potential employers. Complainant appeals that decision.

¹Westinghouse is the successor to Hydro Nuclear Services. References to “Employer” represent both entities.

Employer now request summary decision asserting that (1) it was complying with the ARB Order and there is no evidence that Employer acted with any retaliatory motive; (2) Complainant has not suffered any denial of employment or any other adverse action as a result of the letter to Complainant's counsel; and (3) the letter to Complainant's counsel did not violate any provision of the Act and was sent merely as a courtesy to Complainant and Complainant's counsel. Complainant has filed a Response. For the reasons stated below, the motion is granted and it is recommended that the case against Employer be dismissed.²

FACTS

The uncontested facts are:

1. In 1988, Complainant applied to work with Employer. As a condition of employment, Complainant was required to sign an Authorization and Release form. The form included the following paragraph:

“Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or reviewing any information pertaining to me from any and all liability of claim as results of furnishing or receiving any such information pursuant to this authorization.”

Complainant refused to sign the form and he lost his position with Employer.

2. Complainant sued Employer under the Act and, subsequently, the ARB issued a decision in which it ordered Employer to “send notice to Equifax Corporation³ correcting Respondent's [Employer's] earlier notice that it had denied Complainant unescorted access to a nuclear plant” and “provide neutral employment references.” Doyle v. Hydro Nuclear Servs., 89-ERA-22 (ARB 5/25/00) at 25.

3. The earlier notice that was to be corrected was sent in 1988 by the subsequently dissolved Hydro Nuclear Services to Equifax, the predecessor of Choice Point.

4. Pursuant to the ARB's order, Employer wrote a letter to Choice Point/Equifax providing:

“On November 22, 1988, Hydro Nuclear Services provided information to your employee, Chris,

²Complainant's Motion to Stay Proceedings pending the outcome of the appeal of his initial whistleblower case is hereby DENIED. That appeal is still in the briefing stage and the decision in that appeal will not be determinative of the outcome of the current case.

³Equifax Corporation is now Choice Point.

that Shannon Doyle was disqualified from his position at D.C. Cook nuclear power plant. The reason for the disqualification was the cancellation of the full background investigation. A copy of the Unescorted Access Authorization Log Sheet is attached hereto for your information.

By a final decision and order dated May 18, 2000, the Administrative Review Board of the Department of Labor directed Hydro Nuclear Services to notify Equifax Corporation that this disqualification was improper. Although Hydro Nuclear Services is appealing the decision of the Administrative Review Board, it is complying with the directive in the May 18, 2000 order by sending you this notification. Please correct your records.”

5. The employment reference letter Employer wrote provided:

“Shannon Doyle was in training to work as a Decontamination Technician for Hydro Nuclear Services from November 4, 1988 to November 22, 1988. His rate of pay was \$6.50 per hour. Although Mr. Doyle did not work as a Decontamination Technician, his performance in the training was satisfactory.”

6. Employer’s attorney, Comisky, sent courtesy copies of the court ordered documents to Complainant’s attorney along with a cover letter that provided in pertinent part:

“As you know, the Administrative Review Board issued its Final Decision and Order on Damages on May 17, 2000. Hydro Nuclear Services has now complied with the portions of that Order directing it to take certain actions. Enclosed you will find:

1. a copy of the letter sent to Choice Point (formerly Equifax) stating that Mr. Doyle’s disqualification was improper; and
2. a letter of reference for Mr. Doyle.

There is no derogatory or negative information in Mr. Doyle’s personnel records related to the failure to hire him, except for the report to Equifax which has now been “corrected”, as required by the May 17, 2000 Order.”

7. Hope Comisky is an attorney with the firm Pepper Hamilton LLP and represented Employer in its previous litigation with Complainant.

DISCUSSION

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40 (d) (1994). This section, which is derived from Rule 56 of the Federal Rules of Civil Procedure, permits an administrative law judge to recommend summary decision for either party where “there is no genuine issue as to any

material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40 (d). Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party’s own affidavit, or sworn deposition testimony and declaration in opposition to the motion for summary judgment. Celotex Corp., 477 U.S. at 324; Foster v. Arcata Assoc., Inc., 772 F.2d 1453, 1461 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986). The determination of whether a genuine issue of material fact exists must be made viewing all evidence and factual inferences in the light most favorable to the non-moving party.

In order to prevail pursuant to the Act, Complainant must show that 1) Westinghouse Electric Co. was his employer; and 2) subjected him to adverse action with respect to his compensation, terms, conditions, or privileges of employment; and 3) that the alleged discrimination arose because he engaged in protected activity as defined by the Act. See generally Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989). See also 42 U.S.C. § 5851 (a) (1). See also Saporito v. Florida Power & Light and Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, P.A., 94-ERA-35, (ARB, 7/19/96) (dismissing ERA complaint against an employer’s law firm).

Complainant must allege and prove that Employer subjected him to adverse action with respect to his compensation, terms, conditions, or privileges of employment. Complainant alleges that in its letter to Choice Point, Employer improperly referred to his previous engagement in protected activity. Considering the passage of twelve years and the changing of corporate entities on both the sending and receiving ends of the letter, a reference to the prior disqualification is unavoidable if Employer is to comply with the ARB’s order that it “send a notice to Equifax Corporation correcting Respondent’s earlier notice that it had denied Complainant unescorted access . . .” Complainant has not demonstrated that Employer used or intended the letter for any purpose other than to comply with the ARB’s order. The letter is neutral, nondiscriminatory and complies with the ARB’s order. Without further indications of specific adverse action, the existence of this letter, which contains no language or instructions detrimental to Complainant, is not sufficient to establish the requisite elements of a prima facie case. See Smith v. Tennessee Valley Authority, 90-ERA-12 (Sec’y Apr. 30, 1992).

The same analysis applies to the reference letter and the matters forwarded to Complainant’s attorney. Employer was ordered by the ARB to provide neutral employment references. Contrary to Complainant’s assertion, there is nothing threatening, humiliating or offensive in these documents. I find that the reference letter was proper and was in compliance with the ARB’s order. I find the letter sent to Complainant’s attorney was sent as a courtesy and did not adversely affect any aspect of Complainant’s employment or prospective employment.

The undisputed facts show (1) Employer was complying with the ARB Order and there is no evidence that Employer acted with any retaliatory motive; (2) that Complainant has not suffered any denial of employment or any other adverse action as a result of the letter to Complainant's counsel; and (3) the letter to Complainant's counsel did not violate any provision of the Act and was sent merely as a courtesy to Complainant and Complainant's counsel.

After reading the ARB's decision, the letter to Choice Point, the neutral reference letter, and Comisky's letter to Complainant's attorney, it is clear that Employer has not violated the Act. Complainant has failed to provide any evidence or show that he will present any evidence that Employer has discriminated against him by improperly divulging his protected activity to prospective employers. The undisputed evidence shows Employer's actions were in accordance with the ARB's order and did not arise because Complainant had engaged in protected activity as defined by the Act.

Accordingly, I find that the complaint does not present a *prima facie* case for adjudication under the Act. I find the complaint is deficient as a matter of law and recommend that it be dismissed. In view of this finding, the hearing scheduled for **July 16, 2001** in **Dothan, Alabama** is **CANCELED**.

RECOMMENDED DECISION AND ORDER

It is the recommendation of the Court to the Secretary of Labor:

1. That the Motion by Westinghouse Electric Co. for Summary Decision be **GRANTED**.
2. That the complaint against Westinghouse Electric Co. be **DISMISSED**.

So ORDERED.

LARRY W. PRICE

Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. § 24.7(d) and 24.8.



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**ORDER GRANTING MOTION BY RESPONDENTS
HOPE COMISKY, ESQ., AND PEPPER HAMILTON
FOR SUMMARY DECISION**

Shamon Doyle (Complainant) filed a complaint pursuant to the Employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 *et seq.*, (hereinafter the Act) and the governing regulations thereunder. This claim was filed against Westinghouse Electric Co. (Employer)¹, Hope Comisky, Esq. (Comisky) and Pepper Hamilton, LLP (Pepper Hamilton).

Complainant alleged Employer violated the Act when it 1) wrote a letter to Choice Point advising that Complainant had engaged in protected activity and 2) wrote a "neutral" reference letter, which he alleges is not neutral. Complainant also alleged Employer's attorney, Comisky, and her employer, Pepper Hamilton, violated the Act when Comisky sent a cover letter with copies of both the letter to Choice Point and the reference letter to Complainant's attorney. On March 1, 2001, the Occupational Safety and Health Administration dismissed the complaint against Comisky and Pepper Hamilton finding that (1) the letter to Complainant's attorney was provided as a courtesy and there is no evidence that Complainant has or will suffer any adverse action as a result; and (2) Comisky and Pepper Hamilton are not "employers" as defined under the Act. Complainant appeals that decision.

Comisky and Pepper Hamilton now request summary decision asserting that (1) they are not "employers" as defined under the Act; (2) that Complainant has not suffered any denial of employment or any other adverse action as a result of the letter to Complainant's counsel; and (3)

¹Westinghouse is the successor to Hydro Nuclear Services. References to "Employer" represent both entities.

the letter to Complainant's counsel did not violate any provision of the Act and was sent merely as a courtesy to Complainant and Complainant's counsel. Complainant has filed a Response. For the reasons stated below, the motion is granted and it is recommended that the case against Hope Comisky and Pepper Hamilton be dismissed.²

FACTS

The uncontested facts are:

1. In 1988, Complainant applied to work with Employer. As a condition of employment, Complainant was required to sign an Authorization and Release form. The form included the following paragraph:

“Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or reviewing any information pertaining to me from any and all liability of claim as results of furnishing or receiving any such information pursuant to this authorization.”

Complainant refused to sign the form and he lost his position with Employer.

2. Complainant sued Employer under the Act and, subsequently, the Administrative Review Board issued a decision in which it ordered Employer to “send notice to Equifax Corporation³ correcting Respondent's [Employer's] earlier notice that it had denied Complainant unescorted access to a nuclear plant” and “provide neutral employment references.” Doyle v. Hydro Nuclear Servs., 89-ERA-22 (ARB 5/25/00) at 25.

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“On November 22, 1988, Hydro Nuclear Services provided information to your employee, Chris, that Shannon Doyle was disqualified from his position at D.C. Cook nuclear power plant. The reason for the disqualification was the cancellation of the full background investigation. A copy of the Unescorted Access Authorization Log Sheet is attached hereto for your information.

²Complainant's Motion to Stay Proceedings pending the outcome of the appeal of his initial whistleblower case is hereby DENIED. That appeal is still in the briefing stage and the decision in that appeal will not be determinative of the outcome of the current case.

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By a final decision and order dated May 18, 2000, the Administrative Review Board of the Department of Labor directed Hydro Nuclear Services to notify Equifax Corporation that this disqualification was improper. Although Hydro Nuclear Services is appealing the decision of the Administrative Review Board, it is complying with the directive in the May 18, 2000 order by sending you this notification. Please correct your records.”

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6. Employer’s attorney, Comisky, sent courtesy copies of the court ordered documents to Complainant’s attorney along with a cover letter that provided in pertinent part:

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1. a copy of the letter sent to Choice Point (formerly Equifax) stating that Mr. Doyle’s disqualification was improper; and

2. a letter of reference for Mr. Doyle.

There is no derogatory or negative information in Mr. Doyle’s personnel records related to the failure to hire him, except for the report to Equifax which has now been “corrected”, as required by the May 17, 2000 Order.”

7. Hope Comisky is an attorney with the firm Pepper Hamilton LLP and represented Employer in its previous litigation with Complainant.

DISCUSSION

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d)(1994). This section, which is derived from Rule 56 of the Federal Rules of Civil Procedure, permits an administrative law judge to recommend summary decision for either party where “there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40(d). Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. Anderson v. LibertyLobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and declaration in opposition to the motion for summary judgment. Celotex Corp., 477 U.S. at 324; Foster v. Arcata Assoc., Inc., 772 F.2d 1453, 1461 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986). The determination of whether a genuine issue of material fact exists must be made viewing all evidence and factual inferences in the light most favorable to the non-moving party.

In order to prevail pursuant to the Act, Complainant must show that 1) Comisky and Pepper Hamilton were his employer; and 2) subjected him to adverse action with respect to his compensation, terms, conditions, or privileges of employment; and 3) that the alleged discrimination arose because he engaged in protected activity as defined by the Act. See generally Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989). See also 42 U.S.C. § 5851(a)(1). See also Saporito v. Florida Power & Light and Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, P.A., 94-ERA-35, (ARB, 7/19/96) (dismissing ERA complaint against an employer's law firm).

Comisky and Pepper Hamilton argue that Complainant cannot sue them under the Act because they have never been his employer. I agree. For purposes of the Act, an employer is defined as: a licensee of the commission or of an agreement state; an applicant for such a license, a contractor or subcontractor of such a licensee or applicant; or certain contractors or subcontractors of the Department of Energy. 42 U.S.C. § 5851 (a)(2). See also Saporito, 94-ERA-35, (ARB, 7/19/96) (dismissing ERA complaint against an employer's law firm). I find that, as a matter of law, neither Comisky nor Pepper Hamilton is an employer subject to the Act.

Complainant must allege and prove that Comisky and Pepper Hamilton subjected him to adverse action with respect to his compensation, terms, conditions, or privileges of employment. Complainant alleges that Comisky injured him because her letter to his attorney states that any background check on Claimant through Employer will result in divulging his protected activity to prospective employers. This allegation is a misreading of Comisky's letter. With that letter, Comisky sent courtesy copies of the letter to Choice Point and the neutral reference letter to Complainant's attorney. The letter was sent only to Complainant and his attorney. There is no allegation or evidence that the letter was communicated to anyone other than Complainant's attorney.

After reading the letter to Choice Point, the neutral reference letter, and Comisky's letter to Complainant's attorney, it is clear that neither Comisky nor Pepper Hamilton have violated the Act. Complainant has failed to provide any evidence or show that he will present any evidence that Comisky or Pepper Hamilton have discriminated against him by improperly divulging his protected activity to prospective employers. Also, the Act does not provide a cause of action against Comisky or Pepper Hamilton because neither are or ever were Complainant's employers, as required under the Act.

Accordingly, I find that the complaint does not present a *prima facie* case for adjudication under the Act. I find the complaint is deficient as a matter of law and recommend that it be dismissed. In view of this finding, the hearing scheduled for **July 16, 2001** in **Dothan, Alabama** is **CANCELED**.

RECOMMENDED DECISION AND ORDER

It is the recommendation of the Court to the Secretary of Labor:

1. That the Motion by Hope Comisky, Esq., and Pepper Hamilton LLP for Summary Decision be **GRANTED**.

2. That the complaint against Hope Comisky, Esq., and Pepper Hamilton LLP be **DISMISSED**.

So ORDERED.

LARRY W. PRICE
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. § 24.7(d) and 24.8.