



**In the Matter of:**

**THOMAS SAPORITO,**

**ARB CASE NO. 12-034**

**COMPLAINANT,**

**ALJ CASE NO. 2010-ERA-012**

**v.**

**DATE: August 22, 2013**

**EXELON GENERATION COMPANY, LLC,**

**and**

**EXELON NUCLEAR,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Thomas Saporito, *pro se*, Tequesta, Florida**

***For the Respondents:***

**Tamra Domeyer, Esq., and Traci Braun, Esq.; *Exelon Business Services Co.*,  
Warrenville, Illinois**

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.  
Judge Corchado, dissenting.**

**FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C.A. § 5851 (West 2003 & Supp. 2012) (ERA). On April 14, 2010, Thomas Saporito filed a complaint with the Occupational Safety and Health

Administration (OSHA) alleging that Exelon Generation Company, LLC, and Exelon Nuclear (ExGen) failed to hire him for a position in retaliation for his prior whistleblower activities. OSHA dismissed the complaint. Saporito requested a hearing with the Office of Administrative Law Judges. Prior to a hearing, the parties filed cross-motions for summary decision. On January 10, 2012, the ALJ granted ExGen's motion for summary decision, denied Saporito's motion, and dismissed the complaint. Saporito petitioned the Administrative Review Board (ARB) for review. We affirm.

## BACKGROUND

### A. *Events leading to Saporito's ERA complaint*

This case stems from Saporito's complaint that ExGen violated the whistleblower provisions of the ERA by refusing to hire him for a technical position advertised on the company's corporate website. The relevant facts are taken from affidavits and documents the parties filed on cross-motions for summary decision.

ExGen owns and operates various nuclear generating and power plants in the United States. Affidavit of Neil R. Coy (Coy Aff.) ¶ 3.<sup>1</sup> In 2007, the company partnered with Delaware County Community College (DCCC), in Media, Pennsylvania, to create a two-year Applied Engineering Power Plant Technology Program (PPT Program) to encourage students to explore careers in nuclear, coal, and other types of power plants. Coy Aff. ¶ 11. The company sought to "create a pipeline of local candidates for Exelon Nuclear and Exelon Power positions." *Id.* ¶ 12. The PPT program at DCCC began in the fall of 2008. *Id.* ¶ 13. The company recruited local high school students to enter into DCCC's PPT Program. *Id.* ¶ 12.

In December 2009, the company announced its decision to shut down four Exelon Power coal units in May 2011. Coy Aff. ¶ 16; *see also* Coy Aff. Exhibit (EX) A (Dec. 2, 2009 Exelon News Release). The company stated that it would "redeploy the impacted Exelon Power employees to open and available positions with ExGen or Exelon affiliates." Coy Aff. ¶ 17 and Coy Aff. EX A ("company is aggressively exploring various steps to ease the impact on workers, including redeployment to open positions elsewhere within Exelon."). Around this time, company hiring officials began the process to fill three entry-level Instrument & Controls (I&C) Technician positions at Exelon Nuclear's Peach Bottom Station. Coy Aff. ¶ 18. The managers at Peach Bottom station "prefer[] to fill open and available positions with current Exelon Nuclear or Exelon affiliate employees." Affidavit of Ashley Yuskevich (Yuskevich Aff.) ¶ 4. "Exelon Nuclear typically gives preference to current employees when making selection decisions." *Id.* ¶ 4.

Company hiring officials met on January 15, 2010, and confirmed that they would fill the positions with internal company employees. Yuskevich Aff. ¶¶ 10-12. The hiring officials discussed the possibility that the openings would attract internal candidates "from the nuclear

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<sup>1</sup> ExGen submitted affidavits with its motion for summary decision from two of its hiring officials, Neil R. Coy and Ashley Yuskevich.

stations or Exelon power employees who would be displaced by the Exelon Power shutdowns.” Coy Aff. ¶ 21; *see also* Yuskevich Aff. ¶ 12. The hiring officials also discussed seeking applications from DCCC students enrolled in the PPT program. Yuskevich Aff. ¶ 13 (“We knew that the closing of two Exelon Power stations would limit employment opportunities for the DCCC student pipeline.”); *see also* Coy Aff. ¶ 5 (“A number of DCCC students had interned at Peach Bottom Station the prior summer, and we wanted to provide opportunities for those previous interns and other students in the DCCC pipeline to be considered for these positions.”). Company hiring managers decided to consider only current ExGen employees (internal applicants), and external applicants who were students of, or had attended, the PPT Program that ExGen had created at DCCC. Coy Aff. ¶¶ 11-13, 20; Yuskevich Aff. ¶¶ 9-10, 12-13.

The company posted the I&C Technician position to internal applicants on January 25, 2010. Yuskevich Aff. ¶ 15. On January 28, 2010, the company posted the entry level position on the corporate website that is accessible to the at-large public. Coy Aff. ¶¶ 8-9; Yuskevich Aff. ¶ 16. The job posting specified position requirements and preferred qualifications. Coy Aff. EX D. Neither the internal nor external job posting stated that the company would consider only internal candidates and external candidates who were PPT Program students. *Id.*; *see also* Coy Aff. ¶ 26. *See* Coy Aff. ¶ 22 (“We had no intention of considering or interviewing other external applicants for these positions, unless we were not satisfied [and] things fell through with the pool of internal applicants and DCCC students.”). Potential candidates who did not fall within these two candidate categories, however, had access to the job posting on the corporate website. *See* Coy Aff. ¶ 21. Saporito applied for the I&C Technician position on January 31 and February 10, 2010. Complainant’s Attachment Exhibit (CX) 1. Saporito is neither a current company employee, nor a PPT Program student. Coy Aff. EX I.

The company offered one entry-level I&C Technician position to a DCCC student, and reserved the two remaining I&C positions for current company employees. Coy Aff. ¶ 38. The company extended the DCCC student position to Greg Psaros, a PPT Program student, by letter dated April 23, 2010. Coy Aff. EX H; CX 13; Coy Aff. ¶¶ 34-39. Psaros graduated from DCCC in spring 2010 with an associate’s degree in applied science. He worked with the I&C staff as a technical intern at the company’s Peach Bottom location, which is the same location where the entry-level I&C Technician position was located. *Id.* The company required Psaros to respond to the job offer no later than April 28, 2010. Coy Aff. EX H. Psaros accepted the position and began working at the company on or before June 7, 2010. Coy Aff. ¶ 40; *see also* Respondent’s Attachment Exhibit (RX) 3 (company employment record showing that Psaros was officially hired on June 2, 2010).

The company reports that 177 applicants applied for the entry-level I&C Technician position, including 20 internal and 157 external applicants. Of that number, three were selected for the positions: two internal applicants and one external applicant. Coy Aff. ¶ 40. Of the 177 applicants for the position at Peach Bottom, 172 individuals, including Saporito, were rejected for employment on June 4, 2010, and five individuals were rejected on earlier dates. *See* RX 3 (Job Opening, I&T Technician I, Peach Bottom I&C Maintenance, ID 8147, Applicant List).

## ***B. ALJ's Decision***

The ALJ determined that undisputed facts established that Saporito failed to show that he suffered an adverse action based on a refusal to hire. ALJ's Decision and Order (D. & O.) at 9. The ALJ observed that an element for proving a retaliatory failure to hire is that the "position remained open after his rejection and Respondents continued to seek applicants of similar qualifications." *Id.* at 8. The ALJ determined, based on undisputed evidence, that "the only external applicant hired, who was a participant in the DCCC PPT program (Greg Psaros), was hired prior to Complainant's rejection." *Id.* at 9. The ALJ determined that the "position was filled before Complainant was rejected on June 4, 2010." *Id.*, citing CX 7. The ALJ further observed that "[e]ven assuming that Complainant was rejected before this date – when Coy decided not to select him for an interview – there is no evidence suggesting that Respondents continued to seek applicants of similar qualifications to Complainant after he was rejected." *Id.* The ALJ determined that, "viewing the evidence in the light most favorable to [Saporito], . . . Respondents clearly did not continue to seek applicants of similar qualifications after [Saporito] was rejected." *Id.*

The ALJ next determined that even if Saporito showed a material factual issue on the adverse action element to defeat summary decision, the company is entitled to summary decision based on a "lack of a causal relationship between the protected activity and the adverse action." *Id.* at 9. The ALJ determined, based on undisputed evidence, that Saporito was not selected for the position because the only applicants who received consideration were those already ExGen employed and PPT program students. *Id.* at 10. The ALJ observed that the "record is devoid of any evidence that would contradict Coy's statement that the hiring team wanted to provide opportunities in the program, particularly those that had previously interned for ExGen." *Id.* The ALJ further determined that, despite Coy's January 21, 2010, e-mail about encouraging "DCCC students (and anyone else) to apply," the company had well established its intent to focus efforts on only external DCCC students. *Id.* ("Respondents' relationship with DCCC, Yuskevich's March 2 email to Coy, and the decision to interview only previous interns substantiate claims that prior to receiving Complainant's application, the hiring team decided only to consider DCCC students."). Based on this undisputed evidence, the ALJ determined that there was "no causal relationship between Complainant's protected activity and Respondents' failure to hire him." *Id.* The ALJ observed that, unlike the facts in *Hasan v. Enercon Servs., Inc.*, ARB No. 10-061; ALJ No. 2004-ERA-022, -027 (ARB July 28, 2011), where "external applicants were considered and at least 15 individuals were hired during the relevant period," the circumstances here show "unrefuted affidavits establish[ing] that the only applicants considered were current employees and DCCC students, and no applicants similar to Complainant were even interviewed, let alone hired." *Id.* at 12.

## **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the ERA. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378-69380 (Nov. 16, 2012); 29 C.F.R. §§ 24.100(a), 24.110 (2012).

An ALJ's grant of summary decision is reviewed de novo. *Elias v. Celadon Trucking Servs., Inc.*, ARB No. 12-032, ALJ No. 2011-STA-028, slip op. at 3 (ARB Nov. 21, 2012). Under 29 C.F.R. § 18.40(d), the ALJ may grant summary decision in favor of the movant 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 and that a party is entitled to summary decision." *Id.* "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.'" *Id.* We view the record on the whole in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the movant established that it was entitled to judgment as a matter of law. *Gonzales v. J.C. Penney Corp.*, ARB No. 10-148, ALJ No. 2010-SOX-045, slip op. at 7 (ARB Sept. 28, 2012); *Poli v. Jacobs Eng'g Group, Inc.*, ARB No. 11-051, ALJ No. 2011-SOX-027, slip op. at 4 (ARB Aug. 31, 2012).

## DISCUSSION

### ***A. Statutory Framework And Burden Of Proof***

To prevail on an ERA whistleblower complaint, Saporito must prove by a preponderance of the evidence that he engaged in protected activity, suffered an unfavorable personnel action, and that his protected activity was a contributing factor in the unfavorable personnel action taken against him. 42 U.S.C.A. § 5851(a), (b)(3)(C). If Saporito proves that his protected activity was a contributing factor in the adverse action, the employer may avoid liability only if it demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action" in the absence of the protected activity. 42 U.S.C.A. § 5851(b)(3)(D); *see also Speegle v. Stone & Webster Constr., Inc.*, ARB No. 11-029, ALJ No. 2005-ERA-006, slip op. at 9 (ARB Jan 31, 2013); 29 C.F.R. § 24.109(b)(2).

In refusal to hire cases, such as this, Saporito's proof of an adverse action is based on showing that: (1) he applied and was qualified for an available job; (2) he was rejected despite his qualifications; and (3) after his rejection, the position remained open and/or the employer continued to seek applicants of similar qualifications. *Saporito v. Progress Energy Serv. Co.*, ARB No. 11-040, ALJ No. 2011-ERA-006, slip op. at 6-7 (ARB Nov. 17, 2011), citing *Hasan v. U.S. Dep't of Labor*, 298 F.2d 914, 917 n.3 (10th Cir. 2002).

### ***B. There Is No Genuine Issue Of Material Fact That Precludes A Grant Of Summary Decision In Favor Of ExGen***

The undisputed evidence establishes that Saporito was qualified for the I&C Technician position, and that he was rejected despite his qualifications. *Hasan v. U. S. Dep't of Labor*, 545 F.3d 248, 251 (3d Cir. 2008) ("A failure to hire a qualified individual for a position is a 'rejection' for purposes of establishing a retaliatory refusal to hire" under the ERA.). The ALJ acknowledged ExGen's concession that Saporito engaged in protected activity, and company

hiring officials were aware of that activity. D. & O. at 8.<sup>2</sup> Despite these concessions, Saporito fails to prove a genuine issue of material fact to support his claim that the company's failure to hire him for the I&C Technician position violated the ERA. The narrow and specific circumstances presented in this case fully warrant a grant of summary decision in ExGen's favor.

***1. Undisputed facts establish that the company filled the entry-level I&C Technician position before Saporito was rejected, and there is no evidence that other applicants were solicited after Saporito's rejection***

One of the three criteria for proving a refusal to hire under the ERA is a showing that: "after his rejection, the position remained open and the employer continued to seek applicants of similar qualifications." *Saporito*, ARB No. 11-040, slip op. at 6-7. In *Hasan v. U.S. Dep't of Labor*, the court of appeals held that a complainant can prove this third prong by showing that the employer filled the position, or left the position open, and continued to seek applicants with complainant's qualifications. 298 F.2d at 917 n.3.

The evidence shows that the company extended an offer of employment for the entry-level I&C Technician position to Gary Psaros by letter dated April 23, 2010. See Coy Aff. EX H; CX 13. The letter to Psaros states that the company's offer "accurately reflects the discussions that you have had with [the company] about the position," and directs Psaros to respond to the offer letter "no later than Wednesday, April 28, 2010." *Id.* Psaros accepted the offer and began working on or around June 7, 2010. Coy Aff. ¶ 40; RX 3 (company hiring records for I&C Technician position showing that Psaros was hired on June 2, 2010). Psaros "completed his studies and was conferred an associate's degree prior to starting employment." Yuskevich Aff. ¶ 26. Company hiring records show that on June 4, 2010, the company officially rejected 172 of the 177 external applicants for the I&C Technician position; five of the 177 applicants were rejected on earlier dates. See RX 3. Saporito was one of the 172 external candidates who the company rejected for the position on June 6, 2010.

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<sup>2</sup> ExGen argues that the ARB's prior decision denying Saporito's original complaint precludes Saporito from proving he engaged in protected activity in his current complaint pending before us. But the ERA prohibits retaliation against an employee who has "commenced a proceeding under this chapter," 42 U.S.C.A. § 5851(a)(1)(D), and the "filing of a retaliation claim with OSHA constitutes commencing or instituting a 'proceeding' under the whistleblower statutes," such as the ERA, as the ERA's definition of "protected activity" includes the filing of a whistleblower complaint. *Evans v. U.S. Env't'l Prot. Agency*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 14 (July 31, 2012), citing *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 10-12 (ARB June 24, 2011). The ARB's prior final decision affirming the denial of Saporito's original complaint was not issued until September 30, 2011, after the events at issue in this case. See *Saporito*, ARB No. 10-049. In any event, below ExGen assumed that Saporito's original complaint constituted protected activity at the time when it decided not to hire Saporito for the position at issue in this case. In light of that concession, we assume for purposes of this case that Saporito satisfies his showing of protected activity.

This undisputed evidence shows that Psaros accepted the company's employment offer on or around April 28, 2010, as directed by the company's offer letter, or at the latest June 2, 2010, which is when the hire was recorded in the company's records. RX 3. The company rejected Saporito for the position, at minimum, two days later, on June 4, 2010. *Id.* There is no evidence that the company continued to seek any applicants for the position after June 4, 2010. This undisputed evidence shows that the company hired Psaros before it formally rejected Saporito (and 171 other candidates) for the I&C Technician position.

Saporito asserts (Complainant's Brief at 4) that his application was rejected in January or February 2010, rather than June 4, based on Coy's statements that Saporito's application was not referred to the hiring manager for an interview. The company's internal processing of Saporito's application, however, is consistent with the procedures that the hiring officials agreed to before Saporito applied for the position. The undisputed evidence shows that before advertising the position, the hiring officials "had no intention of considering or interviewing other external candidates for [the] positions, unless [they] were not satisfied [and] things fell through with the pool of internal applicants and DCCC students." Coy Aff. ¶ 22. Undisputed evidence shows that the company received sufficient applications from internal candidates and DCCC students, and among external candidates hiring officials interviewed only DCCC students. Coy Aff. ¶ 33 ("Other than the DCCC students, I did not identify any other external candidates to be considered for the Instruments & Controls Technician position. I did not refer any other external applicants to Peach Bottom station management for consideration, other than eight DCCC students."). Once the company hired an external candidate (a DCCC student), it notified 172 candidates who applied for the position (including Saporito) on June 4, 2010, that their applications had been rejected. *See* RX 3. Only five of the 172 candidates were notified before June 4, 2010. *Id.*

Saporito further argues (Complainant's Brief at 4) that there is a genuine issue of fact pertaining to his rejection date. He argues that the June 4 rejection date reflected in the company's employment records is not valid, and that this is actually the date that the company updated their records. In responding to the company's motion for summary decision, Saporito cannot rest solely on allegations or speculation, "but must set forth specific facts that could support a finding in his favor." *See* 29 C.F.R. § 18.40(c); *see also Johnson v. Wellpoint Cos., Inc.*, ARB No. 11-035, ALJ No. 2010-SOX-038, slip op. at 8 (ARB Feb. 25, 2013). Saporito produces no evidence nor asserts any facts to support his contention that the company's hiring records are not valid. Moreover, this assertion is belied by the employment records. The records show that not all the external candidates for the I&C Technician position were rejected on June 4, 2010. Five individuals were rejected on earlier dates – two candidates on February 4, 2010, one candidate on March 15, 2010, one candidate on May 18, 2010, and one candidate on May 19, 2010. *See* RX 3. The records do reflect, however, that the vast majority of external candidates – 171 candidates and Saporito – were rejected by the company on the same date, June 4, 2010.

**2. Undisputed facts establish that Saporito's protected activity was not a contributing factor in the company's decision not to hire him for the entry level I&C Technician position**

Saporito argues (Complainant's Brief at 6) that the ALJ erred because an "inference of causation arose because of the manner in which the job was filled." Specifically, Saporito argues that, based on statements from his employment expert, Arnold Gunderson, he was the most qualified for the position, and that the company's failure to hire him raises an inference that his protected activity contributed to the decision not to hire him.

Contributory factor means any factor which, alone or in connection with other factors, "tends to affect in any way the outcome of the [employment] decision." *Bobreski*, ARB No. 09-057, slip op. at 13. *See also Addis v. Dep't of Labor*, 575 F.3d 688 (7th Cir. 2009). "Even where a respondent asserts legitimate, non-discriminatory reasons for its actions, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could (1) discredit the respondent's reasons or (2) show that the protected activity was also a contributing factor even if the respondent's reasons are true." *Franchini v. Argonne Nat'l Lab*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 9 (ARB Sept. 26, 2012). Here, however, Saporito asserts no specific facts or evidence that would discredit the company's explanation that his protected activity did not contribute to the decision not to hire him, because the company's priority was to fill the external, entry-level I&C Technician position with a DCCC student.

Saporito submits as support for his ERA claim Gunderson's statement that among all external candidates who applied for the position, Saporito was the most qualified based on the job description. Affidavit of Arnold Gunderson (Gunderson Aff.) ¶ 28. While Gunderson's affidavit deems Saporito the most qualified, the affidavit does not create a genuine issue of material fact that the company had decided, before advertising the position, that it would first interview only qualified external DCCC students, and interview other external candidates if "things fell through with the pool of internal applicants and DCCC students." Coy Aff. ¶ 22. In fact, nothing in Gunderson's affidavit addresses the company's decision to prioritize hiring external DCCC students for the entry-level position, rather than more experienced external candidates. The undisputed facts show that the company received applications from eight DCCC students, and hiring officials "ultimately narrowed the list down to four DCCC students to recommend to the hiring manager for interview." Coy Aff. ¶ 32. Consistent with the prior arrangement agreed to by hiring officials at the January 15, 2010 meeting, no other external candidates were considered for the entry-level I&C Technician position, and no other external candidates were referred to the hiring manager for an interview. Coy Aff. ¶ 33.

Thus, as the ALJ correctly concluded, there is no evidence refuting the company's showing that, prior to posting the job position and receiving Saporito's application, hiring officials had decided to only consider internal applicants and DCCC students for the open I&C Technician position. Saporito's protected activity did not contribute to the company's failure to hire him. *See D. & O.* at 10 ("The record is devoid of any evidence that would contradict Coy's statement that the hiring team wanted to provide opportunities for students in the program, particularly those that had previously interned for ExGen."). Moreover, there is no evidence in

the record indicating that Saporito made any further discovery request to acquire such contradictory evidence.

**3. *Undisputed facts establish that ExGen would not have hired Saporito even absent his protected activity***

Finally, even assuming that Saporito satisfied his initial burden of proving that his protected activity contributed to the company's refusal to hire him, there is "clear and convincing evidence that it would have taken the same unfavorable personnel action" in the absence of the protected activity. *Speegle*, slip op. at 9; 29 C.F.R. § 24.109(b)(2). As the ALJ fully explained, and as set out *supra*, the undisputed evidence shows that the hiring committee determined, even before the job opening was announced, that priority would be given to external DCCC students from the PPT Program, that only DCCC students were referred to the hiring manager for interviews, that a DCCC student who interned at Peach Bottom was offered the job in April 2010 (company records show that he was hired certainly no later than by June 2, 2010), and that Saporito was rejected along with 171 other external candidates on June 4, 2010. Despite Saporito's qualifications for the entry-level position, the undisputed evidence shows that the company would not have hired Saporito even if he had not engaged in protected activity because the company's hiring priority for filling the external, entry-level I&C Technician position was to extend that employment opportunity to a DCCC student from the PPT Program.

**CONCLUSION**

The ALJ's Decision and Order Granting Respondent's Motion for Summary Decision and Dismissing Complaint is **AFFIRMED**.

**SO ORDERED.**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**Judge Luis A. Corchado, *dissenting*:**

Given the genuinely disputed issues of material fact in this case, I do not see how the inherently complex issue of causation can be summarily resolved, without the context provided by direct testimony and cross-examination. As further discussed below, much of the factual

dispute arises from ExGen's own actions. It may be that, in an evidentiary hearing, witnesses would credibly explain the inconsistencies and serendipitous timing issues in the record before us. I appreciate that the ALJ recognized the difficulty of summarily addressing the "causation" issue and carefully considered relevant ARB precedent on point. But, where specific and material inconsistencies exist on the question of "contributory factor" in whistleblower cases like this one, 29 C.F.R. §§ 18.40 and 18.41 do not permit summary decision by affidavits alone. Because the majority opinion bases its decision on many disputed material facts and inconsistencies in the record, essentially making findings of fact by viewing the facts in the light most favorable to ExGen, I dissent.<sup>3</sup>

Recently, in *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014 (ARB Sept. 26, 2012), the Board unanimously reversed a summary decision and noted the difficulties inherently associated with summarily analyzing the "causation" issue in ERA whistleblower cases. Specifically, the Board stated the following, in relevant part:

Obviously, the issue of causation in discrimination cases involves questions of intent and motivation when the complainant argues that the employer's asserted reasons were not the real reasons for its actions. Summary decision on the issue of causation is even more difficult in ERA whistleblower cases where Congress made it "easier for whistleblowers to prevail in their discrimination suits," requiring only that the complainant prove that his protected activity was "a contributory factor" rather than the more demanding causation standards like "motivating factor," "substantial factor" or "but for" (determinative factor) causation. *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). Contributory factor means any factor which, alone or in

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<sup>3</sup> I appreciate ExGen's argument that it is "inherently unjust" that a complainant could pursue a retaliation claim "merely because he submitted a resume referring to his prior protected activity and then he sued that employer when he, among hundreds of other external applicants, was not hired for the position." Respondents' Memorandum of Law in Support of its Motion for Summary Decision at 20. ExGen also objected to "[a]llowing Saporito to continue filing and litigating successive retaliation claims against ExGen" and hinted that perhaps sanctions were appropriate. *Id.* at 21. But, as I explain, it is the combined inconsistencies and timing issues that raise an issue of fact in this case, not simply that Saporito applied for a job. Furthermore, I saw neither an argument for collateral estoppel nor sanctions. *Cf. Hadden v. Georgia Power Co.*, No. 1989-ERA-021, slip op. at 4 (Sec'y Feb. 9, 1994)(it was noted that an employer's lawful decision to permanently bar employee from seeking future employment may have continuing effects but not necessarily give rise to new violations); *Saporito v. Florida Power & Light Co.*, ARB No. 09-141, ALJ No. 2009-ERA-012 (ARB Apr. 29, 2011)(pre-filing sanction requirement ordered).

connection with other factors, “tends to affect in any way the outcome of the [employment] decision.”<sup>[4]</sup>

We also stated that “[c]omplainants may rely on circumstantial evidence to prove that protected activity contributed to the unfavorable employment action in question,” which might include inconsistencies and evidence of pretext.<sup>5</sup>

In *Hasan v. Encercon Servs., Inc.* ARB No. 10-061, ALJ Nos. 2004-ERA-022, -027 (ARB July 28, 2011), a case materially similar to the present case, the Board unanimously reversed a summary decision because of the inconsistencies between the employer’s job announcements and the employer’s explanations. The ALJ noted some differences between this case and *Hasan*. D. & O. at 11-12. But, like this case, the employer sought job applicants externally on several occasions but explained that (1) the purpose for one of the announcements was to find former workers from another company and (2) the jobs never materialized for other announcements. Yet, the announcements were not so limited on their face and they stated that the employer had “immediate opportunities” and “available positions.”<sup>6</sup> Some of the Board’s analysis bears repeating here:

This is not to say that Enercon’s reasons will not prove to be true or legitimate. However, to choose Enercon’s assertions in its motions over its contradictory advertisements is to engage in factfinding without an evidentiary hearing. These factual contradictions, even though created by Enercon’s own choices, must be resolved in an evidentiary hearing. In remanding this case for hearing, we emphasize that we have reached no conclusion regarding the merits of Hasan’s complaint.<sup>[7]</sup>

In this case, Saporito pointed to many specific facts that, taken as a whole, could permit a fact-finder to infer pretext<sup>8</sup> and that protected activity contributed to ExGen’s refusal to hire him.

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<sup>4</sup> *Franchini*, ARB No. 11-006, slip op. at 9 (quoting *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011), also citing *Addis v. Dep’t of Labor*, 575 F.3d 688 (7th Cir. 2009)).

<sup>5</sup> *Id.* at 9-10.

<sup>6</sup> *Hasan*, ARB No. 10-061, slip op. at 10.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> It should be stressed that a showing of “pretext” is not required in ERA cases. *See Franchini*, ARB No. 11-006, slip op. at 7, n.17. The ALJ erroneously required a showing of pretext and erroneously stated that the *McDonnell-Douglas* burden shifting paradigm applies exactly the same in ERA whistleblower cases. D & O. at 6-7; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This error, plus the ALJ’s labeling of one of ExGen’s arguments as meritless and that

For example, the majority cites to ExGen's stated plan to seek internal candidates, but it is undisputed that ExGen hired an external candidate (Greg Psaros) in April 2010 not an internal candidate. *See supra* at 3. Saporito pointed to ExGen's own job announcement that plainly invited the outside world to apply and Saporito did apply. On its face, the announcement had no limitations related to DCCC student status.<sup>9</sup> Despite the obligation to view the facts in the light most favorable to the party opposing summary decision, the majority accepts ExGen's explanation that the external advertisement was only intended for DCCC students. Yet, as Saporito pointed out, Saporito received an e-mail confirming that his application would be looked at to see if he met the "posting requirements."<sup>10</sup> CX 12.

ExGen also stated in an e-mail that it would invite DCCC students to apply "and anyone else." Coy Aff. EX C (Coy, Jan. 21, 2010 e-mail). Three times in the same January 2010 e-mail, ExGen's external recruiter generally references "external candidates" without once stating that he meant only DCCC students. It is undisputed that the record contains no documentary evidence generated during the hiring process that stated only external DCCC student candidates would be considered. *Supra* at 3. As Saporito points out, the decision to forward only external DCCC student candidates occurred after Saporito applied for a job in January 2010. Given that ExGen "launched the [two-year] PPT Program in the Fall of 2008," and "twelve students enrolled in the PPT Program," it is unclear why ExGen could not reach out directly to these few students during the 2010 hiring process. Coy Aff. ¶¶ 11-13. Months passed by without any word to Saporito that he was rejected. Yet, if Coy truthfully sought only DCCC student candidates, then ExGen rejected Saporito's application as of March 2, 2010, when he forwarded the names of eight DCCC student candidates. Coy Aff. EX E. The advertisement expressly stated that candidates with associate's degrees were preferred, which Saporito had but the final candidate did not have when selected. CX 13; Yuskevich Aff. ¶ 26. To ignore these inconsistencies and timing issues in favor of ExGen violates fundamental summary judgment jurisprudence.<sup>11</sup>

For brevity's sake, I will only briefly mention two other disagreements I have with the majority decision. In trying to recite the elements of a "refusal to hire" claim, the majority opinion reads as though there is only one way to prove such a claim. As a general matter, it is

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another argument "appear[ed] pretextual," makes it difficult for me to understand how the ALJ's decision could be affirmed.

<sup>9</sup> The majority opinion concedes this point by finding that Saporito qualified for the posted job. *Supra* at 5.

<sup>10</sup> This e-mail is part of a chain of facts that Saporito points to as demonstrating ExGen's shifting explanations. In this e-mail, the "posting requirements" were important. But then ExGen suggests that the missing requirement of being a DCCC student really mattered. Switching again, ExGen later cites to the importance of geographic location, but the job announcement only stated that the applicant must be able to commute. *See* Complainant's Brief at 16-18.

<sup>11</sup> *Franchini*, ARB No. 11-006, slip op. at 6.

error to rigidly recite the criteria for assessing a “refusal to hire claim.”<sup>12</sup> As in previous ARB decisions, the majority defines the third prong too narrowly.<sup>13</sup> If a complainant’s refusal to hire claim fails because he was rejected after a position was filled, then every employer can simply escape liability for such claims by filling a job before rejecting applicants, as Saporito alleges ExGen did here. The majority seems to confuse the requirement that there be a final, adverse action (the job was either filled or a rejection occurred) with the general requirement for facts that support an inference of discrimination. Viewing the record in the light most favorable to Saporito for summary decisions, we are obligated to find that he was rejected in March 2010 when Coy reviewed the list of external candidates and forwarded only eight names, not Saporito’s, and the job was later filled with a candidate that did not have all of the preferred qualifications. Moreover, even if ExGen rejected Saporito in June 2010, it only filled one of the three vacancies at that time, leaving two vacancies open.<sup>14</sup> Yuskevich Affidavit ¶¶ 26-27.

Lastly, similar to the “causation” issue, I do not understand how the majority could summarily decide that ExGen showed by “clear and convincing” evidence that it would have made the same decision if it had not considered Saporito’s protected activity. I find it sufficient to again quote from the Board’s unanimous decision in *Franchini*:

Like causation analysis for the plaintiff’s burden of proof, Argonne’s affirmative defense presents an equally challenging issue to resolve by summary decision. Such analysis requires us to determine, on the record as a whole, how clear and convincing Argonne’s lawful reasons were for terminating Franchini’s employment. In analyzing the affirmative defense, we are not required to judge the rational basis of Argonne’s employment policies and decisions but we must assess whether they are so powerful and clear that termination would have occurred apart from the protected activity. However, we are reluctant to address such a fact-intensive issue that the ALJ has not addressed.<sup>[15]</sup>

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<sup>12</sup> See, e.g., *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575 (1978) (a prima facie case for a hiring discrimination claim “was not intended to be an inflexible rule”).

<sup>13</sup> See *Hasan v. U.S. Dep’t of Labor*, 545 F.3d 248, 251 (3d Cir. 2008) (the appellate court reversed the ARB’s affirmance of summary decision because the ARB too narrowly viewed the prima facie elements of a refusal to hire claim); *Hasan v. U.S. Dep’t of Labor*, 298 F.3d 914, 917, n.3 (10th Cir. 2002) (the appellate court commented “that the Secretary’s articulation of the third prong is too limited” and explained that the third prong can be proven “a number of ways,” including a showing that a job was “filled or remained open after rejection”). See also *Saporito v. Progress Energy*, ARB No. 11-040, ALJ No. 2011-ERA-006, slip op. at 6-7 (ARB Nov. 17, 2011) (remanding and discussing refusal to hire claim).

<sup>14</sup> This statement in the Yuskevich’s affidavit seems to contradict the majority opinion’s finding that the job vacancies did not remain open after June 2010. *Supra* at 7.

<sup>15</sup> *Franchini*, ARB No. 11-006, slip op. at 13.

In sum, summary decision motions are not substitutes for resolving material fact issues arising from circumstantial evidence.

**LUIS A.CORCHADO**  
**Administrative Appeals Judge**