No. 02-592

In the Supreme Court of the United States

SYED M. A. HASAN, PETITIONER

v.

DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Energy Reorganization Act of 1974 prohibits discrimination against employees who engage in certain protected activities but requires the Secretary of Labor to dismiss a complaint, and not investigate it, "unless the complainant has made a prima facie showing that [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(A). When the Secretary dismisses a complaint, an employee may file a complaint and request a hearing before an administrative law judge (ALJ). 42 U.S.C. 5851(b)(2)(A). The question presented is whether a complaint filed with an ALJ was properly dismissed when, after discovery, petitioner failed to allege a prima facie case of unlawful discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A8) is reported at 298 F.3d 914. The decision and order of the Department of Labor's Administrative Review Board (Pet. App. A9-A17) is unreported. The recommended decision and order of the administrative law judge (Pet. App. A18-A24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2002. A petition for rehearing was denied on July 16, 2002 (Pet. App. A25). The petition for a writ of certiorari was filed on October 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Energy Reorganization Act of 1974 (ERA), as amended, prohibits employers from discriminating against employees who have engaged in certain activities relating to nuclear safety. 42 U.S.C. 5851(a). An employee who believes that he has been subjected to discrimination in violation of the Act may file a complaint with the Secretary of Labor. 42 U.S.C. 5851(b)(1); 29 C.F.R. 24.3(a) and (c), 24.5(b)(2).

Within 30 days of the filing of the complaint, the Secretary must investigate the complaint and determine whether unlawful discrimination occurred. 42 U.S.C. 5851(b)(2)(A); 29 C.F.R. 24.4, 24.5. The Secretary shall dismiss a complaint and not investigate it "unless the complainant has made a prima facie showing that [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(A). The Secretary also shall not investigate "if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior." 42 U.S.C. 5851(b)(3)(B). The Secretary has delegated responsibility for investigating and determining whether unlawful discrimination occurred to the Assistant Secretary for Occupational Safety and Health (OSHA). 67 Fed. Reg. 65,008 (2002) (current delegation); 62 Fed. Reg. 111 (1997) (earlier delegation).

A complainant who is dissatisfied with the Assistant Secretary's determination dismissing a complaint at the investigation stage may request a hearing before an Administrative Law Judge (ALJ). 42 U.S.C. 5851(b)(2)(A); 29 C.F.R. 24.5(d), 24.6. Proceedings before an ALJ are governed by regulations generally applicable to all ALJ proceedings within the Depart-

ment, 29 C.F.R. Pt. 18, as well as regulations specifically promulgated for "handling of discrimination complaints under federal employee protection statutes." 29 C.F.R. Pt. 24. The regulations, among other things, permit the filing of motions and discovery. 29 C.F.R. 18.1(a), 18.6, 18.13-18.22.

The hearing before the ALJ "shall be a proceeding on the merits of the complaint." 29 C.F.R. 24.7(b). An ALJ does not review the Secretary's determination to dismiss or not to dismiss a complaint. *Ibid.* In an ALJ proceeding, "a determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint," and "[r]elief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." *Ibid.*

The ALJ's recommended decision and order becomes a final order of the Secretary unless a petition for review is timely filed with the Department of Labor's Administrative Review Board (ARB). 29 C.F.R. 24.7(a) and (d), 24.8(a). The ARB issues the final agency decision on behalf of the Secretary, 29 C.F.R. 24.8(a), and that decision is reviewable in the court of appeals. 42 U.S.C. 5851(c)(1).

2. Petitioner applied for an engineering job at respondent Wolf Creek Nuclear Operating Corporation (Wolf Creek). Pet. App. A10, A19. In his application, petitioner stated that he had a history of whistleblowing activity. *Id.* at A10. When petitioner had not heard from Wolf Creek within two weeks, he filed an ERA complaint with the Secretary, alleging that Wolf

Creek had refused to hire him because he was a whistleblower. *Id.* at A3-A4, A10, A19.

OSHA investigated petitioner's complaint and found that it lacked merit. Pet. App. A4, A19. Petitioner then requested an ALJ hearing and, at the same time, mailed to Wolf Creek a request for production of documents and interrogatories. *Ibid.*; App., *infra*, 2a. Wolf Creek filed a motion to dismiss the complaint and a motion for a protective order. Pet. App. A19; App., *infra*, 2a. The ALJ denied Wolf Creek's motion for a protective order and directed Wolf Creek "to comply with, respond to, or object to each request for production and interrogatory filed by [petitioner]." *Ibid.* The ALJ subsequently issued a show cause order directing petitioner to "submit evidence or offer arguments to the Court" within 30 days after discovery is due or by May 26, 2000. *Id.* at 4a. The order stated that if petitioner "does not respond, his complaint will be dismissed." *Ibid.*; see Pet. App. A11. Wolf Creek provided documents that were responsive to petitioner's discovery requests, but redacted certain information from those documents. *Ibid.*; Wolf Creek Br. in Opp. 16. In his response to the show cause order, petitioner did not allege that the position for which he applied remained open or that Wolf Creek continued to seek applicants for that position. Pet. App. A11-A12.

The ALJ issued a recommended decision and order to dismiss petitioner's complaint. Pet. App. A18-A24. The ALJ found that petitioner "failed to submit evidence * * * which alleged any set of facts upon which relief could be granted." *Id.* at A19. In reaching that conclusion, the ALJ concluded that dismissal is proper if the complainant fails to allege a prima facie case of unlawful discrimination. *Id.* at A20. In order to allege a prima facie case, the ALJ concluded, a complainant must

allege that (1) he engaged in protected activity; (2) respondent was aware of the protected activity; (3) the complainant was subjected to adverse action; and (4) the evidence raises a reasonable inference that protected activity was the likely reason for the adverse action. *Id.* at A20-A21.

Applying those factors, the ALJ found that petitioner had not alleged that the persons at Wolf Creek responsible for hiring were aware of his prior protected activity or that he was subjected to an adverse action. Pet. App. A22-A23. With respect to the latter factor, the ALJ noted that petitioner failed to allege that the position for which he applied remained open or that Wolf Creek sought other applicants for the position. *Id.* at A22. Based on those deficiencies, the ALJ recommended dismissal of the complaint for failure to "set forth a prima facie case of proscribed behavior, * * * provide a full statement of the acts and omissions * * * which are believed to constitute a violation," and "state a claim upon which relief can be granted." *Id.* at A24.

3. The ARB dismissed petitioner's complaint. Pet. App. A9-A17. The ARB agreed with the ALJ that petitioner was required to allege a prima facie case based on the four factors set forth in the ALJ's recommended decision, and that petitioner had failed to allege two of those factors. *Id.* at A13. In particular, like the ALJ, the ARB concluded that petitioner had failed to allege either that Wolf Creek was aware of his protected activity or that he was subjected to an adverse action. *Id.* at A13-A15.

4. The court of appeals affirmed the ARB's decision. Pet. App. A2-A8. The court noted that the ERA includes a "gatekeeping function," 42 U.S.C. 5851(b)(3)(A), that prohibits the Secretary from investigating a complaint where the complainant fails to

establish a prima facie case that his protected behavior was a contributing factor in an unfavorable personnel action. Pet. App. A4. The court concluded that the ARB had properly examined the four elements discussed above to determine whether petitioner "could proceed beyond the § 5851(b)(3) barrier." *Id.* at A5. Disagreeing with the ARB, the court found that petitioner had adequately alleged that Wolf Creek was aware of petitioner's protected activity. *Ibid.* The court agreed with the ARB, however, that petitioner failed to satisfy the adverse action component of the prima facie case. The court explained that petitioner "failed to allege that a position for which he was qualified was available and that [Wolf Creek] either filled that position or continued to search for applicants for that position after refusing to hire him." *Id.* at A6. The court found petitioner's "conclusory statement that a company the size of [Wolf Creek's] always has positions open" to be insufficient to establish that element of a prima facie case. *Ibid.*

The court of appeals also rejected petitioner's argument that he was improperly denied discovery. Pet. App. A6-A7. The court reasoned that none of the discovery petitioner requested would have established that Wolf Creek hired someone with petitioner's qualifications to fill an open position or that Wolf Creek continued to seek someone with petitioner's qualifications. *Ibid.*

ARGUMENT

The court of appeals correctly affirmed the dismissal of petitioner's complaint. Pet. App. A2-A8. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 11) that the dismissal of his complaint for failure to allege a prima facie case conflicts with this Court's decision in *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002). That contention is without merit and does not warrant review.

In *Swierkiewicz*, the Court held that a complaint in an employment discrimination lawsuit under Title VII need not allege specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). *Swierkiewicz*, 534 U.S. at 508. The Court reasoned that *McDonnell Douglas* set forth an evidentiary standard, not a pleading requirement, and that transforming it into a pleading requirement would conflict with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." 534 U.S. at 512-513.

The question presented in this case does not concern what facts must be alleged in a complaint filed *in a court in a Title VII case*. Instead, it concerns what facts must be alleged in a complaint filed with *an administrative agency under the ERA*. By its terms, *Swierkeiweicz* does not control the resolution of that question.

Moreover, there is an important distinction between Title VII and the ERA. Under the ERA, a complainant must establish a prima facie case that protected behavior contributed to an unfavorable personnel action before the Secretary may even investigate a complaint. 42 U.S.C. 5851(b)(3)(A). The court of appeals concluded that this requirement, unique to the ERA, serves a "gatekeeping function," Pet. App. A4, and therefore operates as a pleading requirement as well as an evidentiary standard. Because *Swierkiewicz* involved

an interpretation of Title VII and Federal Rule of Civil Procedure 8(a), while the court of appeals' decision in this case involved an interpretation of the ERA and its unique gatekeeping provision, there is no conflict between the two.

2. Petitioner also errs in contending (Pet. 15) that the court of appeals' application of the ERA "gatekeeper" provision to the adjudicatory stage of the proceeding conflicts with the Eleventh Circuit's decision in *Stone & Webster Engineering Corp.* v. *Herman*, 115 F.3d 1568, 1572 (1997). In that case, the Eleventh Circuit addressed the standard for proving an ERA claim on the merits. *Id.* at 1572. It did not consider the allegations that an ERA complainant must make to avoid dismissal of a complaint. Petitioner also fails to mention that the Seventh and Eleventh Circuits recently affirmed the dismissals of several of his ERA complaints that are substantially the same as the complaint at issue here. See *Hasan* v. *Florida Power & Light Co.*, No. 01-004 (Dep't of Labor ARB May 17, 2001), aff'd, 35 Fed. Appx. 855 (11th Cir. 2002) (Table); *Hasan* v. *United States Dep't of Labor*, 31 Fed. Appx. 328 (7th Cir. 2002).

3. Petitioner contends (Pet. 14) that requiring allegations of a prima facie case at the pleading stage operates unfairly when a complainant needs discovery in order to establish the elements of a prima facie case. This case, however, does not present the question whether it would be consistent with the ERA or the Secretary's regulations to require an employee to allege a prima facie case prior to receiving any discovery. The ALJ recommended dismissal of the case only after the ALJ ordered respondent to provide petitioner with discovery and gave petitioner an opportunity to allege a

prima facie case in light of the discovery that was provided.

Indeed, the circumstances surrounding the ALJ's recommended dismissal provide a further reason to deny review in this case. In dismissing petitioner's case, the ALJ not only considered the allegations in petitioner's complaint. The ALJ also considered the evidence petitioner submitted in response to the ALJ's show cause order after petitioner had an opportunity for discovery. Pet. App. A24 (recommending dismissal "[a]fter a careful review of the record"). In that procedural posture, the dismissal of petitioner's complaint could be considered as a grant of summary judgment. See Fed. R. Civ. P. 12(b)(6) (if, on a motion "to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"). As the Department argued in the court of appeals, summary judgment was proper because petitioner failed "to make a showing sufficient to establish the existence of an element essential to [his] case." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986).

Petitioner asserts (Pet. 14) that he did not obtain all the discovery that he sought, and that additional discovery would have helped in establishing a prima facie case. But the court of appeals concluded that the additional discovery petitioner sought would not have assisted petitioner in proving a prima facie case, Pet. App. A6, and that fact-bound issue does not warrant this Court's review.

4. Finally, petitioner errs in contending (Pet. 16) that the court of appeals' decision will "have broad application" to other whistleblower provisions in environmental statutes. Unlike the ERA, other environmental

whistleblower provisions do not require the Secretary to dismiss complaints without investigation unless a complainant makes a prima facie showing of discrimination. See, *e.g.*, 15 U.S.C. 2622 (Toxic Substances Control Act); 33 U.S.C. 1367 (Federal Water Pollution Control Act); 42 U.S.C. 300j-9(i) (Safe Drinking Water Act); 42 U.S.C. 6971 (Solid Waste Disposal Act); 42 U.S.C. 7622 (Clean Air Act); 42 U.S.C. 9610 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980). Nor will the court's decision "take[] away the safe haven the ERA was intended to create for nuclear whistleblowers." Pet. 16. Rather, the decision acts as a reasonable safeguard against the filing of insubstantial complaints.

The facts of this case illustrate the need for such a safeguard. Petitioner has a history of applying for jobs and then filing complaints and seeking broad discovery when he receives no response. See Pet. App. A10, A15 n.2. Particularly in that context, the court of appeals' decision does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2002

APPENDIX

[(Seal Omitted)]

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CASE NO.: 2000-ERA-14

IN THE MATTER OF
SYED M. A. HASAN, COMPLAINANT

v.

WOLF CREEK NUCLEAR OPERATING CORP.,
RESPONDENT

[DATE: APR. 3, 2000]

ORDER

Complainant, Syed M.A. Hasan, filed a complaint with the Occupational Safety and Health Administration (OSHA) on November 18, 1999, alleging violations of Section 211 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988 and Supp. IV 1992) and the regulations promulgated thereunder at 29 C.F.R. Part 24. Specifically, Complainant alleged that he was not hired by Respondent, Wolf Creek Nuclear Operating Corp., because he had engaged in activities protected under the provisions of the ERA. On February

17, 2000, OSHA found the complaint to have no merit. On February 23, 2000, Complainant requested a hearing before an Administrative Law Judge and concurrently mailed a request for production of documents and interrogatories to the Respondent. On March 14, 2000, the Respondent filed a Motion to Dismiss and a Motion for Protective Order.

I decline to issue a protective order based on the general objections raised by counsel that Mr. Hasan's discovery should be stayed until the Respondent's Motion to Dismiss is resolved and that the discovery will cause unnecessary expense and burden. The Respondent is directed to comply with, respond to, or object to each request for production and interrogatory filed by Mr. Hasan by April 25, 2000.

So ORDERED this 3rd day of April, 2000, at Pittsburgh, Pennsylvania.

/s/ ROBERT J. LESNICK
ROBERT J. LESNICK
Administrative Law Judge

RJL/lab

[(Seal Omitted)]

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CASE NO.: 2000-ERA-14

IN THE MATTER OF
SYED M. A. HASAN, COMPLAINANT

v.

WOLF CREEK NUCLEAR OPERATING CORP.,
RESPONDENT

[DATE: APR. 20, 2000]

ORDER TO SHOW CAUSE

The above-captioned case has not yet been scheduled for hearing. Respondent's counsel submitted a Motion To Dismiss on March 15, 2000. Respondent alleges that Complainant has failed to state a claim upon which relief can be granted.

At the present time, this Court has not received any information from Complainant to substantiate his claim. Respondent was ordered by this Court to comply with, respond to, or object to each discovery request by April 25, 2000. Accordingly,

ORDER

IT IS ORDERED that within thirty (30) days after discovery is due or by May 26, 2000, Complainant must show cause why his complaint should not be dismissed. Complainant can submit evidence or offer arguments to the Court. If Complainant does not respond, his complaint will be dismissed.

/s/ ROBERT J. LESNICK
ROBERT J. LESNICK
Administrative Law Judge

RJL/mas/lb