USDOL/OALJ Reporter

Gaballa v. Arizona Public Service Co. and The Atlantic Group, 94-ERA-9 (ALJ May 16, 1995)

Date: May 16, 1995

Case No. 94-ERA-9

In the Matter of

MAGED GABALLA
Complainant

v.

THE ATLANTIC GROUP, INC.
Respondent

David K. Colapinto, Esquire
For Complainant

William W. Nexsen, Esquire
For Respondent

Before: STUART A. LEVIN, Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. .§ 5851 ("EPA" or "Act") and the regulations promulgated and published at 29 C.F.R. Part 24 to implement the Act. On January 6, 1994, Maged Gaballa ("Complainant") filed a complaint with the Department of Labor alleging that he was discriminated against and blacklisted by The Atlantic Group, Inc. ("TAG" or "Employer"), the contractor for Arizona Public Service ("APS") where Complainant was working as an engineer.

Following an investigation, the District Director, Employment Standards Administration, U.S. Department of Labor, determined that Gaballa's allegations could not be substantiated. On February 15, 1994, Complainant requested a formal hearing, which convened in Washington, D.C. on June 13 and 14, 1994.

At the hearing, the parties were afforded a full opportunity to present evidence and argument.[1] The findings and conclusions which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing, and upon

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an analysis of the entire record in light of the arguments presented, the regulations, statutory provisions, and applicable case law.

Findings of Fact

1. TAG is a contract labor supply company for commercial nuclear facilities and supplied contract labor to APS in 1993 (TR 37).[2]

2. Complainant holds a Bachelor's Degree in electrical engineering and has worked in the nuclear power industry for approximately fourteen years (TR 157; CX 10, 11).

3. On March 15, 1993, TAG hired Gaballa to work for APS as an engineer at the Palo Verde Nuclear Generating Station for $23.50 per hour (CX 3, 11; TR 164, 349). Complainant's employment with TAG at Palo Verde ended on December 30, 1993 (CX 3), and he subsequently began employment with Carolina Power and Light ("CP&L") as a senior engineer on April 4, 1994, where he was working at the time of the hearing (TR 156, 186, 289-91).

4. TAG has offices around the country, but its main office is located in Norfolk, Virginia. Ellen Taylor is TAG's Personnel Manager, and she works at the Norfolk office (TR 37). Site Managers are located at the field offices. Taylor issues TAG's

Policy and Procedure Manual to new employees when they visit the Norfolk office (TR 69). She keeps a log that employees sign to acknowledge receipt of the manual (TR 384; TAGX 14). The Policy and Procedure Manual contains TAG's employee privacy policy regarding reference requests (TR 54, 55, 72).

5. TAG's employee reference policy mandates that all questions be referred to the Personnel Department in Norfolk, Virginia (TR 54, 55; CX 2). The only information divulged without a written release from the employee is employment dates, job title, and job site. If a written release is provided, TAG can give information concerning that employee's rehireability, reason for leaving, and evaluations (TR 396). Site Managers are not authorized to make comments on present or past employees. Ms. Taylor is aware that this policy is often disregarded in field offices (TR 392, 393).

6. Vance Pettus is TAG's Site Manager at the Palo Verde office and has administrative responsibilities over TAG's employees at APS (TR 46, 78, 79, 166, 346). He was Gaballa's supervisor at Palo Verde. TAG employees at Palo Verde also

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reported to APS supervisors, and Gaballa's APS supervisor was Dave Medek (TR 168).

7. Mr. Pettus was never issued a TAG Policy and Procedure Manual because he never had to report to the Norfolk office where they are disbursed (TR 55, 56, 144, 389). His name does not appear in the log kept by Ms. Taylor (TR 389; TAGX 14). It has not been established that he had knowledge of TAG's official employee reference policy (TR 56, 57, 144). Mr. Pettus's general practice regarding reference calls was to be truthful and to refrain from imparting personal or confidential information (TR 153, 154, 345, 374).

8. In June 1993, Complainant raised a safety issue regarding a discrepancy in information provided by the distributor and the manufacturer concerning the material used in producing a large grommet used in an Atmospheric Dump Valve "ADV") (TR 167; TAGX 11). The distributor reported that the grommet was made of a viton material, while the manufacturer claimed it was made of black rubber. Claimant expressed the concern that if the grommet were to fail or melt, it could render the ADV inoperable during a nuclear emergency (TR 318, 319).

9. After Gaballa raised the safety concern, he reported to APS Human Resources and Vance Pettus that he felt he was the target of retaliation because he had raised a safety issue (TR 87-89, 135, 170; TAGX 33). Complainant also advised Pettus that APS had commenced an investigation of these allegations through its Employee Concerns Program (TR 170). TAG supervisors knew that if an employee went to Employee Concerns, that action constituted protected whistleblower activity (TR 47, 89, 90).

10. On August 19, 1993, Gaballa mentioned to Pettus that he was considering commencing a legal action because of the harassment and discrimination to which he felt he was being subjected. Pettus replied that if Complainant was threatening him, he would take immediate disciplinary action (TR 86, 175, 299; TAGX 33).

11. Gaballa employed Documented Reference Check ("DRC") in September of 1993 to contact TAG and APS supervisors to determine what type of information they would give to third parties about Complainant (TR 176-178; CX 12). Mike Rankin of DRC contacted Vance Pettus on October 6, 1993 (CX 6), asking for a reference on Maged Gaballa. Mr. Pettus could not specifically recall, but did not deny, that he told Rankin, whom he believed to be a prospective employer (TR 110; CX 5, 6), that Gaballa had had some

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internal problems with the people for whom he was working; that he had had a problem with tardiness, for which a note had been placed in his file, but which seemed to have been resolved; that Complainant was productive and his work was average; and that Complainant had felt discriminated against even though there had been no discrimination (CX 6; TR 129-132). There had, in fact, been no note placed in Gaballa's file concerning his tardiness (TR 131), and APS had not, at the time of the inquiry, concluded

its investigations into Gaballa's complaints of discrimination (TAGX 11). Having carefully considered Mr. Rankin's deposition testimony and Mr. Pettus' testimony, I find Mr. Rankin's report concerning the circumstances and content of his conversation with Pettus both reliable and credible.

12. The supervisors from APS that were contacted by DRC refused to provide Rankin with any information about Complainant and referred him to Pettus (CX 7).

13. DRC transmitted the references only to Complainant (Rankin Dep. 25). Pettus did not provide a reference on Gaballa to anyone other than DRC (TR 363, 377).

14. Pettus testified that he would not normally divulge information about an employee's lateness or discrimination claims because that is personal and confidential material (TR 154). He also acknowledged that telling a prospective employer that an employee felt discriminated against' would not be positive information (TR 132). The reference concerning Gaballa which Pettus provided to DRC violated TAG's employee privacy policy (TR 58; CX 2).

15. When Complainant learned of this negative reference, he felt frightened, humiliated, and thought it would have an adverse affect on his career because positive references are an important factor in securing employment in the nuclear power industry (TR 186-188) . Obtaining a security clearance, or "unescorted access," is essential.for engineering positions at nuclear power sites (TR 40, 42, 165, 166, 186-188).

16. Beginning during the summer of 1993, after Gaballa had raised the grommet issue, he began to experience anxiety and shortness of breath (TAGX 11) . These symptoms, combined with previous heart trouble, led him to visit a cardiologist, Dr. S. Leshin. Dr. Leshin told him that his troubles were due to stress and were more mental than physical (TR 188, 224, 225; CX 20).

17. Complainant later visited a psychologist, Dr. Edwin

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Carter, for treatment of continuing emotional troubles (TR 189, 206, 207). Dr. Carter has extensive experience in psychological testing, teaches collegiate courses, and engages in private practice (TR 202).

18. Gaballa's stress symptoms did not abate after he changed jobs (TR 189). Complainant continued to suffer from nightmares, lack of sleep, mood swings, and irritability. He lost interest in his hobbies and sex (TR 190, 211). After administering traditional psychological tests (TR 209; CX 17-22) and interviewing Gaballa (TR 208, 209, 213), Dr. Carter determined that the negative reference provided by Mr. Pettus and obtained by DRC precipitated Gaballa's depression, marital problems, and paranoid thinking, which are commonly engendered by chronic stress (TR 207-209, 233, 237-242, 253, 259, 260, 264). Dr. Carter testified that Claimant was in a state called "anhedonia," which is characterized by a diminished drive and a diminished ability to enjoy activities, including sexual activities (TR 212).

19. Dr. Carter concluded that the psychological impact of the reference continued to affect Gaballa in his current job and personal life; he had lost confidence in his engineering Judgment and was afraid to speak up at work (TR 212, 213) . He had developed a general distrust of others, and his ability to relate to other people had suffered (TR 211, 213, 233, 261, 266, 268). Dr. Carter related that, based on the negative reference he received, Complainant still worried that this derogatory information would follow him (TR 232). Furthermore, Dr. Carter felt that due to his relationship with TAG, Complainant had suffered the development of a full-blown personality disorder which will persist forever, especially in regard to his distrust of authority figures and, to a lesser degree, his relationship with his family (TR 235, 236). Dr. Carter emphasized the importance of the reference in causing Gaballa's emotional state because it had a psychological impact on his reputation and his ability to pursue employment elsewhere (TR 258, 259).

20. Based on his interviews and independent verifications, Dr. Carter believed that Gaballa was not malingering and that he

was presenting a truthful version of events and symptoms (TR 210-212, 228-230).

21. Gaballa is eligible for rehire by TAG (TR 394; CX 3), and he requested in October of 1993 that his resume be placed in TAG's computer system so that if any additional employment opportunities arose, he could be identified and notified (TR 322). He was not, however, entered into the computer system

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until January 24, 1994, after TAG became aware that he had instituted this action (TR 397, 408, 409).

22. Complainant began looking for new employment opportunities after his release from APS (TR 301, 302; CX 12) . In January 1994, he was informed by a friend that CP&L was seeking engineers. He applied and was offered a job on March 24, 1994, and he began working for CP&L on April 4, 1994 at a monthly salary of $4,741 (TR 186, 289-291; CX 15).

23. Complainant and APS have entered into a settlement of the claims arising from APS's alleged discriminatory actions. The only remaining claim concerns the alleged blacklisting and discrimination of Gaballa by TAG (Order, June 15, 1994).

Discussion

The Energy Reorganization Act of 1974, as amended, provides in pertinent part that:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee engaged in specified protected activity.

42 U.S.C. § 5851(a).

To establish a *prima facie* case of discrimination under the ERA, a complainant must prove by a preponderance of the evidence that:

(1) the party charged with discrimination is an "employer" under the Act;

(2) the complainant is an "employee" under the Act;

(3) the complainant was discharged or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment;

(4) the complainant engaged in protected activity[3] ;

(5) the employer knew or had knowledge that the complainant had engaged in protected activity; and

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(6) the retaliation against the complainant was motivated, at least in part, by the complainant's engaging in protected activity.

42 U.S.C. § 5851(b)(3)(C). *See Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984) ; *DeFord v Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983).

Once the complainant has established this *prima facie* case, the burden shifts to the employer to prove with clear and convincing evidence that the same action would have been taken even in the absence of the complainant's protected activity. 42 U.S.C. §5851(b)(3)(D).

I. *Prima Facie* Case

A. Employer/Employee

The parties do not contest and, in fact, have stipulated

that TAG is an employer and that Complainant is an employee under the Act (TR 19, 20). Thus, the first two elements of a whistleblower claim are established and need no further elaboration.

B. Discrimination Against Complainant

Discriminatory acts under the ERA are defined broadly and include the act of blacklisting or circulating negative comments about an employee.[4] *See Doyle v. Hydro Nuclear Serv.*, 89-ERA-22, n.2 (Sec'y March 30, 1994). In addition, 29 C.F.R. section 24.2 (b) provides that there is a violation of the Act if any person "blacklists" an employee because he engaged in protected activity.[5] In fact, Employer concedes that the alleged adverse action of blacklisting would be cognizable if Employer had made this reference to an actual prospective employer instead of DRC,, an agent of Complainant (Respondent's Brief 14).

To be sure, the act of advising a prospective employer that an employee or former employee had filed discrimination charges has been considered retaliation and a violation of Title VII. *Rutherford v. American Bank of* Commerce, 565 F.2d 1162 (10th Cir. 1977). One court has noted that discriminatory treatment in employment references implicates an employee's "'conditions', of past employment as well as 'privileges' of [prospective] employment." *Shehadeh v. Chesapeake & Potomac Telephone Co.*, 595 F.2d 711, 722 n.50 (D.C. Cir. 1978) (applying Title VII). Thus, informing a prospective employer of an employee's protected

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activity would qualify as adverse employment action.

TAG asserts that its acts could not be discriminatory because the reference was not given to an actual prospective employer, and thus, Complainant suffered no damage or loss of employment opportunity. This argument, however, is without merit, and as Employer concedes, it is also not supported by precedent (Respondent Is Brief 15) The court in *Cohen v. SUPA, Inc.*, 814 F. Supp. 251, 260-61 (N.D.N.Y. 1993) (applying Title VII), rejected this contention, holding that the act of retaliation need only have an adverse impact on the complainant to be actionable, and that an actual loss of prospective employment does not necessarily need to be demonstrated. This proposition is also supported by the availability of compensatory damages under the Act, which can be awarded solely for emotional distress. 42 U.S.C. §5851(b)(2)(A).

Furthermore, the Secretary of Labor addressed this issue in *Earwood v. Dart Container Corp.*, 93-STA-16 (Sec'y Dec. 7, 1994). Carey Earwood, the complainant, enlisted another individual to contact his former employer on the pretext of obtaining a reference for possible employment. This person was not actually a prospective employer of Earwood, but was acting on behalf of the complainant. In responding to the request, a Dart employee revealed that Earwood had filed charges against it, and that Dart was displeased. The Secretary ruled that this was impermissible blacklisting and constituted a violation of the Surface Transportation Assistance Act. In addition, he noted that the Dart employee was unaware that the request was not a legitimate inquiry. Consequently, the fact that the complainant did not lose an actual employment opportunity did not shield Dart from liability. The Secretary found that "effective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result." Id. at 5.

Moreover, the *Dart* rationale is readily extended to the ERA. As the Secretary noted, the prohibition against blacklisting is equally applicable to similar employee protection statutes. Id. at 2 (citing *Garn v. Benchmark Technologies*, 88-ERA-21 (Sec'y Sept. 25, 1990)). Thus, DRC's status as an agent of Complainant is inconsequential, and Employer's actions here are adverse and actionable.

Complainant was clearly subjected to discrimination by TAG when his TAG assigned supervisor, Mr. Pettus, violated TAG policy

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and advised the reference caller that Gaballa had felt as if he, had suffered discrimination. Even though Pettus may not have been actually aware of TAG's policy regarding referral of reference requests, this does not absolve him or TAG of its violation. As a Site Manager of Palo Verde, Pettus was acting within the scope of his employment when he gave the reference to DRC; he is a TAG supervisor, and as such, his acts are those of the company. Equally important, whether or not Mr. Pettus was aware of company policy, he admittedly ignored his own policy of not revealing personal and confidential information. Providing references is a term or condition of employment, and therefore, the negative reference was an adverse employment action to which employees who did not engage in protected activities were not subjected.

C. Protected Activity

Complainant engaged in protected activity when he reported his safety concerns regarding the grommet. There was a discrepancy between the supplier and the manufacturer as to the composition of the grommet, and such a conflict is required to be reported to the Nuclear Regulatory Commission. 10 C.F.R. 50, Part 21. Complainant's act of advising his supervisors of this potential problem constituted protected activity; raising health and safety complaints internally to supervisors is protected activity. *Adams v. Coastal Production Operators, Inc.*, 89-ERA-3 (Sec'y Feb. 14, 1989). Specifically, section 5851(a)(1)(A) protects employees who inform their supervisors of a possible violation of the Act. Clearly, Gaballa engaged in protected activity.

D. Employer Aware of Protected Activity

Complainant avers that after he notified his superiors of the conflict concerning the grommet, he became subject to discrimination and harassment. He reported both his safety concerns and his feelings of discrimination to APS Human Resources and Employee Concerns Program. TAG was also cognizant of Gaballa's complaints and the related investigation. Both Pettus and Taylor were aware of his complaints, and this element is not contested.

E. Discrimination Motivated by Protected Activity

Section 5851(b)(3)(C) provides that a violation of the Act has occurred if the complainant demonstrates that his protected activity was a contributing factor in the employer's

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discrimination. Here, the nexus between the adverse action and the protected activity is fairly direct; Gaballa's protected activity was the internal reporting of a possible safety violation in June of 1993, and the adverse action, or negative reference in October, 1993, was based on his complaints of discrimination due to his protected activity. Mr. Pettus explicitly told DRC that Complainant felt discriminated against even though he had not been, and Pettus made this remark despite the on-going investigation of Gaballa's complaint. Indeed, Mr. Pettus' discussion of Gaballa's concerns about discriminatory treatment, and indeed his willingness to provide an adverse reference at all are evidence of retaliatory action against protected activity in the context of this record.

Thus, in *Dart*, *supra*, the Secretary found that the employer acted out of a discriminatory motive when it provided information about the complainant's previous complaint and that these remarks constituted direct evidence of a retaliatory motive. Id. at 3. Likewise, Mr. Pettus' negative reference to DRC concerning Complainant's attendance and discrimination claims are equally demonstrative of a discriminatory purpose. Mr. Pettus admittedly departed from his own practice when he gave Gaballa a negative reference, and there is no showing that other employees who had not engaged in protected activity were treated in this fashion.

In addition, Mr. Pettus had previously demonstrated his displeasure with Gaballa's protected activities when he threatened to initiate immediate disciplinary action if Gaballa took legal action against the alleged discrimination. (Tr. 357-58). A manager's comments may be direct evidence of a

discriminatory motive. *Lederhaus v. Paschen*, 91-ERA-13 (Sec'y Oct. 22, 1992). Although the filing of a complaint in this context would constitute protected activity, Mr. Pettus seemed undeterred in threatening to take adverse action against an employee who was engaging in, or was about to engage in, protected activity. 42 U.S.C. § 5851(a) (1) (D) . The negative reference to DRC was, I find, in furtherance, at least in part, of this retaliatory inclination.

II. Rebuttal/Adverse Action Regardless of Protected Activity

The elements of a *prima facie* case of discriminatory retaliation having thus been established, Employer must now show with clear and convincing evidence that it would have taken,,the same adverse action in the absence of the protected conduct. 42 U.S.C. § 5851(b)(3)(D). For the reasons discussed below, I find the rationale proffered by Employer inadequate to demonstrate that it

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had a legitimate or nondiscriminatory reason for the negative reference.

First, Employer argues that TAG was not involved in Complainant's protected activity, and it had no incentive to discriminate "against him (Respondent's Brief 24). TAG was Claimant's employer and was ultimately responsible for placing Complainant at Palo Verde. If Gaballa's protected activity created an unwelcome problem for APS, it would not strain credulity to infer that it also created an unwelcome problem for TAG. APS is an important TAG contractor. Nevertheless, the Act does not require us to place an economic value on the TAG/APS relationship or weigh an employer's incentives for a particular action it takes against the value to TAG of a single engineer. The existence of discrimination, perforce, assumes its own incentives.

Second, TAG contends that Pettus treated Complainant no differently than any other employee for whom he provided a reference. This contention, however, is not supported by Mr. Pettus' own testimony. Mr. Pettus normally refrained from revealing personal or confidential material, and he did consider the information concerning Gaballa's lateness and discrimination complaints to be personal. His communication of such information to Mr. Rankin of DRC was not consistent with his treatment of other employees.

Next, Employer cites *Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980) (applying Title VII) for the proposition that an employer need only establish a legitimate reason for the adverse action to dispel the inference of discrimination. In *Womack*, the question was whether the basis for the discharge was sufficiently independent of the protected activity. In this case, the negative reference is not sufficiently independent of Complainant's allegations, or protected activity, to rebut the inference. To the contrary, the negative reference was based mainly on Complainant's protected conduct. As such, the facts here do not lend themselves to a reasonable conclusion that the negative reference was independent of the protected activity.

TAG argues further that Pettus did not misrepresent any facts, and therefore, no blacklisting claim can arise. This contention, however, is without merit. In his conversation with Rankin, Mr. Pettus was not entirely candid. First, Pettus stated that Complainant had a note in his file, or a written warning, regarding his few occasions of tardiness. There was, in fact, no such note in Gaballa's file and his suggestion to the contrary

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had a tendency and capacity to overstate the problem. Second, after relating that Gaballa considered himself the target of discrimination, Pettus went further and reported that there had not actually been any discrimination against him. While that may have been Mr. Pettus' opinion, his failure to mention the further material fact that APS Employee Concerns had not yet concluded its investigation of the matter and had reached no conclusions at the time had a tendency to mislead a potential employer into a mistaken belief that Gaballa was a meritless complainer. Thus, Pettus' reference was not only contrary to general TAG policy and

his own practice, but it was also not free from misleading content.[6] Under such circumstances, I find I am unable to conclude that the release of the negative information constituted either an inadvertent error or a non-retaliatory action. I believe Mr. Pettus knew precisely what he was doing.

Employer's equity argument that Complainant has unclean hands, because he created the setting for the negative reference, is also lacking in merit. The Secretary has expressly ruled that adverse information conveyed to a source such as DRC, under similar circumstances, may be offered in support of charge of a discrimination. *See, Dart, supra*.

TAG has not demonstrated that it would have taken the same adverse action in the absence of Gaballa's protected activity. Indeed, Complainant's concern about discrimination arising due to his protected activity was part of the content of the negative reference, *(See* Id. at 1297-98). Moreover, the fact that Gaballa was concerned about discriminatory retaliation as a result of his protected activity was not only mentioned, but characterized as baseless by Pettus in his DRC interview. Under such circumstances, the record fails to show that a negative reference would have been communicated regardless of Complainant's whistleblowing activity.

III. Damages/Relief

Complainant requests compensatory damages to compensate him for the emotional distress he has suffered as a result of TAG's negative reference, as well as for the damage to his reputation. He also seeks lost wages and benefits for the time period between his last employment with TAG at APS and his current employment. In addition, Complainant seeks to enjoin Employer from releasing any personal information about Complainant without a written release, and requests an order requiring TAG to expunge from his file ' all references to his engaging in protected activity and to the related allegations raised by TAG or APS.

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Upon the evidence adduced in this record, I find no basis for awarding Mr. Gaballa compensatory damages due to injury to his reputation. The negative reference was given to DRC, who in turn gave it only to Complainant. Although the negative reference may have constituted an attempt to diminish Claimant's employment potential, there is no evidence to suggest that any prospective employers received it, and Complainant has failed to demonstrate that he suffered any actual damage or injury to his reputation.

Complainant also requests an award for lost wages and benefits for the time period between January 1, 1994, when he was released by TAG, and April 4, 1994, when he commenced work with CP&L. The predicate for such damages has also not been established. There is no evidence to connect his discharge from TAG to the discrimination claim. Gaballa left TAG when his contract expired, and he has not raised the issue that this was a retaliatory discharge. There is, moreover, no evidence to suggest that TAG prevented Complainant in any way from obtaining employment during this time period. Complainant secured his job at CP&L in the same manner in which he was hired by TAG, through notification by a friend that work was available. TAG is, therefore, not liable for the payment of lost wages or benefits.

Complainant also seeks compensatory damages for emotional distress, and it is well settled that damages are available under the Act and the regulations. 42 U.S.C. §5851(b)(2)(A); 29 C.F.R. §24.6(b)(2); *DeVord v. Secretary of Labor*, 700 F.2d 281, 283 (6th Cir. 1983). In this instance, Dr. Edwin Carter testified at length regarding Complainant's emotional problems caused by the negative information which emanated from his TAG supervisor. He examined Gaballa and administered credible diagnostic tests. In Dr. Carter's opinion, Gaballa's complaints and his symptoms are real. As a consequence of the negative reference, Dr. Carter believes Complainant suffered chronic stress, paranoid thinking, a general distrust of others, a lack of confidence in his engineering judgment, a fear of continual repercussions,[7] and a general feeling of apathy, which created problems in his relationship with others, including

family members.

Dr. Carter testified, without contradiction by any other expert opinion in this record, that, as a result of TAG's actions, Gaballa has developed a "full-blown" personality disorder which will "persist forever." His trust in authority figures has been, according to Dr. Carter, "affected forever," and a "permanent" strain has been placed on his marital

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relationship. (Tr. 235-36). Again, Dr. Carter attributed these disorders to TAG'S actions, not to APS. (Tr. 235-36).

In *Marcus v. EPA*, 92-TSC-5 (ALJ D & 0, 12/3/92) an award of $50,000 compensatory damages, in addition to backwages and other relief, was entered upon evidence of "mental and physical anguish" suffered by the complainant in that case. A review of that decision demonstrates that the anguish adduced in that record was predicated solely upon the complainant's testimony. No medically determined permanent affect was demonstrated. On appeal, the award of compensatory damage was specifically affirmed by the Secretary. *Marcus v. EPA*, (Decision of Secretary, 2/7/94 at pg. 10).

In this instance, the evidence of the injury Complainant sustained consists not merely of Claimant's own testimony, but the unrefuted testimony of Dr. Carter. Moreover, unlike the emotional and physical anguish suffered by Marcus, the evidence here demonstrates chat Gaballa has developed permanent disorders due to the discrimination by TAG. Considering past circumstances in which damages of $50,000 have been sustained, I believe the evidence here justifies a more substantial award.

Finally, the relief requested by Complainant includes an order requiring TAG to obtain a written release before disclosing any personal information on Complainant, and also requiring it to expunge any references to this claim or related matters from his employment record. These are reasonable provisions, under the circumstances, and will be included in the order.

Conclusion

Upon consideration of the record in its entirety, I conclude the evidence is sufficient to find that The Atlantic Group, Inc. discriminated against Maged Gaballa with respect to the terms and conditions of his employment when it provided a negative reference, at least in part, in retaliation to referring to his protected activity. Moreover, The Atlantic Group presented insufficient evidence to demonstrate that the adverse action was either an inadvertent error or would have been taken in the absence of the protected activity. Accordingly, Gaballa is awarded compensatory damages and the requested Orders.

ORDER

It is hereby ORDERED that The Atlantic Group, Inc.:

1. Pay to Maged Gaballa the sum of $75,000 in compensatory damages for the infliction of emotional distress;

2. Refrain from releasing any information concerning Maged Gaballa without first obtaining a written release from him; and

3. Expunge from Maged Gaballa's employment records all references to his engaging in protected activity, his allegations of discrimination, and any related claims against him while he was employed at Palo Verde Nucleus Generating Station.

[ENDNOTES]

[1] Although Mr. Gaballa testified at the hearing, and although the Employer was afforded a full opportunity to cross-examine, the Employer sought, after dismissing Mr. Gaballa as a witness, to include portions of his deposition into evidence. Tr. 336-41. As Mr. Gaballa points out, such use of a deposition would be questionable under the Federal Rules, however, in the interest of developing a complete record, and in the absence of any demonstration of prejudice, the portions of the deposition submitted post-hearing are admitted into evidence.

[2]
The abbreviation "TR" refers to the transcript from the hearing, "CX" to Complainant's Exhibit, and "TAGX" to TAG's Exhibit.

[3]
To have engaged in protected activity under the ERA, an employee must have done one of the following:

> (1) notified his employer of an alleged violation of the ERA or the Atomic Energy Act of 1954;
> (2) refused to engage in any practice made unlawful by the ERA or the Atomic Energy Act, if the employee has identified the alleged illegality to the employer;
> (3) testified before Congress or at any federal or state proceeding;
> (4) commenced, cause to be commenced, or is about to commence or cause to be commenced a proceeding under the ERA or the Atomic Energy Act;
> (5) testified or is about to testify in any such proceeding; or
> (6) assisted, participated, or is about to assist or participate in any manner in such a proceeding.

42 U.S.C. §5851(a)(1)(A)-(F).

[4]
Other instances of alleged discrimination against Complainant by APS or TAG were resolved in a previous settlement agreement, and are no longer an issue.

[5]
For a definition of blacklisting, *see Bilka v. Pepe's Inc.*, 601 F. Supp. 1254, 1259 (N.D. Ill. 1985) (giving negative references to employment agencies and prospective employers).

[6]
This is not a finding that blacklisting cannot occur if an employer makes no misrepresentations, only that TAG's claim that it made no misrepresentations is not supported by the evidence.

[7]
When an employer's action instills a fear in its employees which discourages the reporting of their safety concerns, it achieves the precise response which whistleblower laws are designed to alleviate.