



In the Matter of:

WILLIAM SMITH,

ARB CASE NO. 11-003

COMPLAINANT,

ALJ CASE NO. 2009-ERA-007

v.

DATE: June 20, 2012

**DUKE ENERGY CAROLINAS, LLC &
ATLANTIC GROUP, d/b/a DZ ATLANTIC,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jason Zuckerman, Esq., *The Employment Law Group, P.C.*, Washington, District of Columbia

For the Respondent, Duke Energy:

Felicia A. Washington, Esq., *K&L Gates LLP*, Charlotte, North Carolina

For the Respondent, DZ Atlantic:

Lewis M. Csedrik, Esq., *Morgan, Lewis & Bockius LLP*, Washington, District of Columbia

Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

This case arises under the whistleblower protection provision of the Energy Reorganization Act (ERA), as amended and recodified, and its implementing regulations.¹ The complainant, William Smith, a security guard, alleged that Respondents, Duke Energy Carolinas, LLC (Duke Energy) and DZ Atlantic (collectively referred to as Respondents), violated the ERA when they terminated his employment after he reported certain safety complaints. Following an investigation by the Occupational Safety and Health Administration (OSHA), which denied relief on March 26, 2009, Smith requested a hearing before a Department of Labor Administrative Law Judge (ALJ). The ALJ held a hearing from December 1-4, 2009. On September 29, 2010, the ALJ entered a decision denying the complaint. Smith petitions for review. We reverse in part and remand for further proceedings.

BACKGROUND

A. Facts

Smith began working as a security guard with DZ Atlantic, a contractor to Duke Energy, in early 2007. Decision and Order - Denial of Complaint (D. & O.) at 2, 94. In May 2007, Smith began performing fire watch surveillance at the Catawba nuclear power plant. This work involved visually inspecting certain areas of the nuclear plant and recording the inspections on a NSD-316 log. The logs were sent to the Work Control Center at the end of each month. *Id.* at 2, 95. Smith was instructed to sign the fire watch logs *after* each visual inspection. *Id.* at 96. From August to December 2007, however, Smith and his partner, Cathy Reid, *pre*-signed fire watch logs on a few occasions before the visual inspections were completed, in contravention of the instructions that Smith had been given. *Id.* at 96-97.

By December 2007, there were four DZ Atlantic employees working as fire watchers at Catawba. Chris Borders and Jeffrey Pence worked the day shift, from 5:00 a.m. to 5:00 p.m., and Reid and Smith worked the night shift, from 5:00 p.m. to 5:00 a.m. *Id.* at 95. Typically, the two fire watchers on a shift alternate hourly inspections of two rooms, the pump room and the electrical penetration room, for each of the two nuclear power units at Catawba, for a total of four rounds each hour. *Id.* For each area, the 24 hourly inspections are logged on a separate NSD-316 surveillance form. *Id.* In January 2008, David Hord, a supervisor with Duke Energy, met with the four Catawba fire watchers (Smith, Reid, Borders, and Pence), and informed them about action that the NRC had taken against a nuclear station due to falsified fire watch logs. *Id.* at 97. During this meeting, Hord told Smith and his colleagues that he expected them to follow procedures correctly. *Id.* at 97.

The next month, on February 12, 2008, Smith arrived at work at 3:45 p.m. for his 5:00 p.m. shift, and saw that Borders had already signed for the next inspection that would occur at 3:50 p.m., and that there was a blank for one inspection on the log. *Id.* at 98. At 4:10 p.m.,

¹ 42 U.S.C.A. § 5851 (Thomson/West 2010) (ERA); 29 C.F.R. Part 24 (2009).

Pence came into the work area and Smith asked him about the blank log entry on the fire watch log. *Id.* at 99. Pence responded that he needed to sign in the blank. Smith then asked Pence about the 3:50 entry that Borders signed, at least as of 3:45. Pence replied that Borders left early and that he was doing her a favor by completing the round, and would sign her name so that she would get paid for the time on her time sheet. Smith told Pence that the fire watch log needed to be corrected to show that Pence actually accomplished the round or he would have to report the discrepancy. *Id.* at 99. Pence told Smith that he would correct the log. Pence did not correct the log and Borders' signature remained on the fire watch log for 3:50, and then for the other four areas for the rounds at 3:55, 3:58, 4:01, and 4:04. *Id.* at 99.

On February 17, 2008, Borders told Reid that Smith was spreading rumors that Borders was having an affair, and that Smith had told Withers that she had lied on her timesheet. *Id.* at 100. Borders told Reid that she was "going to get" Smith by telling human resources that he sexually harassed her. Later that morning, Borders told Claude Mabry, a Duke Energy SPOC supervisor, that Smith sexually harassed her. Mabry told Susan Kelley (human resources consultant for Duke Energy), Tommy Withers (a Duke Energy maintenance job sponsor at Catawba), and a DZ Atlantic management representative about Borders' charge against Smith. *D. & O.* at 100. When their shift started later that day at 5:00 p.m., Reid told Smith that Borders was angry at him for spreading information about an affair, and telling Withers that she falsified time sheets. Reid also told Smith that Borders wanted to have Smith fired and that "it would be easy if she claimed sexual harassment because Smith is black." *Id.* at 100.

On February 18, 2008, Smith reviewed the fire watch log for February 12, and noticed that Borders' signature was still on the form for the 3:50 p.m. inspection. *Id.* at 100. The next day, Smith met with Larry Ray, project coordinator for DZ Atlantic at Catawba, and DZ Human Resource officer Ellen Simmons, who informed him that Borders had filed a sexual harassment complaint against him. *Id.* at 104. Smith denied the charge, and told them, inter alia, that she had falsified her time sheets. *Id.* Smith told Ray and Simmons that Borders would insert times when she was not in the building. Simmons told Smith that she would investigate the sexual harassment complaint, and, despite Smith's requests to inform Duke Energy of the time sheet falsification, Simmons told him not to inform Duke until she was able to first investigate. *Id.* at 100.

Simmons and Ray met with Reid on February 19, 2008, to discuss Borders' sexual harassment complaint against Smith. Reid told them that "Borders was upset with Mr. Smith because she thought he had talked to Mr. Withers about her time sheets" and that she had "never observed Mr. Smith sexually harass Ms. Borders." *Id.* at 105. Reid also told Simmons and Ray that "Borders threatened to get Mr. Smith." *Id.* Following this interview, Simmons concluded that there was "insufficient evidence to prove or disprove Borders' sexual harassment complaint." *Id.* at 105.

Later that same day, Smith met with Hord, a Duke Energy supervisor, and "informed him about Borders' sexual harassment complaint which, he believed, was falsely lodged by Borders in retaliation for him complaining about her falsification of inspection records on February 12." *Id.* at 105. Hord reported the issue to his supervisor, Danny O'Brien, nuclear section manager

for Duke Energy at Catawba. *Id.* On February 20, 2008, Duke Energy advised DZ Atlantic to relieve the four fire watchers of their duties pending an investigation. *Id.* Upon completion of the investigation, Duke Energy decided to release all four fire watchers, including Smith. *Id.* at 106. Borders was released for failing to conduct the fire watch for which she signed, Pence for failing to correct the fire watch log, and Smith for failing to timely disclose the problem. *Id.* They also released Reid to “get a fresh start with fire watchers at Catawba.” She was released favorably because she was not implicated in the investigation. *Id.*

DZ Atlantic asked Michael Henline, a project manager for DZ Atlantic, and Ray, to investigate Smith’s report of the fire watch log falsification by Borders. *Id.* at 106. Duke Energy told Henline that it was releasing all four fire watchers and placing a hold on their access badges. Henline and Ray investigated the February 12, 2008 logs and concluded that Borders falsified her time sheet and log, Pence covered up for Borders, Smith delayed reporting the issue, and Reid did nothing wrong. *Id.* When Smith arrived for his shift, Ray told him that his access badge had been placed on supervisory hold. *Id.* Smith went home and later received a phone call asking him to come in the next day for an interview.

On February 21, 2008, Henline decided that Borders, Pence, and Smith’s employment would be terminated due to lack of integrity and trustworthiness, but that Reid was not aware of any falsification of the fire watch log. *Id.* at 106-07. Prior to his termination, Smith met with Duke officials, O’Brien and Kelly, to discuss his delay in reporting the falsified fire watch logs. *Id.* at 108. Smith stated that he “did not think of it at the time,” but that after about a week the “fire watch log discrepancy had begun to bother him and he wanted to report the problem before the fire watch logs were turned in at the end of the month.” *Id.* He wholly denied Borders’ sexual harassment complaint. *Id.*

B. Proceedings Below

Smith filed an ERA whistleblower complaint on July 7, 2008. OSHA dismissed the complaint on March 26, 2009.

Following a three-day hearing, the ALJ denied the complaint in a Decision and Order issued September 29, 2010. While the ALJ determined that Smith had engaged in ERA-protected activity, he concluded that the protected activity was not a contributing factor in his termination.

The ALJ determined that Smith’s communications to Pence on February 12, 2008, advising Pence to correct the NSD-316 fire watcher log to reflect that Pence had completed the round, and not Borders, was protected activity. The ALJ found that Smith pointed out the signature problem to Pence that day, and “threatened to report the discrepancy if Mr. Pence did not correct it.” D. & O. at 115. The ALJ determined that Smith’s “stated concern about the problem [coupled with] Hord’s previous briefing” was sufficient evidence to establish that Smith “held a subjective belief that an inaccurate fire watch log represented a violation of a NRC procedure when he told Mr. Pence the log needed to be corrected to reflect that he performed the 15:15 inspection.” *Id.* The ALJ further determined that Smith’s admonition to Pence to correct

the log was “objectively reasonable, particularly considering that the fire watch logs were documenting the patrols the fire watchers were conducting in the four vital areas of Catawba’s two nuclear power units due to impaired fire protection systems.” *Id.*

The ALJ also determined that Smith’s statements to Hord on February 19, 2008, informing Hord that Borders put inaccurate information on a fire watch log was also protected under the Act. Based on the evidence, the ALJ concluded that when Smith:

made his February 19, 2008 report to Mr. Hord, Mr. Smith had both a subjective and objective belief that Ms. Borders’ signature for a fire watch round at a time when she was not on-site represented a violation of an NRC regulation or procedure. As a result, his February 19, 2008 report of Ms. Borders’ inaccurate signature on a fire watch log was a protected activity under the Act.

Id. at 116. The ALJ further determined that Smith’s disclosure on February 19 “may have been motivated by [his] self-interest to defend against, and retaliate for, Ms. Borders’ sexual harassment complaint” but that any such motivation “does not alter the status of his February 19, 2008 communication to Mr. Hord as protected activity under the Act.” *Id.*

The ALJ determined, however, that the protected activity that Smith engaged in was not a contributing factor to his termination. The ALJ found that Duke Energy officials had no knowledge of Smith’s protected statements to Pence on February 12, and, while they were aware of the February 19 statements, that there was insufficient evidence showing that animosity or hostility motivated the company’s decision to terminate Smith. *Id.* at 121. The ALJ instead found that the termination decision was motivated by the company’s desire to ensure that employees are reliable and trustworthy, and that Smith’s failure to immediately report the February 12 incident demonstrated that Smith lacked these traits. *Id.*

The ALJ also found that DZ Atlantic officials were unaware of Smith’s February 12 statements to Pence. The ALJ found that DZ managers Simmons and Ray were aware of the February 19 protected communications due to the interview with Smith that day about Borders’ falsification of the fire watch logs, but they were not involved in terminating Smith’s employment. *Id.* at 123-124. DZ Atlantic project manager, Michael Henline, terminated Smith’s employment on February 21, 2008. *Id.* at 106-107. The ALJ found that there was no evidence that Henline’s termination decision stemmed from Smith’s statement’s to Duke Energy about the falsification of a fire watch log by a DZ Atlantic employee; the ALJ found that “Henline credibly testified that he was not upset with Mr. Smith for bringing the falsification issue to the attention of the Duke Energy supervisors.” *Id.* at 124.

The ALJ finally determined that Smith’s actions – specifically his admission that he pre-signed fire watch logs himself three to four times while working at the Catawba nuclear power facility – were not deliberate misconduct that would render him ineligible for relief under the Act. *See* 42 U.S.C.A. § 5851(g) (Act shall not apply to employees who “acting without

direction” from his employer “deliberately causes a violation of any requirement of the Act.”). The ALJ determined that while Smith’s pre-signing of the fire watch logs violated the ERA because it caused Duke Energy to be in violation of NRC regulations, the “preponderance of the probative evidence fails to prove that” Smith did so “knowing the act was a violation of the ERA or Atomic Energy Act, or that he engaged in that activity with reckless disregard as to whether it represented a violation of the” Acts. *Id.* at 129-130.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the ERA. Secretary’s Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 24.110. The ARB reviews the ALJ’s factual findings for substantial evidence, and legal conclusions de novo. 29 C.F.R. § 24.110(b); 5 U.S.C.A. § 557(b) (Thomson Reuters 2011).

DISCUSSION

“To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action taken against him.” *Hasan v. Enercon Svcs., Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-022, -027, slip op. at 6 (ARB July 28, 2011), citing 42 U.S.C.A § 5851(b)(3)(C). “If the complainant’s 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.” *Id.*, quoting 42 U.S.C.A. § 5851(b)(3)(D).

A. Smith’s communications to his managers on February 12, and 19, 2008, are protected activity

The ALJ determined that Smith’s communications on February 12, and 19, 2008, were protected activity under the ERA. See *supra* at 4-5. On February 12, Smith warned Pence to correct the fire watch logs to reflect that Pence had completed the surveillance and not Borders (who had left early). On February 19, Smith reported to his managers that Borders falsified the fire watch logs. Since the parties do not challenge these findings on appeal, the ALJ’s findings and conclusions on protected activity are final.

B. Smith’s protected communications contributed to his termination

The central issue in this case is whether Smith’s protected activity was a contributing factor in the company’s decision to terminate his employment. The ARB has fully adopted the interpretation of “contributing factor” as set out in *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140

(Fed. Cir. 1993).² In *Marano*, the Federal Circuit interpreted “contributing factor” in the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 5 U.S.C. 1221(e) (1), to mean “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Marano*, 2 F.3d at 1140. The term was intended to “overrule existing case law, which require[d] a whistleblower to prove that his protected conduct was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action in order to overturn that action.” *Id.* at 1140, quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20). Thus “any weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the ‘contributing factor’ test.” *Marano*, 2 F.3d at 1140. This definition of “contributing factor” has also been consistently applied by the federal courts. *See, e.g., Addis v. Dep’t of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Allen v. Admin. Review Board*, 514 F.3d 468, 476 n.3 (5th Cir. 2008); *Kewley v. U.S. Dep’t of Health & Human Svcs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998).

In proving contributing factor, a complainant can show “either direct or circumstantial evidence” of contribution.³ One of the common sources of indirect evidence is “temporal proximity” between the protected activity and the adverse action. *Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010). While not always dispositive, the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation; this indirect or circumstantial evidence can establish causation in a whistleblower retaliation case. *See Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004), *aff’d sub nom., Vieques Air Link, Inc. v. U.S. Dep’t of Labor*, 437 F.3d 102, 109 (1st Cir. 2006); *see also Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

Under the extensive facts found by the ALJ—coupled with the undisputed finding that Smith’s communications on February 12 and 19 were protected under the ERA—it was error to conclude that these protected communications did not contribute to the termination. Indeed, the ALJ found that Smith’s disclosures precipitated the investigation into the falsification of the fire watch records. While Smith may have delayed for seven days informing managers about the

² *See Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 12 (ARB Sept. 30, 2011) (Sarbanes-Oxley Act); *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011) (Surface Transportation Assistance Act); *Rocha v. AHR Util. Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-001 through -004, slip op. at 9 (ARB June 25, 2009) (Pipeline Safety and Improvement Act); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008) (Wendell H. Ford Aviation Investment and Reform Act for the 21st Century).

³ *Bechtel*, ARB No. 09-052, slip op at 12-13.

falsification incident involving Borders and Pence, it is undisputed that the only reason that managers learned about the practice was because Smith notified them.

The facts in this case are analogous to *Marano, supra*, where the court of appeals held that a protected disclosure contributed to an adverse action and thus was covered under the whistleblower statute. *Marano*, 2 F.3d at 1139. *Marano* involved a complaint brought by a DEA agent in the agency's Albany, New York Office, who submitted a memorandum to an incoming manager that alleged misconduct by Marano's supervisors. The memo, which was ruled as protected activity, prompted an investigation that led to a major overhaul of the DEA's Albany Office. *Id.* at 1138-1139. As a part of the overhaul, Marano was transferred to DEA's New York City Office. *Id.* at 1139. Marano's transfer did not result from any direct wrongdoing on his part, but DEA officials determined that remedying the management problems required a "clean sweep" of the office, which included reassigning Marano. *Id.* Marano's whistleblower appeal was denied administratively on the grounds that he failed to show that his disclosure contributed to his termination. On petition for review, the court of appeals reversed, and held that the complainant's "initial memorandum was *inextricably intertwined* with the investigation." *Id.* at 1143 (emphasis added). The court reasoned that the:

investigation was prompted as a direct result of the protected disclosure, and served, *inter alia*, to verify the content of the protected disclosure. . . . In this case, then, the uncontested sequence of events demonstrates that the initial, protected disclosure "in connection" with the investigative report, satisfies the "contributing factor" requirement of the statute. The content of Marano's disclosure gave the agency the reason for its personnel action. Consequently the contributing factor . . . appears to be the same as the agency's reason for taking the personnel action.

Id.

Just as in *Marano*, Smith's disclosure was "inextricably intertwined" with the investigation that led to his termination; thus, the content of his disclosure "gave [his managers] the reason for its personnel action." *Id.* Though the ALJ found that the termination decision by Smith's managers stemmed solely from Smith's seven-day delay in reporting Borders' false log signatures, and not on the bare fact that Smith made the report, Smith's act of reporting the information to the managers triggered the decision to terminate him. Had Smith not reported the falsification of records, the fire watchers violative practices may not have otherwise been disclosed.⁴ See, e.g., Hearing Transcript at 146, 157, 610. As in *Marano*, the Respondents' investigation into the February 12 fire watcher logs was the direct result of Smith's protected disclosures and verified the truth of his February 19 statements to Duke Energy officials. The "uncontested sequence of events" shows that Smith's protected disclosure contributed to the

⁴ The ALJ noted that there was a question as to whether Smith's supervisors would have learned of the falsification issue if Borders had not begun a sexual harassment complaint against Smith. D. & O. at 126.

decision to terminate him and falls within the ERA's scope. *Marano*, 2 F.3d at 1143. Indeed, the content of Smith's disclosures gave the Respondents the reason for their personnel actions against him.

The ALJ's ruling on contributing factor is reversed because it is not in accordance with law. Under the law of contributing factor and the facts of this case, protected activity contributed to Smith's termination. The burden now shifts to the Respondents to demonstrate by clear and convincing evidence that they would have taken the same personnel action absent the protected activity. 42 U.S.C.A. § 5851(b)(3)(D); 29 C.F.R. § 24.109(b).

CONCLUSION

For the foregoing reasons, we **REVERSE** the ALJ's ruling on causation, and **REMAND** for further findings consistent with this decision.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge