

**U.S. Department of Labor**

Office of Administrative Law Judges  
2 Executive Campus, Suite 450  
Cherry Hill, NJ 08002

(856) 486-3800  
(856) 486-3806 (FAX)



**Issue Date: 17 September 2012**

CASE NO: 2008-ERA-00003

In the Matter of:

**JAMES J. BOBRESKI,**  
Complainant,

v.

**J. GIVOO CONSULTANTS, INC.,**  
Respondent.

APPEARANCES:     Richard Renner, Esq.                                     Alan Milstein, Esq.  
                                 Michael D. Kohn, Esq.                                     For Respondent  
                                 For Complainant

BEFORE:             Ralph A. Romano  
                                 Administrative Law Judge

**DECISION AND ORDER**

Complainant, James J. Bobreski, filed this case under the employee protection (“whistleblower”) provisions of the Energy Reorganization Act of 1974 (“ERA” or “the Act”), 42 U.S.C. §5851. The ERA and its attendant statutes prohibit discrimination in employment against individuals who notify employers of an alleged violation of the relevant statutes, who refuse to engage in any practice made unlawful by such statutes, commence or cause to be commenced a proceeding under the statutes, or who testify, assist, or participate in any proceeding to carry out the purposes of the statutes. The ERA prohibits employers from discriminating against any employee with respect to his or her compensation, terms, conditions, or privileges of employment because that employee engaged in protected activity as defined in the Act.

I.     BACKGROUND

A.     Procedural History

On May 2, 2006, Complainant filed a complaint with the United States Department of Labor’s Occupational Health and Safety Administration (OSHA) against J. Givoo Consultants, Inc. (“Respondent” or “Givoo”). Complainant alleged that Respondent violated the ERA by failing to hire him in retaliation for raising issues regarding safety at a previous job. After conducting an investigation, OSHA issued a determination dated September 27, 2007,

concluding that Respondent had not violated the Act's employee protection provisions. Complainant objected to OSHA's findings and timely requested a hearing before an Administrative Law Judge ("ALJ"). The case was assigned to ALJ Janice Bullard, who held a hearing on July 29, 2008 in Cherry hill, New Jersey. On January 26, 2009, ALJ Bullard issued a Decision and Order affirming OSHA's determination.

On June 24, 2011, the Administrative Review Board issued an Order of Remand and the case was reassigned to me. In remanding the case, the ARB has directed as follows:

...the ALJ must make additional and sufficient findings based on the circumstantial evidence as a whole and consistent with our opinion, that: (1) the temporal proximity between the protected activity and the adverse action was overlapping and not a seven-year gap; (2) Givner's influence, if any, on the ultimate adverse action must be determined by viewing all of the circumstantial evidence; (3) Morgan's knowledge or lack of knowledge of Bobreski's protected activity must be analyzed based on all of the circumstantial evidence as a whole; (4) further clarification is needed as to Givoo's legitimate business reasons; and (5) the issue of pretext must be weighed along with all of the circumstantial evidence.

If the ALJ finds that the overlapping temporal proximity and/or the record as a whole establishes that Bobreski's protected activity was a contributing factor to the adverse action, then the ALJ must provide additional reasons and bases explaining whether Givoo has sufficiently demonstrated that it would have taken the same action in the absence of the protected activity. It is within the ALJ's discretion whether to allow additional oral or written argument by the parties on any of the preceding issues pertaining to causation.

To that end, I held a re-hearing on April 3, 2012 in order to clarify certain factual ambiguities underscored by the ARB's directive and to make adequate witness credibility determinations, as ALJ Bullard presided over the previous hearing. My decision in this case is based on the sworn testimony presented at the hearings, the documentary evidence, and the arguments of the parties.

#### B. Factual Background

In reciting the undisputed facts, I rely predominantly upon the factual recitations contained in the ARB's June 2011 Order ("ARB"), ALJ Bullard's Decision and Order ("D&O"), and uncontroverted testimony adduced at the April 2012 hearing ("Tr.").

This matter relates to a previous whistleblowing claim brought by Complainant against the District of Columbia Water and Sewer Authority ("WASA"). In that case, Complainant alleged that WASA pressured Givoo to terminate Complainant after Complainant reported some safety concerns. That matter was resolved in complainant's favor.<sup>1</sup> See Bobreski v. D.C. Water and Sewer Authority, ALJH No. 2001,-CAA-00006 (ALJ July 11, 2005). Givoo, the employer, is a staffing firm that contracts directly or indirectly with industrial utility plants, including

---

<sup>1</sup> Complainant did not bring an action against Givoo in that matter.

nuclear power plants, to provide technicians to service mechanical needs for such utility plants. (Tr. p. 279.) Complainant is an instrument and control technician who installs and maintains automated systems at utility plants. (Id. p. 177.) Two utility plants relevant to this case are the Blue Plains Water and Sewage Treatment Plant ("Blue Plains") and the Hope Creek Plant Nuclear Generating Station ("Hope Creek"). (D&O at 4-5; ARB at 3.) Hope Creek is located on an artificial island in southern New Jersey and shares the island with the Salem Nuclear Generating Station. The site is known as the Salem/Hope Creek Nuclear Generating Station.

Every year to a year and a half, a nuclear power plant shuts down and undergoes repairs. (Tr. pp. 84-85.) Known as "outages," these shut downs last between twenty-one days and several months, during which the power plant contracts with staffing agencies to hire extra technicians to service the plant. (Id.) Givoo is one such contractor, and its day-to-day operations are run by Joel Givner. (D&O at 13; Tr. p. 179.) At Givoo, Mr. Givner secures contracts and "give[s] direction to contracts" for the company. (ARB at 3.) Givoo employs approximately six permanent employees in the corporate office; all other employees work for Givoo as temporary employees. (Id.; D&O at 13)

Two permanent Givoo employees relevant to this case are John Moore and Mel Morgan, managers reporting directly to Mr. Givner in 2006. (ARB at 3.) Mr. Morgan was the Manager of Program Development. (Id.) At the previous hearing in this matter, Mr. Givner stated that "the most important and active persons at Givoo with respect to staffing and service contracts" were himself, Mr. Moore, and Mr. Morgan. (Id.) All three had known Complainant since the mid-1990s and, throughout the 1990s Mr. Morgan often drove to and from jobs with Complainant and shared an apartment with him when they worked away from home. (Id.; D&O at 6, 13, 24.)

Complainant worked for Givoo on several projects throughout the 1990s. (D&O at 13.) In late 1999, Complainant worked for Givoo at Blue Plains, where Givoo maintained a staffing contract with WASA. (ARB at 4.) While on that project, Complainant drove a Washington Post reporter on to the Blue Plains site and disclosed safety-related issues to the local media, which caused hostility amongst Givoo and WASA management. (Id.) On October 29, 1999, Givoo terminated Complainant at WASA's request, giving rise to the above-referenced whistleblowing claim against WASA. (Id.)

In 2000, after learning of an article in the Washington Post regarding the Blue Plains safety issues, Mr. Givner contacted the security department at the nuclear plant where Complainant worked and reported Complainant to be a security risk. (D&O at 6, 14.) Mr. Givner was referring to the incident in which Complainant accompanied a reporter into the Blue Plains facility. (Id. at 14.) Mr. Givner's report about Complainant was the only one Mr. Givner had ever made about a former employee as a security risk. (Id.)

After the incidents at Blue Plains, Complainant worked at various nuclear plants, including Hope Creek. Vincent Law, who at the time was a foreman for the staffing firm Day & Zimmerman, hired Complainant to work at Hope Creek during spring and fall outages in 2005. (ARB at 4.) Mr. Law had also worked for Givoo as a foreman prior to 1997. (Id.)

In 2003, Complainant telephoned Mel Morgan and asked him why Givoo had not hired him for a job at the Fitzpatrick Nuclear Power Plant. (D&O at 26.) Complainant testified that he accused Mr. Morgan of not hiring him because of his whistleblower complaint against WASA. (*Id.* at 6-7; Tr. p. 42.) Although Mr. Morgan testified that he does not remember the substance of the call, he described Complainant's tone as "quite threatening" and Complainant acknowledged that he was angry and called Mr. Morgan a "bastard." (Tr. pp. 65, 87.)

ALJ Craft issued a Decision and Order in Complainant's favor in his whistleblowing claim against WASA on July 11, 2005. Mr. Law had heard about Complainant's successful claim after he had hired Complainant to work at the Salem Nuclear Generating Station for the fall 2005 outage and told Complainant that he had heard about his case. (D&O at 7, 24.)

After staffing the fall 2005 Salem outage, Mr. Law left Day & Zimmerman to work for another firm, Shaw, Stone & Webster ("Shaw"). Shortly thereafter, Shaw was contracted to staff a spring 2006 outage at Hope Creek. Shaw then subcontracted the staffing of instrumentation technicians to Givoo. (Tr. pp. 126-27.) Mr. Law gave his list of potential technicians to Mr. Morgan, who was in charge of staffing the project for Givoo. (*Id.* pp. 129-30.) Mr. Law worked with Mr. Morgan to select names from the list. (*Id.* p. 131.) When Mr. Morgan mentioned Complainant's name to Mr. Law while they reviewed the list, Mr. Law said "No, not at this time." (D&O at 12; Tr. p. 93.)

Givoo began hiring individuals for the Hope Creek outage on February 27, 2006. (ARB at X.) The same day, Complainant called Mr. Law seeking employment. (D&O at 7.) Mr. Law told him to contact Morgan. (*Id.*) On March 20 and 21, 2006, Complainant called Mr. Morgan to seek employment. (D&O at 7-8.) On March 21, 2006, Mr. Morgan told Complainant that there was a hiring freeze and that Complainant should seek work at another power plant that Mr. Morgan thought was hiring. (*Id.* at 8.) Mr. Morgan testified that he did not know about Complainant's protected activity when the hiring decisions were made. (D&O at 25; Tr. p. 87.) Ultimately, of the 202 technicians on Mr. Law's list, ninety were hired for the spring 2006 outage. (D&O at 17.)

On May 2, 2006, Complainant filed the complaint in this matter, alleging that Givoo failed to hire him for the spring 2006 outage at Hope Creek in retaliation for his 1999 whistleblower claim against WASA.

## II. TESTIMONY

### *James Bobreski, Complainant*

Complainant testified that he works as an instrument and control technician at utility plants. (Tr. p. 19.) Complainant worked for Givoo on several projects throughout the mid- to late-1990s, his last being the WASA project in 1999. (*Id.* p. 23.) Complainant stated that he got along well with his fellow Givoo technicians, and often carpooled with Givoo foreman Mel Morgan to and from work sites. (*Id.* p. 24.) As Givoo foreman, Mr. Morgan was tasked with allocating work amongst the technicians hired by Givoo to maintain utility plants during temporary shutdowns. (*Id.* pp. 25-26.) Essentially, Mr. Morgan was Complainant's boss. (*Id.*)

Complainant also worked with John Moore who, throughout the 1990s, was Givoo's project manager and would also allocate work amongst the technicians. (Id. p. 26.)

Complainant testified that he first worked at the Salem/Hope Creek site in August 1995 and had a security clearance to work there. (Tr. p. 28.) Subsequently, Givoo assigned Complainant to work at WASA. (Id.) At WASA, Complainant's most prominent duty was to ensure that the plant's warning detection systems remained in working order. (Id. pp. 28-29.) However, Complainant discovered that, of the eighty-six warning systems located in the plant, only six had been reported. (Id. p. 29.) One of the warning systems remained uncalibrated. (Id.) Complainant reported the problem to his supervisor, Don Juanillo, who forwarded the issue to WASA management. (Id. p. 30.) WASA officials subsequently demanded that Complainant be removed from the site, and Complainant was subsequently terminated. (Id. p. 31.)

Unbeknownst to WASA and Givoo, Complainant had contacted the Washington Post regarding the safety issues at the Hope Creek facility prior to being fired. (Tr. p. 33.) Complainant escorted a journalist onto the site. (Id.) On November 5, 1999, the Washington Post published an exposé regarding the safety issues at Hope Creek. (Id. p. 35.) Subsequently, Complainant received a call from Joel Givner, who stated that he was "very, very upset." (Id.) In the spring of 2000, while working at the Niagara Mohawk Nuclear Power Plant, Complainant was reported by Mr. Givner to be a security risk. (Id. p. 39.) Complainant directed his supervisor to the Washington Post article and continued working at the plant. (Id. p. 41.)

In 2003, Complainant learned of an upcoming outage at the Fitzpatrick Nuclear Power Plant, located relatively close to Complainant's home. (Tr. p. 42.) The Fitzpatrick outage was being staffed by Sun Technical Systems ("Sun"). (Id. p. 43.) After he was not selected, Complainant became upset and telephoned Mel Morgan, who was in charge of staffing the outage for Sun. (Id.) Complainant testified that it "wasn't a very friendly conversation" and that he called Mr. Morgan a bastard several times. (Id.) According to Complainant, Mr. Morgan stated that his name "wasn't on the list" of available technicians. (Id. p. 44.) Complainant suspected, however, that he was not selected because of his prior whistleblowing claim. (Id.)

In July 2005, Complainant received a favorable decision after filing a whistleblower complaint against WASA with the United States Department of Labor. (Tr. p. 37.) Complainant received many calls from fellow technicians offering congratulations. (Id. p. 38.) Shortly after ALJ Craft's decision, Complainant was hired by Vincent Law to work at the Salem plant. (Id.) At the time Mr. Law was working for the staffing firm Day & Zimmerman. (Id. p. 39.) Law was aware of Complainant's whistleblowing claim. (Id.)

Complainant called Mr. Law in 2006 after learning of an upcoming outage at Hope Creek. (Tr. p. 49.) Mr. Law, who was working for Shaw, told Complainant that he had forwarded Complainant's resume to Mel Morgan and that Mr. Morgan was in charge of staffing the outage. (Id.) On March 20, Complainant called Mr. Morgan and left a message. (Id. pp. 53-54.) On March 21, Mr. Morgan informed Complainant "that there was a hiring freeze and that [Complainant] should look somewhere else." (Id. p. 55.) Since 2006, Complainant has received several offers through the International Brotherhood of Electrical Workers (IBEW) union to work for Givoo. (Id.)

Melvin Morgan

Mr. Morgan is the Director of Business Development at Givoo, marketing the company to various utilities and staffing projects. (Tr. pp. 83-84.) Mr. Morgan worked for Sun Technical Systems for approximately five years beginning 1999 before working for Givoo. (Id.) Mr. Morgan explained that when Givoo contracts to staff an outage, he consults with the utility to find technicians. (Id. p. 85.) Technicians are often hired off of lists of technicians that have worked on previous outages at the utility. (Id.) Mr. Morgan also recruits technicians who have worked at other utilities. (Id.)

In 2003, Sun contracted to staff an outage at the Fitzpatrick Nuclear Power Plant. (Id. p. 86.) As vice president of marketing and staffing, Morgan was tasked with hiring technicians. (Id.) Mr. Morgan did not hire Complainant for that outage, and subsequently received a voicemail from Complainant that was “quite extensive, quite verbal, quite threatening to the point where [Mr. Morgan] did contact the local union.” (Id. p. 87.) Mr. Morgan testified that he did not hire Complainant for the Fitzpatrick job because Complainant was not on the list of candidates. (Id. p. 88.) Mr. Morgan stated that he was unsure why Complainant’s name was not on the list and that he was unaware of Complainant’s whistleblowing claim. (Id.)

Mr. Morgan left Sun to work for Givoo. (Tr. p. 89.) In the spring of 2006, Givoo was contracted to staff the Hope Creek outage. (Id.) Mr. Morgan stated that Shaw, Stone & Webster had previously been awarded the contract, but that Shaw subcontracted the hiring of instrument and control technicians to Givoo. (Id.) Vince Law was the foreman at Shaw and he provided Mr. Morgan with a spreadsheet listing the names of over 200 candidates. (Id. p. 90.) Mr. Morgan subsequently met with Mr. Law to review the spreadsheet and indicate their preferred candidates. (Id. p. 92.) Complainant’s name was on the spreadsheet. (Id.) When Mr. Morgan encountered Complainant’s name on the list, Mr. Law stated “no, not at this time.” (Id. p. 93.) Mr. Morgan testified that he was unaware of Complainant’s whistleblowing activity at the time the hiring decision was made and that he received no input from Joel Givner. (Id.) Mr. Morgan stated that he had no objection to hiring Complainant but that he did not have authority to override Mr. Law’s decision. (Id.)

Vincent Law

Mr. Law is currently the general foreman of instrumentation and control technicians at Givoo. (Tr. p. 126.) At the time of the spring 2006 outage at Hope Creek, Mr. Law worked for Shaw, Stone, & Webster. (Id. p. 127.) Shaw had originally been awarded the contract to staff the Hope Creek outage, but instrumentation and control technician hiring was eventually subcontracted to Givoo. (Id. p. 127.) After Givoo was subcontracted, Mr. Law was unsure what his role in the hiring process would be. (Id.) He received a call from Complainant regarding the outage, but told Complainant to contact Mel Morgan. (Id.) Mr. Law later learned that the hiring decisions were to be made in partnership with Givoo, but that Shaw would make the final hiring decisions. (Id. p. 134.)

Mr. Law “sat side by side” with Mr. Morgan to review candidates. (Tr. p. 130.) Mr. Law testified that, although Complainant’s name was on the list, Mr. Law was reluctant to hire Complainant “due to previous issues.” (Id. p. 130-131.) According to Mr. Law, Complainant was “really annoying” and was a “distraction to other workers.” (Id. p. 131.) Mr. Law stated that, during previous outages, other foremen “did not want him in the gangs.” Complainant’s personality conflicts, according to Mr. Law, became worse over the fifteen to twenty years Mr. Law had worked with him. (Id. p. 132.)

At the time the hiring decision was made, Mr. Law knew about Complainant’s prior whistleblowing claim against WASA. (Tr. p. 132.) Mr. Law heard of the case from a friend but “didn’t get into a lot of details on it.” (Id.) Mr. Law was unsure whether he hired Complainant after hearing of the whistleblowing claim, but stated that the claim had no effect upon his decision not to hire Complainant for the Hope Creek outage. (Id.) Mr. Law testified that he did not speak with Joel Givner during the hiring process and that Mr. Givner had no role in rejecting Complainant for the job. (Id. p. 135.)

### Joel Givner

Mr. Givner is a Givoo corporate secretary and runs the company’s day-to-day operations. (Tr. p. 179.) In January 2006, Mr. Givner was approached by Shaw management to enter into a subcontract to staff a portion of the upcoming Hope Creek outage. (Id.) According to Mr. Givner, Mel Morgan was in charge of the staffing, planning, and managerial aspects of the project. (Id. p. 180.) Mr. Givner stated that the only role he played in the hiring process was to recommend that a particular individual be hired to perform the “tip tubing” work at the reactor vessel. (Id. at 180.) Other than this recommendation, Mr. Givner testified that he had no contact with either Mr. Morgan or Mr. Law throughout the hiring process. (Id. p. 181.) Mr. Givner stated: “Complainant was not even a thought. I had not touched base or heard of him for over seven years.” (Id.) Mr. Givner testified that he had no objection to Complainant being on the list of hires. (Id.)

## III. ANALYSIS

### A. Overview

Section 211 of the ERA prohibits employers from retaliating against employees because they notified their employer of a violation of federal law, refused to engage in any practice that violates a covered statute, testify before Congress or any federal or state proceeding, commence or cause to be commenced any such proceeding, or assist in any such proceeding. 42 U.S.C. § 5851. The procedures for processing complaints of discrimination under the ERA and the other environmental whistleblower statutes are set forth at 29 C.F.R. Part 24.

Pursuant to 29 C.F.R. § 24.104(e), a complainant must make a prima facie showing that protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. Complainant must establish that he engaged in protected activity; that Respondent knew or suspected, actually or constructively, that he engaged in the protected activity; that he suffered an unfavorable personnel action; and that the circumstances raise an inference that the

protected activity was a contributing factor in the unfavorable action. 29 C.F.R. § 24.104(e)(2). If Complainant establishes a prima facie case, the burden shifts to Respondent to articulate a legitimate reason for its action. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). If such evidence is presented, then Complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. Hicks, 509 U.S. at 512-20. The Employer must present clear and convincing evidence that there was a nondiscriminatory justification for the adverse employment action. See Yule v. Burns Int'l Security Service, Case No. 1993-ERA-12 (Sec'y May 24, 1995).

When a case is tried on the merits, it is not necessary to determine whether Complainant has established a prima facie case of discrimination. See Burdine, 450 U.S. at 253, 256. Instead, Complainant must prove the same elements as required for the prima facie case, with the exception that Complainant must prove them by a preponderance of the evidence and not by mere inference. Brune v. Horizon Air Indus., Inc., ARB Case No. 04-037, ALJ Case No. 2002-AIR-8 (ARB Jan. 31, 2006); Dysert v. Sec'y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997). Until Complainant meets his burden of proof, Respondent need only articulate a legitimate business reason for its action. Clemmons v. Ameristar Airways, Inc., ARB Case Nos. 05-048, 05-096 at 9, ALJ Case No. 2004-AIR-11 (ARB June 29, 2007). The onus falls on Complainant to prove that the proffered legitimate reason is a pretext rather than the true reason for the challenged employment action.

The proper focus of the inquiry is whether Complainant has shown that the reason for the adverse action was his protected safety complaints. Pike v. Public Storage Companies Inc., ARB No. 99-071, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). As the Supreme Court noted in Hicks, the rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. See also Blow v. City of San Antonio, 236 F.3d 293, 297 (5th Cir. 2001). However, "[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." Mitchell v. Link Trucking, Inc., ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001). Complainant is not entitled to relief under the ERA if Respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action absent protected activity by Complainant. 42 U.S.C. § 5851(b)(3)(B); 29 C.F.R. § 24.109(b). In matters brought under the other six environmental whistleblower statutes, Complainant is not entitled to relief if Respondent demonstrates by a preponderance of the evidence that it would have taken the same unfavorable personnel action absent protected activity. 29 C.F.R. § 24.109(b).

Although the standard of "clear and convincing" evidence has not been defined with precision, courts have held that it requires a burden higher than "preponderance of the evidence" but lower than "beyond a reasonable doubt." Peck v. Safe Air Int'l Inc., ARB No. 02-028, ALJ No. 2001-AIR-3 (Jan. 30, 2004).

## B. Adverse Action

In Hirst v. Southeast Airlines, Inc., ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 (ARB Jan. 31, 2007), the ARB relied upon a decision by the United States Supreme Court in holding that the Complainant had not established that he suffered adverse employment action. See Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (June 22, 2006). The ARB found that the Complainant must establish that a reasonable employee or job applicant would find the employer's action "materially adverse", which was described as "actions [that are] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." USDOL/OALJ Reporter at 10-11, quoting 126 S. Ct. at 2409.

Where the alleged adverse action is a failure to hire, the Administrative Review Board has stated a three-part test: 1) that the complainant applied for the job and was qualified for it; 2) that the complainant was rejected for the job despite his or her qualifications; and 3) that, after the rejection, the job either was filled or remained open and the employer continued to seek persons of similar qualifications to the complainant. Hasan v. Enercon Services, Inc., ARB No. 05-037, ALJ Nos. 2004-ERA-22 and 27 (ARB July 31, 2007). The complainant has the burden of showing that he or she is qualified for the position. Hasan v. J.A. Jones, Inc., ARB No. 02-121, ALJ No. 2002-ERA-18 (ARB June 25, 2003).

In her January 2009 Decision and Order, Judge Bullard found that Complainant suffered adverse action when he failed to be hired for the spring 2006 outage at Hope Creek. The parties do not dispute this point. I therefore find no reason to disturb Judge Bullard's finding on this issue.

## C. Protected Activity

Complainants who engage in actions set forth in the ERA and other environmental whistleblower statutes may be perceived to have engaged in protected activity. 42 U.S.C. § 5851(a), 29 C.F.R. § 24.102. Complainant is not required to establish that the activity about which he complained actually violated Federal law relating to nuclear or environmental safety, but only that his complaints are based on a reasonable belief that they were related to an unlawful practice under Federal law relating to nuclear or environmental safety. The alleged act must implicate safety definitively and specifically and must at least "touch on" the subject matter of the related statute. Nathaniel v Westinghouse Hanford Co., 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; Dodd v. Polysar Latex, 88-SWD-4 (Sec'y Sept. 22, 1994).

Additionally, the subjective belief of the complainant is not sufficient, and the standard involves an objective assessment of whether the allegation constitutes protected activity. Kesterson v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997). "While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event." Leach v. Basin 3Western, Inc., ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003), citing Clean Harbors Envtl. Serv. v. Herman, 146 F.3d 12, 19-21 (1st Cir. 1998). Internal complaints made to company supervisors concerning safety

and quality control have been held to be protected activities. See Bassett v. Niagara Mohawk Power Corp., Case No. 1985-ERA-34 (Sec’y Sept. 28, 1993).

The parties do not dispute Judge Bullard’s finding that Complainant engaged in protected activity when he reported safety issues at the WASA facility in 1999. In its Order of Remand, however, the ARB found that Judge Bullard “too narrowly defined the contours” of Complainant’s protected activity because the litigation stemming from Complainant’s disclosures continued through September 2006. (ARB at 12.) After reviewing the Order of Remand, as well as the testimony adduced at the April 2012 hearing, I find that Complainant’s protected activity lasted through September 2006 and temporally overlapped the adverse action at issue in this case.

D. Causation

Complainant must establish a causal connection between his whistleblowing and Givoo’s failure to hire Complainant for the Hope Creek outage. This element is established if Complainant’s protected activity was a "contributing factor." (ARB at 13.) A "contributing factor" is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. (Id.) This means that the employee must prove that there was an unbroken causation line from the protected activity to the adverse action through either one act or several acts committed by one person or a combination of individuals involved in the decision-making chain. (Id.)

When the employee presents a case based on indirect or circumstantial evidence, as in this case, each piece of evidence should be examined with all the other evidence to determine if it supports or detracts from the employee's claim that his protected activity was a contributing factor. (ARB at 13.) Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence. (Id.) Logically, as was done in this case, the ALJ may examine each piece of circumstantial evidence to determine how substantial it is. (Id.) Then the ALJ must weigh the circumstantial evidence as a whole to properly gauge the context of the adverse action in question. (Id.) Taken as a whole, the evidence may demonstrate that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity. (Id. at 13-14.) Conversely, the evidence as a whole may demonstrate that none of the decision-makers knew about the employee's protected activity and thereby break the causation chain between the protected activity and the final adverse action. (Id. at 14.)

In this case, the evidence establishes that Complainant reported safety issues at the Blue Plains facility against WASA in 1999. (D&O at 13.) Complainant subsequently reported his concerns to the media and accompanied a Washington Post reporter onto the site. (Id.) Complainant was working for Givoo at the time. (Id.) After Complainant reported his concerns to his supervisor, WASA threatened to terminate Givoo’s contract unless Givoo terminated Complainant. (Id.; Tr. p. 189.) Complainant later brought a whistleblowing claim against WASA, which was ongoing at the time of the Hope Creek outage. Givoo maintained a long-

term contract with WASA through at least 2008 (D&O at 5), and Complainant provided uncontroverted testimony that Mr. Givner was “very, very upset” about the incident. (Tr. p. 31.) Givner subsequently testified on WASA’s behalf in Complainant’s whistleblowing claim against the utility. (CX 16.) Givner also reported Complainant to be a safety concern while Complainant was working at another utility. (Tr. p. 31.) This evidence indicates that Mr. Givner harbored some animus toward Complainant and had a motive to retaliate against Complainant for his whistleblowing against WASA.

The evidence also indicates Mr. Givner had some influence over the hiring process. For instance, Mr. Morgan and Mr. Law submitted the list of candidates to Mr. Givner. (Tr. p. 180.) In addition, Mr. Givner personally requested that Givoo hire a particular individual to perform “tip tubing” work, though this request was “met with a lot of resistance.” (Id. pp. 180-81.) Mr. Givner also held some sway over Mr. Law and Mr. Morgan. Mr. Law had previously worked for Givoo (D&O at 2) and Mr. Morgan was Mr. Givner’s subordinate at the time of the adverse action.

The aforementioned evidence is significant because it establishes that Mr. Givner had both the motive and ability to influence Givoo’s decision not to hire Complainant. However, despite this evidence, Complainant cannot prevail on this point because he has not provided sufficient evidence that Mr. Givner actually influenced the decision. Mr. Morgan and Mr. Law both testified that Mr. Givner played no role in rejecting Complainant’s application (Tr. pp. 93, 135), and Complainant’s name remained on the list of potential hires after Mr. Givner’s review. (Id. p. 92.) In fact, Complainant has been listed for subsequent projects and Complainant has since been offered positions staffed by Givoo. (Id. p. 55.)

While true that Mr. Law and Mr. Morgan provided Complainant with “shifting explanations about the hiring process” (ARB at 15), I find that the “shifting explanations” are understandable given the circumstances surrounding the Hope Creek project. Mr. Law credibly testified that Shaw was originally awarded the staffing contract, but that Givoo was later subcontracted to staff instrument and control technicians. (Tr. pp. 128-29.) For a time, Mr. Law believed that Givoo would be entirely in charge of that component of the staffing project. (Id.) Thus, when Complainant called Mr. Law to inquire about a potential position, it was reasonable for Mr. Law to forward Complainant to Mr. Morgan.

Complainant further contends that Mr. Law’s statement to OSHA, and subsequent conflicting hearing testimony, provide circumstantial evidence that Mr. Givner influenced the process. OSHA telephonically deposed Mr. Law in June 2006 and summarized his statements sometime thereafter.<sup>2</sup> In the statement, Mr. Law is summarized as stating Complainant “was a good worker and very intelligent” and that Mr. Law “did not have any problems or issues with him.” (CX 5 at 4-5.) At the hearing, Mr. Law stated that Complainant was intelligent but also noted that he was “annoying” and a “distraction to other workers.” (Tr. p. 131.) Mr. Law stated that, during previous outages, other foremen “did not want him in the gangs.” (Id.) Like Judge Bullard, I am not convinced that these inconsistencies are significant. Mr. Law testified that his statement was recorded while he was in a parking lot (Id. p. 143), and stated: “I’m not one to badmouth a person, okay, to someone I don’t even know who is writing this stuff down.” (Id. p.

---

<sup>2</sup> Mr. Law signed the statement in September 2006.

148.) Given that this deposition was not subject to cross-examination and that the full transcript is not part of the record, I am not willing to find that Mr. Law's statement, when viewed in light of all other evidence, creates the inference that Mr. Givner influenced Mr. Morgan or Mr. Law. After considering the above and all of the issues raised by the ARB, I find the totality of circumstantial evidence remains insufficient to establish that Mr. Givner influenced the final decision.

Having determined that Mr. Giver did not influence the adverse action, I must next determine whether Mr. Morgan knew of Complainant's protected activity and, if so, whether his knowledge played any role in the final decision. (ARB at 17.) Complainant alleges that Mr. Morgan's knowledge can be inferred from several facts. First, at the time of the Hope Creek outage, Mr. Morgan was one of six permanent Givoo employees. (ARB at 3; D&O at 13.) Mr. Morgan worked on jobs with Complainant throughout the 1990s and carpooled with Complainant to and from worksites. (Tr. p. 82.) Complainant last worked with Mr. Morgan in late 2005 at the Salem Nuclear Generating Station. (D&O at 12.)

In 2003, Mr. Morgan worked for Sun Technical Systems and was charged with staffing an outage at Fitzpatrick Nuclear Power Plant. (Tr. p. 86.) Mr. Morgan did not hire Complainant for that outage. (Id.) Complainant testified that he angrily telephoned Mr. Morgan and spoke to him directly, accusing Mr. Morgan of retaliating against him for his whistleblowing against WASA. (Id. p. 44.) Mr. Morgan, however, testified that Complainant merely left a voicemail. (Id. p. 87.)

Complainant also argues that Mr. Morgan's hearing testimony differs from his statement to OSHA investigators in June 2006. As stated above, Messrs. Morgan, Law, and Givner each testified that Shaw was primarily in charge with staffing the Hope Creek outage. Each testified that Shaw provided the list of candidates and that, though Givoo and Shaw worked in partnership to select technicians, Mr. Law retained veto authority. (Tr. pp. 90-93, 130-34, 180-81.) Mr. Morgan's statement to OSHA, however, does not mention either Shaw or Mr. Law's role in the hiring process. (CX 2.)

After considering the evidence above, I find that Complainant has put forth insufficient evidence for me to infer that Mr. Morgan had knowledge of Complainant's whistleblowing. Mr. Morgan testified that he and Complainant were not as close as Complainant made it seem.<sup>3</sup> (Tr. p. 82.) At the time of the Washington Post exposé, Mr. Morgan was working for Sun Technical Systems and only began working for Givoo shortly before the Hope Creek project. (Tr. p. 83-84.) Mr. Morgan was also working for Sun when ALJ Craft's decision was issued in July 2005. (Id.) In fact, Mr. Morgan staffed several projects in Canada while working for Sun and it is unclear whether he was in the United States during these events. (D&O at 26.) Thus, Mr. Morgan was working for an uninvolved company during the two most publicized events related to Complainant's whistleblowing. Even while working for Givoo, Mr. Morgan has worked out of a Syracuse, New York office, while Mr. Givner is based in Cherry Hill, New Jersey. (D&O at 12; CX 4 at 2.) It is therefore unclear whether Mr. Morgan had any substantial opportunity to speak with Mr. Givner or other Givoo employees about the pending whistleblower claim.

---

<sup>3</sup> Notably, the only the only conversations Complainant testified to having with Mr. Morgan between 1999 and 2006 concerned staffing the 2003 Fitzpatrick outage and the 2006 Hope Creek outage.

As for Complainant's 2003 phone call, the testimonial evidence is contradictory. Complainant testified that he spoke directly to Mr. Morgan, angrily called him a "bastard," and accused Mr. Morgan of discriminating against him for his whistleblowing. (Tr. pp. 43-44.) On the other hand, Mr. Morgan testified that he received an angry voicemail. (Id. p. 87.) Even if I credit Complainant's testimony, I also find credible Mr. Morgan's testimony that he did not remember the substance of the call. Again, at the time of the call, Mr. Morgan was working for a party uninterested in the WASA claim. Further, as Judge Bullard noted, the circumstances of the call make it reasonable to conclude that Mr. Morgan focused on the call's tone rather than its substance.

I also decline to accord significance to the omissions in Mr. Morgan's OSHA statement. Without transcripts, it is difficult to discern the full context of the statement though it is clear from the record that Shaw played a role in staffing the Hope Creek project. I therefore find no reason to discredit Mr. Morgan's testimony that he did not mention Mr. Law's role because of the nature of the questions OSHA asked him. After reviewing this and all of the aforementioned evidence as a whole, I find that Complainant has not put forth preponderant evidence indicating that Mr. Morgan knew of Complainant's whistleblowing at the time of the adverse action.

The Board also directed that I address whether Givoo articulated a legitimate business reason for rejecting Complainant. The Board also directed that I address the issue of pretext, stating:

In addition to or in conjunction with temporal proximity evidence and other circumstantial evidence in this case, an employee can prove or buttress a whistleblower claim by proving that the employer's proffered reasons were pretextual (not credible). When the proffered reasons for the adverse action are proven to be false, this evidence coupled with the complainant's evidence that he was qualified, applied, and was rejected suspiciously for the job in question may permit the trier of fact to find discrimination. Pretext can be demonstrated in many ways. One way is by demonstrating that the proffered reasons were conspicuously missing from previous documentation. Shifting explanations could also constitute evidence of pretext. Vague and subjective reasons about personality issues may also suggest that the employer's reasons are pretextual or in reality complaints about whistleblowing. In the end, all pretext evidence should be weighed with all of the circumstantial evidence to determine the issue of causation after an evidentiary hearing.

I have considered the Board's directive, and find that Givoo offered a legitimate business reason and that no pretext occurred. I have already found that Complainant put forth evidence insufficient to establish Mr. Givner's role in rejecting Complainant or that Mr. Morgan knew of Complainant's whistleblowing. While Mr. Law did give "vague and subjective" reasons for rejecting Complainant and had hired Complainant for other projects as late as 2005, I have already weighed this circumstantial evidence together with all of the other evidence of record and found that it did not weigh in Complainant's favor. Moreover, Complainant has not brought suit against Shaw, so Mr. Law's reasons for rejecting Complainant are irrelevant to the extent

that I have found that he was not influenced by Messrs. Givner and Morgan. The evidence in this case indicates that Givoo and Shaw worked in partnership to select technicians to work at the Hope Creek facility, but that Mr. Law retained final authority to either accept or reject applicants. The evidence further indicates that Mr. Law rejected Complainant because Complainant was not high enough on Mr. Law's list of candidates and that Complainant would have been hired if there was a greater need for technicians. (Tr. p. 137.) He did so without input from any party to this case. I credit Mr. Law's testimony on this point because Complainant was not the only rejected applicant who had previously staffed Hope Creek and has, in fact, been offered other Givoo jobs after the Hope Creek outage. Therefore, Givoo's reliance upon Mr. Law to accept or reject applicants was reasonable and legitimate. This evidence is also establishes that Givoo's reliance upon Mr. Law was not pretextual.

#### IV. CONCLUSION

Complainant has failed to put forth preponderant evidence establishing that Respondent retaliated against him for engaging in protected activity.

#### **ORDER**

The claim of JAMES J. BOBRESKI, against Respondent, J. GIVOO CONSULTANTS, INC., is hereby DISMISSED.

SO ORDERED.

Ralph A. Romano  
Administrative Law Judge

Cherry Hill, New Jersey

#### **NOTICE OF APPEAL RIGHTS:**

This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).