Case No.: 2009 ERA 7
In the Matter of
WILLIAM SMITH
Complainant

v.

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

Appearances: Mr. R. Scott Oswald, Attorney
Mr. Adam Augustine Carter, Attorney (on remand)
For the Complainant

Mr. Andrew M. Habenicht, Attorney
Mr. Kiran H. Mehta, Attorney (on remand)
Ms. Molly L. McIntosh (on remand)
For the Respondent Duke Energy Carolinas, LLC

Mr. Paul J. Zaffuts, Attorney
Mr. Lewis M. Csedrik, Attorney
For the Respondent Atlantic Group

Before: Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER ON REMAND – DISMISSAL OF COMPLAINT

This case arises under the employee protection provisions of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851, (“Act” and “ERA”) as implemented by 29 C.F.R. Part 24.1 Section 5851 provides for protection of an employee from employer discrimination because the employee engaged in a protected activity, consisting of: a) notifying the employer of an alleged violation of the Act, b) refusing to engage in any practice made unlawful by the Act, c) testifying in federal or state proceedings, and d) commencing and/or participating in such a proceeding.

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Procedural History

Initial Decision and Order

On July 7, 2008, Mr. Smith filed a complaint of alleged illegal discrimination by the Respondents, Duke Energy Carolinas, LLC (“Duke Energy”) and the Atlantic Group, d/b/a DZ Atlantic (“DZ Atlantic”), based on the termination of his employment on February 21, 2008 (RXD 1). On January 21, 2009, Mr. Smith filed an amended complaint, adding blacklisting as an additional adverse personnel action (RXD 2). On March 26, 2009, after an investigation, the Regional Administrator, Occupational Safety and Health Administration (“OSHA”), United States Department of Labor (“DOL”), dismissed Mr. Smith’s complaint. On April 27, 2009, Mr. Smith appealed the adverse decision to the Office of Administrative Law Judges.

Pursuant to a Notice of Hearing dated June 5, 2009, (ALJ I), I conducted a hearing from December 1 through December 4, 2009 in Charlotte, North Carolina. At the completion of the proceedings, the evidentiary record consisted of the sworn testimony presented at the hearing and the following documents admitted into evidence: CX 1 to CX 61, CX 63 to CX 102, CX 104 to CX 119, RXD 1 to RXD 71, RXD 73 to RXD 76, RXD 80 to RXD 82, RXZ A1, RXZ B1 to B3, RXZ C1 to CX13, RXZ C14 (except first page, Bates stamp 829), RXZ C15 to RXZ C23, RXZ D1 to D8, RXZ E2 to E7, RXZ E12, RXZ E13, and RXZ F2 to RXZ F5.

On September 29, 2010, as summarized below, I issued a Decision and Order (“D & O”), evaluating the three requisite elements necessary to establish ERA employment discrimination, adverse action, protected activity, and causation, and ultimately denying Mr. Smith’s ERA complaints against both Respondents. At the same time, I also denied the Respondents’ deliberate misconduct defense due to insufficient evidence that Mr. Smith’s action in pre-signing a fire watch log represented reckless disregard as to whether the action represented a violation of the ERA.

Adverse Actions

Little dispute existed regarding the adverse personnel actions in this case. On February 20, 2008, Duke Energy released Mr. Smith from his fire watch duties at Catawba nuclear power plant. On February 21, 2008, DZ Atlantic terminated his employment unfavorably. On March 14, 2008, Duke Energy denied Mr. Smith’s unescorted access authorization with an unfavorable characterization and entered that information into the national Personnel Access Data System (“PADS”). On December 8, 2008, Duke Energy denied Mr. Smith’s request for reinstatement of his unescorted access authorization and subsequently advised Wolf Creek Nuclear Plant (“Wolf Creek”) in Burlington, Kansas of the basis for the PADS entry.3 And, from June through September 2009, DZ Atlantic did not select Mr. Smith for re-employment.

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2The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RXD – Duke Energy exhibit; RXZ – DZ Atlantic exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

3After a phone interview, Mr. Smith was hired by Wolf Creek Nuclear Plant in Burlington, Kansas as a nuclear armed security officer. However, when Wolf Creek learned that the access database indicated Mr. Smith was untrustworthy and unreliable, Wolf Creek Nuclear Plant withdrew the job offer.
Protected Activities

Mr. Smith engaged in four protected activities. First, on February 12, 2008, Mr. Smith engaged in a protected activity when he advised a co-worker, Mr. Jeffry Pence, that Mr. Pence needed to correct the signature on the NSD (Nuclear Safety Directive) – 316 fire watch log for the 15:50 (3:50 p.m.) plant inspection to indicate that Mr. Pence had conducted that inspection rather than Ms. Chris Borders who had signed the NSD – 316 but did not actually do the inspection. Second, on February 19, 2008, Mr. Smith engaged in a protected activity when he informed a Duke Energy supervisor, Mr. David Hord, that Ms. Borders had put inaccurate information on a fire watch log because she signed for an inspection on the NSD – 316 fire watch log when she actually was not on-site at that time. Third, on July 7, 2008, Mr. Smith filed an ERA employment discrimination complaint. Fourth, on November 5, 2008 and December 21, 2008, Mr. Smith participated in the NRC (Nuclear Regulatory Commission) investigation associated with his ERA employment discrimination complaint.

Causation

Duke Energy

Because Duke Energy was unaware of Mr. Smith's first protected activity on February 12, 2008, it played no role in the company's decision to release Mr. Smith on February 20, 2008; the subsequent denial of unescorted access authorization and the associated PADS entry; denial of request for reinstatement of his unescorted access authorization, and employment communication to Wolf Creek. The preponderance of the probative evidence also failed to support a finding that Mr. Smith's second protected activity on February 19, 2008 was a contributing factor in any of adverse actions taken by Duke Energy.

DZ Atlantic

Once again, absent DZ Atlantic’s knowledge of Mr. Smith’s first protected activity, it played no role in its decision to terminate his employment on February 21, 2008, subsequent failure to rehire him. The preponderance of the more probative evidence also failed to establish that any of his remaining three protected activities were a contributing factor in DZ Atlantic’s adverse personnel actions.
Administrative Review Board Remand

On June 20, 2012, the Administrative Review Board ("ARB" and "Board") first affirmed as unchallenged my determinations that Mr. Smith’s admonition to Mr. Pence on February 12, 2008 to correct Ms. Borders’ falsification on the fire watch log, and his February 19, 2008 report to his managers about Ms. Borders’ falsification of the February 12, 2008 fire watch logs, were protected activities under the Act. *Smith v. Duke Energy, et al.*, ARB No. 11-003, ALJ No. 2009 ERA 7 (ARB June 20, 2012), slip op. at 6. However, relying on the definition and parameters of “contributing factor” established by the federal appellate court in *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), ARB vacated my causation determinations. Specifically, according to the Board, based on the extensive facts in the case, “it was error to conclude” that Mr. Smith’s protected disclosures “on February 12 and February 19 . . . did not contribute to” his termination since it was “undisputed that the only reason the managers learned about” the falsification “was because [Mr.] Smith notified them.” *Id.*, slip op. at 7. As a result, his protected disclosure was “inextricably intertwined with the investigation that led to his termination” and thus “under the law of contributing factor and the facts of this case, protected activity contributed to [Mr.] Smith’s termination . . . [since] the content of [Mr.] Smith’s disclosures gave the Respondents the reason for their personnel actions against him.” *Id.* at 8. In light of that determination, the ARB indicated that “the burden now shifts to the Respondents to demonstrate by clear and convincing evidence that they would have taken the same protected personnel action absent the protected activity.” *Id.* And, regarding that burden, the ARB observed, “Had [Mr.] Smith not reported the falsification of records, the fire watchers [sic] violative practices may not have been otherwise disclosed.” *Id.*

Present Proceedings

On June 22, 2012, I issued a remand briefing schedule to the parties. On September 17, 2012, I received a remand brief from Complainant’s counsel. On the same day, I received the Respondents’ joint remand brief.

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4 In rendering its causation determination based on the “facts of this case,” the ARB apparently did not note by factual determination that none of the Duke Energy and DZ Atlantic supervisors who made the release and termination decisions were aware of Mr. Smith’s February 12, 2008 protected activity (his admonition to Mr. Pence to correct the falsified fire watch log entry) at the time those two adverse actions were taken. D & O, pp. 108, 118, and 123.

5 The ARB did not address my determinations that: a) Mr. Smith also engaged in protected activities by filing an ERA whistleblower complaint in July 2008 and participating in an NRC investigation in December 2008, and b) the preponderance of the probative evidence did not establish that either of these two protected activities contributed to Duke Energy’s December 2008 refusal to alter PADS and its communication with Wolf Creek in January 2009 about the basis for its PADS entry, and DZ Atlantic’s failure to rehire Mr. Smith.
Parties’ Positions

Complainant

As determined by the ARB, Mr. Smith’s protected activity in February 2008 was a contributing factor in the Respondents’ termination actions. As a result, in order to avoid liability for impermissible employment discrimination, the Respondent must establish by clear and convincing evidence that they would have taken the same adverse action in the absence of Mr. Smith’s protected activity.

For multiple reasons, the Respondent can not meet the significantly burdensome clear and convincing evidentiary standard. Prior to his discharge, Mr. Smith had an impeccable employment record without any disciplinary actions. As a result, the Respondents’ denial of retaliatory motive is pre-textual and superficial. The Respondents had no personnel policy that a short delay of seven days would warrant termination and provided no evidence that any other employee had previously been terminated for a few days delay in reporting a concern. To the contrary, the Respondent did not discipline Ms. Reid, Mr. Ray, or Mr. Henline for also failing to promptly report the falsification issue.

And, Mr. Smith had legitimate reasons for his “brief” delay in reporting the falsification. First, his report to Mr. Pence, a co-worker, was immediate and is considered to be the first step in the complaint process. Then, based on Mr. Pence’s representation that the log would be corrected, Mr. Smith reasonably believed the falsification no longer existed. And, finally, as the end of the month suspense for submitting the fire watch logs approached, the issue began to bother Mr. Smith again and he reported it.

Since the Respondents can not establish by clear and convincing evidence that they would have taken the same adverse actions against Mr. Smith absent his protected activity, he is entitled to all the relief provided under the ERA whistleblower provision to make him whole, including back pay, reinstatement, or in the alternative, front pay, compensatory damages, and attorney fees.

Reinstatement is considered the default and presumptive remedy. And, even if Mr. Smith’s former position at Catawba is no longer available, the evidentiary record demonstrates that multiple similar positions are available at other nuclear power plants through DZ Atlantic.

At the same time, due to the Respondents’ blacklisting efforts and falsification of the reasons for Mr. Smith’s termination, the possibility that Mr. Smith can resume a productive and amicable working relationship with the Respondents is remote. Their adverse actions have similarly denied Mr. Smith the ability to find comparable work, as evidenced by DZ Atlantic’s persistent refusal to rehire him for other positions, and the loss of a job at Wolf Creek. And, despite diligent efforts, Mr. Smith has been unable to mitigate his damages by finding employment, other suitable jobs, such as security or correction guard positions. Consequently, a remedy of front pay is warranted through retirement age because Mr. Smith does not have a reasonable prospect of obtaining comparable alternative employment. Through Dr. Edelman’s
unrefuted calculations, based on varied losses of income and other factors, the estimates for the appropriate front pay for Mr. Smith through 2028, ranges from $542,039.00 to $1,520,568.00.

Due to the Respondents’ adverse actions, which impaired his ability to care for his family, Mr. Smith credibly testified about the emotional damage and suffering that he has suffered. In particular, at the age of 40, Mr. Smith had to move in with his mother and became unable to provide financial support to his mother and grandmother. Mr. Smith’s mother and grandmother’s testimony corroborated the financial and emotional toll that Mr. Smith has suffered. As a result, Mr. Smith seeks an award of $250,000.00, “merely” one-quarter of economic damages, in compensatory damages.

Finally, Mr. Smith seeks an award of all litigation costs and expenses, including attorney fees.

Respondents

The Respondents have established by clear and convincing evidence that they would have taken the same employment actions relating to Mr. Smith in the absence of any of his ERA-protected activities. Accordingly, Mr. Smith is not entitled to any relief under the ERA.

DZ Atlantic’s policies are clear that: a) employees are expected to raise concerns to supervisors and managers in a timely manner, and b) a violation of DZ Atlantic policies can result in termination. Mr. Smith was also aware that Duke Energy’s similar expectations of prompt reporting in light of both his history of promptly reporting other discrepancies and the recent admonition from Mr. Hord about the importance of complying with the fire watch log requirements.

As an NRC licensee, Duke Energy is required to establish a satisfactory fire protection program. As part the requisite program, Duke Energy published an NSD (Nuclear Safety Directive) – 316, which included a requirement to document hourly fire watch rounds on a NSD – 316 form, the fire watch log, during periods of fire protection impairment. Since this fire watch log demonstrates compliance with NRC licensing requirements, the NRC regulation, 10 C.F.R. § 50.9(a), requires the record to be complete and accurate. Due to the importance of this documentation, the NRC will take action against workers, and NRC licensees, who deliberately create an incomplete or inaccurate record.

According to federal courts, the clear and convincing standard does not require that the adverse action be based on facts completely separate and distinct from the protected disclosures. And if the facts supporting discipline are intertwined with the facts disclosed by the whistleblower, the employer need not prove it would have eventually discovered the content of the disclosure. In such a situation, several factors are considered, including the strength of the evidence supporting the employer’s action, evidence of motivation to retaliate, and consistent application of the employment actions against non-whistleblowers.
Within the above context, on several grounds, the Respondents have established by clear and convincing evidence that their multiple employment actions would have been taken in the absence of Mr. Smith’s protected activity within the parameters established by federal courts.

Principally, the Respondents’ subsequent employment actions were taken based on a legitimate non-discriminatory basis and specifically driven by Mr. Smith’s delay in bringing forward the falsification information, and not his act of providing the information about the falsification which also implicated his own dereliction. Notably, his non-compliance with his duty to promptly report the fire watch log falsification is the same fact pattern as the federal court decision addressing the clear and convincing affirmative defense in these types of cases. Mr. Smith’s affirmative and deliberate withholding of information about Ms. Borders’ falsification of the NRC-mandated fire watch log for seven days, coupled with an inability to explain the delay, called into question his integrity, reliability, and trustworthiness for continued employment with Duke Energy and DZ Atlantic since the companies consider these attributes to be core values.

The facts in the case demonstrate Mr. Smith’s awareness of the importance of fire watch logs, following proper procedures, and promptly reporting discrepancies. Yet, despite that awareness, after noticing the falsification at the start of his shift on February 12, 2008, Mr. Smith chose not to report the falsification at that time. And, over the course of several shifts through February 18, 2008, as the uncorrected, falsification remained in the fire watch logs that Mr. Smith completed after each round, he still did not report the falsification. Instead, Mr. Smith informed upper management personnel, and eventually supervisors, of the February 12, 2009 falsification only after being confronted with an allegation of sexual harassment. According to multiple managers and supervisors, such behavior was an adverse reflection on Mr. Smith’s reliability, which is a “core value” for a nuclear power plant employee, as well as his trustworthiness. And, during the subsequent investigation, a DZ Atlantic supervisor found Mr. Smith’s explanation for his delay in reporting the falsification – he didn’t think of it – to be insufficient.

In regards to the PADS entry, 10 C.F.R. § 73.56(i) requires that individuals who possess unescorted access to a nuclear power plant secure protected areas be deemed trustworthy and reliable. Consequently, upon considered of Mr. Smith’s failure to properly report the falsification until seven days after becoming aware of the issue, Duke Energy denied Mr. Smith unescorted access to its facilities and entered its determination into PADS as required.

Neither the Respondents nor the individuals responsible for the employment decisions in this case had a motive to retaliate against Mr. Smith for bringing forward his observation about the falsified fire watch log. The evidence has demonstrated Duke Energy’s intention to comply with all NRC requirements and procedures. In particular, upon learning of the fire watch log discrepancy from Mr. Smith, the Respondents conducted an investigation and took immediate corrective action. Additionally, at the time of the initial employment actions in February/March 2008, the Respondents did not have knowledge of Mr. Smith’s subsequent protected activity of reporting his concerns to the NRC in November 2008.
The employment actions taken by the Respondents in this case were consistent with their past practices and had been taken against other employees similarly situated. Mr. Pence and Ms. Borders were terminated because their actions also called into question their integrity and trustworthiness.

In terms of damages, Mr. Smith’s job at Catawba was a temporary, unskilled position. And, on May 1, 2008, the roving fire watch Mr. Smith had conducted was cancelled during a refueling outage and the fire watches at Catawba ceased to exist after the summer of 2008. The Duke Energy PADS entry did not ban future employment of Mr. Smith in the nuclear industry since each licensee renders its own trustworthiness and reliability determination. And, DZ Atlantic determined Mr. Smith remained eligible for re-employment in the fossil fuel power plant industry. DZ Atlantic forwarded Mr. Smith’s resume to multiple customers who did not select him, potentially due in part to the economic downturn. DZ Atlantic provides no guarantee of re-employment for its temporary employees. Any damages associated with the loss of income from the revoked job offer at Wolf Creek only runs from February 2009 to the date of the present administrative law judge decision on remand. Further, in terms of documentation, the opinion of Mr. Smith’s economic expert contained multiple flaws and assumptions which adversely affect its probative value. Finally, due to insufficient evidentiary support, any compensatory damages should be minimal.

ISSUES

1. Affirmative Defense

2. Remedies
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Initial Decision and Order Specific Findings of Fact

2007 - 2008

Through a contract, DZ Atlantic provides manpower to Duke Energy at three nuclear power stations, Onocee, McGuire, and Catawba. DZ Atlantic provides no guarantee to its employees regarding length of employment. The DZ Atlantic fire watchers at Catawba are under the direct control and supervision of Duke Energy managers. DZ Atlantic has a progressive disciplinary policy that ranges from verbal warning, written warning, suspension and termination. However, the progressive steps are not mandatory.

Duke Energy is a co-owner of the Catawba Nuclear Station ("CNS"). The CNS has two nuclear power units that produce electricity. Duke Energy has an NRC facility operating license. As mandated by 10 C.F.R. § 50.48, and as a condition of being an NRC licensee, Duke Energy is required to establish a satisfactory fire protection program. According to NSD-105, Duke Energy is responsible for the quality of work performance at its nuclear plants.

NRC regulation, 10 C.F.R. § 50.9(a), indicates that information required by the NRC to be maintained by a licensee "shall be complete and accurate in all aspects."

NRC regulation, 10 C.F.R. § 50.5, entitled "Deliberate Misconduct," states that an employee of a contractor of a licensee who provides services that relate to the licensee’s activities may not engage in deliberate misconduct that: a) would cause a licensee to be in violation of any NRC-issued rule, regulation, order, or license condition, or b) deliberately submit to a licensee information “that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.” Under the regulation, "deliberate misconduct" means an intentional act that the person knows will either cause a licensee to be in violation of any NRC-issued rule, regulation, order, or license condition; or, constitutes a violation of a requirement, procedure, instruction, or policy of a licensee.

The NSD-316 indicates that an integral part of the overall fire protection program for a nuclear plant is an hourly fire watch which “is a type of impairment fire watch that requires inspection of the affected area at least once per hour during the entire time of the impairment.” The fire watchers are tasked with observing conditions that indicate the early stages of fire, such as smoke, smoldering or flames. Appendix A contains the two-page fire watch surveillance log

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6To facilitate consideration of the first remand issue, I will repeat the specific findings (minus the discussion portions) that I rendered in my initial decision on September 29, 2010, D & O, pp. 94-109.

7 10 C.F.R.§ 50.5(a)(1).

8 10 C.F.R.§ 50.5(a)(2).

9 10 C.F.R.§ 50.5(c)(1).

10 10 C.F.R.§ 50.5(c)(2).
which must be completed to establish compliance with the NSD-316 fire watch requirements. The log instructions state, “the time that is logged on the Fire Watch Surveillance Log Sheet is to be the time when that inspection is completed.” When an entry error occurs, an employee lines through the incorrect information, makes the correction, initials the correction, and dates the correction. The fire watch logs are subject to NRC inspection at anytime.

NRC and NEI (Nuclear Energy Institute) regulations require an NRC licensee to determine the trustworthiness and reliability of an individual requesting unescorted access authorization. The Access Authorization Program evaluates an employee’s suitability for unescorted access to nuclear power plants in terms of trustworthiness and reliability. Access information is maintained in PADS, a nuclear-industry wide data base.

February 2007

Mr. Smith starts working for DZ Atlantic as a pipe fitter helper at the McGuire nuclear station and receives the company’s employee handbook.

April and May 2007

Mr. Smith works as a DZ Atlantic contract employee at the Oconee nuclear station.

May 2007

Mr. Smith starts work at the Catawba nuclear facility as a fire watcher to conduct NSD-316 hourly fire watches due to an impairment in the plant’s fire protection systems. He works at an hourly rate of $17 for 40 regular hours, plus 36 hours of overtime at the rate of $25.50 per hour. Mr. Smith also receives a per diem of $65.

Based on DZ Atlantic’s authorization documentation, Duke Energy’s Access Services grants Mr. Smith unescorted access authorization to the restricted areas of the nuclear power station.

When Mr. Smith first arrives at Catawba, Mr. Tommy Withers, the Duke Energy Maintenance Job Sponsor for the plant, gives a pre-job briefing to new employees, including Mr. Smith. He presents job expectations and describes the nuclear manual directives. Mr. Withers advises that the documentation of hourly fire watch inspection is to be accomplished when inspection is completed and the inspection intervals should not exceed one hour. He notes any concerns should be raised to the employee’s supervisor.

When the new fire watchers, including Mr. Smith, arrive at their duty station, the old fire watchers who are being relieved from Catawba show them the fire watch routes and the areas to be inspected. They also show the new fire watchers where to sign on the fire watch log.

Mr. Smith works the 5:00 p.m. to 5:00 a.m. shift with another co-worker. They alternate the hourly inspections, which usually take about 10 minutes to accomplish. Mr. Smith usually arrives about an hour early to eat dinner, check-in, transfer keys, and review the areas he is
scheduled to patrol. The fire watch logs are usually kept on a table in the fire watchers work area.

Five SPOCs (single point of contact) oversee the work of the fire watchers by having them check-in daily at the start of the shifts and being available for any reports of discrepancies. Occasionally, the SPOCs review the NSD-316 logs for completion.

June 2007

Mr. Smith discovers that since his temporary badge has expired, he is unable to access the fire watch inspection areas. He tells one of five Duke Energy SPOCs monitoring DZ Atlantic’s employees’ work, Mr. Claude Mabry, about the situation and explains there may be a problem because he has pre-signed a couple of rounds in advance. Mr. Mabry replies that it’s okay because he’ll do the inspections, crosses out Mr. Smith’s name, and makes a correction by signing for the inspection. Mr. Mabry further explains that if the situation happens again, Mr. Smith should make sure he corrects the log in the same manner.

August/September 2007

Ms. Cathy Reid arrives at Catawba and becomes Mr. Smith’s partner on the 5:00 p.m. to 5:00 a.m. shift. The fire watcher Ms. Reid is replacing shows her how to fill out the NSD-316. While understanding that the log entry signifies completion of the fire watch inspection, Ms. Reid typically pre-signs for the last round of her day in order to be able to conduct the 4:50 a.m. round in time to check out at the end of her shift at 5:00 a.m.

September to December 2007

Usually, Mr. Smith signs the NSD-316 form when he returns to the fire watcher work area at the completion of the round. On three or four occasions, Mr. Smith pre-signs the NSD-316 form in preparation for making the inspection when he knows that he might not immediately return to the fire watcher work area to complete the log. Understanding that the purpose of the NSD-316 form is to document the round has been completed, Mr. Smith believes pre-signing is okay for three reasons. First, during the June 2007 incident when Mr. Mabry had to conduct Mr. Smith’s inspections, Mr. Mabry raised no objection to Mr. Smith’s pre-signing the fire watch logs. Second, when Mr. Smith pre-signs, he plans to perform the round at the time indicated on the log, and makes any necessary corrections upon completion. Third, Mr. Smith has received no specific instruction from any supervisor that pre-signing is not allowed.

Over the course of Mr. Smith’s employment, Mr. Claude Mabry observes that Mr. Smith is a proactive fire watcher who on at least two occasions reported problems identified during a fire watch round. Mr. David Hord, another SPOC, also considers Mr. Smith to be a proactive fire watcher who, on at least one occasion, made a timely report of an unusual condition observed during a fire watch tour.
By December 2007, Ms. Borders and Mr. Pence work the day shift, 5:00 a.m. to 5:00 p.m. and Ms. Reid and Mr. Smith work the corresponding night shift. Usually, 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. For each area, the 24 hourly inspections are logged on a separate NSD-316 surveillance form.

December 12, 2007

Ms. Borders pre-signs the NSD-316 logs and then leaves work two hours early due to an emergency at home. Mr. Pence completes her fire watch rounds and does not correct Ms. Borders’ signature on the logs for those rounds.

January 2008

Mr. Hord reads a report about an action the NRC took against the San Onofre nuclear station due to falsified fire watch logs. Mr. Hord tells the Catawba fire watchers, including Mr. Smith, about the incident and indicates that he expects them to follow procedures correctly.

Beginning of February 2008

Mr. Smith begins studying for his re-qualification examination scheduled for February 18 and 19, 2008.

February 12, 2008

In addition to the four regular hourly inspections to be conducted in two areas of the two nuclear power units, the Work Control Center has added an additional inspection of diesel generator area, ETB Room Hose Station. This additional inspection is the first of the five rounds to be conducted each hour.

Ms. Chris Borders and Mr. Pence work the day shift, which is scheduled to end at 5:00 p.m. Ms. Borders pre-signs for the last rounds of her shift with completion times of 15:50, 15:55, 15:58, 16:01, and 16:04. Ms. Borders tells Mr. Pence that she must leave early and Mr. Pence agrees to cover her last rounds. Ms. Borders leaves the Catawba nuclear power plant around 3:10 p.m. (15:10).

Mr. Smith arrives at work about 3:45 p.m. (15:45), checks-in with the SPOC, and goes to the fire watcher work area. As he sits down to eat, Mr. Smith notices that Ms. Borders’ jacket, pocketbook and personal belongings which she usually leaves on a chair are gone. Mr. Smith then looks at the fire watch log which is kept on a table in the room. For the February 12, 2008 ETB Room Hose Station fire watch log, he observes: a) one blank signature space for the 14:50 inspection, tour number 5, b) Ms. Borders’ signature on the next line for the 15:50 round, tour number 6, and c) a blank signature space for the 16:50 inspection, tour number 7.
Mr. Pence then leaves the work area. Later, Mr. Pence signs for the 14:50 round, tour number 5. Mr. Pence also signs for the 16:50 inspection, tour number 7, and departs Catawba at the completion of his shift.

Ms. Borders’ signature remains on the NSD-316 log for the 15:50 round, tour number 6. Ms. Borders’ pre-signed signatures also remain on the fire watch logs for the other four areas for the rounds at 15:55, 15:58, 16:01, and 16:04.

When Mr. Smith signs for his first round of his shift at 17:50 on the ETB Room Hose Station fire watch log, he notices that Mr. Pence signed for the 14:50 inspection, tour number 5. Subsequently, as he completes the rounds for the ETB Room Hose Station, Mr. Smith signs off at 19:50, 21:50, and 23:50. Mr. Smith also completes the associated inspections for the other four areas and signs the respective fire watch logs.

February 13, 2008

As Mr. Smith continues to complete the rounds for the ETB Room Hose Station, he signs off at 01:50 and 03:50. Mr. Smith completes the associated rounds for the other four areas and signs the respective fire watch logs.

In the morning, at the start of her shift, Ms. Borders is scheduled for testing during her shift.

When Mr. Smith arrives in the afternoon for his evening shift, he takes a call from Mr. Withers. Mr. Withers is looking for Ms. Reid and also asks whether Ms. Borders returned after her testing to help with the fire watch rounds. When Mr. Pence comes into the fire watch break room, Mr. Smith tells him about Mr. Withers’ phone call and his inquiry on whether Ms. Borders came back to help Mr. Pence.

February 14 and 15, 2008

Mr. Smith works his fire watcher night shifts at Catawba.
February 16, 2008

Mr. Smith has the day off. Ms. Reid works the night shift alone.

February 17, 2008

At the morning shift change, about 5:00 a.m., Ms. Borders arrives and angrily tells Ms. Reid that Mr. Smith is spreading rumors about her going out with another man and that he called Mr. Withers and told him that she had lied on her time sheet. Ms. Borders states that she is going to get Mr. Smith by going to human resources and accusing him of sexual harassment.

Around 6:16 a.m., Mr. Borders tells Mr. Claude Mabry that Mr. Smith is sexually harassing her physically and verbally. Mr. Mabry advises Ms. Kelley, Mr. Withers, and a DZ Atlantic management representative about the complaint.

As their night shift starts around 5:00 p.m., Ms. Reid tells Mr. Smith that Ms. Borders is angry at him for telling people about an affair and calling Mr. Withers and telling him about the falsification of time sheets. Ms. Reid indicates that Ms. Borders intends to get Mr. Smith fired and believes that will be easy if she claims sexual harassment since Mr. Smith is black.

February 18, 2008

Around 4:00 a.m., near the end of his night shift which started at 5:00 p.m., February 17, 2008, Mr. Smith reviews the fire watch log for February 12, 2008 and notices that Ms. Borders’ signature name is still on the form for the 15:50 round, tour number 6.

Mr. Pence arrives for the start of his 5:00 a.m. to 5:00 p.m. shift and conducts the first inspections for the shift around 6:00 a.m.

During the day, Ms. Kelley speaks with Ms. Borders about her sexual harassment complaint. Ms. Kelley contacts Ms. Simmons who also interviews Ms. Borders.

Mr. Smith arrives for his night shift which includes re-qualification testing. He is called into Mr. Ray’s office and Ms. Simmons is on the conference phone. They express an intention to ask him about an incident involving Ms. Borders. However, since Mr. Smith has a re-qualification examination to take, Mr. Ray and Ms. Simmons agree to discuss the situation with him the next day.

February 19, 2008

Mr. Smith arrives early for his shift to take the second portion of his requalification examination and is advised Mr. Ray needs to see him. After completing his examination, Mr. Smith goes to Mr. Ray’s office. Ms. Simmons is again present by telephone.
Mr. Ray and Ms. Simmons advise Mr. Smith that Ms. Borders has filed a sexual harassment complaint against him. Mr. Smith denies the charge, pointing out that they work different shifts and he only encounters Ms. Borders when they pass by each other during jumps. Ms. Simmons asks Mr. Smith why Ms. Borders would claim he is harassing her. Mr. Smith responds that Ms. Borders thinks that he is aware of her affair and falsification of time sheets. Mr. Smith indicates that according to Ms. Reid when Ms. Borders returned from leave she was angry with everyone and threatened to get Mr. Smith fired with a sexual harassment complaint since he was black. Mr. Smith states that he is never disrespectful to women. Mr. Smith adds that he knows too much and will tell about what’s going on with falsification of documents and time sheets. He reports that Mr. Borders signed a sheet but she wasn’t in the building. Ms. Simmons responds that she is conducting an investigation into Ms. Borders’ sexual harassment complaint and asks him for more time to investigate the falsification matter. Mr. Smith responds that he wants Duke Energy to know what’s going on. Ms. Simmons asks him not to go to Duke Energy so she can investigate the issue first.

As Ms. Reid arrives for the start of her shift, Mr. Ray calls her in for an interview. Ms. Simmons joins by a conference call. Ms. Reid repeats the contents of her conversation with Ms. Borders on February 17, 2008. Ms. Reid indicates that Ms. Borders was upset with Mr. Smith because she thought he had talked to Mr. Withers about her time sheets. Ms. Simmons advises Ms. Reid that she is focusing on the sexual harassment charge. Ms. Reid states that she has never observed Mr. Smith sexually harass Ms. Borders. She also recalls that Ms. Borders threatened to get Mr. Smith.

After the interviews, Ms. Simmons concludes that she has insufficient evidence to prove or disprove Ms. Borders’ sexual harassment complaint.

Concerned about the earlier request not to tell Duke Energy about the falsifications, Mr. Smith tells Mr. Hord that Ms. Borders is making a sexual harassment complaint against him because she believed he was going to report her. Mr. Smith indicates that Ms. Borders put inaccurate information on a February 12, 2008 NSD-316 log by signing for an inspection when she was not on-site. Mr. Hord reports the issue to his supervisor, Mr. Danny O’Brien, Duke Energy station manager at Catawba. Duke Energy also advises Mr. Ray that that a DZ Atlantic employee put inaccurate information on a fire watch log.
February 20, 2008

While on the road, Ms. Simmons receives a call from Mr. Smith. At that time, Ms. Simmons tells him that his job is not in jeopardy due to the sexual harassment complaint.

Pending an investigation, Mr. O’Brien advises DZ Atlantic that all four fire watchers need to be relieved of duty.

Mr. O’Brien asks Mr. Withers to walk the fire watch routes to determine whether the fire watchers go through security doors and if so, to pull access data. He also directs Mr. Withers to initiate a PIP (problem investigation process). Comparison of the security access data with the round logs reveals that the 3:50 p.m. fire watch round was accomplished. However, while Ms. Borders signed the NSD-316 log, indicating that she conducted the round, Mr. Pence actually completed the inspection. Review of several other fire watch logs did not reveal any discrepancies. Security access data also disclosed that Ms. Borders had left the plant on February 12, 2008 about an hour before the 3:50 p.m. round for which she signed.

Additionally, around 4:30 p.m., during a review of the fire watch logs for February 20, 2008, they discover that Mr. Pence has pre-signed for a 5:00 p.m. round that day. When Mr. Withers questions Mr. Pence about the log, Mr. Pence indicates that pre-signing the fire watch log is common. Mr. Withers advises Mr. O’Brien and Mr. Hord about the pre-signing.

Upon completion of the investigation, Duke Energy management decides to release all four fire watchers. Mr. O’Brien advises Mr. Ray that Duke Energy is releasing Ms. Borders for failing to conduct the fire watch for which he signed, Mr. Pence for failing to correct the fire watch log, and Mr. Smith for withholding his discovery of the problem. To get a fresh start with fire watchers at Catawba, Ms. Reid is also released; however since she was not implicated in the investigation, Mr. O’Brien releases her favorably.

Mr. Michael Henline, a project manager for DZ Atlantic, is asked to assist Mr. Ray with an investigation into Mr. Smith’s report of a fire watch log falsification by Ms. Borders. Mr. Henline meets with Mr. Danny O’Brien and Ms. Susan Kelley of Duke Energy who advise that Duke Energy is releasing all four fire watchers and placing a hold on their access badges. Mr. Henline is also informed that Ms. Borders has made a sexual harassment complaint against Mr. Smith.

During their investigation, Mr. Henline and Mr. Ray review the NSD-316 forms, security entry data, and time sheet entries for February 12, 2008. They discover Ms. Borders put down 12 hours of work on her time sheet but left the plant around 3:00 p.m. Ms. Borders also signed for the 3:50 p.m. fire watch round but Mr. Pence actually conducted the inspection. The rounds documentation for Ms. Reid and Mr. Smith are accurate. They conclude Ms. Borders falsified her time sheet and the NSD-316 log, Mr. Pence covered up for Ms. Borders, Mr. Smith delayed reporting the issue, and Ms. Reid had done nothing wrong.

When Mr. Smith arrives for his night shift in the afternoon, Mr. Hord sends him to Mr. Ray’s office. Mr. Rays advises that Mr. Smith’s access badge has been placed on supervisory
hold. Mr. Smith goes home. Later, he receives a phone call to come in for an interview the next day.

February 21, 2008

After his investigation, and as the DZ Atlantic supervisor who would make the final determination regarding employment status, Mr. Henline decides that Ms. Borders and Mr. Pence will be terminated due to integrity and trustworthiness issues. He also decides to terminate Mr. Smith’s employment on the same stated basis. Mr. Henline concludes Ms. Reid was not aware of any falsification of the fire watch log. Mr. Henline conducts interviews with all four fire watchers to give them an opportunity to change his mind.

During her interview, Ms. Borders admits the falsifications and indicates the fire watchers had a practice of pre-signing the logs at the beginning of the day. She acknowledges that she had been trained to sign at the completion of the round and that pre-signing was not the right thing to do. She knew Mr. Pence would cover her round. At the end of the interview, Mr. Henline terminates her employment with DZ Atlantic.

During his interview, Mr. Pence indicates that when Ms. Borders advised she needed to leave early, he told her to go ahead and he would cover her round. Mr. Pence states that he thought the important fact was that he actually conducted the fire watch round. Mr. Pence acknowledges that he should have signed for the round but forgot to cross out Ms. Borders’ entry. Mr. Pence claims that pre-signing is common in the fire watcher work group. At the end of the interview, Mr. Henline terminates Mr. Pence’s employment.

In a tense interview that lasts about 20 minutes, Mr. Henline leads the questioning of Mr. Smith. Mr. O’Brien and Ms. Kelley also participate. Mr. Ray is present only for a short period of time. Mr. Henline describes the purpose of the interview as an investigation into the falsification of fire watch logs. Mr. Smith denies Ms. Borders’ sexual harassment allegation several times. He acknowledges the importance of the fire watch logs and recording the rounds upon completion. When asked to identify the inaccuracy on a February 12, 2008 NSD-316 fire watch log, Mr. Smith points out Ms. Borders’ signature for the inspection associated with the 4:00 p.m. fire watch rounds as the falsification. When Ms. Kelley asked why he delayed reporting Ms. Borders’ falsification, Mr. Smith replies that he didn’t think of it at the time. Mr. Smith adds that he reported the falsification on February 19th because 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. After Mr. O’Brien and Ms. Kelley leave the interview, Mr. Henline tells Mr. Smith that his employment is being terminated for his delay in reporting Ms. Borders’ falsification, which is an integrity and trustworthiness issue.

In her interview with Mr. Henline, Ms. Reid denies any direct knowledge of falsification of time sheets. Mr. Henline tells her that she is being released from Catawba but that a vacancy exists at McGuire.
At the conclusion of the interviews, Mr. Henline formally terminates Ms. Borders’ employment for falsifying time sheets and the fire watch log. Mr. Henline continues to believe Mr. Pence was covering up for Ms. Borders and terminates his employment for aiding and abetting Ms. Borders by failing to change the fire watch log entry to reflect his completion of the fire watch round. Mr. Henline terminates Mr. Smith’s employment on the stated basis that he failed to report Mr. Borders’ falsification in a timely manner. Mr. Henline retains Ms. Reid and reassigns her to another Duke Energy nuclear facility at McGuire. For the change of status form, Mr. Henline characterizes the terminations of Ms. Borders, Mr. Pence, and Mr. Smith as “unfavorable.”

On the exit interview form, Mr. Smith writes that he was fired for telling the truth.

Mr. Ray advises the Duke Energy Access Services Group that Ms. Borders, Mr. Pence and Mr. Smith have been terminated with an unfavorable designation. Mr. Ray indicates Mr. Smith did not report a falsification of documents until seven days after he became aware of the falsification, which was an integrity issue.

February 22, 2008

Ms. Simmons returns to her office and learns that the four fire watchers have been released by Duke Energy and DZ Atlantic has terminated the employment of Mr. Smith, Ms. Borders, and Mr. Pence.

Mr. Ray completes Mr. Smith’s COS (change of status) evaluation. In the absence of any adverse performance feedback from Duke Energy supervisors, and in light with his usual practice for DZ Atlantic employees, Mr. Ray rates Mr. Smith “average” in most areas. Based on the information he received from Mr. Henline and Mr. O’Brien, Mr. Ray rates Mr. Smith “below average” in reliability and judgment. Mr. Ray marks Mr. Smith’s eligibility status for re-hire on-site with Duke Energy and with DZ Atlantic as “no.”

Late February and early March 2008

Mr. Pence asks Mr. Henline to reconsider his termination since Mr. Pence actually conducted the inspection on February 12, 2008 and just didn’t line through Ms. Borders’ name. Mr. Henline approaches Duke Energy about reinstating Mr. Pence at Catawba and possibly McGuire. Duke Energy declines. Mr. Henline also unsuccessfully looks for other work for Mr. Pence.

Upon review of Mr. Ray’s COS for Mr. Smith, Mr. Ross McConnell, DZ Atlantic vice president for corporate services, changes Mr. Smith’s re-hire status with DZ Atlantic from “not eligible” to “eligible.”

The PIP regarding the fire watch discrepancies is completed. The PIP team reviewed Catawba fire watch logs from February 8 through 21, 2008. They determine the cause of Ms. Borders’ falsification was a failure to follow the NSD-316 form and pre-job briefing instructions.
March 14, 2008

When initially advised by Mr. Ray that three fire watchers had been terminated for integrity issues, Mr. Peter Fowler, Duke Energy Access Services Group Manager, asks for clarification. Mr. Ray responds that Ms. Borders and Mr. Pence were released unfavorably due to falsification of a fire watch log and Mr. Smith was released unfavorably for failing to report the falsification in a timely manner. Based on this information, Mr. Fowler determines Mr. Smith is not trustworthy or reliable, denies his unescorted access authorization with an unfavorable characterization, and enters that information into PADS. The denial is effective for one year. By letter, Mr. Smith is advised of the determination; the letter also indicates that he may seek review of the denial decision within ten days.

Around the same time, Mr. Fowler also denies the unescorted access authorization for Ms. Borders and Mr. Pence based on their unfavorable release.

May 1, 2008

The Catawba Nuclear Station is shut down for re-fueling and the fire watch patrols are cancelled.

July 7, 2008

Mr. Smith files a whistleblower complaint under the ERA.

August 21, 2008

The NRC initiates an investigation into the allegations raised in Mr. Smith’s ERA employment discrimination complaint to DOL.

November 2008

Mr. Smith contacts Mr. Fowler about his access denial. Mr. Fowler explains the appeal process that had been previously set out in the denial notification and provides a contact number. Mr. Smith contacts Ms. Joyce McClure of Duke Energy Access Services Group seeking restoration of his unescorted access authorization since he is attempting to obtain re-employment in the nuclear power industry.

November 5, 2008

Mr. Smith participates in an interview associated with the NRC’s investigation into the concerns he raised in his ERA complaint.
December 8, 2008

Duke Energy Access Services Group denies Mr. Smith’s request for reinstatement of his unescorted access authorization because the PADS entry was based on credible information.

December 18, 2008

Mr. Smith participates in a second interview associated with the NRC’s investigation into the concerns he raised in his ERA complaint.

December 20, 2009

Wolf Creek offers Mr. Smith employment as an armed response operator at its nuclear facility in Kansas.

January 2009

Mr. Tom McQuarrie, Duke Energy Access Services Group, advises Wolf Creek that Mr. Smith was terminated by DZ Atlantic along with two other employees following an investigation associated with falsified fire watch logs. While Mr. Smith reported the falsification to Duke Energy, he did not act in a timely manner which raised an integrity issue. At the end of the month, Wolf Creek advises Mr. Smith that his unescorted access authorization is being denied due to unreliable and untrustworthy behavior.

Ms. Herrick and Mr. Durham conduct an investigation for Duke Energy into the initial PIP associated with the falsified fire watch logs and an allegation that a DZ Atlantic supervisor asked an employee to withhold information about the falsification. They conclude that while no specific prohibition against pre-signing existed, management conveyed its expectation that the fire watch logs be signed upon completion of the round. They also determine some pre-signing occurred, and the PIP was inadequate. Finally, no evidence substantiated the assertion that Mr. Smith was asked to keep the falsification information in-house.

February 2009

Wolf Creek enters its denial of Mr. Smith’s unescorted access into PADS based solely on the information Duke Energy had already entered into the system.

September 2009

Mr. Smith requests re-employment with DZ Atlantic and sends in his resume. He is not selected.
**September 25, 2009**

The NRC presents a Notice of Violation to Duke Energy based on an investigation from August 2008 through July 2009. In light of the deliberate pre-signing of fire watch logs by multiple employees, the NRC concludes Duke Energy violated 10 C.F.R. § 50.9(a), which requires an licensee to maintain complete and accurate information in all aspects. Due to the deliberate nature of the acts, the NRC determines the violation is Severity Level IV and requires a written response. The NRC also concluded one fire watcher failed to complete 12 requisite inspections. However, since other fire protection systems were in place, the NRC considered the incidents to have a very low significance in terms of safety.

**September 28, 2009**

Based on its investigation, the NRC informs Ms. Reid of its conclusions that she deliberately pre-signed fire watch surveillance logs in violation of 10 C.F.R. § 50.9(a), which further represents a violation of 10 C.F.R. § 50.5(a)(2) and also caused Duke Energy to be in violation of NRC regulations. Citing Ms. Reid’s situation and apparent lack of licensee supervision, the NRC concludes no further action is warranted.

Based on its investigation, the NRC also informs Mr. Smith of its conclusions that he deliberately pre-signed fire watch surveillance logs in violation of 10 C.F.R. § 50.9(a), which further represents a violation of 10 C.F.R. § 50.5(a)(2) and also caused Duke Energy to be in violation of NRC regulations due to inaccurate fire watch logs. Citing the apparent lack of licensee supervision, the NRC concludes no further action is warranted.

**October 22, 2009**

In response to NRC’s Notice of Violation, Mr. James Morris, Duke Energy’s site vice president for Catawba, acknowledges that from August 2007 through February 2008 fire watch contract employees provided inaccurate information on documents required to be maintained by its license, including the NSD-316 form. He concludes more oversight should have been provided to detect the noted problems. Mr. Morris explains that Duke Energy was focused on completion of the fire watches rather than the accuracy of the required documentation. As corrective action, Duke Energy provides more detailed instructions on completion of the NSD-316 during the pre-job briefing and directs its supervisors to more frequently monitor individuals for proper completion of the fire watch logs.

**October 27, 2008**

Through counsel, Mr. Smith appeals the NRC’s determination on the basis of the insufficiency of the investigation and failure to consider lack of training and supervisory oversight.
Mr. Smith actively seeks re-employment two to three days a week, for up to three hours a day. He submits over 160 job applications and resumes. He submits two job applications to DZ Atlantic and an application to Duke Energy. Mr. Smith remains unemployed. Receiving $356 in weekly unemployment benefits, and with no assets, Mr. Smith struggles financially and is no longer able to financially assist his mother and grandmother. Mr. Smith is depressed, loses 25 pounds, and experiences difficulty sleeping.

Issue # 1 – Affirmative Defense

Adjudication Principles

According to 42 U.S.C. § 5851(b)(3)(D), as implemented by 29 C.F.R. § 24.109(b)(1), in the event that a complainant establishes that an activity protected under the Act was a contributing factor in an unfavorable personnel action, “relief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.” In determining whether the Respondents in this case have met their evidentiary burden under this affirmative defense, I will be guided in part by the adjudication principles established by the U.S. Court of Appeals for the Federal Circuit in Watson v. Department of Justice, 64 F.3d 1524 (Fed. Cir. 1995), which is the same appellate court that developed the adjudication parameters for determining causation under the contributing factor standard in Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993) which the ARB embraced and applied in its remand of Mr. Smith’s case. I will also evaluate the Respondents’ affirmative defense under the standards set out in Carr v. Soc. Security Admin., 185 F.3d 1318 (Fed. Cir. 1999).

Preliminarily, to better understand the appellate courts’ framework for considering the affirmative defense in this case, and since the federal appeals court in Watson specifically addressed its prior decision in Marano, I will review the facts and judicial holdings in Marano, which set the stage for the Watson decision two years later.

In Marano, a DEA agent presented a memorandum to his agency alleging supervisory misconduct and mismanagement in his office located in Albany, New York. The memorandum initiated an investigation which resulted in a recommendation for a major overhaul of the Albany office. As part of the reorganization, the DEA agent was transferred to another office. In response, the agent filed a complaint under the federal Whistleblower Protection Act (“WPA”), which eventually led to a proceeding before an administrative judge (“AJ”) with the Merit Service Protection Board. After determining that the DEA agent engaged in protected activity, the AJ concluded that his disclosure was not a contributing factor since the probative evidence established that DEA did not transfer the agent because he made the protected disclosure. In vacating the AJ’s decision, the appellate court first noted that the contributing factor standard represented a conscious legislative decision to substantially reduce the evidentiary burden on a whistleblower. Next, the court discussed the distinction between the fact of disclosure, upon

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which the AJ had focused, and the contents of the disclosure, which eventually led to the agent’s transfer. In order to effectuate the purposes of the WPA, and to protect “a whistleblower who has done no wrong (emphasis added),” the court determined the contributing factor standard is satisfied if the preponderant evidence demonstrates that the contents of the protected disclosure was one of the factors that tended to affect in anyway the personnel action. At the same time, the court also observed that it was “not faced with a situation in which an employee in essence blew the whistle on his own misconduct.”

Two years later, in Watson, the same federal appellate court was presented with a case in which the contents of the complainant’s protected activity actually revealed his own misconduct. Rather than alter its previous contributing factor analysis set out in Marano in such a situation, the court instead addressed an employer’s affirmative defense when the content of the protected activity includes a disclosure of self-misconduct. Specifically, Mr. Watson, a U.S. border guard, who was an exemplary employee, discovered while on patrol for drug smugglers that another federal border guard had shot and killed an unarmed Mexican national. Mr. Watson did not immediately report the incident and instead went off duty and waited nearly 15 hours before advising his supervisor of the death. Eventually, Mr. Watson was removed from service in part for failure to comply with standards for reporting a shooting incident before going off duty and failure to timely report the use of an unauthorized weapon. In turn, Mr. Watson appealed the removal action. Subsequently, after determining that Mr. Watson’s disclosures were protected activities the AJ and the Merit Service Protection Board determined that the agency had met its evidentiary burden for its affirmative defense by demonstrating that it would have taken the same removal action if it had been alerted to Mr. Watson’s misconduct by other means.

On appeal, Mr. Watson argued the Merit Service Protection Board decision that an affirmative defense may be establish if an agency establishes it would have taken the same adverse action if it had been alerted of the misconduct by other means was in error. In part based on the contributing factor standard in Marano, Mr. Watson maintained that because the facts supporting the adverse action were intertwined with the facts disclosed in his protected activities, the agency had to prove by clear and convincing evidence both: a) it would have taken the same personnel action in the absence of the protected disclosures, and b) it would have eventually discovered the contents of the protected disclosure from another source.

In affirming the Merit Service Protection Board’s decision, the federal appellate court stated, “We decline to establish such an ‘inevitable discovery’ rule, nor do we read the sources cited by Watson – the statute . . . or this court’s opinion in Marano – to establish such a rule.” The court further opined that the statutory phrase, “in the absence of the protected disclosure,” did not mean “that the contents of his disclosure could have nothing to do with his removal.

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12Marano, 2 F.3d at 1142.

13Id. at fn. 5. In its remand decision, the ARB stated the facts in Mr. Smith’s case were “analogous to Marano,” slip op. at 7, without noting, or commenting upon, this factual distinction identified by the federal appellate court in footnote five. That is, unlike Mr. Smith’s case, the contents of the DEA agent’s protected activity did not disclose his own misconduct or dereliction.

14Watson, 64 F.3d at 1528.
because absent his disclosure the agency would not have known the events in question.”\textsuperscript{15} The court specifically disagreed that an agency in this type of case needed a legitimate ground for the personnel action independent of the employee’s protected disclosure.\textsuperscript{16} Instead, the court summarized that “the fact that a protected disclosure may be made as part of an employee’s duties, but that an employee may nevertheless be disciplined for violating agency policy if his disclosure is untimely, strikes a balance between the intent of the WPA and the agency’s interest to prompt disclosure of wrongdoing.”\textsuperscript{17}

In terms of the actual parameters under which to assess the sufficiency of an employer’s affirmative defense, the same appellate court in \textit{Carr}, 185 F.3d at 1323, set out the following factors: “the strength of the agency’s evidence in support of the personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar action against employees who are not whistleblowers but who are otherwise situated.”

In summary, with due deference to the ARB, I consider the facts in Mr. Smith’s case to actually be more analogous to the whistleblower in \textit{Watson}, whose protected disclosure revealed his own misconduct, than the complainant in \textit{Marano}, who “had done no wrong.” Although the subject of the delayed disclosure by Mr. Smith, falsification of the fire watch logs, hardly compares to the failure of a border guard to promptly report a shooting death, the gravamen of employment misconduct in both cases is the employee’s failure to promptly report of violation of an agency regulations, or in Mr. Smith’s case, falsification of documentation related to nuclear safety. Consequently, consistent with the appellate court’s affirmation of the Merit System Protection Board’s affirmative defense determination in \textit{Watson}, a case in which the contents of the protected disclosure revealed misconduct by the whistleblower in a manner similar to Mr. Smith’s case, I will now consider whether the Respondents have demonstrated by clear and convincing evidence under the \textit{Carr} factors that they would have taken the same adverse personnel actions if they had discovered by other means of Mr. Smith’s failure to promptly report the falsification of the February 12, 2008 fire watch logs.

\textsuperscript{15}Id.

\textsuperscript{16}Id. at 1530.

\textsuperscript{17}Id.
Discussion

I now turn to the three Carr factors to determine whether the Respondents can establish the applicable affirmative defense in this case.

Strength of the Supportive Evidence

An evaluation of the strength of the Respondents’ evidence in support of their adverse personnel actions of removing Mr. Smith from his fire watch duties and terminating his employment requires placing that in context. As a result, the starting point is a review of the fire protection program at the Catawba nuclear power facility in 2007 and through the spring of 2008. At that time, Duke Energy was an NRC licensee and under 10 C.F.R. § 50.48 required as one of the terms of its license to maintain a fire protection system in its nuclear power generating plants. Since during this period the automatic fire protection system was degraded at Catawba, Duke Energy established hourly fire watch tours to be conducted by personnel obtained through a contract with DZ Atlantic. These contract workers provided by DZ Atlantic were temporary employees who fell under the supervision of Duke Energy managers and DZ Atlantic single points of contacts located at Catawba.

These mandated hourly fire watch tours were conducted under the provisions of NSD (nuclear safety directive) – 316 and documented through the use of an NSD-316 fire watch log set out in Appendix A. During the course of a fire watch inspection, the fire watcher walked through the various areas of the nuclear facility looking for early stages of fire, such as smoke and smoldering fumes. According to the instructions for the NSD-316 fire watch log, “the time that is logged on the Fire Watch Surveillance Log Sheet is to be the time when that inspection is completed.” Relatedly, under the 10 C.F.R. § 50.9(a), information required by the NRC to be maintain by a licensee “shall be complete and accurate in all aspects.”

In order to be cleared into the nuclear power plant facilities, the NRC required that a fire watcher have an unescorted access clearance. In determining whether an individual will be granted such clearance into the secure areas of a nuclear power facility, including the nuclear reactor areas, the nuclear power plant licensee must evaluate an individual in terms of trustworthiness and reliability. That screening included background investigations, psychological evaluation, criminal history checks, and drug and alcohol testing. This access authorization process was monitored by the NEI.

With this factual background in mind, I will next consider the strength of the evidence supporting each respondent’s adverse actions on February 20 and 21, 2008.

Duke Energy

Although later cited by the NRC for insufficient oversight of its fire watch program which was due in part on the company’s trust that the fire watchers were complying with instructions rather and did not require actual verification, the evidentiary record definitively demonstrates Duke Energy’s significant concern for NRC compliance regarding the fire watch tours in several ways. During the pre-job briefings, Mr. Withers instructed the fire watchers to
document their inspections upon completion. In January 2008, Mr. Hord briefed the fire watchers, including Mr. Smith on the San Onofre incident and emphasized the importance of following proper procedures in conducting their fire watch duties. Then, immediately after Mr. Smith informed him of Ms. Borders’ alleged falsification, Mr. Hord contacted Mr. O’Brien who in turn initiated an investigation and directed a PIP, which subsequently led to the corrective action of advising Duke Energy supervisors to provide more oversight by checking the accuracy of the fire watch logs.

Other than a few incidents of pre-signing a fire watch log prior to actually completing the hourly inspection, Mr. Smith had a good work record up to February 19, 2008 and had previously promptly reported possible issues during his fire watch tours. Nevertheless, the evidentiary record also demonstrates the magnitude and seriousness of Mr. Smith’s seven day delay in reporting the fire watch log falsification, which involved a misrepresentation about who had actually conducted the fire watch tour. As set out in the background discussion, and demonstrated by the San Onofre incident and the subsequent NRC notice of violation Duke Energy received, falsification of a fire watch log was a serious violation of Duke Energy’s licensing requirements, and Duke Energy clearly had an interest in being promptly informed of that licensing breach.

As established by background discussed above and credible testimony of Mr. O’Brien and Mr. Fowler, two fundamental and requisite character traits for an employee in the nuclear industry are trustworthiness and reliability. Both the length of Mr. Smith’s delay in reporting the falsification and the circumstances under which he finally informed Duke Energy of the falsification of the fire watch log led Mr. O’Brien and Mr. Fowler to conclude that Mr. Smith was deficient in both characteristics to the extent that he should be released from his fire watch duties and denied unescorted access clearance. In particular, Mr. Smith’s failure to provide information about the falsification until confronted with the sexual harassment complaint caused Mr. O’Brien to seriously question whether Duke Energy could have trusted, and relied upon, Mr. Smith to come forward and report the fire watch log falsification absent Ms. Borders’ sexual harassment allegation.

Finally, the actual sequence of events clearly substantiates Mr. O’Brien’s reliability and trustworthiness concerns because over the course of several days Mr. Smith demonstrated his unreliability in terms of his willingness to report a fire watch log falsification. Specifically, when he first became aware of the falsification on February 12, 2008, Mr. Smith demonstrated his understanding that the falsification was a significant issue by threatening Mr. Pence that he would report the falsification if left uncorrected. Yet, on February 12, 2008, two hours after he confronted Mr. Pence about the need to correct the false signature and after Mr. Pence had departed the plant, Mr. Smith signed the same fire watch log for the 17:50 inspection which still contained just a quarter inch above his signature in clear view Ms. Borders’ large, bold, and unmistakable signature falsely indicating that she had conducted the 15:50 inspection, and chose not to report the falsification. Upon completion of his shift that day, having signed the same log with Ms. Borders’ falsification for five more fire watch inspections, Mr. Smith departed the plant without reporting the falsification. On February 14 and 15, 2008, during his next two night shifts, Mr. Smith again did not bring the falsification to anyone’s attention. On February 18, 2008, at the end of his night shift, and after Ms. Reid had advised him at the beginning of the
shift that Ms. Borders’ was threatening to have him fired, Mr. Smith reviewed the February 12, 2008 fire watch log, observed the uncorrected falsification for the 15:50 inspection, and then went home in the morning without reporting the falsification. On the same day, at the start of his next shift, when briefly called into Mr. Ray’s office, Mr. Smith continued to withhold his knowledge of the falsification. Ultimately, on February 19, 2008, after being confronted with Ms. Borders’ sexual harassment allegation, Mr. Smith finally chose to report her February 12, 2008 falsification of the fire watch log to Mr. Hord.

In summary, while Mr. Smith’s work record had been good, considering both the regulatory significance of an accurate fire watch log as a condition of retaining an NRC license; the serious breach associated with Ms. Borders’ falsification of the regulatory-mandated fire watch log, which subsequently led in part to an NRC notice of violation; and Mr. Smith’s deliberate withholding of his knowledge of Ms. Borders’ falsification for several days, as well as his disclosure of the falsification only after being confronted with an allegation of sexual harassment, I find the evidentiary record provides exceptionally strong evidence to support Mr. O’Brien’s determination to release Mr. Smith from his fire watch duties on February 20, 2008 because he was not trustworthy or reliable.

DZ Atlantic

Although DZ Atlantic is not a nuclear power plant licensee, and provides employees to fossil fuel power plants which do not require unescorted access clearance, two factors associated with Mr. Smith’s delay in reporting Ms. Borders’ falsification provide a significant basis for Mr. Henline’s decision to terminate his employment as a DZ Atlantic employee. First, Mr. Henline credibly testified that while Mr. Smith’s disclosure of Ms. Borders’ dereliction was very consistent with DZ Atlantic’s expectation of their temporary contract employees that they will report issues to their supervisors, his failure to do so until confronted with a sexual harassment allegation raised significant integrity and trustworthiness issues. Specifically, Mr. Smith’s inaction and failure to report the falsification issue for seven days and only when presented with the sexual harassment charge indicated to Mr. Henline that contrary to company policy, Mr. Smith had deliberately decided to withhold his knowledge about the fire watch log falsification, and the timing of his disclosure created serious doubt about whether absent Ms. Borders’ allegation, Mr. Smith’s supervisors at Duke Energy would have ever discovered the fire watch log falsification. As just previously discussed, the timing and circumstances of Mr. Smith’s eventual disclosure of the fire watch log falsification strongly support Mr. Henline’s trustworthiness and integrity assessments.

Second, although DZ Atlantic had a progressive disciplinary policy, Mr. Henline chose termination because in addition to questionable integrity, Mr. Smith failed to provide a reasonable explanation for the seven day delay until February 19, 2008 when confronted with Ms. Borders’ allegation. Instead, Mr. Smith simply explained in part that when he became aware of the falsification on February 12, 2008 he didn’t think to report it, which Mr. Henline understandably considered to be insufficient on its face to justify the delay and change his termination decision based on the significant integrity deficiency. Additionally, the actual exchange between Mr. Smith and Mr. Pence on February 12, 2008 demonstrates that Mr. Smith’s explanation to Mr. Henline was not only insufficient, it was incorrect because Mr. Smith
obviously did think of reporting the falsification on February 12, 2008 when he threatened Mr. Pence that he would do so.\footnote{After his termination, Mr. Smith explained that he delayed reporting the falsification based on Mr. Pence’s representation that he would correct, the fire watch log. However, even that explanation is insufficient considering that the February 12, 2008 fire watch log that Mr. Smith signed during the course of his night shift on February 12, 2008 after Mr. Pence had left, clearly showed that Mr. Pence had not kept his promise.}

**Strength of Retaliatory Motive Evidence**

The record contains a dearth of probative evidence of retaliatory motive by any Duke Energy supervisor, including Mr. O’Brien, involved in the decision to release Mr. Smith from his fire watch duties on February 20, 2008. As previously discussed in detail in the September 29, 2010 Decision and Order, the record contains no direct evidence of any animosity toward Mr. Smith for his protected activity, and any probative value of circumstantial evidence associated with temporal proximity between his protected activity and release from duty the next day was diminished by the intervening investigation that confirmed Ms. Borders’ falsification on February 12, 2008, which also in turn established Mr. Smith’s failure to report the falsification for seven days, until questioned about Ms. Borders’ allegation.

In terms of DZ Atlantic personnel, in the September 29, 2010 D & O, I also considered the possibility of animosity by Ms. Simmons and Mr. Ray due to Mr. Smith’s protected report to Duke Energy. However, again for multiple reasons discussed in that decision, I concluded the evidence that might be supportive of such a determination to be insufficiently probative. In particular, while Ms. Simmons was upset that Mr. Smith did not honor her request to give her time to investigate possible inaccuracies by Ms. Borders, Ms. Simmons believed Mr. Smith was raising a concern about timesheets rather than fire watch logs. And, due to her absence, Ms. Simmons also played no role in Mr. Henline’s termination decision. I also concluded that the circumstantial evidence relating Mr. Ray’s rating of Mr. Smith’s work performance on the final COS as average was not indicative of animosity towards him and instead represented the usual practice for rating temporary contract employees. And, due to the Duke Energy investigation which verified Ms. Borders’ falsification and Mr. Smith’s seven day delay in reporting the falsification, the two day separation between Mr. Smith’s protected activity and his termination as a DZ Atlantic temporary contract employee on February 21, 2008 did not represent probative circumstantial evidence of impermissible retaliation for reporting Ms. Borders’ falsification.

Finally, the credible testimony of Mr. O’Brien and Mr. Henline provided very probative evidence that they did not discriminate or retaliate against Mr. Smith for his protected activity of reporting Ms. Borders’ falsification. Instead, they reached their decisions to release Mr. Smith from his fire watch duties and terminate his employment on the non-discriminatory basis that Mr. Smith’s failure to promptly disclose that falsification demonstrated unsatisfactory trustworthiness, reliability, and integrity for a Duke Energy fire watch and DZ Atlantic employee.
Similar Action Against Non-Whistleblowers

Concerning Duke Energy’s similar treatment of non-whistleblowers, the Duke Energy supervisors acknowledged that no other employee had been released from duty for failure to promptly report a violation or discrepancy. However, those seemingly stark acknowledgements have no probative value on this issue since each supervisor also testified that the reason for the acknowledgment was that he was not aware of any other case of an employee not promptly reporting problem.

Next, for the reasons previously discussed in the September 29, 2010 D & O, pp. 119-120, I concluded that the situations involving Mr. and Mrs. Reid regarding her pre-signing fire watch logs, and the alleged inactions of Mr. Hord and Mr. O’Brien after they became aware of the fire watch log falsification do not provide probative evidence on whether similarly situated non-whistleblowers are treated similarly or differently (less harsh) than Mr. Smith.

In regards to DZ Atlantic’s treatment of other employees who were not whistleblowers, I first note that Mr. Henline credibly testified that he has discharged non-whistleblowers for integrity issues. Additionally, his discharge of Ms. Borders’ for falsification of the February 12, 2008 fire watch log and Mr. Pence for helping Ms. Borders by not correcting the fire watch log entry after he completed Ms. Borders’ round, which represent integrity issues, corroborates Mr. Henline’s testimony. I have considered that during the course of his discharge actions, Mr. Henline determined that Mr. Pence was eligible for rehire by DZ Atlantic; whereas he concluded Mr. Smith was not eligible for rehire. However, as Mr. Henline explained, Mr. Pence and Mr. Smith were not similarly situated because their termination interviews were different. That is, Mr. Pence acknowledged that he should have corrected the fire watch log and explained that he thought the most significant factor was that he actually accomplished the fire watch round. On the other hand, Mr. Smith’s explanation was that he didn’t think to report the falsification at the time he discovered it. Likewise, in regards to Mr. Henline’s post-termination efforts to help Mr. Pence, the two former fire watchers were not similarly situated. Mr. Pence contacted Mr. Henline and asked for reconsideration and help. Mr. Smith did not.

After acknowledging DZ Atlantic’s progressive discipline policy, Mr. Henline also credibly testified that when integrity is the cause of action, he consistently selects termination. That testimony is again supported because his decision involving the two non-whistleblowers in this case whose behavior reflected adversely on their integrity, Ms. Borders and Mr. Pence. In a manner similar to his treatment of Mr. Smith, Mr. Henline also chose the final step in the progressive discipline sequence, termination of employment.

In summary, concerning Duke Energy’s treatment of similarly situated non-whistleblowers, the evidentiary record is essentially inconclusive due to the lack of any comparison with non-whistleblower employees. At the same time, Mr. Henline’s credible testimony, as well as his termination actions towards Ms. Borders and Mr. Pence, demonstrated

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19The importance of an explanation in the termination interviews to Mr. Henline was demonstrated by his acknowledgement that his decision regarding Mr. Smith may have been affected if Mr. Smith had explained his reliance on Mr. Pence’s promise to correct the fire watch log.
that he treats non-whistleblower employees with integrity issues in a manner similar to Mr. Smith – termination of employment with DZ Atlantic.

Summary

Having evaluated the evidentiary record under Carr factors, I find that evidentiary record provides exceptionally strong evidence to support Mr. O’Brien’s determination to release Mr. Smith from his fire watch duties on February 20, 2008 because he was not trustworthy or reliable. The timing and circumstances of Mr. Smith’s eventual disclosure of the fire watch log falsification, coupled with the lack of a sufficient explanation for the delay, also strongly supports Mr. Henline’s trustworthiness and integrity assessments that led to his termination of Mr. Smith’s employment as a DZ Atlantic temporary contract employee. The record contains no probative evidence that the decisions by Mr. O’Brien and Mr. Henline was influenced in any manner by impermissible retaliatory motive. The evidentiary record also contains no probative evidence of disparate treatment by Duke Energy, and Mr. Henline’s employment termination decision was consistent with his actions toward non-whistleblower cases which involved a lack of integrity. Consequently, I conclude Duke Energy and DZ Atlantic have proven by clear and convincing evidence that they would have taken the same adverse personnel actions if they had learned of Mr. Smith’s seven day delay in reporting the fire watch falsification, and the circumstances of that disclosure, through some means other than the contents of his protected activities.

Issue #2 – Remedies

At this point, I note that the litigation history regarding Mr. Smith’s whistleblower case has extended for several years. In its remand, the ARB also specifically observed that “indeed, the content of Mr. Smith’s [protected] disclosures gave the Respondents the reason for their personnel actions against him,”20 which appears to cast some doubt on the viability of any affirmative defense by the Respondents if Watson is deemed inapplicable. And, the evidentiary record is insufficient to establish that absent the content of Mr. Smith’s disclosure on February 19, 2008, which the court in Watson indicated is permitted to be considered in this type of case, the Respondents would have become aware of Ms. Border’s falsification.21 Consequently, I will render alternative findings regarding the appropriate remedies for Mr. Smith in the event the ARB subsequently determines that the Watson case which permits use of the contents of a protected activity, which also reveals misconduct by the whistleblower in establishing an affirmative defense, is not applicable to Mr. Smith’s whistleblower complaint and/or vacates my determination that the Respondents have established their affirmative defenses which preclude relief under the Act.

20Smith, ARB No. 11-003, slip op. at 8.

21In the absence of Mr. Smith’s February 19, 2008 protected activity, the evidentiary record supports a determination that the other two employees who were aware of the falsification of the February 12, 2008 fire watch log, Ms. Borders and Mr. Pence, were highly unlikely to bring that significant discrepancy to the attention of Duke Energy or DZ Atlantic manager and supervisors. Additionally, Mr. O’Brien opined that without Mr. Smith’s disclosure, Duke Energy would not have known of Ms. Borders’ falsification.
Adjudication Principles

Under 42 U.S.C. §§ 5851(b)(2)(B)(i) and (ii), and 29 C.F.R. 24.109(d)(1), if a complainant establishes a violation of the Act’s whistleblower protection provisions, an administrative law judge may take affirmative action to abate the violation; order reinstatement together with the compensation (back pay), terms, condition, and privileges of employment; and award compensatory damages and litigation expenses, including attorney fees. Reinstatement is considered to be the default or presumptive remedy under the Act. Hobby v. Georgia Power Co., ARB Nos. 98-166, 169, ALJ No. 1990 ERA 30 (ARB Feb. 9, 2001). In the event reinstatement is not a viable remedy, then front pay may be warranted. Id., ARB No. 98-166 at 8.


Evidence that a complainant failed to mitigate his damages will reduce the amount of back pay. West v. Systems Applications International, 94 CAA 15 (Sec’y Apr. 19, 1995). However, the respondent bears the burden of establishing a mitigation failure by showing substantially equivalent positions were available and the complainant failed to use reasonable diligence in seeking such positions. Timmons v. Franklin Electric Corp., 1997 SWD 2 (ARB Dec. 1, 1998).

An employer who violates the ERA may also be held liable for compensatory damages associated with mental and emotional distress due to loss of reputation, personal humiliation, mental anguish, and emotional distress. Hobby, ARB Nos. 98-166, 169, at 33. To receive compensatory damages, a complainant must demonstrate both: 1) objective manifestation of distress, such as sleeplessness, anxiety, embarrassment, and depression, and b) a causal connection between a violation of the Act and the distress. Martin v. Dep’t of the Army, ARB No. 96-131, ALJ No. 1993 SWD 001, slip op. at 17 (ARB July 30, 199).
Discussion

Consistent with the above adjudication principles, I turn to the appropriate relief in terms of reinstatement, back pay, front pay, compensatory damages, and litigation costs.

Reinstatement

Several months after Mr. Smith lost his work as a fire watcher at the Catawba nuclear power plant, the facility was shut down on May 1, 2008 for refueling and the temporary fire watch patrols were cancelled. The record contains no evidence that the fire watcher positions were eventually restored at Catawba. As a result, reinstatement is not a viable remedy in this case.

Back Pay

February 20, 2008 to April 30, 2008

The evidentiary record demonstrates that absent the Respondents’ adverse actions Mr. Smith would have continued working as a temporary contract firewatcher for DZ Atlantic at Duke Energy’s Catawba nuclear facility from February 20, 2008 through April 30, 2008. As a fire watcher, Mr. Smith earned $17.00 an hour for 40 hours a week, and 32 hours a week of overtime at $25.50 an hour, for a weekly total of $1,496.00. Based on that weekly earning, Mr. Smith would have earned a total of $14,960.00 in the 10 weeks between February 20, 2008 and April 30, 2008.

Consequently, I find the Respondents have joint and several liability for back pay in the amount of $14,960.00, plus the applicable pre-judgment interest, compounded quarterly, to restore Mr. Smith to the same position that he would have been in had he remained a temporary fire watcher until his position was cancelled at the end of April 2008.

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22Mr. Smith also received $65.00 per diem which I believed represented reimbursement for his expenses traveling to Catawba, rather than earnings. Since he didn’t work during this period, he would not have incurred the associated travel expenses. As a result, including per diem in the weekly earnings calculation would overcompensate Mr. Smith for his loss of employment. Additionally, due to the absence of any probative evidence, I am unable to determine the value of any lost fringe benefits.

23Although Mr. Smith was a temporary contract employee, I have considered whether DZ Atlantic might nevertheless remain liable for some amount of continuing back pay after April 30, 2008 since Mr. Smith had been a temporary employee for DZ Atlantic for thee months prior to his assignment at Catawba and Ms. Reid was able to remain a DZ Atlantic employee after being removed from Catawba on February 21, 2008. However, the evidentiary record developed at the December 2009 hearing is insufficient to establish that in May 2008 such a continuing employment opportunity would have remained for Mr. Smith and the extent of the compensation he may have received.
February 1, 2009

A second period of back pay liability for the Respondents is warranted beginning February 1, 2009 because their adverse actions caused Mr. Smith to lose his clearance for unescorted access which in turn caused Wolf Creek to terminate at the end of January 2009 its previously proffered armed nuclear plant security officer job in Burlington, Kansas, which Mr. Smith had accepted on January 3, 2009. The calculation of determining back pay for this lost job opportunity requires two estimations related to the duration and earnings of Mr. Smith’s potential employment with Wolf Creek as an armed guard.

According to Mr. Smith, his rate of pay as an armed nuclear plant security officer at the Wolf Creek nuclear power plant facility would have been $13.89 per hour. Mr. Smith provided no information on the value of any fringe benefits with the job, and the expected amount of, and hourly rate for, overtime. As a result, based on an hourly rate of $13.89, Mr. Smith’s weekly pay would have been $555.60 for a 40 hour week, which would produce annual earnings of approximately $29,000.00

In terms of the reasonable expectation for the armed guard position, Mr. Smith did not indicate whether the position was permanent, temporary, or probationary. The record also contains no evidence regarding the usual or expected duration of an armed guard position at the Wolf Creek nuclear facility. Consequently, in considering the parties’ respective interests, I find extending the liability for back pay attributable to the loss of this job beyond two years is too speculative.

Accordingly, I find the Respondents to have joint and several liability for back pay from February 1, 2009 through January 31, 2011 for Mr. Smith’s lost employment opportunity in the amount of $58,000.00, plus applicable pre-judgment interest, compounded quarterly, to restore him to the same position that he would have been in had he become an armed security officer at the Wolf Creek nuclear facility.

Mitigation and Unemployment Compensation

Concerning mitigation, for the reasons set out below, I find the Respondents have failed to demonstrate that Mr. Smith failed to mitigate his damages.

Accordingly to Ms. Hutchinson, a certified vocational consultant, based on his education, work experience, and training, Mr. Smith was suitable for work as a security guard, corrections officer, construction worker, machinist, pipe fitter helper, and janitor. And, in her opinion, these jobs were generally available in the national economy.

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24CX 10 to CX 12, CX 93, and RXD 57 to RXD 64.
Since the spring of 2008, Mr. Smith submitted over 160 resumes and job applications by fax and on-line. For almost all of those submissions, he made follow-up phone calls. Mr. Smith applied for security jobs in different areas and multiple states, as well as nuclear jobs. He also looked for work in machining and partition wall manufacturing. He even went back to some of his old jobs to look for work. Mr. Smith also sought help from the state unemployment agency. He attempted to find work two to three times a week, up to three hours at a time. Mr. Smith conducted job searches on his computer, and even travelled to New York to take job tests. At least ten times, Mr. Smith also applied for re-employment with DZ Atlantic through their website. He also applied for work with Duke Energy on three occasions. Although all the contacts were unsuccessful and Mr. Smith found no job openings, considering the extent and nature of his re-employment efforts, as well as the poor state of the economy at that time, I find that Mr. Smith used reasonable diligence in seeking re-employment.

At the same time, since the evidentiary record actually closed on December 4, 2009 at the end of the hearing, to the extent Mr. Smith subsequently found employment and received earned income between December 5, 2009 and January 31, 2011, the Respondents’ liability for back pay attributable to his lost of employment with Wolf Creek will be offset by that amount of earned income.

And, based on the previously cited case, neither award of back pay will be offset by the Mr. Smith weekly receipt of $356.00 in unemployment benefits which ended December 31, 2009.

Additional Comment

On the basis that the adverse actions by the Respondents precluded his ability to return to his high paying job in the nuclear industry, Mr. Smith seeks damages associated with the loss of earning capacity of up to 74% for the rest of his work-life, until the age of 60, which according to some calculations amounts to $1.5 million. While I have considered this additional claim, I nevertheless deny the additional requested relief.

The calculations supporting the claim for a life-long diminution of earning capacity was based in part on the premise that absent the Respondents’ adverse actions Mr. Smith would have continued to work as a nuclear plant fire watcher, earning 32 hours of overtime a week, until he was 60 years old. However, when he became a fire watcher at Catawba and started earning a significant amount of overtime, Mr. Smith was a contract employee provided by DZ Atlantic to Duke Energy to fill a temporary fire watcher position. The circumstances of his work at Catawba certainly provided no reasonable basis to conclude that he could expect to be a nuclear power plant fire watcher earning 32 hours of overtime a week until he was 60 years old. In fact, Mr. Smith testified that when he started at Catawba, he didn’t expect the position to last very

26CX 27, CX 36, CX 40, and RXD 65.

27TR, pp. 369-572.

28According to Ms. Hutchinson, during this period, the unemployment rates were “very, very high.” Id.
And, indeed, on April 30, 2008, the position was terminated. Additionally, under the terms of his employment contract with DZ Atlantic, his employee status was clearly temporary with no guarantee of continued employment with DZ Atlantic and, more significantly, permanent placement in a nuclear power plant position with significant overtime.

Compensatory Damages

One of the features associated with the December 2009 hearing which I still recall vividly was Mr. Smith’s demonstrable distress when discussing the multiple hardships associated with his loss of employment, which in addition to physical and emotional consequences, led to his inability to provide financial support to his mother and grandmother. Physically, following his termination, Mr. Smith found it difficult to sleep and lost 25 pounds. In terms of emotional impact, his loss of employment affected him “deeply.” Due to the loss of income, he could no longer give his mother and grandmother $300 a month in support. Instead, he had to watch them struggle every day, which “just hurt,” in particular in regards to his grandmother who has to live on a monthly income of only $400. Additionally, Mr. Smith had to move in with his mother who had difficulty paying the bills each month and was facing the loss of her home through foreclosure. Further, at the time of the hearing, Mr. Smith had no assets and $11.00 in his checking account. Although Mr. Smith did not obtain any medical treatment for his post-termination physical and emotion issues due in part to the lack of funds for such care, Mr. Smith’s mother and grandmother provided credible testimony regarding Mr. Smith’s notable manifestations of weight loss and depression, and corroborated his testimony about the financial assistance he had previously provided. Consequently, I find the Mr. Smith has sufficiently established the requisite objective manifestation of emotional and physical distress due to the Respondents’ adverse action.

In considering the appropriate amount of compensatory damages, the degree of the Respondents’ liability for Mr. Smith’s emotional and physical reactions to the loss of his employment, as well as the unique financial impact on Mr. Smith and his mother and grandmother is moderated upon consideration of the type of employment that Mr. Smith actually lost as a result of their adverse personnel actions. As previously discussed, Mr. Smith’s employment as a fire watcher with significant overtime income was only a temporary position, such that Mr. Smith’s financial ability to provide for his extended family could have ended at any time, and would have as of April 30, 2008, even absent the Respondents’ adverse personnel actions. Consequently, upon balancing the significant adverse impact of Mr. Smith’s loss of employment with the actual nature and characterization of that employment, I find an award of compensatory damages in the amount of $25,000 is appropriate.

29 Mr. Smith indicated that when he started working at Catawba as a fire watcher, the job was only suppose to last two weeks, RDX 80 and RXD 81.

30 Mr. McConnell’s testimony. TR, pp. 865-900.

31 See also September 29, 2010 Decision and Order, footnote 17 (“Mr. Smith’s . . . testimony about the severe consequences of his loss of employment was clearly heartfelt and sincere.”).

32 TR, pp. 818-833.
Litigation Expenses and Attorney Fees

In the event, Mr. Smith receives a final determination that establishes a violation of the Act, he may also submit an attorney fee application to recover litigation costs and attorney fees incurred during the course of the prosecution of his whistleblower complaint. However, since the appropriate relief set out above, which totals a little less than $98,000.00, only represent a partial recovery of the claimed amounts of over $1.5 million in back pay and loss of earning capacity, and $250,000.00 in compensatory damages, both parties may need to address the application of the analysis set out by the U.S. Supreme Court, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Alternative Findings Summary

Again, in the event the ARB subsequently determines that the *Watson* case, which permits use of the contents of a protected activity which also reveals misconduct by the whistleblower in establishing an affirmative defense, is not applicable to Mr. Smith’s whistleblower complaint and/or vacates my determination that the Respondents have established their affirmative defenses which preclude relief under the Act, I find:

1. The Respondents, Duke Energy and DZ Atlantic, shall pay Mr. William Smith back pay in the amount of $14,960.00, plus the applicable pre-judgment interest at the rate specified in 26 U.S.C. § 6621(a)(2), compounded quarterly, to restore Mr. Smith to the same position that he would have been in had he remained a temporary fire watcher at Catawba until his position was cancelled at the end for April 2008.

2. The Respondents, Duke Energy and DZ Atlantic, shall pay Mr. William Smith back pay in the amount of $58,000.00, plus applicable pre-judgment interest at the rate specified in 26 U.S.C. § 6621(a)(2), compounded quarterly, to restore him to the same position that he would have been in had he become an armed security officer at the Wolf Creek nuclear facility. This back pay award shall be offset by any earned income Mr. Smith received from December 5, 2009 through January 31, 2011.

3. The Respondents, Duke Energy and DZ Atlantic, shall pay Mr. William Smith compensatory damages in the amount of $25,000.

4. The Respondents, Duke Energy and DZ Atlantic, shall pay Mr. William Smith necessary and reasonable litigation expenses and attorney fees, as subsequently determined upon submission of an attorney fee petition.
Conclusion

As determined by the ARB, Mr. Smith’s has proven that his protected activities were a contributing factor in the Respondents’ adverse personnel actions. However, Duke Energy and DZ Atlantic have proven by clear and convincing evidence that they would have taken the same adverse personnel actions if they had learned of Mr. Smith’s seven day delay in reporting the fire watch falsification, and the circumstances of that disclosure, through some means other than the contents of his protected activities. Accordingly, under the provisions of 42 U.S.C. § 5851(b)(3)(D), as implemented by 29 C.F.R. § 24.109(b)(1), “relief may not be ordered” and Mr. Smith’s ERA whistleblower complaint must be dismissed.

ORDER

The ERA whistleblower complaint of Mr. William Smith is DISMISSED.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: January 14, 2014
Washington, DC
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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party’s legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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.