



Issue Date: 13 January 2017

Case No.: **2013ERA00010**

In the Matter of:

RICKY LADD,
Complainant,

v.

BABCOCK & WILCOX CONVERSION SERVICES,
Respondent.

Appearances:

Mick G. Harrison, Esq.
Bloomington, Indiana
For the Claimant

Mark J. Gomsak, Esq.
Fisher & Phillips LLP
Louisville, Kentucky
For the Employer

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER DISMISSING CLAIM

This proceeding arises from a claim of whistleblower protection under the Energy Reorganization Act (ERA), as amended.¹ The ERA and implementing regulations² protect employees from discharge, discipline, and other forms of discrimination for engaging in protected activity such as reporting violations of nuclear safety rules. In this case, the Complainant, Ricky Ladd, alleges that he was terminated from his position as a cylinder yard operator for the Respondent, Babcock & Wilson Conversion Services (“BWCS”), because he reported unsafe cylinders and conditions in the yard.

¹ 42 U.S.C. § 5851 (2014).

² 29 C.F.R. Part 24 (2015).

I. STATEMENT OF THE CASE

Ricky Ladd filed a complaint with the Occupational Safety and Health Administration of the Department of Labor (“OSHA”) on November 30, 2012. He alleged that BWCS suspended him on October 5, 2012, and terminated him on October 17, 2012, because he engaged in activity protected by the ERA by raising safety concerns. On April 5, 2013, the Regional Administrator for OSHA issued his findings on the complaint. The Administrator found no reasonable cause to believe that BWCS had violated the statute. Mr. Ladd objected to OSHA’s findings and requested a hearing on May 6, 2013.

Before the hearing, BWCS filed a motion for summary decision seeking dismissal of the claim. I denied the motion in an order issued on November 3, 2014.

I conducted a hearing on this claim for four days from October 13–16, 2015, in Paducah, Kentucky. Both parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. Part 18.³ At the hearing, Complainant’s Exhibits (“CX”) 6–8, CX 10, CX 12, CX 13, CX 15–17, CX 19, CX 20, CX 22, pp.1 and 9 of CX 23, CX 25–29, pp. 1–3 of CX 30, CX 31–52, CX 55, and CX 64, and Respondent’s Exhibits (“RX”) 2, RX 3, RX 5–35, RX 40–41, RX 56–64, RX 66, RX 67, and RX 71–73, were admitted into evidence. Missing numbers from the sequences of exhibits were either not offered, or excluded from evidence. Except for Mr. Ladd and the representative for BWCS, Foy Meyer, the witnesses were separated, and, therefore, did not hear each others’ testimony. The record was held open after the hearing to allow the parties to submit closing and reply briefs. Both parties submitted briefs and reply briefs, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at hearing and the arguments of the parties.

II. ISSUES

The issues in this case are whether Mr. Ladd has established by a preponderance of the evidence that BWCS violated the ERA when it terminated his employment in October 2012, and if so, whether BWCS has established by clear and convincing evidence that it would have fired him even absent his protected activities. If Ladd has established a violation of the Act, and BWCS has failed to establish that he would have been fired anyway, then what remedies should be awarded is also at issue.

Mr. Ladd was reinstated in July 2014 pursuant to an arbitration award. BWCS terminated Mr. Ladd a second time in August 2014. Mr. Ladd filed a claim with OSHA over that discharge as well. That claim is not before me, and I have not considered it or the circumstances surrounding it in reaching my decision on this claim.

³ 29 C.F.R. Part 18A (2015).

III. APPLICABLE STANDARDS

The Employee Protection section of the ERA provides:

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.⁴

The ERA “is designed to protect workers who report safety concerns and to encourage nuclear safety generally.”⁵ To be protected, the employee’s activity must definitively and specifically implicate nuclear safety.⁶

The parties’ burdens of proof in an ERA case are set forth in the Act as follows:

(C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior

⁴ 42 U.S.C. § 5851(a)(1)(A)-(F) (2014).

⁵ *American Nuclear Resources, Inc. v. U.S. Department of Labor*, 134 F3d 1292, 1295 (6th Cir. 1998).

⁶ *Id.*; *Hoffman v. Nextera Energy, Inc.*, ARB No. 12-062, ALJ No. 2010-ERA-11 (ARB Dec. 17, 2013), slip op. at 8.

described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(D) Relief may not be ordered under paragraph (2) 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.⁷

These are the same burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”).⁸ In order to prevail on his case Mr. Ladd must show that he engaged in a protected activity, he suffered an adverse action, and the protected activity was a contributing factor in the adverse action. If these elements are satisfied, the burden shifts to BWCS to show by clear and convincing evidence that it would have taken the adverse action taken regardless of Mr. Ladd’s protected activity.⁹ Thus BWCS can prevail if it demonstrates either that Mr. Ladd cannot establish one of the three listed elements, or that it would have taken the action it did regardless of his protected activity.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

Mr. Ladd was employed by BWCS. BWCS is a contractor for the United States Department of Energy (“DOE”). BWCS is a conversion facility that inspects and transports large cylinders of depleted uranium hexafluoride (“DUF6”) which is to be converted into uranium oxide and hydrofluoric acid. Uranium oxide is less hazardous and more stable than DUF6. BWCS is a Department of Energy contractor and stipulated that the work done by BWCS and Mr. Ladd in Paducah is covered by the ERA. Tr. at 26. Mr. Ladd was one of six hourly employees assigned to cylinder yard operations. The hourly employees are represented by the United Steel Workers Union, Local 550. BWCS took over the contract in March 2011. Mr. Ladd had been employed by the previous contractor (although discharged and then reinstated pursuant to proceedings related to the labor agreement), and stayed when the contract was awarded to BWCS. BWCS suspended and then terminated Mr. Ladd a year and a half later in October 2012. In his complaint to OSHA, Mr. Ladd alleged that BWCS suspended and terminated him in retaliation for raising safety issues, specifying four instances in which he raised questions regarding concrete barricades in October 2011, Honeywell cylinders in November 2011, Energy Northwest cylinders in June/July 2012, and cylinder yard dust in July/August 2012. After the hearing, Mr. Ladd also argued that his participation in validation of Technical Safety Requirement (“TSR”) procedures was a factor. Co. Bf. at 3. In addition to Mr. Ladd’s complaint to OSHA about his discharge, the Union also pursued a grievance on Mr. Ladd’s behalf which went to arbitration, resulting in an order that he be reinstated after a 60-day suspension and undergo counseling. Mr. Ladd returned to work pursuant to the arbitration award in July 2014.

⁷ 42 U.S.C. § 5851(b)(2)(C) and (D).

⁸ 49 U.S.C. § 42121(b)(2)(B)(iii) and (iv) (2014).

⁹ 42 U.S.C. § 5851(b)(2)(C) and (D); *Palmer v. Canadian National Railway/Illinois Central Railroad Co.*, Case No. 16-035 (ARB Sept. 30, 2016) (*en banc*) (FRS), PDF at 52; *Bobreski v. J. Givoo Consultants, Inc.*, Case No. 13-001 (ARB Aug. 29, 2014) (ERA), PDF at 15–16.

1. Alleged Protected Activity

Mr. Ladd alleges that he engaged in “five key activities protected by the ERA.” Co. Bf. at 3. Specifically, he argues that the protected activities he “expressed concerns” about were: 1) TSR concrete barricades, 2) Honeywell cylinders, 3) Energy Northwest cylinders, 4) cylinder yard paint and dust residue, and 5) validation of TSR procedures. Co. Bf. at 3. Mr. Ladd argues that each of these five protected activities involved him “raising concerns or questions either regarding the potential mishandling of materials that were or may have been contaminated with radioactive substances, or regarding Respondent’s actions or inaction that could impact the safety of workers or the public related to radioactive materials.” Co. Bf. at 3. A summary of each is below.

a) TSR Concrete Barricades (October 2011)

On or about October 28, 2011, Mr. Ladd informed his supervisor that certain concrete barricades needed to be painted to reflect their “TSR” designation. Tr. 27–30, 618–620. As previously stated, TSR stands for “Technical Safety Requirement.” Tr. 26. TSRs provide administrative controls to prevent safety hazards. Tr. 26, 489. Part of the TSR for the conversion facility specifies the use of “vehicle barriers” to provide physical protection to specified areas. Tr. 27; CX 10. Only one barrier protecting the nitrogen storage tanks and hydrogen generation units had the TSR designation painted on it. Tr. 27–30, 618–620, 649. Mr. Ladd thought that the barriers without the TSR designation violated DOE technical safety requirements and posed a danger. Tr. 618–620. He was concerned that a barricade might be moved and an accident could occur as a result. Tr. 618–619.

b) Honeywell Cylinders (November 2011)

Honeywell operates a uranium hexafluoride (“UF6”) processing facility. Tr. 32, 530. BWCS had an agreement with Honeywell that required Honeywell deliver washed, clean, and empty cylinders. Tr. 113, 545; RX 12-2; CX 10. Honeywell guaranteed that the cylinders contained only natural UF6 and was expected to perform radiological surveys on the cylinders before shipping to BWCS. RX 12-2; Tr. 545. Honeywell delivered the cylinders to an area outside of BWCS’s fenced facility, but still on DOE’s guarded property, which was not open to the public. Tr. 115, 549. The crew would use heavy equipment to offload the cylinders and then perform a visual inspection. Tr. 115, 550. Following the visual inspection BWCS Health and Safety technicians would perform radiological surveys to ensure compliance with government regulations. Tr. 115, 494, 563; CX 10.

On or about November 2, 2011, Mr. Ladd and others unloaded some cylinders that were shipped from Honeywell and performed an inspection. Tr. 620–622. Soon thereafter BWCS Health and Safety technicians began inspections of the cylinders. *Id.* The contamination levels detected exceeded BWCS’s administrative acceptance threshold and were not compliant with the BWCS/Honeywell agreement. Tr. 36, 113, 492, 498, 524, 544–545; CX 10; RX 14. BWCS refused the shipment and sent them back to Honeywell. Tr. 36, 535; RX 14; CX 10.

With regard to the November 2, 2011, Honeywell cylinder delivery, Mr. Ladd raised concerns about the detection of “spot” or “removable” external radiological contamination on two of the Honeywell cylinders and the absence of a Radiological Work Permit for the handling of these contaminated cylinders. Tr. 33, 121–124, 622; RX 15. Mr. Ladd also inquired why there was no Integrated Safety Management System analysis or procedure performed in regard to the contaminated Honeywell cylinders. RX 15. Mr. Ladd additionally raised concerns about the threat of radioactive contamination release during the transport of the cylinders back to Honeywell. *See* RX 15. After this incident Mr. Ladd met with Mr. Deland and Mr. Matheiss and expressed concern that BWCS’s procedures were inadequate to protect workers. Tr. 43–45.

c) Energy Northwest Cylinders (June–July 2012)

The United States Enrichment Corporation (“USEC”) began shipping cylinders containing low-enriched uranium to BWCS on June 1, 2012. Tr. 45; CX 10. USEC and BWCS cylinder storage yards are both owned by DOE and are adjacent to each other. Tr. 131, 567; CX 10. USEC conducted radiological surveys of the cylinders prior to conveying them to BWCS for storage. Tr. 132, 566. Because USEC had surveyed the cylinders prior to shipment, there was no requirement that BWCS survey the cylinders. Tr. 133–134, 175, 567. USEC stored the survey results in a computer database that BWCS could access. Tr. 133, 893.

Mr. Ladd requested copies of the USEC radioactive contamination surveys for the cylinders being shipped to the yard where he worked. Tr. 45–46, 622–623. He also complained that BWCS was not surveying the cylinders for contamination before the cylinder crew offloaded them from USEC. Tr. 622, 625; RX 33. Mr. Ladd requested that Health and Safety Technicians survey the cylinders for radioactive contamination when received before he and others had to perform work on the cylinders. Tr. 45–46, 622–623.

d) Cylinder Yard Dust (July–August 2012)

In about July or August of 2012, cylinder crew member, Jeff Beal, complained about the dust that was stirred up by vehicles driving through the yard. Tr. 135-136, 601; CX 7-27, 59. During the following Monday’s meeting, Mr. Ladd requested that the rust and paint that falls from the cylinders, which contributed to the dust, should be sampled for radiological contamination. Tr. 55, 501–502, 623–624; CX 7-59.

e) TSR Procedure Validation (August–September 2012)

Mr. Ladd was involved in validating TSR procedures. Tr. 644–646. He insisted that BWCS procedures be amended to ensure safety during the handling of cylinders containing uranium. *Id.* He insisted that the maintenance requirements from the manufactures’ owners’ manual and safety bulletins be incorporated into the procedures for the “telehandler” machine that is used to move cylinders. *Id.* Mr. Ladd was concerned that if the manufacturers’ maintenance and safety procedures were not followed that the telehandler could fail when moving cylinders and drop or breach a cylinder. *Id.*

2. Testimony at Hearing

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence, while analyzing and assessing its cumulative impact on the record.¹⁰ An Administrative Law Judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony.¹¹

a) Testimony of Charles Deland

Mr. Deland is the Logistics and Project Manager at BWCS. Tr. 18. He testified that BWCS's mission is to take leftover material from the fuel enrichment process and convert it to a more stable form for long-term storage and disposal. Tr. 18. Mr. Deland supervises Tommy Vaughn and John Wallace. Tr. 22–23. Mr. Ladd worked under the supervision of Mr. Vaughn. Tr. 23. He agreed that Documented Safety Analysis (“DSA”) identified potential hazards for the plant, while Technical Safety Requirements (“TSR”) are established to attempt to mitigate or protect from those identified hazards. Tr. 27.

Mr. Deland recalled that Mr. Ladd raised a safety concern around October 28, 2011 related to a TSR barricade. Tr. 27. The barricades protect the cylinder staging area from vehicle crashes. Tr. 29. He said that Mr. Ladd was concerned that all of the barricades did not have TSR painted on them. Tr. 27. The TSR barricades were never painted. Tr. 29.

Mr. Deland also recalled that around November 2, 2011, Mr. Ladd raised a safety concern regarding two cylinders from Honeywell that had a spot contamination. Tr. 32–33. The contamination was detected with a radiological survey upon delivery prior to accepting the cylinders. Tr. 33–34. The cylinders were rejected because of excessive contamination. Tr. 36. Mr. Ladd's group was assigned to unload the cylinders. Tr. 37. Mr. Deland did not know whether the radiological survey was performed before or after Mr. Ladd's group approached the cylinders. Tr. 37. Mr. Deland attended a meeting with Mr. Ladd and Mr. Matheiss, the Safety Manager, in which the acceptable levels of contamination on cylinders was discussed. Tr. 43–44. He recalled that Mr. Ladd was not satisfied with the procedures in place to protect the workers dealing with cylinders. Tr. 44–45. Mr. Ladd terminated the meeting because he thought Mr. Deland was harassing him. Tr. 128.

Mr. Deland recalled that in December 2012 BWCS received 321 cylinders from Energy Northwest, which contained low-enriched uranium, to store and monitor until Energy Northwest could dispose of them. Tr. 45. He stated that Mr. Ladd complained that he did not have access to the surveys performed by USEC prior to handling the cylinders and did not know why BWCS was not performing its own radiological survey on the cylinders. Tr. 46, 130. Mr. Ladd and the cylinder yard crew were asked to remove plastic bags from valves on the cylinders. Tr. 47.

¹⁰ See, e.g., *Frady v. Tennessee Valley Authority*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995) (citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971).

¹¹ See, *Altemose Constr. Co. v. National Labor Relations Board*, 514 F.2d 8, 15 n. 5 (3d Cir. 1975).

Mr. Deland testified that he did not know if a radiological survey was performed on the cylinders before they were required to remove the bags, but knew that a survey was performed within two weeks thereafter. Tr. 48. BWCS trusted USEC to perform its own survey prior to shipping the containers. Tr. 49.

Mr. Deland testified that In July or August 2012 Mr. Ladd raised a concern over rust and paint residue in cylinder yards, and the need to test that material. Tr. 54–55, 135. He agreed that the containers could rust and the paint could chip and fall off, which may lead to material accumulating in the yard over time. Tr. 54, 135. Mr. Deland testified that Mr. Matheiss' group performed the testing and found no contaminants. Tr. 55, 135.

Mr. Deland testified that members of the local union officials brought to his attention the potential of a hostile work environment in the cylinder crew where Mr. Ladd worked. Tr. 56. He stated that Sue Arnold, the Human Resources manager, conducted that investigation. Tr. 57. He believed that Ms. Arnold interviewed employees as part of the investigation, but he was not certain. Tr. 58. He acknowledged that Mr. Ladd was notified on October 5, 2012, that he was placed on suspension. Tr. 58. He was only involved in that decision “from a limited standpoint.” Tr. 59. Mr. Deland was not directly involved in the decision to suspend Mr. Ladd, but provided input and was privy to the discussions. Tr. 59. However, he concurred with the decision. Tr. 60, 61. He testified that “the hostile work environment was on a Friday. And then, [Mr. Ladd’s] blowup was on a Monday.” Tr. 60. He recalled that on about October 17, 2012, Mr. Ladd was notified that his employment was being terminated. Tr. 62. He was not involved in that decision, but attended the meeting where Mr. Ladd was notified of the termination. Tr. 62, 65.

Mr. Deland testified that union officials were “concerned” about Mr. Ladd’s behavior on Friday, then he received an email on Saturday that three other employees had “concerns” about Mr. Ladd, and then on Monday Mr. Ladd had a “blow up” with Mr. Vaughn. Tr. 155. He thought there was “a serious issue going on with Mr. Ladd.” Tr. 155. He testified that his recollection of the hostile work environment was “an impromptu meeting between the union officials and the cylinder yard crew over [Mr. Ladd] writing grievances for the entire crew. And the crew had expressed that they didn’t want that to be done. And from what the union officials told [him], the conversation and the meeting became heated.” Tr. 101. He stated that his understanding was that BWCS terminated Mr. Ladd “for the grievous nature of the [September 24, 2012] blow up between [Mr. Ladd] and Tommy Vaughn with Amanda McNeely between them.” He testified that to his knowledge Mr. Ladd was neither disciplined nor terminated because he raised safety concerns about the TSR barricades, Honeywell cylinders, Energy Northwest cylinders, or dust in the yard. Tr. 110, 130, 134 –135, 136. He stated that he did not really know the company’s reason’s for terminating Mr. Ladd. Tr. 167.

b) Testimony of Susan Arnold

Ms. Arnold has been the Human Resources manager for BWCS since March 29, 2011. Tr. 212. Her duties include suspension and termination of employees. Tr. 214. With regard to the decision to terminate Mr. Ladd, she testified:

There was an event that occurred at the site in the [sic] September, late September time frame where Mr. Ladd had a violent altercation with a supervisor and an employee. He was alleged at that time to have been screaming at his supervisor with the administrative assistant between them. And I was made aware of that situation and I went to the site to investigate to determine if the allegations were in fact, correct. And after communicating with the individuals involved and other witnesses, we took statements. And it was determined that the allegations were correct. At that point, Mr. Ladd was given an opportunity to give his side of the story and we received no additional information from Mr. Ladd. At that point, we reviewed the information that we had from the investigation. And I made the recommendation based on the interview notes, based on Mr. Ladd's behavior, based on the fear that people had of the work environment of Mr. Ladd and his behavior, that termination for that event was significant enough.

Tr. 218. Based on her investigation, she determined that the individuals she interviewed were fearful and working in a hostile work environment. Tr. 220. She testified that Mr. Ladd's actions "led people to believe that violence would ensue from that activity." Tr. 245. No violence actually occurred. Tr. 245. She stated that the witnesses reported the use of vulgar language during the incident. Tr. 246.

Ms. Arnold testified that:

After I received the complaints from the employees. And the employees had requested that I not go immediately after the event because they were fearful of retaliation from Mr. Ladd if I was doing an investigation. And this was based on their previous experiences. When we investigate a situation, Mr. Ladd then approaches each individual and badgers them to tell them exactly what they're discussing with management or others. And so therefore, I was concerned for their -- their safety and retaliation on the part of Mr. Ladd with my ability to get a -- an honest, open response to my questions during the investigation.

Tr. 247. She described a situation where she personally experienced Mr. Ladd's anger. She testified:

I observed personally in a situation where Mr. Ladd was unhappy with a conversation we were having. I was sitting behind the HR manager's desk. Mr. Ladd was sitting by the door. His steward was standing beside me. We were talking about an ERT situation. Mr. Ladd basically looked at me because he was unhappy with what I was saying, and proceeded to tell me that Mr. Ladd just wants what's due Mr. Ladd. And I watched Mr. Ladd go from zero to 75, keep saying the same thing over and over again as he proceeded to get red in the face until his steward had to tell him to calm down. And it concerned me for my personal safety because he was between me and the door as he was elevated in his discussion with me to the point just ratcheted [sic] from screaming where Ricky Ladd is due -- just wants what's due Ricky Ladd. He kept repeating that. And I know in my mind because of how he was becoming so agitated, I was concerned

that he was between me and the door. And there was no way I could get out of that room without going past Mr. Ladd. And I vowed from that day, that I would not have him between me and an exit. So sir, I did experience Mr. Ladd's agitation, his going from zero to states of -- I don't know how to describe it. But he just got so elevated, so angry, that I had a personal concern for my safety that day. So yes, sir, I have experienced it myself. Have I witnessed it in another employee? No. But I do -- I could empathize because of what happened to me.

Tr. 248; see *also* Tr. 370. She stated that this incident was not part of the basis for Mr. Ladd's termination. Tr. 249. The investigation began while Mr. Ladd was on vacation around October 5, 2012. Tr. 250. The investigation was not completed before Mr. Ladd returned from vacation so he was placed on suspension in order to complete the investigation without his interference. Tr. 250. The witnesses were interviewed by Mr. Haley. Ms. Arnold was not present while Mr. Haley interviewed the witnesses. Tr. 261. His role was to verify the information that Ms. Arnold had gathered in the witness statements. Tr. 261. Ms. Arnold wanted Mr. Haley involved so that Mr. Ladd's rights would be protected and so that she would not unduly influence the outcome. Tr. 264. The witness statements were used to verify that Mr. Ladd's behavior was "abhorrent" and that he was angry, unprofessional, and violated company policy. Tr. 266. Based on the completed investigation, after Mr. Ladd had opportunity to provide information, the recommendation was termination. Tr. 267. She testified that Mr. Deland and Mr. Vaughn both recommended the termination of Mr. Ladd's employment. Tr. 271.

Ms. Arnold testified that she did not understand Mr. Ladd's issue with concrete barriers. Tr. 272. She also did not know what Mr. Ladd's concern about dust on the concrete was about. Tr. 274. She was unaware that Mr. Ladd had requested that the company sample rust and paint residue in the yard. Tr. 274. She did not know what Mr. Ladd's concern was with the cylinders from USEC. Tr. 275. However, she was aware that Mr. Ladd had concerns with the Honeywell cylinders, but was unaware "of the in depth concerns Mt. Ladd had about them." Tr. 302.

Mr. Ladd was told in a morning meeting to put his concerns in writing so they would not be forgotten. Tr. 302. Ms. Arnold observed Mr. Buckley, the safety representative for the union, and Mr. Ladd speaking in a hallway. Tr. 302. She wanted to be sure that Mr. Buckley knew that the company was serious about the safety concerns that Mr. Ladd raised, so she joined the conversation. Tr. 302-303. She asked Mr. Buckley to take the safety concerns seriously and document them. Tr. 303.

Ms. Arnold testified that based on the investigation she concluded that Mr. Ladd was not doing his job. Tr. 278. When Mr. Ladd was assigned to work with a particular individual they would have to "pick up his job duties and his job assignments." Tr. 279. She did not know if Mr. Ladd was not doing his job because he had a safety concern about the work. Tr. 279. She testified that he willfully hindered or limited operations by asking incessant questions about procedures. Tr. 279-280. He would ask questions harassing the crew and would badger Tommy Vaughn and the supervisors because he didn't like the answers. Tr. 280. Mr. Ladd would badger other employees about filing grievances until the supervisor would have to step in. Tr. 280. She did not investigate from a safety perspective. Tr. 281. She "had no knowledge of the number of times or what he was raising in the safety area." Tr. 281. She stated "Mr. Ladd had every right to

raise as many safety concerns as he deemed fit. And we would investigate every one of those concerns. My investigation was focused on his badgering, harassing behavior. And that was what I was focused on, not the safety concerns.” Tr. 282. She stated that safety concerns had nothing to do with Mr. Ladd’s termination. Tr. 282. He “was terminated for his behavior towards his supervisors and Ms. McNeely.” Tr. 282–283. Ms. Arnold stated that Mr. Ladd’s behaviors “that directly impacted the decision to terminate was the behavior of this altercation with his supervisor and Amanda McNeely, and the way he treated and intimidated his fellow employees. He was creating a hostile work environment for the work place. And that is against company policy. That behavior is egregious enough for termination.” Tr. 312. Ms. Arnold, Tom Robinson, and George Dials were the final decision makers in Mr. Ladd’s termination. Tr. 288.

c) Testimony of William Haus

Mr. Haus is an Industrial Program Manager for BWCS. Tr. 486. He recalled that BWCS received two cylinders from Honeywell that were above the acceptance criteria. Tr. 491. He said the levels were not “excessive,” but were greater than what they wanted to accept. T. 493. The cylinders were returned to Honeywell that day. Tr. 496. He recalled another occasion when cylinders arrived from Honeywell with liquid inside, which was not consistent with their acceptance criteria. Tr. 497. Mr. Haus recalled a time when he was investigating Mr. Ladd’s concern that the rust and paint residue in the yard needed to be tested. Tr. 501. The testing found trace levels of lead, arsenic, and standard metallic vallidium, chromium, and standard alloys of steel or zinc at trace levels “well below threshold limit levels. Tr. 504. Mr. Haus did not find it unreasonable that Mr. Ladd desired to know the results of the radiological surveys before working with cylinders. Tr. 527–528. He testified that he was not directly involved with the USEC and Energy Northwest cylinders. Tr. 565–566.

Mr. Haus has worked “off-and-on” with Mr. Ladd since the mid-nineties. Tr. 572. He testified that he has seen Mr. Ladd become angry or agitated a few times. Tr. 572. He said that Mr. Ladd would “turn red” and “bulk up,” or stomp out of the room. Tr. 573. He testified that this occurred when Mr. Ladd thought his concerns were not being addressed. Tr. 603. He never witnessed Mr. Ladd threaten to harm anyone. Tr. 604–605.

d) Testimony of Ricky Ladd

Mr. Ladd testified that he was terminated from a company called UDS in May 2010 and was reinstated in March 2011 to work for BWCS. Tr. 617–618. Mr. Ladd testified about his safety concerns.

Mr. Ladd said that he informed his supervisor, Mr. Vaughn, in a morning briefing that only one barricade in a line of 30 or 40 was marked as required by TSR. Tr. 618. This occurred around October 28, 2011. Tr. 690. Mr. Ladd was concerned that one of the unmarked barricades could be moved and then a “catastrophic event” could take place. Tr. 619. He suggested to his supervisor that either the single painted barricade was out of place and needed to be moved or all the barricades needed to be painted. Tr. 620.

Mr. Ladd testified that on November 3, 2011, he raised a concern about Honeywell cylinders that arrived with removable radiological contamination on them. Tr. 621. This occurred around November 2, 2011. Tr. 690. He testified that workers had already begun working on the cylinders before the radiological people arrived and began taking surveys. Tr. 621. Before the inspectors arrived they had already removed the cylinders off the truck, placed them on Montana Avenue, and began to inspect them. Tr. 621, 717. Mr. Ladd said he submitted five safety issues with regard to those cylinders. Tr. 621–622.

Mr. Ladd testified that he raised concerns about cylinders from USEC that were being received without a radiological survey being performed. Tr. 622. This occurred around June 2012. Tr. 690. He testified that they were required to remove plastic bags that were covering the valves on those cylinders. Tr. 623. He requested that Mr. Vaughn show him the surveys performed by USEC on those cylinders about four or five times. Tr. 623. Ms. McNeely provided the surveys to Mr. Ladd after about one month. Tr. 623. He said he did not feel comfortable taking cylinders without perform a survey. Tr. 625. After he got to see the surveys performed by USEC he dropped the issue. Tr. 757.

Mr. Ladd recounted that around July or August 2012 he informed Mr. Vaughn that there needed to be testing of the rust and paint residue in the cylinder yard. Tr. 623, 690. Mr. Ladd felt there could be contaminants in the yard from the rust and paint on the cylinders. Tr. 624.

Mr. Ladd was involved in the validation of three to five procedures while he was employed with BWCS. Tr. 644. One such procedure was the use of the telehandler to move the cylinders. Tr. 645. He said that a failure of the telehandler would result in a dropped cylinder and possibly a breach. Tr. 645.

Mr. Ladd went on vacation on October 2, 2012. Tr. 627. During his vacation, on about October 5, he received a call from Mr. Harris, who informed him that he was being placed on unpaid suspension pending an investigation. Tr. 627. The union requested information about the reasons for Mr. Ladd's suspension, but the company was unwilling to disclose that information at that time. Tr. 633. Mr. Ladd received a response detailing the reasons for his suspension on October 12. Tr. 633. Mr. Ladd asked the company in an email who was looking out for his interests, but did not receive a response. Tr. 634. He also requested a copy of the allegations against him and did not receive a response. Tr. 634.

Mr. Ladd denied that he routinely yelled and cursed at his coworkers. Tr. 637. He admitted that he told Mr. Vaughn that he “was getting tired of this [expletive] [expletive].” Tr. 647. Mr. Ladd said he apologized immediately after making the statement. Tr. 648. He denied frequently using foul language in the workplace. Tr. 662. He testified that this incident was in regard to a changed escorting policy. Tr. 647. He denied that he intentionally delayed the start of work by asking nonsensical questions under the guise of safety concerns. Tr. 637. He said he has been “persistent” about asking questions. Tr. 664. He denied that he willfully neglected his duties or hindered operations. Tr. 662. He stated that BWCS never provided him with examples of occasions that he refused to perform work, neglected his duties, or hindered operations. Tr. 637, 662. He denied harassing other employees or interfering with other employees' duties. Tr. 663. He had no intention of creating a hostile work place environment nor

did he believe he did anything that created such an environment. Tr. 664. He had no intention of creating “in the mind of someone else a reasonable fear that [he] might injure them.” Tr. 664. Mr. Ladd felt that he was given insufficient information on the particulars surrounding his termination to adequately prepare a defense to the allegations against him. Tr. 641. Mr. Ladd disagreed with Ms. McNeely’s email that stated Mr. Ladd’s behavior had gotten worse with hateful and violent behavior. Tr. 647. Mr. Ladd denied that he ever engaging in violent behavior or threatened Ms. McNeely. Tr. 647. He also denied ever threatening Mr. Vaughn. Tr. 648. Mr. Ladd stated that he was unaware of anyone ever being disciplined for sleeping on the job. Tr. 650. He denied badgering the crew and slowing down the work to get overtime. Tr. 650. He testified that he was never disciplined for anything. Tr. 668.

Mr. Ladd recalled the conversation he had on September 24, 2012, with Mr. Vaughn and Ms. McNeely present. Tr. 651. He said the Mr. Vaughn instructed him to go straight to the gate and open it up for the construction crew. Tr. 652. Mr. Ladd informed Mr. Vaughn that escorting or giving access to the cylinder yard was union work. Tr. 652. And Mr. Vaughn informed Mr. Ladd that “things had changed.” Tr. 652. Mr. Ladd replied that he was getting tired of this expletive expletive, apologized, and walked out. Tr. 652. He also recalled the conversation with Mr. Buckley the morning after the Honeywell cylinder incident. Tr. 653. He said that he was speaking with Mr. Buckley between a set of doors and Ms. Arnold opened the door, questioned why he was speaking with Mr. Buckley and informed him that if he had anything to say about safety it needed to be documented. Tr. 653. Mr. Ladd also testified about a conversation he had with Ms. Jolley when the company tried to take the bioassays away from the cylinder yard employees. Tr. 659. He “fought for the men to keep it,” and they did get to keep the bioassays. Tr. 659.

He testified that his coworkers accused him of slowing work by raising procedure questions and safety concerns. Tr. 759. He said he felt that his questions were appropriate to the procedures. Tr. 759. He also stated that he had asked questioned on a daily basis. Tr. 759. To his knowledge there was nothing in his coworker’s statements that was true. Tr. 759. He thought they made the statements because they were tired of being called to participate in investigations. Tr. 760. He also speculated that his coworkers no longer wanted to work with him. Tr. 764. He stated that they were lying to get rid of him. Tr. 765. Mr. Ladd felt that his coworkers no longer wanted to work with him because they thought he was a trouble maker for raising safety concerns. Tr. 766. He further testified that in a meeting on September 21, 2012, Donna Steele had instructed union officials to report a hostile work environment. Tr. 769.

e) Testimony of Dr. Kenneth Manges

Dr. Manges provided an evaluation of Mr. Ladd on behalf of the Respondent on August 28, 2015. Tr. 814–815. He spent approximately four hours with Mr. Ladd; two hours were spent answering questionnaires and two hours were spent in interview. Tr. 815. Dr. Manges conducted a psychological and vocational evaluation. Tr. 815. Based on his examination he provided a report. Tr. 817; *see* RX 58. He diagnosed Mr. Ladd with obsessive compulsive disorder. Tr. 821. Dr. Manges testified that Mr. Ladd “evidenced some limited insight and some delusional beliefs. So that acted again, at the work site, having the belief that other peoples or other persons, coworkers were conspiring against him, as well as the company was subjecting

him to conditions that were threatening to his life.” Tr. 823–824. Dr. Manges further testified that Mr. Ladd’s obsessive compulsive disorder would have also manifested as “[t]he need to be right, the need to insist upon a particular order of things and being – having to quote, chapter and verse with regards to training and manuals of training.” Tr. 827. Dr. Manges also diagnosed Mr. Ladd with depression and anxiety. Tr. 828. He opined that Mr. Ladd “already had a preexisting depression and anxiety that was substantially aggravated by the suspension and termination.” Tr. 833. He testified that Mr. Ladd is agitated, upset, and dislikes other people. Tr. 843. Dr. Manges opined that Mr. Ladd could “return to work within a reasonable degree of psychological certainty after achieving MMI, which is opined to be approximately 50 sessions of out-patient, individual therapy and continuation with his current medications.” Tr. 841.

f) Testimony of Amanda McNeely

Ms. McNeely has worked for BWCS since April 2011. Tr. 877. She is the production support administrative assistant. Tr. 878. She works in a trailer at the back of the conversion building. Tr. 878. She is part of the cylinder yard operations. Tr. 878. During 2012 she worked as part of the cylinder yard crew as the cylinder yard data base clerk. Tr. 878. Mr. Ladd worked in the same group. Tr. 879.

Ms. McNeely testified that she filed an employee concern about an argument that she “was put in the middle of ... that got completely out of hand.” Tr. 881; *see* RX 41. She stated that on September 24, 2012, in the break room of the trailer she worked in, Mr. Ladd came into a meeting and “started yelling about something he disagreed with. He was yelling profanity toward Tom Vaughn and Wally Deland. He was very close to them. I never turned around. I was scared.” Tr. 882. She recalled that Mr. Ladd was upset about escorting people in the cylinder yard. Tr. 883. She noted on the employee concern that the cylinder crew, herself, and her supervisor were in a hostile work environment. Tr. 885. She said “[a]s time went on, there was more door slamming, just more arguing over there in our trailer, just – just constant. It just kept going on and on and on and on as time got – went by, and then the blow up that I talked about with Tom Vaughn.” Tr. 885.

Ms. McNeely requested assurances that she would not have to work with Mr. Ladd in the future. Tr. 911. Ms. Arnold and Mr. Harris told her they would try to make sure she would not work with him again. Tr. 912. They provided no guarantee. Tr. 917. Ms. McNeely recalled that around October 1, 2012, Mr. Ladd went on vacation and then was subsequently suspended. Tr. 918.

g) Testimony of Paul Almon

Mr. Almon has worked for BWCS for five years and is currently the plant support group operator. Tr. 923–924. He works at the cylinder yard. Tr. 924. He and Mr. Ladd were coworkers. Tr. 924. Mr. Almon recalled a meeting in September 2012 between the cylinder yard employees and union officials. Tr. 924. During the meeting there was concern over potentially contaminated containers, an ex-supervisor escorting someone into the yard when it was assigned to the cylinder yard crew, and discussion of a hostile work environment. Tr. 925. Mr. Almon agreed that there was a hostile work environment. Tr. 926. He said “it was just a very uncomfortable

environment at the time. I couldn't go in and take a break without Mr. Ladd crossing his arms and just staring at me red-faced mad." Tr. 927. He testified that Mr. Ladd was reporting to human resources and union officials that the "entire cylinder yard crew felt a certain way about a few different issues, and that wasn't the case because I did not feel the same way he did, and I let that be known." Tr. 927. Mr. Almon spoke with Ms. Arnold on October 4, 2012, and then provided a written statement. Tr. 928; *see* CX-38. Mr. Almon said that based on his observations Mr. Ladd did not use profanity and cuss words in general. Tr. 935. Mr. Almon testified that before Mr. Ladd was terminated "things just kept getting worse and worse in the break room." Tr. 936. The situation had gotten to the point where Mr. Ladd was frequently mad. Tr. 936. He testified that Mr. Ladd and his supervisor butted heads. Tr. 936.

Mr. Almon testified that on one occasion when Mr. Ladd was assigned to pick up saddles, he performed the work with one hand in his pocket. Tr. 937-938. This made each pickup take 30 seconds instead of about 5 seconds. Tr. 938. Mr. Almon said they called it "slow walking the company." Tr. 939. Mr. Almon said that Mr. Ladd was purposefully not producing for Mr. Vaughn. Tr. 941. Mr. Almon felt that Mr. Ladd had a personal vendetta to create as many problems as he could for the company and crew. Tr. 945. He requested not to be assigned to work with Mr. Ladd. Tr. 950. The last time he was assigned to work with Mr. Ladd he instead took a half day of vacation. Tr. 950.

3. Chronological Summary of Events Leading to Mr. Ladd's Discharge

About six months after his reinstatement with BWCS Mr. Ladd filed an Employee Concern over not being placed on the Emergency Response Team. Tr. 362; RX 6. He alleged the reasons for his exclusion from the Emergency Response Team were related to discrimination against him and the possibility of retaliation and harassment. Tr. 362; RX 6. Ms. Arnold began an investigation based on Mr. Ladd's claims of discrimination, retaliation, and harassment. Tr. 364, 366; CX 6-83; CX 19-3. She interviewed Mr. Ladd's managers and coworkers. Tr. 366-368. During the interviews she learned that Mr. Ladd's behavior was creating a hostile work place. Tr. 368, 442; CX 68-84. The employees refused to sign statements about Mr. Ladd's behavior. Tr. 386, 443.

After she concluded the interviews, Ms. Arnold met with Mr. Ladd and informed him of what she learned during the investigation. Tr. 370-371. Mr. Ladd was agitated when she informed him what she had learned. Tr. 370-371. He wanted the scope of the investigation limited to his complaint about not being placed on the Emergency Response Team. Tr. 372. Mr. Ladd informed her that if he was paid \$3000.00 "this would go away." Tr. 371. He stated that "Ricky Ladd wants what's due Ricky Ladd." Tr. 248-249, 370-371. The union representative tried to calm Mr. Ladd during the meeting. Tr. 370. Ms. Arnold testified that Mr. Ladd was agitated and she was concerned that he would become violent. Tr. 248-249. On September 20 and 21, 2011, Mr. Ladd withdrew his Employee Concern. Tr. 373-375; RX 7. Ms. Arnold held a meeting on October 21, 2011, with the cylinder yard crew, management, and union officials, in which she reviewed BWCS's policies regarding harassment and hostile work environments. Tr. 385-387. Mr. Ladd was not singled out during the meeting. Tr. 387.

On September 21, 2012, several union officials had a meeting with the cylinder yard crew. Tr. 767, 769. The meeting was to discuss the cylinder yard crew members' complaints about Mr. Ladd. Tr. 767. Some cylinder yard crew members complained that Mr. Ladd was filing grievances and representing that the complaints were being made on behalf of crew members. Tr. 767, 935; CX 7-26. Crew member Paul Almon complained during the meeting that Mr. Ladd was creating a hostile work environment. Tr. 767, 925; CX 6-71. The next day some crew members approached Mr. Deland and complained that Mr. Ladd was creating a hostile work environment and that they feared he might become violent. Tr. 138; CX 29. They offered to provide statements about Mr. Ladd's conduct. CX 29. Two additional crew members were willing to provide a statement if they would no longer have to work with Mr. Ladd. CX 29.

On September 24, 2012, Mr. Ladd became confrontational with other cylinder yard crew members about filing a grievance over the assignment of escort duties. Tr. 767-768; CX 6-68; CX 7-30. Later on September 24, 2012, Mr. Ladd entered the breakroom where Mr. Vaughn and Ms. McNeely were having a discussion. Tr. 882; CX 6-13. Mr. Ladd was agitated about the fact that the cylinder yard crew members were no longer performing escort duties for subcontractors. Tr. 145, 647, 652, 883; CX 7-57. Mr. Ladd was agitated, yelled, and used cusswords. Tr. 882; CX 6-13-14. Ms. McNeely testified that Mr. Ladd was screaming very close to her back and she could feel her hair moving. Tr. 882; RX 42. She was afraid and concerned that Mr. Ladd was going to become physically violent. Tr. 885; CX 6-14.

On September 25, 2012, Ms. McNeely and Mr. Vaughn reported the break room incident to Human Resource Director Ms. Arnold. Tr. 396; CX 6-13; CX 13; CX 19. Ms. McNeely informed Ms. Arnold that she was afraid to work in the cylinder yard trailer by herself because of Mr. Ladd. Tr. 396. She testified that Mr. Ladd's behavior was become more frequent and unpredictable. Tr. 400-401. On September 26, 2012, Ms. McNeely wrote an email to Ms. Arnold in which she wrote in part:

I am going to tell you that since he has obsessively got worse with the hateful and violent behavior, that I do believe that he could get physically violent with me, Tom Vaughn especially, or one of the other crew members. Mr. Ladd's actions keep getting more violent and terrifying, and I believe that something needs to be done about this situation for my well-being and the cylinder yard crews [sic] well-being before something seriously happens.

I will send over the documentation that I started to keep, it is not much but does record a few incidents earlier this year. Since then the incidents have escalated and I fear for my safety and the safety of my coworkers.

CX 30-1. Ms. McNeely also provided two pages of handwritten notes in which she documented incidents involving Mr. Ladd. *See* CX 30-2-3. Ms. McNeely filed a formal Employee Concern in which she claimed that Mr. Ladd had created a hostile work environment and requested a position without contact with Mr. Ladd. Tr. 403-404. Mr. Vaughn also filed an Employee Concern on the incident. Tr. 352; CX 15. On October 3 and 4, 2012, Ms. Arnold conducted interviews about the incident. Tr. 218, 246; CX 6-87. The interviews uncovered multiple examples of Mr. Ladd engaging in inappropriate work place behavior. Some employees

expressed concern that Mr. Ladd could become violent and one even decided to retire to get away from Mr. Ladd. Tr. 141, 220, 944–945; CX 6-36; CX 34; CX 36; CX 37. Ms. Arnold found the employees’ stories credible. Tr. 310, 406.

Based on the investigation and the September 24, 2012, incident Mr. Ladd was suspended pending further investigation. Tr. 163, 250, 262, 627. On October 15, 2012, BWCS met with Mr. Ladd and reviewed the finding of the investigation and permitted Mr. Ladd to respond in turn. Tr. 163, 638–639. Based on the investigation, Ms. Arnold recommended that Mr. Ladd be terminated. Tr. 267, 270–271, 331; CX 12-6. The decision to terminate was communicated to Mr. Ladd via telephone and a letter dated October 17, 2012. Tr. 640–641; CX 7-11.

B. Discussion

In a claim of retaliation or discrimination arising under the ERA, the complainant must demonstrate that he participated in protected activity, which furthers the purpose of the ERA.¹² I find that Mr. Ladd has met his burden to show that he engaged in a protected activity, he suffered an adverse action, and the protected activity was a contributing factor in the adverse action. I also find that BWCS has shown, by clear and convincing evidence, that it would have taken the adverse action taken regardless of Mr. Ladd’s protected activity.

Mr. Ladd engaged in protected activities protected by the ERA. Specifically, these key activities were the incidents involving: 1) TSR concrete barricades, 2) Honeywell cylinders, 3) Energy Northwest (“USEC”) cylinders, 4) cylinder yard paint and dust residue, and 5) validation of TSR procedures. The TSR concrete barricades were placed to protect nitrogen storage tanks and hydrogen generation units. Tr. 27–30, 618–620. Mr. Ladd believed that the failure to properly mark the TSR concrete barricades posed a serious threat of a catastrophic event. Tr. 618–620. Mr. Ladd was also concerned about the detection of “spot” or “removable” external radiological contamination on two of the Honeywell cylinders. Tr. 33, 121–124, 622. He also questioned why there was no Integrated Safety Management System performed on the contaminated Honeywell cylinders. *See* RX 15. Additionally, he raised concerns about the potential threat of radioactive contamination release during the transport of the contaminated cylinders along public roads. *Id.* Mr. Ladd was concerned about radioactive contamination on the USEC cylinders. He requested copies of the USEC radioactive contamination surveys and requested that BWCS also survey the cylinders for radioactive contamination. Tr. 45–46, 622–623. Mr. Ladd was also concerned that the rust and paint that would flake off the cylinders stored in the yard and requested that they site be sampled for contamination. Tr. 623–624. He was further concerned that without proper TSR procedures a cylinder could be dropped resulting in a breach of a cylinder. Tr. 644–646. Each of these protected activities involved Mr. Ladd raising potential safety questions or concerns. These safety concerns definitively and specifically implicated nuclear safety.¹³

Mr. Ladd has also established, by a preponderance of the evidence, that his complaints about safety were a contributing factor in BWCS’s decision to terminate his employment. In the

¹² 42 U.S.C. § 5851 (1)-(3); 29 C.F.R. § 24.2.

¹³ *Id.*; *Hoffman v. Nextera Energy, Inc.*, ARB No. 12-062, ALJ No. 2010-ERA-11 (ARB Dec. 17, 2013), slip op. at 8.

case of *Bobreski v. J. Givoo Consultants, Inc.*, cited above in the section describing the standards applicable to this case, the Administrative Review Board described the significance of the “contributing factor” element in ERA cases:

...The plain meaning of “contributing factor” focuses on whether protected activity did or did not, in fact, contribute at all to an employer’s unfavorable employment action. Congress expressly ensured that the causation standard was not defined as meaning an essential (“but for”) or significant (“motivating”) factor as in other discrimination statutes but rather a lower causation standard of “contributory factor.”¹⁴

The Board further refined the standard in a case brought under the Surface Transportation Assistance Act,¹⁵ which also adopts the standard of proof in AIR 21 cases:

The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent’s reason for the unfavorable personnel action was pretext, or that the complainant’s activity was the sole or even predominant cause. The complainant “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge of discrimination.” A “contributing factor” ... is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the [adverse employment] decision.” Thus, for example, a complainant may prevail by proving that the respondent’s reason, “while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant’s] protected activity.” Moreover, the complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence.¹⁶

These concepts were confirmed more recently in the *Palmer* case, also cited above.¹⁷ In this case, the record demonstrates that BWCS considered Mr. Ladd’s protected activity when it decided to terminate. Most notably, a list of “additional examples” provided to Mr. Ladd, citing items that attributed to his termination lists three of the activities that I have found to be protected under the ERA. *See* CX 51. Specifically, item 3 references Mr. Ladd’s concern about cylinder yard dust, and items 19 and 20 reference procedures and radiological surveys regarding the Honeywell and USEC cylinders. This direct evidence is sufficient, standing alone, to establish by a preponderance of the evidence that Mr. Ladd’s protected activity was a contributing factor in the decision to terminate Mr. Ladd.

Although Mr. Ladd has established that protected activity contributed to the decision to terminate his employment with BWCS, I also find that BWCS has established by clear and

¹⁴ *Bobreski, id.*

¹⁵ 49 U.S.C. § 31105 (2014).

¹⁶ *Beatty v. Inman Trucking Management, Inc.*, Case No. 13-039 (ARB May 13, 2014) (STA), PDF at 8–9 (citations omitted).

¹⁷ *Palmer, supra*, PDF at 53–56.

convincing evidence that it would have fired Mr. Ladd regardless of his engagement in protected activity.

Ms. Arnold testified that she recommended Mr. Ladd's termination because of the hostile work environment he created at BWCS. *See* Tr. 218, 278, 282–285, 420. She stated that Mr. Ladd's behavior was sufficiently egregious to justify termination. Tr. 285, 288, 425. I find her testimony credible and give it great weight. Moreover, her testimony is further supported by the numerous employee statements and containing examples of Mr. Ladd's hostile and inappropriate behavior. Mr. Almon testified about Mr. Ladd's inappropriate behavior towards him. Tr. 925–927. As a coworker of Mr. Ladd, I give his testimony significant weight. Further, it is apparent from all the testimony and evidence in the record, that Mr. Ladd regularly had outbursts whenever he believed that things were not going the way he desired. He was responsible for creating a hostile work environment at BWCS such that other employees did not want to work with him and some were even fearful for their own safety in the presence of Mr. Ladd. Mr. Ladd did not deny any of the aforementioned incidents, but downplayed the extent of his unacceptable workplace behavior. Based on the evidence of record, I find that Mr. Ladd was responsible for creating a hostile work environment. I find that the investigation by BWCS into Mr. Ladd's behavior was adequate for the decision to terminate his employment, and that his continuing and ongoing behavior was so egregious that BWCS would have terminated him regardless of any protected activity.

Given the seriousness of Mr. Ladd's ongoing pattern of egregious behavior, I conclude that BWCS has shown by clear and convincing evidence that it would have terminated Mr. Ladd even had he never engaged in protected activity.

C. Conclusion

For the reasons discussed above, I find that although Mr. Ladd has established that protected activity was a contributing factor in his termination, BWCS has established by clear and convincing evidence that it would have discharged him even absent his protected activity.

V. ORDER

Because BWCS has established that it would have discharged Mr. Ladd even absent his protected activity, his complaint filed with OSHA on November 30, 2012, is **DISMISSED**.

Alice M. Craft
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within fourteen (14) days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1978.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1978.110(b).