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Issue Date: 05 April 2018

CASE NO: 2016-ERA-00007

In the Matter of:

ED BOETTCHER,
Complainant,

v.

**WASHINGTON RIVER PROTECTION
SOLUTIONS,**
Respondent,

Appearances:

Stephanie Ayers, Esq.,
Thad M. Guyer, Esq.,
For the Complainant

Brad Page, Esq.,
For the Respondent

Larry E. Halvorson, Esq.,
In-House Counsel for Washington River Protection Solutions

Before:
Christopher Larsen,
Administrative Law Judge

DECISION AND ORDER

This is a claim arising under employee-protection provisions of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, and the implementing regulations (29 C.F.R. Part 24) (“ERA”). Ed Boettcher (“Complainant”) seeks recovery from Washington River Protection Solu-

tions (“WRPS” and “Respondent”) for retaliation resulting in his termination on October 16, 2013.

I. PROCEDURAL HISTORY¹

I held a formal hearing in this case in Kennewick, Washington, beginning July 10, 2017, at which both parties were afforded a full and fair opportunity to present evidence and argument as provided by law and applicable regulations.

At the hearing, Mr. Boettcher offered Exhibits (“CX”) 1 through 70, which I admitted into evidence without objection. Parties stipulated the disciplinary records received as CX 61, CX 62, CX 67, CX 68 and CX 69 were being admitted “only for the purpose of showing the range of Respondent’s discretion and disciplinary review proceeding outcomes...and not for the purpose of disparate impact” (Respondent’s Closing Brief, p. 3 to 4 citing TR 432 to 435, 909-910). Respondent offered Exhibits (“RX”) 1 through 94, which I also admitted into evidence without objection. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, I carefully considered each in arriving at this decision.

II. ISSUES

The issues to be addressed include:

1. Whether Mr. Boettcher deliberately violated the Atomic Energy Act (“AEA”) and is therefore barred from relief under Section 211(g) of the ERA.
2. Whether Mr. Boettcher engaged in protected activity within the meaning of the ERA.
3. Whether Mr. Boettcher meets the burden of proving his protected activity was a contributing factor in the decision to terminate his employment.
4. Whether Respondent establishes by clear and convincing evidence that it would have terminated Mr. Boettcher’s employment in the absence of any protected activity.
5. The damages, if any, Mr. Boettcher is entitled to.

III. SUMMARY OF THE EVIDENCE

A. Complainant’s History with Respondent

¹ In this Decision, I use these references: “TR” for the official hearing transcript; “CX” for a Complainant’s exhibit; and “RX” for a Respondent’s exhibit.

Mr. Boettcher began work as an electrician for Respondent on October 1, 2008 (Stipulated Fact No. 4 and No. 8). He was a member of the International Brotherhood of Electronic Workers (“IBEW”) Local 77 (Stipulated Fact No. 7). Mr. Boettcher’s duties included performing electrical work onsite such as layout on construction wiring, installation, and maintenance of electrical equipment (RX 6).

On October 1, 2008, Respondent became a contractor for the U.S. Department of Energy (“DOE”) and assumed responsibility for the Hanford Tank Operations Contract. Respondent is charged with the safe management and removal of 53 million gallons of radioactive and chemical waste stored in 177 underground tanks on the Hanford site (Stipulated Fact No. 2). The parties have stipulated Mr. Boettcher is an “employee” under the ERA and Respondent is an “employer” (Stipulated Fact No. 3; Stipulated Fact No. 5).

In 2013, Bae Operations Manager Robert Wilkinson directed the Base Operations Group (RX 33, p. 1). Approximately 468 employees reported to Mr. Wilkinson (TR 749 to 750). Base Operation maintained buildings, the tank farms and other worksite maintenance (TR 750 to 751). The tank farms contain 177 single-shell and double-shell tanks buried underground holding nuclear waste (TR 751). Each tank farm contains six to eight tanks (*Id.*).

Dave Strasser managed the AX and AY/AZ tank farm teams (RX 33, p. 1, 13; TR 617 to 618). Mr. Strasser supervised 50 employees charged with operating and maintaining his tank farms (TR 617 to 618). Mark Lutz managed the AZ maintenance team and reported to Mr. Strasser (TR 645). He supervised eight employees along with Randy Hoover, Field Work Supervisor (*Id.*). Mr. Hoover supervised the employees assigned to Mr. Lutz, including Mr. Boettcher (TR 791; RX 33, p. 13).

Mr. Boettcher did not always get along with his co-workers. On July 10, 2012, Mr. Boettcher received a written warning for yelling at another employee (RX 61). When Mr. Boettcher showed up for a new assignment with a different group of employees in October, 2012, Flu Garza, a lead worker, told Mr. Boettcher no one wanted him there and he should return to his previous assignment. Electricians and some instrument tech employees observed the incident and were shocked (TR 404 to 407).

On either March 28, 2013, or May 31, 2012, Mr. Wilkinson attempted to coach Mr. Boettcher on how to bring up safety issues because his methods were creating friction with other employees. Mr. Wilkinson testified Mr. Boettcher had a tendency to badger employees (TR 774). Mr. Wilkinson met with Mr. Boettcher and his shop steward to discuss how to treat individuals with dignity and respect (TR 772 to 775).

Mr. Strasser testified Mr. Boettcher would bring up safety issues in meetings even when they were not under discussion and also after the issues had been resolved in an effort to grandstand and get attention (TR 609 to 610). Mr. DeCola found it irritating when Mr. Boettcher's repeatedly attempted raised safety issues after he had already received an answer (TR 876).

On October 3, 2013, Mr. Boettcher accepted an offer of employment from Mission Support Alliance ("MSA") through the Labor Assets Management Process ("LAMP") (CX 22, p. 1 to 2). He would have transferred within 30 days if he had not been terminated on October 16, 2013 (TR 772 to 773).

B. Complainant's Transfers

Respondent transferred Mr. Boettcher between different work teams at the Hanford site during his employment. In February, 2011, Respondent transferred Mr. Boettcher to ST Team (CX 1, p. 6). In June, 2012, they transferred him to AN Team because of personal issues with his coworkers (TR 80 to 81, 779; CX 1, p. 3). Respondent transferred him again temporarily on October 17, 2012, to Closure/Projects (RX 4, p. e 6). This transfer was temporary pending the completion of an investigation into issues Mr. Boettcher had raised (TR 780). It was made at the request of the Hanford Concerns Council, a non-profit Respondent voluntarily allows to provide oversight (TR 775, 780). Finally, Respondent transferred him to the AZ team in March 2013 (RX 4, p. f 7-g 8). The transfer was coordinated with the Hanford Concerns Council, and the parties involved believed Mr. Boettcher would get along personally with those on the team (TR 74 to 75, 782 to 783). There is no evidence in the record indicating these transfers had any impact on Mr. Boettcher's salary, commute, or job duties.

When he was on the ST Team with manager Todd Synoground, Mr. Boettcher testified he was transferred after raising concerns about the treatment of a co-worker (TR 77 to 82). Mr. Boettcher testified Mr. Synoground threatened to bring in HR and that it "could get really ugly" (TR 78 to 79). Mr. Boettcher continued to raise safety concerns when Mr. Synoground used the name of a recently-fired electrician to refer to Mr. Boettcher (TR 80).

C. Alleged Protected Activity

a. Complainant's Stop Works and PER's

During the course of his employment with Respondent, Mr. Boettcher filed many Stop Work Orders ("Stop Work"). Using Problem Evaluation Request ("PER"), a tracking program, Mr. Boettcher would file complaints about safety issues he believed needed correction (TR 32). Using these PER complaints, Mr. Boettcher would call for a Stop Work. Any employee may identify an issue that places other employees, the facility, or the public at risk and notify the shift office (TR 33). Once Respondent resolves the issue, the Stop Work ends (*Id.*).

On April 20, 2012, Mr. Boettcher submitted a Stop Work to prevent employees from accessing certain electrical cabinets that did not have proper warning labels (CX 46, p. 1; TR 335 to 36). Mr. Boettcher believed this posed a risk of an arc flash that could burn a worker (TR 37 to 38). Respondent cleared the Stop Work on March 13, 2013 (TR 205 to 206, 213).

On October 11, 2012, Mr. Boettcher filed a Stop Work over temporary scaffolding he believed was not properly bonded, posing a risk of shock to workers on the scaffold (CX 5). Respondent cleared the Stop Work on July 2, 2013 (CX 46, p. 10).

Mr. Boettcher filed a Stop Work on February 11, 2013, but it was cleared the same day (CX 46, p. 3). Mr. Boettcher had become aware of software updates for the ABB software systems (CX 7). This software monitored pressure in the Tank Farms. Mr. Boettcher was concerned that if the ABB software system malfunctioned, an alarm would not sound when toxic vapors entered the air, and it would expose the workers to those vapors (TR 45 to 48). Respondent explained to Mr. Boettcher the controls for such a malfunction, including a local operator who monitored the tank farm pressure and would alert personnel if the automated system failed and an alarm condition was reached (CX 7, p. 1, 3).

Mr. Boettcher filed another Stop Work a few weeks later on February 27, 2013 (CX 8). He was concerned the Ahlberg lights lacked open neutral protection, which would protect workers against the risk of shock (TR 192; CX 8). Respondent cleared the Stop Work on March 6, 2013 (CX 46, p. 4, 5). At the hearing, Mr. Boettcher added the concern that a shock might ignite flammable gasses that had escaped from a tank (TR 61).

Mr. Boettcher raised another Stop Work on April 18, 2013, and Respondent cleared it on May 30, 2013 (CX 10). Mr. Boettcher found a damaged electrical inbox which presented a shock hazard to workers (CX 10; TR 65 to 68).

On June 1, 2013, Mr. Boettcher filed a Stop Work which the Respondent did not clear until September 26, 2013 (CX 14; CX 46, p. 9). Respondent was running two portable air conditioners constantly, which could, according to Mr. Boettcher's PER, present a fire or electric shock hazard (CX 14). At the hearing, Mr. Boettcher added they could "cause the building to catch fire, which in turn could affect the HEPA filter system" (TR 96 to 100). If the ventilation shut down in the tanks, Mr. Boettcher believed they could release flammable gasses.

Mr. Boettcher filed another Stop Work on September 3, 2013 (CX 16; CX 46, p. 11, 12). He noticed metal tags improperly attached to electrical cabinets he believed could create arc flash or shock employees. Later, during the hearing, Mr. Boettcher added the tags could blow in the wind and "shut down the systems" (TR 101 to 104, 279 to 280). This shutdown, Mr.

Boettcher believed, could eventually result in the release of flammable gasses (TR 279 to 280). Respondent cleared the Stop Work three days later, on September 6, 2013 (CX 46, p. 11, 12).

Complainant raised another Stop Work on September 12, 2013 (CX 17). Respondent cleared the issue on October 24, 2013 (CX 46, p. 13, 15). Complainant once again believed the scaffolding was not bonded and posed a risk of shock to workers on the scaffold (CX 17; TR 106 to 107).

Complainant issued a second Stop Work on September 12, 2013 (CX 19; CX 46, p. 13, 17). Mr. Boettcher was concerned a crane operating at the work site was not properly barricaded on all sides, and a worker might injure him or herself when wandering into the operating area (TR 108 to 112). Respondent cleared this issue on November 13, 2013 (RX 46, p. 13, 17).

Mr. Boettcher also filed a PER which did not request a Stop Work on September 26, 2013 (CX 20). The PER alleges group craft meetings were cancelled and replaced with meetings to talk about union contract negotiations (*Id.*).

On October 2, 2013, Mr. Boettcher tripped and fell on a defective step (TR 115 to 116). He tried to initiate a Stop Work on all EAPC walk down items that had been listed as defective or hazardous “to personnel or facilities,” but Mr. Boettcher did not have a list naming these items (TR 115 to 116; CX 21). The Shift Manager, Todd Synoground, refused to initiate a Stop Work because he could not tell based on Mr. Boettcher’s request what he was to initiate a Stop Work on (TR 117).

b. The “Flam Gas” Issue

In April 2013, Mr. Boettcher asked management and engineering whether NFPA-70, Article 500 of the electrical code, applied to the Hanford tank farm. Article 500 applies to any area that could possibly emit gases that might explode. Mr. Boettcher sent an email to management (CX 51, p. 2; TR 662 to 665). If Article 500 did apply, Mr. Boettcher believed he would need to use a specific set of equipment appropriate for such circumstances (TR 88).

Tom Pickles, an Engineering Manager and Subject Matter Expert, responded in writing that Article 500 did not apply to tank farms (CX 51, p. 2; TR 663 to 664;). Mr. Pickles provided a four-page response, illustrating Mr. Boettcher’s concerns had been taken into account when designing the tanks and that such an incident is virtually impossible (CX 51, p. 2 to 5; TR 662 to 663; TR 1072). This did not satisfy Mr. Boettcher (CX 50, p. 2).

On April 24, 2013, Respondent brought in representatives from Nuclear Engineering to explain controls were in place to ensure the tank farm would stay below Article 500 thresholds (*Id.* at 1). Respondent arranged a meeting between Mr. Boettcher and a panel of experts includ-

ing Walton Isom, Deputy Chief Engineer; Dian Cato and Larry Krips of Nuclear Safety; Cheryl Myott, Fire Protection Engineer; Tom Pickles; and Chris McCoy, electrical subject matter expert (*Id.* at 1). The panel told Mr. Boettcher a large bubble of flammable gas building up in a tank and leaking out the side through a small hole is not a credible event (*Id.*). The Nuclear safety subdivision specifically found the odds of enough flammable gas accumulated to reach the lowest possible flammable point to be one in one million (*Id.* at 2). According to Mr. Strasser, the likelihood of gasses reaching the minimum level to be flammable was less than one or equal to once in one million operating years (*Id.* at 2). Mr. Boettcher never filed a PER or initiated a Stop Work on this issue and never raised the issue with management again.

During the meeting, Mr. Boettcher also raised a contradiction in tank farm procedures involving the tanks, fire cord, and flammable gas. The contradiction is in HNF-SD-WM-HC-017, but the record does elaborate (*Id.* at 1). Fire Protection Engineer Cheryl Myott told Mr. Boettcher she was already in the process of revising the document to clarify what was meant by the contradictory item and that the correct interpretation was the tanks and support do not meet Class 1 Division 1 criteria (CX 50, p. 1).

c. OSHA Complaint

On April 9, 2013, Mr. Boettcher filed a complaint with the DOL/OSHA alleging that on or about March 28, 2013, he was threatened with discharge and was subject to a hostile work environment since April, 2012 (CX 11, p. 1). Mr. Boettcher filed the complaint under Section 11(c) of the Occupational Safety and Health Act of 1970, 29 USC § 660(c) (*Id.* at 3). Mr. Boettcher alleged he had engaged in protected activity by requesting Stop Works (*Id.* at 5 to 6).

On May 1, 2013, OSHA referred the complaint to DOE's Employee Concerns Program (*Id.* at 1 to 2). Mr. Boettcher met with the DOE twice in 2013 to discuss the transferred complaint (TR 85 to 86). He requested permission from Mr. Hoover to meet with the DOE, but did not inform Mr. Hoover why he was meeting with the DOE (TR 86 to 87). When he spoke with Mr. Lutz and Mr. Strasser about the flam gas issue, he only informed them of that portion of the complaint (*Id.*).

d. October 8, 2013 Meeting

On October 8, 2013, Mr. Boettcher posed a question to Dave Olson, President of Respondent, during a team meeting (TR 134 to 136). Mr. Boettcher raised concerns about Respondent's work practices and told Mr. Olson Respondent was not adhering to the DOE's ISMS guiding principles (*Id.*). Mr. Boettcher did not discuss specific requirements or violations with Mr. Olson, and their conversation was brief (TR 200). Mr. Olson concluded the meeting and left, saying he had a lot of work to do (CX 37).

D. Training

Billie Garde, an attorney who represents whistleblowers and served on the Hanford Concerns Council, made a presentation to Base Operations managers and Field Work Supervisors entitled “Managing Protected Employees, Getting the Balance Right Between Accountability and Safety Culture” (TR 592 to 593, 747 to 748, 787 to 788; RX 71). The presentation was on January 21, 2013. The Hanford Concerns Council recommended Respondent use Ms. Garde to train the management team to ensure employees were encouraged to continue raising concerns while managing Mr. Boettcher’s interpersonal behavior (TR 737 to 740).

E. October 8, 2013 incident

On October 8, 2013, Mr. Boettcher and Mr. DeCola were assigned to the AZ Team with Randy Hoover as a supervisor (TR 217). Their first work assignment was to change fluorescent lamps in the 702 AZ building (*Id.*). The fluorescent lamps were in the Conex locked lamp storage box, a steel cargo container 40 feet in length (TR 217 to 218). Almost thirty electricians working for Respondent along with other groups had access to the Conex (TR 322 to 323, 630). When they arrived, Mr. Boettcher found a white powder on the floor with a black cord coiled through it (TR 146, 218). The powder was very fine and covered an area approximately 60 percent size of an 8.5 x 11 inch sheet of paper (RX 51; TR 867, 903, 937 to 938).

Mr. Boettcher assumed the powder leaked from the bottom corner of a box containing broken lamps (TR 143). He knew older style fluorescent lamps contained more mercury than new lamps (*Id.*). Mr. Boettcher believed this pile of powder was not “worthy” of a Stop Work, (TR 249 to 250), and did not constitute a “spill” (TR 153). He was just curious as to how the powder got into the Conex and where it came from (*Id.*). Mr. Boettcher believed he was qualified to determine whether the white material was not hazardous because he cleaned broken tubes and the powder they left behind for years, exposing himself to them in the process (TR 144, 252). Normally, he would just clean up and dispose of broken light bulbs, but this time he was inspired by a class on Lumex monitoring to satisfy his curiosity (TR 144, 236).

Mr. Boettcher and Mr. DeCola left the Conex (TR 840 to 841). Mr. Boettcher called Mr. Hoover, reported discovery of the powder, and requested it be tested for mercury (RX 93; TR 841). Mr. Hoover arrived at the Conex and informed Mr. Boettcher and Mr. DeCola he would request Industrial Hygiene (“IH”) to monitor the powder to determine if it was hazardous (TR 221, 795, 841). Mr. Boettcher and Mr. DeCola placed yellow caution tape across the door of the Conex to prevent anyone from entering (TR 796, 841 to 843). Mr. Hoover called Amanda Beerman, an Industrial Hygienist, and asked her to send someone to the Conex to monitor the powder (TR 798, 842). Ms. Beerman assigned Karli Wilkes, an Industrial Hygienist tech, to test the powder for mercury (TR 895). Ms. Beerman told Ms. Wilkes the name of the field work supervisor and the location of the Conex, but not the names of either electrician (TR 465 to 466).

To test the powder, Ms. Wilkes used a Lumex, a device that uses a wand to test the mercury content of objects in front of it (TR 895). Ms. Wilkes needed to pass the wand a third of an inch to an inch over the powder in an “S formation” (*Id.*). The Lumex gives an immediate real-time reading of the amount of mercury present (TR 449, 457, 899).

When Ms. Wilkes arrived at the Conex, Mr. Boettcher was sitting in the truck and Mr. DeCola was standing outside (TR 222 to 223). Mr. DeCola unlocked the door, and the three of them entered the Conex (TR 222 to 223, TR 902). Ms. Wilkes placed the Lumex on the floor, crouched down, and began waiving the wand above the powder (TR 904, 906 to 907). She got a reading of 36 ng/m³ (RX 36, p. 1).

While Ms. Wilkes monitored the powder, Mr. Boettcher asked her questions about her methods, readings, and how she was going to get an accurate reading if the powder was not airborne (TR 905). At this point, Ms. Wilkes did not know Mr. Boettcher by name or reputation (RX 41). Mr. Boettcher asked the questions quickly without giving Ms. Wilkes a chance to answer (TR 874). Mr. Boettcher observed Ms. Wilkes get upset and become more aggravated every time he asked her a question (TR 151). The questions made her feel intimidated and uneasy (TR 905).

Next, Mr. Boettcher asked Ms. Wilkes whether the powder needed to be airborne or disturbed to get an accurate reading (TR 288, 949). Without asking permission, Mr. Boettcher used his boot to roll the cord back and forth three or four times (TR 907 to 908, 919 to 920). Since the length of cord ran through the powder, the rolling disturbed the powder and caused it to rise into the air (TR 849). Mr. Boettcher moved it with enough force to catch the cord in the cleat of his boot (TR 147). Mr. Boettcher did this intentionally (TR 234 to 235). He was “curious” about the readings but not concerned about the powder (TR 229 to 230).

Ms. Wilkes was still in a crouched position when Mr. Boettcher rolled the cord and the airborne powder entered her breathing zone (TR 851 to 852, 919, 938). According to OSHA, the breathing zone of an employee’s face consists of a hemisphere from the shoulders forward with a radius of approximately nine inches (RX 91, p. 3; TR 923). Ms. Wilkes testified she turned her face from the powder to get away and does not know if she breathed it in (TR 923).

After Mr. Boettcher rolled the cord, he said, “There, breathe that in,” or something to that effect (CX 66, p. 2; TR 850). Ms. Wilkes continued to monitor the powder and got a reading of 802 ng/m³ (CX 66, p. 2). This is below the 12,500 action level (TR 526 to 527). Mr. Boettcher had not heard or understood the action level was 12,500 until that moment (TR 147, 233). Mr. DeCola, to Mr. Boettcher’s offense, declared Mr. Boettcher had just kicked the powder in Ms. Wilkes’ face and could not believe he had done it (TR 878 to 879, 883). Ms. Wilkes stood up and

told Mr. Boettcher she did not want to go to the Hanford medical site because of him, but Mr. Boettcher replied she should not have anything to worry about if it was under action level (TR 920 to 921).

Mr. DeCola then requested Ms. Wilkes monitor a piece of broken fluorescent tube. He picked up the tube, which contained no powder (TR 853 to 856). He asked Ms. Wilkes if she would test the broken tube while he held it at waist height in front of him (TR 855 to 856). Ms. Wilkes agreed to test the broken pieces Mr. DeCola was holding, and got a reading of 206 ng/m³ (TR 925 to 926).

As Ms. Wilkes prepared to leave the Conex, Mr. Hoover returned (TR 798 to 800). Ms. Wilkes informed Mr. Hoover of the low readings, and Mr. Hoover told her he would notify the proper persons to get it cleaned up while Ms. Wilkes left in a hurry (TR 926, 927).

After Ms. Wilkes left the Conex, Mr. Hoover directed Mr. Boettcher and Mr. DeCola to walk around the powder without disturbing it to get the lamps they needed to complete their work assignment (TR 800). Mr. Hoover placed a sign on the door of the Conex which warned readers to stay out due to a broken florescent lamp (TR 572). Mr. Hoover asked Ms. Beerman how to clean up the powder safely (TR 807 to 809). Michael Schmoldt, a Certified Industrial Hygienist, advised Ms. Beerman they should use the “wet method” to prevent the powder from going airborne (TR 508; CX 28). Ms. Beerman, an Industrial Hygienist, testified that dry sweeping or vacuuming the powder from broken fluorescent lamps kicks up dust and creates dust dispersion and should therefore be avoided (TR 509). The airborne powder can contain traces of mercury and is an irritant (*Id.*). Ms. Beerman communicated this to Mr. Hoover, and believed it was important to avoid inhalation of the powder (TR 510). Mr. Hoover testified that someone cleaned up the powder with a damp rag, put it into a sealed container, and disposed of it at the site’s waste disposal facility (TR 833).

Mr. Boettcher’s conduct surprised and worried Ms. Wilkes because she did not know what the white powder was (TR 921 to 922). She also found his behavior outside the norm for work in the tank farms where, according to her, employees attempt to care for one another (TR 922 to 923).

F. Investigation and Discipline

After returning the Lumex to the lab, Ms. Wilkes returned to the IH trailer and reported the incident to Ms. Beerman (TR 929 to 930). Ms. Wilkes was very upset and her hands were shaking (TR 506). Ms. Beerman found Mr. Boettcher’s behavior shocking (TR 506 to 507).

Ms. Beerman and Ms. Wilkes reported the incident to Dan Wolf, Base Operations Safety and Health Manager, and Don MacKay, supervisor for the industrial hygienist technicians as-

signed to Base Operations (TR 501, 508). Mr. Wolf observed Ms. Wilkes shaking, and thought she was upset (TR 971 to 972). The three of them went to Mark Lutz's office to report the incident (TR 648).

Mr. Lutz notified his own manager, Dave Strasser, of the incident, briefed Curtis Nettles, the HR representative assigned to Base Operations, and asked Mr. Nettles to initiate an investigation (TR 650 to 651). Mr. Nettles also told Scott Sheets, a labor representative, and asked him to assist (TR 537, 568).

Mr. Sheets and Mr. Nettles conducted the investigation. They inspected the scene of the incident and took photos of the interior and exterior of the Conex (TR 568; RX 51). They obtained written statements from Mr. Hoover, Ms. Wilkes, Ms. Beerman, Mr. DeCola, Mr. Wolf and Mr. Lutz (TR 572, 573; RX 40; RX 41; RX 42; RX 43; RX 44; RX 47; RX 49; RX 50). They tried to obtain a statement from Mr. Boettcher, but he refused (TR 158). They interviewed Mr. DeCola and Mr. Boettcher (RX 45; RX 46).

When they interviewed Mr. Boettcher on October 8, 2013, his union shop stewards Dave Patrick and Steve Smith were present (TR 574 to 575; RX 46; CX 33, p. 1-2). Mr. Boettcher admitted he intentionally rolled his boot over the electrical cord to cause the powder to go airborne (TR 557 to 558, 659). Mr. Boettcher thought he did not put anyone in danger and felt he was being retaliated against by the safety managers for his attempt to initiate a Stop Work the previous week (RX 57).

Respondent placed Mr. Boettcher on administrative suspension after his October 8, 2013 interview (RX 52). Mr. Wilkinson and Mr. Latteri, the HR Manager, approved the suspension (TR 772, 1058). The Hanford Patrol escorted Mr. Boettcher off-site (TR 589 to 590).

On October 9, 2013, Mr. Schmoltd identified the powder as belonging to broken Philips ALTO lamps (TR 508; CX 28). The Material Safety Data Sheet ("MSDS") identified four hazardous ingredients in the lamps: glass, phosphor powder, mercury, and polyethylene terephthalate (TR 510 to 511; RX 16, p. 1). The MSDS warns against inhalation of any airborne dust (RX 16, p. 2). Mr. Strasser did not believe an investigation into the source of the powder was necessary because he assumed the powder leaked from the bottom of a box containing broken lamps (TR 629).

On October 10, 2013, Christopher Andersen, Industrial Hygienist Supervisor, instructed Ms. Wilkes to visit the HPMC, the Hanford Site Medical Contractor (TR 943 to 944). After an exam, HPMC found nothing wrong with Ms. Wilkes (TR 945 to 946).

Respondent's Standards of Conduct contain three categories of misconduct. "Category A" is "Extremely Serious Misconduct." Category A offenses may result in immediate discharge without progressive discipline. A-1 violations are described in detail:

Deliberate disregard of safety rules or safety procedures. This includes conduct demonstrating reckless indifference of disregard for safety rules or procedures, including willful action or inaction resulting in injury to personnel or damage to property or equipment.

(RX 53, p. 9).

Mr. Sheets and Mr. Nettles, using the evidence gathered during the investigation, concluded Mr. Boettcher engaged in misconduct (RX 57). According to procedure, they prepared a Disciplinary Review Summary Report ("DRSR"), which summarized the results of their investigation and included a recommendation Respondent terminate Mr. Boettcher for an A-1 violation (*Id.*). Mr. Sheets and Mr. Nettles concluded Mr. Boettcher demonstrated reckless indifference to the safety of a coworker when he intentionally caused an unknown and potentially-hazardous substance to become airborne, risking contamination to his coworker and causing her to inhale the unknown substance (*Id.*). The DRSR notes Mr. Boettcher had raised safety concerns or other issues before or concurrent with this event (*Id.* at 2). It expressly notes its authors considered Mr. Boettcher's "harassing" behavior towards Ms. Wilkes an aggravating factor (*Id.* at 2).

Mr. Sheets obtained information on Mr. Boettcher's record of raising safety concerns using the Safe Work Environment Disciplinary Review Summary Analysis ("SWE") form, which human resources completed (RX 58). The SWE found Mr. Boettcher had no open or current safety concerns with Respondent (*Id.*). The purpose for disclosing the SWE was to ensure proposed disciplinary action was not being driven by animus toward an employee's safety concerns (TR 1059 to 1060). As to Mr. Boettcher's accusation that the safety managers were attempting to retaliate against him, the safety managers were not part of the DRB and no one consulted with them about the proposed termination (TR 771).

The SWE Analysis (RX 58) includes a statement that terminating Mr. Boettcher was consistent with personnel actions in similar circumstances (RX 58; TR 1012 to 1013). Mr. Kauer explained this statement was based on information Mr. Latteri provided: two previous disciplinary actions (TR 1003 to 1004).

According to Respondent's disciplinary procedures, all terminations must be reviewed and approved by the disciplinary review board ("DRB") which includes: 1) the Workforce Resources Manager or his designee; 2) the Labor Relations Manager or his designee if the person being terminated is a bargaining unit employee, 3) the Organization Level 1 Manager; and 4) the

WRPS Project Manager or his designee (RX 53, p. 5). . Mr. Kauer scheduled the DRB meeting for October 15, 2013 (RX 56). The four managers responsible for Mr. Boettcher's disciplinary action were: Michael Latteri, Human Resources Manager; Clayton Plemmons, Labor Relations Manager; Robert Wilkinson, the Level 1 Manager; and Wyatt Clark, Chief Operating Officer, acting as the CEO's delegate (TR 1005; RX 56). Messrs. Kauer, Lutz, Strasser, Nettles, Sheets and Sandra Kent, office of the General Counsel, also attended (RX 56). A DRB is free to charge an employee with a wide variety of standard of conduct violations and impose an array of punishments. Punishments can include documented verbal warnings, suspensions ranging from a day to a month, and termination for violations ranging from falsifying time cards to exposing co-workers to radioactive materials (CX 61; CX 67; CX 68; CX 69).

The DRB relied on the DRSR, (RX 57), the SWE, (RX 58), and a database run showing prior disciplinary actions (TR 1013 to 1014). No one provided the DRB details of Mr. Boettcher's raised safety concerns (TR 1062). All four members of the DRB concurred with Mr. Nettles' and Sheets' recommendation Mr. Boettcher be terminated for an A-1 violation (TR 1005; TR 759; RX 57, p. 3).

Members of the DRB gave their rationale at the hearing. Mr. Latteri concurred with the recommendation to terminate Mr. Boettcher because his behavior was deliberate, indicated a lack of concern or appreciation for the safety and wellbeing of his coworker, ignored his procedure and training, demonstrated an intolerable attitude, and put any concept of a safety program in jeopardy (TR 1051 to 1052). Mr. Wilkinson supported Mr. Boettcher's termination because he demonstrated a reckless indifference to safety procedure and numerous safety rules (TR 761 to 765). The actual mercury reading had no impact on Mr. Wilkinson's decision because the consequence of disturbing the powder was unknown at the time, and he believed everyone involved was lucky the consequences were not more severe (TR 764).

On October 16, 2013, Dave Strasser, Mr. Boettcher's Level Two Manager, met with Mr. Boettcher and notified him he was terminated effective immediately (TR 591 to 592; RX 62). Before Mr. Strasser read Mr. Boettcher's termination letter, Mr. Boettcher stated he believed this termination was in retaliation for all the Stop Works he had filed (TR 615).

WRPA policies and procedures state "any employee who believes they are being retaliated against as a result of raising a concern...should contact the WRPS Employee Concerns Program at 376-0533 or cell phone 438-9283" (RX 69; RX 53, p. 6). Mr. Boettcher knew Ed Kennedy, the Employee Concerns Program Manager, and had access to the telephone number but did not report retaliation to the program (TR 274 to 275).

G. After the Termination

Mr. Boettcher's termination removed his seniority rights, effectively ending his pending transfer to MSA (TR 569). Mr. Boettcher lost weight after his termination and felt humiliated. He suffered from depression and anxiety, but never sought treatment (CX 60). Six months after his termination, he found another job a two-hour commute away from his home which paid less (*Id.*). As of June 30, 2017, Mr. Boettcher was again unemployed (*Id.*).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Motion to Strike

There is an initial issue over whether this court must strike Section IV-K of Complainant's brief on the grounds that it breaks a stipulation between the parties. A stipulation is controlling on the parties. *See Richardson v. Director, Office of Workers' Comp. Programs*, 94 F.3d 164, 167 (4th Cir. 1996). The court's rules, set forth in 20 C.F.R. Part 18, Subpart A, impose a high standard of good faith and professionalism on counsel appearing before this court.

Respondent moves to strike Section IV-K of Complainant's brief entitled "The Complainant was Subjected to Disparate Discipline by WRPS Managers in That Other A-Violations Were Disciplined Less Harshly" on the grounds it contains facts and arguments supported by Complainant's Exhibit 69, p. 7, related to the case of Mr. Villarreal. Complainant recites the facts and other information set forth in Mr. Villarreal's Disciplinary Review Summary Report, (CX 69, p. 7 to 9), and argues Mr. Villarreal was charged with the same type and level of violation as Mr. Boettcher, but received a different and less-severe punishment (Complainant's Closing Brief, p. 40 to 41). Parties stipulated the disciplinary records received as CX 61, 62, 67, 68 and 69 were being admitted "only for the purpose of showing the range of employer discretion and disciplinary review proceeding outcomes...and not for the purpose of disparate impact" (Respondent's Brief, p. 3 to 4 citing TR 432 to 435, 909-910).

While Complainant includes the term "disparate impact" in the title of Section IV-K, only part of the section actually broaches the subject. Pages 38 to 40 of the section use the stipulated exhibits to explore how various witnesses on the stand kept the disciplinary process consistent. Respondent and the witnesses on the stand insisted the disciplinary process was consistent; Complainant was free to use the examples of diverse punishments in CX 61, 62, 67, 68 and 69 to impeach that assertion.

But beginning in the first full paragraph on page 40, Complainant makes a disparate impact argument. Complainant's argument he did not mean the term "disparate impact" as a legal term is not persuasive considering it is a key whistleblower term and part of the section makes a disparate impact argument. Complainant asserts Mr. Villareal engaged in an action of similar severity to Complainant, but received a less-severe punishment. Since this assertion violates the stipulation from the parties, I strike it from the record to the extent Complainant uses CX 61

through 69 to prove it. Complainant's brief from the first full paragraph on page 40 to the end of Section IV-K is stricken.

B. Employer Fails to Meet its Burden of Proving Mr. Boettcher Deliberately Violated the Atomic Energy Act or the Energy Reorganization Act

The ERA provides

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent) deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

See 42 U.S.C. § 5851(g) ("§ 211(g)").

Mr. Boettcher brings an action under subsection (a). 42 U.S.C.A. § 5851 (West). This is an affirmative defense, and the employer bears the burden of proof by a preponderance of the evidence. *Hibler v. Exelon Generation Co., LLC*, ARB No. 05-035, ALJ No. 2003-ERA-9 (ARB Mar. 30, 2006). To establish an affirmative defense under § 211(g), a respondent must establish by a preponderance of the evidence: (1) the complainant caused a violation of the ERA or AEA, (2) the complainant acted with knowledge or reckless disregard that his or her action would cause a violation of the ERA or AEA, and (3) the complainant acted without respondent's expressed or implied direction. 42 U.S.C. § 5851(g). *See Fields v. U.S. Dep't of Labor Admin. Review Bd.*, 173 F.3d 811, 813 (11th Cir. 1999).

As a remedial statute, the ERA should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived nuclear safety violations without fear of retaliation. *See generally, English v. Gen. Elec. Co.*, 496 U.S. 72, 87, 110 S. Ct. 2270, 2279, 110 L. Ed. 2d 65 (U.S. 1990). *See also, Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws."). Accordingly, any affirmative defenses should be interpreted narrowly to provide the act's protections to employees who work within the bounds of safety. When interpreting an identical defense for a similar statute, the ALJ in *Dotson v. Anderson Heating and Cooling, Inc.*, 95- CAA-11 (ALJ Oct. 2, 1995), concluded "[a]n intentional violator who experiences a change of heart is the only class of persons to whom subsection (g) could apply."

Respondent fails to meet the burden of proving Mr. Boettcher caused a violation of the ERA or the AEA. Respondent argues Mr. Boettcher violated 10 C.F.R. § 851.20(b), under which "[w]orkers must comply with the requirements of this part, including the worker safety and

health program, which are applicable to their own actions and conduct.” Respondent asserts because Mr. Boettcher’s behavior violated their private safety policies, which Respondent relies on to maintain compliance with the ERA and AEA, Mr. Boettcher has violated the ERA itself (Respondent’s Closing Brief, p. 17). These private safety policies revolve around generic aspirations for a respectful, careful, and accident-free work place, but do not cite specific ERA or AEA regulations (Respondent’s Closing Brief, p. 17 to 18).

Adopting Respondent’s interpretation would drastically expand the scope of this affirmative defense. Respondent argues Complainant must follow all of its privately-crafted safety regulations or the court will block their whistleblower protections. Essentially, an employer would be free of liability if it found any violation of any conduct in the employee’s record which could be tied to safety, even conduct that did not result in documented discipline. Employees in any working environment frequently make mistakes, so I would be cutting off almost all employees from recovery under the ERA. I reject this overbroad reading.

The evidence also indicates Mr. Boettcher’s behavior in the Conex is unrelated to the ERA. The Conex, while on the site of a nuclear waste disposal facility, is a self-contained trailer with no connection to the nuclear site (TR 217 to 218). Employer has not produced evidence indicating the Conex was in any way integrated to the nuclear site. There is no indication that a disturbance in the Conex would affect the rest of the site. Employer has not offered evidence to indicate it contained nuclear waste or materials or that the materials inside it were dangerous to the public or the environment. Instead, the sole issue during the October 8, 2013 testing was how much mercury was in the pile.

Ultimately, Respondent’s reading of the statute is overbroad, and Mr. Boettcher’s behavior in the Conex on October 8, 2013, is unrelated to the Atomic Energy Act. I, therefore, reject Respondent’s reading and find Mr. Boettcher’s conduct within the Conex unrelated to the ERA. Respondent’s Section 211(g) affirmative defense fails.

C. Mr. Boettcher Fails to Meet the Burden of Proving he Engaged in Protected Activity

42 U.S.C. § 5851(b)(3)(C) and (D) and the applicable regulations at 29 C.F.R. Part 24 govern actions under the whistleblower-protection provisions of the ERA. To prevail on an ERA claim based on circumstantial evidence of retaliatory intent, a complainant must demonstrate by a preponderance of the evidence that

- (1) the complainant was an employee of a covered employer;
- (2) the complainant engaged in protected activity;
- (3) the complainant thereafter was subjected to adverse action regarding his or her employment;

- (4) the Respondent knew of the protected activity when it took the adverse action; and
- (5) the protected activity was the reason for the adverse action.

See 42 U.S.C. § 5851(b)(3)(C); 29 C.F.R. § 24.109(b)(1). *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). If a complainant proves his protected activity contributed to the unfavorable employment action, the employer may escape liability by proving with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 42 U.S.C.A. § 5851(b)(3)(D). Complainant and Respondent agree Complainant meets elements one, three, and four. Both parties agree Complainant suffered adverse action when Employer terminated his employment on October 16, 2013 (Respondent's Closing Brief, p. 33). Respondent concedes it was generally familiar with "many of Boettcher's alleged Stop Works and PERs" (*Id.*).

a. Mr. Boettcher fails to prove he engaged in protected activity

In *Williams v. Mason & Hanger Corp.*, ARB No. 98 030, ALJ No. 1997 ERA 14 (Nov. 13, 2002), the ARB described several general principles relating to protected activity under the ERA whistleblower provision, and specifically as applicable to nuclear weapons workers. First, safety concerns may be expressed orally or in writing. Second, the concern expressed must be specific to the extent that it relates to a practice, condition, directive, or occurrence. Third, a whistleblower's objection to practices, policies, directives, or occurrences is covered if the whistleblower reasonably believes that compliance with applicable nuclear safety standards is in question; it is not necessary for the whistleblower to cite a particular statutory or regulatory provision or to establish a violation of such standards. *Id.* Complainant must prove he *actually* believed Respondent was violating environmental laws *and* that such belief was *reasonable*. In other words, there is both a subjective and objective element to Complainant's belief that Respondent was violating the law. *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000).

Section 5851(a) lists six ways an employee may act under its aegis. Listing only the three relevant provisions, an employee commits a protected activity if he:

- (A) notified his employer of an alleged violation 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 [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.

In *Decresci v. Lukens Steel Co.*, 87-ERA-13 (Sec'y Dec. 16, 1993), the Secretary held Complainant's safety-related activity must relate to nuclear safety to be protected under 42 U.S.C. § 5851. In *American Nuclear Resources, Inc. v. U.S. Dept. of Labor*, No. 96-3825, 1998 WL 29862 (6th Cir. Jan. 29, 1998) (case below 92-ERA-37), the Sixth Circuit explained "the ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. . . ." Concerns implicating only occupational safety and health matters are not protected under the ERA. See, e.g., *McKoy v. North Fork Services Joint Venture*, ARB No. 04-176, ALJ No. 2004-CAA-2 (ARB Apr. 30, 2007); *Aurich v. Consolidated Edison Co. of New York, Inc.*, 86CAA-2 (Sec'y April 23, 1987) (handling of asbestos in workplace); See also, *Tucker v. Morrison & Knudson*, Case No. 94-CER-1, ARB Final Dec. and Ord., Feb. 28, 1997, slip op. at 5 (under environmental acts, complaint about violations that related only to occupational safety and not environmental safety were not protected).

In *Williams v. Dallas Independent School District*, ARB No. 12-024, ALJ No. 2008-TSC-1 (ARB Dec. 28, 2012), the ARB stated that "[t]he case law makes clear that while the environmental statutes "generally do not protect complaints restricted solely to occupational safety and health [covered by Section 11(c)]," they do if "the complaints also encompass public safety and health or the environment." *Id.* at 11 (citations omitted). In *Cox v. Lockheed Martin Energy Systems, Inc.*, 1997-ERA-17 (ALJ Feb. 8, 1999), the ALJ found Complainants failed to establish they engaged in protected activity under the ERA, where their case was based on allegations they were the victims of cyanide intoxication related to an occupational exposure. The ALJ found that such exposure was not related to nuclear safety and therefore not protected under the ERA.

In *Macktal v. Brown & Root, Inc.*, 86-ERA-23 (ARB Jan. 6, 1998), the ARB found Respondent is not required to read a complainant's mind. Complainant requested leave from his duties, but the ARB found "[i]t would have required considerable mental gymnastics on the part of [Respondent's] managers to recognize that, when [Complainant] said he wanted to be relieved of his duties, he really meant he wanted to be reassigned to work that did not require him to violate NRC procedures." Slip op. at 5. The ARB agreed with the ALJ that "a reasonable person could only interpret [Complainant's] request as a resignation and could not be held responsible for failure to intuit what [Complainant] now claims was on his mind." Slip op. at 5-6.

i. Complainant's Stop Works

Mr. Boettcher's April 20, 2012 Stop Work over proper warning labels on electrical cabinets was entirely an occupational concern. He believed this posed a risk of an arc flash that could

burn a worker (TR 37 to 38). While a purely occupational issue can become the kind of concern addressed in the ERA, Mr. Boettcher's request for a Stop Work focused only on himself and his coworker's safety. The public, the environment, or any purpose of the ERA did not enter his mind at the time of the April 20, 2012 PER, so this activity is not protected under the ERA.

Mr. Boettcher's second Stop Work also only concerned occupational hazards. On October 11, 2012, Mr. Boettcher filed a Stop Work over his concern that temporary scaffolding was not properly bonded, posing a risk of shock to workers on the scaffold (CX 5; TR 38 to 40). Mr. Boettcher's concern in this issue was solely for his fellow workers and had nothing to do with the public, environment, or the purpose of the ERA.

Mr. Boettcher's February 11, 2013 Stop Work was also purely occupational (CX 7). He was concerned for himself and his fellow employees. Mr. Boettcher testified a software system malfunction might expose workers or equipment to vapors (TR 45 to 48). Mr. Pickles, the Engineering Manager and an electrical engineer himself, added the potential harm was damage to the equipment, not to the public or environment (TR 1070). Since Mr. Boettcher raised an issue that did not concern the ERA, the February 11, 2013 Stop Work is not protected activity.

Mr. Boettcher's filed another Stop Work a few weeks later on February 27, 2013 (CX 8). He was concerned the Ahlberg lights lacked open neutral protection to protect workers against the risk of shock (TR 192). This is purely an occupational concern because it does not involve any risk to the public or the environment.

At the hearing, Mr. Boettcher added his concern that a shock might ignite flammable gases that had escaped from a tank (TR 61). Evidence indicates Mr. Boettcher did not think of this issue until the hearing, and he therefore did not have a reasonable and subjective belief this Stop Work constituted protected activity under the ERA. The paperwork Mr. Boettcher filed makes no mention of flammable gas or a fire hazard and he could not produce a single witness to indicate he brought up the issue at the time (CX 8). His statement to Mr. Cronin described the alleged danger as one to workers, (RX 93, p. 3), and Mr. Wutzke testified Mr. Boettcher was primarily concerned with the danger it posed to workers (TR 375 to 376). Therefore, the record indicates Mr. Boettcher did not have a subjective belief his February 27, 2013 Stop Work constituted protected activity under the ERA.

The April 18, 2013 Stop Work is also solely concerned with the safety of Mr. Boettcher and his fellow personnel. Mr. Boettcher found a damaged electrical inbox which presented a shock hazard to workers (CX 10; TR 65 to 68). Mr. Boettcher provides no evidence indicating his concerns involved the ERA. This activity was not protected under the ERA.

Complainant's June 1, 2013 Stop Work is a purely occupational concern. Mr. Boettcher believed the positioning and overuse of these portable air conditioners presented a fire hazard

(CX 14; CX 46, p. 9). The June 1, 2013 Stop Work also argues the portable air conditioners were shock and tripping hazards, but these are purely occupational concerns. Only employees of respondent would be concerned about these issues, and they are irrelevant to the ERA.

The question of whether the June 1, 2013 Stop Work relates to a concern relevant to the ERA revolves around what Mr. Boettcher meant when he called the portable air conditioners a “fire hazard.” Mr. Boettcher testified he was afraid the air conditioner units could overload the electrical circuit, catch fire, and disturb the HEPA filter system (TR 96 to 100). He further testified that if the ventilation building shut down the tanks could release gasses (*Id.*). But Mr. Boettcher did not provide any contemporaneous evidence to indicate he believed there was a danger to the public besides using the words “fire hazard.” Instead, Mr. Boettcher waited until the hearing to elaborate on his concerns. I do not find this new elaboration credible. Even if it was credible, Respondent would have no contemporaneous knowledge such a concern was on Mr. Boettcher’s mind. This generic concern is not specific enough to bring Mr. Boettcher’s June 1, 2013 Stop Work into the purview of ERA protection and those two words are not sufficient to prove Complainant’s activity was related to the public or the environment. Therefore, Mr. Boettcher’s June 1, 2013 Stop Work was not protected activity under the ERA.

Mr. Boettcher’s September 3, 2013 Stop Work was entirely an occupational concern and not protected activity under the ERA whistleblower protections. As of September 3, 2013, Mr. Boettcher’s concerns revolved around a shock hazard to himself and his fellow employees (CX 16; CX 46, p. 11, 12). During the hearing Mr. Boettcher would add the tags could blow in the wind and “shutdown the systems” and cause the release of flammable gases (TR 101 to 104, 279 to 280). Given the only evidence of this concern is Mr. Boettcher’s testimony years after his Stop Work, I cannot find Mr. Boettcher has proven he subjectively and reasonably believed he was engaging in protected activity. The addition is not credible and even if it was, there is no indication Respondent knew this was on Mr. Boettcher’s mind. Instead, his concern was entirely occupational and not protected under the ERA.

Complainant’s September 12, 2013 Stop Work was also entirely occupational and therefore not covered under the ERA (CX 17). Complainant once again believed the scaffolding was not bonded and posed a risk of shock to workers on the scaffold (TR 106 to 107). These concerns are identical to his October 11, 2012 Stop Work and I reject the proposition it is ERA protected activity for the same reason.

Complainant issued a second Stop Work on September 12, 2013, which only covered occupational concerns (CX 19; CX 46, p. 13, 17). Mr. Boettcher was concerned a crane operating at the work site was not properly barricaded on all sides, and a worker might injure him or herself when wandering into the operating area (TR 108 to 112). As Respondent concludes, this condition may have been dangerous to workers in the area, but this was a purely occupational

concern that did not risk radiation exposure, adversely affect nuclear safety, or endanger environmental safety and was therefore not protected activity under the ERA (Respondent's Closing Brief, p. 39).

I cannot find the September 26, 2013 PER-2013-1848 was protected activity under the ERA. The PER alleges group craft meetings were cancelled and replaced with meetings to talk about union contract negotiations (CX 20). The record fails to explain the context or content of these meetings, and I cannot ascertain whether this change in content may have implicated the ERA. Mr. Boettcher makes no effort to explain how these meetings threatened the environment or the general public, so has failed to demonstrate this PER was protected activity.

Mr. Boettcher's October 2, 2013 attempt to file a Stop Work was not protected activity. He tried to initiate a Stop Work on all EAPC walk down items that had been listed as defective or hazardous "to personnel or facilities" but Mr. Boettcher did not have a list that named these items (TR 115 to 116; CX 21). There is nothing in the record to show he perceived any of these unnamed items as nuclear, environmental, or public hazards. Therefore, Mr. Boettcher has failed to meet his burden of proving this attempted PER was protected activity under the ERA.

Ultimately, none of Mr. Boettcher's Stop Works or PERs comprised protected activity under the ERA.

ii. The "Flam Gas" Issue

Mr. Boettcher also engaged in a regular dispute with Respondent over whether Respondent was taking the proper corrective actions to prevent flammable gases from escaping the tanks, which would create the risk of an explosion. This dispute took place via a series of emails and meetings in April, 2013. Mr. Boettcher had numerous questions about flammable gas build-up, but his primary concern revolved around the issue whether the tanks were a hazard to leak flammable gas and explode if he did not take proper electrical precautions (Complainant's Closing Brief, p. 7).

If a concern over the harm caused by violating the ERA or another environmental whistleblower statute is too speculative, it cannot be based in an objectively reasonable belief. *See McKoy v. North Fork Services Joint Venture*, ARB No. 04-176, ALJ No. 2004-CAA-2 (ARB Apr. 30, 2007). Also, if complainant raises concerns over a technical issue which only raises environmental concerns after many speculative events, his or her activity is not protected under the whistleblower statute. *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-0012, slip op. at 3 (ARB 1997).

Mr. Boettcher's argument he engaged in protected activity when he raised this hazardous classification issue fails for two reasons. First, Mr. Boettcher makes no effort to explain how this

classification issue impacts the environment or public. Second, Mr. Boettcher's fear of an explosion is too speculative to be reasonable.

As noted above, the ERA does not protect Mr. Boettcher when he raises entirely occupational concerns and the burden is on Mr. Boettcher to prove he engaged in protected activity. Mr. Boettcher makes no effort beyond saying this is a "nuclear safety concern" to argue an explosion might place either the public or the environment at risk (Complainant's Closing Brief, p. 7). Even if an explosion were possible, Mr. Boettcher does not provide any argument indicating whether the explosion might impact anyone beyond the workers within the Hanford site. He does not indicate how radioactive gasses might escape the tanks after the explosion he is so concerned about, or in what quantity. I cannot ascertain the magnitude or impact of such an event and therefore cannot be certain of its relation to the ERA. He is content to stop with the idea of an explosion, but goes no further. Mr. Boettcher has failed to meet his burden of proving he engaged in protected activity.

Mr. Boettcher's concern over the flam gas issue is also too speculative. At its core, Mr. Boettcher raised the issue of whether flammable gasses might leak from the tanks and explode. As Respondent explains, the chain of events for Mr. Boettcher's electrical concern to be dangerous to the environment or public is tenuous. First, the failure to properly classify the zones of Mr. Boettcher's concern would need to cause Mr. Boettcher to use unsafe equipment and create electrical code violations. From there, those issues could only lead to an environmental concern if a hydrogen bubble formed in the annulus space in the tanks, leaked out from the annulus space of the tank, and a spark from Mr. Boettcher's equipment ignited the gas. An explosion might then release radioactive or chemical effluents into the environment (Respondent's Closing Brief, p. 44 to 45).

Aside from requiring a number of steps to include harm to the environment, the record indicates the odds of these events occurring are almost impossible. Mr. Pickles, an Engineering Manager utilizing the help of the Nuclear Safety subdivision, found flammable gas leaking was virtually impossible to occur (CX 51, p. 2 to 5; TR 662 to 663; TR 1072). The nuclear safety subdivision specifically found the odds of enough flammable gas accumulating to reach the lowest possible flammable point to be one in one million (CX 50, p. 2). According to Mr. Strasser, who managed the tank farms, the likelihood of gasses reaching the minimum level to be flammable was less than one or equal to once in one million operating years (*Id.*). The engineers at the April 24, 2013 meeting believed a leak out the side of a tank into the annulus through a small hole was not a credible danger (*Id.* at 1).

Aside from his own testimony, which is only supported by his own convictions, Mr. Boettcher does not produce evidence that indicates this chain of events is plausible. While Mr. Boettcher worked at a nuclear facility, he is an electrician by trade. His work does not make him an expert in nuclear disposal or engineering. I do not find his unsupported testimony more credible than the evidence Respondent has produced.

Mr. Boettcher also raised a contradiction in tank farm procedures involving the tanks, fire cord, and flammable gas. The contradiction is in HNF-SD-WM-HC-017, but the record does not explain what this contradiction is and Complainant does not explain how or why it involves the ERA (*Id.* at 1). All I can tell is Cheryl Myott, a fire protection engineer, explained she was already in the process of revising the document to clarify what was meant by the contradictory item when she met Mr. Boettcher in April 2013, and that the correct interpretation was the tanks and support do not meet Class 1 Division 1 criteria (*Id.* at 1). At best, this complaint fits into Mr. Boettcher's general concern the tanks might explode if he did not take proper electrical precautions (*Id.* at 1). This concern is too speculative and Mr. Boettcher has failed to prove his complaints were protected under the ERA.

Ultimately, Mr. Boettcher's flam gas concerns are both objectively unreasonable and he has failed to meet the burden of proof he engaged in protected activity under the ERA.

iii. OSHA Complaint

In his prehearing statement, Mr. Boettcher contends he engaged in protected activity under the ERA when he reported whistleblower retaliation to OSHA on April 9, 2013 (Complainant's Supplemental Prehearing Statement, p. 5). Mr. Boettcher filed the complaint under Section 11(c) of the Occupational Safety and Health Act of 1970, 29 USC § 660(c) (CX 11, p. 3).

Employer asserts complaints filed under section 11(c) of OSHA 29 U.S.C. § 660(c) cannot constitute protected activity, but this is not correct (Respondent's Closing Brief, p. 40 to 41). In *Williams v. Dallas Independent School District*, ARB No. 12-024, ALJ No. 2008-TSC-1 (ARB Dec. 28, 2012), the ARB noted there is a potential for overlap between the environmental whistleblower acts and the Occupational Safety and Health Act. The ARB stated "[t]he case law makes clear that while the environmental statutes "generally do not protect complaints restricted solely to occupational safety and health [covered by Section 11(c)]," they do if "the complaints also encompass public safety and health or the environment." *Id.* at 11 (citations omitted). See also *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, slip op. at 10 (quoting *Post v. Hensel Phelps Constr. Co.*, No. 1994-CAA-013, slip op. at 1-2 (Sec'y Aug. 9, 1995)).

Mr. Boettcher's OSHA complaint alleges that on or about March 28, 2013, he was threatened with discharge and had been subject to a hostile work environment since April 2012 because he was exercising his right to initiate Stop Works and his vocalization of workplace health and safety concerns (CX 11, p. 1). If Mr. Boettcher's OSHA complaint encompassed public safety and health concerns, or concerns for the environment, it might be protected activity. Boettcher (CX 11, p. 1). But nothing in the complaint indicates Mr. Boettcher was acting to protect the safety and health of the public at large or the environment.

Complainant also exchanged a number of emails with Diane Robello, an investigator from OSHA (CX 11, p. 4 to 8). In these emails, Mr. Boettcher based his claim for protected activity on the Stop Works which occurred before April 24, 2013. For the reasons stated above, these Stop Works are occupational concerns, not protected activity. Therefore, they indicate Mr. Boettcher's OSHA complaint and his fear of retaliation were an occupational health and safety concern. Mr. Boettcher also accused Respondent of creating a hostile work environment by retaliating against him for the Stop Works, but without underlying protected activity, this is not relevant.

Since Mr. Boettcher's OSHA complaint was an entirely occupational concern, it is not protected activity under the ERA.

iv. Discussions with DOE

Mr. Boettcher contends in his prehearing statement he engaged in protected activity under the ERA when he met with the DOE to discuss the "flam gas" issue (See Complainant's Supplemental Prehearing Statement, p. 5). Mr. Boettcher met with the DOE twice in 2013 to discuss his transferred OSHA complaint (TR 85 to 86). He requested permission from Mr. Hoover to meet with the DOE, but did not inform Mr. Hoover why he was meeting them (*Id.*). When he spoke with Mr. Lutz and Mr. Strasser about the flam gas issue, he only informed them of the portion of the complaint in which he raises the flam gas issue (TR 87). Ultimately, Mr. Boettcher proves he told Respondent he was meeting with the DOE to discuss the flam gas issue, but nothing in the record indicates these meetings took place (CX 12). If these meetings did take place, nothing in the record indicates what came of them. The issue, therefore, is whether Mr. Boettcher's communication to Respondent that he was meeting to discuss the flam gas issue with the DOE constituted protected activity.

External complaints to safety organizations are protected under environmental whistleblower statutes. *See Scerbo v. Consolidated Edison Co. of New York, Inc.*, 89-CAA-2 (Sec'y Nov. 13, 1992). But safety concerns must be objectively reasonable and cannot be too speculative. *Lee v. Parker-Hannifin Corp.*, ARB No. 14-018, ALJ No. 2009-SWD-3 (ARB May 22, 2015); *McKoy v. North Fork Services Joint Venture*, ARB No. 04-176, ALJ No. 2004-CAA-2 (ARB Apr. 30, 2007). Mr. Boettcher's meeting with the DOE is not protected activity. As reasoned above, his dispute over the flam gas issue is too speculative to constitute protected activity or to be objectively reasonably interpreted as protected activity.

v. October 8, 2013 Meeting

The October 8, 2013 meeting in which Mr. Boettcher spoke to Dave Olson, President of WRPS, is not protected activity because it was a general inquiry (TR 134 to 136). General inquiries about safety are not protected activity. In *Bechtel Construction Co. v. Secretary of La-*

bor, No. 94-4067 (11th Cir. Apr. 20, 1995) (available at 1995 U.S. App. LEXIS 9029) (case below 87-ERA-44), the court agreed with the Respondent's position that general inquiries regarding safety do not constitute protected activity. *See also Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571 (11th Cir. 1997); *Amer. Nuc. Res., Inc. v. U.S. Dep't. of Labor*, 134 F.3d 1291, 1295 (6th Cir. 1998).

Mr. Boettcher fails to prove by a preponderance of the evidence that his conversation with Mr. Olson was anything other than a generalized inquiry. Mr. Boettcher kept his inquiries both brief and broad. He did not get more specific than accusing Mr. Olson and his company of ignoring ISMS guiding principles (TR 134 to 136, 200). Therefore, Mr. Boettcher's conversation with Mr. Olson was not protected activity.

vi. Request for substance test

Mr. Boettcher requested Respondent test the white powder in the Conex for mercury, but this is not protected activity because he did not subjectively believe the white powder posed any kind of danger (RX 93, p. 4; TR 142, 153, 249 to 250, 252, 841). A complainant must prove that he *actually* believed Respondent was violating environmental laws *and* such belief was *reasonable*. In other words, there is both a subjective and objective element to a complainant's belief that a respondent was violating the law. *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000). A demand to test a substance when a complainant believes the substance is toxic and poses a danger to the environment might be protected activity under the ERA. But Mr. Boettcher made clear he did not believe the powder to pose any danger. Mr. Boettcher expressly argues "No individual was actually worried about the composition of the dust from the fluorescent bulbs" (Complainant's Closing Brief, p. 26). Therefore, Mr. Boettcher fails to establish he subjectively believed Respondent was violating a provision of the ERA and his request for monitoring is not protected activity.

While I do not believe Mr. Boettcher was concerned about the flam gas issue when he filed the Stop Works mentioned above, I believe him when he testified he was not concerned about the pile of white powder. First, he did not initiate a Stop Work when he saw the powder. After using Stop Works for misplaced air conditioners, unchecked electrical cords, absent barricades, and mislabeled electrical cabinets, Mr. Boettcher believed this pile of powder was not "worthy" of a Stop Work (TR 249 to 250). He argued the powder did not constitute a "spill" and he was just curious as to how the powder got into the Conex and where it came from (TR 153). Mr. Boettcher believed he was qualified to determine whether the white material was not hazardous because he cleaned broken tubes and the powder they left behind for years (TR 252). He testified he had been exposing himself to broken tubes for years (TR 144). He stated normally he would just clean up and dispose of broken light bulbs, but that this time he was inspired by a class on Lumex monitoring just to satisfy his curiosity (TR 144, 236). All of this indicates he did not believe the powder posed any danger relevant to the ERA.

Mr. Boettcher had an opportunity clearly to state whether he believed the white powder posed a danger to the environment, the public, or even his fellow workers, but he failed to do so. When asked if he had the survey done because he believed the powder might be potentially hazardous, he testified he had no idea how many bulbs were in the pile and that was why he asked for a courtesy survey (TR 254). This non-responsive answer does not help Mr. Boettcher.

I cannot find Mr. Boettcher has met his burden of proving he subjectively believed his request for monitoring the powder was protected under the ERA. I find his request for monitoring of the white powder in the Conex on October 8, 2013, is not protected activity.

D. Even if Mr. Boettcher Proved He Engaged in Protected Activity, He Has Failed to Prove the Alleged Protected Activity Contributed to Respondent's Decision to Terminate His Employment

Even if all of Mr. Boettcher's actions listed above were protected activity, his claim would fail because he has failed to prove any of his alleged protected activity contributed to his termination. Mr. Boettcher must prove the protected activity was a contributing factor in the unfavorable action. *See* 42 U.S.C. § 5851(b)(3)(C); 29 C.F.R. § 24.109(b)(1). Subsection 5851(b)(3)(C) provides that "[t]he Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any [ERA Protected Activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 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. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-3 (ARB Aug. 29, 2014). "Contributing factor" means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *See DeFrancesco v. Union R.R.*, ARB No. 10-114, ALJ No. 2009-FRS-9, at 6-7 (ARB Feb. 29, 2012). The ARB found that substantial evidence supported the ALJ's findings of fact, and that the ALJ correctly applied the applicable law. *Hoffman v. NextEra Energy, Inc.*, ARB No. 12-062, ALJ No. 2010-ERA-11 (ARB Dec. 17, 2013).

In his closing brief, Mr. Boettcher argues temporal proximity alone is enough for him to meet the element of contributing factor (*Id.* at 150).

- a. *Mr. Boettcher fails to prove the discipline for his actions in the Conex on October 8, 2013, was a pretext for retaliation*

In *Barry v. Specialty Materials, Inc.*, ARB No. 06-005, ALJ No. 2005-WPC-3 (ARB Nov. 30, 2007), the ARB stated:

Temporal proximity is sufficient to raise an inference of causation. But once an employer articulates a legitimate, nondiscriminatory reason for its actions, the employee then must prove by a prepon-

derance of the evidence that the employer intentionally discriminated against him because of his protected activity, and that the employer's articulated reason was pretext.

Respondent has articulated a legitimate, nondiscriminatory reason for terminating Mr. Boettcher. Respondent terminated Mr. Boettcher for his actions in the Conex on October 8, 2013 (RX 57). This shifts the burden to Mr. Boettcher to prove by a preponderance of the evidence his allegedly-protected activity contributed to his termination, and that Respondent's articulated reason was pretext.

- i. Respondent followed previously standardized procedures when they investigated Ms. Wilkes' complaint and terminated Mr. Boettcher

Mr. Boettcher points to a number of alleged facts he believes indicate his alleged protected activity was a contributing factor to his termination and Respondent merely used the October 8, 2013 incident as pretext, but there is no evidence of any pretext in Mr. Boettcher's termination. Beginning with Ms. Wilkes' and Mr. DeCola's startled reactions at the time, through Ms. Wilkes' complaint to her supervisor and all the way to Mr. Boettcher's termination, reports of his behavior disturbed Mr. Boettcher's fellow employees and Respondent followed its previously standardized procedures. Ms. Wilkes' complaint lead to a series of events naturally leading to Mr. Boettcher's termination according to previously-established company policy.

There is no evidence anyone interfered with the process or that Mr. Boettcher's alleged protected activities changed the course of the investigation. Ms. Wilkes reported Mr. Boettcher's behavior to Ms. Beerman, and they reported it to Dan Wolf and Don MacKay (TR 501, 508). Ms. Beerman, Mr. MacKay, and Mr. Wolf reported the incident to Mr. Lutz (TR 648). From there, Mr. Lutz reported to his own manager, Mr. Strasser, and briefed Mr. Nettles, the HR representative, and asked Mr. Nettles to initiate an investigation (TR 537, 568, 650 to 651). At this point, seven people had heard of Mr. Boettcher's behavior and agreed it was serious enough to pursue an investigation, and there is no evidence Mr. Boettcher's protected activity influenced their behavior in any way.

During the course of the investigation, Mr. Sheets and Mr. Nettles interviewed the witnesses and obtained written statements (TR 572, 573; RX 40; RX 41; RX 42; RX 43; RX 44; RX 49; RX 50; RX 45; RX 46; CX 33). When they interviewed Mr. Boettcher on October 8, 2013, his union shop stewards, Mr. Patrick and Mr. Smith, were present as Mr. Boettcher admitted he intentionally rolled his boot over the electrical cord, to cause the powder to go airborne (TR 574 to 575, 557 to 558; RX 46; CX 33, p. 1 to 2). Nothing in the investigation indicates anyone directed Mr. Sheets or Mr. Nettles to consider Mr. Boettcher's alleged protected activity, and he

has introduced no evidence his alleged protected activity contributed to any of the investigations conclusions or methods.

After Mr. Sheets and Mr. Nettles concluded Mr. Boettcher engaged in extremely serious misconduct, they wrote a report (TR 577; RX 53; RX 57). Then, Respondent followed procedure and convened the DRB (RX 56). The DRB was not aware of the details of Mr. Boettcher's alleged protected activity (TR 1062) when all four members concurred with Mr. Nettles' and Sheets' recommendation Mr. Boettcher be terminated for extremely serious misconduct (TR 1005; TR 759; RX 57, p. 3). Nothing in this process, from Ms. Wilkes' original complaint to this termination, indicates anyone let Mr. Boettcher's alleged protected activity contribute to their determination to either pursue the complaint to its metamorphosis into an investigation, to the conclusion of the investigation, or the determination of the DRB.

ii. Mr. Boettcher has failed to prove there was a meaningful connection between his termination and his alleged protected activity

Further undermining Mr. Boettcher's argument is his failure to connect those involved in the complaint against him, the investigation, or actual decision makers to his alleged protected activity.

First, the decision makers behind his termination were not influenced by Mr. Boettcher's alleged protected activity. As to Mr. Boettcher's accusation that the safety managers were attempting to retaliate against him, the Safety Managers were not part of the DRB and no one consulted with them about the proposed termination (TR 771). No one provided the DRB details of Mr. Boettcher's raised safety concerns; they were only told he had engaged in protected activity (TR 1062). Mr. Latteri and Mr. Wilkinson each testified they agreed to terminate Mr. Boettcher because of his behavior on October 8, 2013.

Mr. Boettcher has not offered any evidence to indicate his alleged protected activity contributed to the actions of any other individuals involved. Ms. Wilkes did not know who Mr. Boettcher was before she arrived at the Conex. There is no indication anyone in Ms. Wilkes' department had any negative association with Mr. Boettcher or knew about his alleged protected activity (TR 761 to 765, 1051 to 1052).

Mr. Boettcher has introduced evidence he did not get along with his coworkers and that he may have been known as a "whistleblower," but this does not help his case. Mr. Strasser and Mr. DeCola were not always pleased when Mr. Boettcher brought up safety issues (TR 609, 610, 878). But neither Mr. DeCola nor Mr. Strasser was a decision maker during Mr. Boettcher's disciplinary process, and their opinions are not relevant to the issue.

iii. Employees for Respondent believed the white powder posed a threat to its employees

Mr. Boettcher argues Respondent never believed the powder presented an actual threat; therefore, Respondent was using the October 8, 2013 incident as a pretext for his termination. Mr. Boettcher goes as far to proclaim “No individual was actually worried about the composition of the dust from the fluorescent bulb” (Complainant’s Closing Brief, p. 26).

But the record indicates many individuals involved were concerned about the powder and took various precautions to either prevent its exposure to others or provide medical assistance after Mr. Boettcher exposed it to Ms. Wilkes. After learning of the white powder, Mr. Hoover instructed Mr. Boettcher to secure the Conex with a lock and yellow caution tape and wait for further instructions (TR 221, 795, 841). After the mercury testing, Mr. Hoover told Mr. Boettcher and Mr. DeCola not to disturb the powder and placed a sign on the Conex warning others to stay out (TR 572, 800, 805 to 806).

Many of Mr. Boettcher’s fellow employees were taken off guard by Mr. Boettcher’s behavior in the Conex, indicating they were concerned about the powder. Mr. DeCola was shocked after Mr. Boettcher disturbed the powder, (TR 878 to 879, 883). Ms. Wilkes was concerned for her medical safety after Mr. Boettcher disturbed the powder (TR 920 to 921; RX 41). She was concerned enough about the incident to report it to her superior, Ms. Beerman, as her hands visibly shook with emotion (TR 506, 929 to 930). From there, the complaint traveled through Respondent’s hierarchy, with each individual becoming concerned enough to pursue an investigation. Of all those involved, it appears only Mr. Boettcher considered the powder unquestionably harmless.

Mr. Boettcher argues no one was concerned because MSDS found there were no adverse effects from exposure to the occasional broken lamp, the employees commonly understood there were no adverse effects to exposure to the broken lamps, and the bulbs were below the action level for mercury (Complainant’s Closing Brief, p. 26). But the MSDS identified four hazardous ingredients in the lamps: glass, phosphor powder, mercury, and polyethylene terephthalate, (TR 510 to 511; RX 16, p. 1), and warns to avoid inhalation of any airborne dust (RX 16).

Mr. Boettcher’s argument that other employees believed the dust was harmless is incorrect. Several witnesses testified common practice was to use a wet rag to clean up the dust to avoid spreading it into the air, indicating it was unsafe to breathe (TR 508, 833; CX 28). Mr. Boettcher may not believe the lamps were dangerous, but Respondent did.

The bulbs were below action level for mercury, but actual mercury levels were not the point of the disciplinary investigation. Mr. Boettcher deliberately disturbed an unknown substance, causing it to enter a coworker’s breathing zone as she tested it for a toxic element. The

record indicates Respondent engaged in an investigation without any consideration as to Mr. Boettcher's protected activity into that incident. The bulbs testing below the actionable mercury level is a minor and ancillary point that falls short of helping Mr. Boettcher meet his burden.

Mr. Boettcher also argues pretext because Mr. DeCola and Mr. Boettcher were not sent for testing to a medical care provider like Ms. Wilkes (Complainant's Prehearing Statement, p. 8). But Ms. Wilkes' experience of direct exposure to the powder differentiates her situation from Mr. DeCola and Mr. Boettcher. She informed Ms. Beerman and her supervisor, Chris Anderson, she had been exposed to the white powder and she was instructed to go to the medical clinic (TR 497). Mr. Boettcher and Mr. DeCola each had a different supervisor and different level of exposure, explaining why they were not sent.

Mr. Boettcher argues no one was worried about the white powder in the Conex, but this the record shows this is not true.

iv. Ms. Wilkes was upset Mr. Boettcher disturbed the white powder and because he asked badgering questions

Mr. Boettcher also believes no one, including Ms. Wilkes, was genuinely upset due to his disturbing the powder in the Conex. Mr. Boettcher argues Ms. Wilkes only got upset due to his questioning rather than his intentional disturbing of the powder. Mr. Boettcher's argument falls apart because Ms. Wilkes' anger over Mr. Boettcher's actions and her anger over his questions are not mutually exclusive. The record indicates Mr. Boettcher's behavior in the Conex, as a whole, made her upset. She testified Mr. Boettcher disturbing the powder upset her (TR 921 to 922). Later, multiple people noticed Ms. Wilkes' hands were shaking (TR 506; 971 to 972). Ms. Wilkes was apparently disturbed by the incident enough to report Mr. Boettcher. Mr. Boettcher does not give any reason to doubt Ms. Wilkes' corroborated testimony.

v. The exact verbiage describing how Mr. Boettcher deliberately disturbed the white powder while Ms. Wilkes' leaned over it is irrelevant

Mr. Boettcher argues "the 'investigation' confirmed Complainant had not violated policy and did not kick any debris into anyone's face" (Complainant's Closing Brief, p. 30). He focuses on whether Mr. Boettcher "kicked" the powder into Ms. Wilkes' face or whether some other verbiage was more appropriate to explain how Mr. Boettcher deliberately caused Ms. Wilkes to be exposed to the powder. The various distinctions between "kick," "poof," and "rolled" are not relevant, and Mr. Boettcher does not explain how they help his case. Despite the specific language used, Mr. Boettcher deliberately disturbed the powder, causing it to go airborne while Ms. Wilkes tested the substance for mercury.

I do not understand how Mr. Boettcher could conclude the investigation confirmed he had not violated policy. Mr. Sheets and Mr. Nettles, using the evidence gathered during the investigation, concluded Mr. Boettcher engaged in misconduct (TR 577). Mr. Boettcher had access to both Mr. Sheets' testimony and the DSSR (RX 57). There is no support for Mr. Boettcher's conclusion.

vi. Respondent's standard clean-up process for broken fluorescent bulbs indicates it believed the powder was hazardous

Mr. Boettcher asserts the powder could easily have just been swept up, and his actions in the Conex were therefore pretext to terminating him (Complainant's Closing Brief, p. 30). This conclusion is not correct based on the record. Ms. Beerman, an Industrial Hygienist, testified that dry sweeping or vacuuming the powder from broken fluorescent lamps kicks up dust and creates dust dispersion and should be avoided (TR 509). The airborne powder could contain traces of mercury and is an irritant (*Id.*). Mr. Swift and Mr. Wutzke each corroborated this testimony and explained it is standard practice to use the wet method to clean up broken fluorescent lamps to avoid dispersion (TR 330, 372). Therefore, Mr. Boettcher's argument that the white powder could easily have been swept up is unpersuasive.

Respondent wiped up the white powder with a wet rag several days after the incident (TR 833). Respondent's general practice was to clean up such messes using the wet method. In addition, the powder was put into a sealed container and disposed of at the site's waste disposal facility (*Id.*). This method indicates the powder posed a danger to Mr. Boettcher and his fellow employees. Therefore, Mr. Boettcher cannot argue this style of clean up indicates the October 8, 2013 incident was pretext. Instead, the extra precautions indicate Respondent had a good-faith belief the powder was dangerous, making pre-text less likely.

vii. The low mercury readings are irrelevant

Mr. Boettcher suggests that because the mercury readings were below action level, he should not have been terminated, and therefore his actions in the Conex are being used as pretext for terminating him due to his protected activity. Respondent does not deny tests revealed the white powder was below action levels for mercury.

Mr. Boettcher misses the point of his termination. Mr. Wilkinson, a member of the DRB, reasoned the mercury reading in the Conex had no impact on his decision because the consequence of disturbing the powder was unknown at the time and the reading could have been higher (TR 764). In essence, Ms. Wilkes and all the parties involved, including Mr. Boettcher, were fortunate this unknown powder did not have higher levels of mercury. Respondent makes it clear Mr. Boettcher's termination was not based on the results of his actions or the mercury tests, but on his deliberate disregard for safety and the consequences which could have arisen from those

actions. Respondent charged Mr. Boettcher, per its pre-established policy, with an A-1 violation defined as “Deliberate disregard of safety rules or safety procedures” and never cites mercury exposure as a specific reason for his termination. Mr. Boettcher’s argument is unpersuasive.

Overall, Mr. Boettcher’s argument that the powder was “harmless,” he should not have been terminated, and his actions in the Conex are being used as pretext for terminating him due to his protected activity is unpersuasive.

- viii. Respondent’s failure to investigate Mr. Boettcher’s claims of retaliation is not evidence of pretext because Mr. Boettcher never complained of retaliation to Respondent in a manner warranting investigation per Respondent’s policy

Mr. Boettcher argues he reported retaliation in the DRB process, but no one took any steps to investigate. He reasons the failure to investigate is evidence of pretext (Complainant’s Closing Brief, p. 34). Mr. Boettcher did raise the issue of retaliation, but not before the DRB. During the investigation, Mr. Sheets and Mr. Nettles interviewed Mr. Boettcher in the presence of his union shop stewards (TR 772 to 775). Mr. Boettcher said he felt he was being retaliated against by the safety managers for his attempt to initiate a Stop Work the previous week (RX 57). When Mr. Strasser read Mr. Boettcher’s termination letter to Mr. Boettcher on October 16, 2013, Mr. Boettcher stated he believed the termination was in retaliation for all his Stop Works (TR 615).

But Mr. Boettcher failed to follow the proper procedure for reporting retaliation. Respondent’s policies and procedures state “any employee who believes they are being retaliated against as a result of raising a concern...should contact the WRPS Employee Concerns Program at 376-0533 or cell phone 438-9283” (RX 69; RX 53, p. 6). Mr. Boettcher knew Ed Kennedy, the Employee Concerns Program Manager, and had access to the telephone number but did not report the retaliation concern he expressed to Mr. Strasser (TR 274 to 275). As far as the record shows, Mr. Boettcher said the word retaliation twice without providing further details. He said it once during a disciplinary investigation and once again as he was being terminated, but never followed through. He has not shown Respondent deviated from any kind of policy to retaliate against him. The word “retaliation” is not a magical invocation that requires Respondent to halt all actions once it is uttered in any context. Respondent’s failure to investigate after Mr. Boettcher said he thought he was being retaliated against is not convincing evidence of pre-text or retaliation of any kind.

- ix. Respondent followed the most logical interpretation of Section A-1 of their Standards of Conduct

Respondent followed the logical interpretation of Section A-1, indicating its basis for terminating Mr. Boettcher's employment was not pretext. Section A-1 in the Standards of Conduct states:

Deliberate disregard of safety rules or safety procedures. This includes conduct demonstrating reckless indifference or disregard for safety rules or procedures, including willful action or inaction resulting in injury to personnel or damages to property or equipment or the environment."

(RX 53, p. 9).

Based on a plain reading, this section indicates deliberate disregard of safety rules or safety procedures is a general category under extremely serious misconduct since it is followed by a full stop. Respondent began the paragraph by defining the general category. If they had intended to limit A-1 violations to situations concerning personal or property damages, they would have labeled the category accordingly. Instead, the category is meant to cover all "deliberate disregard for safety rules and safety procedures."

The paragraph then illuminates what is included in the definition of deliberate disregard of safety rules or safety procedures. As a general rule, conduct demonstrating reckless indifference or disregard for safety rules or procedures is included in section A-1 violations. The word "including" within the same sentence indicates this category includes willful action or inaction resulting in injury, but does not limit A-1 violations only to situations where someone suffers personal or property damage. If that were Respondent's intention, they would have used more concrete language such as "define" or "limited to."

The plain language of the A-1 standards of conduct does not limit the category to situations involving personal and property damages. Mr. Boettcher's reading is not persuasive. Mr. Boettcher often insinuates or argues Ms. Wilkes did not suffer an injury so he did not commit a serious violation under the A-1 standard. Since Section A-1 violations do not require an injury, this line of thinking is unpersuasive.

x. Mr. Boettcher's Assertion Respondent Made No Effort to Determine How the Powder was Left Behind is not Evidence of Pretext

In his pre-hearing statement, Mr. Boettcher argues Respondent failed to take any effort to determine how the powder was left behind, and therefore Respondent cannot argue it considered the white powder a hazardous substance (Complainant's Supplemental Prehearing Statement, p. 8). This argument is not persuasive for two reasons. First, any investigation would not have been productive. Mr. Strasser testified no investigation was necessary because it was assumed the powder leaked from the bottom of a box containing broken lamps (TR 629). On October 9, 2013,

Mr. Schmoldt identified the powder as belonging to broken Philips ALTO lamps (TR 508; CX 28). Identifying the exact culprit also would have been nearly impossible, making an investigation unproductive. Almost thirty electricians working for Respondent along with other groups had access to the Conex (TR 322 to 323, 630, 684).

Second, Mr. Boettcher has failed to produce any evidence establishing Respondent had a policy or practice of conducting an investigation under the circumstances present, but failed to adhere to that policy or practice in his case. My job is not to substitute my judgement for that of an employer. It may or may not have been a wise business practice not to investigate the source of the powder, but that is irrelevant.. The issue is whether Mr. Boettcher can prove Respondent used its policies as a mask to prevent him from engaging in his allegedly-protected conduct. Mr. Boettcher fails to produce any evidence this is the case.

xi. Respondent resolved the “flam gas” issue

Mr. Boettcher argues Respondent failed to resolve the flam gas issue until his termination. Though Mr. Boettcher never expressly states it, he implies this alleged failure is evidence Respondent terminated his employment at least in part to avoid addressing the flam gas issue (Complainant’s Closing Brief, p. 22). He is mistaken. Respondent made every effort to resolve the flam gas issue and the record indicates the issue was resolved in Mr. Boettcher’s mind. Mr. Boettcher was concerned a virtually-impossible event might occur. To resolve the controversy, Respondent needed to explain the situation to Mr. Boettcher. Respondent last discussed the event with Mr. Boettcher in April 2013, but was not terminated until October of that year. If Mr. Boettcher truly felt the issue was not resolved, he had every opportunity to file a PER or initiate a Stop Work, a process he knew well. Instead, Mr. Boettcher never raised the issue again. His inactivity over a six-month period indicates the issue was resolved. Mr. Boettcher’s argument is unpersuasive.

b. Mr. Boettcher fails to prove he suffered disparate treatment compared to any other employees of Respondent

If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, non-discriminatory reasons. The employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981) (Title VII case); *Dartey v. Zack Company of Chicago*, 82-ERA-2 (Sec’y Apr. 25, 1983). Here, Mr. Boettcher failed to prove he suffered disparate treatment compared to Mr. DeCola or the unknown individual who was originally responsible for the white powder in the Conex.

i. Mr. DeCola was not similarly situated to Mr. Boettcher in all material aspects

Mr. Boettcher argues he suffered disparate treatment because Respondent did not discipline or investigate Mr. DeCola after presenting Ms. Wilkes with bulbs which contained the same material as the white powder in her breathing zone (See Complainant's Supplement Pre-hearing Statement, p. 8). But Mr. DeCola was not similarly situated to Mr. Boettcher. Mr. DeCola's broken lamps did not contain any breathable powder and were not in her "breathing zone." In addition, Mr. DeCola asked Ms. Beerman if she would monitor the lamps, but Mr. Boettcher disturbed the powder without her consent. Mr. Lutz and Ms. Wilkes did not believe Mr. DeCola committed a violation or presented a hazard (TR 688 to 692, 956 to 966).

In addition, Ms. Wilkes never reported Mr. DeCola's conduct to Mr. Nettles (*See* Nettles Depo. p. 54). The origin of Mr. Boettcher's investigation was Ms. Wilkes' complaint, but no complaint ever existed for Mr. DeCola. Given the distinguishing facts, including Ms. Wilkes' lack of a complaint, Mr. DeCola was not similarly situated to Mr. Boettcher, and the lack of investigation or discipline into Mr. DeCola is not evidence of disparate treatment.

ii. Mr. Boettcher cannot prove the unknown individual who may or may not exist was similarly situated to Mr. Boettcher in all material aspects

Mr. Boettcher also argues he suffered disparate treatment compared to the unidentified individual who spilled the dust. As noted above, Respondent declined to investigate for reasons which did not apply to Mr. Boettcher. I am not the ultimate arbiter of Respondent's personnel decisions. I must only weigh whether this unknown individual, who may or may not exist, was similarly situated to Mr. Boettcher. I find Mr. Boettcher has failed to prove this was the case.

Mr. Boettcher cannot meet the burden of proving he suffered a disparate punishment compared to this mystery person. There is no evidence this source engaged in misconduct in a similar way to Mr. Boettcher. In fact, since the source was never found because of a reasonable decision not to investigate, it is possible no one is responsible. Mr. Boettcher is trying to argue he suffered disparate treatment when compared to an individual he cannot identify and who may not exist. Even assuming this individual did exist, he or she may not have engaged in the same kind of misconduct as Mr. Boettcher and he or she may not have engaged in any misconduct. Given the unknown, Mr. Boettcher's argument fails.

Therefore, Mr. Boettcher cannot meet the burden that he suffered disparate treatment compared to this unknown individual due to his alleged protected activity.

c. *Mr. Boettcher fails to prove Respondent exhibited animus towards him due to his alleged protected activity*

i. There is no evidence of animus to Mr. Boettcher due to his alleged protected activity

Mr. Boettcher fails to prove any of his alleged protected activity caused anyone within Respondent's employ to have discriminatory animus against him. The DRB made the decision to terminate Mr. Boettcher, but no one provided the DRB details of Mr. Boettcher's raised safety concerns (TR 1062). Mr. Boettcher never had any interactions with Mr. Latteri, Mr. Clark, or Mr. Plemmons (TR 265). Even the originator of the complaint against him, Ms. Wilkes, had no idea who Mr. Boettcher was when she arrived at the Conex.

If the motivation for terminating Mr. Boettcher were discriminatory animus, his October termination would make no sense. Mr. Boettcher alleges he engaged in protected activity beginning in April 2012. Respondent terminated Mr. Boettcher in October of 2013. That entire period, Mr. Boettcher alleges he engaged in protected activity in one form or another, but he makes no effort to explain why Respondent would suffer from Mr. Boettcher's alleged protected activity for a year and a half. If Mr. Boettcher's alleged protected activity infuriated Respondent, they would have taken some kind of adverse action before his October 2013 termination.

In addition, at the time of the DRB meeting, Mr. Wilkinson knew Mr. Boettcher was scheduled to transfer to another contractor, MSA, within thirty days (TR 772 to 773). If Respondent did not want to deal with Mr. Boettcher's alleged activity, it only needed to wait. Terminating Mr. Boettcher and risking a whistleblower complaint would make no sense.

Instead of harboring animus towards Mr. Boettcher, Respondent took Mr. Boettcher's complaints seriously and tried to resolve the issues he raised. Respondent, with one exception, initiated the Stop Works Mr. Boettcher requested, appointed people to look into each, and worked with Mr. Boettcher until they could find a resolution (TR 204 to 217; CX 46). The one exception, the EAPC Walk Down Items, was never addressed because it was too vague (TR 115 to 116; CX 21). When Mr. Boettcher called for the white substance to be tested on October 8, 2013, Respondent did so immediately. That same day, Mr. Boettcher had a conversation with the President of the company about safety. When Mr. Boettcher raised the flam gas issue, Respondent engaged with Mr. Boettcher in several meetings and provided him written answers. They even brought in personnel from different departments to answer his questions. Not all of these events resolved to Mr. Boettcher's complete satisfaction, but Respondent took them seriously and nothing about their responses to Mr. Boettcher's complaints indicates animus.

Respondent brought in Ms. Billie Garde, a renowned attorney who represents whistleblowers and served on the Hanford Concerns Council, to make a presentation to Base Operations managers meant to help Respondent balance fostering safety concerns and an efficient workplace (TR 592 to 593, 747 to 748, 787 to 788; RX 71). Mr. Boettcher insists this presentation was intended to teach management how to deal with his well-known whistleblower reputation. Re-

spondent disputes this idea, but the distinction is not important. If it is true, Mr. Boettcher is arguing Respondent took extra steps to protect him, indicating it was taking steps to prevent animus. If it were not true, it still indicates Respondent was taking safety concerns seriously and trying to protect whistleblowers like Mr. Boettcher within their organization, another indication of a lack of animus.

ii. Mr. Boettcher fails to prove his transfers are evidence of animus due to his alleged protected activity

Mr. Boettcher argues his transfers between different teams are evidence of animus (Complainant's Closing Brief, p. 20). He reasons since he was transferred more often than other employees it must have been an adverse action motivated at least in part by his alleged protected activity. Mr. Boettcher's transfers do not help his case for two reasons. First, Mr. Boettcher has limited his recovery to damages related to his termination. Second, neither Mr. Boettcher nor the record illustrates how these transfers adversely impacted Mr. Boettcher's employment. Mr. Boettcher does not provide any argument or evidence indicating he lost pay, opportunities for advancement, or that his transfers forced him to commute longer distances. He does not even argue he lost the companionship of friendly coworkers upon his transfers. Therefore, Mr. Boettcher cannot argue his transfers were either an adverse action or evidence of animus.

iii. Mr. Boettcher fails to prove potentially hostile remarks from his coworkers reflect any rationale for his termination

Mr. Boettcher also argues his coworkers were hostile to him, but this is irrelevant to his alleged protected activity possibly contributing to his termination (Complainant's Closing Brief, p. 17). To establish a claim of retaliation, the complainant must submit evidence of a connection between the hostility and the decision to terminate him. *See Carraher v. Target Corp.*, 503 F.3d 714, 718-19 (8th Cir. 2007); *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 640-41 (8th Cir. 2002), *abrogated on other ground by Desert Palace, Inc. v Costa*, 539 U.S. 90 (2003). Mr. Boettcher has done nothing to link these statements to either his protected activity or to the people who made the determination to initiate the complaint, investigation, or termination. Therefore, they do not help him meet the burden of proving animus.

iv. Mr. Boettcher provides no evidence to indicate Respondent blocked his transfer to another employer due to his alleged protected activity

Mr. Boettcher also raises the accusation Respondent "ensured they stopped the transfer of Mr. Boettcher to a different contractor" (Complainant's Closing Brief, p. 41). Mr. Boettcher implies, but does not expressly state, this is evidence of animus against Mr. Boettcher for his alleged protected activity. Respondent does not dispute terminating Mr. Boettcher prevented him from transferring to a new employer, but Mr. Boettcher has not provided evidence to indicate it was ever mentioned at any point during his investigation or disciplinary proceedings. Neither has

he introduced any evidence that indicates any decision maker involved in Mr. Boettcher's termination was thinking about it at the time. Therefore, Mr. Boettcher's argument is not persuasive and the fact that he was unable to transfer after his termination cannot help him prove his alleged protected activity contributed to either his termination or his failure to transfer.

d. Mr. Boettcher's other miscellaneous concerns do not help him meet his burden of proof

i. Mr. Boettcher's argument Respondent is "very inconsistent" in its disciplinary procedures is irrelevant

Mr. Boettcher argues Respondent is very inconsistent in how it both charges misconduct and how it chooses to punish that misconduct (Complainant's Closing Brief, p. 36). Mr. Boettcher does explain how this is evidence of animus, pretext, or disparate treatment. This registers more as a complaint about the alleged unfairness of Respondent's policies, but Mr. Boettcher never argues how this wide range of punishments indicates he was treated differently due to his alleged protected activity. This argument, therefore, has no effect on his case.

ii. Any contradictions in the testimony of Mr. DeCola or Mr. Wilkinson have no significant effect on their credibility or on the outcome of Mr. Boettcher's case

Finally, Mr. Boettcher points out alleged inconsistencies in the testimonies of Mr. DeCola and Mr. Wilkinson, but does not explain how these alleged inconsistencies affect his argument (Complainant's Closing Brief, p. 43). Assuming Mr. Boettcher is trying to argue this court cannot find either Mr. DeCola or Mr. Wilkinson credible, his argument fails. Mr. Boettcher, similar to the debate of "poof" versus "kick" above, places too much stock in specific vocabulary. Mr. DeCola occasionally changes the key terms he uses, but these minor discrepancies are not enough to convince me he is an untrustworthy witness.

I am also not alerted by Mr. DeCola's waffling on the conclusion he might have been in trouble for his own actions in the Conex. This is a minor issue only barely relevant to the issue of whether Mr. Boettcher suffered adverse action based on his allegedly-protected activity and not fatal to his credibility. Mr. Boettcher's theory Mr. DeCola thought he was in trouble and needed to deflect attention to Mr. Boettcher makes no sense. Mr. DeCola would be unreasonably assuming his employer would not have the attention span to bring two disciplinary actions resulting from the same investigation into two incidents which took place minutes apart. It also assumes Mr. DeCola would continue the lie under oath, years after the incident and well beyond the time frame he could reasonably expect discipline. This theory is unconvincing.

As to Mr. Wilkinson, Mr. Boettcher has misinterpreted the answer to his question. Mr. Wilkinson consistently denies the Billie Garde training was specifically for dealing with Mr. Boettcher, but acknowledges they waited until he was available to conduct the training. This pa-

tience does not necessarily mean the training was to teach Mr. Boettcher's coworkers how to deal with him. If that were the training's sole purpose, Mr. Boettcher would not need to attend. Even if he did waffle back and forth, the failure to be consistent on such a minor issue would not be fatal to his credibility as a witness.

Ultimately, Mr. Boettcher fails to point out any inconsistency in Respondent's witness testimony that would be fatal to a witness's credibility.

- e. The close time proximity between Mr. Boettcher's alleged protected activity and the adverse employment action is not sufficient for Mr. Boettcher to meet his burden of proof*

Mr. Boettcher insists he has established the contributing factor element using temporal proximity alone (Complainant's Closing Brief, p. 50). Temporal proximity is powerful evidence of retaliatory animus, but not necessarily controlling. *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-34 (ARB Mar. 30, 2001); *Caldwell v. EG&G Defense Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-1 (ARB Oct. 31, 2008). An ALJ must consider the record as a whole, and not just view the evidence in fragments, when deciding the issue of causation. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-3 (ARB June 24, 2011). Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence. *Id.*

Temporal proximity may be sufficient to raise an inference of causation in an environmental whistleblower case. *See, e.g., Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). But where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, the inference of causation is compromised. Because the intervening event reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action. As the court held in *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000), "we have ruled differently on this issue [raising an inference of retaliatory motive based on temporal proximity] . . . depending, of course, on how proximate the events actually were, and *the context in which the issue came before us.*" (Emphasis added.).

Here, Mr. Boettcher's alleged protected activity began sometime in April, 2012, and ended on October 8, 2013, the day he was suspended. On October 16, 2013, Respondent changed his suspension into a termination. While this temporal proximity may be sufficient to raise an inference of causation, I am obliged to look at the entire context of Mr. Boettcher's termination.

The close temporal proximity helps Mr. Boettcher meet his burden of proof, but the October 8, 2013 incident is an intervening event which independently could cause his termination. Mr. Boettcher intentionally caused his fellow employee to become exposed to an unknown substance as she was testing it for mercury. Mr. Boettcher does not deny he intentionally caused the substance to become airborne. He deliberately disregarded Respondent's safety procedures, a violation of section A-1 of Respondent's standards of conduct and therefore a fireable offense. This kind of behavior is an intervening event that compromises any inference of causation. Therefore, there is no longer a logical reason to infer Mr. Boettcher's alleged protected activity was causally related to his termination based on time alone. This compromised inference is insufficient to prove by a preponderance of the evidence Mr. Boettcher's alleged protected activity contributed to Respondent's decision to terminate him.

Mr. Boettcher fails to prove he engaged in activity protected under the ERA, and he fails to meet his burden even if I assume he engaged in protected activity. Mr. Boettcher does not provide any evidence of pretext, animus, or disparate treatment. His time-based inference is insufficient. Ultimately, Mr. Boettcher fails to provide any evidence his alleged protected activity contributed to the decision to terminate him on October 16, 2013.

E. Conclusion

While Respondent fails to meet the burden of proof for its affirmative defense, Mr. Boettcher fails to meet his burden of proving he engaged in protected activity under the ERA. The record shows his concerns were purely occupational, too speculative, or too generalized. Even if Mr. Boettcher had met that burden, he has failed to meet the burden of proving any of his alleged protected activity contributed to Respondent's decision to terminate him on October 16, 2013. Therefore, I need not determine whether Respondent establishes by clear and convincing evidence that it would have terminated Mr. Boettcher's employment in the absence of any protected activity or decide damages.

V. CONCLUSION

Having reviewed the hearing testimony and exhibits, I find:

1. Mr. Boettcher did not carry his burden of showing he engaged in his alleged protected activity under the ERA.
2. Rather, Mr. Boettcher's Stop Works were purely occupational concerns and therefore not protected activity under the ERA.
3. His concern about the hazardous classification of potentially flammable gasses was too speculative to be reasonable, and he failed to show it was protected activity under the ERA.

4. His OSHA complaint also raised purely occupational concerns and was therefore not protected activity under the ERA.
5. His meetings with the DOE raised only the issue regarding hazardous classification of potentially flammable gasses, which was too speculative to be reasonable and was therefore not protected activity under the ERA.
6. His October 8, 2013 meeting, during which he spoke with President Dave Olson, was a generalized inquiry into safety concerns and therefore not protected activity under the ERA.
7. His October 8, 2013 request for monitoring of the substance in the Conex was not driven by a subjective belief Respondent was violating any law and was therefore not protected activity under the ERA.
8. Because Mr. Boettcher failed to show he engaged in protected activity under the ERA, his termination from employment with Respondent does not implicate the ERA or its whistleblower protections.
9. Mr. Boettcher also failed to prove any of his alleged protected activities contributed to Respondent's decision to terminate his employment on October 16, 2013.

VI. ORDER

Mr. Boettcher's complaint is DENIED.

SO ORDERED:

CHRISTOPHER LARSEN
Administrative Law Judge

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 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

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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

If 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 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.