

U.S. Department of Labor

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Issue Date: 13 June 2019

Case No.: 2017-PSI-00001

In the Matter of:

S. SCOTT SITTNER
Complainant

v.

**JACOBS ENGINEERING GROUP,
SOUTHERN CALIFORNIA GAS,
and SEMPRERA ENERGY**
Respondents

APPEARANCES: For Complainant, Richard E. Condit, Esq. and Brett D. Watson, Esq.
For Respondents, Rick Bergstrom, Esq. and Koree Blyleven, Esq.

BEFORE: Hon. Tracy A. Daly
Administrative Law Judge

DECISION AND ORDER

1. Jurisdiction and Procedural History. The case arises pursuant to a complaint alleging violations under the employee protective provisions of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129 (“PSIA” or “the Act”) and the implementing regulations at 29 C.F.R. Part 1981. The Act includes a whistleblower protection provision with a Department of Labor complaint procedure.

Complainant filed a retaliation allegation against Respondents that asserted violations of the employee protective provisions in the Act. The Secretary investigated the allegations and issued findings and an order dismissing the complaint because there was no cause to believe Respondents violated the Act. Complainant objected to the findings and order, and he filed a

timely request for a formal hearing before an Administrative Law Judge (ALJ) with the Chief Administrative Law Judge, Office of Administrative Law Judges (OALJ), U.S. Department of Labor. The undersigned ALJ was assigned to preside over a formal hearing in this matter, and it was conducted on July 23 to 27, 2018 in Long Beach, California. The parties were afforded a full opportunity to adduce testimony and offer documentary evidence.¹ Consistent with filing deadlines ordered by the undersigned, Complainant and Respondents filed post-hearing briefs with legal analysis and factual arguments. Both parties also filed reply briefs.²

2. Statement of the Case.

Complainant contends he suffered an adverse action under the PSIA when Respondents terminated his employment after he engaged in the protected activity of reporting pipeline safety violations. In particular, Complainant asserts he engaged in protected activity by reporting to his supervisor that Respondents were: 1) failing to provide “sufficient and documented auditor certification or training” and, 2) utilizing “deficient audit processes, including misuse of audit checklists by auditors and lack of source references and requirements in the checklist items, and the fact that the auditing deficiencies presented a stop work condition.” Complainant maintains that these reports were a contributing factor in Respondents’ decision to terminate his employment. (CB-1, p. 52)

In response, Respondents argue Complainant did not engage in protected activity under the PSIA. Respondents also contend, even if Complainant’s actions were protected activity under the PSIA, such activity was not a contributing factor in Respondents’ decision to terminate Complainant’s employment. They assert that Complainant’s employment ended solely because of his failure to produce satisfactory work product and his hostile work interaction with other employees. Respondents further maintain that, even if Complainant’s conduct constitutes protected activity that was a contributing factor in his employment termination, it can establish by clear and convincing evidence that it would have taken the same unfavorable personnel action against Complainant. (RB-1, pp. 31, 43, 51)

3. Contested Issues of Fact and Law. Based on the parties’ prehearing statements, opening statements, stipulations, evidence presented during the hearing, the parties’ Joint Statement of Contested Issues of Fact and Law³ and the parties’ post-hearing briefs, the undersigned identified the following contested legal issues in this matter:

- a. Whether Respondent Jacobs was Complainant’s sole employer.
- b. Whether Complainant engaged in protected activity covered under the by PSIA.
- c. Whether, if Complainant had engaged in protected activity, Respondents violated the whistle blower protection provisions of PSIA by taking adverse action against him in the form of

¹ Exhibits are marked as follows: JX for Joint Exhibits; CX for Complainant Exhibits; RX for Respondent Exhibits; and, AX for Appellate Exhibits. Reference to an individual exhibit is by party designator and page number (e.g. CX-1, p. 4). Reference to the hearing transcript is by designator Tr. and page number (e.g. Tr. p. 3).

² Complainant’s post-hearing brief is marked CB-1. Respondents’ post-hearing brief is marked RB-1. Complainant’s reply brief is marked CB-2. Respondents’ reply brief is marked RB-2.

³ The parties’ joint statement of contested facts and law is marked as AX-41.

terminating his employment.

d. Whether Complainant's alleged protected activity was a contributing factor to the decision to end Complainant's employment.

e. Whether the evidence establishes by clear and convincing evidence that Complainant's employment with Respondents would have been terminated in the absence of his alleged protected activity.

f. If Complainant proves that Respondents violated the whistleblower protections of the PSIA, what remedies are appropriate in this case.

4. Relevant Evidence Considered. In making this decision, the undersigned reviewed and considered all reliable and material documentary and testimonial evidence presented by Complainant and Respondents. This decision is based upon the entire record.⁴

a. *Stipulated Facts.* The parties entered into a stipulation regarding a number of uncontested facts in this case. The undersigned accepted the parties' stipulation as uncontroverted facts in this matter, and they are included in the undersigned's relevant and material findings of facts. (AX-40, Tr. pp. 308-309)

b. *Exhibits Admitted Into Evidence.* The undersigned fully considered the exhibits admitted at the hearing. However, as specifically provided in the undersigned's Notice of Case Assignment and Prehearing Order and as expressly articulated to the parties at the hearing, only exhibit content directly cited in a post-hearing brief by specific exhibit and page number was considered material and relevant evidence. All other information contained in the exhibits, but not specifically cited in the briefs, was regarded as non-relevant background information provided for chronological context to cited relevant evidence. (Tr. pp. 1107-1108)

1) Joint Exhibits. The parties jointly offered 104 exhibits, which the undersigned admitted into evidence. Each exhibit was admitted into evidence without objection. (Tr. pp. 12, 1040)

2) Complainant Exhibits. Complainant offered sixteen (16) exhibits for identification. The undersigned sustained Respondents' objections to CX 1, 2, 3, 4, 9, 10, 11, and 15; these exhibits were not accepted into evidence. Respondents' objections to CX 5, 6, 7, 8, 12, 13, 14, and 16 were overruled; the undersigned admitted them into evidence and considered them as substantive evidence. (Tr. pp. 12-47)

3) Respondents Exhibits. Respondents offered one (1) exhibit, which was admitted into evidence without objection. (Tr. p. 49)

c. *Testimonial Evidence and Witness Credibility Determinations.* The undersigned fully considered the entire testimony of every witness who appeared at the hearing. As the finder of

⁴ As the Administrative Review Board (ARB) stated its recent *Austin* decision, ALJs should tightly focus on making findings of fact and "a summary of the record is not necessary" because the ARB assumes the ALJ reviewed and considered the entire record. *Austin v. BNSF Railway Co.*, ARB No. 17-024, slip op. at 2, n.3, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam).

fact in this matter, the undersigned is entitled to determine the credibility of witnesses, to weigh evidence, to draw his own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. An administrative law judge has the authority to address witness credibility and to draw his own inferences and conclusions from the evidence. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

In weighing testimony in this matter, the undersigned considered the relationship of the witnesses to the parties, the witnesses' interest in the outcome, demeanor while testifying, and opportunity to observe or acquire knowledge about the matter at issue. The ALJ also considered the extent to which the testimony of each witness was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). The undersigned makes the following credibility assessments of the witnesses who presented testimony in this case:

1) Complainant. (Tr. pp. 53-414)

Complainant testified regarding the circumstances related to being hired as a Pipeline Safety Enhancement Program (PSEP) Quality Manager by Respondents, the nature of his work duties, performance and relationships, his concern and reports about procedures he considered insufficient auditor training and practices and the ultimate circumstances that he believed led Respondents to terminate his employment.

Complainant's testimony was marginally credible. His answers to a number of questions were inconsistent or contradictory. He provided unpersuasive and illogical explanations for some of his conduct or the reasons behind statements he made to his supervisors and fellow employees. Complainant also conceded during his testimony that he purposefully said things to his supervisors that he knew to be false. His explanations for such conduct were implausible. Much of Complainant's testimony relating to the material and relevant facts in this matter were directly contradicted by the testimony of other witnesses, and his assertions regarding the conduct of Respondents' employees were not corroborated in any significant manner by other witness testimony or documentary evidence presented by both parties.

Complainant's testimony also demonstrated recurrent internal inconsistencies on both directly relevant and not relevant facts, and it was significantly and unequivocally contradicted by testimony of other witnesses or documentary evidence. On several occasions during his testimony, Complainant's demeanor indicated an obvious inability or unwillingness to provide specific, detailed, relevant information because of either poor recollection of factual details or personal bias. On numerous occasions during his testimony, Complainant exhibited an evasive demeanor and responded to clear and direct questions with his own questions or non-responsive answers. His testimonial conduct in this regard undermined the reliability of the details of his testimony. In total, the undersigned found Complainant's testimony regarding relevant contested facts to be mostly unreliable and unconvincing.

2) Mr. John Cotton. (Tr. pp. 418-548)

Mr. Cotton testified regarding his employment in different positions with Jacobs and SoCal Gas as well as his observations regarding Complainant's job performance and interaction with subordinate employees, peers, and supervisors.

Mr. Cotton's testimony was generally persuasive. His testimony was mostly consistent and contained only a few directly relevant inconsistencies or conflicts. Occasionally his testimony was contradicted by the testimony of other witnesses or documentary evidence. His demeanor indicated an objectively sincere effort to provide accurate testimony, but his answers were at times slightly confusing, or incomplete.

3) Mr. Phillip Andrew. (Tr. pp. 551-786)

In pertinent part, Mr. Andrew testified about his employment as a Project Manager for Jacobs during the time of Complainant's employment with Respondents. His testimony described the manner in which Jacobs hired Complainant as an employee, and Mr. Andrew described his role, actions, and observations as Complainant's direct supervisor while Complainant worked for Respondents. He provided evaluation and opinion testimony regarding Complainant's job performance, managerial efforts, and interaction with other employees.

Mr. Andrew provided highly persuasive testimony. His testimony contained only minor variances in detail related to non-relevant facts. His testimony was substantially corroborated by the testimony other witnesses, particularly Ms. Meraz, Mr. Cotton, and Mr. Magnus. Mr. Andrew's testimony demonstrated some small, non-relevant inconsistencies or changes in testimony. His testimony contradicted that of other witnesses only in unimportant, non-material ways. His testimonial demeanor demonstrated a genuine desire to provide accurate unbiased testimony based on his direct personal knowledge.

4) Ms. Delia Meraz. (Tr. pp. 787-936)

Ms. Meraz testified regarding her job duties as the SoCal Gas Quality, Risk & Compliance Manager. In pertinent part, her testimony addressed the nature of her working relationship and direct interaction with Complainant. As part of her job duties at SoCal Gas, Ms. Meraz served as the primary client liaison with Complainant in his capacity as a Jacobs' employee responsible for providing quality assurance services to SoCal Gas.

Ms. Meraz's testimony was largely credible. Her testimony contained only minor variances in detail related to non-relevant facts, and she demonstrated a detailed, specific recollection of the events related to Complainant's work efforts and Respondents' decision to terminate Complainant's employment. Her testimony was directly corroborated by other witnesses and displayed only some small, non-relevant inconsistencies or changes in testimony. Ms. Meraz's testimony contradicted that of other witnesses only in unimportant, non-material ways. Ms. Meraz's testimony about her work relationship with Complainant and Respondents was objective in nature, and she expressed no discernable bias or preference toward either party in this matter. Her demeanor during the course of her testimony showed a sincere effort to present an accurate and detailed accounting of her recollection of the relevant events related to this case.

5) Mr. Reginald Conway. (Tr. pp. 943-958)

In general, Mr. Conway provided testimony regarding his past professional relationship and friendship with Complainant. He described Complainant's work qualifications, expertise, and professionalism and provided an opinion that Complainant had a reputation for being a highly qualified expert in quality assurance matters. He opined that Complainant comported himself in a professional manner when interacting with fellow employees and supervisors in a job setting.

Mr. Conway's testimony was only partially persuasive. His opinion regarding Complainant's professionalism on the job was based on direct personal interaction that occurred more than 35 years before Complainant was employed by Respondents. Mr. Conway possessed no first-hand observation of Complainant's conduct as an employee or supervisor in the work place for more than three decades. Consequently, although Mr. Conway's displayed no obvious signs of bias in favor of Complainant because of their personal friendship, the foundation for Mr. Conway's opinion testimony is extremely outdated and contradicted by testimony from other witnesses with far more recent and direct personal knowledge.

6) Mr. David Paul Magnus. (Tr. pp. 961-1027)

Mr. Magnus' testimony addressed his position and job duties as a Quality Auditor for SoCal Gas. As a foundation for his testimony, he provided a description of his past employment history as a quality director and a quality manager. Of particular relevance, Mr. Magnus' described the exact responsibilities and duties of SoCal Gas' Quality Auditors in conjunction with the joint Jacobs and SoCal quality program, and he detailed the manner in which new Quality Auditors were introduced to the quality program and trained to perform job tasks. He also described the working relationship between auditors in the quality program before and after Complainant was hired as the Quality Plan manager.

On the whole Mr. Magnus' testimony was generally persuasive. His testimony was supported by a demonstrated foundation of education and experience in the field of quality assurance. His answers contained direct and specific details based on personal observation or knowledge. Mr. Magus' testimony was not significantly or materially contradicted by other witnesses with the exception of Complainant. Mr. Magnus' manner of answering questions and demeanor conveyed an earnest attempt to be factually accurate and responsive. His opinions were direct and well explained.

7) Mr. Roger D. Platt. (Tr. pp. 1049-1079)

Mr. Platt's testimony addressed his past employment with both Jacobs and SoCal Gas. He explained the general nature of his duties as a quality plan auditor and described the nature of his observations of the joint work environment between the Jacobs and SoCal quality control audit departments. He provided his opinion about the purpose of the Quality Plan and its implementation. Mr. Platt also described his opinion about the nature of the Quality Auditors working relationships before Complainant began his employment as the Quality Manager.

Overall Mr. Platt's testimony was credible and reliable. His answers were directly

responsive to the questions posed by counsel and based on personal observation or knowledge. In relevant parts, Mr. Platt's testimony was largely consistent with that of Mr. Magnus and Mr. Cotton. In relation to the material and relevant facts in this case, his testimony was not significantly different from that of any other witness with the exception of Complainant. Mr. Platt's answer conveyed a candid effort to accurately describe his observations and opinions, and he expressed no specific bias or partiality for any party in this matter.

5. Relevant and Material Findings of Facts. Based on the parties' stipulations, documentary exhibits, and testimonial evidence presented, the undersigned makes the following relevant and material findings of fact in this case:

a. Respondent Jacobs (Jacobs) is a global provider of technical, professional, and scientific services, including construction management, engineering, and procurement services. Jacobs provides project management consulting services to Respondent Southern California Gas (SoCal Gas). SoCal Gas is the primary provider of natural gas to the region of Southern California and is indirectly owned by Respondent Sempra. (AX-40, Tr. p. 558)⁵

b. SoCal Gas is subject to the requirements of the PISA, but the PISA generally exempts gas pipelines installed prior to 1970 from its pressure testing requirements. Additionally, SoCal Gas is regulated by the California Public Utilities Commission (CPUC). (AX-40)

c. In February 2011, the CPUC issued regulations requiring the submission of a pipeline safety plan that included replacement or pressure testing of all gas pipelines that had not previously been tested. On August 26, 2011, SoCal Gas filed its initial Pipeline Safety Enhancement Plan (PSEP) with CPUC; SoCal Gas filed an amended PSEP on December 2, 2011. The PSEP established SoCal Gas' plan to test and replace pipelines covered by CPUC requirements. The PSEP also identified an "existing pipeline integrity management program" that it used to perform a comprehensive records review of their transmission pipelines in order to determine which pipelines needed to be tested and replaced. (AX-40, JX-2, JX-6, JX-9)

d. In 2013, SoCal Gas contracted with Jacobs to provide support services to SoCal Gas relating to the management of its PSEP. (AX-40, JX-6, JX-9, Tr. pp. 175, 789-790)

e. Pursuant to its contract with SoCal Gas, Jacobs also administered the development of an internal PSEP Quality Plan (Quality Plan) that took effect in June 2014. Establishing and implementing this Quality Plan was not mandated by the PSIA, the Code of Federal Regulations (CFR), the CPUC, or any other federal or state law or regulation. Additionally, the PSEP does not require any specific formal quality review or auditing plan. (AX-40, JX-2, JX-6, JX-11, Tr. pp. 558, 613, 617, 752-753, 790, 858, 917-918)

f. SoCal Gas adopted its Quality Plan as a "best business practice" within the company to standardize and manage the process of reviewing documents related to pipeline construction activities. As an "internal process" utilized by SoCal Gas, the Quality Plan was essentially a tool

⁵ Citations to stipulations, exhibits, or testimony upon which the undersigned made factual findings are not all-inclusive. They simply reference some of the most persuasive evidence among everything in the record that the undersigned considered when making the related finding.

the company used to conduct review of documents generated during pipeline construction, repair, maintenance, and testing projects. The Quality Plan attempted to ensure that such records were accurately maintained. It was not, however, used to review and confirm that SoCal Gas complied with PSEP requirements. (JX-6, JX-7, JX-8, Tr. pp. 90, 546, 585, 613, 616-617, 752-753, 760-761, 827, 861, 918)

g. Initially, the Quality Plan was developed, implemented, and utilized by Jacobs' employees subject to final approval from SoCal Gas quality managers. These employees were given the job title of Quality Auditors and assigned to work together on a Quality Team. This team was responsible for employing the Quality Plan. The number of Quality Auditors on the team varied at different times but in general averaged around seven or eight. (Tr. pp. 419, 794)

h. Over time the goals, procedures, and structure of the Quality Team evolved. As a result, a decision was made to update the Quality Plan, which led to the need to hire a new PSEP Quality Manager. The specific job duties for the new PSEP Quality Manager were outlined in a job announcement for the position. Mr. Andrew, in his position as a program manager for Jacobs, served as the hiring manager responsible for filling the PSEP Quality Manager position. Ms. Meraz, as the quality risk and compliance manager for SoCal gas, participated in a review of the job applicant's selection because the new PSEP Quality Manager would directly interact with her on a significant basis. (JX-12, Tr. pp. 518-519, 561-567, 802-803, 861, 863)

i. In March 2015, Complainant applied for employment with Jacobs as the PSEP Quality Manager. Prior to applying for the position with Jacobs, Complainant had between 35 and 37 years of professional experience in various positions as a quality programs analyst for employers in the petrochemical, chemical demilitarization, and nuclear industries. He did not possess any prior direct gas pipeline quality assurance experience. Some of his past employment required managing subordinate employees. (AX-40, JX-92, Tr. p 55)

j. In April 2015, Complainant interviewed for the Jacobs PSEP Quality Manager position. Mr. Andrew and his supervisor, Program Director Mr. Ted Potter, initially conducted a telephonic job interview with Complainant. A secondary in-person interview was conducted in Los Angeles. In addition to Mr. Andrew and Mr. Potter, Ms. Meraz participated in the interview. Jacobs, however, did not extend an employment offer to Complainant after his interview for a couple of key reasons. First, Complainant lacked any significant gas industry quality control experience. Second, Complainant lacked an engineering background. Third, Complainant's recent work history was largely supervisory in nature and the interviewers had concerns about Complainant's ability to actually generate work product. Fourth, during the interview Complainant demonstrated an inability to follow specific reasoning or questioning. (AX-40, JX-16, JX-17, JX-20, Tr. pp. 64-66, 632-34)

k. After Complainant's interview, Jacobs resumed efforts to recruit a more qualified candidate for the position. However, this employment recruiting effort was difficult and unsuccessful. Consequently, Jacobs eventually decided to extend a temporary employment offer to Complainant. The temporary employment offer was extended to Complainant even though Mr. Andrew and Ms. Meraz harbored significant reservations about his qualifications and ability to successfully perform the job duties. In particular, both Mr. Andrew and Ms. Meraz continued

to be concerned about Complainant's lack of any natural gas industry experience and his ability to actually generate work product in light of significant experience in supervisory jobs. (AX-40, JX-18, JX-24 Tr. pp. 66, 182, 634-635)

l. In its employment offer, Jacobs specifically advised Complainant that his employment would be on a "two-month trial" basis in order to determine whether he would be suitable for the position. Jacobs made no promise that Complainant would be extended as an employee beyond the trial period, and it explicitly noted that "[t]here is no guarantee of future efforts." However, he was told that, if his job performance was satisfactory, Jacobs would consider offering him a permanent employment position. Complainant accepted the position with a clear understanding that it was a temporary job. In his new position, Complainant reported "to Phil Andrew for task direction and mentoring." Ms. Meraz served as the SoCal Gas client manager of the PSEP Quality Plan program and interacted extensively and directly with Complainant. Although she provided some client input to Jacobs regarding whether Complainant would be satisfactory to SoCal Gas as a Quality Manager, she had no direct, formal role in Complainant's employment status with Jacobs. (AX-40, JX-24, JX-35, Tr. pp. 66, 193, 578, 599, 788-789)

m. Additionally, Complainant understood that Jacobs would be his employer. His salary was paid solely by Jacobs and his human resource processing, employee support, work assignment, and employment supervision were all provided by Jacobs' employees. Other than in a client capacity, SoCal and Sempra were not involved in any meaningful way with Complainant's employment. Other Quality Auditors also understood that Complainant reported to Mr. Andrew as a Jacobs' manager. (JX-28, Tr. pp. 75, 194-5, 199, 409, 493, 578, 561, 599)

n. On June 8, 2015, Complainant began employment as a PSEP Quality Manager with Jacobs. His primary job duty was updating the PSEP Quality Plan. In conjunction with this primary job task, Complainant was also expected to revise a document review checklist that accompanied the Quality Plan. The specific job duties of Complainant's position were communicated to him through a job description as well as during initial conversations with Mr. Andrew and Ms. Meraz. (AX-40, JX-12, JX-35, Tr. pp. 85, 93, 291-292, 569, 579, 631, 633, 804-805, 815, 818, 837)

o. Complainant clearly understood the primary focus of his job duties related to updating the Quality Plan and the accompanying review checklist. This understanding came from a job task list that Mr. Andrew sent to Complainant, which identified "[u]pdate Quality Plan" as his number one job task. On June 11, 2015, Ms. Meraz also sent an e-mail to Jacobs' managers with a subject line of "Quality Manager Task Listing." The e-mail contained 10 listed items – the first of which was "Update Quality Plan . . ." Additionally, within three days of Complainant starting his employment, Ms. Meraz met with Complainant to address SoCal Gas' expectations as a contract client of Jacobs. During this meeting Ms. Meraz discussed each item on Mr. Andrew's task list in detail with Complainant. During this discussion, Ms. Maraz went through every page of the Quality Plan with Complainant. Her purpose in doing this was to identify for Complainant the relevant background of the Quality Plan and potential areas that could be revised. Consequently, Complainant clearly understood that Mr. Andrews and Ms. Meraz expected him to make the Quality Plan update his top work priority. With that clear understanding, Complainant recognized the first course of action in his new job position was to review the

Quality Plan, and he concluded that it was a “primary concern” that needed to be addressed. (JX-35, JX-50, Tr. pp. 67, 102, 291-294, 656, 681, 878-880, 910-911, 923)

p. To assist Complainant in making initial progress on his primary work task, Mr. Andrew gave Complainant a copy of the Quality Plan, recommended that Complainant consider addressing the organization and structural components of the Quality Plan in the revision and determine whether an outreach component could be incorporated into the revision. Over the course of his employment, Mr. Andrew met with Complainant approximately 8 to 12 times to discuss Complainant’s progress. Likewise, Ms. Meraz met with him on multiple occasions every week throughout his entire employment. Complainant felt Ms. Meraz had an open-door policy that supported his effort to accomplish his job tasks. (Tr. pp. 102, 201-202, 225, 656-667, 681-682, 810-812)

q. The first few days of Complainant’s employment included filling out administrative employee paperwork with Jacobs’ Human Resource office. During this process, Complainant dealt with administrative staff members Ms. Michelle Acero and Ms. Tina Kinney. Complainant’s behavior toward them caused both to voice concerns to Mr. Andrew. Ms. Acero spent time explaining to Complainant the method of filing timesheets and an expense report. She told Mr. Andrew that Complainant described her as “a girl to do his work.” She further noted that Complainant would not listen to her in order to learn how to complete required paperwork, and she described his conduct with her as “short and demeaning.” One of the Quality Auditors, Mr. Cotton, overheard a phone call Complainant had with Ms. Acero during which Complainant spoke to her in a “demeaning” way, and later on Complainant told Mr. Cotton that Ms. Acero was a “dumb girl.” Similarly, during her initial interaction with Complainant, Ms. Kinney felt Complainant “talked down to her about being one of the girls that should just be able to do what he wants.” During the course of Complainant’s employee orientation and new employee processing, Mr. Gemmell, the human relations business manager for Jacobs, told Mr. Andrew that Complainant was the most difficult employee he had ever dealt with during the new employee administrative processing stage. As a result, they reconsidered whether to complete the process of hiring Complainant for the position. Ultimately, they again decided to give Complainant an opportunity to adjust to the new position and demonstrate his ability to perform the job tasks. (Tr. pp. 521-522, 539, 635-637, 669, 673-735, 754)

r. The supervisory component of Complainant’s job required him to manage a composite team of Quality Auditors that included employees from both Jacobs and SoCal Gas. At the time Complainant was hired, there were approximately seven to eight Quality Auditors on the team. Prior to Complainant becoming the quality manager, Mr. Scott Pierucci was the team leader. (Tr. pp. 227, 419, 490)

s. In carrying out the Quality Plan, the Quality Auditors reviewed documents related to construction activities for the PSEP. They did not, however, review the quality and compliance of work activities such as field inspections, testing, engineering, or construction performed pursuant to the requirements of the PSEP. Those specific job duties were performed by individuals in different departments at Jacobs and SoCal Gas. Instead, the Quality Auditors reviewed the documents produced after such activities had been performed and inspected by other employees. As such the Quality Auditors’ purpose in reviewing the documents was to try

to “validate the accuracy of the documentation, not the components themselves.” The primary function of the Quality Auditors’ team was to “ensure that there was agreement and consistency in the documents.” Thus, the Quality Auditor team was performing an internal business practice audit function that focused on ensuring documentation associated with work that had been performed was properly created and accurately filled out. The audit reports generated by the Quality Auditors specifically noted that: “PSEP QRC review is intended to provide feedback regarding the content and completeness of the documents provided. This review does not validate the accuracy of the information represented in the documents . . .” Even prior to beginning his employment, Complainant explicitly understood the process that the Quality Auditors “were actually doing was document review.” (JX-2, JX-3, JX-22, JX-102, JX-103, Tr. pp. 69, 81, 420, 430-431, 502, 523-524, 536, 611-613, 760, 763-764, 863-865, 969, 970, 983, 1015)

t. In conducting a quality audit review, the Quality Auditors would utilize a checklist as part of their final report. The checklist required that the Quality Auditor verify things such as: properly signed approvals for work orders, completeness of design data sheet forms, and all required supporting documentation forms for strength testing. The review process was correlated to specific stages of a project that had occurred anytime from a couple of months to a couple of years before the audit. As such, the Quality Auditors engaged in post-construction review of documents generated during work projects. Complainant understood this and believed the Quality Auditors were “doing a good job with document review.” In general, it took a new quality auditor about one week to learn and understand the fundamental tasks and duties of the job. (JX-11, Tr. pp. 232, 505, 536, 542-546, 613)

u. Compliance with applicable PSEP requirements related to all work performed on a pipeline was independently verified by specific inspectors and teams in the field who directly confirmed that proper work quality and safety testing had been completed on a project. (Tr. pp. 614-615, 803, 969-970, 1013-1014)

v. Mr. Cotton and Mr. Magnus worked as Quality Auditors prior to and during the period of Complainant’s employment with Jacobs. Both understood the purpose of the quality team was to review construction related documents for accuracy. They did not think the team performed any review or safety audits of the quality and compliance of pipeline construction, repair, or testing activities. (Tr. pp. 419-420, 432-433, 443, 502, 505, 969-970)

w. Complainant did not believe that any type of regulation controlled the nature of his job duties, but he strongly believed it was professionally improper to apply the title Quality Auditor to the Jacobs’ employees working on the PSEP Quality Team. He did not believe the individuals who performed the Quality Plan audits possessed the training and certification he felt was necessary to be qualified as a traditional “quality auditor.” Complainant felt that, based on the nature of the work being performed, the members of the team would be more correctly defined as “document reviewers.” If the Quality Auditor’s job title had been different, he would not have been concerned about the nature of their training, certifications, and work process. Complainant’s opinion about the job title was based on his personal professional judgment and not supported by any PSEP standard or requirement. (JX-75, Tr. pp. 78-79, 114, 235-236, 290)

x. Over the course of his employment with Respondents, Complainant sent a number of emails to both Mr. Andrew and Ms. Meraz that touched on the broad topics of Quality Auditor training and quality auditing process requirements. In general, he attempted to convey his opinions that: 1) proper Quality Auditor training and certification had not occurred; 2) there was no documentation about the nature of the training Quality Auditors had received; and 3) that the audit process and past audit reports were improper and deficient. Complainant was very ineffective in his communication efforts on these subjects. The format and content of Complainant's e-mails frequently contained incomplete, fragmented sentences that gave them a disjunctive feel and made following their logic difficult. They also demonstrated a recurrent tone of general observations and musing about the Quality Auditor qualifications and Quality Plan review process without containing any detailed conclusions or recommendations. This style of writing by Complainant made it hard for the recipients to follow his train of thought or discern what, if any, specific observations or recommendations he intended in the e-mail. In one such confusing e-mail, Complainant wrote to Ms. Meraz at length ostensibly about documentation of auditor training, and, among other things, he stated, "So use your judgment. I am here to support, not slow down. You are the final decision. I just have responsibility to point out rocks in the roadway. The manager sign off type of qualifying is another way of qualifying your personnel to do safety related activities. Unofficially and is used as a standard in Government and other industries." Complainant also opined that more than half of the Quality Auditors were inexperienced, but his e-mail offered no clear conclusions or recommendations for Ms. Meraz to consider. Similarly, in an e-mail to Mr. Andrew, Complainant wrote "[I] am seeing bunches of rationalization on the part of the department as a whole, but no pointing to requirements or specifics of the individual activities." Complainant did not identify the nature of the "rationalizations," the source or nature of the "requirements" to which he referred nor the type of "activities" he addressed. Complainant's communication failures often left Mr. Andrew and Ms. Meraz confused about what he was trying to convey to them. (JX-18, JX-47, JX-48, JX-53, JX-54, JX-56, JX-57, JX-70, JX-72, JX-74)

y. In his e-mails to Mr. Andrew and Ms. Meraz during his employment with Respondents, Complainant never described or characterized any of his concerns as being related to safety violations. He did not identify any particular process or policy employed by Respondents that he believed was dangerous or violated the PSIA or any other applicable pipeline safety laws or regulations. Complainant also never indicated to Mr. Andrew, Ms. Meraz, or any other Respondent employee that he believed the Quality Team audit process was part of Respondents' pipeline integrity management program and designed to verify safety regulation compliance. Complainant also never advised any Jacobs or SoCal Gas employee that Respondents were violating integrity management program requirements or non-compliant with American Society of Mechanical Engineers (ASME) standards. (JX-34, JX-36, JX-38, JX-39, JX-41, JX-42, JX-45, JX-46, JX-47, JX-48, JX-51, JX-52, JX-53, JX-54, JX-56, JX-57, JX-59, JX-60, JX-64, JX-65, JX-67, JX-70, JX-72, JX-73, JX-74, JX-75, JX-76, JX-81, JX-83, JX-84, JX-85)

z. Complainant performed the supervisory component of his job duties as Quality Manager in a brusque and confrontational manner. As a result, his interaction with the Quality Auditors who worked under him on the team was strained, and he created a number of professional and personal conflicts. Complainant bluntly criticized members of the quality team

in a manner they found unprofessional or personally offensive. Some of the Quality Auditors complained to Mr. Andrew or Ms. Meraz about Complainant's conduct. Mr. Andrew estimated that, on approximately somewhere between 8 to 12 occasions, he talked with Complainant about grievances related to his unprofessional, disrespectful, or offensive interaction with other employees. Complainant's unprofessional manner led Ms. Meraz to inform Mr. Andrews that she had concerns about Complainant's conduct. She also met with Complainant to request that he modify his work relationship style and attempt to be more constructive in his approach. Complainant responded in what she considered to be an agitated and angry fashion, and Ms. Meraz became concerned about what he would do. (Tr. pp. 674, 678, 669-670, 890-892, 895-898, 906-907)

aa. During the first three weeks of his employment with Jacobs, Complainant sent Mr. Andrew and Ms. Meraz e-mails that demonstrated an intent to use embarrassment and intimidation as tools to motivate the Quality Auditors. In one e-mail he noted that he "mildly embarrassed a few and will try to get around to everyone when they all hit the office." In another e-mail, he noted "[a] couple team meetings should pull it off, where I pistol whip with a pencil." A different e-mail from Complainant noted that "Jacobs has no clue what is going on" and characterized the Quality Auditors as "weak people." (JX-41, JX-42, JX-58)

bb. Early on in his employment, Complainant also developed a significantly acrimonious work relationship with Mr. Pierucci. As part of Complainant's initial job orientation and program training, Mr. Andrew directed him to "shadow" Mr. Pierucci to see how the Quality Auditors performed their jobs and what Mr. Pierucci did as the lead Quality Auditor on the team. Twice in Complainant's first week of employment, Mr. Pierucci lodged complaints with Mr. Andrew about Complainant's contentious leadership style. In particular, Mr. Pierucci took offense when Complainant called him "[a] god damn idiot." Mr. Pierucci also informed Ms. Meraz that Complainant's conduct bothered him. At some time within Complainant's first three weeks of employment, he and Mr. Pierucci engaged in a very heated argument that Mr. Cotton, at one point, suspected may escalate into physical contact. (JX-34, Tr. pp. 236, 520-521, 661-664, 666, 668-670, 890-892, 997-998)

cc. By the third week of Complainant's employment, Mr. Andrew had on multiple occasions discussed Complainant's "behaviors and disruptions in the office." On one occasion, Mr. Andrew specifically suggested that Complainant apologize for the comments he made to Mr. Pierucci. Complainant dismissed this suggestion and never proffered any such apology because he did not believe it was warranted. On another occasions, Mr. Andrew met with Complainant for 45 minutes to discuss the grievances lodged against him. Mr. Andrew told Complainant that such conduct was professionally unacceptable and encouraged him to be more calm and professional during his interaction with other employees. Despite his effort in these conversations, Mr. Andrew concluded that Complainant did not agree with his observations and recommendation. Mr. Andrew also believed that Complainant did not truly listen or appreciate that his conduct was a problem. Mr. Andrew considered Complainant to occasionally be aggressive or confrontational during these meetings, noting that Complainant would raise his voice to Mr. Andrew to make a point. Overall, Mr. Andrew found Complainant very challenging to engage in communication because Complainant frequently interrupted, appeared unengaged, jumped from topic to topic, or tried to change the course of a discussion. (Tr. pp. 680, 684, 667,

692-695, 725)

dd. Complainant's relationship with Mr. Pierucci became so hostile that Complainant never followed Mr. Andrew's direction to shadow Mr. Pierucci to learn the specific components of the Quality Auditors' work duties. Complainant maintains this failure resulted because Mr. Pierucci refused to work with him. However, Complainant never informed Mr. Andrew or Ms. Meraz about the dysfunctional nature of his work relationship with Mr. Pierucci, nor did he tell either of them that he could not observe the Quality Auditor review process because Mr. Pierucci refused to assist him. Complainant did, however, send Mr. Andrew an e-mail about Mr. Pierucci in which he opined: "[o]ff the record, Scott P. is absolutely not a rocket scientist. I mean this respectfully. He has already lied to me three time or so. Be careful, I would suggest you reevaluate any trust you put in him." The e-mail did not mention that Complainant felt Mr. Pierucci refused to assist Complainant in understanding the Quality Auditor process. Complainant also directly contradicted himself in assessing who was responsible for the break down in their work relationship. Although Complainant failed to fully grasp that he was creating a hostile work environment, he did recognize that leading the Quality Auditor team was an important component of his job duties and that he failed at it. (JX-36, Tr. pp. 236-242, 247, 263, 273, 311, 319, 775, 917)

ee. Prior to Complainant assuming the position of Quality Manager, Mr. Cotton and Mr. Magnus believed the quality audit team interacted professionally and efficiently. In general, the members of the team worked well together and respected each other professionally. They felt the team's work atmosphere changed in a significantly negative way after Complainant began work as the Quality Manager. Mr. Platt held a contrary opinion and believed the quality audit team experienced some professional conflict before Complainant's employment. (Tr. pp. 916-917, 978, 1056-1066)

ff. Mr. Cotton shared a common military background with Complainant and characterized their working relationship as relatively amiable. In general, however, Mr. Cotton opined that Complainant's leadership style was "very abrasive." Mr. Cotton felt that Complainant injected "chaos" into the team working relationships, and he believed Complainant caused "discontent" among the quality auditing team. In particular, Mr. Cotton observed Complainant on a few occasions refer to other Quality Auditors as an "idiot" or "dumb." He also overheard Complainant accuse a Quality Auditor of "[n]ot knowing what you're doing." Mr. Cotton felt that Complainant's conduct was unproductive. In an attempt to assist Complainant, Mr. Cotton discussed the matter with him, and Mr. Cotton recommended Complainant modify the manner in which he interacted with the quality auditors. In particular, Mr. Cotton suggested that Complainant would be better served if he "laid back" and observed how things were done by the Quality Auditors before speaking with them. Mr. Cotton did not believe that Complainant heeded or in any way acted on this advice. (Tr. pp. 271, 483, 487, 492, 520)

gg. While working with Complainant, Mr. Magnus believed that Complainant was a "terrible" manager who "inserted all kinds of animus and discord within the group." He felt the work environment for the Quality Auditors' program was tense when Complainant was the manager, and he believed Complainant caused the team to become "dysfunctional." Mr. Magnus described the atmosphere for the members of the quality team as "like walking on eggshells."

Mr. Magnus heard Complainant say that Mr. Pierucci “should be fired, he should be put in jail” and that he should “let him die a slow death.” As a result of Complainant’s conduct toward the Quality Auditors, Mr. Magnus told Ms. Meraz that he was uncomfortable with some of the things being said by Complainant. (Tr. pp. 979-980, 997-998, 1010)

hh. The training for Quality Auditors was not mandated by any laws or regulations. Jacobs utilized an on-the-job training program for its Quality Auditors, and Mr. Cotton and Mr. Magnus estimated that it took approximately a week of job training for a Quality Auditor to read the Quality Plan, review the related checklists, and get an understanding of the core concepts of the document. Complainant understood the discretionary nature of the Quality Auditor training and the fact that the qualifications for performing the job could be independently established by Jacobs or SoCal Gas. Complainant did not identify a particular section of the C.F.R. or any other applicable state or federal regulation that required specific training for Quality Auditors. Neither Mr. Cotton nor Mr. Magnus observed Complainant read the Quality Plan or ask specific questions about its implementation. (JX-56, Tr. pp. 73, 172-175, 509-512, 627, 858-859, 982)

ii. After two weeks in the PSEP Quality Manager position, Complainant was not demonstrating any significant progress on updating the Quality Plan, and Mr. Andrew sent Complainant an e-mail that provided him with a streamlined job task list. The list emphasized that updating the Quality Plan was Complainant’s number one job priority, and Complainant understood Mr. Andrew’s expectations of him. Around the same time, Complainant solicited Mr. Cotton to tell Mr. Andrew that Complainant had another job offer. This was a blatant effort on Complainant’s part to “manipulate the situation” in order to obtain permanent employment. Complainant acknowledged that his conduct in this effort was unprofessional. (JX-37, JX-50, Tr. pp. 203-207, 296, 298, 682, 689-690)

jj. At approximately this same period of his employment with Jacobs, Complainant sent e-mails to, and had discussions with, Mr. Andrew and Ms. Meraz that made them believe he did not comprehend the nature of the gas industry, the application of controlling laws and regulations, and the discretionary business practice goal that the Quality Plan was designed to achieve. Mr. Andrews and Ms. Meraz considered these e-mails as offensive comments about SoCal Gas and unprofessional recommendations by Complainant to Ms. Meraz about how she should perform her business leadership duties. They also believed the e-mails illustrated that Complainant sought to avoid responsibility for failing to generate any progress on the Quality Plan update project. (JX-53, JX-60, JX-67, JX-72, JX-75, JX-77, Tr. pp. 592, 687-688, 712-715, 723-724, 732-733, 907-908)

kk. During the third and fourth weeks of Complainant’s employment, Ms. Meraz repeatedly requested that Complainant provide her updated materials related to the Quality Plan revision. In particular, Ms. Meraz asked that Complainant give her copies of “red-line edits” that demonstrated actual progress and ongoing revisions that Complainant was developing for the Quality Plan. Ms. Meraz did not expect Complainant to fully complete a revision of the Quality Plan within the time frame of his temporary employment; rather, she wanted to see tangible examples of Complainant’s meaningful progress on the project. Similarly, Mr. Andrew requested that Complainant provide him with handwritten editing suggestions that were annotated directly in the margins of a copy of the Quality Plan. Mr. Andrew also sent Complainant several

additional e-mails that clearly identified the need for him to update the Quality Plan. In one of Mr. Andrew's e-mails he unequivocally stated that Complainant needed to show "more complex progress each week." At this stage in Complainant's employment, Mr. Andrew felt Complainant's performance was "poor" and that things "were not going very well." (JX-52, Tr. pp. 576, 648, 659, 694, 698, 771, 872-873)

ii. In the first week of July 2015, pursuant to a request Complainant made at the time Jacobs hired him, Mr. Andrew met with Complainant to discuss his performance at the approximate halfway mark of his 60-day employment term. Mr. Andrew told Complainant that "things did not look good" as it pertained to continuing future employment. Mr. Andrew also specifically identified things that Complainant needed to improve. Despite Mr. Andrew's candid and explicit explanation of Jacobs' disappointment with Complainant's lack of progress on the Quality Plan update, Complainant failed to appreciate that Jacobs was unhappy with his performance at that point in his employment. To the contrary, after this meeting, Complainant believed that his transition to permanent employment with Jacobs at the end of his temporary employment period was a mere formality that simply required paperwork processing. Complainant's belief was wholly unjustified and premised solely on his own unrealistic evaluation of his job performance. (Tr. pp. 320-323, 702-703, 722)

mm. By the end of his fourth week, Ms. Meraz informed Mr. Andrew that she had not seen any progress from Complainant regarding the Quality Plan. Complainant had not delivered a "red-line" draft revision, and he had not generated a written proposal of how and what he planned to incorporate into the Quality Plan update. Ms. Meraz again asked Complainant to produce updates to the Quality Plan in the form of "red-line" edits. At this point in Complainant's employment, Ms. Meraz also felt he "demoralized the team" and "continued to be disruptive to the team." She tried to help guide him and clarify her expectations, but she believed Complainant "did not seem to understand." (JX-67, Tr. p. 300, 658, 701, 872-873, 877, 897-898, 912-913)

nn. Around this time, Complainant engaged in purposely misleading and inaccurate communications with Mr. Andrew and Ms. Meraz that he claimed was designed to obtain their agreement with his interpretation of the regulations that applied to the gas industry. Specifically, on July 9, 2015, Complainant sent Ms. Meraz and Mr. Andrew an e-mail that, in pertinent part, stated he had just realized SoCal Gas was a self-regulated industry. This e-mail was particularly concerning to Mr. Andrew because he believed it illustrated that Complainant lacked an understanding of the regulatory requirements applicable to the gas industry despite prior concerted efforts by both Mr. Andrew and Ms. Meraz to explain them to Complainant. In response, Ms. Meraz corrected Complainant and identified the controlling regulatory authorities. Complainant then sent Ms. Meraz another e-mail that did not include Mr. Andrew as a recipient and asserted that Mr. Andrew had said SoCal Gas was self-regulating. Complainant's stated reason for sending these disingenuous e-mails was implausible and unpersuasive. His actions were exceptionally unprofessional employee conduct. They explicitly demonstrated that Complainant either: 1) did not comprehend the explanations Mr. Andrew and Ms. Meraz gave him about the applicable governing statutory and regulatory safety requirements for the gas industry; or 2) deliberately misrepresented his interpretation of gas industry regulatory requirements to hide his lack of understanding about the manner in which PSIA requirements

interacted with the Quality Plan's "best business" goals. (JX-72, Tr. pp. 334-336, 393-394, 585-587, 684-685, 714-715, 718)

oo. Complainant made disparaging comments about Ms. Meraz to his supervisor and subordinate Quality Auditors. Complainant wrote to Mr. Andrews that Ms. Meraz "has difficulty describing what she needs or wants." Mr. Andrews found this comment offensive, unprofessional, and inaccurate. Based on his significant past work experience with Ms. Meraz over the course of the preceding year, Mr. Andrew had concluded that she was extremely competent at her job and very proficient at describing her expectations as a client of Jacobs. Additionally, in a written communication to Mr. Cotton, Complainant stated that "delia will be up to her neck in excuses soon and nobody will be able to help her." Conduct of this nature gave Mr. Andrew serious doubts about Complainant's suitability for the Quality Manager position. (JX-46, JX-51, Tr. pp. 683-684, 687)

pp. At the end of five weeks of employment, Complainant had failed to produce any tangible work product related to a revision of the Quality Plan. Complainant had not provided any working draft of the Quality Plan revision that identified areas of change to either the Quality Plan or its accompanying audit checklist. Complainant had not even generated generalized subjects or areas in the Quality Plan or audit checklist that he proposed be changed or updated. At this point in Complainant's employment, Mr. Andrew was completely unsatisfied with Complainant's performance. Specifically, Mr. Andrew felt Complainant was only "just now beginning to formulate a plan on how he's going to write a plan to update the Quality Plan." Mr. Andrew had also formed the opinion that Complainant was not capable of producing an edited or draft revision for the Quality Plan - although he did not specifically express his doubts to Complainant. (JX-67, JX-73, Tr. pp. 300, 331, 658-659, 711, 769, 78-81, 872-873, 876, 934-935 1016-1017)

qq. At approximately the same time, Complainant informed Ms. Meraz that he wanted to assign the rewrite of the Quality Plan update to Mr. Cotton. This proposal concerned Ms. Meraz and Mr. Andrew, who felt Complainant was trying to delegate the primary job task that he had been hired to perform. (JX-73, Tr. pp. 893-895, 931, 977)

rr. Ms. Meraz rated Complainant's job accomplishments after five weeks of working on the Quality Plan update project as a "very low, low performance." She felt that Complainant "did not provide work product, but he also showed no progress towards any of the tasks that were assigned to him, much less the priority of, at minimum, making recommendations or red-lining the Quality Plan." She also considered Complainant to be a demoralizing supervisor for the Quality Auditors on his team. (Tr. pp. 876-877)

ss. On Saturday, July 11, 2015, Complainant sent a lengthy e-mail with 12 numbered paragraphs to Mr. Andrew and Mr. Potter. Complainant's primary purpose in sending Mr. Andrew the e-mail was to determine his future employment status, and Mr. Andrew interpreted this e-mail as a demand from Complainant to know whether Jacobs planned to offer him permanent employment. Complainant started the e-mail by asking "[w]hat is my hire-on status as I need to keep my future in front of me and the clock is winding down." In the e-mail Complainant also opined that "Delia has no understanding of Process Quality and essentially the

auditors are just untrained document reviewers without any specific guidance or template activity path.” In paragraph 12, Complainant stated: “As the only Certified ANSI/ASME Quality Auditor in this effort, I can honestly state that a Stop Work condition has existed for at least a year or more . . .” Complainant did not specifically identify the reason for this belief. The e-mail does not reference any statutory or regulatory provision that Complainant believed Respondents had violated, nor does the e-mail cite or describe the general nature of any safety concern Complainant possessed. After reading the e-mail, Mr. Andrew did not know what Complainant meant by a “Stop Work condition.” Mr. Andrew considered the e-mail offensive in tone and unprofessional in nature. (AX-40, JX-75, Tr. pp. 154, 345, 721-722)

tt. Mr. Andrews met with Complainant on the Monday, July 13, 2015 to discuss the subjects contained in the July 11, 2015 e-mail. Among the topics Mr. Andrew addressed with Complainant at that meeting was what Complainant meant when he wrote that a “Stop Work condition” existed. Mr. Andrew could not initially understand what condition Complainant felt constituted a safety failure or warranted a work shut down; he instead believed Complainant was providing excuses for failing to make any progress on the quality plan update. Over the course of the entire meeting, Mr. Andrew came to believe that Complainant felt a stop work condition existed because “the quality audits and Quality Auditors had not been certified or trained by him.” Mr. Andrew felt Complainant was sincere in his belief about the stop work condition. However, Complainant’s concern did not address any of the safety regulations or standards Mr. Andrew knew applied to the gas industry, and Mr. Andrew did not believe Complainant had reported a safety concern or violation. Mr. Andrew was not angered by Complainant’s e-mail, and he did not develop any animus or resentment toward Complainant because of the e-mail or Complainant’s belief that the auditing training and process was insufficient. (JX-79, Tr. pp. 587-592, 600-601, 724-728, 771, 907-908)

uu. After his meeting with Complainant, Mr. Andrew consulted with Ms. Meraz as the client liaison to discuss concerns about Complainant’s recent e-mails and job performance. The two agreed that Complainant’s performance was unsatisfactory. Mr. Andrew then later met with his supervisor, Mr. Potter, to discuss Complainant’s demand to know his future employment status. The discussion addressed Complainant’s past unprofessional e-mails with and about Ms. Meraz, Complainant’s failure to understand the applicable gas industry regulations, and his lack of progress in updating the Quality Plan. They concluded Complainant did not accurately comprehend the nature of the natural gas industry or the non-regulated business practice purpose of the Quality Plan, and they decided he was unable to satisfy the work obligations of the Quality Manager position. As a consequence, Mr. Andrew decided to terminate Complainant’s employment. (JX-60, JX-67, JX-72, JX-75, JX-77, Tr. pp. 687-689, 712-714, 723-724, 732-333, 771 587-592, 600-601, 725, 727-728, 771, 907-908)

vv. On July 16, 2015, Complainant was called into a meeting with Mr. Andrew, Mr. Potter, and Mr. Gemmell, and Mr. Andrew informed Complainant that his temporary employment with Jacobs would end effective Friday, July 24, 2015. He was told that his temporary employment would end on that day for three reasons: 1) he had failed to update the quality plan; 2) he was unprofessional; and 3) he was disruptive in the office environment. (AX-40, Tr. pp. 162-163, 594-595, 727-728)

ww. July 24, 2015 was the last day Complainant worked for Jacobs; it was the day 46 of Complainant's 60-day temporary employment period. Complainant's "Stop Work" allegation and stated concerns about Quality Plan auditing insufficiencies played no part in the Jacobs' managers' decision to terminate Complainant's temporary employment early. The decision was a direct response to Complainant's e-mail requesting a decision about his future employment status. (AX-40, Tr. pp. 594-595, 727-728)

xx. Upon termination of Complainant's employment, Mr. Cotton was tasked with leading the work effort to update the Quality Plan. Mr. Cotton concluded that Complainant had not generated any work product that could be incorporated into the Quality Plan update. Ultimately, Ms. Meraz created a draft revision of the Quality Plan, and she provided it to Mr. Cotton to use. The updated Quality Plan created by Mr. Cotton after Complainant's employment ended contained no work product of any form that was generated by Complainant. Mr. Cotton found the task of updating the Quality Plan time consuming but not that difficult. (Tr. pp. 469, 475-476, 480-481, 527-531, 839, 934-935)

yy. Since ending employment with Jacobs, Complainant has submitted more than one hundred applications for jobs in the field of quality assurance and quality control with employers. At the time of the hearing on this matter, Complainant had not received a job offer that he accepted.

6. Applicable Law and Analysis.

a. *The Parties' Arguments.* Complainant alleges Respondents committed prohibited discrimination under § 60129(a)(1)(A) of the Act when it ended his employment after he reported concerns about insufficient auditor training and certification and deficient auditing procedures. In particular, Complainant also contends his e-mail on July 11, 2015, about his belief that a "Stop Work" condition existed constituted protected activity. Complainant argues the close temporal proximity of Respondents' termination of his employment establishes that his e-mail report was a contributing factor in that decision.

In response, Respondents argue Complainant did not engage in protected activity because his reported concerns pertained to Respondents' business practice related to document monitoring rather than any safety requirements imposed by the PSIA. Respondents also maintain that, even if Complainant's action constituted protected activity, his employment termination was not adverse action in retaliation for his report. Rather, Respondents assert that Complainant was a temporary employee whose employment was terminated because he failed to satisfactorily perform his required job tasks and created a hostile work environment for his fellow employees. Additionally, Respondents maintain that, even if Complainant's employment termination constitutes adverse action, his report of a "Stop Work" condition was not a contributing factor to the adverse action. Lastly, Respondents maintain they can demonstrate by clear and convincing evidence that they would have taken the same unfavorable personnel action against Complainant in the absence of his alleged protected activity.

The parties also disagree about whether SoCal Gas and Sempra Energy meet the required

criteria under the Act to be employers for the purpose PSIA jurisdiction in this matter.⁶

b. Elements of PSIA Claim. No employer may discharge any employee for disclosing or providing information relating to any violation or alleged violation of any order, regulation or standard under the PISA or any other Federal Law relating to pipeline safety. 49 U.S.C. § 60129(a)(1)(A).

To prevail, a PSIA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) the named person knew or suspected, actually or constructively, that the employee engaged in the protected activity; (3) the employee suffered an unfavorable personnel action; and, (4) the protected activity was a contributing factor in the unfavorable personnel action. 29 C.F.R. § 1981.109(a); *see also Rocha v. AHR Utility Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-001, -002 (ARB June 25, 2009); *Donahue v. Peco Energy*, ALJ No. 2008-PSI-001, at 29 (Dec. 4, 2008) citing *Brune v. Horizon Air Indus. Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008 (ARB Jan 31, 2006).

1) Protected Activity.

A “[c]omplainant is not required to establish that the activity about which he complained actually violated Federal law relating to pipeline safety, but only that his complaints are based on a reasonable belief that they were related to unlawful practice under Federal law relating to pipeline safety.” *Donahue*, 2008-PSI-001, at 30. The Administrative Review Board (ARB) also ruled that, in order to establish protected activity, an employee does not have to complain of or report a violation that “definitively and specifically” relates to any one specific law or category of laws *Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 19 (ARB May 25, 2011). Additionally, internal complaints concerning safety and quality control have been held to be protected activity. *Donahue*, 2008-PSI-001, at 30, citing *Bassett v. Niagara Mohawk Power Corp.*, Case No. 1985-ERA-034 (Sec’y Sept. 28, 1993).

To qualify as protected activity under the PSIA, Complainant must prove that he had a “reasonable belief” that Respondents violated pipeline safety laws. *Sylvester*, ARB No. 07-123, slip op. at 14. A reasonable belief must be both subjectively and objectively reasonable. *Id.* Subjective reasonableness requires Complainant to establish that he actually held a good faith belief that Respondents violated the law in light of Complainant’s experience and training. *Id.* at 14-15. Objective reasonableness requires the undersigned to evaluate the nature of Complainant’s complaint “based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience” as Complainant. *Id.* at 15.

In this case, the parties contest whether Complainant engaged in protected activity when he informed Respondents that he believed they were failing to properly train and certify the Quality Auditors and were using a deficient auditing process, which he considered to be a “Stop Work condition.”

⁶ The parties stipulated that Jacobs hired Complainant; this sufficiently identifies one employer against whom he can bring this claim. Based on the undersigned’s ensuing legal analysis and conclusions, it is unnecessary to resolve the contested issue of whether the other named Respondents are also liable as employers under this claim.

No law or regulation requires Respondents to develop the Quality Plan that Complainant was hired to manage. At its core, Jacobs' Quality Plan was nothing more than a discretionary documentation auditing business program. It did not serve a direct pipeline safety inspection or quality control requirement mandated by the PSEP. As illustrated in the findings of facts, the Quality Auditors who worked on the program prior to and after Complainant's temporary employment understood they were ensuring nothing more than documentation accuracy rather than safety compliance standards imposed by the PSEP. As such, there was no statutory or regulatory training requirements for Respondents' Quality Auditors. The facts plainly show Complainant never appreciated this clear distinction during his short term of employment.

Additionally, Complainant never identified for Mr. Andrew, his supervisor, Ms. Meraz, his primary client contact, or anyone else working for Jacobs or SoCal Gas, a safety statute, regulation, or requirement that he believed Respondents had violated. Indeed, Complainant never used the term "safety violation" in any of his communication with Respondents' managers. Nonetheless, the facts also demonstrate, as Mr. Andrew testified, that Complainant subjectively and sincerely believed he had discovered and reported general auditing failures that he felt were some kind of regulatory violation. In light of the ARB's precedent that a complainant is not required to make a definitive and specific reference to a law or category of laws in order to establish protected activity, the undersigned concludes that Complainant proved he held a subjective, good-faith belief that Respondents violated some general statute or regulation related to gas pipeline safety.

However, regardless of the reason Complainant failed to comprehend the Quality Plan's purpose, the totality of the evidence demonstrates his subjective belief that the quality team was working on PSEP safety requirement compliance was objectively unreasonable. Both Mr. Andrew and Ms. Meraz explained the Quality Plan was created as a business practice adjunct that was separate and distinct from the PSEP requirements imposed on them by the C.F.R. and CPUC. A quality control professional with Complainant's extensive quality control and assurance training and experience should have comprehended this distinction. Strong support for this conclusion comes directly from the understanding of the Quality Auditors who were working on the Quality Plan. In particular, two Quality Auditors working for Jacobs at the same time as Complainant's employment tenure, Mr. Cotton and Mr. Magnus, clearly understood that their job role was to "ensure that there was agreement and consistency in the documents." Both employees recognized the purpose of the Quality Plan was to serve as an internal auditing process. Neither believed they were engaged in a safety auditing program that reviewed compliance with the PSEP or the sufficiency of work performed on the gas pipelines.

Equally important in this analysis, the audit reports the Quality Team produced specifically contain language indicating that "PSEP QRC review is intended to provide feedback regarding the content and completeness of the documents provided. This review does not validate the accuracy of the information represented in the documents . . ." In light of the distinct understanding by other Jacobs' employees performing job duties similar to Complainant and the written explanation contained on the audit reports, it is objectively unreasonable for Complainant to believe the quality team's work - such as auditor training and processes - addressed PSEP safety concerns in any direct way.

The facts in this case fail to establish that Complainant engaged in a protected activity under the PSIA. Complainant clearly possessed a subjective good faith belief that Jacobs violated a safety regulation as evidenced by his “Stop Work” e-mail. However, in light of his training and experience, Complainant’s belief was not objectively reasonable.

2) Knowledge of Alleged Protected Activity.

The undersigned concludes there is no doubt Respondents knew of Complainant’s alleged protected activity. As reflected in the findings of facts, Complainant’s July 11, 2015, e-mail to Mr. Andrew clearly referenced a belief that a “Stop Work” condition existed. After reading the e-mail, Mr. Andrew discussed that specific issue with Complainant. Although Mr. Andrew concluded that Complainant’s belief was erroneous and demonstrated a fundamental misunderstanding, Mr. Andrew also concluded that Complainant was sincere in his belief that some sort of safety issue or regulatory violation existed as a result of the Quality Plan auditing protocol. Consequently, the undersigned concludes Complainant proved that Respondents had some general knowledge of what he believed was protected activity.

3) Unfavorable or Adverse Personnel Action.

Although the undersigned concluded that Complainant did not engage in any protected activity under the PSIA, assuming arguendo that Complainant’s actions did amount to protected activity, the undersigned would be required to determine whether he suffered adverse action because of his protected activity. In particular, the PSIA explicitly prohibits employers from discharging an employee or otherwise discriminating against an employee with respect to his compensation, terms, conditions or privileges or employment because the employee provided, cause to be provided or is about to provide or cause to be provided, to the employer or the Federal Government information relating to any violations of any order, regulation, or standard under the PISA or any other Federal law relating to pipeline safety. 49 U.S.C. § 60129(a)(1)(A).

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court’s *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006) decision addresses what constitutes an adverse employment action and is applicable to the employee protection statutes enforced by the U.S. Department of Labor. *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (ARB Sept. 30, 2008). To be an unfavorable personnel action the action must be “materially adverse” meaning that it “must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern*, 548 U.S. at 57.

Moreover, “adverse actions” refer to unfavorable employment actions that are “more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Fricka v. Nat’l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015) (citing *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010)(holding that a performance rating drop from “competent” to “needs development” was more than trivial and was an adverse action as a matter of law).

It is undisputed that Complainant’s employment with Jacobs ended. Complainant was

explicitly hired on a temporary 60-day trial basis; he was not entitled to any employment beyond the trial basis. For all practical purposes, on July 11, 2015, Complainant submitted a direct and pointed request to his managers seeking an immediate answer as to whether his employment would be extended beyond the 60-day temporary employment period under which he was hired. In response to Complainant's inquiry, Respondents terminated Complainant's 60-day temporary employment 14 days earlier than previously agreed to by the parties. Although Complainant pointedly asked to know his future employment status, Respondents could have simply chosen to inform him that he would not be retained beyond the previously agreed upon 60-day trial period. Instead, Respondents discharged Complainant from employment 14 days early and denied him a salary during that time; this directly decreased Complainant's total employment compensation. As such, Respondents' decision constitutes an adverse action.

4) Protected Activity as a Contributing Factor.

Although the undersigned concluded Complainant did not engage in protected activity, assuming arguendo that he had proven some form of protected activity, the evidence clearly establishes the protected activity was not a contributing factor in his unfavorable personnel action.

A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the [unfavorable personnel] decision." *Rocha v. AHR Utility Corp.*, ARB No. 07-112, ALJ No. 2006-PSI-001, slip op. at 9 (ARB June 25, 2009). A complainant must "prove as a matter of fact that the protected activity was a contributing factor in the adverse personnel action." *Palmer v. Canadian Nat'l R.R.*, ARB No. 16-035, ALJ No. 2014-FRS-154, (ARB Sept. 30, 2016)(emphasis in original). The ARB also specifically noted that this is a relatively low standard for an employee to meet. A complainant does not have to prove that a factor was "significant, motivating, substantial or predominant - it just needs to be a factor." *Id.* The protected activity need only play some role, and even an "[in]significant" or "[in]substantial" role suffices. *Id.*

In order to determine if a protected activity contributed to the adverse decision, an ALJ must consider all relevant evidence, including evidence of the employer's non-retaliatory reasons for the unfavorable action. The ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action. *Id.* at 31. A complainant can show that his protected activity was a contributing factor in an unfavorable personnel action using either direct or indirect evidence. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 (June 24, 2011). As such, a complainant may meet his burden with circumstantial evidence. *Speegle v. Stone & Webster Constr., Inc.* ARB No. 11-029, ALJ No. 2005-ERA-006, slip op. at 10 (ARB Jan 31, 2013); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012); cf. *Bobreski II*, ARB No. 13-001, slip op. at 17 (noting that "[c]ircumstantial 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 evidence.").

The temporal proximity of a protected activity to an adverse employment action is a common type of circumstantial evidence that demonstrates the protected activity was a contributing factor, but the ARB has specifically rejected “any notion of a per se knowledge/timing rule.” *Palmer*, ARB No. 16-035, slip op. at 52. However, “an ALJ *could* believe, based on evidence that the relevant decision maker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action.” *Id.* (emphasis in original). “The ALJ is thus *permitted* to infer causal connection from decision maker knowledge of the protected activity and reasonable temporal proximity.” *Id.* (emphasis in original).

“Proof that an employee’s protected activity contributed to the adverse action does not necessarily rest on the decision-maker’s knowledge alone.” *Rudolph v. Nat’l R.R. Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 17 (ARB Mar. 29, 2013). “Proof of a contributing factor may be established by evidence demonstrating ‘that at least one individual among multiple decision makers influenced the final decision and acted at least partly because of the employee’s protected activity.’” *Id.* citing *Klopfenstein v. PCC Flow Techs. Holding, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006) (requiring ALJ upon remand to determine “whether knowledge held by other company employees should be imputed to the decision-maker.”); *Keister v. Carolina Power & Light Co.*, ARB No. 02-00007, ALJ No. 2000-ERA-031, slip op. at 9 (ARB Sept. 30, 2003) (imputing to company official responsible for employment decision knowledge of protected activity of employees having substantial input into the personnel action). *See also Bartlik v. T.V.A.*, No 1988-ERA-015, at n. 1 (Sec’y, Apr. 7, 1993) (“[W]here managerial or supervisory authority is delegated, the official with the ultimate responsibility who merely ratifies his subordinates’ decisions cannot insulate a respondent from liability by claiming bureaucratic ignorance.”).

Complainant maintains he was released from his employment in part because he reported what he believed were insufficient auditor training and practices and a “Stop Work” condition related to safety concerns. Respondents refute these assertions and argue that Complainant’s temporary employment was terminated and he was not offered permanent employment for three distinct reasons totally unrelated to any alleged report of safety concerns: 1) he failed to make any update at all to the Quality Plan; 2) he was unprofessional; and 3) he was disruptive in the work environment.

Respondents’ non-discriminatory explanation for terminating Complainant’s temporary employment is convincing.

First, the totality of the evidence persuasively demonstrates that Mr. Andrew and Ms. Meraz were completely unsatisfied with Complainant’s work performance prior to Complainant making any communication that could potentially qualify as protected activity. Of particular note, at the half-way review meeting Complainant requested, Mr. Andrews unequivocally informed Complainant that “it was not looking good” in regard to the possibility of converting his employment from temporary to permanent. Despite this quite frank assessment, Complainant continued to possess an unrealistic and unwarranted belief that he would receive a permanent job offer. The facts indicate that not only was Complainant’s belief highly implausible, but they also

demonstrate that it is reasonable to conclude Jacobs had every intention of terminating Complainant for employment performance and conduct failures before any potentially colorable protected activity occurred. None of the evidence presented to the undersigned indicates Mr. Andrew, Mr. Potter, or Ms. Meraz were in any way angered by Complainant's July 11, 2015 e-mail. Mr. Andrew persuasively explained the specific basis for the decision to terminate Complainant's employment, and it was in no way premised upon Complainant's concerns of auditing failures or his report that he believed a "Stop Work" safety situation existed. The undersigned concludes this explanation is highly believable.

Second, Respondents' position that Complainant performed his job duties in an unprofessional manner is well supported by the evidence. He displayed an arrogant and dismissive approach toward the management recommendations and performance standards that Mr. Andrew, his direct supervisor, expected from Complainant. He was wholly unsuccessful in comprehending and implementing the direction he received from his boss, Mr. Andrew, and the primary client contact, Ms. Meraz, on his work project.

Third, the full weight of the evidence presented in the case establishes that Complainant antagonized a number of fellow employees at Jacobs. He directly created an unproductive work environment for the Quality Auditors that he was tasked with supervising. Complainant's conduct in this regard was a fundamental failure of his duties and contributed directly to Mr. Andrew's decision to terminate Complainant's employment.

Complainant's argument that his e-mail report of a "Stop Work" condition contributed to his employment termination is largely premised on the timing of his e-mail and the notice from Jacobs that his employment would end. The temporal proximity of a complainant's protected activity and any adverse or unfavorable personnel action can be circumstantial proof establishing the activity as a contributing factor for the employment action. In this case, however, the undersigned concludes the timing of the end of Complainant's employment with Respondents in relation to his alleged protected activity is coincidental and the direct result of Complainant's explicit request for a decision on his desire for permanent employment.

Mr. Andrew met with Complainant to discuss this July 11, 2015 e-mail. In part, Mr. Andrew sought to ascertain exactly why Complainant contended a "Stop Work" condition existed and whether it presented a safety issue that needed to be addressed. During the meeting, Complainant did not identify a specific safety concern. He made no mention whatsoever about any statutory or regulatory violation that he believed Respondents had committed.

At the end of Mr. Andrew's discussion with Complainant regarding his July 11, 2015 e-mail, Mr. Andrew concluded Complainant had not identified a safety concern. Mr. Andrews thought Complainant misunderstood the fundamental nature of the quality program to such a degree that Complainant mistakenly believed he had discovered a regulatory compliance or safety violation. The undersigned considers this a powerful indicator that Complainant's alleged protected activity played no role in the decision about his employment status. To the contrary, the reasons cited for the decision arose directly from concerns Mr. Andrew developed about Complainant's capabilities and job performance exceptionally early on in Complainant's employment.

Prior to discussing the July 11, 2015 e-mail with Complainant, Mr. Andrew had already concluded that “it didn’t look good” for Complainant to be offered permanent employment at the end of his 60-day trial. Likewise, Ms. Meraz conveyed to Jacobs’ managers that - as the client liaison on Complainant’s work project - she was significantly disappointed in his lack of work product and unprofessional office conduct. Mr. Andrew and Ms. Meraz held these opinions at the beginning of July 2015, prior to any alleged protected activity by Complainant. Both also indicated that Complainant continued his unsatisfactory job performance in the next two weeks before he sent the e-mail with the “Stop Work” portion of his alleged protected activity.

Most importantly, no evidence presented to the undersigned establishes that the Jacobs’ managers involved in the decision to end Complainant’s temporary employment - Mr. Andrew, Mr. Potter, and Mr. Gemmell - considered the alleged protected activity in making the decision.

As such, the undersigned is unpersuaded by Complainant’s argument that the timing of the employment decision is strong circumstantial evidence that his alleged protected activity must have been a contributing factor in the decision to terminate employment. Nothing in the evidence shows that Complainant’s alleged protected activity impacted or altered Mr. Andrew’s previously held opinion in such a way that it contributed to the decision to end Complainant’s employment. To the contrary, the facts establish that Mr. Andrew initiated the managers’ discussions about Complainant’s employment status as a direct response to Complainant’s inquiry about it. Thus, the timing of the report and the decision on Complainant’s employment future occurred only because he addressed both issues - among a number of others - in the same e-mail correspondence to Mr. Andrew. Complainant’s primary purpose for this e-mail was not to describe a “Stop Work” condition but rather to deliver a pointed inquiry about his future employment status. The undersigned determines that this specific demand by Complainant was the precipitating and sole reason Respondents discussed and decided his employment status at that time.

There is no doubt that Mr. Andrew consulted Ms. Meraz about Complainant’s past e-mail communications. Similarly, he also discussed Complainant’s e-mails with Mr. Potter and Mr. Gemmel. However, the evidence does not establish that Complainant’s auditing concerns or declaration of a “Stop Work” condition were a distinct subject addressed during those discussions. To the contrary, Mr. Andrew and Ms. Meraz testified that they discussed Complainant’s July 11, 2015 e-mail in the general context of being one of several e-mails from Complainant that demonstrated his fundamental inability to comprehend the Quality Program’s purpose. Neither witness indicated that Complainant’s auditing concerns or “Stop Work” allegation were discussed or considered in any fashion at all.

This is a critical distinction. The relevant facts on this issue demonstrate that Complainant’s e-mail touched on 12 different subjects; his “Stop Work” allegation was the very last bullet item among those subjects. Thus, Complainant’s alleged protected activity is not the entire e-mail, but a relatively small portion of it. And it is that information that Complainant must demonstrate was a contributing factor in the decision to terminate his employment. If Complainant’s “Stop Work” assertion was the sole - or even a primary - subject of the e-mail, it may be reasonable for the undersigned to circumstantially conclude it was specifically discussed

and considered by Mr. Andrew. However, Mr. Andrew persuasively explained that he discussed the July 11, 2015 e-mail in general terms and as one of a number from Complainant that raised serious concerns about his lack of regulatory understanding, work production, and lack of professionalism. As such, the undersigned declines to infer a causal connection from the decision-maker's knowledge of Complainant's asserted protected activity and the temporal proximity of Respondents' decision to terminate his employment. To the contrary, the undersigned concludes that Respondents' managers discussed exactly what Complainant asked them to and what Mr. Andrew described: Complainant's future employment status.

Although showing a contributing factor is comparatively low evidentiary standard of proof, Complainant bears the burden to establish that element of the claim. There is no direct evidence that Complainant's asserted protected activity was in any way a contributing factor to his employment termination. Not one witness testified that Complainant's opinions about insufficient auditor training, his assertions about deficient auditing reports, or his conclusion that a "Stop Work" situation existed were even mentioned - much less a factor that was considered - during the discussions preceding the decision to terminate his employment. To conclude otherwise would require the undersigned to do so solely on the basis of circumstantial evidence, which is a determination the undersigned does not find supported by the weight of the evidence in this matter.

The undersigned thoroughly considered the totality of the circumstantial evidence of record, including the relevant decision-maker's knowledge of Complainant's asserted protected activity, the temporal proximity between the asserted protected activity and adverse action, Respondents' consistent non-retaliatory reason for taking the adverse activity, and the lack of any animus by Respondents' supervisors toward Complainant during his employment and specifically after his e-mail reports of auditing process concerns and opinion that a "Stop Work" condition existed.

Accordingly, the undersigned concludes Complainant failed to meet his burden to demonstrate by a preponderance of the evidence that his asserted protected activity was a contributing factor in the ultimate personnel action taken by Respondents. Rather, the undersigned concludes the totality of the evidence demonstrates that Complainant's alleged protected activity played no factor in Respondents' decision to terminate Complainant's employment.

c. Clear and Convincing Evidence that Respondents Would Have Ended Complainant's Employment Absent Protected Activity.

Although the undersigned concluded otherwise, if Complainant had met the burden of proving by a preponderance of the evidence that protected activity contributed to his employment termination, Respondents could still avoid liability in this matter if they "demonstrate[] by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 60129(b)(2)(B)(iv), 29 C.F.R. § 1981.109(a); *see also Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 11-13 (ARB Apr. 21, 2015). In interpreting the "clear and convincing" burden of persuasion imposed upon an employer, the ARB quantified this evidence standard in

the following way:

The standard of proof that the ALJ must use, “clear and convincing,” is usually thought of as the intermediate standard between “a preponderance” and “beyond a reasonable doubt”; it requires that the ALJ believe that it is “highly probable” that the employer would have taken the same adverse action in the absence of protected activity. Quantified, the probabilities might be in the order of above 70%.

Palmer, ARB No. 16-035, slip op. at 57; *Peck v. Safe Air Int’l. Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003 (ARB Jan. 30, 2004).

The evidence presented by Respondents satisfies the “clear and convincing” evidentiary burden required for this defense. The protected activity alleged by Complainant was not a factor in Respondents’ decision to ultimately take adverse employment action against Complainant. For many of the same reasons discussed above in the contributing factor analysis of this claim, the evidence also establishes that Respondents would not have continued Complainant’s employment any further.

Among other things, it is noteworthy that the three specific bases Respondents used for ending Complainant’s temporary employment are not substantively related to the general nature of Complainant’s alleged protected activity. Respondents identified 1) lack of work production, 2) unprofessionalism, and 3) disruptive conduct as the specific grounds for their decision about Complainant’s employment. Respondents had concerns about all three of these areas of Complainant’s work performance exceptionally early on in his employment. In fact, his unprofessionalism and disruptive conduct became evident to such a concerning degree during new employee administrative processing that two Jacobs supervisors considered rescinding Complainant’s job offer.

Additionally, the facts unequivocally demonstrate that Complainant’s work conduct and performance never approached anything that could be legitimately described as satisfactory to Respondents. Halfway through Complainant’s temporary employment period, his supervisor, Mr. Andrew, candidly apprised Complainant that “it did not look good” that his employment would be extended to a permanent position.

Complainant acknowledged that he failed in his job performance as it relates to supervising the Quality Auditors, acted unprofessionally by trying to manipulate his supervisor in an attempt to obtain permanent employment, and purposely misrepresented his knowledge of applicable regulations to his primary client’s liaison. Complainant’s conduct in these - and a number of other - instances was extremely concerning to his supervisor, Mr. Andrew, very early in Complainant’s employment.

The undersigned is completely convinced that Respondents would have taken the exact same action if Complainant had not voiced concerns regarding auditor training and process insufficiencies and not asserted a “Stop Work” condition in his July 11, 2015 e-mail. The evidence demonstrates Respondents’ termination of Complainant’s employment was a *fait*

accompli very early on in their work relationship; the only real question was when his employment would end.

Ultimately, Complainant's employment with Respondents ended when it did because Complainant sent a written e-mail correspondence to his supervisor that attempted to justify his lack of work production and demanded to know his future employment status. Respondents found this to be yet another example of insufficient performance and unprofessional conduct by Complainant, and for those reasons alone, they decided to terminate his employment.

7. Decision and Order. Based upon the above analysis of the contested issues of fact and applicable law in this matter, the undersigned makes the following decision and order:

a. Complainant failed to carry his burden to prove by a preponderance of the evidence: 1) he engaged in protected activity under the PSIA by reporting violations related to pipeline safety; and 2) it was a contributing factor to the adverse personnel action he suffered.

b. Alternatively, even if Complainant's conduct did amount to protected activity under the PSIA and it was a contributing factor to his employment termination, Respondents demonstrated by clear and convincing evidence that they would have taken the same personnel action in regard to Complainant in the absence of his asserted protected activity.

c. The claim in this matter is denied, and the case is dismissed.

SO ORDERED this day 13th day of June, 2019, at Covington, Louisiana.

TRACY A. DALY
Administrative Law Judge

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

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1982.110(a) and (b).