



In the Matter of:

**KIRTLEY CLEM and
MATTHEW SPENCER,**

COMPLAINANTS,

v.

COMPUTER SCIENCES CORP.,

RESPONDENT.

ARB CASE NO. 2016-0096

**ALJ CASE NOS. 2015-ERA-00003
2015-ERA-00004**

DATE: September 17, 2019

Appearances:

For the Complainants:

**Stephani L. Ayers, Esq.; *Law Offices of S.L. Ayers*, Medford Oregon;
Nikolas F. Peterson, Esq.; *Hanford Challenge*, Seattle, Washington**

For the Respondent:

**Rachel Linzy, Esq., Joseph R. Ward, III, Esq., Stephen L. Scott, Esq.,
The Kullman Firm, Birmingham, Alabama**

Before: William T. Barto, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Heather C. Leslie, *Administrative Appeals Judges*.

DECISION AND REMAND ORDER

THOMAS H. BURRELL, *Administrative Appeals Judge*: This case arises under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (2005), as implemented by regulations codified at 29 C.F.R. Part 24 (2015). Kirtley Clem and Matthew Spencer (complainants) filed complaints alleging that Computer

Sciences Corporation (CSC or Respondent) violated the whistleblower protection provisions of the ERA when it suspended them without pay, failed to pay them special pay, and failed to retain and rehire Clem. Consolidating the appeals, the Administrative Law Judge (ALJ) found for Clem and Spencer and awarded damages. We vacate and remand.

BACKGROUND¹

At the time in question, CSC operated the Department of Energy (DOE)'s Occupational Health Clinic (Clinic) at Hanford Nuclear Reservation Site (Hanford). CSC employed Kirtley Clem, Matthew Spencer, P.R., and M.J. as information-technology (IT) staff. Clem and Spencer were both Senior Programmer Analysts. Eric Elsethagen, Clem and Spencer's supervisor, was CSC's IT Chief. Elsethagen reported to Business Operations Director George Baxter, who was also the Principal Manager of Occupational Services. ALJ's Decision and Order (D. & O.) at 2-3. Kim Conley was the Clinic's Director and reported to Baxter. Baxter reported to Lisa Poulter, Public Health Sciences Manager, from CSC corporate staff. J.V., head of Performance Assurance, was employed by Hollie P. Mooers Corporation (HPM) but reported to Conley. Cleve Mooers was Hollie's husband and an executive at HPM. K.M. was a CSC Employee Relations specialist.

In its daily operations, the Clinic provided first aid and medical testing for employees working at Hanford. D. & O. at 2. The Clinic also tested workers for prior and current exposure and notified employees if they were cleared to work in certain areas.

CSC was the prime contractor for the Clinic. During the time in question, HPM provided the Clinic's IT work as a subcontractor of CSC. In mid-2012, CSC lost the prime contract to HPM. For the follow-on contract beginning on October 1, 2012, HPM and CSC planned to switch positions with CSC providing HPM's IT support as a subcontractor of HPM. D. & O. at 2. CSC and HPM workers worked side by side on the Clinic's day-to-day operations. Many employees carried out their duties without any distinction between the two companies. D. & O. at 5. HPM began transition activities in the summer of 2012. As of the dates in question, Lockheed Martin Systems (LMSI) provided other IT services for Hanford outside of

¹ In reciting these background facts, we make no findings of fact.

Clinic's operations, including Hanford's e-mail and server administration. D. & O. at 17 n.13.

1. HPM Reduced CSC's Staff for the Follow-On Contract

On July 10, HPM announced that the IT segment for which Clem and Spencer worked would be reduced to 50% for the new contract. D. & O. at 4. Beginning on or about October 1, three of CSC's six programmers would be laid off. Clem and Spencer began looking for new jobs and both applied to stay on with CSC. D. & O. at 4.

On August 22, CSC notified Clem that it decided not to hire him for one of the remaining three slots available after the transition. CSC chose to retain Elsethagen, Spencer and M.J., a senior CSC IT person. D. & O. at 11. Both Spencer and Elsethagen initially accepted the job. Elsethagen declined CSC's job offer on September 4. Spencer notified CSC on September 13 that he declined CSC's IT job offer for a job with another entity. D. & O. at 13.

With two spots remaining, Clem was still not selected for retention. Conley picked a more junior member to stay on. Clem's employment was set to end on or about September 27, 2012, the date that employees not retained for the follow-on contract were laid off.

2. CSC's Occupational Health Management Software

In 2011, CSC had begun working on an electronic records management program called Occupational Health Management (OHM), which combines many different medical databases together. OHM electronically incorporated clearances and medical records to manage appropriate worker assignments. The programs were able to indicate whether it was appropriate for an employee to be in a particular location at a particular time. D. & O. at 3. For example, an employee would need to have a medical clearance and training clearance checked off to be in a specific area. Clem's job duties included supporting older database systems and converting applications to operate with the OHM database. D. & O. at 2-3. The OHM software was initially scheduled to go live on August 20, 2012.

3. Clem and Spencer Complain to CSC and DOE about OHM

According to Clem and Spencer, the reduction of staff from six to three was not supported by CSC personnel. D. & O. at 4. Clem and Spencer complained about OHM's progress and insufficient staffing in a July 2012 meeting. Clem complained to Elsethagen that he was having difficulties getting OHM to operate on time due to other distractions. D. & O. at 4. Spencer also testified that he was having difficulty making the August 20 "go live" deadline. Employees were working weekends and many overtime hours. D. & O. at 4. Clem and Spencer complained to Elsethagen that data feeds in the old databases did not migrate well into OHM's databases. D. & O. at 6-7. Elsethagen responded that CSC would not release OHM if it placed Hanford employees at risk. D. & O. at 7. At some point, Lisa Zaccaria, Business Process Analyst, told Spencer to stop raising his concerns at IT staff meetings. D. & O. at 8. As the August 20 go-live date approached, Spencer complained that OHM was sending out numerous error messages. D. & O. at 8.

Clem solicited J.V.'s views on the subject. D. & O. at 8. J.V. thought that Elsethagen's responses to OHM's problems were vague and encouraged Clem and Spencer to go to DOE. D. & O. at 8. On August 10, Clem filed an anonymous complaint with DOE's Employee Concerns about OHM's intended implementation on August 20. Clem's e-mail indicates that "[t]he issue is not one of safety or death. It is one of PHI [personal health information] and PII [personal identification information] and site wide information systems." D. & O. at 8. DOE met with Clem and Spencer that day.

As part of his efforts, Clem solicited support from others. On August 10, Clem sent an anonymous e-mail to P.R., an IT co-worker, informing her that he and another worker had contacted DOE regarding the "readiness of OHM." Clem asked P.R. if she would be willing to discuss it with DOE. P.R. responded that if she were asked, she would report that OHM was on schedule.

On that same day, August 10, Elsethagen sent out an e-mail to the IT department concerning OHM. D. & O. at 9; Complainant's Exhibit (CX)-30. Elsethagen acknowledged staff's concerns that OHM's bugs might allow an employee to work in an area where the employee is not supposed to be because of a clearance problem or other medical condition. *Id.* Elsethagen commented that CSC

is working on the problem and reinforced CSC's commitment to safety. *Id.* Elsethagen explained that the data in the OHM system was not yet complete and was still being entered. Thirty minutes after this e-mail, P.R. forwarded to Elsethagen the anonymous e-mail that she received from Clem and Spencer. D. & O. at 10.

Later on August 10, Clem revealed himself and Spencer to P.R. as the source of the anonymous e-mail. P.R. replied to the e-mail indicating that she was "shocked, saddened, and disappointed" that Clem and Spencer were elevating "gripe sessions" to "secretive enrollment of co-conspirators to derail the project." P.R. forwarded the second e-mail to Elsethagen with a response that she was upset about the "corporate backstabbing." D. & O. at 10; CX-37.

On August 17, Baxter postponed OHM's implementation to August 23 for additional training, mock-patient exercises, and additional quality assessment, specifically mentioning the goal that "no worker [be] placed at risk." Respondent's Exhibits (RX)-20; D. & O. at 10. On August 22, Baxter e-mailed Poulter to indicate that while the implementation is "90-95%," he delayed OHM's go-live date to September 17 because of an employee's concern, "which ha[d] been investigated by DOE and closed as unsubstantiated." D. & O. at 11. Baxter wanted "to ensure we are as close to perfection as possible when we do our release." CX-46. Clem met with DOE again on September 13. He was still concerned that OHM was not ready. D. & O. at 13; Transcript (Tr.) 110.

4. CSC Warned its Employees Not to Work on HPM Transition Tasks without CSC Approval

During the August-September time frame, CSC claims that it had difficulty segregating CSC staff from HPM transition efforts. On August 10, 2012, CSC sent out an e-mail that CSC staff should not be working to support HPM-identified transition work unless directed to do so by George Baxter or Kim Conley. CX-29; Tr. 325-26.

M.J., a senior CSC IT person, expressed frustration that Clem and Spencer were talking with J.V. and LMSI and that J.V. was coordinating with LMSI. Tr. 1433. M.J. counseled Spencer to keep material "within our department." Tr. 1434, 1436; RX-34, 100. M.J. considered LMSI "a direct competitor" of CSC who was

surveying CSC operations to learn Clinic operations. Tr. 1434-35, 1441. M.J. spoke with Conley about his frustrations. Tr. 1435.

On September 6, Conley met with Spencer after receiving complaints from M.J. about Clem and Spencer's suspicious activity. D. & O. at 11; Tr. 741-42, 760-63. On September 6, Conley warned Spencer not to discuss OHM with J.V. or HPM. CX-26 p.13; Tr. 741-42; D. & O. at 11-12.

During the week of September 17-25, J.V. brought a database technician and senior expert from LMSI into the Clinic to learn the Clinic's IT. Tr. 828. Conley testified that they objected to these individuals being in CSC office space for a "knowledge transfer" because CSC's information was proprietary. Tr.1582-84; *see also* Tr. 828. Conley asked the individuals from LMSI to leave the area. Tr. 1582-84.

5. CSC Implements OHM on September 17

Debugging and quality assurance testing for OHM continued in August and September 2012. On September 14, Elsethagen e-mailed IT staff and others before the final release of OHM asking for anyone to e-mail him if there were any remaining "show stoppers" or IT problems before the final release. RX-35. As of the e-mail, management and quality assurance had approved final release. Clem responded to Elsethagen's e-mail with a few issues. Elsethagen responded, asking if he and P.R. can work those out. RX-35; Tr. 411-16. Clem testified that he believed that they could work them out. Tr. 412.

CSC implemented OHM on September 17, 2012. After going live, Spencer notified Elsethagen and Zaccaria that there were 213,000 error messages and that the system had crashed on two occasions where users could not input data. D. & O. at 14-16. In an e-mail chain spanning September 17-20, Spencer and Elsethagen discussed the error messages. CX-59; Tr. 700-01. Elsethagen was upset that Spencer had not notified him before of his concerns as Elsethagen thought it was Spencer's obligation to bring up the complaint before the release. Spencer responded that he has brought these complaints to Elsethagen and Zaccaria but they were not considered to be an issue. D. & O. at 14-15.

6. CSC Suspends Clem and Spencer on September 20

On September 18, at HPM's request, Clem and Spencer met with J.V. and Cleve Mooers at Bob's Burgers and Brew to discuss the IT system, OHM staffing, HPM's transition, and LMSI's bidding for the IT component. D. & O. at 16; Tr. 114-16. HPM confirmed the rumor that LMSI was bidding on the IT component in place of CSC. D. & O. at 17. Cleve Mooers of HPM offered to pay Clem for a transition write-up on staffing and risk assessment.

On September 19, Baxter, Poulter, and Conley received an e-mail chain between HPM and DOE showing HPM's effort to switch from fixed-firm costs to cost-reimbursable. CX-57. Mooers testified that the switch would bring LMSI in for the clinic's IT work in place of CSC. *See* Mooers's Dep. at 19-21, 56-58. Mooers testified that he was working to get LMSI placed on the IT subcontract as early as September 16. *Id.*; *see also* Tr. 1193 (DOE officer's testimony as to HPM's effort to substitute LMSI in place of CSC).

On September 20, Clem and Spencer initiated a meeting with Conley. Clem and Spencer testified that the meeting was to seek continued employment in the follow-on contract as they believed that there was only one person staffed after October 1. Tr. 558-59, 1554.

In the first meeting on the morning of September 20, Clem and Spencer informed Conley of their staffing and OHM data-quality concerns since September 17. Tr. 1145-50. Conley testified that Clem and Spencer informed her that they had met with and discussed CSC's IT systems and staffing with HPM, that LMSI was bidding on the IT component, and that HPM had requested Clem to provide consulting on OHM and staffing for HPM's transition. Tr. 1153-57.

In response to the IT concerns, Conley asked why Clem and Spencer did not bring this up before, specifically noting Elsethagen's request for last-minute IT concerns before going live. Conley explained that Clem and Spencer believed that OHM would suffer catastrophic failures in the upcoming weeks because of the change in staffing as no "key staff" would be retained after the transition. Tr. 1145-50, 1572-73; CX-66 (Conley's 9-24 statement to Employee Relations).

As to Clem and Spencer's meeting with HPM, Conley asked how long they had been communicating with HPM and what information they had shared and whether LMSI had offered Clem a job, which he denied. Tr. 430-32; 1155. Conley testified that Spencer admitted that he spoke with individuals at LMSI at all levels. D. & O. at 18-19; Tr. 1155-57.

Following the meeting, Conley met with Baxter and then Baxter and Conley phoned Poulter of CSC Corporate that same day. Conley reported to Poulter that Clem and Spencer had provided information to aid LMSI in their bidding, including information on systems, projects, and operations to develop their pricing proposal for their subcontracting bid. Tr. 1153; D. & O. at 19-20. Conley also informed Poulter about the meetings Clem and Spencer had with HPM, including off-site meetings, and the information they shared. Tr. 1153-55. Conley informed Poulter of the risk assessment that HPM asked Clem to provide for them and "they were both aware that this was for a bid for Lockheed Martin to take over the IT scope." Tr. 1155. Conley states that Poulter directed Conley to suspend Clem and Spencer immediately for fear that they may sabotage OHM. Tr. 1147-50, 1557-58, 1572-73.

Poulter testified that HPM was not honoring its agreement because it was trying to remove CSC from the follow-on contract. "CSC's business interests were at risk based on HPM's performance or behavior, and certainly that was not helped by Mr. Clem and Mr. Spencer going and talking to HPM clandestinely, if that's the word." Poulter Dep. 49-50, 53-54. Poulter testified that Clem and Spencer should not have been "colluding" with HPM or sharing proprietary information "outside of the normal management chain." Poulter Dep. at 58. Poulter testified that she did not have authority to terminate employees at CSC as CSC has a rigorous policy of ensuring employee's rights are protected. No one terminates an employee "in a vacuum." Documentation is required, notification is required, and justifications must be in place. Poulter Dep. at 27-28. Poulter testified: "I didn't decide to suspend them. Employee relations decided to suspend them." D. & O. at 20; Poulter Dep. at 68. Poulter testified that Conley and Baxter approached Employee Relations, and it was Employee Relations' job to investigate the allegations of wrongdoing. Poulter Dep. at 43-44.

Conley testified that she spoke with Employee Relations about the events and received instruction as to what to do. Tr. 1166-67, 1558-59. Conley testified that CSC pulled Clem and Spencer's e-mails and the content was given to legal to determine if they had shared information. Conley did not know whether a finding

was reached. Tr. 1159-61. In the second meeting in the afternoon, Conley informed Clem and Spencer that they were suspended “for aiding and supplying confidential business sensitive information to a competitor.” D. & O. at 20; Tr. 137, 560.

On September 20, K.M., CSC’s Employee Relations specialist, responded that she will be the specialist working on the ticket that Conley opened that day. CX-66. K.M. testified that if an employee was sharing information with a competitor of CSC that would be considered a serious offense under CSC policy. K.M. Dep. at 41. K.M. stated that she did not make a determination in this case. K.M. Dep. at 39. K.M. recalled that one of the two employees [Spencer] resigned due to another job offer and this affected her management of the case. K.M. Dep. at 35-36. Both Clem and Spencer’s job employment ended one week later, and K.M.’s investigation was never completed. K.M. Dep. at 42-43. After the layoff date, K.M. was directed by her supervisor to close the investigation.

After the September 20 meeting, Poulter exchanged e-mails with Mooers about CSC employees working on HPM transition work and Clem and Spencer’s suspension. Poulter wrote to Mooers that “CSC remains committed to supporting HPMC in a smooth transition. Should you need assistance of any CSC staffer, please contact Kim and she will be happy to coordinate with you. Please use Kim as the face-off for all such activities in order to ensure the best support for HPMC.” CX-60. Mooers asked Poulter if she suspended employees for talking to HPM and “aiding the competition,” which Poulter denied. D. & O. at 24; CX-61. On September 20, Baxter sent out an e-mail to all CSC staff indicating that CSC was committed to the transition and that “[i]n order to make that happen, all direction and requests for support must come from your CSC manager. No CSC employee should provide any work effort without the express permission of CSC management. Should you be asked to provide such assistance from anyone other than CSC management, please contact your supervisor or Kim Conley immediately so the response can be coordinated appropriately.” CX-62.

After the suspension decision, CSC did not retain Clem for employment in the follow-on contract, and CSC did not pay Clem and Spencer special pay for additional or overtime hours worked during OHM’s implementation. D. & O. at 24-26. Clem applied for a job with CSC in December 2012 and October 2013 but was not selected for employment. D. & O. at 25.

Both Clem and Spencer filed complaints with the Occupational Safety and Health Administration (OSHA). On November 18, 2014, OSHA found for complainants. CSC filed objections with the Office of Administrative Law Judges. The claims were consolidated before the ALJ. The ALJ held hearing for six days and thereafter ruled for complainants. The ALJ found that Clem and Spencer engaged in protected activity, that CSC was aware of that protected activity, and that Clem and Spencer suffered adverse actions. The ALJ further found that a totality of factors supported a reasonable inference that protected activity contributed to complainants' suspension. The ALJ also found that circumstances support a reasonable inference that protected activity contributed to CSC's decision not to retain or re-hire Clem for employment and to CSC's failure to pay complainants special pay for additional hours worked. For each of the adverse actions, the ALJ found that CSC's evidence is not clear and convincing and that CSC could not prove that it would have taken the same action. The ALJ awarded damages to both Clem and Spencer.²

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the ERA. 42 U.S.C. § 5851. The Secretary has delegated that authority to the Administrative Review Board. Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); *see* 29 C.F.R. Part 24.110. The ARB will affirm an ALJ's findings of fact when supported by substantial evidence. *See* 29 C.F.R. 24.110(b) ("The ARB will review the factual findings of the ALJ under the substantial evidence standard."). As the United States Supreme Court has recently noted, "[t]he threshold for such evidentiary sufficiency is not high." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). Substantial evidence is "'more than a mere scintilla.' It means—and means only—'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citing and quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The ARB reviews an ALJ's legal conclusions de novo. *Saporito v. Progress Energy Serv. Co.*, ARB No. 11-040, ALJ No. 2011-ERA-006 (ARB Nov. 17, 2011).

² We do not address the propriety of this award as any issues are not yet ripe in light of our disposition of this matter.

DISCUSSION

To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, suffered an unfavorable or adverse personnel action, and that his protected activity was a contributing factor in the unfavorable personnel action taken against him.³ If the complainant's protected activity was a contributing factor in the adverse action, the employer may avoid liability and damages only if it demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action" in the absence of the protected activity.⁴

1. Clem and Spencer Engaged in Protected Activity

The ALJ found that Clem and Spencer's contacting the DOE is protected activity under the ERA. D. & O. at 22. The ALJ found that Clem and Spencer's complaints concerning OHM communicated to CSC before and after contacting DOE are protected activities. D. & O. at 22. The ALJ also found that problems with the OHM software could jeopardize worker safety because one of its functions was to memorialize whether it was safe for a worker to be in a particular area. D. & O. at 22.

On appeal, CSC claims that Clem and Spencer's assertions of protected activity concern insufficient time and staff to implement the OHM software and not nuclear safety. CSC emphasizes that Clem and Spencer state in their initial communication with DOE that their complaint does not involve safety or health. CSC claims that the ALJ's findings were not based on the reasonable construction of what Clem and Spencer reported to anyone but on the after-thought that in a chain of events, the failure of staffing needs could result in personnel deficiencies that could affect worker safety.

³ 42 U.S.C. § 5851(b)(3)(C) ("The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint."); 29 C.F.R. § 24.109(b)(1).

⁴ 42 U.S.C. § 5851(b)(3)(D) ("Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."); 29 C.F.R. § 24.109(b)(1).

ERA's employee protection provision does not provide much guidance as to what constitutes protected activity. The ERA protects five categories of activity, including notifying one's employer of an alleged violation of the ERA or the Atomic Energy Act (AEA), refusing to engage in activities prohibited under either the ERA or AEA provided the employee has identified the alleged illegality to his or her employer, testifying before Congress or at any Federal or State proceeding regarding any provision of the ERA or the AEA, commencing or causing to be commenced a proceeding under or the enforcement of the ERA or AEA, or testifying (or about to testify) in any such proceeding.⁵ Subsection 5851(a)(1)(F) includes a catchall provision that prohibits discrimination against an employee who "assisted or participated or is about to assist or participate . . . in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic

⁵ The ERA's whistleblower provision specifically provides the following:

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

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

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

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

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

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

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

42 U.S.C. § 5851(a).

Energy Act of 1954, as amended.” *Id.* The ERA does not define the phrase “any other action to carry out the purposes of this chapter” as set forth in subsection (F), but the ARB has held that an employee engages in protected activity under (F) when the acts implicate nuclear safety. *Hoffman v. Nextera Energy, Inc.*, ARB 12-062, ALJ No. 2010-ERA-011 (ARB Dec. 17, 2013). Courts have held that ERA’s whistleblower provision serves a “broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality.” *Sanders v. Energy Northwest*, 812 F.3d 1193, 1197 (9th Cir. 2016). In *Indiana Michigan Power Co. v. U.S. Dept. of Labor*, 278 Fed. Appx. 597 (6th Cir. 2008), the Court of Appeals for the Sixth Circuit held that an employee engaged in protected activity when he complained about overtime hours because the employer had violated the Nuclear Regulatory Commission’s guidance letter which limits the amount of overtime that staff members performing safety-related functions may work. *Id.*; see *Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-030 (ARB Sept. 29, 2006).

In this matter, the ALJ did not cite a particular ERA subsection under which Clem and Spencer’s complaints about OHM staffing and error messages fall. Instead, the ALJ found Clem and Spencer’s complaints related to worker safety. D. & O. at 22. Nevertheless, under the cited authority related to subsection (F), the ALJ’s conclusion that Clem and Spencer had engaged in protected activity is supported by substantial evidence. Clem and Spencer contacted the DOE with concerns about CSC’s ability to safely implement OHM in the intended time frame. CSC delayed implementation of OHM on two occasions with reference to worker safety. D. & O. at 9-11; see also Tr. 976-78 (complainants complained about errors in data feeds and indicated that doctors’ lab results could be off with the wrong IT feeds). Clem and Spencer also raised complaints concerning OHM’s inadequate staffing, error messages, and the possibility of catastrophic failure with supervisors and with Conley in the September 20 meeting. Tr. 131, 558, 1145-46, 1572.

2. CSC Knew of Clem and Spencer’s Protected Activity

The ALJ found that CSC, in particular Elsethagen, knew of Clem and Spencer’s reporting. D. & O. at 22-23. CSC claims that there is no evidence that Conley knew of Clem and Spencer’s complaints to the DOE when she suspended them on September 20.

The ALJ's finding that CSC knew of complainants' protected activity is supported by substantial evidence. Clem and Spencer revealed their identity as the source of the DOE complaint to a colleague who informed Elsethagen. D. & O. at 10; CX-37. Complainants complained to co-workers and to Elsethagen about OHM problems before and after the DOE complaint. D. & O. at 4, 14-15. Although Clem and Spencer's identity as the individuals who reported to the DOE may not have been known throughout CSC, CSC, including Conley, Baxter, and Poulter, knew of complainants' staffing and OHM error complaints as they included those complaints in the September 20 meeting with Conley. Conley explained in her statement to Employee Relations that Clem and Spencer believed OHM would suffer catastrophic failures in the upcoming weeks because of the change in staffing as no "key staff" would be retained after the transition. CX-66 (Conley's 9-24 statement to Employee Relations); Tr. 1147-53, 1571-74.

3. Clem and Spencer Suffered an Adverse Action

The ERA provides that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment" because of the employee's protected activity. 42 U.S.C. § 5851(a). The ALJ found that CSC suspended Clem and Spencer without pay on September 20, 2012. CSC also failed to pay Clem and Spencer special pay for extra hours worked, and CSC failed to retain Clem for the follow-on contract. CSC did not re-hire Clem in December 2012 or in October 2013. CSC does not appeal the ALJ's finding that Clem and Spencer suffered an adverse action, and we affirm the ALJ's findings on this issue.

4. The ALJ Erred to the Material Prejudice of Respondent in his Contributing-Factor and Same-Action-Defense Analyses⁶

A. *The ALJ did not Apply the Correct Contributing-Factor Causal Standard*

Under the ERA, the employee must prove by a preponderance of the evidence that his protected activity contributed to the adverse action. The ERA's implementing regulations state the following:

In cases arising under the ERA, a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged in the complaint.

29 C.F.R. § 24.109(b)(1); 42 U.S.C. § 5851(b)(3)(C).

The ALJ failed to properly apply this standard. The ALJ's heading for this section states the following: "[t]he Circumstances Support a Reasonable Inference That the Protected Activity Was a Contributing Factor To Some Adverse Actions[.]" D. & O. at 23. By using the term "reasonable inference" without any other clarifying language or explanation, we are left to conclude that the ALJ did not apply the correct burden of proof by preponderance of evidence. Our conclusion is confirmed by the ALJ's application of the facts to the standard in which the ALJ wrote the following: "[t]he circumstances support a reasonable inference that the protected activity was a contributing factor to CSC's suspension of Messrs. Clem and Spencer without pay." D. & O. at 23; *see id.* at 24, 25 (committing same error for retention, re-hire, and special pay analyses). In his closing, the ALJ found that "equity appears on the Complainants' side here." D. & O. at 25. We are unable to ascertain

⁶ We note that CSC did not raise the ALJ's erroneous contributing-factor and same-action standards on appeal. CSC did appeal the ALJ's application of these elements. We review the ALJ's construction of governing law de novo and remand for plain error. *Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

how this finding fits into the statutory and regulatory framework and the parties' respective burdens.

B. The ALJ did not Apply the Correct Same-Action-Defense Standard

The ALJ also erred in his analysis of CSC's same-action defense. The ERA's implementing regulations state the following:

If the complainant has demonstrated by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

29 C.F.R. § 24.109(b)(1); 42 U.S.C. § 5851(b)(3)(D).

In his heading for the same-action-defense section, the ALJ wrote, CSC's "Evidence of Justification Is Not Clear and Convincing." D. & O. at 26. In his closing findings for the retention decision, the ALJ wrote "I conclude Respondent has not produced clear and convincing evidence to show that the protected activity did not contribute to Ms. Conley's choice of R.M. over Mr. Clem, after Messrs. Elsethagen and Spencer resigned." D. & O. at 27.

The ALJ erred in his analysis. The same-action defense requires the fact-finder to analyze whether the employer has proven by clear and convincing evidence that it would have imposed the same adverse action if the employee had not engaged in protected activity. The same-action defense is applied *after* a fact-finder has already found that protected activity contributed to the employer's action. Here, the ALJ shifted the focus of his analysis to whether CSC has proven by clear and convincing evidence that CSC was *justified* in taking its actions. D. & O. at 26, 28. Further, the ALJ's finding on same-action defense double credits his finding of contribution and fails to give the employer the benefit of the same-action defense—that it would have taken the same action had Clem and Spencer not engaged in protected activity. D. & O. at 27. In whistleblower law in particular, the same-action defense, in addition to being a statutory requirement, is an important component of the mixed-motives analysis. *Stallard v. Norfolk Southern Ry, Co.*, ARB 16-028, ALJ

No. 2014-FRS-149 (ARB Sept. 29, 2017) (remanding for the ALJ to, among other things, correct the erroneous merger of the “contributing factor” and same-action-defense standards).

5. The ALJ’s Findings of Fact do not Demonstrate that the ALJ Weighed the Evidence and Reached Findings by the Appropriate Burden of Proof

The ALJ’s legal errors in the description of the applicable standards are magnified by his cursory analysis.⁷ After laying out a fact-intensive statement of the case, the ALJ’s main contributing-factor analysis spans roughly one page in the form of seven bullet-point sentences. The ALJ makes additional findings of fact for the accompanying adverse actions of failure to retain and re-hire Clem and denying Clem and Spencer special pay for additional hours worked. The ALJ incorporates findings of fact in an abbreviated analysis of CSC’s same-action defense on the suspension and accompanying adverse actions.

As previously noted, the ARB will uphold an ALJ’s factual finding where supported by substantial evidence “even if there is also substantial evidence for the other party, and even if we would justifiably have made a different choice had the matter been before us de novo.” *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). A finding of fact lacks contextual strength and substantial evidence if the fact-finder ignores, or fails to resolve, a conflict created by countervailing evidence or “if it is overwhelmed by other evidence or if it really constitutes mere conclusion.” *Dalton v. U.S. Dept. of Labor*, 58 Fed. Appx. 442, No. 01-9535, 2003 WL 356780, at *445 (10th Cir. Feb. 19, 2003); see *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, -159; ALJ No. 2005-STA-063, slip op. at 7-8 (ARB June 30, 2008) (citations omitted).

The Administrative Procedure Act requires that the adjudicator support any findings of fact:

⁷ We do not hold that bullet-point findings or abbreviated analysis in itself constitutes error, but here we are left with unresolved issues. *In re Weeks Marine, Inc.*, ARB Nos 12-093, -095, ALJ No. 2009-DBA-006 (ARB Apr. 29, 2015) (criticizing the ALJ’s seventeen pages of transcript summary but only one and a half pages of bullet-point findings of fact).

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c).

On this record comprised of six days of hearing, hundreds of exhibits, and sharply diverging accounts as to the reasons for the suspension and other adverse actions, the ALJ's findings concerning contribution and same-action defense are superficial and fail to engage adequately the parties' arguments and the evidentiary record. The ARB's appellate review requires that the ALJ conduct an appropriate analysis of the evidence to support his findings. It is essential that the ALJ "adequately explain why he credited certain evidence and discredited other evidence." *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016).

We are unable to ascertain how the ALJ reached his ultimate findings concerning contribution and the affirmative defense in light of the record taken as a whole. Although an ALJ "need not address every aspect of [a party's claims] at length and in detail," the findings "must provide enough information to ensure the Court that [he or she] properly considered the relevant evidence underlying [a] plaintiff's request[.]" *Mori v. Dept. of the Navy*, 917 F.Supp.2d 60, 65 (D.D.C. 2013). A reviewing court must be able to "discern what the ALJ did and why he did it." *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999).

6. On Remand, the ALJ Must Expressly Analyze the Parties' Arguments and the Evidence Supporting or Undermining those Arguments

Because we conclude that the ALJ's findings are insufficient to show that the ALJ weighed evidence by the appropriate burden of proof, we remand this matter to the ALJ to fully analyze the record, weigh evidence, and make revised findings of fact on the issues of contributing factor and same-action defense. *Cf. BNSF Ry. Co. v. U.S. Dept. of Labor, Admin. Rev. Bd.*, 867 F.3d 942, 947 (8th Cir. 2017) (vacating and remanding the order because "findings" were either non-existent or insufficient to support contributing factor and same-action defense rulings). To prove a fact by a preponderance of the evidence "means to show that that fact is more likely than not; and to determine whether a party has proven a fact by a preponderance necessarily means to consider all the relevant, admissible evidence and, on that basis, determine whether the party with the burden has proven that the fact is more likely than not." *Palmer v. Canadian Nat'l Ry, IL Cent. R.R. Co.*, ARB 16-035, ALJ No. 2014-FRS-154, slip op at 18 (ARB Jan. 4, 2017) (reissued with dissent).

For the same-action defense, the fact-finder must assess whether the respondent has demonstrated by clear and convincing evidence that it would have taken the action even if the employee had not engaged in protected activity. We have said that the employer satisfies this burden when it shows that it is "highly probable" that it would have taken the action in the absence of protected activity. *Palmer*, ARB 16-035, slip op. at 52.⁸ The ALJ's findings of fact should show deliberation upon the facts in favor of a particular finding and consideration of the facts that take away from that finding. *Carter v. Marten Transp.*, ARB 09-117, ALJ

⁸ We are aware that at least one panel of the Board has, in the past, asserted that the ERA "requires" that certain factors "must be considered in applying the 'clear and convincing' defense." *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 12 (ARB Apr. 25, 2014). The factors identified by the panel were "(1) how 'clear' and 'convincing' the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer "would have" taken the same adverse actions; and (3) the facts that would change in the "absence of" the protected activity." *Id.* As these factors are not expressly prescribed in the statutory text and such a rule was not necessary to resolve the matter at issue, we consider the announced "requirement" to be merely precatory dicta. A fact-finder must holistically consider any and all relevant, admissible evidence when determining whether an employer would have taken the same adverse action against an employee in the absence of any protected activity. *See* 29 C.F.R. § 24.109(b)(1).

No. 2009-STA-031 (ARB July 21, 2011) (“two conclusory statements related to USIS’s liability . . . are insufficient to allow us to review the ALJ’s reasons for his conclusions.”); *Stallard*, ARB 16-028 (finding one-sentence conclusions to be conclusory and remanding for analysis).

A. *CSC Argues that it Suspended Clem and Spencer under the Belief that Clem and Spencer Colluded and Shared Proprietary Information with HPM*

The ALJ found that there was temporal proximity between CSC’s adverse action and Clem and Spencer’s protected activity. Temporal proximity may constitute circumstantial evidence of causation. *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB May 26, 2010). The circumstantial value of temporal proximity, as CSC argues, is greatly reduced when there is an intervening event to account for. *Feldman v. Law Enforcement Assoc. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014). CSC claims that Clem and Spencer’s collusion and sharing proprietary information with HPM’s senior management, revealed just hours before their suspension, constitutes such an intervening event.

As part of the ALJ’s findings on contributing factor and same-action defense, the ALJ must more fully evaluate CSC’s stated reason for the adverse actions.⁹ The ALJ focused on CSC’s inability to precisely identify the type of proprietary information that Clem and Spencer allegedly shared with HPM and CSC’s failure to prove that they actually shared that information. D. & O. at 18-19 n.17. The ALJ also discussed uncertainties as to whether CSC had a policy that prevented CSC employees from working with HPM on transition content. D. & O. at 13 n.11, 26.

CSC correctly argues on appeal that CSC is not required to prove that Clem and Spencer shared proprietary information. This is, after all, a nuclear safety and retaliation matter, not simply a wrongful suspension case. And neither the ALJ nor the ARB is a super-personnel department, evaluating the merits of the employer’s decisions beyond the necessary parameters of the whistleblower retaliation

⁹ Under the contributing factor standard, a complainant may prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected” activity. *Walker v. Am. Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (ARB Mar. 30, 2007).

complaint before it. *Gale v. Ocean Imaging & Ocean Res., Inc.*, ARB No. 98-143, ALJ No. 1997-ERA-038, slip op. at 13 (ARB July 31, 2002); *Jones v. U.S. Enrichment Corp.*, ARB Nos 02-093, 03-010, ALJ No. 2001-ERA-021 (ARB Apr. 30, 2004) (“It is not enough . . . to *disbelieve* the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.”) (case citations omitted). It is not a question of whether Clem and Spencer actually shared proprietary information or whether CSC had an applicable policy prohibiting employees from colluding with competitors. Rather, the issue to be decided by the ALJ, on CSC’s affirmative defense in particular, is whether CSC genuinely believed that complainants colluded and shared proprietary information and suspended Clem and Spencer for this reason and not for activity protected under the ERA. *Stone & Webster, Constr., Inc. v. U.S. Dept. of Labor*, 684 F.3d 1127, 1136 (11th Cir. 2012).

With the correct legal standard in place as to the distinction between CSC’s good-faith belief of wrongdoing and actual proof of wrongdoing or violation of company policy, the ALJ must re-analyze the record and address CSC’s argument and supporting evidence that CSC was concerned with HPM’s senior management attempting to substitute LMSI for CSC and suspended Clem and Spencer under the belief that they were colluding with HPM in furtherance of HPM’s interests. The ALJ’s findings of fact should also re-evaluate CSC’s arguments and supporting evidence that CSC warned employees not to work with HPM on HPM transition-related activities without permission. With the correct legal standard in place, the ALJ’s fact-finding on contributing factor and same-action defense should assess the testimony of Conley, Baxter, and Poulter concerning the meetings and decision-making that took place on September 20. If the ALJ disbelieves testimony proffered by CSC, he should explain why.

B. If the ALJ Finds that CSC’s Stated Reasons for the Suspension and Other Actions are Pretext for ERA-Protected Retaliation, the ALJ Must Explain Why

If a complainant shows that an employer’s reasons for its action are pretextual, he or she may, through the inferences drawn from such pretext, meet the evidentiary standard of proving by a preponderance of the evidence that protected activity was a contributing factor in the adverse action and that an employer cannot carry its burden to prove its same-action defense by clear and convincing evidence. *Bechtel v. Competitive Tech. Inc.*, ARB 09-052, ALJ No. 2005-SOX-033 (ARB Sept. 30, 2011).

The ALJ's findings of fact appear to implicitly support a finding that CSC's stated reason for the adverse actions were pretextual. The ALJ found that neither Conley, Baxter, nor Poulter squarely accepted responsibility for the suspension decision. The ALJ found that CSC shifted its reason from working with competitors to sabotaging OHM. The ALJ found that Conley did not provide Clem and Spencer with a written memorandum per CSC's policy. The ALJ also cited as a factor the fact that Conley and Poulter did not consult with Elsethagen, Clem and Spencer's direct supervisor, before suspending Clem and Spencer. The ALJ did not, however, explain how these findings of fact support his ultimate finding of contributing factor causation or lack of a same-action defense.

On remand, if the ALJ finds that CSC's stated reasons are pretextual, he must explain why and show how those findings of fact support his ultimate findings of contributing-factor causation by a preponderance of the evidence and the employer's inability to prove its same-action defense by clear and convincing evidence. The ALJ's analysis of contribution and same-action defense must analyze, for example, the evidence concerning the role that Employee Relations played in the investigation and CSC's disciplinary process.

Finally, the ALJ cited as a factor supporting his analysis that Mooers asked Poulter if she suspended employees for talking to HPM and "aiding the competition," which Poulter denied. D. & O. at 24; CX-61. The ALJ fails to discuss the other e-mails accompanying this discussion. CX-60. If the ALJ is relying upon Poulter's response as evidence that she did not claim responsibility for decision-making or that she admitted that CSC did not suspend them for aiding the competition, the ALJ must weigh this evidence with the remainder of the e-mail conversation and the record in general, in particular Poulter's deposition, Conley's testimony, and Employee Relations' role in CSC's disciplinary process.

In light of the above discussion, we remand for the ALJ to apply the correct law to the facts in a manner that allows the ARB to evaluate how the ALJ credited and discredited parties' arguments and the supporting or undermining evidence.

CONCLUSION

We **AFFIRM** the ALJ's findings of fact that Clem and Spencer engaged in protected activity, CSC was aware of that protected activity, and Clem and Spencer

suffered adverse actions as supported by substantial evidence and based upon correct legal conclusions. The ALJ erred in his analysis of the evidence relating to causation and same-action defense. Accordingly, we **VACATE** the ALJ's finding of liability and order of damages and **REMAND** for further findings consistent with this order.

SO ORDERED.