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Issue Date: 26 July 2006

CASE NOS. 2006-ERA-7,
2006-ERA-11

In the Matter of:

IFTIKHAR A. ABBASI,
Complainant,

v.

CONSTELLATION ENERGY GROUP,
Respondent.

RECOMMENDED ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING COMPLAINT

These proceedings arise under Section 211 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. § 5851 (1994), and the applicable regulations issued thereunder at 29 C.F.R. Part 24. On June 2, 2006, Respondent's counsel filed a motion for summary judgment ("Resp. Mot."). An order granting an extension of time to respond was thereafter issued, and on July 18, 2006, Complainant filed an opposition to the motion ("Comp. Opp."). On July 24, 2006, Respondent filed a motion for leave to file a reply brief accompanied by its proposed reply brief.[1] Based on my review of the parties pleadings, and the attachments thereto, I find, for the reasons discussed below, that Respondent's motion should be granted.

Procedural History

A complaint alleging violations of the whistleblower provisions of the ERA was filed on April 29, 2004 by Iftikhar A. Abbasi ("Complainant" or "Mr. Abbasi") against Constellation Energy Croup, Inc. ("Respondent" or "Constellation") with the U.S. Department of Labor ("DOL"), Occupational Safety & Health Administration ("OSHA") Regional Office in New York, New York. Mr. Abbasi alleged therein that the termination of his employment by Respondent on January 12, 2004 was "directly related to [his] having raised various concerns, including a safety concern, regarding station events and practices [at Respondent's Nine Mile

[1] Constellation's motion notes, *inter alia*, that Respondent's reply brief incorporates information from documents which were received from Complainant after it had filed its motion for summary judgment. Inasmuch as these documents were originally requested by Respondent on April 27, 2006 but not produced by Complainant until July 14, 2006, I find good cause for allowing Respondent to file its reply brief and thus grant its motion to do so.

Point Nuclear Station in Oswego County, New York where he had been employed]." April 29, 2004 Complaint of Iftikhar A. Abbasi ("Apr. 2004 Comp.") at 1.

A second ERA complaint was filed by Mr. Abbasi with OSHA on February 15, 2005 in which he alleged that Constellation had engaged in further retaliation against him for having raised safety issues. According to the complaint, Respondent did not pay Mr. Abbasi for his entire complement of accrued unused vacation for 2004, did not pay him a performance bonus for 2003, and does not consider him eligible for re-employment. February 15, 2005 Complaint of Iftikhar A. Abbasi ("Feb. 2005 Comp.").

In a letter dated January 30, 2006, OSHA advised Mr. Abbasi that it was dismissing his first complaint based, *inter alia*, on its conclusion that Complainant had failed to establish any link between his alleged protected activity and any adverse employment action. Secretary's Findings of January 30, 2006 at 2.

After receipt of OSHA's letter dismissing his first complaint, Mr. Abbasi filed a timely request for hearing with the Office of Administrative Law Judges ("OALJ") on February 9, 2006. His request for hearing noted that he was then employed in Chicago, Illinois, and he therefore requested that any hearing be held at that location. The case was subsequently scheduled for formal hearing in Chicago beginning March 14, 2006.

In a letter dated February 16, 2006, Respondent's counsel sought a continuance of the hearing date based on his need to prepare for another hearing scheduled to begin shortly after March 14, 2006, his need to engage in appropriate discovery in this case, and his intention to file a motion for summary judgment which, given the existing hearing and discovery schedule, could not be filed more than 20 days before the March 14, 2006 hearing as required by applicable regulations. After conferring with the parties during a subsequent telephone conference, and learning that Complainant also needed additional time to seek counsel and prepare his case for hearing, I granted Respondent's motion for continuance and set the hearing for June 27, 2006.

On March 23, 2006, Mr. Abbasi's appeal of OSHA's dismissal of his second complaint against Constellation was docketed in the Office of Administrative Law Judges. According to a March 3, 2006 letter to Complainant from OSHA's Regional Administrator, Complainant had failed to show that he was denied compensation and eligibility for re-employment in retaliation for having engaged in any activity protected by the ERA. Secretary's Findings of March 3, 2006 at 2.

In an order dated March 28, 2006, I granted the parties joint request that Case Nos. 2006-ERA-7 and 2006-ERA-11 be consolidated. I further ordered that these matters proceed to formal hearing beginning June 27, 2006 in Chicago, Illinois. Complainant's unopposed request for a continuance was thereafter granted in an order dated June 2, 2006, and these cases are presently scheduled for hearing on August 22, 2006.

Respondent's Summary Judgment Motion

As noted above, Respondent filed a motion for summary decision in this matter on June 2, 2006. Constellation argues, in part, that Mr. Abbasi cannot establish a *prima facie* case of retaliatory discharge because he never engaged in protected activity, and his complaint must therefore be dismissed. Resp. Mot. at 28-32. It further argues that, even if his activities were protected under the ERA, dismissal is required since he cannot establish any causal connection between his activities and Respondent's termination of his employment. *Id.* at 32-35. Finally, Respondent asserts that Mr. Abbasi's second complaint must be similarly dismissed because the alleged retaliatory actions of withholding an incentive bonus and payment for accrued leave are time barred and his allegation of "blacklisting" cannot be substantiated. *Id.* at 35-38.

Complainant's Opposition to Summary Judgment

In his July 18, 2006 response opposing Constellation's motion for summary judgment, Complainant argues that, viewing the evidence in the light most favorable to him, the undisputed facts establish a *prima facie* claim under the ERA. Comp. Opp. at 1. According to Complainant, his employment performance for the period 1998 through 2002 was "acceptable by the official company . . . criteria," he received "declining performance" evaluations during 2003 as a result of "multiple ERA protected activities in which [he] was involved," the concerns and recommendations he expressed with regard to his ERA protected activities "were fully grounded in the actual work that [he] did," and there are genuine issues of material fact which must be resolved after a formal hearing. *Id.* at 6-7.

Undisputed Material Facts

Based on the evidence of record, the facts listed below are among those which I find to be both undisputed and material to this litigation:

1. Mr. Abbasi received undergraduate degrees in science (physics, chemistry and math) and mechanical engineering from Osmania University, Hyderbad, India in 1967 and 1970, respectively. Resp. Mot., Ex. 1 at 18, Ex. 2.

2. Complainant moved from India to the United States in 1971, and received a graduate degree in nuclear engineering from the University of New Mexico in December 1973. Resp. Mot., Ex. 1 at 18.

3. Complainant has over twenty-five years of experience in the commercial nuclear industry as a licensing engineer. Resp. Mot., Ex. 2; Comp. Opp. at 2.

4. Constellation is the parent company of Nine Mile Point, LLC ("NMP, LLC"), which is the NRC-licensed owner and operator of the Nine Mile Point Nuclear Station ("NMP"). Resp. Mot. at 3.

5. Niagara Mohawk Power Company ("Niagara Mohawk"), NMP's prior owner, transferred all rights, title, and interest in the ownership of NMP to NMP, LLC on November 7, 2001. Resp. Mot. at 3-4; Comp. Opp. at 3.

6. NMP is a two-unit nuclear generation station located in Scriba, New York. Resp. Mot. at 3.

7. Mr. Abbasi was hired as a Senior Licensing Engineer in the NMP Licensing Department on January 26, 1998 by NMP Licensing Manager Denise J. Wolniak. Resp. Mot. at 4; Comp. Opp. at 2.

8. A Niagara Mohawk performance evaluation form dated February 1999 identifies M. Steven Leonard as Mr. Abbasi's "Evaluator" and reflects an overall performance assessment for Complainant of "Improvement Needed." Resp. Mot., Ex. 3. The comments section accompanying this rating states:

> Ali integrated smoothly into the department. He is meticulous and precise in his review of licensing submittals. These attributes were useful in his development of the validation program and guidelines. The overall assessment of "Improvement Needed" is a direct consequence of his unacceptable performance in the area of training attendance which is noted in Section B (Responsibility) combined with the declining trend in productivity output (Personal Organization/Time management).

   The form was signed by Complainant on 2/18/99.

9. A memorandum dated April 16, 1999 from Mr. Leonard to Iftikhar Abbasi regarding "Disciplinary Action" states that Complainant has engaged in a "pattern of continued tardiness [which] will no longer be tolerated." Resp. Mot., Ex. 3. The memorandum further states: "Failure to report to work on time will result in disciplinary action, up to and including termination of employment."

10. A Niagara Mohawk performance evaluation form dated January 2000 for Complainant again identifies Mr. Leonard as his "Evaluator" and again notes an overall performance assessment of "Improvement Needed." Resp. Mot., Ex. 5. The comments section accompanying this rating states:

> Ali's lack of motivation, work output, and inefficiency limit his usefulness to the department. Because of the limitations described above, he is presently assigned work normally associated with that of a junior engineer. His performance during this review period is inconsistent with the needed behaviors and behavioral change required by the Phase I Improvement Plan. A performance improvement plan is in preparation and will be discussed with Ali within two weeks of this evaluation.

The form was signed by Denise J. Wolniak on behalf of Steve Leonard on 4/7/00 but not signed by Complainant.

11. A three-page email message from Complainant dated 5/1/2000 addressed to Denise J. Wolniak, with copies to Complainant and Kathleen M. Miles, reflects various objections Mr. Abbasi raised regarding the January 2000 performance evaluation. Resp. Mot., Ex. 6. The introductory paragraph of the email states:

> The performance evaluation (PE) suffers from serious weaknesses and has limited usefulness. It incorporates superficial impressions, unverified information, and facts that do not tell the whole story. It contains vague statements and lacks thoroughness. It masks the supervisor's uncertainty about his role in the Licensing organization, his unsatisfactory handling of issues concerning vacation, medical problems, religious obligations etc., his panic driven work style and inadequate appreciation of diverse work styles (extrovert versus introvert, cool versus panic driven), and his overall tendency to complicate matters instead of resolving them. These factors greatly affected the relationship between him and me. Our relationship lacked smoothness and productivity.

The remainder of the email message contains 19 numbered paragraphs which note Complainant's disagreement with various aspects of the performance evaluation.

12. Mr. Abbasi signed a Niagara Mohawk Performance Improvement Plan ("PIP") on 8/24/00. Resp. Mot., Ex 7. The form is also signed by Branch Manager Denise J. Wolniak and Nancy B. Holden of Human Resources. The PIP identifies the following performance deficiencies: Schedules that are not met or sometimes not established; Failure to provide quality solutions to licensing issues; Failure to elevate schedule challenges in a timely manner; and Failure to report to work in accordance with work responsibilities like training, meetings, etc. The PIP further notes that prior discussions and warnings regarding these deficiencies have occurred and identifies actions which must be taken to correct them. Possible consequences of any failure to improve performance are identified as "[e]scalation through disciplinary policy up to possibly termination." The space for employee comments regarding the PIP is blank.

13. A Niagara Mohawk performance evaluation form dated February 2001 for Complainant identifies Denise J. Wolniak as his "Evaluator" and reflects an overall performance assessment for Complainant of "Fully Competent." Resp. Mot., Ex. 8. The comments section accompanying the rating states:

> Ali has improved performance during the year 2000. During the year 2001 it will be important for Ali to demonstrate improvement in technical skills so that the group can fully benefit from his senior engineer role. Ali has demonstrated a willingness to do this and accepted responsibility for his technical development for the coming year. Once this is achieved, Ali will be fully compentent [sic] in the position.

The form was signed by Complainant and Ms. Wolniak on 3/9/01.

14. A Niagara Mohawk performance evaluation form dated May 2002 for Complainant identifies Ms. Wolniak as his "Evaluator" and reflects an overall performance assessment for Complainant of "Fully Competent." Resp. Mot., Ex. 9. The comments section accompanying the rating states:

> Ali accomplishes needed work for the department. For a senior engineer however, he has the potential to develop his skills in areas such as the Tech Specs and ability to strategize to better his contribution to the department. Ali needs to be more assertive in achieving this.

The form was signed by Complainant and Ms. Wolniak on 5/15/02.

15. A Constellation Energy Group document captioned "2002 Nine Mile Point Professionals Review" reflects a "Supervisor Assessment" for Mr. Abbasi. Resp. Mot., Ex. 10. The form was signed by Complainant and Mr. Leonard on 4/25/03 and notes that Mr. Abbasi "Fully Meets Expectations" in all but four rating categories. In the category captioned "Stretch," Mr. Leonard rated Complainant as "Sometimes Below Expectations" and wrote:

> As noted in other sections of this assessment, Ali frequently is below expectations is [sic] this area. He prefers to work in his "comfort zone" which typically includes routine tasks or those commensurate with less senior level work.

In the category captioned "Continuous Improvement," Mr. Leonard rated Complainant as "Sometimes Below Expectations" and wrote:

> As noted above, an area for improvement for Ali. He excels at performing routine tasks for the department. As a senior engineer however, he is expected to stretch personally and improve his technical specification and industry knowledge.

16. Mr. Abbasi was also rated as "Sometimes Below Expectations" with respect to the categories of "Decision Quality" and "Technical/Professional Skills." The comments regarding the former reflect that Mr. Abbasi needed development in the areas of "operability/reportability assessments and compliance issues," while comments with respect to the latter reflect that Complainant "excels at routine tasks . . . [but] expends too much time on relatively non-complex licensing products." A comment regarding "Performance Goal 2" notes that Mr. Abbasi failed to teach a course to the department and his performance with respect to that goal was thus "Below expectations."

17. During June and July 2003, Complainant coordinated the preparation of an "Owners Group Activity Report" with Glenn Perkins and Edward Anderson relating to NMP Unit 1 to be filed with the NRC. Comp. Opp. at 3.

18. In an email dated June 25, 2003 from Complainant to Mr. Perkins, Mr. Anderson, and Steven Leonard, Mr. Abbasi listed various comments and questions he had with respect to the Owners Group Activity Report. Comp. Opp. at 3, Ex. D.

19. An August 18, 2003 email message from Mr. Abbasi to Mr. Leonard describes various "questions and concerns [Complainant had] regarding several recent events . . . ," one of which involved a July 23, 2003 Owners Group Activity Reports for NMP Unit 1. Ex. 29, ¶ 3; Comp. Opp. at 3, Ex. E.

20. During his deposition, Complainant alleged that his August 18, 2003 email message to Mr. Leonard represents a "protected communication" inasmuch as it relates to a "quality concern." Resp. Mot., Ex. 1 at 61-62.

21. A Constellation Energy Group document captioned "2003 Mid-Cycle Review" signed by Complainant and Mr. Leonard on 10/21/03 reflects a "Supervisor Assessment" for Mr. Abbasi. Resp. Mot., Ex. 11. The form sets forth various ratings ranging from "Fully Meets Expectations," to "Sometimes Below Expectations," to "Far Below Expectations." Mr. Abbasi received the latter rating in the categories of "Learning," "Speed," "Stretch," "Ownership," "Teamwork," "Continuous Improvement," "Dealing with Ambiguity," "Decision Quality," "Interpersonal Savvy," and "Technical/Professional Skills." The "Overall Performance Rating" was noted as "Sometimes Below Expectations" and included the following comment: "If you are unable to achieve the goals or are unable to sustain performance, the appropriate actions will be taken, including discharge." Resp. Mot., Ex. 11.

22. On October 21, 2003, Complainant and Mr. Leonard signed a document entitled "Action Plan for Performance Change Process" identified as "a 90-day process intended to give [Mr. Abbasi] an opportunity to correct a serious performance/behavior problem for which [he has] been counseled on multiple occasions." Resp. Mot., Ex. 13. The "Performance/Behavior Problem(s)" listed in the document include, *inter alia*: late attendance at training; failure to meet 7:30 a.m. start time; late for meetings; failure to wear a pager when on call; leaving "without a complete turnover" and providing inaccurate information in a letter due the next day causing staff to work on "the issue to 8pm;" missing commitments; failure to take "ownership of tasks;" and not meeting expectations for someone who is a senior engineer. The plan described various improvement goals which Complainant was expected to meet, including: arriving at work at scheduled start times; meeting schedules established for all work products; establishing a cooperative attitude toward team members; demonstrating an appropriate level of understanding of licensing positions and NRC submittal content consistent with a senior engineer position; and accepting ownership for assigned tasks.

23. Complainant submitted a four-page written response to Constellation's 2003 mid-cycle review dated 11/8/03 noting, *inter alia*, that it "omitted significant assignments completed during the review period." Resp. Mot., Ex. 12; Comp. Opp. at 4, Ex. E. The comments further state: "In many places, the reconstruction of facts and events is inaccurate, incomplete, unverified, or exaggerated." Mr. Abbasi thereafter identified 20 specific objections he had to the performance evaluation. *Ibid*.

24. Complainant alleged during his deposition that he raised a second "quality concern" during his employment with Constellation about a November 20, 2003 NMP Unit 2 License Amendment Request ("LAR") which had been approved by NMP's onsite Station Operations Review Committee ("SORC") and to which he made an "editorial change" before forwarding the document to NMP's offsite Safety Review and Audit Board ("SRAB"). Resp. Mot., Ex. 1 at 68, Ex. 31.

25. After Mr. Leonard learned of Complainant's change to the LAR, he confronted Mr. Abbasi about the change telling him that he was required to submit any such change for supervisor or peer review before sending the document to the SRAB. Resp. Mot., Ex. 1 at 69, Ex. 31.

26. Complainant thereafter filed a deviation event report stating that the written procedure upon which Mr. Leonard relied was not clear and should be revised. Resp. Mot., Ex 1 at 69-70, Ex. 31; Comp. Opp. at 5-6, Ex. K.

27. In November 2003, Mr. Leonard directed Complainant to prepare a "Position Paper" relating to temporary corrective actions intended for possible use at NMP Units 1 and 2 following tests scheduled for February 2004. Resp. Mot. at 19, Ex. 25; Comp. Opp. at 5, Ex. J.

28. The temporary corrective actions were to be employed on an interim basis only in the event tests designed to evaluate the atmospheric isolation capabilities of the control rooms at NMP Units 1 and 2 revealed "inleakage" into the control rooms of contaminated outside air at values higher than the design levels established for those facilities. Resp. Mot. at 19, Ex. 25.

29. There were two alternative interim measures to be considered if tests revealed greater than acceptable "inleakage" values: (1) Use of potassium iodide ("KI") tablets by control room operators; and (2) Use of an alternative source term ("AST") analysis for operability determination purposes to resolve degraded[2] or nonconforming[3] conditions. Resp. Mot. at 19, Ex. 25.

30. Mr. Abbasi determined that the operating license for NMP Unit 1 allowed for the use of KI tablets by control room operators on an interim basis without "a plant specific evaluation or prior NRC approval . . . ." Ex. 25 at 2.

[2] The term "degraded condition" refers to "any loss of quality or functional capability" by a licensee. Ex 25 at 1.
[3] A "nonconforming condition" is defined as a licensee's "failure to meet requirements or licensee commitments." EX 25 at 1.

31. Complainant further determined that the operating license for NMP Unit 2 did not specifically mention the use of KI tablets that that their use on an interim basis would therefore require a review pursuant to 10 C.F.R. § 50.59 "to determine whether prior NRC approval is needed." Ex. 25 at 2.

32. Mr. Abbasi also determined that applicable regulations and guidance did not address the interim use of an AST analysis to resolve degraded or nonconforming conditions and that the Nuclear Energy Institute ("NEI")[4] had published a guidance letter which "briefly addresses use of AST [analyses] for operability determination purposes when a degraded or nonconforming condition of the [control room envelope] is identified . . . ." Ex. 25 at 3.

33. Mr. Abbasi noted that an NEI proposal for the use of AST analyses "for demonstrating interim [control room] habitability is undergoing NRC staff review," and he therefore recommend that use of any AST analysis at NMP Units 1 and 2 "be the secondary option" pending NRC action following its review of NEI's proposal. Ex. 25 at 3.

34. The conclusion portion of Mr. Abbasi's "Position Paper" states:

    1. The use of KI tables on an interim basis is permissible for NMP1 without a 10CFR50.59 review but will require a 10CFR50.59 review for NMP2.
    2. The use of AST calculations on an interim basis is permissible for NMP1 and NMP2 under Generic Letter 91-18, Revision 1. Any associated procedure changes or temporary modifications are subject to 10CFR50.59 review to determine impact on other aspects of the facility as described in the USAR.

35. Constellation had a written policy which provided that "[t]he NRC shall not be used as a consultant." Resp. Mot., Ex. 28 at 3, § 3.1.7. The policy further provided that "[i]tems presented to the NRC should represent the position or decision of [Nine Mile Point Nuclear Station] Senior Management." *Ibid*.

36. Mr. Leonard completed progress reports dated 11/21/03 and 12/30/03 in which he noted continuing performance deficiencies with respect to Complainant's meeting the goals established by the October 21, 2003 Action Plan. Resp. Mot., Ex. 14, Ex. 15

37. In a letter dated January 12, 2004 from Susan E. Collins, Director of Human Resources at Constellation Energy Group, Mr. Abbasi was informed that his employment was

[4] "NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry." Ex. 27 n.1.

terminated that date "due to your history of unacceptable performance." Resp. Mot., Ex. 19.

38. In a letter dated February 12, 2004, responding to a February 5, 2004 request by Complainant concerning the calculation of vacation pay, Mr. Abbasi was informed that he had been paid for 64.5 hours of vacation time and an additional check would be mailed for a remaining balance of 1.3 hours of vacation time. Resp. Mot., Ex. 21.

39. On February 25, 2004, Mr. Abbasi was interviewed in Oswego, New York by two Special Agents of the U.S. Nuclear Regulatory Commission during which time he gave sworn testimony concerning various matters relevant to his ERA whistleblower complaints. Resp. Reply Br., Ex. 1

40. During his February 25, 2004 interview, Complainant testified that all his comments with respect to the draft July 23, 2003 "Owners Activity Report" were resolved before that document was sent to the NRC, and that the final report submitted to the NRC was timely, complete, and accurate. Resp. Reply Br., Ex. 1 at 31, 35-36.

41. In a letter dated August 9, 2004 from Susan E. Collins, Constellation's Director of Human Resources, Mr. Abbasi was informed, *inter alia*, that Respondent changed its vacation policy effective January 1, 2004 to an "earn as you work" formula, that he had been credited with and paid for 2.3 hours for work performed prior to his termination on January 12, 2004, and that Respondent had thus satisfied its obligation to him regarding vacation pay. Resp. Mot., Ex. 24.

42. Ms. Collins' August 9, 2004 letter to Complainant further informed Mr. Abbasi that Constellation's 2003 incentive plan required the use of an individual performance multiplier when computing annual incentive awards and that, given his overall poor performance which led to his termination on January 12, 2004, a zero multiplier was applied in his case resulting in no annual incentive award payment. Resp. Mot., Ex. 24.

43. Mr. Abbasi was hired by Exelon Corporation in June 2005 as a Senior Regulatory Specialist to work at its Dresden Nuclear facility in Morris, Illinois. Resp. Mot., Ex. 1 at 19.

Discussion

Applicable regulations provide that an Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). The opposing party "may not rest upon the mere allegations or denials of such pleading. . . . [but] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c).

Section 18.40 is modeled on Rule 56 of the Federal Rules of Civil Procedure, pursuant to which "the judge does not weigh the evidence or determine the truth of the matter asserted, but

only determines whether there is a genuine issue for trial" by viewing "all the evidence and factual inferences in the light most favorable to the non-moving party." *Stauffer v. Wal-Mart Stores, Inc.,* USDOL/OALJ Reporter (HTML), ARB No. 99-107, ALJ No. 99-STA-21 at 6 (ARB Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)). The party moving for a summary decision has the initial burden of showing that there is no genuine issue of material fact. This burden may be discharged by simply stating that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Moreover, there is no requirement that the moving party support its motion with affidavits or other similar material negating the opponent's claim. *See Celotex*, 477 U.S. at 324; Fed. R. Civ. Pro. 56(b). However, if a motion is properly supported, then the nonmoving party must go beyond the pleadings to overcome the summary judgment motion. He may not rest upon mere allegations, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson*, 477 U.S. at 248.

The ERA's whistleblower provisions are intended to protect employees who raise awareness of safety concerns, and they are to be broadly construed so as to prevent intimidation of employees through retaliation. *DeFord v. Sec'y of Labor*, 700 F.2d 281 (6th Cir. 1983). As one court has noted:

> Whistleblower provisions "are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment."

Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1104 (10th Cir. 1999) quoting *Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474, 478 (3d Cir. 1993). The court went on to note, however, that these provisions were never "intended to be used by employees to shield themselves from the consequences of their own misconduct or failures." *Ibid.* (citation omitted).

The Act prohibits any employer from discharging or otherwise discriminating against any employee "with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected whistleblowing activity. 42 U.S.C. § 5851(a). The ERA requires a complainant to "demonstrate" that his protected behavior was a contributing factor in the unfavorable personnel action that followed. 42 U.S.C. § 5851(b)(3)(C). "Demonstrate," in this context, means to prove by a preponderance of the evidence. *Dysert v. Florida Power Corp.*, 93 ERA 21, slip op. at 3 (Sec'y Aug. 7, 1995), *aff'd sub nom. Dysert v. U. S. Secretary of Labor*, 105 F. 3d 607, 609 10 (11th Cir. 1997); *Trimmer v. U. S. Dep't of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Stone & Webster Engineering Corp. v. Herman*, 115 F. 3d 1568, 1572 (11th Cir. 1997).

In order to prevail in a whistleblower complaint brought under the ERA, a complainant must prove, by a preponderance of the evidence, that: (1) he engaged in protected activity; (2) the respondent took adverse action against the complainant; and (3) the complainant's protected activity was a contributing factor in the adverse action that was taken. *Paynes v. Gulf States Utilities Co*., USDOL/OALJ Reporter (HTML), ARB No. 98-045 at 4 (Aug. 31, 1999). Even if

the complainant meets this burden, the employer may avoid liability if it is able to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. 42 U.S.C. § 5851(b)(3)(D).

Reporting, or threatening to report, a violation of the Atomic Energy Act of 1954 ("AEA"), the regulations of the Nuclear Regulatory Commission ("NRC"), or the ERA constitutes protected activity. 42 U.S.C. § 5851(a)(1)(A); *Saporito v. Central Locating Services, Ltd*., ARB No. 05-004, ALJ No. 2004-CAA-13, at 10 (ARB Feb. 28, 2006); *see also Mactal v. U. S. Dep't of Labor*, 171 F.3d 323, 329 (5th Cir. 1999)("A written expression of intent to file a complaint with the NRC falls squarely within [the statutory phrase] 'is about to commence or cause to be commenced' a proceeding under the ERA."). The "contributing factor" standard is a lesser standard than the "significant," "motivating," "substantial," or "predominant" factor standard sometimes articulated in case law regarding other statutes prohibiting discrimination. *Van Der Meer v. Western Kentucky University*, 1995-ERA-38 (ARB Apr. 20, 1998).

A. Prima Facie Case

The parties do not contest that Respondent and Complainant are covered by the whistleblower provisions of the ERA. Furthermore, there is no genuine dispute regarding whether Constellation was aware of the conduct alleged by Mr. Abbasi to be protected activity or that Mr. Abbasi suffered an adverse employment action. The parties do contest, however, whether Complainant's activities were protected under the ERA and, if so, whether any action taken by Constellation against Mr. Abbasi was caused by such conduct.

(1) Protected Activity

In the original complaint filed in this case, Mr. Abbasi alleges:

> In August 2003, I submitted a letter to the NRC committing to perform special testing at Nine Mile Point Units 1 and 2 in early 2004. The purpose of this testing was to demonstrate that the Unit 1 and Unit 2 control rooms are sufficiently leaktight against unfiltered contaminated air drawn from outside. In November 2003, I drafted a paper evaluating certain compensatory measures that could be taken on an interim basis to protect plant operators in case the special testing results were unfavorable. With regard to one controversial compensatory measure (use of alternative radiological source terms that were not yet approved by the NRC to be used at the plant), I concluded that NRC regulations did not specifically forbid such use. However, in view of the controversy being generated at the NRC and for reasons specific to Nine Mile Point, I recommended in my paper that reliance on this compensatory measure be first discussed with the NRC staff. I orally explained to my supervisor, Steve Leonard, why a discussion with the NRC staff was necessary to avoid legal problems. Mr. Leonard asked if I was proposing to use the NRC as a consultant and admonished me saying: "Don't ask the regulator something if you cannot live with the consequences." I responded that I was not proposing to use the NRC as a consultant but considered it

> necessary to inform the NRC. Mr. Leonard dismissed my recommendation as inappropriate and not in the company's interest.

Apr. 2004 Comp. at 1. Mr. Abbasi's complaint further alleges that Mr. Leonard thereafter made false statements in two performance evaluations dated November 21 and December 30, 2003 as a result of his proposal to consult with the NRC, and Complainant's employment was then terminated just a few weeks later on January 12, 2004. *Id.* at 1-2. During his deposition, Complainant amplified, and appears to have expanded, the bases for his retaliation complaint, testifying that he discussed with the NRC three issues which supported his ERA complaint – one safety issue (described as "the control room habitability safety issue") and two quality issues (one relating to "the owners group report" and the other relating to "a license amendment request"). Ex. 1 at 84, 92-94, 108-09.

As Respondent correctly points out, an individual alleging that a violation of a law or regulation covered by the ERA has occurred, or is about to occur, must have a *reasonable belief* that the employer has violated the applicable law or regulation. Resp. Mot. at 28-29. According to the Administrative Review Board:

> Pertinent case law indicates that the reasonableness of a whistleblower's belief regarding statutory violations by an employer is to be determined on the basis of "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." A survey of decisions issued by the Secretary and this Board . . . also reveals that, whether or not the term "good faith" has been used, the whistleblower has been required to have actually held a belief that there were pertinent statutory violations at the time he or she engaged in the activity subject to whistleblower protection.

Melendez v. Exxon Chemicals Americas, ARB No. 96-051, ALJ No. 1993-ERA-6, slip op. at 20 (ARB July 14, 2000)(case citations omitted). Thus, a complainant's belief that his employer had violated, or was about to violate, applicable law "must be scrutinized under both subjective and objective standards, *i.e.*, he must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the complainant's] circumstances having his training and experience." *Ibid*.

As noted above, Complainant's allegations of retaliation in this case are based primarily on Constellation's response to the Position Paper he prepared in November 2003. According to his April 29, 2004 complaint, Mr. Abbasi's supervisor, Mr. Leonard, gave him negative performance evaluations and subsequently fired him because he suggested that someone from Constellation should discuss with the NRC's staff the use of AST analyses at NMP Units 1 and 2 as an interim compensatory measure in the event test results at those facilities were unfavorable.

As a preliminary matter, I note that this entire incident revolved around a *proposal* for the use of interim compensatory measures which would never be necessary *unless* the February 2004 testing at NMP Units 1 and 2 produced negative results. At the time Mr. Abbasi was fired on January 12, 2004, the tests had not yet taken place, and there was thus no basis for concluding that the measures would ever be implemented by Constellation. As one court has noted, "[t]o

constitute a protected safety report, an employee's acts must implicate safety *definitively and specifically*." *American Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998) (italics added). The court went on to state: "The ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern." *Ibid*. Given the fact that it was unknown whether such measures would ever be used, neither Mr. Abbasi nor anyone with his training and experience could have had a reasonable basis for believing that Constellation had violated, or was about to violate, any applicable law or regulation.

More importantly, however, is the fact that Complainant himself had already determined before he was fired that the use of such measures did not require prior NRC approval. Ex. 1 at 165, Ex. 25. Nor did he have any basis for second guessing that determination. As Complainant clearly knew, the NEI had reached the same conclusion with respect to the use of AST analyses as interim compensatory measures. Resp. Mot., Ex. 1 at 120, Ex. 27 Mr. Abbasi also knew that his first and second-tier managers, Mr. Leonard and Ms. Wolniak, were in agreement with that position inasmuch as they had both worked directly with the NEI's Task Force in formulating the White Paper outlining NEI's position with respect to the use of AST analyses. Resp. Mot., Ex. 26. There was simply no reason to "consult" with NRC personnel under these circumstances. Indeed, Complainant also knew that it was contrary to Constellation's written corporate policy to use the NRC as a "consultant" and that items presented to the NRC were required to represent the position of NMP's Senior Management. Resp. Mot., Ex. 1 at 165, Ex. 28. Based on these undisputed material facts, it is clear that an individual with Complainant's training and experience could not have reasonably believed that Constellation had committed, or was about to commit, a violation of any applicable law or regulation. It is equally clear that Mr. Abbasi himself did not reasonably believe that Constellation had violated, or was about to violate, any law or regulation governed by the ERA. Complainant's allegations of retaliation based on this conduct must therefore fail. As explained below, his allegations of retaliation based on the two "quality concerns" he raised must also fail for similar reasons.

As noted previously, Mr. Abbasi alleges that Mr. Leonard's actions against him were motivated, in part, because of the issues described in his August 18, 2003 email regarding his involvement in finalizing the NMP Unit 1 Owners Activity Reports of July 23, 2003 for submission to the NRC. Mr. Abbasi testified during his deposition that he was "concern[ed] about the quality of the documents that were being prepared by other organizations to send to the NRC through [L]icensing."[5] Resp. Mot., Ex. 1 at 61. Specifically, Complainant expressed

[5] The clearest articulation by Mr. Abbasi of his "quality concern" regarding the OAR is set forth in the following colloquy during his deposition:

> Q. Okay. And your concern was not that inaccurate or incomplete documents went to the NRC, your concern was that you didn't think the process was efficient?
>
> A. I didn't think that the process – I didn't feel we were in compliance with procedures, our own procedures.
>
> Q. And did you indicate that? Did you state that to Ms. Wolniak, that there was a procedural problem?
>
> A. I stated that to Mr. Leonard, my supervisor.
>
> Q. Okay. And what was the procedural problem that you saw?
>
> A. Huh?
>
> Q. What was that procedure problem that you had, the concern?

concern over Mr. Leonard's response to his request for assistance in resolving "professional differences" between Mr. Abbasi and two individuals who worked in NMP's "ASME Programs" office concerning comments and suggested revisions Complainant had offered regarding the Unit 1 OAR. Resp. Mot., Ex. 1 at 62, Ex. 29, ¶3. The undisputed facts show, however, that this communication represents nothing more than Mr. Abbasi's disagreement with Mr. Leonard over his determination that Complainant was responsible for resolving his own disputes with the ASME Programs personnel, either directly with the two engineers with whom he was working or through their supervisor. Complainant himself admits that the OAR submitted to the NRC contained complete and accurate information and that the issues he had with the original draft were resolved. Resp. Mot., Ex. 1 at 63-64, Resp. Reply Br., Ex. 1 at 31, 35-36.. It is thus clear that Complainant did not, and any similarly situated individual could not, reasonably believe that Constellation had committed, or was about to commit, a violation of the ERA, the AEA, or any of NRC's regulations.

Finally, Complainant's allegations with respect to his second "quality concern" are even less compelling than his concern regarding the OAR. Mr. Abbasi testified during his deposition that he "raised [a quality concern] to the NRC about a license amendment that had been reviewed and approved by everyone."[6] Ex. 1 at 68. According to Complainant, before being routed to

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> A. The procedure problem is that if I let those kind[s] of things go and everybody reviews and concurs, then the document goes through a back end review. And at that back end review stage, the back end review is going to hold it up, because the items in the checklist have not been followed, which means that we are not going to be meeting our commitment date to the NRC.
>
> Q. That was a schedule concern that you had?
>
> A. Yes.
>
> Q. Other than that, were there any other issues –
>
> A. Also besides the schedule, under time pressure, people make errors. And it's a big problem in the nuclear industry right now, people making errors under time pressure.

Ex. 1 at 66-68. This concern, however, is hardly the type of concern that "implicate[s] safety definitively and specifically" and which might constitute protected activity. *American Nuclear Resources, Inc. v. U.S. Dep't of Labor*, *supra*., 135 F.3d at 1295.

[6] Complainant's deposition testimony again sheds some light on how he concluded that this incident substantiates his claim of retaliation:

> Q. . . . . Mr. Leonard was upset with you because you made a change to a document that had already been reviewed by the internal review committee, it's a document that was going to go to the NRC, you may have thought it was an editorial change, you may have thought that was allowed by the instruction, he disagreed with that, he said no, he said a change to a document that has already been reviewed by the internal committee that is going to go to the NRC should be looked at by another set of eyes, to make sure it wasn't a material change. That was his position, wasn't it?
>
> A. That was the –
>
> Q. That's what he told you?
>
> A. That's what he told me.
>
> . . . . .
>
> Q. Okay. And Mr. Leonard – his position on that instruction is that if you have a change in the licensing document that's going to the NRC, right, after it's already been completely reviewed internally, and if someone goes in like you did and made a handwritten change to that document, that that should be reviewed by someone else before it goes outside, correct? That's what his position was?

him, the license amendment had been approved by the on-site managers and review committee, after which Mr. Abbasi made what he considered to be an "editorial" correction before forwarding the document to an offsite review committee for its review and approval. *Ibid*. When one of the offsite reviewing officials thereafter noticed Mr. Abbasi's changes, that individual brought the matter to Mr. Leonard's attention, and then, according to Complainant, "Mr. Leonard got on my back, saying well, how come I didn't have the change seen by Mr. Leonard himself or by somebody else in peer review." Resp. Mot., Ex. 1 at 69. Mr. Abbasi subsequently defended his actions based on his interpretation of Constellation's "Administrative Instruction EAI-LPP-01 (Rev.2)," and thereafter filed a "deviation event report, saying that the procedure is not clear . . . ." Resp. Mot., Ex. 1 at 69-70, Ex. 31.

As with his other "quality concern," the undisputed facts surrounding this event, including Complainant's deposition testimony, establish nothing more than Mr. Abbasi's disagreement with Mr. Leonard concerning the proper procedures to be followed by Complainant in carrying out his assigned duties. *See, e.g.*, Resp. Mot., Ex. 1 at 72-76. Mr. Abbasi has not alleged, and the facts do not establish, that the licensing amendment which he "edited" and which was subsequently submitted to the NRC was inaccurate in any way. Nor do the facts substantiate any violation of an applicable statute or regulation based on the procedures followed by Constellation prior to its submission to NRC. Indeed, although Complainant disputes the necessity for it, the further review of the licensing amendment occasioned by Mr. Leonard's insistence could only have *enhanced* the accuracy of the document. Thus, Mr. Abbasi had no reasonable basis for believing that Mr. Leonard, or anyone else at Constellation, had violated, or was about to violate, any statute or regulation implicated by the ERA's whistleblower provisions.

Based on all the foregoing, it is clear from the undisputed material facts that Mr. Abbasi did not engaged in any activity protected by the ERA. His complaint must therefore be dismissed.

(2) Causal Connection Between Protected Activity and Adverse Action

Since Mr. Abbasi has not established that he engaged in any activity protected by the whistleblower provisions of the ERA, he cannot show that Constellation retaliated against him based on a protected activity. However, even if I were to determine that the acts described above constituted protected activity, the undisputed facts clearly show that these acts were not the cause of Constellations' termination of Mr. Abbasi's employment.

According to Respondent:

> Mr. Abbasi's performance record is well-documented and demonstrates that Mr. Abbasi was, at his best, a marginal performer who never fully performed at the level expected of a Senior Licensing Engineer. Notably, Mr. Abbasi's poor performance became evident long before he first allegedly engaged in protected

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A. Yes, and he took that position in order to harass me, not because of quality reasons.

Ex. 1 at 85-86, 88-89.

> activity, which, at the earliest, was his June 25, 2003 email forwarding comments on the draft OAR package. By that time, Mr. Abbasi had already amassed a long record of poor or marginal performance – numerous poor or marginal performance reviews, formal written discipline, numerous oral reminders, critical feedback from customers, and placement on a PIP.

Resp. Mot. at 33. Constellation thus concludes that "[the evidence of record,] viewed either separately or as a whole, leads to the inescapable conclusion that the decision to terminate Mr. Abbasi had no connection to the conduct he asserts is protected." *Ibid*.

The record before me confirms Respondent's assertions. For example, the performance evaluation for Mr. Abbasi for the year 1998 when he first began working for Respondent states, *inter alia*, that his output declined over the latter part of the review period. Resp. Mot., Ex. 3. The evaluation further notes that Complainant spent a significant amount of time away from his work area and states that Complainant demonstrated an inability to adhere to established nuclear division policy regarding training attendance inasmuch as he showed up at least 30 minutes late for scheduled training on five consecutive days. *Ibid*. Mr. Abbasi was formally warned by his supervisor about excessive tardiness at work in a letter dated April 16, 1999. Resp. Mot., Ex. 4.

The next performance evaluation for Complainant, for the year 1999, notes, *inter alia*, that Mr. Abbasi was counseled on numerous occasions regarding his lower than expected performance, he continued to spend an unacceptable amount of time away from his work area, and he spent an inordinate amount of time working on routine tasks. Resp. Mot., Ex. 5. The evaluation form further notes that Complainant continued to have problems reporting to work on time and several division staff members (including a Branch Manager and a Vice President) had expressed a lack of confidence in his abilities, resulting in the assignment to him of tasks normally given to junior, rather than senior, engineers. *Ibid*. The same form notes that Complainant routinely presented "problems without solutions" expecting supervisors to identify solutions for him. *Ibid*.

No changes to the 1999 performance evaluation were made, despite Mr. Abbasi's multiple exceptions to various aspects of the evaluation, and Complainant was thereafter placed on a Performance Improvement Plant. Resp. Mot., Ex. 6, Ex. 7. The PIP, signed by Mr. Abbasi, his Branch Manager, and a Human Resources representative, stated that Complainant's performance was unsatisfactory because schedules were not met or not established, Mr. Abbasi failed to provide quality solutions to licensing issues, he failed to elevate schedule challenges in a timely manner, and he failed to report to work in accordance with his assigned responsibilities. Resp. Mot., Ex. 7. The PIP also noted that any failure to improve performance or correct behavior could lead to further disciplinary action up to and including termination. *Ibid*.

Mr. Abbasi's 2000 performance evaluation form, dated February 2001, was completed by Complainant's Branch Manager, Denise Wolniak, and showed that Complainant had shown some improvement during the rating year, but it also notes, *inter alia*, that Mr. Abbasi's "technical skills and continued planning efforts without reinforcement from supervision are a concern." Resp. Mot., Ex. 8.

In the 2001 performance evaluation of Complainant, completed by Ms. Wolniak in May 2002, she again noted that Mr. Abbasi needed "to be more assertive" in "develop[ing] his skills in areas such as the Tech Specs and ability to strategize to better his contribution to the department." Resp. Mot., Ex. 9.

Complainant's 2002 performance evaluation states that Mr. Abbasi "frequently" performed below expectations with respect to setting aggressive, realistic goals and, instead, preferred to work performing routine tasks commensurate with work performed by less senior engineers. Resp. Mot., Ex. 10. The report also notes that Complainant had been counseled to improve his productivity and technical knowledge consistent with that of a Senior Level Engineer. *Ibid*.

Thus, by the time Complainant engaged in his first alleged protected activity in June 2003, he had an established work history of substandard performance. Mr. Abbasi's performance did not substantially improve between June 2003 and his discharge in January 2004. On the contrary, the 2003 mid-cycle review rated Complainant as "Far Below Expectations" in ten categories including, *inter alia*, "Learning," "Teamwork," "Continuous Improvement," "Dealing with Ambiguity," "Decision Quality," and "Technical/Professional Skills." Resp. Mot., Ex. 11. This mid-cycle review resulted in the implementation of a 90-day "Action Plan" giving Complainant "an opportunity to correct serious performance/behavior problems for which [he had] been counseled on multiple occasions." Resp. Mot., Ex. 13. Progress reports completed by his supervisor, Mr. Leonard, on November 21, 2003 and December 30, 2003 continued to note performance deficiencies, and Mr. Abbasi was thereafter notified in a letter dated January 12, 2004 that his employment with Constellation was being terminated.

The undisputed facts thus establish that Complainant was either unwilling or unable to conform his conduct to that required of him by Constellation's management. He was routinely criticized for, among other things, an unwillingness to undertake tasks commensurate with his position as a Senior Licensing Engineer, preferring instead to perform routine tasks typically assigned to less experienced licensing engineers. He was also described as lacking in motivation, inefficient, and unable to meet the time constraints of his job, and he was urged to improve his technical specification and industry knowledge so that he might better perform his job. Instead of accepting these and other evaluations of his performance as accurate, Complainant's typical response to such criticism was to find fault with the accuracy of the assessment and attack the competency of the evaluator. The most glaring example of such a response is his May 1, 2000 email responding to the 1999 performance appraisal in which he wrote, *inter alia*, that the appraisal

> masks the supervisor's uncertainty about his role in the Licensing organization, his unsatisfactory handling of issues concerning vacation, medical problems, religious obligations etc., his panic driven work style and inadequate appreciation of diverse work styles (extrovert versus introvert, cool versus panic driven), and his overall tendency to complicate matters instead of resolving them.

Ibid. He similarly complained that the facts and events related in his mid-cycle 2003 performance appraisal were "inaccurate, incomplete, unverified, or exaggerated."

Comp. Opp., Ex. E. The views expressed in Mr. Abbasi's performance evaluations were not, however, just the views of Complainant's immediate supervisor, Steven Leonard. On the contrary, each performance evaluation was reviewed and approved by Denise Wolniak, Mr. Abbasi's Branch Manager, an individual whom Complainant himself acknowledges never engaged in any allegedly retaliatory conduct.

Based on the foregoing, it is clear that Complainant's employment was terminated because of his ongoing performance deficiencies while employed by Constellation, not because of any purported protected activity. As noted previously, the ERA's whistleblower provisions were never "intended to be used by employees to shield themselves from the consequences of their own misconduct or failures." *Trimmer v. U.S. Dep't of Labor*, *supra*, 174 F.3d at 1104. As such, Mr. Abbasi cannot sustain his burden to establish a *prima facie* case of discrimination, and his complaint must be dismissed.

B. Second Complaint

As noted above, Mr. Abbasi initiated a second complaint of retaliation against Constellation in which he alleged that after his termination in January 2004 he was not compensated for certain accumulated vacation time, was not paid an incentive bonus for the year 2003, and was "blacklisted" by virtue of Constellation's determination that he was not eligible to be rehired. Inasmuch as Complainant has not identified any protected activity to support these claims other than that identified in support of his first complaint, and he has failed to establish that he was terminated as a result of any protected activity, Mr. Abbasi's second complaint must be dismissed for the reasons set forth above.

Conclusion

Viewing the undisputed facts of record in the light most favorable to Mr. Abbasi, as I am required to do, it is clear that neither he, nor any similarly situated individual in his position, could have reasonably believed that Constellation had engaged in, or was about to engage in, any conduct which would violate the AEA, ERA or the regulations of the NRC. Mr. Abbasi thus could not have engaged in any activity protected by the ERA when he spoke out about the various activities described in his original whistleblower complaint. What is also clear from this record is that Mr. Abbasi had established a pattern of below-average performance from the very commencement of his employment with Constellation, and he thereafter demonstrated an inability or unwillingness to improve his performance which ultimately led to his discharge by Respondent in January 2004. Since Complainant has failed to establish that he engaged in conduct protected by the ERA, or that the termination of his employment was in any way related to protected conduct, his complaint must be dismissed.

Recommended Order

Based on the foregoing, IT IS HEREBY RECOMMENDED that Respondent's motion for summary decision be GRANTED and that the complaint of Iftikhar A. Abbasi be DISMISSED.

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STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg.