

U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)



Issue Date: 26 January 2009

Case No.: 2008-ERA-00003

In the Matter of

JAMES J. BOBRESKI,
Complainant,

v.

J. GIVOO CONSULTANTS, INC.,
Respondent.

Appearances:

Michael D. Kohn, Esquire
For Complainant

Alan C. Milstein, Esquire
For Respondent

Before: Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provisions of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (hereinafter the ERA or the Act), and other whistleblower statutes, as implemented by 29 C.F.R. Part 24.¹ These statutory provisions and the attendant regulations prohibit discrimination in employment against individuals who notify employers² of an alleged violation of the relevant statutes, who refuse to engage in any practice made unlawful by such statutes, commence or cause to be commenced a proceeding under the statutes, or who testify, assist, or participate in any proceeding to carry out the purposes of the statutes.

¹ Complainant filed this matter simultaneously under the ERA, the Safe Water Drinking Act, 42 U.S.C. § 300j-9(i), the Clean Air Act, 42 U.S.C. § 7622, the Solid Waste Disposal Act, 42 U.S.C. § 6971, the Water Pollution Control Act, 33 U.S.C. § 1367, and the Toxic Substances Control Act, 15 U.S.C. § 2622.

² The ERA defines “employer” as a licensee of the Nuclear Regulatory Commission or, relevant to this matter, as a contractor or subcontractor of a licensee. 42 U.S.C. § 5851(2).

I. BACKGROUND

A. Procedural History

On or about May 2, 2006, James J. Bobreski (Complainant) filed a complaint with the United States Department of Labor's Occupational Health and Safety Administration (OSHA) against J. Givoo Consultants, Inc. (Respondent). Complainant alleged that Respondent discriminated against him by failing to hire him in retaliation for raising issues regarding safety at a previous job. After conducting an investigation of the complaint, the Regional Administrator for OSHA issued a determination dated September 27, 2007, that concluded that Respondent had not violated the Act's employee protection provisions.³ Through correspondence dated December 6, 2007, Complainant objected to the findings and requested a hearing before an Administrative Law Judge. The case was thereafter assigned to me.

By Notice issued January 24, 2008 I scheduled a hearing in Cherry Hill, New Jersey for February 20, 2008. The hearing was continued twice at the request of counsel until July 29, 2008. At that time, the parties appeared before me and submitted evidence and produced witnesses who testified. I admitted to the record Complainant's exhibits numbered CX 1 through CX 15. Tr. at 21. Respondent did not submit any documentary evidence. My file contained the transcript of witness Vincent Law's deposition testimony. At his deposition, Mr. Law testified that he was employed by Respondent, a fact that was not brought up at the hearing, or in his statement to OSHA, identified as CX 5. I find this fact significant, and accordingly admit the testimony to the record as ALJX 1. Complainant filed a written closing statement on October 24, 2008, and Respondent filed a written closing statement on October 29, 2008.

My decision in this case is based on the sworn testimony presented at the hearing, the documentary evidence, and the arguments of the parties.

B. Complainant's Statement of the Case

Complainant contends that he was not hired by Respondent in retaliation for a 1999 whistleblowing complaint that he made against a customer of Respondent's. In support of the instant complaint, Complainant asserts that despite his experience working on refueling outages at the Salem/Hope Creek nuclear power plant complex, he was not offered a job when Respondent became the contractor responsible for hiring technicians. Complainant contends that he was assured by a supervisor for the general contractor responsible for the work that Complainant was wanted at the site.

³ In a follow-up letter dated November 16, 2007, OSHA noted that the parties apparently had not received the Regional Administrator's findings, as no return receipts had been sent back, and Postal Service tracking could not confirm that the findings were delivered. Accordingly, the findings were sent again, and the parties given thirty days from November 16 in which to appeal. Complainant's appeal is thus timely under the requirements of 29 C.F.R. § 24.106(a).

C. Respondent's Statement of the Case

Respondent denies that the failure to hire Complainant was in retaliation for any earlier protected activity. Rather, Complainant was not hired because he failed to follow proper procedures in applying for the job, and because his conduct during previous employment at Salem/Hope Creek caused the same supervisor of the general contractor to rate him as a less-desirable hire. Respondent also denies that its own supervisor in charge of hiring decisions was aware of Complainant's previous protected activity. As a result, Respondent hired all of the technicians that it needed before it considered Complainant's application. Respondent contends that it would have hired Complainant if necessary, and will consider him for future employment.

II. ISSUES

The issues to be decided are:

1. Whether Complainant was not hired on the basis of his protected activity, and;
2. If so, what is the appropriate remedy?

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

Although the parties did not make extensive stipulations, certain facts essential to this matter are not in dispute.

1. Complainant's Previous Whistleblowing Complaint

This matter relates to a previous whistleblowing complaint by Complainant against the District of Columbia Water and Sewer Authority (WASA). That matter was resolved in Complainant's favor. See Bobreski v. D.C. Water and Sewer Authority, ALJ No. 2001-CAA-00006 (ALJ July 11, 2005) (recommended decision on the merits regarding liability and order to supplement record as to remedies), and Bobreski v. D.C. Water and Sewer Authority, No. 2001-CAA-00006 (ALJ Sept. 22, 2006) (order approving settlement and dismissing with prejudice).

All of the witnesses at the July 29, 2008, hearing testified regarding the prior matter to varying degrees. I rely predominantly on Administrative Law Judge Alice M. Craft's July 11, 2005, Recommended Decision and Order in summarizing the facts in that matter that are relevant to the present one.

WASA contracted Respondent to provide instrumentation maintenance technicians for work at WASA's Blue Plains Wastewater Treatment Plant. Bobreski, slip op. at 4 (July 11, 2005). Respondent hired Complainant and assigned him to work at Blue Plains in support of this contract in 1999. His role was to provide routine preventative maintenance to, among other things, chlorine sensors and alarms. Blue Plains used a substantial amount of liquid chlorine, a hazardous chemical that can cause death after short exposures. Id. at 5-6.

Complainant alleged, and Judge Craft found, that after Complainant reported the failure of several chlorine sensors, Respondent terminated Complainant at the direction of WASA. Id. at 7. Specifically, on October 22, 1999, Complainant tested the sensors, discovered their failure (not for the first time),⁴ then wrote a report detailing the failures and delivered it to a WASA supervisor at Blue Plains. Id. at 38. In the following days, Respondent's supervisor on site, Dan Juanillo, was told by WASA officials that if Complainant was not terminated, then Respondent's contract with WASA would be. Id. at 45-46. Complainant was terminated from employment at the site on October 29, 1999. At that time, Respondent told Complainant that it had no other projects for him to work on, but that he would be considered for future openings. Id. at 46, CX 11 (letter from John Moore to Complainant, Oct. 29, 1999).

Sometime during September, 1999, Complainant contacted a reporter at The Washington Post to talk about conditions at Blue Plains. Complainant met with the reporter several times and gave him copies of memos he had written about sensor problems at the plant. Bobreski, slip op. at 31-32. During the first week of October, Complainant brought the reporter onto plant grounds without telling Respondent or WASA.⁵ Id. at 37. On November 5, 1999, a front-page article about conditions at the plant appeared in the newspaper, with Complainant identified as a source. Id. at 46, CX 13 (Eric Lipton, Plant Warnings Go Unheeded, City Ignores Lapses in Handling Toxic Chemical at Blue Plains, Wash. Post, Nov. 15, 1999, at A1).

2. Undisputed Facts Regarding the Work of Complainant and Respondent

Before discussing the testimony of the witnesses in this matter, it will be helpful to establish certain undisputed facts about the type of work Complainant and Respondent were engaged in.

Complainant is an instrumentation and control technician, and Respondent is in the business of (among other things) hiring instrumentation and control technicians to staff "outages" at nuclear power plants. This work is commonly referred to as "I&C work," and the people who do it as "I&C technicians."⁶ I&C technicians install and repair instruments, control systems, gauges, valves and related components of nuclear power plants and other industrial facilities.

In the case of a nuclear power plant, much of the work can be done only while the plant is shut down for refueling and maintenance, which occurs approximately once every eighteen months. As Complainant put it, to do otherwise would be "like trying to work on your car while it's running." Tr. at 217. Because so much work has to be done at one time, power plants hire temporary workers such as Complainant for a few weeks or months (depending on the tasks). To minimize the time that the power plant is shut down, outages often involve intense work schedules, with hundreds of temporary employees in round-the-clock shifts, seven days a week. For example, Complainant testified that he would have expected to work an eighty-four hour

⁴ Complainant's decision to report several sensors as failed was the culmination of a long series of reports about problems with the sensors, which were not well-received by the WASA supervisor responsible for them.

⁵ Complainant said that he and the reporter were waved through the gate by a guard. He was not aware of any work rule that the visit may have violated, nor did WASA identify any violations. Bobreski, slip op. at 37.

⁶ In the transcript, references by the parties to "I&C" were recorded as "INC."

workweek had he been hired for the Hope Creek outage, with considerable overtime and double-time pay. Tr. at 247.

Respondent contracts with plant owners directly, or acts as a subcontractor, to provide I&C technicians as needed, on a temporary or permanent basis, depending on the job. The WASA job in the earlier whistleblowing matter was a long-term contract (Respondent continued to supply technicians at Blue Plains at the time of the hearing). The job for which Complainant was not hired in this matter was scheduled to last for around a month.

Although Respondent's hiring practices are at the center of the dispute in this matter, certain facts were not disputed. Complainant is a member of the International Brotherhood of Electrical Workers (IBEW), one of the two unions that represent I&C technicians working in nuclear power plants. The other union is the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (UA). The two unions have an agreement with employers, including Respondent, that hiring will be done on an equal basis, with half of the I&C technicians being members of each union. Members of either union are permitted to do the work that traditionally would be done only by one or the other. Within each union, various locals have jurisdiction over hiring done at particular nuclear power plants. Respondent typically hires union employees, and the local unions have input into who is hired by recommending their local members or non-local members who have asked to be considered for work in the jurisdiction. Tr. at 103-04, 210.

The job for which Complainant was not hired took place at the Hope Creek Nuclear Generating Station in spring of 2006. Hope Creek is part of a complex of nuclear reactors on the New Jersey shore of Delaware Bay. Also at the site is the two-reactor Salem Nuclear Generating Station. All three reactors are owned by PSE&G Nuclear, a subsidiary of Public Service Electric & Gas. In the transcript, Complainant and the other witnesses variably referred to the site as "Salem," "Hope Creek," and "the Island," a reference to the artificial island on which the plants were built. The work involved in the 2006 outage was overseen by another contractor, The Shaw Group, which subcontracted with Respondent to provide workers.

B. Testimony of the Parties and Witnesses

The following summary of the testimony of the witnesses who appeared at the hearing emphasizes those facts that I consider most consistent, probative and relevant to my findings. However, in reaching my findings of fact and conclusions of law, I have carefully considered all of the testimony of all of the witness, taking into account all relevant and probative evidence. I have evaluated the testimonial evidence by assessing its inherent consistency and its consistency with other evidence of record. I have also made assessments of the credibility of the witnesses, considering the source of information, its reasonableness, and the demeanor and behavior of the witnesses.

James J. Bobreski (Complainant), Tr. at 204-74

Complainant has a lifetime interest in electronics and received formal training in the Air Force during the 1970s. Tr. at 205. He joined IBEW in 1979 with an interest in doing I&C

work. Tr. at 206. He has the highest level of certification as a Control Systems Technician, level 3. Tr. at 207. Complainant has worked on a broad array of nuclear and nonnuclear I&C tasks. Tr. at 207, CX 3 at 1. Since the 1990s, most of Complainant's work has involved short term contracts to install or maintain electrical instruments and controls, in particular at nuclear power plants, but also for other industries. CX 3. He has worked at Hope Creek maintaining valves during prior outages. Tr. at 208.

From 1994 through 1999, before the events at Blue Plains in 1999, Complainant frequently worked on projects staffed by Respondent, including outages at the Salem/Hope Creek nuclear complex. Complainant was not a permanent employee of the company, although all of his work during this period was obtained through Respondent. Tr. at 215, 258. During those years he and Mr. Morgan often drove home from jobs together (both live in upstate New York), and shared an apartment when working far from their homes. Tr. at 216. Complainant testified that Mr. Morgan was close with the management of Respondent. Tr. at 216. Complainant also testified that he never saw Mr. Morgan be upset by profanity, and that conversations on the job tended to be "stereotypic construction site language." Tr. at 216.

Complainant was not hired by Respondent after being laid off from Blue Plains after the article was published in the Washington Post. Tr. at 228. At one point he said that he called an employee of Respondent, John Moore⁷, and asked for a job. Complainant testified that he was told "that [Moore] would get back to me if there was a job opening." Tr. at 229. Complainant also said that Mr. Moore and Mr. Givner were unhappy about the newspaper article. "There were two conversations after—after the article hit the press and made news. And, in both conversations, Mr. Givner and Mr. Moore expressed their disdain that—and that was the sum and substance of it." Tr. at 229.

In 2000, Complainant was working at the Niagara Mohawk⁸ nuclear power station when he was called by the chief security officer at the plant and told that he had been reported as a security risk and needed to explain himself. Complainant was told that the complaint came from Respondent. Tr. at 230. Had Complainant been judged to be an actual security risk, "[m]y career would be over." Tr. at 231. He never filed a complaint about that incident, and has been able to continue working at nuclear power plants since that time. Tr. at 231-32.

Complainant did not talk to Mr. Morgan after the Blue Plains job until sometime in 2003, when he was upset that Morgan had not hired him for a job at Fitzpatrick Nuclear Power Plant. Morgan had been the recruiter for that job and did not work for Respondent at that time. Complainant called Mr. Morgan and complained that he should have been hired for the job, which was near his home and would not have entailed the travel that is common in the industry.⁹

⁷ John Moore was a senior employee of Respondent at all times during the events of the WASA matter and the present matter. He did not testify in this matter.

⁸ Similar to Salem/Hope Creek, there are two plants on the site commonly referred to as Niagara Mohawk: Fitzpatrick and Nine Mile Point nuclear power plants. Complainant's resume indicates he was working at Nine Mile Point Unit 2 at the time. CX 3 at 6.

⁹ Complainant testified that the long periods away from home that are necessary in his profession "are a strain on relationships . . . and your home life." Tr. at 232. Fitzpatrick was one of the few power plants to which Complainant could commute from home on a daily basis.

Tr. at 232. Complainant admitted that he used profanity during the call and “was probably ranting and raving.” Tr. at 234. Complainant asserted that during the call, he asked Mr. Morgan:

“This is all part of that WASA thing, isn’t it?” And, he was very pragmatic, very calm. He said, “I don’t have your name on the list. Your name never came up on the list.” And, I said—I said, “This is bullshit. You know I was looking for work. You know where I am. And, you called”—There were other guys who live out of the vicinity, so if he’s doing the—Here’s the rub.

If he was doing everything like he’s been telling you, my name would have been on the same list of the same other guys that he hired. So, from a documentary standpoint—But, from the real world, he knows who I am. He knows where to get hold of me. He knew it was my jurisdiction. He lived in a town just outside of Syracuse.

Tr. at 235.

Complainant worked at Salem/Hope Creek several times, including outages in fall and spring 2005, and spring 2004. CX 3 at 3. Asked how he obtained the 2005 job (whether fall or spring is not clear), Complainant testified that he called Mr. Law on the phone and asked to be hired. He submitted his resume only after he arrived at the plant, so that Mr. Law would have it on file. Tr. at 242. Records from the fall 2005 outage indicate that Complainant was among an early group of I&C technicians who worked at the plant. Most of the technicians starting on the same day (September 28, 2005) were rehired in the spring 2006 outage. CX 10.¹⁰

During the fall 2005 outage at Salem, Mr. Law asked Complainant about the WASA matter. “He said, ‘I heard you won a lawsuit,’ you know. He just said kind of like ‘what was that about.’ It was in passing. . . . That was the last outage I worked at Salem.” Tr. at 230.

Seeking a spot on the spring 2006 outage at Salem, Complainant called Mr. Law. Tr. at 242. Telephone records introduced by Complainant and referenced during this testimony indicate that this call occurred on February 27, 2006. CX 6 at 1.

Complainant: He said that he was not staffing the job. He was not making a decision on hiring. That all the work was going to be done by—All the hiring was going to be done by J. Givoo. . . . He mentioned Mel Morgan. And, he said you’d have to give your—give Mel Morgan a call. And, I said, Do you have—Did you submit my name to him? And, he said, Yes.

Question: All right. Did he tell you how many names he had submitted?

Complainant: At that time he said, that was on the first 30 names he submitted.

¹⁰ There were nine IBEW members hired the same day, including Complainant. Six were rehired. Ten UA members also started that day, five were rehired. See discussion of CX 1, *infra*.

Tr. at 243. Complainant's testimony and phone records indicate that he called Mr. Morgan on March 20, called Mr. Law on March 21, then called Mr. Morgan again on March 21 and left a message. Tr. at 246, CX 6 at 2. Later on March 21, Complainant got a call from Mr. Morgan saying that Salem had a hiring freeze, that no more hiring was anticipated, and that he should try Sequoyah Nuclear Power Plant, in Tennessee, which he believed was hiring. Tr. at 247. Complainant said that he never sent Mr. Morgan a resume. Tr. at 267. He was not on the out-of-work list with the local union for Salem/Hope Creek. Tr. at 268.

Complainant explained that every IBEW local maintains lists of local members seeking work, and of IBEW members from other members who are seeking work, known as "travelers." Tr. at 210. When hiring, preference is given to local members if qualified, then to travelers. However, Complainant said that the system generally runs on an informal basis, where travelers, once hired, are allowed to sign the local travelling list as if they had formally been seeking work in the jurisdiction. Tr. at 211.

Complainant testified that he frequently did not provide a resume to his employers until after he was hired, including at Salem/Hope Creek. Tr. at 242, 273. Likewise, he typically would not be signed in as a traveler with the local union where he got a job, unless it was his own local, since it would not make sense to travel to locals around the country just to sign in to their out-of-work book. Instead, he typically would be hired first and sign in when he arrived at the job. Tr. at 211. Respondent cross-examined Complainant regarding whether he had sent resumes to other employers, and he said that he had. Tr. at 261-62. However, on redirect, he said that all of those resumes were sent out after he was hired for the respective jobs, and that Respondent never sought his resume. Tr. at 273. Complainant also testified that many plants took part in a system where resume-type information was stored in a database to avoid the need of resending resumes for each job. Tr. at 219.

On cross-examination, Complainant acknowledged that he had experienced some problems working at other plants. Tr. at 262. Since 2006, he has worked in his field, including jobs at nuclear and non-nuclear power plants. Tr. at 269, CX 3 at 2.

Vincent P. Law, Tr. at 126-71, CX 5

Vincent P. Law acted as foreman for a succession of contractors at Salem/Hope Creek. During the spring 2006 outage and its run-up, he was employed by Shaw, Stone & Webster.¹¹ Tr. at 128. There were nine IBEW members hired the same day, including Complainant. Six were rehired. Ten UA members also started that day, five were rehired. As foreman, Mr. Law was responsible for planning and staffing outages at the power plant. He hired technicians based on the amount of work to be done, the amount of time to do it, and the willingness of the utility to pay. In some outages, that meant hiring a few dozen people, and at times he hired more than one hundred. Tr. at 129-30. Mr. Law generally started with a list of people he had used in the

¹¹ Throughout the hearing, witnesses referred to "Shaw/Stone & Webster," or to "Stone & Webster" when discussing the Shaw Group, which acquired Stone & Webster several years ago. The latter company was long a major contractor for the design, construction, and maintenance of nuclear power plants. Throughout this matter I will refer to them as "Shaw."

previous outage and then supplemented the list as necessary. Tr. at 131. When Complainant was available, Mr. Law tried to hire him. Tr. at 138.

In making hiring decisions, Mr. Law relied upon factors other than the basic ability to do the job. He needed to consider the type of work to be done, technicians' schedules had to be accommodated, and he had to work within the parameters of the IBEW's labor-management agreement. The union contract required that half of the technicians come from the IBEW, and half from the UA. Tr. at 139. Mr. Law tried to rehire the same people for particular sites from year to year because he found the technicians' knowledge of the plant was helpful. Tr. at 140.

Mr. Law initially assumed that he would be responsible for staffing the spring 2006 outage, as he had staffed previous outages at Hope Creek. Tr. at 138. However, he was told by supervisors at Shaw that staffing would be provided by Respondent, a decision that he said he did not take very well, because he viewed it as "a wake up call . . . as to what's changed here." Tr. at 141. He was told to turn over his list of technicians to Mel Morgan. Tr. at 142. Mr. Law initially believed that he was completely detached from the hiring process. However, he testified at the hearing that at some point he was told that he needed to be involved. He explained:

Question: If I understand, you were initially told that under—that Givoo was doing through a PSE&G contract and it was hands off.

Answer: Correct. That I was to give my list over to them. I wasn't happy. And, then, I don't know what the time frame was, but it wasn't very long that, basically, it came down that if we're not successful, you're not going to have a job. Okay? Just as it is on any other outage.

Tr. at 144. Mr. Law did not know who Respondent contacted for the job at first. Tr. at 144. When he became involved in the process, he still did not actually hire technicians because the project budget and schedule were uncertain, and he did not want to offer jobs with no guarantee that each position would be funded. Tr. at 144. Mr. Law testified:

[D]ealing with [PSE&G] in the past, they changed their minds right up until the last minute where we had to call people up and tell them they're not coming. . . . Until you have money in hand . . . and until you have the dates locked in . . . I would never confirm anybody.

Tr. at 145.

At the hearing, Mr. Law testified that he received a call from Complainant and he described their conversation. He testified: "I'm sure I said, you know, [the] same thing that I say to everybody else, you know. 'How you doing,' basically. 'How's things going,' you know. Things like that. But, at the time, I'm not sure if we even had dates or numbers at the time." Tr. at 146. Mr. Law acknowledged that when he gave his statement to OSHA in 2006 that he had told Complainant that "...I was not doing the hiring for the upcoming outage and that he needed to contact Mel Morgan." CX 5 at 4. When he was asked about this discrepancy, Mr. Law

testified that he may have talked to Complainant during the period when he thought he was not going to be involved in the hiring process. Tr. at 147.

In his OSHA statement, Mr. Law stated that he received a second phone call from Complainant, in which he was asked about why Complainant was not hired. Mr. Law stated: “I explained to him that I did not have any problems or issues with him, but I was not the person in charge of doing the hiring for the outage. I also explained to him that I did not have any control over the hiring of technicians.” CX 5 at 4. He added that “[i]f I was the person doing the hiring I would tentatively place his name on the list and wait for contact from the union.” CX 5 at 5.

Mr. Law testified that although he had hired Complainant several times in the past, personality conflicts caused him to move Complainant’s name down the list so that he was not among the ninety people who ultimately were hired. He explained himself in the following colloquy:

JUDGE BULLARD: Why was it that if Mr. Bobreski was hired in the past to do this sort of work, that he was not hired this time, if you know?

THE WITNESS: Again, if I was asked to bring in a higher number that I would have to man the job, because basically they’ll get somebody else if I’m not doing that job, then I would have probably hired him. The problem I had with Jim is I can’t get a partner to stay with him. If he’s worked with him on a prior outage, he won’t work with him again. Okay? And, I can’t keep him in the same gang because I have foremen that have told me that he’s a problem and they don’t want him in—in their gang. You know, they have eight guys in their gang, then it’s a problem.

JUDGE BULLARD: Well, why did those factors not keep you from hiring him for the six or however many outages you hired him for—

THE WITNESS: What I saw was getting worse. From—From—From the first time till—till the end, it just progressed. Okay?

JUDGE BULLARD: Tell me specifically what you saw.

THE WITNESS: We had a job in 1995, where, basically, he was working with us in that time frame, ‘95 to ‘98, where he was in a gang and the foreman repeatedly put him out on one job that was an ongoing job, just to get him—basically, he didn’t know what to do with him, so he put him on this one particular team odd job, where he sat out there and just watched the recorder for day after day, after day, after day. Okay?

JUDGE BULLARD: All right. What did he—What did Mr. Bobreski do that made him difficult or undesirable?

THE WITNESS: He—He—I can’t sum it up. Okay? I like Jim, I’ve known him for years, very smart guy. But, I guess when he’s around the other guys in the shop and things like that, maybe, he doesn’t fit in, or whatever. But, there’s always been a little bit of—he’s different. You know, he’s just different. You know, his personality’s different. And, he just didn’t fit in with a majority of the people that we were hiring from outage to outage.

So, again, I would have to put him with somebody that maybe didn't know him, or just met him, or something like that, to try and team him up with different people like that.

JUDGE BULLARD: All right. So, in this particular outage, you did participate in the decision to leave him off of—

THE WITNESS: Yes.

JUDGE BULLARD:—the top 90.

THE WITNESS: Yes.

JUDGE BULLARD: If you—

THE WITNESS: If I needed to hire—You know, like I said, if I had to man the job, I would have hired him.

JUDGE BULLARD: All right. So, how much was that decision influenced by Mr. Morgan, the decision to leave Mr. Bobreski out?

THE WITNESS: How much—Percentage wise? I mean, it was—It was—We worked together at it. Okay? And, we probably never came to his name on the list after the number got reduced down to that point.

Tr. at 153-55. Mr. Law stated that he knew that Complainant was interested in working the outage and that he was available. He also said that he never told Mr. Morgan not to hire Complainant. Tr. at 165. Mr. Law said that he did not remember being asked by Mr. Morgan whether or not he wanted to hire Complainant. Tr. at 166.

On examination by Respondent's counsel, Mr. Law said that he was aware that Complainant had filed a whistleblower lawsuit, but that it did not influence the hiring decision, and that Mr. Morgan never told him not to hire Complainant. Tr. at 169-70. Mr. Law learned of the WASA complaint after hiring Complainant for the fall 2005 outage. He did not know who the suit was filed against. Tr. at 169.

I remember telling [the union member who told Mr. Law about the complaint] that he is either just working for me, or I just hired him, you know. So, it was around the same time frame. But, that wouldn't . . . affect, you know, any—any of my reasons to hire him or not hire him.

Tr. at 170. Mr. Law had not hired Complainant since that outage, and he left Salem/Hope Creek in 2007. Tr. at 170-71.

Mr. Law said that he probably had a resume on file for Complainant, because he saved resumes for all persons hired in case he was audited, as often happened. Tr. at 158-59. There was a file kept for every person hired dating back to 1995, when Mr. Law started at Salem/Hope Creek. Tr. at 159. "I would just pull out the ones that were actively working the outage and, then, update them." Tr. at 159. Mr. Law said that he no longer has access to the files, since he no longer works at Salem/Hope Creek. Tr. at 159.

Melvin Morgan, Tr. at 172-203, CX 2¹²

Melvin Morgan works for Respondent as Director of Business Development, based in an office at his Syracuse, New York, home. He markets the company to various utilities and works on staffing projects. Tr. at 173. Although he had worked for Respondent in the past, the spring 2006 outage was the first that he staffed after rejoining the company. Previously he had staffed and planned outages for other contractors in the United States and Canada. Tr. at 172-73

For the spring 2006 outage, Mr. Morgan worked alongside Mr. Law to find technicians to staff the project. Tr. at 175. Since Mr. Law had worked on the site for several years, “we pretty well left everything up to [Mr. Law].” Tr. at 177. Mr. Morgan said that he would go down the list of names that Mr. Law had compiled and ask which people should be hired. Complainant was on the list of names that were discussed as possible hires. Mr. Morgan testified that he was never told not to hire Complainant. Tr. at 177.

On cross-examination by Complainant’s counsel, Mr. Morgan explained that the relationship with Mr. Law was established at the start of the process of staffing the spring 2006 outage. at 186. The only specific requests Mr. Morgan made were in connection with “three or four guys” who needed to be at another job scheduled to start before the Hope Creek outage ended. Those technicians were assigned to tasks at Hope Creek that would end early in the process. Tr. at 184-85.

I would pretty well work with Vince on a daily basis saying, “OK, Vince, who’s contacted you, what do you want, where are we at with this, who have you promised jobs to?” And, he would relay that to me. And, then, a lot of times, the individuals would call me and say, “I talked to Vince. Vince told me to call you. And, that he wants me to hire you.” So, I would get the process started that way.

Tr. at 188-89. With respect to Complainant, Mr. Morgan said that “I had went through the list, named the names and he would say, ‘yes, yes, no, no.’ And, when I got to Mr. Bobreski’s name, he said, ‘No, not at this time.’” Tr. at 189.

Mr. Morgan said that he spoke to Complainant once in connection with the Spring 2006 outage, by telephone. Complainant asked about the job and Mr. Morgan replied that

the situation we were in, that the staffing was very erratic and that we didn’t know, really, from day to day how many we were going to put on. At the time, you know, like I do all technicians, I tell them, look, obviously, stay in touch, you know. In that job particularly, I said, you know, make sure you check with Vince. But, right now, I don’t want to promise anybody anything, so I would certainly, you know, look for other work as well, you know, because the outages are short. I just try to—That’s just kind of standard policy, what I do. I tell them I don’t promise anybody anything. I always tell them, Look, if you find something else, certainly, don’t feel obligated, but, you know, you need to look for other work just in case.

¹² Mr. Morgan testified at the hearing and gave a statement to OSHA (CX 2).

Tr. at 176. Complainant never sent Mr. Morgan a resume. Tr. at 176. Mr. Morgan said that he would not have simply called Complainant to offer him a job had there been an open slot, because he would have called Mr. Law to consult his list of candidates. Tr. at 194. However, it was Mr. Morgan's duty to call technicians who were selected for employment. Tr. at 195.

Mr. Morgan denied having the telephone conversation that Complainant said took place about his nonselection for an earlier job. Rather, Mr. Morgan testified that Complainant left an abusive message on his answering machine.

He used some profanity It was quite an extensive message. Apparently, he was upset because I had not hired him on the job. I'm not sure what job it was or what the incident was. But, I did have a quite extensive message from Mr. Bobreski. Life threatening, to be quite honest with you.

Tr. at 174. Mr. Morgan particularly recalled the message because his daughter had been murdered, and her murderer had left numerous abusive telephone calls for her. Id. He was unsure of the date of the message. Tr. at 174, 196. Although he kept the tape of the message for some time, he no longer has it. Tr. at 197. Mr. Morgan said that he called Complainant's union to complain about the call but never took any further action, and would not have failed to hire Complainant on the basis of the telephone call. Tr. at 174, 198-99.

Joel E. Givner, Tr. at 27-125, CX 1, CX 4¹³

Joel E. Givner is Manager of Plant Services for J. Givoo Consultants Inc. (Respondent) Although his wife is the owner of the company, Mr. Givner oversees all day-to-day operations, including seeking contracts and managing employees. Tr. at 28-30. Respondent provides staffing services to nuclear power plants and other industrial customers that need technicians to perform maintenance and repair. Except for approximately six people permanently employed in the corporate office, all of Respondent's staff consists of technicians on short-term and long-term projects at various locations. Tr. at 120-21. Approximately 70 percent of the company's business is in the power industry, and 80 percent of that 70 percent is assigned to nuclear plants. Tr. at 28. Mr. Givner is familiar with Salem/Hope Creek because Respondent has had contracts to staff outages there on multiple occasions. Tr. at 31, 34-35, 121.

Respondent employed Complainant several times during the period from 1994 to 1999. In 1994, Complainant was hired to staff a temporary nuclear power plant job. Tr. at 32. He was hired for at least seven similar jobs in the following five years. Tr. at 34-35. In 1999, Complainant asked to get some experience working on wastewater treatment, so he was recommended for Respondent's contract with WASA at Blue Plains. Tr. at 36. However, Complainant had problems in that job. Mr. Givner explained, "Mr. Bobreski was not working to the direction of the supervision. He was out there trying to re-engineer the whole facility." Tr.

¹³ In addition to his testimony at the hearing, Mr. Givner wrote a statement for OSHA during that agency's investigation (CX 1), and gave an interview to OSHA's investigator, which was subsequently transcribed (CX 4). I have attempted to use the hearing transcript as my primary source in recounting the facts, since that was the only testimony subject to cross examination, however, counsel for Complainant questioned Mr. Givner on relevant portions of the prior statement and interview, and those are discussed herein as necessary.

at 37. Complainant was laid off from the WASA job when Respondent was told by WASA that he could not continue there. Tr. at 37, 97-98. Mr. Givner testified that he heard about Complainant's protected activity after the layoff. Tr. at 37, 44, 98. Mr. Givner testified about the circumstances at Blue Plains, saying that he "felt that the facts weren't in order" and explaining that:

I felt that this was a reporter doing a job based on a former employee taking him on the facility, violating a security measure by taking him there when he was not an employee of the facility any more, and giving him a one-sided, biased opinion of what he felt were the conditions of a power—of a water and sewer authority. That's all I felt.

I knew there would come a point in time, I would have my day—at least I thought I would have my day to try to say what I thought or we thought was on the site. We never had that day. But, am I upset to hold it against him? No. In fact, Mr. Bobreski called Mr. Moore and I was on speaker phone and Mr. Bobreski said, "I'm not going to sue you. I'm going to sue the district, 'cause they have all the money. So, why would I be upset with Mr. Bobreski?"

Tr. at 44. Regardless, Respondent did not hire Complainant for any further jobs after that time. Mr. Givner said that he thought there was an understanding with Complainant that it would be best if he worked elsewhere. Tr. at 45. Mr. Givner believed that the understanding was reached before he knew about the newspaper article. Tr. at 47. Sometime in the next year, Respondent was contacted by Complainant when he was seeking work. He was told that Respondent had nothing available at the time, but Complainant was advised to call another employer who was believed to have open positions on a job also staffed by Respondent. Tr. at 45-46. Mr. Givner testified that he believed that Complainant would contact Respondent when he wanted to work for Respondent again. Tr. at 46-47.

After he learned about the article, Mr. Givner responded to an inquiry from the security department at a plant where Complainant was working and said that Complainant was a security risk because he had brought a reporter onto Blue Plains. Tr. at 48-49. Mr. Givner testified that "It was done verbally, 'cause I refused to put it in writing." Tr. at 48. On the form sent by the new employer, Mr. Givner asked that the security officer call him. Tr. at 111. He told the security director that Complainant had brought a reporter onto the grounds after his security badge was revoked. Tr. at 48. Mr. Givner said that while he typically did not sign security questionnaires (someone on his staff normally does that), he did look them over and added comments, because "we have an obligation." Tr. at 112. This was the only time that Mr. Givner has ever reported a former employee as a security risk. Tr. at 48, 113.

When Respondent won a contract to work at Hope Creek in the Spring 2006 outage,¹⁴ Mr. Givner received a list of names of technicians from prior outages from Mr. Law. Tr. at 58. Mr.

¹⁴ An "outage" refers to periodic shutdowns of a nuclear power plant for maintenance and refueling. Such outages typically occur about once every eighteen months and last a month or more. They generally occur during the spring or fall, when there is less demand for electricity.

Givner testified that he tries to get lists of technicians who recently worked at a site so that he would have their most recent contact information. Tr. at 62-63.¹⁵ Mr. Givner noticed that Complainant's name was on the list, but as he was not personally staffing the outage, he forwarded the list to Mr. Morgan. Tr. at 60. The only person Mr. Givner specifically wanted to bring into the project was one individual who was skilled in under-vessel¹⁶ work. He had no conversations with anyone regarding Complainant's potential employment on the outage. Tr. at 61. Due to the short amount of lead time and the large number of outages taking place in the spring of 2006, Mr. Givner said that his staff had to "scramble" to hire the ninety technicians needed for the Hope Creek outage because availability was an issue. Tr. at 66-67.

Respondent's contract for the 2006 outage was typical of contracts that the company entered into to provide staff to perform instrumentation and control work. This work was controlled by the plant's owner and Shaw/Stone & Webster, which was overseeing the outage and assisted in the hiring (through Mr. Law). Also assisting were the unions representing technicians in the Salem/Hope Creek Jurisdiction: IBEW Local 351, and UA Local 420. Respondent generally hires technicians through a combination of existing relationships with individuals that it uses frequently (such as Complainant in the 1990s), individuals who have frequently worked at a particular job site and are known by the owner or general contractor, recommendations from the local union offices, and by hiring individuals who contact Respondent looking for work. Tr. at 102-03. Resumes sent in by job applicants are helpful, but are not the only consideration.

You don't necessarily get hired off your resume. In a lot of cases, it's name recognition. Guys have been there before. Guys that get along with other people. Based on experience levels.

And, it may be OK, this guy will make a phone call, let's say, Sam—Sam Smith makes a phone call to Mel, says, "Look, I want to be considered at Hope Creek," and Mel knows the guy intimately. He says, "All right. Let me see what I can do." So, he goes there, he discusses it with Vince. And, Vince will say, or the client will say, "I don't know this guy, can we get a resume on him?" And, then, we'll make sure he'll get a resume there.

Tr. at 103.

¹⁵ In his interview with OSHA, Mr. Givner said that

to get a guy who's been in the plant in the last six months . . . is a blessing in disguise because it's a lot less training and background checks that have to go on. . . . [W]here they talk to one another so XYZ utility doesn't have to spend \$2,000 or \$3,000 doing a background check on Sam Jones when one was done six months ago from ABC utility. So they all talk amongst themselves and it's basically they're sharing costs that way.

CX 4 at 24. Mr. Givner was asked about that statement during the hearing and said it was accurate. Tr. at 65.

¹⁶ "Under vessel" refers to work performed underneath the nuclear reactor, inside the containment building. It tends to be difficult or dangerous work, as described by Mr. Givner: "there's going to be heat, they're going to be working underneath the reactor vessels, so there's radiation concerns . . . you may have to use a respirator based on the conditions" CX 4 at 16.

Mr. Givner testified that for the most part he was not directly involved in determining who would be hired. Mr. Morgan and Mr. Givner discussed individual names as far as which supervisors would be hired, and one specific technician with experience in under-vessel work. Tr. at 100-01. Beyond that, staffing decisions were the responsibility of Mr. Morgan and Mr. Law. Tr. at 101. During his initial statements to OSHA, Mr. Givner said that “Mel Morgan was responsible in staffing the project.” CX 1 at 3. Mr. Law’s involvement, he said at that time, was to send Mr. Morgan his list of names of technicians who had worked past outages at Salem/Hope Creek. Mr. Law directed technicians who called him looking for work to call Mr. Morgan. CX 1 at 3. During the hearing, Mr. Givner said that Mr. Law was somewhat more involved. “My understanding was that Vince and Mel would get together and jointly prepare a list of the people most qualified to do the work for the outage.” Tr. at 101. When Mr. Morgan made hiring decisions he notified Respondent’s office of the individuals selected. Tr. at 108.

Mr. Givner did not instruct Mr. Morgan not to hire Complainant, and he said that he had no reason to give such an instruction. Tr. at 101. Had Complainant been hired, Mr. Givner said he could “[c]are less. I was trying to staff a job to the best of our ability, to meet—to meet the needs of the station and our contract with Shaw.” Tr. at 102.

Mr. Givner gave varied accounts about the reasons Complainant was not hired at Hope Creek. In his initial statements to OSHA, and at the hearing, Mr. Givner said that nobody at Respondent was aware that Complainant was seeking work because Complainant never sent in a resume or otherwise applied for a job. Tr. at 105, CX 1 at 4. However, he said he had no objection to hiring Complainant were he known to be available, because Complainant was qualified. CX 1 at 5, Tr. at 106. Mr. Givner also said at the hearing that Complainant would have been hired, had there been positions available.

THE WITNESS: If we had enough positions available and Mr. Bobreski was available, we would have hired him.

BY MR. KOHN:

Q: That’s not what you said to the Department of Labor, is it?

A: I said I would have hired him. I’m just putting a clarifier on it now. If there were a hundred and twenty positions available, Mr. Bobreski would have been hired. The fact that we went down to ninety, he was not on that top of the list of ninety. I would have hired him, had it been a hundred and twenty, which was our original intent.

Tr. at 79. By way of explanation, Mr. Givner said that he learned during preparations for the hearing that Mr. Law had taken steps to reduce Complainant’s chance of being hired.

C. Documentary Evidence

CX 1: Letter from Joel Givner to OSHA

CX 1 is a letter written May 22, 2006, responding to OSHA’s investigation. Its contents are discussed in the testimony of Mr. Givner, above.

Attached to the letter are copies of the lists initially created by Mr. Law in staffing the fall 2005 outage at Salem/Hope Creek, and used by Mr. Law and Mr. Morgan in staffing the spring 2006 outage. These records indicate that eight other individuals were hired to start the same day as Complainant (September 28) from the IBEW. Looking at CX 10, six of those technicians were hired back for the spring 2006 outage. Ten UA members started work for the fall 2005 outage on September 28. Of those, five were hired back for the spring 2006 outage. In all, Mr. Law's fall 2005 list had approximately 202 names. Tr. at 100-01. Of those individuals, 90 were hired. Tr. at 100-01, CX 10. There is no evidence regarding the reason the rest were not hired (aside from Complainant).

CX 2: Summary of interview with Melvin Morgan

CX 2 summarizes the interview of Mr. Morgan by OSHA on June 1, 2006. Its contents are discussed with his testimony, above.

CX 3: Resume of Complainant

CX 3 includes an updated resume of Complainant, listing his skills and work history.

CX 4: Statement of Joel Givner to OSHA

CX 4 is a transcription of Mr. Givner's interview with the OSHA investigator. Its contents are discussed in the testimony of Mr. Givner, above.

CX 5: Statement of Vincent Law to OSHA

CX 5 is a summary of Mr. Law's interview with OSHA on June 26, 2006. Its contents are discussed above along with his testimony at the hearing.

CX 6: Complainant's telephone records

CX 6 contains two pages of Complainant's telephone records. The following calls are highlighted, and all other calls are redacted. Complainant, Mr. Law, and Mr. Morgan all testified to the fact that the calls were made to and from their telephone numbers on or about the dates indicated.

Date	Time	Duration	From	To
Feb. 27, 2006	11:33 a.m.	1 minute	Complainant	Mr. Law
Feb. 27, 2006	1:04 p.m.	3 minutes	Complainant	Mr. Law
March 20, 2006	3:21 p.m.	2 minutes	Complainant	Mr. Morgan
March 20, 2006	4:38 p.m.	2 minutes	Complainant	Mr. Law
March 21, 2006	10:48 a.m.	2 minutes	Complainant	Mr. Morgan
March 21, 2006	9:20 p.m.	8 minutes	Mr. Morgan	Complainant

CX 7: Respondent's staffing plan

CX 7 is a copy of Respondent's staffing plan for the spring 2006 outage at Hope Creek. It includes different estimates for the total number of technicians to be hired as of different dates in early 2006, apparently depending on input from Shaw.

CX 8: Union contract

CX 9: Contract between Shaw/Stone & Webster and Respondent

CX 10: Staff roster for spring 2006 outage

CX 11: Letter from Respondent laying off Complainant from Blue Plains

This letter, dated October 29, 1999, informed Complainant that his services were "no longer required to perform work" at Blue Plains and that Respondent did not have any other projects for him at that time. Accordingly his employment was terminated, with the statement that he would be considered for future openings. The letter is from John Moore, Manager of I&C Services.

CX 12: Letter from John Moore to Dan Juanillo regarding media contacts at Blue Plains

This letter, dated November 1, 1999, was to "remind you that any and all contact with the 'media' will be referred to Mr. Joel E Givner." Mr. Juanillo, Respondent's supervisor at Blue Plains, was asked to provide appropriate notice to Respondent's employees at the site.

CX 13: Newspaper article

Eric Lipton, Plant Warnings Go Unheeded, City Ignores Lapses in Handling Toxic Chemical at Blue Plains, Wash. Post, Nov. 15, 1999, at A1.

CX 14: Decision in prior matter

Bobreski v. D.C. Water and Sewer Authority, ALJ No. 2001-CAA-00006 (ALJ July 11, 2005)

CX 15: Resume for John J. Jasinski

This appears to be a resume for a witness who did not testify. As neither party has referenced it at any time in its presentation, I will not consider CX 15 any further.

D. Statement of the Law

Section 211 of the ERA prohibits employers from retaliating against employees because they: notified their employer of a violation of federal law, refused to engage in any practice that violates a covered statute, testify before Congress or any federal or state proceeding, commence

or cause to be commenced any such proceeding, or assist in any such proceeding. 42 U.S.C. § 5851. The procedures for processing complaints of discrimination under the ERA and the other environmental whistleblower statutes are set forth at 29 C.F.R. Part 24.

Pursuant to 29 C.F.R. § 24.104(e), a complainant must make a prima facie showing that protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. Complainant must establish that he engaged in protected activity; that Respondent knew or suspected, actually or constructively, that he engaged in the protected activity; that he suffered an unfavorable personnel action; and that the circumstances raise an inference that the protected activity was a contributing factor in the unfavorable action. 29 C.F.R. § 24.104(e)(2). If Complainant establishes a prima facie case, the burden shifts to Respondent to articulate a legitimate reason for its action. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). If such evidence is presented, then Complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. Hicks, 509 U.S. at 512-20. The Employer must present clear and convincing evidence that there was a nondiscriminatory justification for the adverse employment action. See, Yule v. Burns Int'l Security Service, Case No. 1993-ERA-12 (Sec'y May 24, 1995).

When a case is tried on the merits, it is not necessary to determine whether Complainant has established a prima facie case of discrimination. See, Burdine, 450 U.S. at 253, 256. Instead, Complainant must prove the same elements as required for the prima facie case, with the exception that Complainant must prove them by a preponderance of the evidence and not by mere inference. Brune v. Horizon Air Indus., Inc., ARB Case No. 04-037, ALJ Case No. 2002-AIR-8 (ARB Jan. 31, 2006); Dysert v. Sec'y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997). Until Complainant meets his burden of proof, Respondent need only articulate a legitimate business reason for its action. Clemmons v. Ameristar Airways, Inc., ARB Case Nos. 05-048, 05-096 at 9, ALJ Case No. 2004-AIR-11 (ARB June 29, 2007). The onus falls on Complainant to prove that the proffered legitimate reason is a pretext rather than the true reason for the challenged employment action.

The proper focus of the inquiry is whether Complainant has shown that the reason for the adverse action was his protected safety complaints. Pike v. Public Storage Companies Inc., ARB No. 99-071, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). As the Supreme Court noted in Hicks, supra, the rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. See also Blow v. City of San Antonio, 236 F.3d 293, 297 (5th Cir. 2001). However, "[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." Mitchell v. Link Trucking, Inc., ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001). Complainant is not entitled to relief under the ERA if Respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action absent protected activity by Complainant. 42 U.S.C. § 5851(b)(3)(B); 29 C.F.R. § 24.109(b). In

matters brought under the other six environmental whistleblower statutes, Complainant is not entitled to relief if Respondent demonstrates by a preponderance of the evidence that it would have taken the same unfavorable personnel action absent protected activity. 29 C.F.R. § 24.109(b).

Although the standard of “clear and convincing” evidence has not been defined with precision, courts have held that it requires a burden higher than “preponderance of the evidence” but lower than “beyond a reasonable doubt.” Peck v. Safe Air Int’l Inc., ARB No. 02-028, ALJ No. 2001-AIR-3 (Jan. 30, 2004).

E. Analysis

1. Adverse Action

In Hirst v. Southeast Airlines, Inc., ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 (ARB Jan. 31, 2007), the ARB relied upon a decision by the United States Supreme Court in holding that the Complainant had not established that he suffered adverse employment action. See Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (June 22, 2006). The ARB found that the Complainant must establish that a reasonable employee or job applicant would find the employer’s action “materially adverse”, which was described as “actions [that are] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” USDOL/OALJ Reporter at 10-11, quoting 126 S. Ct. at 2409.

Where the alleged adverse action is a failure to hire, the Administrative review board has stated a three-part test: 1) that the complainant applied for the job and was qualified for it; 2) that the complainant was rejected for the job despite his or her qualifications; and 3) that, after the rejection, the job either was filled or remained open and the employer continued to seek persons of similar qualifications to the complainant. Hasan v. Enercon Services, Inc., ARB No. 05-037, ALJ Nos. 2004-ERA-22 and 27 (ARB July 31, 2007). The complainant has the burden of showing that he or she is qualified for the position. Hasan v. J.A. Jones, Inc., ARB No. 02-121, ALJ No. 2002-ERA-18 (ARB June 25, 2003).

In the present matter, Complainant argues that he applied for the job by contacting Mr. Law. Respondent argues that Complainant never properly applied for the job, because he did not contact Mr. Morgan early enough and never sent a resume. I find that the record establishes that the hiring process used to staff outages does not involve an application process in the traditional sense, but is based upon the accumulation of a list of potential technicians who are then considered for the job. In addition, Respondent’s own witness (Mr. Morgan) also testified that Complainant’s candidacy for the position was discussed and his name was listed as a potential technician, but Mr. Law did not want to hire Complainant yet. Tr. at 189. In addition, it is undisputed that Complainant contacted Morgan and Law and advised them of his interest in working the outage. In these circumstances, I find that Complainant applied for the job. I also find that he was qualified, based on the unanimous testimony of all witnesses.

It is uncontroverted that Complainant was not hired to work the spring 2006 outage. The third prong of the failure-to-hire test requires that the employer either hires someone with equal or lesser qualifications, or that it continues to seek applicants with equal or lesser qualifications. Hasan v. U.S. Dep't of Labor, 298 F.3d 914, 916 (10th Cir. 2002). In the present matter, Respondent's witnesses testified that Complainant was qualified. Tr. at 106. They testified that he would have been hired, but for the available number of slots, and the fact that his position on the list of eligible technicians was downgraded because of his personality. Accordingly, I find that Complainant has shown that he could have been hired for an open position, and that Respondent's failure to do so constitutes an adverse employment action.

2. Protected Activity

Complainants who engage in actions set forth in the ERA and other environmental whistleblower statutes may be perceived to have engaged in protected activity. 42 U.S.C. § 5851(a), 29 C.F.R. § 24.102. Complainant is not required to establish that the activity about which he complained actually violated Federal law relating to nuclear or environmental safety, but only that his complaints are based on a reasonable belief that they were related to an unlawful practice under Federal law relating to nuclear or environmental safety. The alleged act must implicate safety definitively and specifically and must at least "touch on" the subject matter of the related statute. Nathaniel v Westinghouse Hanford Co., 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, Dodd v. Polysar Latex, 88-SWD-4 (Sec'y Sept. 22, 1994).

Additionally, the subjective belief of the complainant is not sufficient, and the standard involves an objective assessment of whether the allegation constitutes protected activity. Kesterson v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997). "While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event." Leach v. Basin 3Western, Inc., ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003), citing Clean Harbors Env'tl. Serv. v. Herman, 146 F.3d 12, 19-21 (1st Cir. 1998). Internal complaints made to company supervisors concerning safety and quality control have been held to be protected activities. See Bassett v. Niagara Mohawk Power Corp., Case No. 1985-ERA-34 (Sec'y Sept. 28, 1993).

It is undisputed that Complainant engaged in protected activity while working at the WASA plant. Counsel for Complainant went to great lengths to make this point. Disclosure of safety-related issues to the news media is protected activity. Wedderspoon v. City of Cedar Rapids, Iowa, ALJ No. 80-WPC-1, (Sec'y July 28, 1980), Gutierrez v. Regents of the University of California, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002). Likewise, internal disclosure to supervisors is protected activity. Gutierrez, supra. Respondent has not contested this point in its brief. Accordingly, I find that Complainant has proven by a preponderance of the evidence that he engaged in protected activity.

3. Respondent's Awareness of Protected Activity

The Secretary has held that knowledge of a complainant's protected activity on the part of the alleged discriminatory entity is an essential element of a complainant's case. Martin v. Akzo Nobel Chemicals, Inc., 2001-CAA-00016 (ALJ December 20, 2001), aff'd, ARB 02-031

(July 31, 2003), citing Bartlick v. TVA, Case No. 88-ERA-15, Sec. Ord., Dec. 6, 1991, slip op at 7 n. 7 and Sec. Ord. Apr. 7, 1993, slip op. at 4 n.1, aff'd, 73 F.3d 100 (6th Cir. 1996). Complainant must prove by a preponderance of the evidence that those responsible for the adverse action were aware of the alleged protected activity. Mace v. Ona Delivery Systems, Inc., 91-STA-10 (Sec'y Jan. 27, 1992). Internal complaints to management are protected activity. Reed v. National Minerals Corp., Case no. 91-STA-34, Sec., Dec. and Order, slip op. at 4 (Sec'y July 24, 1992).

Three witnesses testified about their involvement in the hiring process and their knowledge of Complainant's previous whistleblowing activity. Mr. Givner testified that he had substantial knowledge of the WASA matter, but little involvement in the Hope Creek hiring process. Mr. Law testified that he had some knowledge of the WASA matter, and some involvement in the Hope Creek hiring process. The degree of his involvement has not been consistently reported by Mr. Law throughout the record. Mr. Morgan testified that he had no knowledge of the WASA matter at the time that he was involved in the Hope Creek hiring process.

In order to successively prosecute his claim, Complainant must prove by a preponderance of the evidence that someone had both knowledge of his protected activity and responsibility for the adverse action. Complainant may use circumstantial or direct evidence to meet his burden of proof. Samodurov v. General Physics Corp., 89-ERA-20 (Sec'y Nov. 16, 1993). Temporal proximity between the protected activity and the adverse action can constitute circumstantial evidence, although the converse also is true. See Bonnano v. Stone & Webster Engineering Corp., ALJ Nos. 95-ERA-54, 96-ERA-7, ARB Nos. 96-110, 96-165, elec. op. at 2 (ARB Dec. 12, 1996) (three-year period, during which complainant was hired by respondent for other jobs, establishes lack of animus or causation). The Board, the Secretary of Labor, and ALJs all have consistently found that passage of time mitigates inferences of causation. The seven-year time lapse at issue in this matter is not dispositive, however. The circumstances underlying the instant matter are markedly different from those involved in Bonnano. In that case, the complainant had been hired at the same plant by the same employer five times between when he engaged in protected activity and when the adverse action occurred. Id. In the present matter, the Hope Creek outage was the first in which Complainant applied for a job with Respondent since his protected activity years previously.

Mr. Givner, the person with the most knowledge of the protected activity, had the least involvement. He had the power to determine whether Complainant, or anyone else, would be hired; but there is no evidence that he expressed an opinion regarding whether Complainant should be hired. That he knew about the prior case is not in dispute. Nor is the fact that Mr. Givner saw Complainant's name on the list provided by Mr. Law. However, Mr. Givner testified that he was not aware of whether Complainant actually applied for a position on the outage, and he was not directly involved in hiring decisions. He never communicated a preference either way about hiring Complainant to Mr. Morgan and Mr. Law, who he said were doing the hiring.

Mr. Givner initially told OSHA that Complainant had not applied for a job. He amended his testimony at the hearing to state that he had been unaware of Complainant's phone call to Mr. Morgan until after the fact, because Mr. Morgan works in Syracuse and Mr. Givner in Cherry Hill, New Jersey. Tr. at 74-75. He gave the same reason for his repeated misstatement (saying that the call occurred later, which would have been favorable to Respondent) of the date on which that call occurred. Tr. at 74-75. Mr. Givner consistently testified that he never discussed hiring Complainant with Mr. Morgan, or as he put it, "I did not micromanage that job." Tr. at 61. Complainant suggests that the discrepancies between Mr. Givner's statements impugns his credibility, and further argues that this is circumstantial evidence that he either notified Mr. Morgan about a preference not to hire Complainant, or otherwise took a more active role in the process. Complainant also points to Mr. Givner's evident hostility toward him; based on the attempt to have Complainant classified as a security risk as additional evidence supporting his probable involvement in the employment decisions made in the spring 2006 outage.

I agree that it was possible for Mr. Givner to have interjected his opinion into the hiring process, but I do not find that Complainant has proven by a preponderance of the evidence that such interference occurred. That said, I am skeptical of Mr. Givner's testimony that he was willing to hire Complainant, given his stated belief that he thought Complainant was a security risk, and his stated understanding that Complainant would not seek employment with Respondent. I find that Mr. Givner's statement that he was willing to hire Complainant in the years following the Blue Plains layoff as inconsistent with the evidence that during that period, Mr. Givner tried to get Complainant barred from another job as a security risk.¹⁷ However, Complainant introduced no evidence of more recent animus, and no evidence from any witness to contradict Mr. Givner's statement that he was not involved in the failure to hire Complainant for a job that came up six years later.¹⁸ On the evidence presented regarding Mr. Givner, I find that Complainant has not proven by a preponderance of the evidence that Mr. Givner had any direct involvement in the failure to hire, although he clearly had knowledge of the protected activity.

In the alternative, Complainant argues that Mr. Givner's knowledge of protected activity and hostility toward Complainant on that basis can be imputed to Mr. Morgan and Mr. Law. The Board has held that in some circumstances, knowledge of protected activity can be imputed to a person taking adverse action, where the person with knowledge had substantial input. See Kester v. Caroline Power & Light Co., ARB No. 02-007, ALJ No. 2000-ERA-31, elec. op. at 4 (ARB Sept. 30, 2003) (imputing knowledge where firing manager acted based on recommendation of person with knowledge of protected activity). The instant situation is not analogous to Kester,

¹⁷ Mr. Givner said that Respondent and Complainant agreed to a vaguely defined cooling off period during which they would "part[] ways for a little bit of time." Tr. at 45. He said that after this agreement, he learned about the visit from the newspaper reporter, and then decided to report Complainant as a security risk. Tr. at 47. The report could be viewed as retaliation, or as a legitimate (and presumably required) report of a safety concern; I make no judgment on that here, but I do note that Mr. Givner said he had an obligation to report safety information. Tr. at 110-12.

¹⁸ Although the transcript indicates four years, it is six. Counsel for Complainant misspoke when asking his question and was not corrected by the witness, which illustrates the risk of attempting to directly examine a hostile witness, rather than letting opposing counsel first conduct direct examination. Complainant also testified that the incident occurred in 2000, which is corroborated by his resume. Tr. at 230-31, CX 3 at 4.

because Complainant has not established a link between Givner and Morgan, Respondent's representative in the hiring process.

Morgan was close to Respondent's management and knew Complainant well. However, Morgan did not physically work with Givner, as he worked out of his home in Syracuse and not the company's corporate office in New Jersey. Moreover, Morgan had only recently rejoined Respondent, having worked for another company, often in Canada, for several years. He was employed by the other company during the period when Complainant filed and won his prior whistleblowing complaint. Complainant has produced no evidence on which to find that Mr. Givner's knowledge of his whistleblowing activity was imputed to Mr. Morgan. I find that the facts in the instant matter are more closely analogous to Shriani v. ComEd/Exelon Corp., ARB No. 03-100, ALJ No. 2002-ERA-28 (ARB Sept. 30, 2005). In that case, the Board found against a complainant who was not given a promotion by managers who were unaware of his previous whistleblowing in another department within the company. Id. slip op. at 9-10.

Complainant argues that Mr. Law's personal knowledge creates knowledge of protected activity on the part of Respondent because Mr. Law was acting either as an agent of, or a joint employer with Respondent. Mr. Law had knowledge of the WASA matter, and discussed the case with Complainant. Tr. at 169-70. In addition, the evidence demonstrates that Law declined to hire Complainant after Law became aware of his actions at WASA. However, I find that Law is neither an agent for Respondent, nor jointly employed by Respondent. To be an agent of Respondent, Mr. Law would have to have performed services for Respondent while subject to Respondent's control or right to control. Restatement (Second) of Agency § 220(1) (1958).¹⁹ The exact opposite was true—Respondent was the agent of Mr. Law's employer, Shaw/Stone & Webster. CX 9 (contract between Shaw and Respondent). Complainant cites a New Jersey case, Abbamount v. Piscataway Township Board of Education, 650 A.2d 958 (N.J. 1994), for the proposition that “agency law is sufficiently flexible to provide just results in the great variety of circumstances presented by [the retaliatory discharge of whistleblowers].” Id. at 964 (brackets in original). However flexible agency law may be, it is hardly elastic enough to convert a master into a servant, which is what Complainant is arguing here. Mr. Law worked for Shaw/Stone & Webster, the company that hired Respondent, and Complainant did not charge that entity with discrimination. Instead, Complainant identified that company's agent, Givoo Inc., as the alleged discriminating entity.²⁰

¹⁹ Complainant cites to this Restatement section, which has been adopted by New Jersey courts. The citation is not apt, for the reason mentioned in the main text, but also because a comment to the Restatement section more accurately describes the situation:

When two persons are engaged in a common undertaking, it may be understood that there is to be joint control, as where two men hire an automobile for a vacation trip, alternating in driving. On the other hand, two servants, directed to drive on their master's business and alternating in driving, do not agree to joint control, and one of them would not be liable to a person hurt by the negligent driving of the other.

Restatement (Second) of Agency § 220 cmt. d. In the latter situation, each servant could only create liability on the part of their master, not for each other. Mr. Law and Mr. Morgan served different employers. Assuming *arguendo* that Mr. Law retaliated against Complainant, that does not create liability on the part of Mr. Moore or his master (Respondent) without more (such as if Mr. Law told Mr. Moore that he was retaliating for whistleblowing activity).

²⁰ I note that Complainant (with the same counsel) faced a similar situation in 1999 when dealing with WASA, and at that time chose to pursue the master (WASA) and not the servant (Givoo).

Complainant also posits that Mr. Law occupies the position of “joint employer,” a doctrine that has been used in Sarbanes-Oxley whistleblowing claims to provide jurisdiction where a private company owned by a public company retaliates against a whistleblower. The joint employer theory allows claims against the parent company for the subsidiary’s actions where the parent exercises sufficient control over the subsidiary. Complainant cites, among other cases, Armbrister v. Quinn, 711 F.2d 1332 (6th Cir. 1983). The facts of that Title VII case, however, are entirely different from the present matter. In Armbrister, and in other cases cited by Complainant, the companies involved had shared ownership and shared operations. For example, employees of one company used credit cards issued by the other company, employees were routinely transferred between the entities, some of the same individuals were officers of both companies, and one company had approval power over any purchase of more than \$200 by the other company. Id. at 1338-39. Respondent and Shaw/Stone & Webster are separate companies, with separate ownership, management, and operations. The two companies were collaborating on a single project under contract with a utility company. Respondent did not have any sort of control over the routine business of Shaw, which would be required to make Respondent liable for Shaw’s actions under a joint employer theory.

I further note that the application of the joint employer test in SOX and Title VII cases appears to have been limited to issues involving jurisdictional requirements. I find no grounds to expand upon its use in the instant matter. On the basis of the evidence of record, I conclude that the only way that Mr. Law’s knowledge of Complainant’s protected activity would be relevant would be if Respondent was aware that Law denied Complainant employment because of his protected activity. Mr. Morgan testified that Mr. Law had a part in ensuring that Complainant was not hired, by lowering his standing on the list, thereby delaying his consideration for employment. It is clear that there is a temporal relationship between Law’s knowledge of Complainant’s whistleblowing and the lowering of Complainant’s status on the list of eligible technicians. In fact, it is uncontroverted that Law did not hire Complainant for any outage after learning of his protected activity. Further, the evidence could conceivably support a finding of pretext in Law’s explanation that he lowered Complainant’s status because he did not get along with others, despite a history of Law hiring Complainant for outages in the past. However, Complainant failed to name Shaw/Stone & Webster as a discriminating party in the subject complaint, and therefore did not name Law as a party who allegedly violated his whistleblowing protections.

I find that even if could be shown that Mr. Law retaliated against Complainant, the evidence does not establish that Mr. Morgan was aware of Law’s actual intentions toward Complainant. There is no evidence that Mr. Morgan heeded Mr. Law’s advice regarding Complainant’s standing on the list because of Complainant’s whistleblowing activities.

Although I decline to impute Mr. Givner’s or Mr. Law’s knowledge of Complainant’s protected activity to Mr. Morgan, it is necessary to consider whether Mr. Morgan had independent knowledge of the protected activity. Morgan testified that he was not aware of Complainant’s protected activity at the time hiring decisions were made. Tr. at 178. Complainant argues otherwise. In support of his contention, Complainant offers a direct, but out-of-context, statement by Mr. Givner that Mr. Morgan may have lied in his statement to

OSHA. Referring to Tr. at 85, Counsel for Complainant contended that Givner acknowledged "...that Morgan may be lying." Compl. Brf. at 30 n.25. However, this is not an accurate and complete reflection of the hearing testimony, which states in relevant part:

MR. KOHN: Did Mr. Morgan lie to you about having no contact with Mr. Bobreski?

THE WITNESS: Maybe, he did.

JUDGE BULLARD: I just have to clarify that last statement. It's hanging out there. It's not that I don't trust your powers of cross-examination.

Mr. Givner, you wrote in your statement to the Department of Labor that Mr. Morgan spoke with Mr. Bobreski on April 3rd, after the job was fully staffed. So, Mr. Morgan did tell you at some point that he spoke with Mr. Bobreski.

THE WITNESS: Yes.

JUDGE BULLARD: Correct?

THE WITNESS: Yes.

JUDGE BULLARD: All right. So, when you were asked, did he ever lie about not speaking with Mr. Bobreski

THE WITNESS: I don't believe he lied about it. Maybe, the dates were wrong. But, he said he had spoken to Jim and he had told Jim, if you could find other employment, seek it.

Tr. at 85-86. I decline to find that this testimony contradicts Morgan's testimony regarding his awareness of Complainant's protected activity.

Complainant also argues that it is reasonable to conclude that Mr. Morgan knew about his prior protected activity for the following reasons: Complainant knew Mr. Morgan; Complainant placed a telephone call to Mr. Morgan regarding the failure to hire at Fitzpatrick; Mr. Morgan had a close relationship with Respondent's management; and the fact that people in the industry knew and talked about the prior case. These facts could constitute circumstantial evidence favoring Complainant's position. However, neither Complainant nor Mr. Morgan testified that they had spent any time together since before the protected activity occurred in 1999. In fact, Complainant testified that he and Mr. Morgan were "non-communicative." Tr. at 232. Their only contact was a single phone call initiated by Complainant to protest Morgan's failure to hire him on another job. Complainant testified that he spoke with Mr. Morgan, and Mr. Morgan testified that Complainant left him a message on his message machine. I accord more weight to Mr. Morgan's version of the telephone communication, as he provided specific and compelling reasons for his recollection that Complainant left a message. Mr. Morgan testified that he felt that Complainant had threatened his life. I find that given the circumstances of the phone call and Mr. Morgan's family tragedy, it is reasonable to conclude that Mr. Morgan concentrated on the tone and not the substance of Complainant's communication.

Although Complainant testified that Mr. Morgan was close with Respondent's management, and specifically with Mr. Givner, the evidence shows that Mr. Morgan did not work for Respondent during the period that Complainant filed and pursued the WASA claim. Rather, Mr. Morgan was employed by another company, working often on projects in Canada. Even when Morgan returned to work for Respondent shortly before the Hope Creek job in 2006,

he worked from his home in Syracuse, New York and not at the corporate office in New Jersey. In addition, I am not convinced that knowledge about Complainant's victory against WASA was widespread. I note that the individuals in this industry do not work at a common work site on a daily basis. Mr. Law testified that he learned about it from one other person at the union hall, but did not know who the employer had been, or if Complainant had won. Tr. at 169, 171. Considering the fact that the previous complaint did not involve a nuclear power plant, and the fact that Mr. Morgan was out of the country much of the time, I decline to conclude that Mr. Morgan must have known about the prior protected activity on the basis of it being common knowledge.

The strongest²¹ circumstantial evidence that discredits Mr. Morgan's claim of ignorance is the inconsistencies between his hearing testimony and his OSHA statement, and the corresponding discrepancies of Mr. Law. In the original statements, the two men both say that Mr. Morgan made the hiring decisions more or less on his own. In the hearing, both say that Mr. Law had significant input, to the point of raising the question of why Mr. Morgan and Respondent were needed at all. However, the probity of this evidence affects the credibility of the witnesses in general rather than providing indirect proof of Mr. Morgan's knowledge of Complainant's whistleblowing activity. If Mr. Law really made the hiring decisions, then the issue of his (and Shaw's) not being named in the complaint resurfaces. If Mr. Morgan was the decider, then Complainant need demonstrate that he knew about the prior protected activity. Any discrediting of Mr. Morgan's account does not automatically prove that Complainant's theory is true. In addition, I am not convinced that the inconsistencies are significant. Both men were interviewed by OSHA, and the investigator drafted their statements at a later date and returned them to the subjects of the interviews for review and signature.²² Without seeing a transcript of the interview, and considering that there was no opportunity for cross examination, I am unwilling to assign great weight to the absence of a fact in the OSHA interviews. Complainant did not need to raise direct evidence of Mr. Morgan's knowledge, but he needed more circumstantial evidence than exists in the record. Accordingly, Complainant has not proven by a preponderance of the evidence that Mr. Morgan knew about his protected activity.

Assuming, arguendo, that Complainant could prove that Mr. Morgan had knowledge of protected activity, he would need to establish that Mr. Morgan was responsible for the adverse action taken against him. Despite contradictory evidence, I find from the record as a whole that Mr. Morgan was the individual responsible for hiring. Mr. Law and Mr. Morgan both initially testified to OSHA that Mr. Morgan had been in charge of hiring. CX 2, 5. I find that the evidence establishes that Mr. Law had significant input in the hiring process for the spring 2006 outage, and that Mr. Morgan acted upon his recommendations regarding the suitability of technicians for the job, including assigning Complainant a low spot on the list of candidates. Tr. at 189. However, despite Morgan's deference to Mr. Law's suggestions, it was Morgan who was employed by the contractor that was being paid to do the hiring. Morgan was the person who notified technicians that they were hired, which suggests that he had final approval. Tr. at 195. Accordingly, I find that if Complainant could have proved that Mr. Morgan had knowledge of

²¹ Or at least the issue that took up the most time at the hearing.

²² The review seems to have occurred at a considerably later date. Both interviews were conducted in June of 2006. Mr. Law signed off on his review of the statement on September 22, 2006, and Mr. Morgan on October 22, 2006. CX 2, 5.

his protected activity, he would also have proven by a preponderance of the evidence that Mr. Morgan was the person responsible for hiring. However, I find that considering the record as a whole, Complainant cannot prove by a preponderance of the evidence that the person responsible for making hiring decisions had knowledge of his prior protected activity at the time of the adverse action.

4. Respondent's Articulated Legitimate Business Reason

Respondent maintains that Complainant's discharge was totally unrelated to any protected activity. The record establishes that Mr. Morgan was charged with filling positions for the spring 2006 outage, and in doing so, relied upon Mr. Law's list. Mr. Law testified that he moved Complainant low on the list of eligible candidates because he would have had difficulty assigning Complainant to work with other technicians who did not get along with Complainant. Mr. Morgan credibly testified that he did not discuss the reason that Mr. Law did not recommend Complainant for one of the earlier jobs. Mr. Law did not recall specifically discussing with Mr. Morgan whether Complainant was a good candidate for the spring 2006 outage. The testimony of record states that when Complainant's name was encountered on the list, Law told Morgan that he would not hire him "at that time". The implication was that if the selection process went deep enough, Complainant could have been hired.

Although Morgan spoke with Complainant once by telephone regarding the spring 2006 outage, Morgan and Law explained that the staffing process hinged upon funding, and that at the time of the conversation, Morgan did not know exactly how many technicians would be needed. Mr. Givner credibly testified that he was not involved in the compilation of the list of eligible technicians, or in the decision making part of the hiring process.

I find that Respondent has articulated a legitimate business reason for declining to hire Complainant for the spring 2006 outage. I find it significant that Complainant was not the only technician who had experience at Salem/Hope Creek who was not hired for the spring 2006 outage. In the fall of 2005, nine IBEW members including Complainant were hired on the same day. Six of those were rehired for the spring outage. Ten UA members also started that day in the fall of 2005, but only five were rehired for the spring outage.

I have found that Complainant cannot prove by a preponderance of the evidence that the individual who worked for Respondent and engaged in adverse activity against Complainant knew about his protected activity. Therefore, he cannot carry his burden of proof in this matter, and it is unnecessary to consider whether or not Respondent's stated reason for the adverse employment action is pretextual, or to undertake a dual motive analysis.

IV. CONCLUSION

Complainant has failed to establish that Respondent's adverse action was taken against him in retaliation for his protected activity. Accordingly, his complaint must be denied.

V. REMEDIES

At the hearing, I bifurcated the case *sua sponte* into liability and remedies. Tr. at 255. As Complainant has not established that he is entitled to relief, he is not entitled to remedies. Therefore, my ruling regarding bifurcation of the matter is moot.

ORDER

The claim of Complainant, JAMES J. BOBRESKI, against Respondent, J. GIVOO CONSULTANTS, INC., is hereby DISMISSED.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210.

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

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).

