In the Matter of:

ROBERT PHILLIPS, **ARB CASE NO. 98-020**

COMPLAINANT, **ALJ CASE NO. 96-ERA-30**

v. **DATE: January 31, 2001**

STANLEY SMITH SECURITY, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Complainant:
John T. Burhans, Esq., *Burhans Law Offices, St. Joseph, Michigan*

For the Respondent:
Kevin M. McCarthy, Esq., *Miller, Canfield, Paddock and Stone, P.L.C., Kalamazoo, Michigan*

FINAL DECISION AND ORDER

On October 20, 1995, Complainant, Robert Phillips (Phillips), filed a complaint under the employee protection provision of the Energy Reorganization Act (ERA), as amended, 42 U.S.C. §5851 (1994), and implementing regulations at 29 C.F.R. Part 24 (1995) with the Department of Labor's Wage and Hour Division. Phillips alleged that Respondent, Stanley Smith Security, Inc. (Stanley Smith) improperly terminated him from his security guard position for complaining to company personnel and to a local television station about the disarming of security guards at the nuclear power plant where he was employed.[1/] The Wage and Hour Division determined that Phillips had been retaliated against in contravention of the ERA and ordered relief. Stanley Smith appealed that determination and requested a hearing before a Department of Labor Administrative Law Judge (ALJ). Following a full evidentiary hearing, the ALJ issued a Recommended Decision and Order (RD&O) finding that Phillips had not engaged in activity protected by the ERA and recommending that the complaint be dismissed.

[1/] Phillips also alleged that he was retaliated against for filing a safety complaint with the Nuclear Regulatory Commission (NRC). He later withdrew this allegation.

We have jurisdiction to review the ALJ's recommended decision and to issue the final agency order in this case pursuant to 29 C.F.R. §24.8. Our standard of review is *de novo*. 42 U.S.C.A. §5851(b)(2)(A); 5 U.S.C.A. §557(b) (West 1996).

BACKGROUND

I. Facts

Stanley Smith is a security firm providing security guard services to the Indiana & Michigan Power Company (I&M) at its D.C. Cook Nuclear Power Plant (Cook Plant) in Bridgman, Michigan. Phillips was employed by Stanley Smith as an armed security guard at the facility from December 6, 1991, until his discharge on May 3, 1995.

Prior to the spring of 1995, all Stanley Smith security officers guarding the Cook Plant were armed. However, on March 15, 1995, Lowell Wilds, Stanley Smith's Director of Nuclear Security, informed security personnel by memorandum that the firm was working with Cook Plant management to establish a new security force configuration. The restructuring plan called for the creation of a team, comprised of skilled tactical response officers (TRO), which would defend the core areas of the plant. On the other hand, guards patrolling the perimeter of the Plant would be unarmed. This approach was advocated within the nuclear industry generally, and the plan for the I&M plant was authorized by and designed in conjunction with the NRC.

The NRC tentatively approved the plan for restructuring the security force on March 31. On April 7, 1995, Stanley Smith Site Manager Al Hemerling held a meeting to inform security personnel of the contemplated restructuring plan. The plant's security officers, including Phillips, were in attendance, as well as Wilds, Stanley Smith Executive Vice-President Randy Dorn, and Walt Hodge, I&M Superintendent for Security at the Cook Plant.

As explained in a memorandum distributed at the April 7 general meeting:

> The current focus is for an increased level of response capability by a skilled tactical response force and an unarmed force for the more routine plant protection tasks not requiring weapons qualification . . . .
>
> Recent changes to the Cook Plant Security plan and procedures provide for the use of both armed and unarmed personnel for protection of the plant. The armed response force may consist of either a skilled tactical response team or the current Appendix B level of armed officers. This restructuring will allow for continuing employment for those personnel who no longer desire to maintain their armed qualification or are unable to meet the increasing requirements of the armed response position.

* * * * *

> We understand that this restructuring change will have an impact on many of our employees. However, in today's environment, to remain competitive, we must offer our client the most cost effective service possible. In addition, we must be able to meet all of the requirements set forth by the client. We recognize that this period of restructuring will be a trying time for all of us.
>
> If you are interested in making application to the new TRO position, a letter of application/interest shall be submitted to the Stanley Smith Office no later than April 15, 1995.

Respondent's Exhibit (RX) 10 at 1, 5.

Phillips testified that at the April 7 meeting he voiced opposition to the reduction in the number of armed guards, citing the danger to the surrounding community if security were breached, but Hemerling did not respond to these concerns. However, Hemerling and Wilds, whose testimony the ALJ specifically found to be credible (RD&O at 17) "denied hearing any complaint regarding the safety of the plan from" Phillips. RD&O at 14. In fact Hemerling and Wilds testified that at the meeting Phillips only expressed concern that a guard's attendance record would be used in determining eligibility for the TRO position. Wilds added that although Phillips had expressed support for the new security program for some time prior to the meeting, Phillips' support wavered when he learned of the attendance criteria "that basically eliminated him [from eligibility for the TRO position] at that point in time."

Phillips also testified that he complained about using unarmed guards at the Plant's outer perimeters to Lieutenant McKamy, who agreed but told Phillips not to discuss the matter with I&M's Walt Hodge.[2/] Finally, Phillips also testified that he expressed his criticisms of the plan to various unidentified Stanley Smith lieutenants and captains immediately after the meeting and on various occasions thereafter. According to Phillips, the consensus was "that they should not drop their first line of defense . . ." (*i.e.* a fully-armed cadre of security officers).

According to Phillips, on April 20, 1995, he was contacted by Luke Choate, a relative by marriage and television anchor at WSBT, Channel 22, in South Bend, Indiana, regarding the restructuring plan. After confirming that the plan provided for unarmed guards at the plant's perimeter, Phillips declined Choate's invitation to appear on television to discuss the plan for fear of jeopardizing his job. Instead, he suggested that Greg Peck, local plant guard union president, be contacted for further information. RD&O at 5.

[2/] McKamy did not testify, and for that reason the ALJ ruled that Phillips' "assertion is uncontradicted as there was no evidence in the record to indicate that this conversation did not take place." RD&O at 14.

Peck was contacted by Channel 22 reporter Steve Barron and interviewed on the evening of April 24. According to Peck, he merely confirmed information that Barron already had, which included manpower numbers as well as the details of the restructuring plan. The news story about the restructuring plan ran that night and again the next day. In the news clip Peck confirmed that the proposed plan would result in a reduction in the number of armed security guards and expressed his concern that the plan would adversely affect the security of the plant. *Id.* at 5.

The Channel 22 newscasts also broadcast a copy of an internal I&M e-mail, captioned "Threat Advisory," from Cook Plant Security Chief Hodge to site Vice President Al Blind.[3/] The reports highlighted a sentence in the e-mail which indicated that the FBI had received information that terrorist groups had made threats toward nuclear facilities in the U.S. The news stories failed to mention that the e-mail actually minimized the likelihood of a terrorist attack at the facility. The e-mail previously had been posted in the security guards' break room at the Cook Plant.

Word of the television news story spread throughout the plant on April 25. Stanley Smith officials immediately suspended Peck on suspicion of disclosing security-related information to

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[3/] The e-mail stated:

> At 1445hrs on 2/9/95 I received a telephone call from Special Agent Roy Johnson, FBI, Benton Harbor field office. Roy advised that the FBI had received information that threats had been made by identified terrorist g[roup]s directed specifically at "nuclear facilities in the United States". He f[urth]er advised that the FBI's position was that the threats may be credible but they were not overreacting. He said the threats appeared to be a direct result of the recent arrest in Pakistan of the leader of the terrorist group responsible for the World Trade center bombing. He said he would keep me advised of any further developments.
>
> I contacted NRC Region III Safeguards to pass on the info and Mr. Gary Pirtle advised that they had received the information a day or so ago. He said that a threat assessment had been made by federal agencies and it was determined that no increase in security posture on a national level was warranted at this time. He said that NRC had further made the decision not to advise nuclear facilities because the threat was not considered sufficiently credible to warrant additional security measures. Based on this information I do not intend to increase security measures at the site beyond making security personnel aware of this information unless I receive guidance to the contrary.

Complainant's Exhibit (CX) 25.

unauthorized personnel and launched an investigation into the circumstances of the disclosure.[4/] Shortly after Peck's suspension, armed guard Theresa Greer told Stanley Smith managers that on the morning of April 25 Phillips had told her that he had called Channel 22 and had spoken to an individual named "Steve" concerning the security restructuring plan, had faxed him a copy of Hodge's e-mail on terrorist threats, and given him Peck's name for further inquiry.[5/]

Phillips made a video recording of the April 24 late evening Channel 22 news broadcast, brought it to the Cook Plant on the morning of April 25, and allowed Stanley Smith managers to copy it. When Hemerling returned the tape to Phillips on the afternoon of April 25 he asked Phillips about his involvement in the Channel 22 report. Phillips acknowledged speaking to his relative, Choate, but indicated nothing further. Hemerling then asked Phillips to prepare a written statement concerning his involvement.

The following morning, Stanley Smith assistant site manager Al White met with Phillips and notified Hemerling that Phillips was refusing to prepare a statement regarding his involvement with the broadcast. Hemerling then interviewed Phillips in the presence of his union representative. When Hemerling reminded Phillips that they had discussed the need for

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[4/] All Stanley Smith employees, including Phillips and Peck, are required to sign a variety of documents acknowledging that they will not disclose security-related information to unauthorized persons. For example, when he was hired in 1991 Phillips signed a document in which he promised that he would "safeguard company and client security-related information and ensure this information is not communicated to unauthorized personnel." RX 2. These documents clearly warned that violation of company rules could result in discharge. *See, e.g.,* RX 3.

[5/] Greer prepared a written statement the next day in which she related her conversation with Phillips:

> I told Bob that Greg should not have gone to the media the way he did. Bob said to me that Greg did not go, that someone else did. . . . He then proceeded to tell me that he called WSBT channel 22 and talked to a guy named Steve. He told this Steve about the Security cutbacks and about the T.R.O. I told him to shut up, that I did not want to know this but he kept on talking. He then told me that he sent Walt's E-Mail to WSBT. I asked him how he got Walt's E-Mail and he told me "off the bulletin board in the squad room." He then told me he had faxed it to WSBT. He said he called WSBT to see if they had received the fax and they said yes.

RX 19 at 531. Before the ALJ, Phillips denied that the Greer conversation took place. However, Greer's testimony was supported by that of armed guard Linda Bennett, who testified that on April 14 Phillips asked her whether he could make copies of posted e-mail for his personal use. She told him that she didn't see a problem with it, but that he should seek permission first. Bennett testified that Hodge's e-mail was one of at most two on the break room's bulletin board at the time of Phillips' inquiry. At the hearing Phillips also denied that the Bennett conversation took place. The ALJ expressly credited the testimony of Greer and Bennett and discredited Phillips'. RD&O at 12.

him to prepare a written statement the previous afternoon, Phillips denied having any such conversation with Hemerling. However, after further questioning, Phillips conceded that Hemerling had made such a request. Phillips continued to deny any involvement in the broadcast other than his contact with Choate, specifically denied that he had any conversation with "Steve" from Channel 22, and also denied that he had any contact with any other Channel 22 personnel, either by phone or fax. Although he initially continued to refuse to prepare a written statement, at the end of the meeting he complied. Phillip's written statement merely acknowledged affirmatively answering Choate's inquiry about "unarming security" and stated that he refused to appear on television with the story but suggested Peck instead.

A second meeting was held with Phillips the next day, April 27. Hemerling, Wilds, and union representative Gary Anderson were present. At the meeting Phillips refused to sign a consent form stating that he would cooperate in the investigation of the disclosure of information to Channel 22 and declined to add anything to his written statement of the previous day.

In the meantime, Peck was also interviewed at length about his involvement in disclosing information to Channel 22. In management's view, Peck cooperated with the investigation, readily providing a statement detailing the circumstances under which he had agreed to appear on the news broadcast.

On May 1 Wilds submitted a report of his investigation into the disclosures to Stanley Smith Executive Vice-President Randy Dorn. Wilds concluded that Phillips was the "primary person involved in releasing information and the E-Mail," hypothesizing that Phillips' motive was to scuttle the restructuring plan because he would not be eligible to apply for a higher-paying TRO position. Wilds also stated that Phillips had contradicted himself in his interview with Hemerling. Wilds concluded that Phillips should be terminated because "[h]e violated state law and company/plant policies and has serious trustworthiness failures." RX 19 at 4.[6/] Dorn concurred with Wilds' recommendation and Phillips was notified of his termination on May 3 at a meeting with Hemerling and Al White, Stanley Smith Assistant Site Manager. Phillips' written termination notice, which he received and signed on that date, indicated that he was being dismissed for violating confidentiality requirements under State law, employee handbook provisions, and company and plant policies for "[o]n or about April 24 through April 26, 1995, removal of notice from bulletin board and dissemination to news media or others." RX 20.

On the other hand, Peck's ten-day suspension was reduced to five days. He was not discharged because management believed that his role as local union president forced him into the public limelight; he had received approval to speak to the media from the union's international president; and, unlike Phillips, Peck had been cooperative and truthful about his involvement.

II. The ALJ's Recommended Decision

[6/] Hemerling concurred with Wilds' recommendation.

The ALJ made several critical credibility determinations in reaching his conclusion that Phillips was not discharged in violation of the ERA whistleblower protection provision. First, the ALJ found Phillips to be a "less than credible witness, whose testimony was often contradictory and evasive." RD&O at 12. The ALJ continued:

> [T]he Complainant impressed me as a person with a personal agenda who was more concerned about protecting his own position as an armed security guard than protecting the public because of his perceived safety concerns. In particular, I do not credit the Complainant's denials concerning the transmission of the e-mail message to the news media or that he had no contact with news reporter Steve Barron prior to his discharge. His testimony is directly contradicted by the testimony of Ms. Greer and Ms. Bennett, both of whom struck me as candid and forthright witnesses. The fact that Steve Barron was contacted by someone in the employ of the respondent and the fact that the television station had a copy of the e-mail that had been posted on the plant bulletin board is not disputed. Yet, there is nothing in the record that suggests that the information was furnished by some alternative source. In short, based on the evidence before me, the finger of suspicion points only to the Complainant.

RD&O at 12. Second, the ALJ explicitly found that Hemerling and Wilds, who were involved in the events leading up to -- and who recommended -- Phillips' termination, were credible witnesses. RD&O at 17.

These credibility determinations provided the foundation for the ALJ's ultimate findings that: 1) Phillips had not registered safety complaints about the restructuring to Stanley Smith managers, but instead had expressed his concern that Stanley Smith intended to take attendance records into account in selecting officers for the TRO positions; 2) Phillips contacted Channel 22, gave the station information regarding the restructuring, and sent a copy of the "Threat Alert" e-mail to Channel 22 by fax; 3) Stanley Smith managers believed that Phillips had turned over information regarding the restructuring as well as the e-mail to Channel 22; and 4) Stanley Smith managers became convinced that Phillips had repeatedly lied to them about his contacts with Channel 22.[7/] However, the ALJ limited his conclusion to the issue of protected activity: "Based on the foregoing, I find that the Complainant has failed to establish that he engaged in protected

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[7/] The ALJ also found that Phillips had not engaged in activity protected by the ERA whistleblower provision because, in light of the NRC's approval of the restructuring plan, he could not have had a reasonable belief that the plan raised safety concerns, and because Phillips failed to articulate a statutory or regulatory basis for his criticism of the new approach. *Id.* at 13, 14-16. NRC approval of the plan and Phillips' ignorance of the law would not in and of themselves support a finding of no "reasonale belief." *See, e.g.*, *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec. and Rem. Ord., Jan. 25, 1994, slip op. at 5. Thus, we have no quarrel with Member Brown's criticism of this aspect of the RD&O. See Dissenting Opinion at 22-23, *infra.*

activity. As this is a *prima facie* element of any whistleblower claim, the complaint must be dismissed." RD&O at 18.

DISCUSSION

In order to prevail in an ERA whistleblower case such as the one before us, the complainant must prove by a preponderance of the evidence that he engaged in protected conduct, and that the employer took some adverse action against him because of that protected conduct. *Carroll v. Bechtel Power Corp*., Case No. 91-ERA-46, Sec. Fin. Dec. and Ord., February 15, 1995, slip op. at 11, n.9, *aff'd Carroll v. Dept. of Labor*, 78 F.3d 352 (8th Cir. 1996). We first discuss Phillips' claims of protected activity and then the question whether Stanley Smith retaliated against him in violation of the ERA.

A. Protected Activity

Phillips argues two bases for a finding of protected activity, internal complaints and media contact. We address each of these allegations in turn.

1. Internal Complaints. Phillips contends that he made internal complaints at the April 7 restructuring plan meeting and thereafter with regard to the safety consequences of the plan. We conclude that Phillips did not make nuclear safety-related complaints about the restructuring plan at the April 7 meeting, and that even if he expressed such concerns to fellow officers and to low level supervisors thereafter, none of the Stanley Smith supervisors who were involved in his termination were aware of such complaints.

Phillips testified that he raised nuclear safety-related objections to the restructuring plan at the April 7 meeting and afterward.[8/] Both Hemerling – who conducted the meeting – and Wilds – who was in attendance – testified that Phillips only objected to the use of attendance records as an eligibility criterion for the TRO positions. As the ALJ found:

> Mr. Hemerling and Mr. Wilds both testified at the hearing that they never heard the Complainant register any safety complaint at the restructuring meeting on April 7. . . . Both men did testify that the Complainant took issue with the requirement for the new TRO position, specifically the attendance points needed to qualify. . . .

RD&O at 17. Moreover, both Hemerling and Wilds testified "that they received no safety complaints from the Complainant subsequent to this meeting nor were they made aware of any such complaint by any other person." *Id.* The ALJ explicitly credited the testimony of

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[8/] Phillips testified that he raised safety concerns after the meeting with Lieutenant McKamy, and with several other unnamed captains and lieutenants. *See* RD&O at 14.

Hemerling and Wilds on both points, and concluded that "neither Mr. Hemerling nor Mr. Wilds knew of the Complainant's safety concerns when the decision to terminate him was made." *Id.*

Although we review ALJ decisions under the ERA *de novo*, in conformity with the federal courts, we accord special weight to an ALJ's demeanor-based credibility determinations. *See, KP&L Electrical Contractors, Inc.*, ARB Case No. 99-039, ALJ Case No. 96-DBA-34, ARB Fin. Dec. and Ord., May 31, 2000, at 4 n.2*; NLRB v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983) (contrasting exceptional weight accorded to ALJ credibility findings that rest on demeanor with lesser weight accorded to credibility findings based on other aspects of testimony, such as internal discrepancies or witness self-interest). "One must attribute significant weight to an ALJ's findings based on demeanor because neither the Board nor the reviewing court has the opportunity similarly to observe the testifying witnesses." *Kopack v. NLRB*, 668 F.2d 946, 953 (7th Cir. 1982). Here the ALJ weighed the directly conflicting testimony of Hemerling and Wilds on the one hand and Phillips on the other, and implicitly found Phillips' version of his participation in the April 7 meeting incredible. We can find nothing in the record that would lead us to overturn that determination.

We similarly credit the testimony of Hemerling and Wilds that they knew nothing about any ERA-related complaints Phillips had made to other officers after the meeting. Therefore, we find that Phillips did not express any nuclear safety-related objections to the restructuring plan at the April 7 meeting, and that if he did express any such objections to other officers later, those objections never came to the attention of the Stanley Smith officials who ultimately terminated his employment.[9/] Thus, Phillips could not have been terminated for making internal safety-related complaints about the restructuring plan.

2. Media Contact. Phillips testified that he had only one extremely limited conversation with anyone at Channel 22 prior to the broadcast of the news story on April 24. He gave the following version of his telephone conversation with Channel 22 anchorman Choate:

> Q. * * * As I understand your testimony, you indicated that the first contact you had with anyone from Channel 22 was a phone call you received from Luke Chao[t]e?

[9/] Phillips' own testimony appears to lay this issue to rest:

> Q. Did you ever express a concern to Stanley Smith management about the possibility of an intruder breaching the perimeter without armed guards there?
>
> A. No, I don't – I don't think I did. I think I just basically told them that, you know, we're kind of forgetting that this is a nuclear facility.

Transcript (T.) at 153-154.

A. Correct.

* * * * *

Q. Okay. And did that contact, in that contact did he ask questions about the restructured TRO Program?

A. He asked me if they [were] disarming security.

Q. Okay, and did that relate to this TRO Program that we've discussed here today?

A. The TRO is a segment of the restructuring.

Q. Um-hum.

A. He would – he asked me if they were going to be disarming security.

Q. Okay. And you told him yes?

A. Right.

Q. That was your reply?

A. Yes.

Q. Okay. And you didn't say anything else substantive to him?

A. No.

Q. You didn't express a safety concern to him then?

A. He asked me if I would go on the air with it, and I said, "No."

Q. Right. Did you express a safety concern about the operation of the plant to Mr. Choa[t]e in that phone conversation?

A. No.

Q. So you didn't raise a safety concern with Mr. Choa[t]e when he – that's correct, right? * * * Those are correct statements?

A. Correct.

T. at 200-201. Thus, with regard to media contacts, Phillips is evidently contending that Stanley Smith officials **erroneously** concluded that he had engaged in protected activity by giving information to Channel 22 regarding the details of the restructuring plan and turning over to news personnel a copy of the "Threat Alert" e-mail.[10/] For purposes of our analysis of this issue, it is not important whether – in fact – Phillips gave information and the e-mail to Channel 22.[11/] It is also irrelevant what Phillips' motive actually might have been for disclosing that information, if such a disclosure was, in fact, made.[12/] We also need not decide whether Phillips' asserted belief that the restructuring plan would make the Cook Plant vulnerable to attack was reasonable.[13/] What is of decisive importance is *Respondent's*

[10/] Phillips' theory in this regard is not fully developed, and is sometimes contradictory. Thus, in his brief before the Board, Phillips states that he "made his internal complaint to management and to the news media. . . ." Complainant's Initial Brief to the Administrative Review Board (Comp. Br.) at 2. Later Phillips asserts that "[t]he information released by the plant was no different than the information given to the news media by Complainant and Peck." Comp. Br. at 7. Still later Phillips states that he "had responded to a question posed to him by an anchorman off camera confirming generally the restricting [sic] plan . . . ." *Id.* at 8. Because it does not affect our decision, we will not endeavor to determine which of Phillips' contentions accurately reflects his position.

[11/] Thus, we will not burden this decision with a lengthy discussion of this issue. Suffice it to say that we can find no reason in the record not to accord decisive weight to the ALJ's demeanor-based determination that Phillips was the source of the information that Channel 22 possessed.

[12/] However, the motive ascribed by the ALJ makes sense:

> There is no doubt in my mind that the Complainant was upset by the fact that he was going to be disarmed and that due to the fact that he had acquired too many absentee points he would not be eligible to be considered for the TRO position, with its higher rate of pay. Therefore, I find that he was motivated, not by safety considerations, but rather by attempting to embarrass his employer and the licensee by creating a media event which would possibly result in reconsideration of the implementation of the newly proposed security plan.

RD&O at 12.

[13/] Member Brown concludes that "Phillips' security concerns were protected under the ERA" because he reasonably believed that NRC's approval of the restructuring plan "had been obtained fraudulently based on information suggesting that the tests and exercises relied upon to support the new security format had been intentionally contrived" so that the guards defending the plant invariably won. Dissenting Opinion at 21-22. Member Brown bases his conclusion on Phillips' testimony, which, our colleague asserts, is substantiated by the testimony of Union President Peck: "Phillips was not alone in his perception that NRC approval was based on sham security drills. Mr. Peck, the local union president, testified that he had voiced his concerns to fellow guards, including Phillips, prior to the announcement of the guard restructuring. T. 61-64, 68." However, Peck **did not** testify to anything related to "sham security drills," either on the transcript pages cited by the Dissenting Opinion or at any other point. This (continued...)

motivation for taking action against Phillips. As the Dissent accurately points out, "[t]he

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[13/](...continued)
is Peck's only testimony on the subject:

> Q. Did you testify that the company had tested this before it put it into – had proposed the restructuring?
>
> A. It had been tested at other facilities.
>
> Q. How about at the plant, through drills and exercises?
>
> A. Yes, it was.
>
> Q. And what was the result of that?
>
> * * * *
>
> [objection sustained]
>
> Q. Anyhow, as a result of what you know about the drills, did you have an additional concern?
>
> A. Yes.
>
> Q. And what was that?
>
> A. That . . .
>
> * * * *
>
> [objection overruled]
>
> * * * *
>
> Q. As a result of the drills and exercises, did you have a heightened concern about the safety and security of the plant?
>
> A. Yes, I did.
>
> Q. And what was that?
>
> A. That the reduction in numbers did not allow us to adequately defend the plan [sic] and provide our mission statement.

T. 61-64. In light of the complete lack of support for Phillips' assertion that the drills were a sham, we do not find it in the least exceptionable that the ALJ found it unnecessary to discuss Phillips' unsupported theory.

evidence must support a finding that retaliatory motive animated the adverse employment action taken." Dissenting Opinion at 17.

Stanley Smith officials represent that they terminated Phillips because they believed that: 1) Phillips disclosed security information about the nuclear power plant to unauthorized personnel at Channel 22; 2) Phillips did so **not** because he was concerned about the safety of the facility, but because he would not be eligible to apply for a TRO position and would therefore be downgraded to an unarmed guard; and 3) Phillips obstructed their investigation into the disclosure and flatly lied about his activities. We find compelling Stanley Smith's evidence in support of their rationale for terminating Phillips.

First, it makes sense to us that Stanley Smith officials believed that Phillips had turned over security information to Channel 22. Although Phillips denied it to Stanley Smith officials, on April 26 officer Greer gave Stanley Smith officials a detailed account of the conversation she had with Phillips on April 25 in which he bragged about contacting the Channel 22 reporter, giving him information regarding the restructuring plan, and sending the "Threat Alert" e-mail to the station. As the ALJ himself concluded, "the finger of suspicion points only to" Phillips. RD&O at 12.

Second, the Stanley Smith officials who made the recommendation to terminate Phillips – Hemerling and Wilds -- had no reason to think that Phillips would have turned security information over to Channel 22 out of a concern that the restructuring plan would endanger the Cook Plant should it go into effect. This is so because, as the ALJ and we have found, they had never heard Phillips make a safety-related complaint about the plan. In fact, Phillips was in favor of the plan until he learned that he would not be eligible for the armed TRO position, and the eligibility criterion was the only aspect of the plan to which they had heard him object. Thus, Stanley Smith officials did not believe that Phillips had engaged in a protected ERA- or Atomic Energy Act-related disclosure, and believed that Phillips had taken security information to the media out of a purely personal desire to derail the plan.

Third, Hemerling and Wilds had every reason to think that Phillips had lied to them about his involvement and had, in Hemerling's words, "serious trustworthiness failures." RX 19 at 529. They had Greer's statement, and had no reason to disbelieve her account of her conversation with Phillips. Additionally, Phillips contradicted himself, and engaged in obvious falsehoods during the investigation. For example, although on the afternoon of April 25 Hemerling asked Phillips to write a statement regarding his involvement, on the morning of April 26 Phillips flatly denied that he had even had such a conversation. When confronted about this falsehood, Phillips reversed course and agreed that the conversation had taken place. Finally, Phillips even refused to sign a form stating that he would cooperate with Stanley Smith's investigation. Thus, Stanley Smith officials had ample reason to believe that Phillips was lying to them and obstructing their investigation into what they considered to be a serious breach of security.

On this point we think it is significant that Phillips continued his attempts at deception even before the ALJ. Thus, he testified that the conversation with Greer never happened,

although he was at a loss to attribute a motive for Greer's asserted false testimony. In the face of credible contrary testimony, Phillips also flatly denied that he had any conversation with officer Bennett about copying an e-mail from the bulletin board. The ALJ concluded, based upon the evidence and his own evaluation of the demeanor of the witnesses, that Phillips was "a less than credible witness whose testimony was often contradictory and evasive." RD&O at 12. We agree wholeheartedly. There is every indication that Phillips made false statements under oath about his involvement in the disclosure.[14/] Under these circumstances we confess that we are not surprised that Stanley Smith officials believed that they were dealing with a security guard who would disclose security information about their facility and then lie about it.

Finally, we wish to emphasize that we agree with much of what Member Brown says in his Dissenting Opinion:

- Raising security-related concerns at a nuclear facility may be protected activity under the ERA (Dissenting Opinion at 17);

- Employee whistleblowing contact with the media may be protected (*Id*. at 20);

- In order for safety concerns to be protected, they must be grounded in conditions constituting reasonably perceived violations of the ERA and/or the Atomic Energy Act (*Id.* at 21); and

- NRC's approval of the restructuring plan did not render concerns expressed about it unreasonable (*Id*. at 22-23).

However, as the ALJ correctly found, this case is not about Phillips' "raising security-related concerns," or raising concerns constituting reasonably perceived violations of the ERA; it is not about Phillips engaging in protected contacts with the news media. At bottom, the Dissenting Opinion stands for a proposition which we find to be wholly untenable: that a security officer at a nuclear power plant may, with complete abandon, disclose to the news media security-related information "related to manpower and weapons," then lie about those disclosures and obstruct the subsequent investigation into the disclosures, and find sanctuary in the ERA whistleblower provision.

We conclude that Stanley Smith officials terminated Phillips' employment not because they believed that he had engaged in activity protected by the ERA, but because they believed that he had turned over security information to an unauthorized person to further his own

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[14/] Thus, in all likelihood the ALJ understood what Stanley Smith official Wilds had in mind when he wrote that Phillips had "serious trustworthiness failures."

personal interests, and then lied about it. Therefore, we conclude that Stanley Smith did not terminate Phillips for retaliatory reasons. Accordingly, we **DISMISS** the complaint.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

E. Cooper Brown, Member, dissenting:

Respondent Stanley Smith Security cited the basis for its termination decision as being Complainant Phillips' participation in the disclosure of security-related information to members of the media in violation of company policy, which Respondent viewed as motivated out of a desire on Phillips' part to derail the security guard reorganization; aggravated by Phillips' refusal to cooperate in Respondent's subsequent investigation. *See* R. D. & O. at 7, 9.

I am of the opinion that Phillips' disclosures to the media were protected activity under the Energy Reorganization Act, which cannot be discounted due to either his personal motive in releasing the information or his refusal to cooperate in Respondent's internal investigation. Moreover, I am of the opinion that Respondent terminated Phillips' employment in violation of the ERA whistleblower protection provisions. Thus, I dissent from the majority's opinion in this case.

As the majority points out, there exists considerable disagreement between the parties about Phillips' involvement in the media coverage of the new security force configuration that was, at the time, being put into place at the Cook Nuclear Power Plant. However, for purposes of determining whether Respondent retaliated against Phillips for having engaged in activities protected under the ERA, this dispute is largely irrelevant.

Whether or not Complainant actually engaged in the activity Respondent perceived him to have engaged in is immaterial. The focus is necessarily on the employer's perception of the employee's activity and whether the employer was motivated by its belief that the employee had engaged in protected activity. *Willy v. Coastal Corp.*, 85-CAA-1, Sec'y D&O (June 1, 1994), slip op. at 6, 13-14; *Smith v. ESICORP, Inc.*, 93-ERA-16, Sec'y Dec. & Ord. of Remand (March 13, 1996). This is because it is the employer's motivation or intention with regard to the adverse employment action it has taken that is key to establishing a causal connection. The evidence must support a finding that retaliatory motive animated the adverse employment action taken. *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 367-368 (8th Cir. 1994) (construing the Occupational Safety and Health Act's (OSHA) anti-retaliation provision, 29 U.S.C. §660(c), to protect employees from adverse employment actions because they are *suspected* of having engaged in protected activity). *Cf. Brock v. Richardson*, 812 F.2d 121, 123-125 (3d Cir. 1987) (holding that the analogous employee protection provision of the Fair Labor Standards Act, 29 U.S.C.

§215(a)(3), is not rendered inapplicable if the employer's *belief* that the employee engaged in protected activity proves false).[15/]

In the instant case it was clearly Respondent's perception, based on the information Respondent had before it at the time of its termination decision, that Phillips had played a principal role (if not *the* principal role) in the disclosure of security-related information to members of the media in violation of company policy.[16/] As the questioning of Respondent's principal officials involved in the decision to terminate Phillips makes clear, the decision to terminate Phillips was in reaction to the news stories that appeared on television and in the local papers critical of the impending security guard restructuring and partial disarming. Based on the information gathered as a result of an internal investigation, Respondent (Mssrs. Hemerling and Wilds in particular) concluded that Phillips had played an instrumental role in the news stories. Respondent's investigation revealed that, in addition to faxing the e-mail "Threat Advisory" to the television station (*see* majority opinion, *supra* at 4 n.3), Phillips instigated the initial media interest in the guard restructuring, provided background information (including information related to manpower and weapons), and arranged the TV interview of others for additional information. *See* Transcript (T) at 257, 276-277, 281-282, 287, 322, 369, 382, 385, 387. *See also* RX 12, Greer's statement of April 26, 1995;[17/] RX 19, Wilds' memo to Randy Dorn, May 1, 1995, regarding results of Respondent's investigation; RX 16, Wilds' memo to Respondent's employees, April 27, 1995; and RX 20, the "Employee Disciplinary Report" regarding Phillips, issued at the time of his termination.

Respondent's perception of Phillips' activities was clearly a contributing factor in the decision to terminate his employment. When the two principal Smith Security officials involved in recommending Phillips' termination (Mssrs. Hemerling and Wilds) were asked at hearing why Phillips was terminated, they indicated without hesitation that it was due to his participation in

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[15/] "It is evident that the discharge of an employee in the mistaken belief that the employee has engaged in protected activity creates the same atmosphere of intimidation as does the discharge of an employee who did in fact complain of FLSA violations. For that reason, we conclude that a finding that an employer retaliated against an employee because the employer believed the employee complained or engaged in other activity specified in section 15(a)(3) is sufficient to bring the employer's conduct within that section." *Brock v. Richardson*, 812 F.2d. at 125.

[16/] Initially, at the inception of Respondent's internal investigation, there was concern that protected "safeguards" information, within the meaning of 10 C.F.R. §7321, had been released. Smith Security officials appear to have been particularly concerned in this regard with the release to the media of the e-mail "Threat Alert." However, at hearing Mr. Hemerling conceded that there had been no release of "safeguard" material, T. 298, 326, but only the unauthorized release of "security related" information. "Security related" information, Hemerling testified, includes all information gained by an employee during his employment. T. 246. *See* RX 2, Item 10.

[17/] During the course of the hearing the ALJ observed that Ms. Greer's statement "goes to explain why [Hemerling] did what he did." T. 159. Relevant excerpts from Greer's statement are at footnote 5 of the majority opinion, *supra* at 5.

the communication and release of what was considered "security related" information to the media. *See* T. at 276-277, 281-282, 369, 385.[18/]

By the express language of the ERA whistleblower protection provision, 42 U.S.C. §5851(a), an employee is protected against discharge or discrimination by his employer for, *inter alia*, engaging in any action in furtherance of the purposes not only of the ERA, but of the Atomic Energy Act of 1954, 42 U.S.C. §2011 *et seq*., as well. This is clearly recognized in the legislative history accompanying the 1978 amendments to the ERA that placed into law the whistleblower protection provision. "Under this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act." Senate Rep. No. 95-848, 95th Cong., 2nd Sess. (May 15, 1978), 1978 U.S.C.C.A.N. 7303- 7304.

The fact that the scope of the ERA's whistleblower protection goes beyond the ERA to include the purposes of the Atomic Energy Act has been repeatedly recognized by this Board and the Secretary of Labor before us. Numerous decisions have recognized the raising of security-related concerns at various nuclear facilities as protected activity under the ERA. *See, e.g.*, *Miller v. T.V.A.*, ALJ Case No. 97-ERA-2, ARB Case No. 98-006, slip op. at 5 (Sept. 29, 1998) (expression of security concerns regarding proposed implementation and installation of new security system considered protected activity because it "affected nuclear safety matters"), *aff'd sub nom. Miller v. Department of Labor*, 191 F.3d 452 (6th Cir. 1999) (table); *Larry v. Detroit Edison Co.*, 86-ERA-32, Sec'y D. & O. (June 28, 1991) (raising of security concerns related to the processing of confidential "safeguards" information), *aff'd sub nom. Detroit Edison Co. v. Secretary of Labor*, 960 F.2d 149 (6th Cir. 1992) (table); *Yule v. Burns International Security Service*, 93-ERA-12, Sec'y Final D. & O., slip op. at 3, n.6 (May 24, 1995) (complaint to supervisor regarding posting of unarmed security guard at nuclear plant); *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24, Dep. Sec'y D. & O. of Rem. (Feb. 14, 1996) (raising concerns regarding security violations); *Boytin v. Pennsylvania Power & Light Co.*, 94-ERA-32, Sec'y D. & O. of Rem. (Oct. 20, 1995) (reporting security violations to NRC and subsequent participation in NRC investigation).

The ERA's employee protection provision proscribes discharging or discriminating against an employee because he has, *inter alia*, "assisted or participated or is about to assist or participate . . . in any . . . action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended." 42 U.S.C. §5851(a)(1)(F). This provision, it has been recognized, was drafted broadly by Congress. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1575 (11th Cir. 1997). Accordingly, protection is not limited to an employee's internal complaint or participation in a formal "proceeding" under 42 U.S.C. §5851(a)(1), but has been

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[18/] As the majority opinion notes, Respondent also had the perception that Complainant had disclosed the security-related information out of a desire to derail the security guard reorganization for purely personal reasons. Respondent had also concluded, as a result of Complainant's refusal to cooperate with Respondent's internal investigation (including lying at the time to Respondent's officials) that Complainant was untrustworthy. However, as discussed *infra* 24, under the circumstances of this case, neither of these rationales can serve as an independent basis justifying Respondent's termination of Phillips' employment.

held to also include employee contact with the media. *See, e.g., Dobreuenaski v. Associated Universities, Inc.*, ALJ Case No. 96-ERA-44, ARB Case No. 97-125, slip op. at 9 (June 18, 1998); *Rudd v. Westinghouse Hanford Co.*, ALJ Case No. 88-ERA-33, ARB Case No. 96-087, slip op. at 3-4 (Nov. 10, 1997); *Trimmer v. L.A.N.L.*, ALJ Case Nos. 93-CAA-9 & 93-ERA-55, ARB Case No. 96-072, slip op. at 2-3 (May 8, 1997), *aff'd sub nom. Trimmer v. U.S. Dept. of Labor*, 174 F.3d 1098 (10th Cir. 1999); *Carter v. Electrical District No. 2*, 92-TSC-11, Sec'y D. & O. of Rem., slip op. at 12 (July 26, 1995); *Floyd v. Arizona Public Service Co.*, 90-ERA-39, Sec'y D. & O. (Sept. 23, 1994). *See also, Dias-Robainas v. Florida Power & Light Co.*, 92-ERA-10, Sec'y D. & O. of Rem. (Jan. 19, 1996) (employee's mere threat to take safety concerns to media considered protected). *Cf. Crosby v. Hughes Aircraft Co.*, 85-TSC-2, Sec'y D. & O., slip op. at 23, n.15 (Aug. 17, 1993) (contacting news media not protected under analogous whistleblower provisions of TSCA only because the subject matter raised with media was not an environmental concern).

Providing the media with information concerning perceived violations of the environmental whistleblower laws has been held to constitute protected activity because it is recognized as "tantamount to preliminary steps in a 'proceeding'" under such Acts "which could expose employer wrongdoing." *Pooler v. Snohomish County Airport*, 87-TSC-1, Sec'y D. & O., slip op. at 3 (Feb. 14, 1994). As the Secretary of Labor has explained, the whistleblower protection provisions are intended not only to protect an employee's commencement or participation in proceedings governed by the whistleblower laws, but also to "protect preliminary steps to commencing or participating in a proceeding, when those steps 'could result in exposure of employer wrongdoing.'" *Helmstetter v. Pacific Gas & Electric*, 91-TSC-1, Sec'y D. & O., slip op. at 3 (Jan. 13, 1993) (citing *Poulos v. Ambassador Fuel Oil Co.*, 86-CAA-1, Sec'y D. & O. of Rem., slip op. at 3-4 (April 27, 1987)). *Accord Donovan v. Andersen Construction Co.*, 552 F. Supp. 249, 251-253 (D. Kan. 1982) (employee communication to the media protected under analogous provisions of OSHA, 42 U.S.C. §660(c), because it could result in institution of agency proceeding under Act).

Respondent's perception that Complainant disclosed the security-related information out of a desire to derail the security guard reorganization for purely personal reasons is irrelevant to the question of whether Complainant engaged in protected activity. "[W]here the complainant has a reasonable belief that the respondent is violating the law, other motives he may have for engaging in protected activity are irrelevant." *Diaz-Robainas v. Florida Power & Light Co., supra*, slip op. at 15. *Accord, Carter v. Electrical District No. 2, supra*, slip op. at 10-11; *Oliver v. Hydro-Vac Services*, 91-SWD-01, Sec'y Dec., slip op. at 14 (Nov. 1, 1995).

To be protected, Phillips' security concerns must be grounded in conditions constituting reasonably perceived violations of the ERA and/or the Atomic Energy Act. *Jones v. EG & G Defense Materials, Inc.*, ALJ Case No. 95-CAA-3, ARB Case No. 97-129, slip op. at 10-12 (Sept. 29, 1998), *appeal pending sub nom. EG & G Defense Materials, Inc. v. U.S. Dept. of Labor*, No. 99-9501 (10th Cir.); *Tyndall v. U.S. Environmental Protection Agency*, 93-CAA-6 & 95-CAA-5, ARB Dec. & Rem. Ord., slip op. at 5-6 (June 14, 1996); *Crosby v. Hughes Aircraft Co.*, 85-TSC-2, Sec'y Dec. & Ord., slip op. at 26 (Aug. 17, 1993), *aff'd sub nom. Crosby v. U.S. Dept. of Labor*, 53 F.3d 338 (9th Cir. 1995) (table); *Johnson v. Old Dominion*

Security, 86-CAA-3, Sec'y Fin. Dec. & Ord., slip op. at 15 (May 29, 1991). Mere belief that plant security may be negatively impacted by the employer's conduct is not *by itself* sufficient to establish protected activity. *Johnson v. Oak Ridge Operations Office, U.S. Dept. of Energy*, ALJ Case Nos. 95-CAA-20, -21and -22, ARB Case No. 97-057, slip op. at 10 (Sept. 30, 1999); *Minard v. Nerco Delamar Co.*, 92-SWD-1, Sec'y Dec. & Rem. Ord., slip op. at 4, 8 (Jan. 25, 1995).

Phillips' security concerns were protected under the ERA because they were based on his reasonable belief that Respondent had violated, or was in the process of violating security requirements applicable to the Cook Nuclear Facility. He had a rational basis for his concern regarding the adequacy of the new plant security format notwithstanding its NRC approval. Complainant's perception was predicated on his contemporaneous belief that NRC approval had been obtained fraudulently based on information suggesting that the tests and exercises relied upon to support the new security format had been intentionally contrived. As Phillips testified at the hearing before the ALJ:

> Question [by Attorney Buhans]:
>
> > Now, with respect to these exercises that took place, my question before, I believe, was, was there anything peculiar about them?"
>
> * * * * *
>
> Answer [by Complainant]:
>
> > [T]he adversary team actually had their hands tied. I mean, we rehearsed this for two weeks prior to the [NRC] OSRE, and we knew pretty much everything that was going to happen and where we should be to make the security look good.

T. at 151-153.

Phillips was not alone in his perception that NRC approval was based on sham security drills. Mr. Peck, the union local president, testified that he had voiced his concerns to fellow

guards, including Phillips, prior to the announcement of the guard restructuring. T. 61-64, 68.[19/]

Nor do I consider the NRC's "approval" of the guard restructuring to remove Phillips' subsequent dealings with Channel 22 from ERA protection. Nuclear safety is enhanced by encouraging employees to assert their concerns, regardless of prior NRC approval. Protection of their concerns is not dependent upon proof of actual ERA violations. Rather, as indicated above, protection is accorded to reasonably perceived violations, regardless of their full merit. Employees would be discouraged from lodging meritorious complaints if their complaints were unprotected merely because the subject of the complaint had previously received NRC approval or acquiescence. Recent events fully attest to the fact that such approval does not automatically

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[19/] If anything, the equivocal nature of Hemerling's deposition testimony, cited in his testimony at the hearing, serves to corroborate the reasonableness of Phillips' concern about the unreliability of the tests and exercises used to obtain NRC approval of the new security plan:

> Question [Attorney McCarthy]:
>
> > Mr. Burhans read you a portion of a transcript from a deposition you got the other day, from page 52 of this deposition. He asked you about lines 12 through 21, where he asked you if Mr. Keebler [training manager] had told the adversary team to perform in a manner the plant guard team would win in those exercises, and your response, as he read, was, "I never heard him say that. I do know that in the conducting of drills, there is an occasion that drills or training exercises for the officers, there could be the desire in the training environment that you could manipulate what the drill's outcome was for the benefit of the officers." Can you read the next question and answer that follows that?
>
> Answer [Hemerling, reading from his prior deposition]:
>
> > The next question is, "Do you know if there was any such manipulation?" My answer was, "I guess as a former training manager, I've got to say that there probably was some training program. I don't want to say manipulation. I don't think that's the right word. I think it's do this to, you know, to positively reinforce the officers doing this. Probably after a long night of eight-hour sessions of drilling, to end up on a upbeat if the eight-hour shift was going bad for the officers, you may want to end it on a high note for the officers, and so maybe you, you know, could manipulate the last one, if that's the word you want to use."

T. 343-44. *See* T. 296-297.

mean that the agency acted correctly or irrevocably or that it could not require subsequent modification based upon further agency review.[20/]

In the instant case, however, there can be no claim that Complainant's concerns were not reasonable based on agency approval of the actions in question, for at the time Phillips presented his concerns to the media the NRC was continuing to examine the security guard restructuring. RX 28, Nov. 3, 1995 I & M memo from J. F. Labis regarding Oct. 30 - Nov. 3, 1995 NRC inspection.[21/]

Finally, Respondent cited Phillips' refusal to cooperate with Respondent's internal investigation (including lying at the time to Respondent's officials), upon which Respondent concluded that Complainant was untrustworthy, as an aggravating factor leading to its decision to terminate Phillips. Phillips' conduct must, however, be evaluated within the whistleblower context in which it arose. *Carter v. Electrical District No. 2*, *supra*, slip op. at 11-12; *Kenneway v. Matlack*, 88-STA-20, Sec'y Final Dec. & Ord., slip op. at 5-6 (June 15, 1989).

Within the instant context of Complainant's whistleblowing activities, it was not unreasonable for Complainant to refuse to cooperate in Respondent's internal investigation. For reasons of self-preservation it is certainly understandable that an employee, such as Phillips, might be less than candid during management's efforts to assess blame for his protected activity. He should not be forced to put himself at immediate risk of adverse action for failing to divulge his role in such activity. To hold otherwise would discourage potential whistleblowers, contrary to public policy. "The ability of nuclear industry employees to come forward to either their employers or to regulators with safety concerns without fear of harassment or retaliation is a key component of our system of assuring adequate protection of public health and safety from the inherent risks of nuclear power." H. Rep. No. 102-474(VIII) at 79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2282, 2297.

Under the ERA, the relevant question, which I would decide in Complainant's favor, is whether he established that his protected activity was a *contributing factor* in Respondent's decision to terminate his employment. 42 U.S.C. §5251(b)(3)(C). Clearly, based upon the preponderance of the evidence of record, it was. But of course, under the ERA this is not the end of the analysis. If Respondent Smith Security was to demonstrate "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior," Respondent still would not be liable. 42 U.S.C. §5851(b)(3)(D). *Creekmore v. ABB Power Systems Energy Services*, *supra*, slip op. at 5. "For employers, this is a tough standard, and not by accident." *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d at 1572 (citing ERA 1992 legislative history).

[20/] *See, e.g.*, Sept. 13, 2000 statement by U.S. District Court Judge James A. Parker in Albuquerque, N.M. to Dr. Wen Ho Lee, who pleaded guilty to single charge of mishandling nuclear secrets. *N.Y. Times*, Washington, D.C. final ed., Sept. 14, 2000, at A21.

[21/] If anything, the NRC's ongoing monitoring of the guard restructuring further demonstrates the reasonableness of Phillips' concerns.

As noted previously, the only additional basis cited by Respondent for Complainant's discharge is his failure and refusal to cooperate, and be "forthcoming and honest," in Respondent's internal investigation of the television reports. However, given the context, this cannot serve as an independent basis for Phillips' termination. Phillips had the right under the ERA to anonymous and unfettered communication of his concerns regarding the security of the guard restructuring plan, which communication under the facts he reasonably believed was in furtherance of the purposes underlying the ERA. Respondent cannot lawfully assert an employment-related obligation on Phillips' part for full disclosure of his role in derogation of this federal right. Therefore, Phillips' reticence and apparent deceptiveness during the company's investigation of the news leaks cannot furnish an independent, nondiscriminatory basis for his dismissal. *See Stone & Webster Engineering Corp. v. Herman*, 115 F.3d at 1573-74; *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 279-81 (7th Cir. 1995).[22/]

For the foregoing reasons, I would thus hold that Respondent Stanley Smith Security terminated Complainant Phillips' employment in violation of the whistleblower protection provision of the ERA.

E. COOPER BROWN
Member

[22/] Moreover, as evidenced by Peck's suspension for his televised interview despite his cooperation in the company's investigation, it is clear that Phillips would have been subjected to some form of discriminatory adverse action for his protected media contact even if he had cooperated fully in the company's investigation.