U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

KATHY ADAMS,

COMPLAINANT,

v.

DUKE ENERGY CAROLINAS,

RESPONDENT.

ARB CASE NO. 2022-0043

ALJ CASE NO. 2021-ERA-00005
DISTRICT CHIEF
ALJ PAUL C. JOHNSON, JR.

DATE: January 31, 2024

Appearances:

***For the Complainant*:**
Adam Augustine Carter, Esq. and R. Scott Oswald, Esq.; *The Employment Law Group, P.C.*; Washington, District of Columbia

***For the Respondent*:**
R. Jeremy Sugg, Esq.; *Lincoln Derr PLLC*; Charlotte, North Carolina

Before HARTHILL, Chief Administrative Appeals Judge, and WARREN and THOMPSON, Administrative Appeals Judges

DECISION AND ORDER OF REMAND

THOMPSON, Administrative Appeals Judge:

This case arises under the whistleblower protections of the Energy Reorganization Act (ERA) and its implementing regulations.[1] On May 1, 2020, Kathy Adams (Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Duke Energy Carolinas (Respondent) retaliated against her in violation of the ERA by reassigning her to a non-

[1] 42 U.S.C. § 5851; 29 C.F.R. Part 24 (2023).

supervisory developmental position after she engaged in protected activity. After 30 days had elapsed, Complainant requested OSHA to terminate its investigation before completion and issue a determination based on the information gathered at that point in its investigation. Based on that information, OSHA was unable to conclude if there was reasonable cause to believe a violation had occurred and dismissed Complainant's complaint on March 5, 2021. Complainant filed timely objections with the Office of the Administrative Law Judges requesting a hearing and that the case be assigned to an Administrative Law Judge (ALJ).

Respondent filed a motion for summary decision with the ALJ, and on May 19, 2022, the ALJ issued an Order Granting Respondent's Motion for Summary Decision (D. & O.). Complainant appealed to the Administrative Review Board (ARB or Board). For the following reasons, the Board vacates the ALJ's D. & O. and remands the case for the ALJ to proceed to an evidentiary hearing on the merits.

BACKGROUND[2]

Duke Energy Corporation (Duke) hired Complainant into an entry level position in 1977. Over the years, Complainant was promoted to positions of increasing responsibility, ultimately obtaining the position of Quality Control (QC) Manager.[3] As part of her duties as QC Manager, Complainant supervised six QC supervisors in charge of each of Duke's six nuclear sites (Brunswick, Harris, Robinson, Catawba, McGuire, and Oconee). She also led a major initiative to gain consistency and clarity across the different nuclear sites.[4] Complainant reported to Duke's General Manager of Nuclear Oversight (GM NOS), Scott Saunders (Saunders).[5]

On April 4, 2018, Complainant and Saunders attended a "kickoff" outage meeting at the Harris nuclear site.[6] Duke held "kickoff" meetings prior to scheduled nuclear site outages to set, reiterate, and reinforce management's expectations of

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[2] This background summarizes the most significant aspects of the matter, as derived from the ALJ's D. & O. and record evidence. Nothing in this background section should be considered as constraining any fact finding the ALJ makes on remand after an evidentiary hearing.

[3] D. & O. at 2.

[4] *Id.* Duke's nuclear fleet consists of six nuclear sites located in North Carolina and South Carolina. *Id.* at 2, 2 n.1. Respondent is a wholly owned subsidiary of Duke and owns the operating licenses for three of its nuclear sites. Respondent (Resp.) Response Brief (Br.) at 6.

[5] D. & O. at 2.

[6] *Id.*

safety standards.[7] Due to the volume of work required during these scheduled outages, Duke hired contract workers to supplement its workforce.[8] At the Harris "kickoff" meeting, Day & Zimmerman (D & Z) contract workers, who had just completed an outage at the Brunswick nuclear site, complained to Saunders and Complainant that the Brunswick QC Supervisor, Mike Gore (Gore), discouraged them from writing nuclear condition reports.[9] Ultimately, Harris's QC Supervisor, Mike Hart (Hart) submitted a complaint to Duke's Employee Concerns Program (ECP) regarding Gore, and, as a result, ECP opened an investigation into the alleged conduct.[10]

Sometime in May of 2018, the Robinson QC Supervisor, Pete Tingen (Tingen), raised concerns to Saunders regarding Complainant.[11] Specifically, Tingen expressed concerns that Complainant was a micromanager and that she treated certain employees differently compared to other employees.[12]

On September 5, 2018, the ECP completed its investigation of Gore.[13] Their investigation did not substantiate allegations that Gore's behavior or communications undermined QC independence.[14] Rather, the investigative report stated that Gore made it clear to employees that nuclear quality and safety was a priority.[15] The investigative report did note "some instances" where QC inspectors were "hesitant" to write nuclear condition reports.[16] The investigative report identified five corrective actions, none of which recommended that management determine whether the position of a QC Supervisor was an appropriate job assignment for Gore.[17]

In the fall of 2018, during a nuclear site outage at Robinson, the ECP received an anonymous complaint alleging that Gore was discouraging inspectors

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7 *Id.* at 2 n.4.

8 *Id.* at 2 n.4.

9 *Id.* at 2. Nuclear condition reports are electronic documents used to record non-conforming work. *Id.* at 2 n.5.

10 *Id.* at 2-3; Respondent Exhibit (RX) G (Deposition Transcript, selected excerpts of William Ted Smith) at 15, 34, 192-93.

11 D. & O. at 3.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 RX A (Documents produced by Respondent) at 77-78.

from writing nuclear condition reports and that there was a lack of independence between the QC and maintenance departments.[18] On September 13, 2018, the ECP transferred the complaint to Complainant via a "Transfer of Concern" form, used to transfer complaints or other issues between departments.[19] On September 20, 2018, Complainant sought guidance from Saunders on how to handle the Transfer of Concern.[20] Complainant met with Saunders in late September and pushed for a corrective action and possibly a second investigation into Gore.[21] Instead, Saunders recommended involving the D & Z ECP representative, which prevented further escalation of the issue at that time.[22] Complainant did not agree with his recommendation but Saunders instructed her to transfer the concern to the D & Z ECP representative and she followed his instruction.[23]

Around the same time the ECP transferred the complaint concerning Gore to Complainant, Tingen and Hart filed complaints with the ECP alleging that Complainant created a chilled work environment, displayed poor leadership, micromanaged the QC organization, and took adverse actions against individuals who challenged her.[24] ECP formed an independent investigation team to investigate the allegations against Complainant, selecting Beverely Adkins-Bailey (Adkins-Bailey) to be the primary investigator.[25]

In late 2018, the QC Organization underwent a reorganization that required a workforce reduction of ten individuals. Complainant was responsible for rating the QC supervisors to decide who would be removed from their position, i.e., deselected.[26] Complainant ranked Tingen and Hart as the lowest performing QC supervisors.[27] Saunders reviewed and approved Complainant's rankings. Duke's human resources and legal departments also reviewed Complainant's rankings and

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18 D. & O. at 4.

19 *Id.*; RX J (Deposition Transcript (1/25/2022), selected excerpts of Brian McCabe) at 99-100.

20 D. & O. at 4.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 4-5. Complainant commented that neither Tingen nor Hart were "strong leader[s]" and both required "direct oversight for even mundane and everyday tasks." *Id.* at 5.

concluded there was no evidence of discrimination or retaliation.[28] As a result of Complainant's rankings, both Tingen and Hart were deselected.[29] Duke terminated Tingen's employment, and the Harris nuclear site's maintenance department hired Hart.[30] After their deselection, Tingen and Hart filed complaints alleging Complainant retaliated against them for challenging her authority and for raising concerns about her to the ECP.[31] As a result, the investigation into Complainant led by Adkins-Bailey was expanded to consider those allegations.[32]

In February of 2019, Saunders and Complainant met to discuss her annual performance appraisal.[33] The parties dispute whether Saunders advised Complainant that she was going to lose her job or, at best, be transferred to another position.[34] Before writing the appraisal, Saunders consulted human resources about how to handle the subject of the ongoing investigation of Complainant, which he had no specific knowledge of because he was not part of the investigation.[35] He was instructed by HR to include language in Complainant's appraisal that characterized the concerns that were unfolding from the then-incomplete investigation.[36]

On March 24, 2019, Complainant attended a kickoff outage meeting at the McGuire nuclear site, which followed an outage at the Brunswick nuclear site.[37] At this meeting, D & Z contract workers advised Complainant that nothing had changed with Gore.[38] Complainant asked a D & Z team leader to survey the D & Z

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28 Complainant Exhibit (CX) 9 (Deposition Transcript, selected excerpts of William Scott Saunders) at 72; CX 3 (Deposition Transcript, selected excerpts of Megan Butler) at 56-57.

29 D. & O. at 5.

30 *Id.* at 5, 5 n.8.

31 *Id.* at 5.

32 *Id.*

33 *Id.*

34 *Id.* Complainant contends that during their meeting Saunders told her that she was going to lose her job or be transferred, but either way, she was not going to stay in her position. CX 1 (Deposition Transcript, selected excerpts of Complainant) at 39-40. Saunders contends that he did not tell Complainant she was going to lose her job or be transferred because he had no knowledge of the extent of the investigation other than what was captured in the appraisal. RX D (Deposition Transcript, selected excerpts of William Scott Saunders) at 196.

35 RX D at 102-05.

36 D. & O. at 5-6.

37 *Id.* at 5.

38 *Id.*

contract workers that had just worked at the Brunswick nuclear site outage.[39] The next day, on March 25, 2019, the D & Z team leader provided Complainant with a list of concerns about Gore based on the survey responses.[40] Complainant advised Saunders of these additional complaints, and he agreed with her recommendation that Gore's conduct required corrective action.[41] With Saunders's help, Complainant began working with human resources to deliver a corrective action to Gore.[42]

On June 1, 2019, Saunders transferred positions, and Brian McCabe (McCabe) was selected as the new GM NOS.[43] After McCabe started, he spoke with Complainant about the status of the pending corrective action for Gore, and Complainant advised that she was waiting for guidance from human resources.[44] McCabe questioned Complainant on the timeliness of the corrective action because she had not taken any action since March.[45] McCabe told her that her actions were untimely and that she should have followed up with human resources sooner to bring the corrective action to a conclusion.[46] McCabe then worked with Complainant to obtain final approval from human resources for the corrective action.[47] On June 19, 2019, Complainant and McCabe delivered the corrective action to Gore.[48]

In September of 2019, Adkins-Bailey completed the investigation into the allegations against Complainant.[49] The investigative report found that there was a perception that Complainant would take adverse actions against individuals who crossed her, and that this perception was strengthened following the deselection of Tingen and Hart.[50] There was, however, no evidence that Tingen and Hart were deselected in retaliation for challenging Complainant, or for bringing their concerns to the ECP.[51] The investigative report also found that "50% of the interviewees

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39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 5-6.

43 *Id.* at 5.

44 *Id.* at 5-6.

45 RX C (Deposition Transcript (10/14/2021), selected excerpts of Brian McCabe) at 91.

46 *Id.* at 95-96.

47 D. & O. at 6.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

expressed hesitancy in raising non-nuclear safety concerns to the QC Manager."[52] The investigative report identified six corrective actions, including "[c]onsider employee feedback indicating a belief that the NOS QC Manager takes adverse actions with anyone who challenges or disagrees with [her] direction and determine if this is an appropriate job assignment for [her]."[53]

After reviewing the investigative report, McCabe decided to reassign Complainant to a non-supervisory developmental position.[54] McCabe submitted the proposed reassignment to Duke's Employee Review Board (ERB), and the ERB recommended reassignment based on the findings of the investigation, despite noting that many of the allegations raised against Complainant could not be substantiated.[55]

On November 6, 2019, McCabe informed Complainant of the results of the investigation and his decision to reassign her.[56] Complainant maintains that McCabe told her that she was being reassigned because of her failure to timely correct Gore, the results of the investigation, and a pending lawsuit filed by Tingen and Hart.[57] McCabe maintains that he does not recall any reference to Gore during his conversation with Complainant and denies that the Gore corrective action played a role in his decision to reassign her.[58] Complainant was later transferred to a developmental assignment where she has no supervisory or managerial responsibilities.[59]

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the ERA.[60] The Secretary of Labor has delegated authority to the Board to review ALJ decisions

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52 CX 26 (Investigation into Complainant) at 4.

53 *Id.* at 27-28.

54 D. & O. at 6. In making the decision to reassign her, McCabe noted that the investigative report indicated that fifty percent of interviewees were hesitant to raise concerns to Complainant and explained that he thought the best way to handle this decline in a safety-conscious work environment was to reassign Complainant. RX J at 85-86.

55 D. & O. at 6.

56 *Id.*

57 *Id.* at 6, 12.

58 RX J at 48, 85-86.

59 D. & O. at 6.

60 42 U.S.C. § 5851.

under the ERA.[61] The ARB reviews an ALJ's order on summary decision de novo, applying the same standard that ALJs employ.[62] Summary decision must be entered if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issues as to any material fact and that a party is entitled to summary decision.[63] In reviewing summary decision cases, the Board reviews the record as a whole in the light most favorable to the nonmoving party.[64]

DISCUSSION

To prevail on an ERA whistleblower complaint, a complainant must establish by a preponderance of the evidence that they engaged in protected activity, that they suffered an adverse personnel action, and that their protected activity was a contributing factor in the adverse personnel action taken against them.[65] A "contributing factor" is any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the unfavorable personnel action."[66] If all of those elements are met, the respondent may still avoid liability if it

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[61] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020); 20 C.F.R. § 24.110.

[62] *Mansell v. Tenn. Valley Auth.*, ARB No. 2020-0060, ALJ No. 2019-ERA-00010, slip op. at 3 (ARB May 12, 2022) (citation omitted); *Vinnett v. Exelon Generation*, ARB No. 2023-0005, ALJ No. 2022-ERA-00002, slip op. at 4 (ARB Mar. 31, 2023).

[63] *Vinnett*, ARB No. 2023-0005, slip op. at 4.

[64] *Id*.

[65] 29 C.F.R. § 24.109(b)(1). On appeal, Complainant argues that the ALJ failed to apply the correct legal standard in his contributing factor analysis. Specifically, Complainant argues that the ALJ should have applied the three-part burden-shifting framework that has developed under *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1974). However, the *McDonnell Douglas* burden-shifting framework is separate and distinct from the ERA evidentiary framework. *See* 29 C.F.R. § 24.109(b)(1). Accordingly, the ALJ applied the correct legal standard, the ERA evidentiary framework, in his D. & O. *See Armstrong v. Flowserve US, Inc.*, ARB No. 2014-0023, ALJ No. 2012-ERA-00017, slip op. at 6 n.22 (ARB Sept. 14, 2016) ("The ERA, however, sets forth an independent, two-part evidentiary framework under which it is the complainant's burden to demonstrate that his protected activity contributed to an adverse action. If he does so, the burden switches to the respondent to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.").

[66] *Armstrong*, ARB No. 2014-0023, slip op. at 5-6 (citing *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 2009-0057, ALJ No. 2008-ERA-00003, slip op. at 13 (ARB June 24, 2011)).

"demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity."[67]

In general, the party bringing a motion for summary decision bears the initial responsibility of demonstrating the absence of a genuine issue of material fact.[68] A moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[69] Accordingly, to prevail under a motion for summary decision, Respondent must show that Complainant did not present evidence to support an essential element of the claim and that there are no disputes of material fact.[70] To successfully oppose the motion, Complainant need not show that she will ultimately prevail on the merits of her complaint because the summary decision standard requires only that Complainant establish the existence of "a fact dispute concerning the elements of h[er] claim" that could affect the outcome of the case.[71] Complainant "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing."[72]

"Summary decision on the issue of causation is even more difficult in ERA whistleblower cases where Congress made it 'easier for whistleblowers to prevail in their discrimination suits,' requiring only that the complainant prove that his protected activity was 'a contributory factor' rather than the more demanding causation standards . . . ."[73] A fact-finder may reasonably infer causation shown by circumstantial evidence to preclude summary decision,[74] including evidence of

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67 29 C.F.R. § 24.109(b)(1).

68 *Vinnett v. Mitsubishi Power Sys.*, ARB No. 2008-0104, ALJ No. 2006-ERA-00029, slip op. at 7 (ARB July 27, 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

69 *Holland v. Ambassador Limousine/Ritz Transp.*, ARB No. 2007-0013, ALJ No. 2005-STA-00050, slip. op at 2 (ARB Oct. 31, 2008) (quoting *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 73 (D.D.C. 2003)).

70 *Mansell*, ARB No. 2020-0060, slip op. at 4.

71 *Vinnett*, ARB No. 2008-0104, slip op. at 7 (quoting *Muino v. Florida Power & Light Co.*, ARB Nos. 2006-0092, -0143, ALJ Nos. 2006-ERA-00002, -00008, slip op. at 8 (ARB Apr. 2, 2008)).

72 *Holland*, ARB No. 2007-0013, slip. op at 3 (quoting 29 C.F.R. § 18.40(c)).

73 *Franchini v. Argonne Nat'l Lab'y (Franchini I)*, ARB No. 2011-0006, ALJ No. 2009-ERA-00014, slip op. at 9 (ARB Sept. 26, 2012).

74 *See Bobreski*, ARB No. 2009-0057, ALJ No. 2008-ERA-00003, slip op. at 13 ("Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence.").

temporal proximity,[75] an employer's shifting rationale for the adverse action,[76] or disparate treatment.[77] Furthermore, the ARB has previously explained that "in a motion for summary decision, an employer cannot nullify the complainant's evidence of contributory factor by simply presenting an independent lawful reason for the unfavorable employment actions."[78]

On May 19, 2022, the ALJ issued an Order Granting Respondent's Motion for Summary Decision, denying Complainant's complaint. The ALJ found, for purposes of ruling on Respondent's motion, that (1) Complainant's reassignment to a non-supervisory developmental position qualified as an adverse personnel action; (2) Complainant engaged in ERA-protected activity on three occasions;[79] and (3) Complainant did "not put forth any evidence that her protected acts contributed in any way to the adverse personnel action."[80]

On appeal of an order granting a motion for summary decision, the Board reviews the entire record to determine whether there is any genuine issue of a material fact that would prevent summary disposition of the case.[81] The Board has

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[75] *See Franchini I*, ARB No. 2011-0006, slip op. at 10 ("Temporal proximity is an important part of a case based on circumstantial evidence [and] . . . [d]etermining what, if any, logical inference may be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science but requires a 'fact-intensive' analysis [and] [i]nvolves more than determining the length of the temporal gap and comparing it to other cases.") (citations omitted).

[76] *See id.* at 9-10 ("[I]n some circumstances, evidence of inconsistencies in the respondent's reasons could present sufficient circumstantial evidence for the ALJ to reject the employer's asserted reasons and, if sufficiently persuasive, accept the complainant's claim that protected activity was a contributory factor.") (citation omitted).

[77] *See Armstrong*, ARB No. 2014-0023, slip op. at 11-13; *see also Smith v. U.S. Dep't of Lab.*, 674 F. App'x 309, 315-16 (4th Cir. 2017) (ERA whistleblower claim) (noting the propriety of considering whether an "employer is selectively enforcing rules or selectively imposing extraordinarily harsh discipline against whistleblowers as a pretext for unlawful retaliation").

[78] *Armstrong*, ARB No. 2014-0023, slip op. at 9 (citation omitted).

[79] The ALJ found that Complainant engaged in ERA-protected activity on three occasions: (1) on September 20, 2018, when she spoke to Saunders on how to handle Transfer of Concern and the complaints against Gore; (2) on March 25, 2019, when she informed Saunders about the additional complaints against Gore from the Brunswick nuclear site's inspectors and advocated for a corrective action against Gore; and (3) on June 19, 2019, when she held a meeting with McCabe and presented the corrective action to Gore. D. & O. at 8-9.

[80] *Id.* at 12.

[81] *Vinnett*, ARB No. 2008-0104, slip op. at 7 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

held that "a 'genuine issue' exists if a fair-minded fact-finder [] could rule for the nonmoving party after hearing all the evidence, recognizing that in hearings, testimony is tested by cross-examination and amplified by exhibits and presumably more context."[82] Denying summary decision because there is a genuine dispute as to a material fact simply means that an evidentiary hearing is required to resolve those issues; it is not an assessment on the merits of any particular claim or defense.[83] Again, the analysis performed is the threshold matter of "whether there is the need for a trial—whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[84] The Board has explained that it is "cautious in affirming summary decision against a complainant when the complainant has provided prima facie evidence of protected activity, adverse action, and some temporal proximity."[85]

Applying this standard to the current case, we find that the ALJ made several errors. Specifically, the ALJ ignored material factual disputes in the record, failed to view the evidence presented in the light most favorable to the nonmoving party, and improperly weighed Respondent's affirmative defense evidence and made findings of fact as if he was resolving the case on the merits based on the record before him in the absence of a hearing. Therefore, we vacate the ALJ's D. & O. granting summary decision and remand the case to the ALJ to conduct an evidentiary hearing.[86]

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[82] *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 2011-0013, ALJ No. 2010-FRS-00012, slip op. at 8 (ARB Oct. 26, 2012); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (summary decision cannot be granted if there is a genuine dispute about a material fact, "genuine" meaning "if the evidence is such that a reasonable [fact finder] could [decide in favor of] the nonmoving party.").

[83] *Henderson*, ARB No. 2011-0013, slip op. at 9.

[84] *Anderson*, 477 U.S. at 250.

[85] *Hukman v. U.S. Airways, Inc.*, ARB No. 2018-0048, ALJ No. 2015-AIR-00003, slip op. at 19 (ARB Jan. 16, 2020) (citations omitted).

[86] Complainant also argues on appeal that the ALJ made a legal error by requiring Complainant to put forth evidence of retaliatory animus. Complainant (Comp.) Opening Br. at 19-22. However, upon review of the ALJ's contributing factor analysis, we find that the ALJ correctly stated the causation standard, D. & O. at 10, and he did not explicitly or implicitly require Complainant to put forth evidence of retaliatory animus in order for Complainant to establish that her protected activity was a contributing factor to the adverse personnel action. *See Beatty v. Inman Trucking Mgmt., Inc.*, ARB Nos. 2015-0064, -0067, ALJ Nos. 2008-STA-00020, -00021, slip op. at 9 n.46 (ARB June 27, 2016) (citation omitted) ("[A]nimus is not required for a finding of causation: 'Animus can be evidence of retaliation, but . . . [c]ausation is established, with or without evidence of retaliatory animus, if the protected activity contributed to the adverse action.'").

First, there are factual disputes and questions arising from the record evidence that are material to the resolution of this case. As an initial matter, there is a material question regarding whether McCabe had knowledge of Complainant's first two protected acts—on September 20, 2018, when Complainant spoke to Saunders about the complaints against Gore, and on March 25, 2019, when she informed Saunders about the additional complaints and advocated for a corrective action against Gore—which occurred prior to his tenure as GM NOS when he made the decision to reassign Complainant. Knowledge of those two acts could bear on whether Complainant's protected acts contributed to McCabe's decision to transfer her.[87] On summary decision, viewing this evidence in a light most favorable to Complainant, this dispute alone raises a genuine issue of material fact as to whether Complainant's protected activity was a contributing factor to her reassignment, in violation of the ERA.

There is also a material question regarding whether McCabe told Complainant her protected activity was a consideration in his decision to reassign her. Complainant asserted that when McCabe informed her of her reassignment, he provided multiple reasons for why he was reassigning her: her failure to timely correct Gore,[88] the results of the investigation, and the lawsuit filed by Tingen and Hart. Viewing Complainant's testimony in a light most favorable to her, McCabe considered a protected act—the Gore corrective action—when deciding to reassign Complainant. The ALJ determined that Complainant had engaged in ERA-protected activity on March 25, 2019, when she advocated for a corrective action for Gore. After that point, Complainant began working to deliver a corrective action to Gore, which she did not present to him until June 19, 2019, her third protected act.

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[87] Although the ALJ noted that shortly after McCabe started as the new GM NOS in June of 2019, he met with Complainant to discuss the status of the pending corrective action against Gore, D. & O. at 5, the ALJ's contributing factor analysis summarily concluded that "[t]wo of [Complainant's] protected acts occurred while Scott Saunders was the General Manager of Nuclear Oversight. Saunders was not involved in the decision to reassign Complainant. That decision was made by the new General Manager of Nuclear Oversight, Brian McCabe." *Id.* at 10. However, when McCabe met with Complainant in June of 2019, McCabe questioned the timeliness of the corrective action against Gore because she had been working on it since March of 2019. RX C at 91-92. The ALJ found that Complainant's second protected act occurred on March 25, 2019, after which she began working with the human resources to deliver a corrective action against Gore. D. & O. at 8. Viewing this evidence in a light most favorable to the Complainant, it appears McCabe may have had some knowledge of her first two protected acts, as they both relate to the development of the corrective action against Gore, and McCabe had formed an opinion about Complainant's handling and timeliness of the corrective action around the time he started as GM NOS. Thus, there remains a genuine dispute as to whether McCabe had knowledge of all of Complainant's protected acts when he made the decision to reassign her.

[88] Complainant asserts that when McCabe told her about her reassignment he mentioned "at least four times . . . about how I didn't correct Mike Gore." CX 1 at 75-76.

These protected acts, as found by the ALJ for purposes of Respondent's motion for summary decision, relate to Complainant's actions to deliver a corrective action to Gore. It is undisputed on this record that McCabe had previously questioned Complainant's timeliness on delivering the corrective action when he first started as GM NOS and advised her that she should have taken a timelier engagement with human resources to bring the corrective action to a conclusion.[89] Therefore, there is a genuine dispute regarding not only whether McCabe had knowledge of Complaint's protected acts related to the Gore discipline, but also whether knowledge of her protected conduct contributed to his decision to reassign her . . . .[90]

Accordingly, there remain genuine disputes as to the material facts concerning the role (if any) that Complainant's protected activity played in the adverse personnel action taken against her.

Second, the ALJ failed to view the evidence presented in the light most favorable to the nonmoving party. The ALJ's temporal proximity analysis relied solely on the four-and-a-half-month period from Complainant's last protected act and when McCabe informed Complainant of her reassignment.[91] However, the initiation of the investigation into Complainant occurred within one month following her first protected act. As noted above, the Board has previously explained that it is "cautious in affirming summary decision against a complainant when the complainant has provided prima facie evidence of protected activity, adverse action, and some temporal proximity."[92] Considering the close temporal proximity between Complainant's first protected act and the investigation, and that it is undisputed that Saunders had knowledge of her first two protected acts, we find upon a de novo review of the record that Complainant presented some circumstantial evidence of causation that raises a genuine issue of material fact as to whether her protected

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89 RX C at 91-92, 95-86.

90 As noted, *supra* n. 86, all of Complainant's protected acts, as determined by the ALJ, relate to the development and deliverance of the corrective action against Gore, and there remains a genuine dispute as to whether McCabe had knowledge of all of Complainant's protected acts when he chose to reassign her since he ultimately developed an opinion on her timeliness in handling the corrective action.

91 The ALJ, relying on *Roberts v. Glenn Industrial Group, Inc.* 998 F.3d 111 (4th Cir. 2021), found that Complainant did not present any direct or circumstantial evidence of causation and that a "four-and-a-half-month gap between the final protected activity and adverse action is insufficient by itself to raise an inference of retaliation." D. & O. at 11. However, the Fourth Circuit has explained that "there is no 'bright-line rule' for temporal proximity," *Roberts*, 998 F.3d at 127, and in this case, we find that Complainant presented both evidence of temporal proximity and some circumstantial evidence of causation that raises a genuine issue of material fact as to whether her protected activity was a contributing factor to her reassignment.

92 *Hukman*, ARB No. 2018-0048, slip op. at 19.

activity contributed to the investigation into her and her reassignment. For example, Saunders considered the incomplete investigation to add adverse language to Complainant's annual performance appraisal, and Complainant contends that Saunders told her that she was going to be transferred or lose her job when they discussed the appraisal. Thus, the ALJ failed to properly evaluate the temporal proximity evidence presented by Complainant within the context of all her protected acts and other circumstantial evidence of causation in a light most favorable to her.[93]

Also, there is additional evidence in the record that, when viewed in the light most favorable to Complainant, would preclude summary dismissal of this case.[94] For example, Complainant asserts that Respondent inconsistently disciplined Gore,[95] who did not engage in protected activity, and herself, although the results of his investigation were similar to the results of her investigation (that there was no evidence to substantiate the allegations of their behavior against them, but there was a hesitancy to either write nuclear condition reports under Gore or bring safety concerns to Complainant). Also, Complainant asserts that McCabe relied on a percentage in the investigative report indicating that "50% of the interviewees expressed hesitancy in raising non-nuclear safety concerns to the QC Manager" to reassign her, but this percentage is skewed and does not accurately reflect the number of interviewees who felt hesitant to raise non-nuclear safety concerns.[96]

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[93] *See Armstrong*, ARB No. 2014-0023, slip op. at 8-9 ("The ALJ correctly recognized that when evaluating temporal proximity in the context of a causation analysis, the relevant time frame is not necessarily when Respondent terminated [the employee's] employment but when the conduct leading up to the discharge began.").

[94] Although we note some additional evidence of record, the Board does not consider this list to be exclusive for what the ALJ should or may consider on remand. *See Booker v. Exelon Generation Co., LLC*, ARB No. 2017-0038, ALJ No. 2016-ERA-00012, slip op. at 11 n.31 (ARB July 31, 2019) (Decision and Order of Remand) (citing *Henderson*, ARB No. 2011-013, slip op. at 14) (explaining that "[t]he issue of whether there is contributing-factor causation is a fact-intensive determination, often involving complex and subtle questions of intent and motivation, which is usually challenging to resolve by summary decision.").

[95] We note that whether Gore was a "similarly situated employee" to Complainant is a factual question that requires analysis based on a review of the evidentiary record and we do not make any findings as to whether he was. *See Graff v. BNSF Ry. Co.*, ARB No. 2021-0002, ALJ No. 2018-FRS-00018, slip op at 12 (ARB Sept. 30, 2021) (quoting *Smith v. BNSF Ry. Co.*, ARB No. 2015-0055, ALJ No. 2013-FRS-00071, slip op. at 5 (ARB Apr. 11, 2017)) ("A whistleblower who argues that disparate treatment occurred 'must prove that similarly-situated employees' who were 'involved in or accused of the same or similar conduct were disciplined differently.").

[96] Upon review of the Adkins-Bailey interview notes as part of her investigation (CX 40), in a light most favorable to the nonmoving party, it appears that less than fifty percent of interviewees "expressed hesitancy in raising non-nuclear safety concerns to" Complainant.

Respondent on appeal disputes some of these points. However, it is nevertheless controvertible that Complainant's protected activity, as found by the ALJ for purposes of Respondent's motion for summary decision, was a contributing factor to her reassignment and/or to the initiation and the results of the investigation that led to the adverse personnel action.

Lastly, the ALJ improperly weighed the evidence and made findings of fact as if he was resolving the case on the merits based on the record before him in the absence of a hearing.[97] After analyzing the evidence the parties proffered, the ALJ reached the following conclusion:

> The evidence demonstrates Complainant was stripped of her supervisory authority because her subordinates perceived she would take adverse action against them if they challenged or crossed her. That perception was only strengthened when Quality Control Supervisors, Pete Tingen and Mike Hart, lost their jobs not long after filing an Employee Concerns Program complaint against Complainant. Brian McCabe chose to transfer Complainant to a position that fit her talents, strengths, and experience, without supervisory authority. He arrived at this decision at the recommendation of the Employee Concerns Program investigation and with the approval of the Employee Review Board.[98]

This finding was improper because the ALJ weighed the evidence that Respondent proffered as to its legitimate business decision for reassigning Complainant, and then determined which party he believed, as if there had been a hearing. "While such fact-finding may be necessary and appropriate when adjudicating other types of motions or the merits of a complaint, it is not appropriate when resolving a motion for summary decision."[99] Accordingly, the ALJ impermissibly weighed the evidence and determined that Respondent's version of events was true, which is not

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97 *See Armstrong*, ARB No. 2014-0023, slip op. at 5 ("In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted.") (citation omitted).

98 D. & O. at 10.

99 *See Booker*, ARB No. 2017-0038, slip op. at 9.

appropriate at the summary decision stage of a case,[100] and in doing so, overlooked the disputed nature of the evidence supporting causation.[101]

CONCLUSION

Complainant, the nonmoving party below, submitted enough evidence to raise questions of material fact on the issue of whether her protected activity, as found by the ALJ for purposes of Respondent's motion for summary decision, was a contributing factor to her reassignment to a non-supervisory developmental position. Therefore, the ALJ's Order Granting Respondent's Motion for Summary Decision is **VACATED** and this matter is **REMANDED** for an evidentiary hearing on the merits.

SO ORDERED.

ANGELA W. THOMPSON
Administrative Appeals Judge

SUSAN HARTHILL
Chief Administrative Appeals Judge

IVEY S. WARREN
Administrative Appeals Judge

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100 *See Kao v. Areva Inc.*, ARB No. 2016-0090, ALJ No. 2014-ERA-00004, slip op. at 5 (ARB Apr. 30, 2018) (citing *Henderson*, ARB No. 2011-0013, slip op. at 7).

101 In his D. & O., the ALJ did not make an affirmative defense determination. After an evidentiary hearing on the merits, we recommend that the ALJ do so on remand, regardless of the outcome of his contributing factor analysis.