



In the Matter of:

CATE JENKINS,

ARB CASE NO. 15-046

COMPLAINANT,

ALJ CASE NO. 2011-CAA-003

v.

DATE: MAR 01 2018

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Mick Harrison, Esq.; Paula Dinerstein, Esq.; *Public Employees for Environmental Responsibility*, Washington, District of Columbia

For the Respondent:

Joanna M. DeLucia, Esq.; *United States Environmental Protection Agency*, Washington, District of Columbia

Before: E. Cooper Brown, *Administrative Appeals Judge*,¹ and Leonard J. Howie III, *Administrative Appeals Judge*; Judge Howie concurring, in part, and dissenting, in part

FINAL DECISION AND ORDER

This case arises under the Clean Air Act, 42 U.S.C.A. § 7622 (Thomson/West 2003) (CAA); the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.A. § 9610 (Thomson/West 2003) (CERCLA); the Federal Water Pollution Control Act

¹ This decision was signed by the judges on March 1, 2018, and scheduled to be issued on March 2, 2018. Because of the federal government shutdown on March 2, 2018, the decision is being issued on March 5, 2018.

Control Act of 1976 (TSCA), 42 U.S.C.A. § 2622 (Thomson Reuters 2009) (hereafter collectively referred to as the Environmental Whistleblower Statutes). In a complaint filed with the Occupational Safety and Health Administration (OSHA) on January 31, 2011, Complainant Cate Jenkins alleged that her employer, Respondent Environmental Protection Agency (EPA), unlawfully terminated her employment in retaliation for disclosures, complaints, and communications protected under the Environmental Whistleblower Statutes. OSHA subsequently dismissed the complaint based on the determination that it had not been timely filed. Appealing OSHA's dismissal, Jenkins requested a hearing before a Department of Labor Administrative Law Judge (ALJ).

Jenkins conducted extensive discovery, facilitated by multiple ALJ orders compelling the EPA to respond to her discovery requests. The ALJ commenced a hearing on the merits on April 30, 2012, but she suspended the hearing when it was disclosed that the EPA had not fully complied with the ALJ's prior Orders to Compel. The ALJ ordered additional discovery. After further ALJ orders compelling the EPA to respond to discovery requests, Jenkins moved the ALJ to impose discovery sanctions. In response, the ALJ issued a Recommended Decision and Order (D. & O.) ordering a default judgment against the EPA on April 15, 2015, from which the EPA appealed to the Administrative Review Board (ARB or Board). For the following reasons, the Board affirms the ALJ's award of a default judgment.

FACTUAL BACKGROUND

Jenkins began working for the EPA, in December 1979. She served as an Environmental Scientist with EPA's Office of Solid Waste and Emergency Response (OSWER) for approximately 31 years, until her discharge from employment December 30, 2010. When discharged, Jenkins was a GS-13 Environmental Scientist with the Waste Characterization Branch (WCB) in the Material Recovery and Waste Management Division (MRWMD) in OSWER's Office of Resource Conservation and Recovery (ORCR).

Beginning in 2001, Jenkins made numerous disclosures and complaints alleging that the EPA engaged in improper laboratory testing, falsified a regulation governing exposure safety standards, and knowingly covered up the toxic properties of the dust emanating from the September 11, 2001 ("9/11") World Trade Center (WTC) disaster. The improper testing and cover-up, Jenkins claimed, contributed to excessive and harmful toxic dust exposures of WTC "First Responders" and others sufficient to later cause respiratory and other serious and debilitating disease. Jenkins disseminated these disclosures and complaints to her supervisors and others at EPA, to the EPA Inspector General's Office, members of Congress, and the Federal Bureau of Investigation, as well as to state officials, state elected representatives, law firms representing WTC First Responders, citizens, and the media. Her disclosures were posted on web sites and repeatedly quoted in the press and television broadcasts, and by members of Congress. Jenkins's health and safety complaints to EPA officials, Congress, and the FBI continued up through April of 2010.¹

¹ In 2006 Jenkins submitted new complaints to the EPA Inspector General and to Congress alleging an EPA cover-up of the corrosive alkalinity of WTC dust, EPA falsification of information concerning the health effects of the corrosive dust, and fraudulent testing of pH levels of the WTC

On May 3, 2010, Jenkins received a memorandum from her second-level supervisor, Mr. Dellinger, that sought to clarify a disciplinary warning (proposed suspension) that she had received almost a year earlier, in July of 2009.² That disciplinary warning, which Jenkins challenged in a whistleblower retaliation complaint filed in August of 2009 with the Office of Special Counsel pursuant to the Whistleblower Protection Act, 5 U.S.C. § 1214 *et seq*, had charged Jenkins with misuse of her position, failure to follow supervisory directives, and discourteous conduct because of an email she had distributed within the EPA urging imposition of a workplace fragrance ban. Dellinger's clarification memorandum sought to persuade Jenkins that she had not suffered an adverse employment action because of the disciplinary warning and to persuade her to withdraw her complaint that was pending at the time before the Merit System Protection Board.³

Upon its receipt, Jenkins immediately returned the clarification memorandum to Dellinger, informing him that she considered it an inappropriate *ex parte* communication. Dellinger later that same day (May 3rd) returned the memo to Jenkins, whereupon Jenkins returned to Dellinger's office to demand that he retract the clarification memorandum—this time asserting that he had violated her rights under the Privacy Act because of the manner by which he had initially delivered the memorandum to her.

On May 10, 2010, Dellinger reported to the Acting Deputy Director of ORCR, Maria Vickers, that Jenkins had threatened his life during his meeting with her on May 3rd. Based on Dellinger's report, Vickers directed Dellinger to draft a Notice of Proposed Removal (NPR), thereby initiating internal EPA processes for Jenkins's employment termination. Effective May

dust particles. In May 2007, Jenkins further complained to the FBI and members of Congress about falsification of the corrosivity standard. She supplemented her complaint to the FBI in October of 2008 alleging fraud in pH testing of the WTC dust and falsification of EPA corrosivity characteristic regulations, and provided documentation that the EPA laboratories had diluted WTC dust almost 600 times with water before testing it for corrosivity. Her 2008 complaint to the FBI was copied to her chain of command at the EPA, including the Administrator, the Assistant Administrator for OSWER, Robert Dellinger (Jenkins's second-level supervisor), and James Michael, the Chief of the WCB (Jenkins's immediate supervisor).

In March and April of 2010, Jenkins notified her immediate superiors and EPA Headquarters about a pending lawsuit involving WTC First Responders in which her complaints and disclosures were being used as documentary evidence. Her notification included references to her earlier FBI, Congressional, and Inspector General complaints and published medical studies attributing the high corrosivity of WTC dust to medical symptoms in First Responders.

² At all times relevant to Jenkins's complaint, Dellinger was Director of MRWMD and her second-level supervisor.

³ Jenkins's whistleblower complaint initially asserted that the 2009 disciplinary warning was in retaliation for her having engaged in activity protected under the federal Whistleblower Protection Act. Jenkins's complaint, which she did not withdraw and subsequently amended in June of 2010 (see discussion *infra*), was dismissed on July 1, 2010, by an MSPB Administrative Judge. The dismissal was upheld by the full MSPB Board on December 23, 2010.

12, 2010, Jenkins's first-level supervisor placed Jenkins on paid administrative leave and barred her access to EPA's work premises.

On June 2, 2010, Jenkins amended her federal whistleblower retaliation complaint arising out of the 2009 disciplinary warning to allege that Dellinger's May 3rd clarification memorandum constituted further retaliation because it sought to unlawfully censor her right to raise health and safety concerns by requiring that she obtain pre-approval from the EPA Ethics Office before sharing her concerns.

On July 9, 2010, Dellinger, who Vickers had appointed to serve as the "proposing official," issued a Notice of Proposed Removal (NPR).⁴ Jenkins immediately filed a request for a stay with OSC and the MSPB on July 14, 2010, in her then-pending federal whistleblower complaint, asserting that the NPR was illegal retaliation for her protected whistleblowing. Following EPA's submission of its opposition to Jenkins's stay request, on August 31, 2010, the Office of Special Counsel requested that EPA provide records related to Jenkins's removal, to which the EPA (through attorney Paul Winick) responded on September 28, 2010. Notwithstanding Jenkins's pending stay request, Dellinger's NPR was referred to the Acting Director of the Office of Resource Conservation and Recovery (ORCR), Suzanne Rudzinski, who served as the final decision-maker with respect to Jenkins's discharge. Following Jenkins's written and oral submissions, in which she denied Dellinger's allegations, Rudzinski terminated Jenkins's employment effective December 30, 2010. Jenkins, in turn, filed whistleblower retaliation complaints on January 31, 2011, with both OSHA and the MSPB.⁵

For purposes of the discussion and analysis that follows in this decision it is important to note that Vickers retired from the EPA on June 23, 2010. On June 30th and July 1st three separate orders were issued by ORCR directing the destruction of Vickers's emails. In the absence of a litigation hold, Vickers's email inventory was destroyed on August 3, 2010, with her backup files destroyed on or about November 1, 2010. In the EPA's September 28, 2010 response to the OSC, EPA legal counsel Winick identified Vickers as having been involved in the May/June decision proposing termination of Jenkins's employment and also listed her as a person involved in proposing discipline of Jenkins in 2009 because of her "fragrance" complaint. *See D. & O.* at 23.

PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE

Jenkins requested a hearing before the Office of Administrative Law Judges on April 4, 2011. Following assignment of Jenkins's complaint to an ALJ, hearing was scheduled for the week of April 30, 2012. In the year leading up to that hearing, the parties became embroiled in

⁴ EPA attorney Winick drafted the NPR and provided it to Dellinger. *See D. & O.* at 12-13.

⁵ An MSPB administrative judge dismissed Jenkins's federal whistleblower complaint challenging the termination of her employment in May 2011. Upon appeal, the full MSPB, on May 5, 2012, overturned the dismissal and ordered reinstatement of Jenkins's employment.

contested discovery that resulted in multiple ALJ orders compelling EPA's compliance with Jenkins's discovery requests.

Initially, by Order issued September 29, 2011, the ALJ addressed Jenkins's motion to compel discovery with regard to 37 separate document requests and 3 separate interrogatories. The ALJ summarized this initial round of discovery intransigency as follows: "From the outset, the Respondent has resisted providing the Complainant with anything more than what [EPA attorney] Winick thought she was entitled to in connection with her MSPB proceeding." D. & O. at 11.

On February 9, 2012, the ALJ issued a second Order compelling the EPA to cooperate in discovery, after the EPA withheld requested documents on the grounds of privilege. The ALJ ordered that documents the EPA claimed were privileged, and thus protected from discovery, be submitted to the ALJ for *in camera* review, and further ordered production of several disputed items that were not claimed as privileged. Upon subsequent *in camera* review of the documents EPA claimed as privileged, by Order issued February 29, 2012, the ALJ directed that the documents be produced. The February 29th Order further directed the EPA to provide the ALJ with a complete copy of the June 24, 2010 draft Notice of Proposed Removal that Winick had prepared for Dellinger, that had been withheld from discovery, for *in camera* inspection. Finding that the document was not properly withheld, the ALJ on March 8, 2012, ordered its production.

Hearing before the ALJ commenced as scheduled on April 30, 2012. But on the fourth day of the hearing, during the testimony of Ms. Rudzinski, the EPA official responsible for the decision terminating Jenkins's employment, it was revealed that the EPA had not produced a draft of Rudzinski's removal decision, which the ALJ deemed clearly responsive to Jenkins's discovery requests, as well as the ALJ's previous discovery orders. *Id.* at 13. The ALJ abruptly suspended the hearing to afford Jenkins the opportunity to obtain the draft removal decision and also take the deposition of EPA counsel Winick, concerning his efforts to comply with discovery and the ALJ's prior orders compelling production of documents.

The ALJ anticipated that the hearing could conclude following Winick's deposition. But the case quickly devolved into further discovery disputes requiring the ALJ's intervention. It was discovered that EPA had withheld literally hundreds of documents responsive to Jenkins's previous discovery requests, which the ALJ noted, "were clearly responsive to the Complainant's repeated discovery requests, and clearly required to be produced pursuant to my repeated Orders." *Id.* at 2.

Immediately following suspension of the hearing, and before Winick's deposition, Winick notified the ALJ of his "discovery" of 27 previously undisclosed documents related to Rudzinski's role in Jenkins's removal. Winick claimed that the documents were privileged and thus qualified for protection. However, Winick failed to submit a privilege log and, when the ALJ subsequently ordered him to do so, failed to articulate the basis for EPA's claim of privilege with respect to each identified document.⁶ After reviewing the EPA's conclusory basis for

⁶ This was not the first time that the EPA (and Winick) had been so instructed. The ALJ had previously made it clear that the EPA was required to specify the nature and basis for any claim of

seeking protection from discovery based on privilege, the ALJ directed the EPA to provide a copy of the documents to Jenkins for her use in conducting Winick's subsequent deposition.

Following Winick's deposition, Jenkins requested documents identified during the deposition that were responsive to her prior discovery requests but not previously produced. Upon EPA's refusal, per Winick, to honor Jenkins's documents request, Jenkins returned to the ALJ for an order requiring compliance with Jenkins's latest request. After rejecting the EPA's and Winick's various arguments seeking to justify EPA's refusal, *see* D. & O. at 14-15, the ALJ issued yet another Order to Compel on July 11, 2012. In this Order to Compel the ALJ noted that the discovery process had been marked by the persistent failure of EPA's counsel to abide by even the most basic requirements for responding to discovery requests in the course of litigation, and that Winick's deposition had not provided any further assurance that the EPA had adequately complied with its obligations during discovery. *Id.* at 14. Stating that she had "absolutely no confidence in the integrity of the Respondent's response to the Complainant's discovery requests, or its compliance with my Orders directing the production of documents, and that I would not require the Complainant to keep returning to the Court to try to enforce the Respondent's compliance with discovery requirements," the ALJ's Order was comprehensive in scope and specificity as to what the EPA was obligated to produce. *Id.* at 16-17. The EPA was directed to provide the information and documents within thirty days for *in camera* inspection, at which point the ALJ would determine which were covered by any argued privilege, and confer with the parties about the resumption of the hearing and for the submission of any possible motions.

At the EPA's request, the ALJ allowed the production of documents to proceed piecemeal over the next months. Dissatisfied with the EPA's response, on October 12, 2012, Jenkins again filed a motion seeking discovery compliance. On December 19, 2012, the ALJ issued a fourth Order to Compel, in which the ALJ cited numerous deficiencies in the EPA's search methodology responsive to Jenkins's documents production requests and EPA's compliance with the ALJ's Order of July 11, 2012. The ALJ issued specific instructions to assure the EPA's full compliance with Jenkins's discovery requests and the ALJ's prior Orders compelling discovery. *Id.* at 18-19. Nevertheless, Jenkins was forced to return to the ALJ for assistance in securing the EPA's compliance. Consequently, the ALJ issued another Order on May 12, 2013, again rejecting the EPA's attempts to limit its response to Jenkins's discovery requests and the ALJ's previous instructions and discovery orders. *Id.* at 19-22.

The EPA finally completed its production of documents responsive to Jenkins's post-hearing discovery requests and the ALJ's subsequent discovery Orders on or about January 7, 2014. By that time, the EPA had produced an additional 900-plus documents, which the ALJ noted were produced notwithstanding EPA counsel Winick's prior repeated representations to the ALJ that discovery was complete. *Id.* at 22.

The ALJ advised the parties that once the discovery process was completed, she would afford Jenkins an opportunity to submit a motion for sanctions based on the EPA's discovery

privilege for each document for which it claimed a privilege. Nevertheless, in response to the ALJ's order the EPA (and Winick) relied on a conclusory claim of privilege rather than articulating the basis for its claim of privilege with respect to each identified document. D. & O. at 14.

conduct. Accordingly, on September 30, 2014, Jenkins moved for discovery sanctions under 29 C.F.R. § 18.6(d). After consideration of the parties' respective arguments for and against the imposition of sanctions, on April 15, 2015, the ALJ issued the Decision and Order, in which the ALJ drew adverse evidentiary inferences of causation and as to the EPA's lack of a legitimate, non-pretextual reason for dismissing Jenkins that effectively resulted in a default judgment against the EPA.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the Environmental Whistleblower Statutes.⁷ The ARB reviews the ALJ's factual findings under the substantial evidence standard and legal conclusions, *de novo*.⁸ Consistent with federal court authority imposing discovery sanctions pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, the Board reviews an ALJ's imposition of discovery sanctions, including the sanction of a default judgment, under the abuse of discretion standard.⁹

DISCUSSION

In entering a default judgment against the EPA, the ALJ cited her authority under 29 C.F.R. § 18.6(d)(2) for issuing discovery sanctions,¹⁰ as well as the inherent authority vested in ALJs, like courts, to manage their affairs to achieve the orderly and expeditious disposition of cases.¹¹

Consistent with federal case authority,¹² ARB precedent affords a reasonable degree of latitude and discretion to ALJs in the imposition of discovery sanctions under 29 C.F.R. §

⁷ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012); 29 C.F.R. § 24.110.

⁸ 29 C.F.R. § 24.110(b); *Kaufman v. U.S. Envtl. Prot. Agency*, ARB No. 10-018, ALJ No. 2002-CAA-022 (ARB Nov. 30, 2011).

⁹ *Butler v. Anadarko Petroleum Corp.*, ARB No. 12-041, ALJ No. 2009-SOX-001 (ARB June 15, 2012); *Saporito v. Florida Power & Light Co.*, ARB No. 09-009, -010; ALJ No. 2008-ERA-014 (ARB Feb. 28, 2011); *Waechter v. J.W. Roach & Sons Logging & Hauling*, ARB No. 04-167, -183; ALJ No. 2004-STA-043 (ARB Jan. 9, 2006).

¹⁰ 29 C.F.R. § 18.6(d)(2), in effect at the time of the ALJ's decision, has since been replaced by 29 C.F.R. § 18.57, effective June 18, 2015.

¹¹ A court's "inherent powers" are those "necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812).

¹² See, e.g., *Roadway Express v. Dep't of Labor*, 495 F.3d 477, 484 (7th Cir. 2007); *Chapman v. U.S. Commodity Futures Trading Comm'n*, 788 F.2d 408, 411 (7th Cir. 1986); *Sigliano v. Mendoza*,

18.6(d)(2),¹³ as well as in imposition of sanctions pursuant to the inherent authority of ALJs to manage the orderly and expeditious disposition of cases.¹⁴ The ARB has reviewed the ALJ's imposition of such sanctions under an abuse of discretion standard, and under that standard on occasion affirmed an ALJ's dismissal or entry of default judgment as a discovery sanction.¹⁵ In no case, however, has the ARB articulated the basis or factors by which an ALJ's decision is to be measured under the abuse of discretion standard. The ARB has nevertheless recognized the substantial similarity of the Rules of Practice and Procedure governing discovery before the Office of Administrative Law Judges and those under the Federal Rules of Civil Procedure.¹⁶ Accordingly, the Board necessarily turns to federal case authority interpreting FRCP Rule 37(b)(2) for guidance in determining whether the ALJ's imposition in this case of a default judgment as a discovery sanction constitutes a permissible exercise of the ALJ's discretionary authority.¹⁷

642 F.2d 309, 310 (9th Cir. 1981); *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir. 1986) (“We rightly pay great deference, as the abuse-of-discretion standard itself suggests, to the District Court’s determination in such instances.”).

¹³ See *Butler v. Anadarko Petroleum*, ARB No. 12-041, ALJ No. 2009-SOX-001 (ARB June 15, 2012); *Matthews v. Labarge, Inc.*, ARB No. 08-038, ALJ No. 2007-SOX-056 (ARB Nov. 26, 2008); *Waechter v. J. W. Roach & Sons Logging*, ARB No. 04-183, ALJ No. 2004-STA-043 (ARB Dec. 29, 2005); *Canterbury v. Wage & Hour Div.*, ARB No.03-135, ALJ No. 2002-SCA-011 (ARB Dec. 29, 2004); *Dickson v. Butler Motor Transit*, ARB No. 02-098, ALJ No. 2001-STA-039 (ARB July 25, 2003); *In re Supervan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-014 (ARB Sept. 30, 2002).

¹⁴ See *Stalworth v. Justin Davis Enters.*, ARB No. 09-038, ALJ No. 2009-STA-001 (ARB June 16, 2010); *Administrator, Wage & Hour Div. v. Siliconlinks*, ARB No. 09-131, ALJ No. 2009-LCA-024 (ARB Oct. 28, 2009); *Newport v. Fla. Power & Light, Co.*, ARB No. 06-110, ALJ No. 2005-ERA-024 (ARB Feb. 29, 2008); *Dickson v. Butler Motor Transit*, ARB No. 02-098, ALJ No. 2001-STA-039 (ARB July 25, 2003).

¹⁵ See, e.g., *Butler v. Anadarko Petroleum*, , ARB No. 12-041, ALJ No. 2009-SOX-001 (ARB June 15, 2012) *Matthews v. Labarge, Inc.*, ARB No. 08-038, ALJ No. 2007-SOX-056 (ARB Nov. 26, 2008); *In re Supervan*, ARB No. 00-008, ALJ No. 1994-SCA-014 (ARB Sept. 30, 2002).

¹⁶ *Hasan v. Burns & Roe Enters., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-006 (ARB Jan. 30, 2001).

¹⁷ While dismissals under a court’s inherent powers are generally subject to the same considerations as those governing the imposition of discovery sanctions, *Halaco Eng’g Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988), there nevertheless remains a critical distinction. Unlike discovery sanctions that are governed by rule or statute, sanctions imposed pursuant to a court’s inherent authority are “shielded from direct democratic controls.” *Roadway Express v. Piper*, 447 U.S. 752, 764 (1980). Because of this, and because the question of “whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies that a court may employ, as well as by authorizing any order that is ‘just,’ [r]eliance upon ‘inherent power’ can only obscure analysis of the problem before us.” *Societe*

We begin with the Supreme Court's articulation of several fundamental principles, starting with the admonition that upon appellate review the question is not whether the appellate court "would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."¹⁸ Moreover, "as in other areas of the law, the most severe in the spectrum of [discovery] sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."¹⁹ To justify dismissal or entry of default as a discovery sanction, the misconduct must be due to "willfulness, bad faith, or . . . fault" on the part of the non-complying party.²⁰ "Rule 37(b)(2) contains two standards—one general and one specific—that limit a district court's discretion. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' that was at issue in the order to provide discovery."²¹ Finally, in determining whether to dismiss for failure to comply with discovery orders, the trial court is obligated to consider the full record.²²

For purposes of the Board's analysis of this case under federal appellate law, we turn primarily (although not exclusively) to the Circuit Court of Appeals for the District of Columbia,²³ which provides a relatively comprehensive explication of the foregoing principles, beginning with explanation of the "abuse of discretion" standard as it applies to dismissals and default judgments imposed as a discovery sanction: "We rightly pay great deference, as the abuse-of-discretion standard itself suggests, to the District Court's determination in such instances. Implicit in that governing standard is the recognition that the trial court has a better "feel," as it were, for the litigation and the remedial actions most appropriate under the

Internationale v. Rogers, 357 U.S. 197, 207 (1958). *Accord Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1338 (9th Cir. 1985). Heeding the Court's cautionary admonition, the Board's analysis of the sustainability of the default judgment entered in this case primarily focuses on the ALJ's authority under 29 C.F.R. § 18.6(d)(2).

¹⁸ *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976).

¹⁹ *Id.* at 643.

²⁰ *Societe Internationale v. Rogers*, 357 U.S. at 212.

²¹ *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982).

²² *National Hockey League*, 427 U.S. at 642.

²³ Other Circuit Courts of Appeal provide the same or similar analysis, although often without the detail or analysis that the D.C. Circuit provides. *See, e.g., Southern New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 148-149 (2d Cir. 2010); *Malloy v. WM Specialty Mortg. LLC*, 512 F.3d 23, 26 (1st Cir. 2008); *Procter & Gamble Co. v. Haugen*, 427 F.3d 727, 738 (10th Cir. 2005); *Shelton v. American Motors*, 805 F.2d 1323, 1329-1330 (8th Cir. 1986); *Batson v. Neal Spelce Assocs., Inc.*, 765 F.2d 511, 514 (5th Cir. 1985).

circumstances presented.”²⁴ Nevertheless, where a lower court’s order of dismissal or default as a discovery sanction is under review, the review “is more ‘thorough’ because the ‘drastic’ sanction ‘deprives a party completely of its day in court’.”²⁵

As discussed below, under this more thorough review, the range of a trial court’s discretion is narrowed. Required, in the first instance, is consideration by the trial court of the appropriateness of lesser sanctions. Given the “central requirement” of FRCP Rule 37(b) that any discovery sanction be “just,” appellate courts have directed that the choice of sanction be guided by the “concept of proportionality” between offense and sanction.²⁶ Accordingly, in cases involving severe sanctions such as dismissal or default a trial court is required in the first instance to consider “whether lesser sanctions would be more appropriate for the particular violation.”²⁷ This requirement applies as well to discovery sanctions that result in a one-sided trial, as the preclusion order under review in *Bonds v. Dist. of Columbia* effectively did.²⁸ “Particularly in the context of litigation-ending sanctions, we have insisted that ‘[s]ince our system favors the disposition of cases on the merits, dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success’ or would obviously prove futile.”²⁹ It is not that a trial court is required to exhaust lesser sanctions before turning to

²⁴ *Founding Church of Scientology*, 802 F.2d at 1457. See also, *Bristol Petrol. Corp. v. Harris*, 901 F.2d 165, 167 (D.C. Cir. 1990) (appellate court should be “hesitant to type the exercise of a district court’s dismissal authority as an abuse of discretion” because the district court has “front-line responsibility for operating the judicial system”).

²⁵ *Washington Metro. Area Transit Com’n v. Reliable Limousine Serv.*, 776 F.3d 1, 4 (D.C. Cir. 2015). See also, *Webb v. Dist. of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998); *Bonds v. Dist. of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996).

²⁶ *Bonds v. District of Columbia*, 93 F.3d at 808.

²⁷ *Webb v. Dist. of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998); *Bonds*, 93 F.3d at 808; *Shea v. Donohoe Constr. Co.*, 795 F.2d 1071, 1077 (D.C. Cir. 1986).

²⁸ In *Bonds* the D. C. Circuit Court of Appeals found that the broad preclusion order under review effectively constituted a default judgment given that the district court’s order precluding the District of Columbia from calling any fact witnesses “left the District with little ability to contest the plaintiff’s claims.” *Bonds*, 93 F.3d at 808-809. *Accord Outley v. City of New York*, 837 F.2d 587, 591 (2d Cir. 1988) (“Before the extreme sanction of preclusion may be used by the district court, a judge . . . must consider less drastic responses.”); *Webb v. Dist. of Columbia*, 146 F.3d at 973 (Where adverse evidentiary inference accepted by trial court would not effectively dispose of the merits, but leave open the prospect that the party subject to the discovery sanction could still prevail on the merits through other evidence, D.C. Circuit did not agree with district court conclusion that “the only adverse inference that would adequately compensate plaintiff . . . would effectively dispose of the merits of the claim.”).

²⁹ *Bonds*, 93 F.3d at 808.

dismissal or default, but that “the court explain its reason for issuing a default judgment rather than a lesser sanction.”³⁰

Assuming lesser sanctions were appropriately considered but rejected, the question turns to the nature of the discovery misconduct of the non-complying party. While the import of *Societe Internationale v. Rogers* has been understood to justify less severe sanctions for less than willful conduct, such as a mere failure to respond to discovery,³¹ conduct justifying dismissal must be attributable to “willfulness, bad faith, or [some] fault” on the part of the non-complying party.³² “Fault,” within its context as one component of *Societe Internationale*’s triple criterion, has been interpreted by appellate courts to include “gross negligence.”³³ As the Second Circuit explained, “[u]nless we are to assume that the Court chose its words carelessly, we must accord the term ‘fault’ a meaning of its own within the *Societe Internationale* triad. And plainly, if ‘fault’ has any meaning not subsumed by ‘willfulness’ and ‘bad faith,’ it must at least cover gross negligence amounting to a “total dereliction of professional responsibility” even though not a conscious disregard of a court’s orders.³⁴

A determination that the misconduct at issue was due to willfulness, bad faith, or fault on the part of the non-complying party does not, however, end the inquiry. While such a finding “remains a prerequisite to imposition of the dismissal sanction, it is by no means the sole consideration relevant to the determination whether to dismiss the case.”³⁵ To be considered is any resulting prejudice to the other party, prejudice to the judicial system requiring the trial court “to modify its own docket and operations to accommodate the delay,” and the need “to sanction

³⁰ *Webb*, 146 F.3d at 971 (citations omitted). Nonetheless, the D.C. Court of Appeals has been quick to point out that a district court “enjoys authority to impose this sanction [of dismissal] even where ‘a less drastic sanction might have been entertained.’” *Founding Church of Scientology*, 802 F.2d at 1459.

³¹ *Weisberg v. Webster*, 749 F.2d 864, 871 (D.C. Cir. 1984).

³² *Id.* at 870-871 (“The correct standard for evaluating what conduct justifies dismissal comes from cases such as *National Hockey League* and *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*. . . . Read together, *National Hockey League* and *Societe Internationale* require a minimum of ‘willfulness, bad faith, or [some] fault’ to justify dismissal.”).

³³ *Weisberg*, 749 F.2d at 871 (citing *Penthouse Int’l v. Playboy Enters.*, 663 F.2d 371, 388 (2d Cir. 1981), and *Flaks v. Koegel*, 504 F.2d 702, 708-709 (2d Cir. 1974)). *Accord Butera v. Dist. of Columbia*, 235 F.3d 637, 661 (D.C. Cir. 2001); *Regional Refuse Systems, Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 153-154 (6th Cir. 1988); *Founding Church of Scientology*, 802 F.2d at 1458).

³⁴ *Cine Forty-Second St. Theatre v. Allied Artists Pictures*, 602 F.2d 1062, 1067 (2d Cir. 1979).

³⁵ *Founding Church of Scientology*, 802 F.2d at 1458.

conduct that is disrespectful to the court and to deter similar conduct in the future.”³⁶ At least one of these factors concerning the relationship between the discovery misconduct at issue and the matters in controversy in the case must exist.

In determining the potential prejudice to the other party, to be considered (among other things) is whether the discovery misconduct at issue “has severely hampered the other party’s ability to present his case—in other words, that the other party has been so prejudiced by the misconduct that it would be unfair to require him to proceed further in the case.”³⁷ In the context of F.R.C.P. Rule 37(b)(2) motions, prejudice has been found to exist where the failure to make discovery “impairs the opponent’s ability to determine the factual merits of the party’s claim.”³⁸

Regarding the question of prejudice to the judicial system, to be taken into account is the extent to which the party’s misconduct has put “an intolerable burden” on the trial court “by requiring the court to modify its own docket and operations in order to accommodate the delay.”³⁹ “The judicial system cannot tolerate litigants who flagrantly refuse to comply with the orders of the court and who refuse to make discovery, for ‘(d)elay and evasion are added burdens on litigation, causing waste of judicial and legal time, are unfair to the litigants and offend the administration of justice’.”⁴⁰ To allow parties to flout their discovery obligations and choose, instead, to wait “until a trial court has lost patience with them” thereby forcing the trial judge to become embroiled in virtual day-to-day supervision of discovery is a result “directly contrary to the overall scheme of the federal discovery rules.”⁴¹

Finally, there is the deterrence function that Rule 37 discovery sanctions are also intended to serve. In addition to serving to ensure that a party does not benefit from its own misconduct and to assure compliance with orders compelling discovery, discovery sanctions “are intended to serve a general deterrent effect on the case at hand and on other litigation, provided that the party

³⁶ *Butera v. Dist. of Columbia*, 235 F.3d 637, 661 (D.C. Cir. 2001). *Accord Washington Metro. Area Transit Com’n*, 776 F.3d at 4-5; *Benedict v. Super Bakery*, 665 F.3d 1263, 1268 (Fed. Cir. 2011); *Webb*, 146 F.3d at 971; *Bonds*, 93 F.3d at 808; *Bristol Petroleum Corp.*, 901 F.2d at 167.

³⁷ *Webb*, 146 F.3d at 971 (citation omitted).

³⁸ *Avionic Co. v. General Dynamics Corp.*, 957 F.2d 555, 558-559 (8th Cir. 1992).

³⁹ *Webb*, 146 F.3d at 971.

⁴⁰ *Denton*, 564 F.2d at 241 (quoting *Gulf Oil Co. v. Bill’s Farm Center, Inc.*, 449 F.2d 778, 779 (8th Cir. 1971)). *Accord G–K Props.*, 577 F.2d at 647 (“Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism.”).

⁴¹ *Cine Forty-Second St. Theatre*, 602 F.2d at 1068.

against whom they are imposed was in some sense at fault.”⁴² Even when a party finally (albeit belatedly) *complies* with discovery orders, occasions may exist where further sanctions, including dismissal, are warranted. “[C]ompulsion of performance in the particular case at hand is not the sole function of Rule 37 sanctions. Under the deterrence principle of [*National Hockey League*], plaintiff’s hopelessly belated compliance should not be accorded great weight. Any other conclusion would encourage dilatory tactics, and compliance with discovery orders would come only when the backs of counsel and the litigants were against the wall.”⁴³

Turning to the case before the ARB, the first question is thus whether the ALJ considered lesser alternative sanctions, such as fines, attorneys’ fees, adverse evidentiary rulings, or other issue-related sanctions, before imposing the default judgment against EPA. In fact, the ALJ did consider several alternative discovery sanctions, beginning with consideration of EPA’s argument that sanctions should be imposed exclusively against EPA’s attorney Winick, lead counsel for EPA in the case. Acknowledging that “much of the blame for the ongoing failure of the Respondent to comply with its discovery obligations and the Court’s Orders rightfully falls on Mr. Winick,” the ALJ nevertheless rejected Respondent’s argument, pointing out that Winick did not act in a vacuum; that other attorneys were also involved before the court on EPA’s behalf. D. & O. at 9. More importantly, the ALJ reasoned, because Winick was an employee of the EPA, as opposed to a privately retained attorney, the EPA “was most assuredly implicated in Mr. Winick’s activities on its behalf” and thus could not absolve itself of responsibility “by throwing Mr. Winick under the bus.” D. & O. at 9.⁴⁴

The ALJ also considered, but rejected, reopening the record and continuing the hearing after completion of the post-hearing discovery, accompanied by an award of costs to Jenkins. Respondent argues that the ALJ’s rejection of this alternative was conclusory and constituted an abuse of discretion because the ALJ failed to give “specific, reasoned consideration” to this lesser sanction. See Respondent’s Brief, at 14. To the contrary, the ALJ noted that the documents produced following suspension of the hearing raised far more questions than they answered, required even further discovery (by both parties), and effectively required Jenkins to retry her entire case. Moreover, the ALJ pointed out, not only would many of the witnesses who originally testified have to be recalled to testify, additional witnesses essential to Jenkins’s claim appeared to be necessary in light of the post-hearing discovery, some of whom the EPA no

⁴² *Update Art, Inc. v. Modiin Publ'g, Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988); *see also Nat'l Hockey League*, 427 U.S. at 643 (noting that Rule 37 sanctions may serve both to “penalize those whose conduct may be deemed to warrant” them and to “deter those who might be tempted to such conduct in the absence of such a deterrent”).

⁴³ *Cine Forty-Second St. Theatre*, 602 F.2d at 1068.

⁴⁴ In support of her reasoning, the ALJ cited the distinction drawn by Judge Lamberth in *Webb v. District of Columbia*, 189 F.R.D. 180 (D.D.C. 1999): “The situation of government or in-house counsel, however, is decidedly different from that of appointed or even retained counsel. [*Citations omitted.*] A government lawyer and her client maintain an exclusive and ongoing relationship, in which the client has an unusually broad influence because of the power to control litigation policies and the entirety of the lawyer’s resources.” *Webb*, 189 F.R.D. at 191.

longer employed and thus could not be compelled under the ALJ's authority to testify. See D. & O. at 38-39. The ALJ also noted that the destruction of the emails of the EPA official who initiated the process that resulted in Jenkins's removal had "tainted the evidentiary resolution of this case." D. & O. at 39 n.37. "[I]n light of the nature of the Respondent's conduct," the ALJ concluded, "reopening the record, even if accompanied by an award of costs to the Complainant, would be a mere slap on the wrist." D. & O. at 39.

EPA further argues on appeal that the ALJ's reasoning for rejecting resumption of the hearing is not supported by the record. But as Jenkins established before the ALJ in support of her motion for sanctions and argued before the ARB, the record more than amply supports the ALJ's decision ruling out resumption of the hearing. Detailed with particularity in Jenkins's Motion for Sanctions filed with the ALJ, and summarized in her response brief on appeal at pages 10-11, the post-hearing discovery revealed, among other things: (1) further deposition of the Principal Deputy Assistant Administrator for OSWER (Mr. Breen) would be required because it was revealed that he was far more involved as a high-level EPA official in responding to Jenkins's protected disclosures (suggesting evidence of institution-wide retaliatory motive) than he had lead Jenkins to believe in his original deposition; (2) further deposition and discovery pertaining to Dellinger would be required because documents produced after the hearing revealed that Dellinger was much more involved in responding to Jenkins's protected activities than he previously admitted; yet Dellinger, having retired from the EPA, is beyond the authority of the ALJ to recall as a witness; (3) documents produced post-hearing not only revealed attorney Winick's improper coaching of Dellinger to downplay his concerns about Jenkins's protected activities but revealed his attempts to influence Rudzinski, the deciding official in Jenkins's termination, necessitating further examination of both Winick and Rudzinski; yet both are now retired from the EPA;⁴⁵ (4) finally, there are the issues that would necessarily require pursuit pertaining to Vickers's destroyed emails, should hearing in this matter have been resumed (see discussion *infra* pertaining to Vickers's emails).

The requirement that a trial court consider whether lesser sanctions would be more appropriate for particular discovery misconduct does not require exhaustion of lesser sanctions; only that the court explain its reasoning for not imposing the lesser sanctions.⁴⁶ Clearly the ALJ explained her reasoning for not imposing the aforementioned lesser sanctions, and just as clearly the record supports the ALJ's reasoning. In any event, the ALJ did consider *and did impose* the lesser sanction of adverse evidentiary rulings pertaining to the issues of causation and Respondent's affirmative defense. The ALJ imposed issue-related sanctions based on adverse evidentiary inferences specifically with respect to "whether the Complainant's protected activity was a contributing factor in her dismissal and, if so, whether the Respondent had a legitimate, non-pretextual reason to dismiss her." D. & O. at 39.⁴⁷

⁴⁵ Winick retired from the EPA in 2012. See D. & O. at 2, n.4. Jenkins suggests in her brief on appeal, at pg 10, that Rudzinski is also retired, although there is no evidence of record that the Board can identify supporting this assertion.

⁴⁶ *Webb*, 146 F.3d at 971.

⁴⁷ Under the Environmental Whistleblower Statutes, a covered employer is prohibited from discharging or otherwise retaliating against an employee with respect to the employee's

The ALJ found, as a matter of adverse evidentiary inference, that Jenkins's protected activity was a contributing factor in her dismissal: "As a sanction for the Respondent's extensive and blatant failure to fulfill its discovery obligations, and its repeated violations of my Orders, I draw the inference that the Complainant's protected activity was a contributing factor in her dismissal." D. & O. at 40.⁴⁸ The ALJ then addressed the EPA's asserted basis for its action: "In addition, also as a sanction for the Respondent's misconduct, I draw the inference that the Respondent did not have a legitimate, non-pretexual reason for dismissing the Complainant. The Complainant has adamantly maintained that she did not make a threat of any kind to Mr. Dellinger on May 3, 2010, or at any other time. As a sanction for the Respondent's abuse of the discovery process, I find that the Complainant did not utter a profane death threat to her supervisor, Mr. Dellinger, on May 3, 2010." *Id.* at 40.⁴⁹

The EPA concedes that issue-related sanctions constitute a "less dire" alternative sanction to default or dismissal (Respondent's Brief at p. 9), but raises a multitude of arguments challenging the ALJ's imposition of issue-related sanctions in the form of adverse evidentiary inferences. The EPA argues that the ALJ misapplied the adverse inference rule because her invocation of that rule was based on existing evidence of record rather than missing relevant evidence within EPA's control that it had a duty to preserve. To the extent the ALJ's adverse evidentiary inferences are based on destruction of the emails of the EPA official (Vickers) who initiated the process to remove Jenkins, the EPA argues that an adverse inference ruling requires showing that the destroyed Vickers emails were relevant to Jenkins's claim; that the ALJ's "mere

compensation, terms, conditions, or privileges of employment because the employee engaged in protected activity under any of the six environmental statutes. 29 C.F.R. § 24.102(a), (b). To prevail on the merits in a case arising under any of the environmental statutes, a complainant must establish by a preponderance of evidence that he/she engaged in protected activity, that he/she suffered an adverse action, and that the protected activity caused or was a motivating factor in the adverse action. In this case, there was no dispute but that Jenkins engaged in protected activity under the Environmental Whistleblower Statutes when she made her reports to Congress and the FBI, and to the public through the media, about her allegations of violation of environmental laws and regulations by the EPA in connection with the rescue and cleanup operations at the WTC. Nor was there any dispute but that Respondent was aware of her protected activity, and that Jenkins suffered an adverse personnel action. *See* D. & O. at 39.

⁴⁸ It is noted that the ALJ's invocation of "contributing factor" language is an incorrect burden of proof standard under the six environmental whistleblower statutes, where the complainant must establish causation by a preponderance of the evidence. *See* 29 C.F.R. § 24.109(b)(2). EPA having not asserted the use of this term as legal error on the part of the ALJ in its Petition for Review, the error is deemed to have been waived. Moreover, because the ALJ concluded the causation element was met as a discovery sanction, we find the ALJ's error harmless.

⁴⁹ Independently of the second adverse evidentiary inference drawn by the ALJ, the ALJ found "that the facts and testimony already in the record also support my finding that the Complainant did not make this threat." D. & O. at 40. The ALJ made this finding based in significant part on an assessment of the credibility of Jenkins and Dellinger, the only two parties to their exchange on May 3, 2010. The propriety of the ALJ's alternative ruling is discussed *infra*.

speculation” of relevancy⁵⁰ was not sufficient. The EPA argues that the ALJ’s explanation of EPA’s duty to preserve her emails was “inconsistent” and “equivocal;” that Vickers was not a “key witness,” as the ALJ found, whose emails should have been preserved rather than destroyed; and challenges the ALJ’s finding that the EPA’s Office of General Counsel, responsible for imposing litigation holds, knew of Vickers’s involvement in the decision to terminate Jenkins’s employment when the EPA destroyed her emails. The EPA also contends that the ALJ ignored evidence of record (i.e. Frazier Declaration (Exh 2 to Agency Response to Motion for Sanctions)) that established that the destruction of Vickers’s emails was in the normal course of business; that at the time Vickers’s emails were ordered destroyed it was routine agency procedure to delete departing employee’s emails if not subject to outstanding litigation hold. Moreover, the EPA argues, FRCP Rule 37(e) applies and prohibits imposing discovery sanctions against a party for failing to produce electronically-stored records lost as result of the routine, good-faith operation of an electronic-information system.

Finally, the EPA argues that the ALJ committed reversible error as a matter of law because entry of default judgment for spoliation of evidence requires proof by clear and convincing evidence that the destruction was undertaken in bad faith, a burden of proof that in this case was not met. Respondent’s Brief, at 18.

“A party that fails to preserve evidence ‘runs the risk of being justly accused of spoliation’ . . . and find itself the subject of sanctions.”⁵¹ “Spoliation” is defined as “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”⁵² The determination of an appropriate sanction for spoliation “is confined to the sound discretion of the trial judge,” assessed on a case-by-case basis, and will not be reversed on appeal absent abuse of that discretion.⁵³ The trial court’s authority for imposing such sanctions arises jointly under the court’s inherent powers and the Federal Rules of Civil Procedure.⁵⁴

⁵⁰ Cited by Respondent is the ALJ’s statement at n.18 of the D. & O, that, “it is simply not possible to say what might have been in the destroyed emails.”

⁵¹ *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011) (citation omitted); *Smith v. Cafe Asia*, 246 F.R.D. 19, 21 n. 1 (D.D.C. 2007).

⁵² *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). *See generally* BLACK’S LAW DICTIONARY 1409 (7th ed.1999).

⁵³ *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *West*, 167 F.3d at 779; *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995).

⁵⁴ *Zubulake v. USB Warburg LLC*, 229 F.R.D. 422, 430 (S.D.N.Y. 2004) (citing *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991); *Shepherd*, 62 F.3d at 1474 (“When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap.”); *id.* at 1475 (holding that sanctions under the court’s inherent power can “include . . . drawing adverse evidentiary inferences”).

The D. C. Circuit Court of Appeals has subdivided spoliation sanctions into two categories: (1) issue-related sanctions, such as adverse evidentiary determinations and preclusion of the admission of evidence, and (2) punitive or penal sanctions, such as dismissal or default judgments (as well as contempt orders, awards of attorney’s fees, and the imposition of fines).⁵⁵ “Because issue-related sanctions are fundamentally remedial rather than punitive,” the Circuit Court in *Shepherd v. American Broadcasting Companies* explained, a trial court may impose such sanctions “whenever a preponderance of the evidence establishes that a party’s misconduct has tainted the evidentiary resolution of the issue.”⁵⁶ On the other hand, because dispositive sanctions for spoliation such as dismissal or default judgment are fundamentally penal in nature, a trial court “must find clear and convincing evidence of the predicate misconduct” before imposing dismissal or a default judgment.⁵⁷

Because the ALJ in the present case drew adverse evidentiary inferences (an issue-related sanction) due to the EPA’s destruction of Vickers’s emails, as opposed to directly imposing default judgment for the spoliation of evidence, consistent with *Shepherd* proof by a preponderance of the evidence (as opposed to proof by clear and convincing evidence) is all that was required to establish before the ALJ that the EPA’s misconduct fouled evidentiary resolution of the two issues for which the adverse inferences were drawn. There is no reversible error on the ALJ’s part in this regard.

In assessing the appropriateness of the ALJ’s issue-related sanctions and responding to the EPA’s several arguments, the Board is guided by the “concept of proportionality” between offense and sanction embraced by the federal courts,⁵⁸ “but only to ask whether the judge’s decision was a reasonable one—not to decide whether we might have done the same in the judge’s place.”⁵⁹

To support an adverse inference ruling based on the spoliation of evidence it must be established before the trial court that: (1) the party having control over the evidence had an obligation to preserve it when it was destroyed; (2) the records were destroyed with a “culpable state of mind;” and (3) the destroyed evidence was relevant to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable fact finder could conclude that the lost evidence would have supported the claims or defense of the party that sought it.⁶⁰

⁵⁵ *Shepherd*, 62 F.3d at 1478.

⁵⁶ *Shepherd*, 62 F.3d at 1478. *Accord Clarke v. Washington Metro. Area Transit Auth.*, 904 F. Supp. 2d 11, 21 (D.D.C. 2012).

⁵⁷ *Shepherd*, 62 F.3d at 1478.

⁵⁸ *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 707; *see e.g. Bonds*, 93 F.3d at 808.

⁵⁹ *Roadway Express v. Dep’t of Labor*, 495 F.3d 477, 484-485 (7th Cir. 2007).

⁶⁰ *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-12 (2d Cir. 2001); *Mazloun v. D.C. Metro. Police Dep’t*, 530 F. Supp. 2d 282, 291 (D.D.C. 2008); *Zubulake v. USB Warburg*, 220 F.R.D. 212,

There is no question but that the EPA had a duty to preserve Vickers's emails. A party has a duty to preserve potentially relevant evidence whenever "litigation is reasonably foreseeable."⁶¹ "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."⁶² The scope of evidence a party is obligated to preserve extends not only to potentially admissible evidence, but also to documentation that "is reasonably calculated to lead to the discovery of admissible evidence [or] is reasonably likely to be requested during discovery."⁶³

The substantial evidence of record supports the ALJ's finding that the EPA was "clearly on notice that Ms. Vickers played an important role in the Complainant's disciplinary process" involving "not one, but two actions initiated by her in connection with that process." D. & O. at 19, 25. Vickers was the first official to determine that Jenkins's employment should be terminated, directing on May 10, 2010, that a Notice of Proposed Removal (NPR) be drafted—before any investigation of the alleged death threat, before hearing Jenkins's side of the story, before the appointment of a proposing official, and before any analysis of an appropriate penalty. Vickers was aware of Jenkins's protected activities, and was also involved in earlier attempts to discipline Jenkins. See D. & O. at 26.⁶⁴ Indeed, in EPA attorney Winick's response to a documents request from the Office of Special Counsel (OSC), issued in response to Jenkins's

220 (S.D.N.Y. 2003). An adverse evidentiary inference may also be warranted, in some circumstances, for the untimely production of evidence. See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

⁶¹ *Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 170 (D.C. Cir. 2013); see also *Shepherd*, 62 F.3d at 1481 (a party to litigation has "an obligation to preserve and also not to alter documents it knew or reasonably should have known were relevant . . . if it knew the destruction or alteration of those documents would prejudice" an opponent). *Accord Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 554 (6th Cir. 2010); *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007); *Ritchie v. United States*, 451 F.3d 1019, 1024 (9th Cir. 2006); *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).

⁶² *Zubulake*, 220 F.R.D. at 218.

⁶³ *Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp. 2d 27, 33 n.3 (D.D.C. 2004) (internal quotation omitted).

⁶⁴ Evidence of record, including emails produced during post-hearing discovery, showed that Vickers was aware of Jenkins's protected disclosures and involved in responding to them, including previous involvement on more than one occasion in proposed disciplinary activity in connection with the protected disclosures. See D. & O. at 24, 25. See also, D. & O. at 29 ("Ms. Vickers herself, in her declaration (as confirmed by Mr. Prince and Mr. Dellinger), confirmed that she determined that the Complainant should be removed from federal service, and ordered that a proposed removal notice be drafted immediately. She was also copied on an email chain regarding the preparation of a proposed removal notice, and the acquisition of the Complainant's statement. And contrary to Mr. Winick's claim, Ms. Vickers also exchanged communications about the Complainant's whistleblowing activities.").

challenge of the NPR that she subsequently filed with OSC and the Merit Systems Protection Board (MSPB), Winick acknowledged the EPA's awareness of Vickers's involvement in both the decision proposing Jenkins's removal and her involvement in proposing discipline of Jenkins in 2009. *See* D. & O. at 23, 29.

The EPA was clearly put on notice that Jenkins intended to dispute her dismissal on the grounds that she had been retaliated against for her whistleblowing activities as of July 14, 2010, when Jenkins filed her request with the OSC and the MSPB to stay the Notice of Proposed Removal. The EPA was clearly aware of Jenkins's stay request, filing its response in opposition with the OSC and MSPB on July 21, 2010. The Board agrees with the ALJ that regardless of when Jenkins served her discovery requests in this claim, "the Respondent was under an obligation to preserve these documents, as of at least July 14, 2010, when the Complainant requested a stay pending resolution of her whistleblower claims." D. & O. at 25. As the ALJ observed: "One would not have to be clairvoyant to foresee that the dismissal of a senior employee (one who had previously brought retaliation claims against the Respondent) could result in litigation in some form, and thus it would be important to preserve documents generated by key players in that process." *Id.* at 27.⁶⁵

The Board fully agrees with the ALJ's conclusion that, "[f]rom the moment that the Complainant indicated that she intended to dispute her dismissal, the Respondent was under a duty to assure that any documents that could be relevant to a resolution of her claim were preserved, D. & O. at 27, and that as of July 14, 2010, upon Jenkins filing of her stay request, the EPA was under an affirmative obligation to preserve "all documents relevant to the central issues in this claim, including the Complainant's involvement in protected activity, as well as the events leading up to her termination." *Id.* at 28. Clearly Vickers, who ordered the drafting of the Notice of Proposed Removal, was a key player. Just as clearly, the EPA was obligated to preserve any and all documents Vickers generated, including her emails.

As previously mentioned, the EPA contends that the ALJ ignored evidence of record contained in the affidavit of Mr. Frazier (with EPA's Office of Environmental Information) that established that the destruction of Vickers's emails was in the normal course of business and that at the time Vickers's emails were ordered destroyed, it was routine agency procedure to delete departing employee's emails if not subject to an outstanding litigation hold. Moreover, the EPA argues, FRCP Rule 37(e), in effect at the time, applies and prohibits imposing discovery sanctions against a party for failing to produce electronically-stored records lost as result of the routine, good-faith operation of an electronic-information system.⁶⁶

⁶⁵ In arguing that the ALJ erred in finding that Jenkins was a "key witness" whose emails should have been preserved, the EPA cites the ALJ's error in her description of Jenkins role found on two occasions in the D. & O.—where the ALJ referred to Jenkins as having "drafted" the proposed removal decision. *See* D. & O. at 25, 29. The Board finds this error harmless and certainly no basis for reversing the ALJ, given that the ALJ nevertheless correctly stated that Vickers *directed* the drafting of the Notice of Proposed Removal, or otherwise determined that Jenkins should be removed, on at least five other occasions in the decision. *Id.* at 23, 26, 29, 30, 34.

⁶⁶ FRCP Rule 37(e) as it existed prior to its amendment in 2015 states:

It is not, however, the case that the ALJ ignored Frazier's affidavit. Nor does the record support the EPA's argument that it destroyed Vickers's emails through routine, good-faith operation of an electronic-information system or in the normal course of business. The ALJ noted that Frazier stated that when Vickers retired in June 2010, standard agency procedure was to determine if there was an outstanding litigation hold on the departing employee's email inventory, and if not, to initiate deletion of the emails. D. & O. at 21. But as the ALJ further noted, Frazier's affidavit did not address the question of why no litigation hold was placed on Vickers's email inventory. *Id.* Nor did Frazier address preservation of Vickers's emails pursuant to the Federal Records Act (FRA) that required the preservation of records of departing government officials, and which the EPA admitted (through Ms. Washington, counsel for the EPA) required that a substantial volume of Vickers's emails be preserved. *Id.* at 25-26. In the words of the ALJ: "Although the Respondent provided affidavits describing the process by which Ms. Vickers' emails were destroyed, there is nothing to establish that this was in fact the "normal course of business." *Id.* at 29 n.20. The Board thus fully agrees with the ALJ's conclusion that, "The existence and applicability of laws regarding the preservation of Ms. Vickers' emails, and the failure of the Respondent to take any steps to abide by these laws, certainly leads to the rational inference that the wholesale destruction of Mr. Vickers' emails was not in the 'ordinary course of business.'" *Id.* at 26.

In any event, the fact that records are destroyed in accordance with a party's typical practice for retaining documents does not absolve the party of its duty to preserve relevant documents for litigation.⁶⁷ This obligation extends both to legal counsel, "who has a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction," as well as the managers of governmental or corporate parties, "who are responsible for conveying to their employees the requirements for preserving evidence."⁶⁸

The question becomes whether the EPA destroyed Vickers's emails with the necessary "culpable state of mind." The EPA argues on appeal that it must be demonstrated by clear and convincing evidence that it destroyed Vickers's emails in bad faith or with purposeful intent, citing *Shepherd v. Am. Broadcasting Cos.*, 62 F.3d 1469 (D.C. Cir. 1995). Respondent's Brief, at 18. What Respondent ignores, however, is that in *Shepherd*, the appellate court distinguished

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

⁶⁷ See *Talavera v. Shah*, 638 F.3d 303, 311 (D.C. Cir. 2011) (fact that the records were destroyed as part of the defendant's "typical practice" was insufficient to overcome the duty to preserve them); *Zubulake*, 220 F.R.D. at 218 ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.").

⁶⁸ *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011) (quoting *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 437 (S.D.N.Y. 2010)).

between the burden of proof required for the imposition of punitive sanctions such as default for the spoliation of evidence, and the burden of proof required for the imposition of issue-related sanctions such as that the ALJ imposed in this case. Proof by clear and convincing evidence of bad faith or purposeful intent is required as a condition for imposing punitive sanctions, whereas the imposition of issue-related sanctions may be imposed “whenever a preponderance of the evidence establishes that a party’s misconduct has tainted the evidentiary resolution of the issue.”⁶⁹

“There is no question that when relevant documents are willfully destroyed by a party then that party is culpable and should be held responsible for the prejudice it has caused.”⁷⁰ At the same time, a “culpable state of mind” for purposes of a spoliation inference has been held to include ordinary negligence.⁷¹ “[A] court may employ an adverse inference due to a party’s ‘failure to preserve evidence,’ even if deliberate or reckless conduct is not present.”⁷²

In this case, the EPA’s failure to preserve Vickers’s emails was neither negligent nor reckless. Nor was the loss of Vickers’s emails “inadvertent,” as EPA’s attorney Winick apparently asserted in response to the ALJ’s July 11, 2012 Order to Compel requiring the EPA to search emails, including Vickers’s. See D. & O. at 24. The substantial evidence of record supports the ALJ’s finding that, “Respondent willfully failed to preserve Ms. Vickers’ emails when she retired, despite the fact that there was pending litigation in which her testimony could play a key role.” *Id.* at 23. On June 30, and July 1, 2010, there were three separate orders from the Office of Resource Conservation and Recovery (ORCR) for the destruction of Ms. Vickers’s email inventory. *Id.* at 21, 23, 24. Notwithstanding clear notice by July 14, 2010 that Jenkins intended to dispute her dismissal on whistleblower retaliation grounds, the EPA neither invoked a litigation hold with respect to Vickers’s emails nor, for that matter, is there any indication in the record that the EPA made any effort whatsoever to assure the preservation of Ms. Vickers’s emails, let alone the emails of any other potential witnesses, or for that matter even identify those employees whose emails might be discoverable. *Id.* at 23, 29. As a result, the EPA destroyed Vickers’s email inventory on August 3, 2010. Even then, after attorney Winick’s September 28, 2010 response to OSC’s request to the EPA for the records related to Jenkins’s removal, in

⁶⁹ *Shepherd*, 62 F.3d at 1478. As previously noted, the ALJ did find that the destruction of Vickers’s emails had “tainted the evidentiary resolution of this case.” D. & O. at 39, n.37.

⁷⁰ *Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co.*, 654 F. Supp. 1334, 1364 (D.D.C. 1986).

⁷¹ See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002); *Mahaffey v. Marriott Int’l Inc.*, 898 F. Supp. 2d 54, 61 (D.D.C. 2012) (“[T]o justify the issuance of an adverse inference instruction, the destruction need not be purposeful, and negligent spoliation suffices.”). See also *Grosdidier v. Broad. Bd. of Governors*, 709 F.3d 19, 27 (D.C. Cir. 2013) (spoliation inference may be “appropriate in light of the duty of preservation notwithstanding the fact that the destruction was negligent” (citing *Talavera v. Shah*, 638 F.3d at 312)).

⁷² *More v. Snow*, 480 F. Supp. 2d 257, 274-75 (D.D.C. 2007) (quoting *Rice v. United States*, 917 F. Supp. 17, 19-20 (D.D.C. 1996)).

which he identified Vickers as a person involved in the decision proposing Jenkins's removal and listing her as a person involved in previously proposing discipline of Jenkins, the EPA allowed Vickers's email back-up tapes to be destroyed on or about November 1, 2010. See D. & O. at 23.

The EPA's effort to shift blame to EPA's Office of General Counsel, normally responsible for invoking litigation holds, by arguing that OGC was not aware of Vickers's involvement until after her email inventory was destroyed on August 3, 2010, is an attempt barely worthy of credence. The EPA conveniently ignores the fact that OGC would have known no later than September 28th of Vickers's involvement, upon Winick's filing of EPA's response to the Office of Special Counsel's documents request in which he listed Vickers as a person involved in the decision proposing Jenkins's removal—well in advance of the destruction of Vickers's backup tapes.⁷³ Yet, as the ALJ noted, see D. & O. at 30, whether the OGC was aware of Vickers's involvement is ultimately irrelevant, as EPA managers and legal counsel were clearly aware of Vickers's role as early as May 10, 2010,⁷⁴ when she met with Jenkins's supervisors and directed Dellinger to draft a proposed removal notice.⁷⁵

The next question is whether the destroyed evidence was relevant to the claims or defenses of the party that sought the discovery of the spoliated evidence to the extent that it can be reasonably concluded that the destroyed evidence would have supported the claims or defense of the opposing party.⁷⁶ "Once a court has determined that future litigation was reasonably

⁷³ The EPA's belated attempt to claim that there is no evidence to suggest that Vickers's backup tapes contained Vickers's emails, and even if they did no evidence that the emails could have been retrieved from those tapes, is hardly worth mention. See Respondent's Brief at 18 n.32. As Jenkins points out in her brief on appeal, the EPA had the opportunity to argue this before the ALJ and present evidence that it knew that the backup tapes did not contain Vickers's emails, but did not do so. The EPA cannot now, based on self-serving and unsupported assertions, made for the first time on appeal, abandon the declarations of EPA officials (see D. & O. at 26) upon which the ALJ relied in finding that Vickers's backup emails were destroyed.

⁷⁴ In EPA's January 5, 2012 Motion for Summary Judgment filed with the ALJ, Winick acknowledged that he talked with Dellinger by telephone on May 3, 2010, after Jenkins allegedly made the death threat, and that he and Dellinger exchanged emails on May 3rd and 4th in which they discussed Dellinger's interactions with Jenkins on May 3rd. See D. & O. at 33.

⁷⁵ The Board further agrees with the ALJ that it is not dispositive that Vickers's emails were destroyed by persons or contractors not directly involved in Jenkins's removal. See D. & O. at 30. Respondent had control over this evidence, and thus was responsible for its destruction. See *K-Con Bldg. Sys. v. U.S.*, 106 Fed. Cl. 654, 664 (Fed. Cl. 2012) ("If a party having control over evidence allows that evidence to be discarded, then the disposal of that evidence is attributable to that party, regardless of who actually discarded the evidence.").

⁷⁶ See footnote 58, *supra*.

foreseeable to the party who destroyed relevant records, the court must then assess . . . whether the destroyed records were likely relevant to the contested issue.”⁷⁷

“Destruction of evidence raises the presumption that disclosure of the materials would be damaging.”⁷⁸ Nevertheless, the EPA argues that the showing of relevancy necessary to impose issue-related sanctions in this case was not met. Although the ALJ found that the destroyed emails “would have been relevant and helpful to the Complainant’s claim” (D. & O. at 26), the EPA argues that the ALJ’s finding is without record support. Moreover, the EPA asserts, the ALJ’s finding of relevance is based on mere speculation, citing footnote 18 of the D. & O, where the ALJ states: “it is simply not possible to say what might have been in the destroyed emails [but that] [g]iven the circumstances, it is appropriate to draw the inference that they were destroyed because they would have hurt the Respondent’s case.”

The EPA ignores the fact that the ALJ found that Vickers’s emails and backup tapes were intentionally destroyed,⁷⁹ which in and of itself supports the inference that the destroyed records were relevant to Jenkins’s claim. When evidence is destroyed in bad faith (*i.e.*, intentionally or willfully), that fact alone is sufficient to demonstrate relevance.⁸⁰ “It is a well-established and long-standing principle of law that a party’s intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.”⁸¹ “By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions.”⁸²

Moreover, it is not the case, as the EPA argues, that the ALJ’s conclusion that the destroyed emails were relevant to Jenkins’s proof of causation and proof that the EPA’s affirmative defense was pretextual is not supported by the evidentiary record. As the ALJ expressly noted in supporting her finding of relevance: “Ms. Vickers was the first official to determine that the Complainant should be removed, and to direct the drafting of a proposed removal. She did so before any investigation of the alleged death threat, before hearing the Complainant’s side of the story, before the appointment of a proposing official, and before any analysis of the appropriate penalty. Ms. Vickers was also involved in earlier discipline and attempts to discipline the Complainant, and she was aware of the Complainant’s protected

⁷⁷ *Gerlich v. U.S. Dep’t of Justice*, 711 F.3d at 171 (citing *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1998)).

⁷⁸ *Arista Records v. Sakfield Holding*, 314 F. Supp. 2d 27, 34 (D.C.C. 2004) (citing *Synanon Church v. United States*, 820 F.2d 421 (D.C. Cir. 1987)).

⁷⁹ See discussion *supra*, holding that the substantial evidence of record supports the ALJ’s finding of intentionality.

⁸⁰ *Residential Funding Corp.*, 306 F.3d at 109.

⁸¹ *Kronisch*, 150 F.3d at 126.

⁸² *Zubulake*, 229 F.R.D. at 431.

activity. *All of this is circumstantial evidence that could support the Complainant's claims of retaliation and pretext.*" D. & O. at 26 (emphasis added).

Furthermore, it is by no means reversible error that in reaching her finding of relevancy the ALJ acknowledged that it was impossible to say what might have been in the destroyed records. As the D.C. Circuit Court of Appeals has recognized, an inquiry as to the relevance of destroyed evidence is "unavoidably imperfect . . . in the absence of the destroyed evidence," and that as a consequence "[a court] can only venture guesses with varying degrees of confidence as to what that missing evidence may have revealed."⁸³ "[I]n situations where 'the document destruction has made it more difficult for a party to prove that the documents destroyed were relevant,' the 'burden on the party seeking the adverse inference is lower,' and 'the trier of fact may draw such an inference based even on a very slight showing that the documents are relevant.'"⁸⁴

Based upon a thorough examination of the record, the ALJ's reasoning, and application of the foregoing cited legal authority, the Board affirms the adverse evidentiary inferences the ALJ drew supporting causation and that the EPA's stated reason for terminating Jenkins's employment was pretextual. This, then, brings us full circle to the question of whether the ALJ's default judgment imposed against the EPA is sustainable. By effectively resolving the issues of causation and the legitimacy of the EPA's affirmative defense through adverse evidentiary inferences, and with the other proof elements of Jenkins's claim also resolved (see D. & O. at 39), the resulting ALJ decision is little different than that before the D. C. Circuit in *Bonds v. District of Columbia*, where the broad preclusion order there under review was held to constitute a default judgment, having effectively disposed of the merits of the claim by leaving the District "with little ability to contest the plaintiff's claims."⁸⁵

The Board thus turns its attention to the nature of the EPA's discovery non-compliance. As previously discussed, to justify dismissal or default judgment the discovery misconduct must be attributable to willfulness, bad faith, or some fault on the part of the non-complying party, with "fault" interpreted to include "gross negligence."⁸⁶

Justifying the imposition of default judgment, the ALJ cited not just the EPA's intentional destruction of Vickers's email records but the entire history of the EPA's repeated efforts to thwart the discovery Jenkins undertook and the EPA's disregard of the ALJ's repeated

⁸³ *Gerlich v.* 711 F.3d at 171 (quoting *Kronisch, supra*, 150 F.3d at 127)).

⁸⁴ *Gerlich*, 711 F.3d at 171 (quoting *Ritchie v. United States*, 451 F.3d 1019, 1025 (9th Cir. 2006)).

⁸⁵ *Bonds*, 93 F.3d at 808-809.

⁸⁶ *Weisberg*, 749 F.2d at 871. *Accord Cine Forty-Second St. Theatre*, 602 F.2d at 1067 (if 'fault' has any meaning not subsumed by 'willfulness' and 'bad faith,' it must at least cover gross negligence amounting to a "total dereliction of professional responsibility" even though not a conscious disregard of a court's orders).

Orders to Compel. Throughout the ALJ's Decision and Order, she found the EPA's conduct willful, deliberate, and undertaken in bad faith. "Respondent's conduct over a more than two year period reflects a deliberate, willful disregard of its discovery obligations in this matter, as well as continued willful disobedience of the Court's specific Orders regarding discovery." D. & O. at 9. "[T]he Respondent's conduct, from beginning to end, reflected a wholesale, deliberate, and willful disregard of the Respondent's discovery obligations in this proceeding, as well as the Court's authority to govern the conduct of the proceedings." *Id.* at 10. "Respondent's discovery shortcomings were ongoing, blatant, knowing, and willful. Indeed, a major factor in my consideration of the Complainant's motion is the breadth and depth of the Respondent's ongoing disregard of its discovery obligations, and failure to abide by my orders." *Id.* at 35.

"[T]he Court is not dealing with a single failure to comply with a discovery order," the ALJ declared, "[t]he Respondent's discovery misconduct was ongoing, starting from the moment discovery began in this claim (and with respect to Ms. Vickers' emails and the failure to put a litigation hold in place, even earlier), and continuing through, and after the suspension of the hearing. The Respondent's intransigence in carrying out its discovery responsibilities, and in repeatedly violating my specific directions, has resulted in the issuance of numerous lengthy Orders directing the Respondent to do what it should have done in the first place, and then to do what the Court had ordered it to do." D. & O. at 35.

EPA misconduct specifically cited by the ALJ included not only Respondent's "willful fail[ure] to preserve Ms. Vickers' emails when she retired, despite the fact that there was pending litigation in which her testimony could play a key role," *id.* at 23, but also "Respondent's failure to produce literally thousands of documents before the hearing," *id.* at 10, and "Respondent's lengthy course of willful misconduct during the protracted prosecution of this claim." *Id.* at 38. Nor did the conduct of the EPA's legal counsel go unnoticed by the ALJ. "Mr. Winick withheld documents and emails that reflected his involvement, concealed their existence by not identifying them on a privilege log, and misrepresented to the Court and the Complainant that the Respondent had complied with its discovery obligations." *Id.* at 31. "That Mr. Winick withheld documents and email traffic reflecting his own involvement in the process, despite the Court's explicit Orders to produce them, strongly supports a finding that he acted in bad faith." *Id.* at 37. "[T]he conduct of the Respondent in this claim demonstrates its callous disregard of the responsibilities the Respondent and its counsel owe to the Court and their opponent." *Id.* at 36. "I have no doubt," the ALJ concluded, "that Respondent's repeated failures to fully respond to the Complainant's discovery requests, and to comply with my discovery orders, were deliberate and willful." *Id.* at 39.

On appeal, the EPA argues that while its discovery responses "were initially insufficient" and that the conduct of its attorney, while "deserving of some sanction," was nevertheless timely and objections to discovery pursued in good faith either because the requested documents had been the subject of Jenkins's claim before the MSPB or because he reasonably believed non-disclosed documents were attorney-client privileged. "On the spectrum of discovery misconduct," the EPA asserts, "Winick's actions on behalf of the Agency were less egregious than those typically found to warrant a default sanction." Respondent's Brief, at 11-12 (citing several cases in which default judgments were imposed due to a party's failure to respond to discovery).

It is debatable that the EPA's responses to requested discovery can be labeled "timely" where because of the its continued failure to fully respond to Jenkins's discovery requests and comply with the ALJ's orders, often through evasive or misleading responses,⁸⁷ its responses necessitated repeated Orders to Compel—including two Orders to Compel post-hearing.⁸⁸ In the ALJ's First Order to Compel, issued September 28, 2011, the ALJ addressed and rejected the EPA's argument that Jenkins was entitled to nothing more than what Winick thought she was entitled to in connection with her MSPB proceeding; rejected the EPA's claim that there were only two EPA employees who had any involvement in the matters at issue (Dellinger and Rudzinski) from whom discovery was relevant; and directed Winick in detail on the necessity and requirements of privilege logs for protecting attorney-client privileged communications. See D. & O. at 11-12. Nevertheless, as late as the ALJ's Third Motion to Compel, issued post-hearing on July 11, 2012, the EPA continued to take the position that the discovery produced pursuant to Jenkins's MSPB complaint satisfied discovery in this case,⁸⁹ as late as the ALJ's Order of Clarification, issued May 12, 2013, the EPA continued to insist that the universe of relevant discoverable evidence was limited to Dellinger and Rudzinski;⁹⁰ and to the bitter end the ALJ was forced to repeatedly call into question Winick's refusal to properly prepare or use privilege logs.⁹¹

⁸⁷ As the ALJ noted, "Respondent's responses to [Jenkins's] discovery requests, as well as the Court's Orders compelling discovery, were shifting, contradictory, and often inaccurate." D. & O. at 23.

⁸⁸ FRCP Rule 37(a)(4) directs that an evasive or incomplete response to discovery is to be treated no differently than a failure to disclose, answer or respond to a discovery request or court order. See *Tom v. S.B., Inc.*, 280 F.R.D. 603, 610 (D.N.M. 2012); *Nike, Inc. v. Top Brand Co.*, 216 F.R.D. 259, 268-69 (S.D.N.Y. 2003).

⁸⁹ "Despite my repeated and explicit instructions that the Respondent's discovery obligations were not limited to what was produced in connection with the MSPB proceeding, having gathered those documents, and documents in connection with the Complainant's complaint to the OSC, Mr. Winick did not feel obligated to conduct any further searches in response to the Complainant's Department of Labor complaint. Indeed, despite my explicit instructions to the contrary, Mr. Winick continued to refer to the discovery process in this claim as a "do-over," with issues identical to those raised in the MSPB proceeding." D. & O. at 14-15. "[I]t was apparent that Mr. Winick believed the records he produced to the OSC in response to its information request, as well as whatever records he produced to the Complainant in connection with the MSPB proceeding, were synonymous with the Complainant's requests in this proceeding, and he was not required to produce or search for anything further." *Id.* at 16.

⁹⁰ "Once again, I noted [in the Order of Clarification] the Respondent's continued insistence, despite my repeated instructions to the contrary, that the universe of relevant evidence came solely from Mr. Dellinger and Ms. Rudzinski. . . . I noted that I had repeatedly advised the Respondent, and the Respondent had repeatedly ignored, that the universe of relevant evidence was not limited to information in the hands of Mr. Dellinger and Ms. Rudzinski." D. & O. at 21-22.

⁹¹ The ALJ noted that she "repeatedly was forced to instruct Winick on the preparation and proper use of privilege logs, citing her Second Order to Compel, issued February 9, 2012, and her Order of May 9, 2012, in which the ALJ "not[ed] that I had previously made it clear that the

The fact of the matter is that EPA's conduct (including that of attorney Winick) was just as egregious as numerous cases where default judgment as a sanction for discovery misconduct has been ordered. Several examples of discovery misconduct found attributable to "willfulness, bad faith, or fault" on the part of the non-complying party merit mention, beginning with *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), in which the Supreme Court held that the district judge did not abuse his discretion in finding bad faith on the plaintiff's part for failing to timely answer interrogatories, for providing substantially incomplete answers to the interrogatories when finally answered, and in concluding that extreme sanction of dismissal was appropriate by reason of the plaintiff's "flagrant bad faith" and its counsel's "callous disregard" of its responsibilities. Another example is *Weisberg v. Webster*, where the D.C. Circuit had little trouble in finding the requisite bad faith or fault under F.R.C.P. Rule 37(b) where the plaintiff repeatedly refused to answer interrogatories in compliance with court orders.⁹² In *Denton v. Mr. Swiss of Missouri, Inc.*, the Eighth Circuit held plaintiffs' noncompliance with discovery to be willful "due to their complete disregard of repeated orders of the court, their inaction during an entire discovery period, and their insufficient and defective offers of discovery eventually made even after numerous extensions of time running over more than a year."⁹³

The Ninth Circuit decision in *G-K Properties v. Redevelopment Agency*,⁹⁴ is particularly instructive. In *G-K Properties* the plaintiffs supplied a large portion of the requested documents in response to the trial court's order compelling production of the documents. Four months later the plaintiffs had not fully responded to the trial court's order, notwithstanding the court having twice by order and also at conference in chambers directed the plaintiffs to produce the documents included in the court's order to compel or explain why such documents did not exist. Upon defendants' subsequent motion for dismissal as a discovery sanction for plaintiffs' failure to comply with the initial discovery order, the plaintiffs tendered the requested documents on the eve of hearing on the motion to dismiss. The trial court rejected plaintiffs' tender of those documents, and dismissed the case. The Ninth Circuit, in affirming the trial court's dismissal, cited the plaintiffs' conduct as a willful effort "halting the discovery process . . . in opposition to

Respondent was required to indicate the nature and basis for its claim of privilege for each document for which it claimed a privilege [but that] once again, the Respondent did not articulate the basis for its claim of privilege with respect to each document, but relied on a conclusory claim that the documents were protected under 'one or all' of three possible privileges," and following Winick's post-hearing deposition and Jenkins's follow-up discovery request, noting that Winick "again . . . did not provide a privilege log" in support of EPA's objection to disclosure of communications between Winick and other EPA officials. See D. & O. at 12-14.

⁹² *Weisberg*, 749 F.2d at 871 ("There is no argument in this case that appellants' noncompliance with court orders was anything other than willful."). Cf. *Shelton v. American Motors*, 805 F.2d 1323, 1329-1330 (8th Cir. 1986) (finding defendant's refusal to obey discovery orders "undoubtedly willful" but under the circumstances of the case not made in bad faith).

⁹³ *Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236, 240 (8th Cir. 1977).

⁹⁴ *G-K Props. v. Redevelopment Agency*, 577 F.2d 645 (9th Cir. 1978).

the authority of the court” causing “impermissible prejudice” to both the opposing parties and the court that the plaintiffs’ “last-minute tender of relevant documents could not cure.”⁹⁵ “On the facts of this case” the Court stated, “we do not think that the court below could have done other than to conclude that appellants’ refusal to cooperate was in direct disobedience to the authority of the court.”⁹⁶

It is abundantly clear that the ALJ’s finding that the EPA willfully and deliberately engaged in discovery misconduct is supported by the substantial evidence of record.

The Board’s affirmation of the ALJ’s determination that the EPA’s discovery misconduct was willful and deliberate is not the end of the inquiry. To affirm the ALJ’s default judgment, the EPA’s discovery misconduct must have resulted in either prejudice to Jenkins, or prejudice to the judicial system, or warrant the sanction of default as a penalty because of the nature of the EPA’s misconduct and to deter similar misconduct by the EPA or other litigants in the future.⁹⁷

The ALJ viewed the EPA’s “discovery recalcitrance” as having resulted in “extreme prejudice” to Jenkins, and found that Jenkins’s ability to present her case was so prejudiced because of the EPA’s misconduct that it would have been unfair to require her to proceed any further in the case. D. & O. at 23, 36. The ALJ specifically cited the destruction of Vickers’s email records which, the ALJ noted, would have been relevant and helpful to Jenkins’s claim given that Vickers was the first EPA official to determine that Jenkins should be removed and directed the drafting of the Notice of Proposed Removal. The ALJ rightfully concluded that Vickers initiation of the removal process “before any investigation of the alleged death threat, before hearing the Complainant’s side of the story, before the appointment of a proposing official, and before any analysis of the appropriate penalty,” coupled with the fact that Vickers was aware of Jenkins’s protective activity and involved in earlier discipline and attempts to discipline Jenkins, and she was aware of Jenkins’s protected activity, constituted “circumstantial evidence that could support the Complainant’s claims of retaliation and pretext.” *Id.* at 26.

In determining the potential prejudice to Jenkins, the ALJ thus properly viewed the EPA’s destruction of Vickers’s email records as severely hampering Jenkins’s ability to present her case, making it unfair on this basis alone to require Jenkins to proceed further.⁹⁸ The ALJ did not, however, base her finding of prejudice to Jenkins on the destruction of Vickers’s emails alone. Additionally, the ALJ found that the prejudice that would accrue to Jenkins would be “extreme and manifest” should the EPA’s discovery misconduct be ignored and the case allowed to proceed to further hearing. Cited by the ALJ was “[t]he sheer volume of the Respondent’s untimely [post-hearing] document production,” which in the ALJ’s estimation “would require and entitle the Complainant to additional, extensive, and costly discovery in the form of

⁹⁵ *Id.*, at 647-648.

⁹⁶ *Id.* at 648.

⁹⁷ *Webb*, 146 F.3d at 971.

⁹⁸ *Id.*

depositions and interrogatories.” D. & O. at 36. Further prejudicing Jenkins, the ALJ concluded, “is the fact that most of the major witnesses in this claim are no longer available to the Complainant. Thus, Ms. Vickers, Mr. Dellinger, and Mr. Winick are no longer employed by the Respondent, and cannot be compelled to participate in discovery, or to testify at a hearing.” *Id.*

The EPA counters, arguing that the ALJ’s finding of “extreme” prejudice to Jenkins because the post-hearing discovery results would require Jenkins to conduct additional discovery is “pure speculation.” According to Respondent, that “additional, extensive, and costly discovery” would be required was an “assumption” on the part of the ALJ not supported by the record. Respondent’s Brief, at 10. The EPA further asserts that out of all of the discovery documentation produced post-hearing, Jenkins admitted that only 85 emails were potentially relevant; that there was no showing that any of 85 emails would require additional discovery; and that no “smoking gun” was produced germane to whether the alleged death threat upon which the EPA based its employment termination decision was fabricated by Dellinger in retaliation for Jenkins’s protected activity. *Id.* Of the 900+ new emails that were produced post-hearing, the EPA asserts that, “Complainant herself has admitted that only a small fraction of those documents are arguably relevant. Specifically, in an affidavit accompanying her Motion for Sanctions, she identified eighty-five (85) emails, out of the hundreds provided, that she believed were related to her disclosures.” *Id.*⁹⁹

Concerning the need to call Vickers as a witness and recall Dellinger, the EPA notes that both had retired before the 2012 hearing; thus their retirements were “nothing new.” D. & O. at 11. In any event, the EPA argues, Dellinger provided deposition and hearing testimony despite his retirement, and there was no indication that additional testimony from Dellinger was necessary or warranted based on the post-hearing discovery. *Id.* The same argument applied to Winick, who retired from the EPA in 2013. *Id.*

What is not supported by the record, however, are the EPA’s arguments, beginning with its assertion that Jenkins admitted that only 85 emails out of all that were produced post-hearing were relevant to her claim. To the contrary, the Declaration of Jenkins submitted in support of her Motion for Sanctions clearly states that the 85 emails she presented to the ALJ in support of her motion were “examples” of the approximate 905 emails and email chains that Jenkins had identified as relevant to her claim.¹⁰⁰ As to the EPA’s assertion that there is no showing that the identified documents would require further discovery, Jenkins set forth in her Motion for Sanctions that the identified documents revealed for the first time the involvement of Vickers

⁹⁹ See also Respondent’s Brief at 14, n.24 (“the Complainant admits that only 85 of these documents are potentially relevant to her complaint.”).

¹⁰⁰ Jenkins’s Declaration states in relevant part: “From the many duplicate emails and emails contained within larger email chains, I identified approximately 905 distinct *relevant* emails/email chains from each of the 20 individuals subject to discovery responding to the 3rd and 4th Orders to Compel. . . . From these 905 emails/email chains I culled 85 *examples* of significant interchanges concerning my disclosures, particularly the toxic aftermath of the World Trade Center collapse and corrosive, high pH WTC dust.” Attachment A to Jenkins’s Motion for Sanctions (emphasis added).

and other high-level EPA officials in responding to her protected disclosures and in attempts to discipline her; revealed Winick's attempts to pressure Rudzinski, the deciding EPA official; revealed Winick's animus towards Jenkins; and drew into question the credibility of the testimony at hearing of Dellinger and Rudzinski, the EPA's two key witnesses, and the deposition testimony of other high-ranking EPA officials. Based on the post-hearing discovery revelations, Jenkins cited the need as a result to pursue additional discovery and testimony regarding (among other things): the need to pursue discovery regarding the destruction of Vickers's email records and why they were destroyed notwithstanding the Federal Records Act and in the absence of a litigation hold; the need to recall Dellinger in light of documentation revealing that he was much more involved with Jenkins's protected activities than he had previously admitted; the need to recall both Winick and Rudzinski in light of the documentation revealing Winick's efforts to influence Rudzinski's decision to terminate Jenkins's employment; and the need to re-depose a Mr. Breen, Principal Deputy Assistant Administrator for OSWER, in light of revelations that he was far more involved in responding to Jenkins's protected disclosures than he had admitted in deposition. None of the post-hearing revelations may constitute a "smoking gun," as the EPA argues. Nevertheless, as Jenkins has argued, the belated discovery revealed cumulative evidence of retaliatory intent clearly deserving of further discovery.¹⁰¹

Finally, the EPA argues that the ALJ committed reversible error by entering a default judgment that cannot be justified as a necessary response to the prejudice suffered by Jenkins. The EPA cites to *Shepherd v. American Broadcasting Cos.*, in which the D.C. Circuit Court held that the prejudice to a party engendered by the destruction of documents typically merits default in two instances: "where the destroyed document is dispositive of the case, so that an issue-related sanction effectively disposes of the merits anyway, and where the guilty party has engaged in such wholesale destruction of primary evidence regarding a number of issues that the district court cannot fashion an effective issue-related sanction."¹⁰² In the present case we are actually confronted with the former situation—the ALJ imposed issue-related sanctions for EPA's spoliation of documentary evidence that, in turn, effectively disposed of the merits. Rather than a basis for reversible error, *Shepherd* supports the ALJ's imposition of issue-related sanctions that, in turn, resulted in the default judgment at issue. As previously mentioned, by effectively resolving the issues of causation and the legitimacy of the EPA's affirmative defense through adverse evidentiary inferences, the resulting decision of the ALJ is little different than

¹⁰¹ Further prejudicing Jenkins, as the ALJ found (and notwithstanding the EPA's argument to the contrary) is the fact that Dellinger and Winick are no longer EPA employees, and could not be compelled to either appear for further deposition or testify should the hearing have been resumed. As to Vickers, who retired long before the original hearing in this matter, neither the full extent of her involvement *viz* Jenkins's protected activities nor the destruction of her email records were revealed until the post-hearing discovery; thus the prejudice resulting from Jenkins inability to call her as a witness were the hearing to be rescheduled can hardly be attributed to any fault on Jenkins's part, as the EPA argues.

¹⁰² *Shepherd*, 62 F.3d at 1479.

that before the D. C. Circuit in *Bonds v. District of Columbia*, where the preclusion order there under review effectively disposed of the merits of the claim.¹⁰³

Regarding the question of prejudice to the judicial system, the ALJ concluded that “although the Court’s resources have been significantly diverted by the need to oversee the discovery process in this claim, it cannot fairly be characterized as an ‘intolerable burden’ that required the Court to modify its docket and operations,” and accordingly found no prejudice to the judicial system because of the EPA’s discovery misconduct. D. & O. at 36.

Concerning the issue of prejudice to the judicial system as a result of the EPA’s discovery misconduct, the ALJ stated that “[a]lthough the Court’s resources have been significantly diverted by the need to oversee the discovery process in this claim, it cannot fairly be characterized as an ‘intolerable burden’ that required the Court to modify its docket and operations.” D. & O. at 36. The Board disagrees. Not only did the EPA’s misconduct result in the significant diversion of the court’s resources because of the need to oversee the discovery process,¹⁰⁴ the ALJ voiced her concern that the EPA’s discovery misconduct resulted in continued pendency of the a case that “should have been resolved several years ago,” D. & O. at 35. Cited, too, was Winick’s misconduct, which the ALJ stated would have resulted in her granting Jenkins’s pre-hearing motion to disqualify him from legal representation of the EPA had she been aware at the time of Winick’s role in “the Respondent’s massive discovery violations and Mr. Winick’s role in them, as well [his role] in the removal process.” *Id.* at 35, n.34. The ALJ lamented that “[h]ad the Court contemporaneously known the extent and breath of the Respondent’s discovery failures,” about which she stated she was “repeatedly deceived,” hearing on the merits “certainly would not have been scheduled until this matter was resolved.” *Id.* at 34-35.

It bears repeating: “The judicial system cannot tolerate litigants who flagrantly refuse to comply with the orders of the court and who refuse to make discovery, for ‘(d)elay and evasion are added burdens on litigation, causing waste of judicial and legal time, are unfair to the litigants and offend the administration of justice’.”¹⁰⁵ “Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-

¹⁰³ *Bonds*, 93 F.3d at 808-810.

¹⁰⁴ “I note that the time spent by the Court and parties in dealing with the Respondent’s repeated failure to fulfill its obligations in discovery and to respond to my Orders has far outstripped the amount of time that would be required to review the evidence and write a decision on the merits of this claim.” D. & O. at 11, n.7. The ALJ further noted that “it was unfortunate that it had been necessary for the Court to become so deeply involved in the discovery process. But I found it necessary to ensure that, regardless of the ultimate outcome, the Complainant was able to pursue her claim with all of the relevant information and documents to which she was entitled, which was the purpose of discovery.” *Id.* at 17.

¹⁰⁵ *Denton*, 564 F.2d at 241.

settlement mechanism.”¹⁰⁶ To allow parties to flout their discovery obligations and choose, instead, to wait “until a trial court has lost patience with them” thereby forcing the trial judge to become embroiled in virtual day-to-day supervision of discovery is a result “directly contrary to the overall scheme of the federal discovery rules.”¹⁰⁷

Finally, the ALJ gave consideration to the deterrence function that the discovery sanctions are also intended to serve, *i.e.*, that a party not benefit from its own misconduct and to assure compliance with orders compelling discovery through sanctions intended to serve a general deterrent effect on both the party engaged in misconduct in case at hand as well as other litigants in other litigation.¹⁰⁸ The ALJ found that “[t]his factor clearly applies to this claim.” D. & O. at 36. Cited in particular by the ALJ was the conduct of Winick, who served as senior litigation counsel for the EPA. Prepared to dismiss Winick’s initial “shortcomings” to “inexperience or incompetence, or both,” the ALJ found Winick’s continued “arrogant belief that he was entitled to ignore the Court’s explicit instructions, and do whatever he wanted” inexcusable. *Id.*

In response to the EPA’s argument that its discovery conduct (and that of Winick’s) was merely less than “robust” or otherwise inadvertent—that among other things it reasonably relied on production of documents related to the MSPB proceeding—the ALJ stated that while this may have excused the EPA’s initial discovery recalcitrance, it did not excuse its subsequent failures based on the same defense. “The Respondent’s stubborn reliance on this claim indicates that the Respondent believes that it is free to disregard the Court’s discovery orders if, in its opinion, it should not have to conduct the discovery ordered. I also agree that this indicates that there was nothing inadvertent about the Respondent’s repeated discovery failures.” D. & O. at 37.

The ALJ also cited Winick’s failure to adhere to repeated instructions by the ALJ concerning adherence to privilege log requirements. “It should not have been necessary for the Court to instruct Mr. Winick on the necessity of preparing a privilege log, or how one should be prepared, for those documents he unilaterally withheld, and did not identify, on claims of privilege. But despite the fact that I did so, and instructed him to provide such a privilege log henceforth, Mr. Winick continued to disregard my instructions, necessitating further motions and orders.” D. & O. at 37.

The Board agrees with the ALJ that the departure of EPA’s lead litigation counsel, Mr. Winick, upon whom the EPA attempts to hoist any blame for its discovery misconduct, does not absolve it of penalizing sanctions. The ALJ found it “fair to consider that the extensive and blatant flouting of the rules of discovery, and repeated violation of my Orders, was done, not by a private litigant, but by an agency of the United States.” D. & O. at 38. Citing the EPA’s

¹⁰⁶ *G-K Props.*, 577 F.2d at 647.

¹⁰⁷ *Cine Forty-Second St. Theatre*, 602 F.2d at 1068.

¹⁰⁸ *Nat’l Hockey League*, 427 U.S. at 643 (noting that Rule 37 sanctions such as default and dismissal serve both to “penalize those whose conduct may be deemed to warrant” them and to “deter those who might be tempted to such conduct in the absence of such a deterrent”).

“lengthy course of willful misconduct during the protracted prosecution of this claim,” the ALJ embraced the applicability of ALJ Tureck’s commentary in *Beliveau v. Naval Undersea Warfare Center*:

A party’s deliberate failure to [produce] material evidence that was properly requested through discovery is an unconscionable perversion of the judicial process. It is reprehensible when it is engaged in by a private party; but I am not sure there is an adjective pejorative enough to describe this conduct when it is engaged in by attorneys representing the United States government.^[109]

The Board agrees with the ALJ that one should be able to expect better of public servants than that evidenced by the EPA and its lead counsel in this case.

Was the EPA “cured” of its misconduct, particularly given the departure of Winick, such that the ALJ’s sanction of default as a deterrence was unnecessary? The ALJ’s answer is prescient: “Even today, after the departure of Mr. Winick, on whom the Respondent would like to lay blame for all of its shortcomings, the Respondent’s pleadings reflect its continued view that it, and not the Court, is the arbiter of what is relevant or subject to disclosure.” D. & O. at 37. Nor does the EPA’s belated post-hearing compliance with the ALJ’s repeated discovery orders excuse it from the ultimate sanction of default. “Under the deterrence principle of [*National Hockey League*], plaintiff’s hopelessly belated compliance should not be accorded great weight. Any other conclusion would encourage dilatory tactics, and compliance with discovery orders would come only when the backs of counsel and the litigants were against the wall.”¹¹⁰

The Board affirms the ALJ’s invocation of deterrence as an additional basis for the entry of a default judgment against the EPA. The EPA’s continued non-compliance with discovery requests and at least five court orders directing it to search emails of specific individuals and justify withholding of documents in privilege logs, non-compliance that forced the ALJ to suspend hearing in this case pending even further discovery, covered an expanse of more than two and one-half years. Moreover, the EPA’s misconduct did not just begin the moment discovery commenced in this case, it began even earlier with its failure to place a litigation hold preserving Vickers’s email records. Again, EPA’s attempt to place all blame on its attorney, Winick, is to no avail. As the record in this case demonstrates, Winick was not a rogue actor but a senior EPA attorney who, together with colleagues, litigated this case under the supervision of superiors.¹¹¹

¹⁰⁹ *Beliveau v. Naval Undersea Warfare Ctr.*, ALJ No. 1997 SDW 001, slip op. at 29-30 (June 29, 2000).

¹¹⁰ *Cine Forty-Second St. Theatre*, 602 F.2d at 1068.

¹¹¹ See, e.g. D. & O. at 9 (“Mr. Winick did not work in a vacuum, nor was he the only attorney who participated in the prehearing activity surrounding this claim. For example, Mr. Starrs, Mr.

Whether or not EPA's misconduct (and that of Winick's) rises to the level of fraud on the court as Jenkins argues, thereby providing an independent legal basis for dismissal,¹¹² the nature of its misconduct, and that of Winick's, certainly weighs heavily in support of the imposition of default judgment as a deterrence sanction. Throughout the Decision and Order, the ALJ recites the EPA's (and Winick's) repeated misrepresentations and deceitful conduct, noting that "the Court was repeatedly deceived by the Respondent about its compliance with its discovery obligations, as well as the Court's orders." D. & O. at 34-35.¹¹³

Winick's supervisor, assisted in depositions and at the hearing. Mr. Winick was assisted by co-counsel, Ms. Lais Washington at the hearing.").

¹¹² See *United States v. Shaffer Equip.*, 11 F.3d 450, 462 (4th Cir. 1993); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989); *Bulloch v. United States*, 763 F.2d 1115, 1118 (10th Cir. 1985); *Great Coastal Express v. Int'l Brotherhood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982).

¹¹³ The ALJ's recitations of EPA's and attorney Winick's misrepresentations and deceitful conduct are almost too numerous to catalogue. Several examples:

The ALJ noted that "[w]hen the Complainant served her discovery requests, asking for documents reflecting communications to or from Ms. Vickers and employees of the Respondent about her before May 3, 2010, the Respondent answered that Ms. Vickers did not receive or generate any communications about the Complainant's whistleblowing, a claim that has turned out to be false." D. & O. at 23.

Regarding preservation of Vickers's email records, the ALJ noted that in the EPA's response to Jenkins's Third Motion to Compel, "Mr. Winick misled both the Complainant and the Court when he stated that Ms. Vickers told him that her sole role in the Complainant's removal was the placement of the Complainant on administrative leave," given other evidence subsequently obtained through discovery that revealed that Vickers "determined that the Complainant should be removed from federal service, and ordered that a proposed removal notice be drafted immediately" that also revealed, "contrary to Mr. Winick's claim, [that] Ms. Vickers also exchanged communications about the Complainant's whistleblowing activities." *Id.* at 29.

"At the hearing, Mr. Winick explicitly stated that he did not make any changes to the draft decision document Ms. Rudzinski provided to him, and argued that because this was the only document that had not been produced, it was not significant. . . . As it turned out, Mr. Winick's statements to the Court were demonstrably false. . . . Nor was Mr. Winick's representation that only the one draft of this document had not been produced truthful." *Id.* at 30.

"Mr. Winick also lied to the Court at the hearing when he claimed that he had provided all documents from Mr. Dellinger in response to discovery requests and the Court's Orders. As the Complainant has noted, the post-hearing search produced 35 additional responsive documents that had been previously withheld." *Id.* at 31, n.23.

Default judgment as a deterrent is clearly warranted in this case. The EPA argues that an “unpublished administrative ALJ decision” would serve little if any deterrence for other litigants “who might be tempted to flout discovery rules. Certainly, the EPA asserts, it would not have the deterrence value that the Supreme Court in *National Hockey* found warranted default judgment because in its absence other parties in other federal lawsuits “would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.”¹¹⁴ The EPA’s argument simply has no merit. ALJ decisions are published. Moreover, the matter is now before the Administrative Review Board, whose affirmation of the ALJ’s ruling will surely send a signal to government and private-sector parties alike who appear before Department of Labor administrative law judges that the level of discovery misconduct engaged in by the EPA and its legal counsel in this case will simply not be tolerated.

THE ALJ’S ALTERNATIVE RULING

Independently of the inference drawn by the ALJ that the EPA did not have a legitimate, non-pretexual reason for dismissing Jenkins (*i.e.* that Jenkins did not utter a profane death threat to her supervisor, Dellinger, on May 3, 2010), the ALJ found that “the facts and testimony already in the record also support my finding that the Complainant did not make this threat.” Because the EPA did not conduct an investigation into the circumstances surrounding Dellinger’s allegation, the ALJ resolved this issue “rel[ying] on an assessment of the credibility of the Complainant and Mr. Dellinger, the two parties to any exchange that occurred.” D. & O. at 40.

“Mr. Winick withheld documents and emails that reflected his involvement, concealed their existence by not identifying them on a privilege log, and misrepresented to the Court and the Complainant that the Respondent had complied with its discovery obligations.” *Id.* at 31.

“Respondent’s claim, in its September 21, 2011 response to [Jenkins’s] motion to compel, that there were no other documents related to the Complainant’s World Trade Center disclosures, was false, as shown by the disclosures the Respondent was forced to make after the hearing was suspended.” *Id.* at 32.

“Mr. Winick also claimed to the Court that Ms. Rudzinski was a neutral and unbiased witness, because she did not consult with anyone about the Complainant’s proposed removal. [However] Mr. Winick was fully aware that he drafted the first removal decision in August 2010, in which he added a charge that the Complainant had engaged in conduct that was ‘generally criminal, infamous, dishonest, immoral, or notoriously disgraceful.’ . . . Mr. Winick also lobbied Ms. Rudzinski to reject the Complainant’s side of the story. It was not Ms. Rudzinski, acting alone and in a vacuum, who made the removal decision; Mr. Winick also had a big hand in that process. . . . While it may be true that Ms. Rudzinski was the only “deciding” official of record, she was not “solely responsible” for the removal decision.” *Id.* at 34.

¹¹⁴ *National Hockey League*, 427 U.S. at 643.

The ALJ's credibility determinations were based on the demeanor of Jenkins and Dellinger, as well as other evidence and testimony of record that further addressed Dellinger's credibility. Based on their respective demeanors, the ALJ "found the Complainant to be fully credible on this issue, and her testimony consistent and forthright. In contrast, I found Mr. Dellinger to be evasive and equivocal in his testimony in general, and on this issue in particular." *Id.*

In support of her determination that Dellinger's testimony about the alleged threat lacked credibility, the ALJ additionally considered the circumstances surrounding Dellinger's report of the alleged death threat, including Dellinger's stated reason for his delay in reporting the alleged threat, and "evidence and testimony at the hearing support[ing] an inference that Mr. Dellinger was being coached by Mr. Winick." D. & O. at 41. "[T]he circumstances surrounding Mr. Dellinger's report of this threat," the ALJ stated, "cast significant doubt on whether it actually occurred." *Id.* at 40. The ALJ cited several things, including: the fact that although Dellinger spoke with attorney Winick by telephone on the day of the alleged incident, and emailed him more than once in the days immediately following, Dellinger did not mention the alleged death threat to Winick; the fact that Dellinger did not immediately report the alleged threat to any of his supervisors or managers, in person, by phone, or by email; the fact that Dellinger testified that on May 3rd, shortly after the alleged threat, Jenkins twice came to his office, was "nice as pie," and that during these visits Dellinger did not once ask her to clarify or confirm what she had allegedly said to him; and the fact that Dellinger said nothing about any threat to management or anyone else at EPA until May 10, 2010, when he reported it to Mr. Prince, EPA Resource Conservation and Recovery Management Chief. *Id.*

The ALJ found Dellinger's reason for waiting so long to report the alleged threat unconvincing,¹¹⁵ which the ALJ also noted conflicted with Rudzinski's initial understanding for Dellinger's delay based on what Winick had originally told her.¹¹⁶ Further undermining Dellinger's credibility in the ALJ's estimation, as previously mentioned, was evidence and hearing testimony of others supporting, in the ALJ's opinion, "an inference that Mr. Dellinger was being coached by Mr. Winick."¹¹⁷

¹¹⁵ Specifically cited by the ALJ was Dellinger's testimony that he was "[s]till trying to figure out exactly what my—what my role as a manager was in dealing with the incident. It had took [sic] me a while to determine what the right action was. . . . [and that] he was not ready—he was "struggling with the whole threat issue. And it took me awhile to determine that I—you know, that I had to take some kind of an action." CX 116 (Dellinger Deposition) at 125. See D. & O. at 40.

¹¹⁶ The ALJ noted that Winick had advised Rudzinski that the reason Dellinger did not timely report the alleged threat was because he was too busy dealing with EPA business, and other managers were out of the office, but that "Mr. Dellinger himself stated that these were not the reasons for his delay in reporting a threat." D. & O. at 41 (citing EX 24, CX 116 at 124-126).

¹¹⁷ Cited by the ALJ: "Mr. Winick prepared Mr. Dellinger's sworn affidavit, which included several claims about the Complainant's protected activities that Mr. Dellinger admitted were simply not within his knowledge [and the fact that] Mr. Winick encouraged Mr. Dellinger to downplay the significance of the Complainant's protected activities in his testimony." D. & O. at 41.

On appeal the EPA argues that the ALJ's credibility determinations— both her comparative demeanor based credibility determinations and the ALJ's additional evidentiary based credibility determination pertaining to Dellinger—constitute an abuse of discretion because neither is supported by the substantial evidence of record, the ALJ having failed to take into consideration the evidentiary record as a whole.

The ARB gives considerable deference to an ALJ's credibility findings that “rest explicitly on an evaluation of the demeanor of witnesses.”¹¹⁸ This is because the ALJ, unlike the ARB, is able to observe the witnesses' behavior and demeanor in the course of a hearing first hand, plus much more.¹¹⁹ Consistent with federal case authority,¹²⁰ the ARB will uphold an ALJ's demeanor based credibility determination unless it is found to be “inherently incredible or patently unreasonable.”¹²¹ The Board will defer to an ALJ's credibility determination when the “decision is based on testimony that is coherent and plausible, not internally inconsistent, and not contradicted by external evidence.”¹²²

Here, the Board will uphold the ALJ's determination finding Jenkins's testimony concerning the alleged death threat credible because it is internally consistent, coherent, and plausible. Moreover, the Board does not find Jenkins's testimony contradicted by external evidence, despite the EPA's assertions to the contrary.¹²³

¹¹⁸ *Negron v. Vieques Air Link*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 5 (ARB Dec. 30, 2004); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 99-STA0-21, slip op. at 9 (ARB July 31, 2001).

¹¹⁹ *Chen v. Dana Farber Cancer Inst.*, ARB No. 09-058, ALJ No. 2006-ERA-009, slip op. at 9 (ARB Mar. 31, 2011); *Pollock v. Cont'l Express*, ARB Nos. 07-073; ALJ No. 2006-STA-001, slip op. at 10 (ARB Apr. 7, 2010). See *Ass't Sec'y & Mailloux v. R. & B Transp., L.L.C.*, ARB No. 07-084, ALJ No. 2006-STA-012, slip op. at 9 (ARB June 16, 2009) (“In weighing the testimony of witnesses, the ALJ as fact finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of their testimony, and the extent to which their testimony was supported or contradicted by other credible evidence.”).

¹²⁰ See, e.g., *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 519 (9th Cir. 1989).

¹²¹ *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012). *Accord Jeton v. Avior Techs.*, ARB No. 06-035; ALJ No. 2004-AIR-030, slip op. at 13 (ARB, Feb. 27, 2008); *Negron*, ARB No. 04-021, slip op. at 5.

¹²² *Bobreski v. J. Givoo Consultants*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 26 (ARB Aug. 29, 2014).

¹²³ The EPA contends that the ALJ ignored “a mountain of record evidence that casts doubt” on Jenkins's credibility and failed to discuss “a host of other credibility factors.” The evidence the EPA cited in attempting to cast doubt about Jenkins's credibility, as Jenkins points out in her brief on appeal (pp 26-27), either has nothing to do with credibility, at times mischaracterizes the evidence, and is irrelevant on occasion to the extent the cited evidence appears in the record of other cases.

Concerning the ALJ's rejection of Dellinger's testimony as not credible, the EPA argues that the ALJ committed reversible error by failing to consider the evidentiary record "as a whole." But there is no indication that the ALJ failed to consider the entire evidentiary record because she expressly cited only evidence supporting her determination of Dellinger's credibility. The fact that the ALJ found support for her demeanor-based credibility assessment of Dellinger's testimony about the alleged death threat in other testimony by Dellinger and other evidence of record is, instead, consistent with case authority requiring as much.¹²⁴ Moreover, under the substantial evidence standard applicable in the review of credibility determinations that are in part evidentiary-based,¹²⁵ an ALJ's credibility determination will only be overturned where it is found to "conflict with a clear preponderance of the evidence."¹²⁶

In sum, the ALJ had ample opportunity upon hearing (and seeing) the testimony of Jenkins and Dellinger, after comparing that testimony to prior deposition testimony and other evidence of record as noted, to determine which witness was more worthy of credence. The ALJ's conclusion that Jenkins was credible on the issue of the alleged death threat and that Dellinger's testimony was evasive and equivocal in general and with regard to the alleged threat in particular does not conflict with a clear preponderance of the evidence. Nor, as previously discussed, are the ALJ's credibility determinations inherently incredible or patently unreasonable in light of the ALJ's thoroughly detailed exposition of the evidence supporting her decision.

CONCLUSION

The findings of fact upon which the ALJ based her decision having been found supported by substantial evidence of record, for the foregoing reasons the Board holds that the ALJ did not abuse her discretion in concluding that the extreme sanction of default judgment was warranted, and accordingly affirms the ALJ's Decision and Order. In rendering our decision, the Board finds appropriate, in concluding reflection, the words of the Supreme Court's in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. at 642-643, strikingly applicable to the present case:

There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily

¹²⁴ See, e.g., *Kin v. Holder*, 595 F.3d 1050, 1056 (9th Cir. 2010) (citing the appropriateness of providing specific examples of a party's demeanor that would support the basis for an adverse credibility determination).

¹²⁵ An ALJ's evidentiary based credibility finding will not be reversed if supported by substantial evidence review, which "requires more than a scintilla but less than a preponderance of the evidence . . . the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Board's findings from being supported by substantial evidence." *Hall v. Dep't of Labor*, 476 F.3d 847, 854 (10th Cir. 2007).

¹²⁶ *Bobreski*, ARB No. 13-001, slip op. at 14.

influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.

But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts. Under the circumstances of this case, we hold that the District Judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondents' "flagrant bad faith" and their counsel's "callous disregard" of their responsibilities.

With Judge Howie's concurrence, the ALJ's Order of Default Judgment against the Environmental Protection Agency is **AFFIRMED.**"

SO ORDERED.


E. COOPER BROWN
Administrative Appeals Judge

Leonard J. Howie III, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur in affirming the ALJ's Order of Default Judgment for the reasons set forth by Judge Brown. I dissent from the affirmation of the ALJ's alternative ruling for the reasons set forth below.

The ALJ's alternative ruling concluded that Jenkins engaged in protected activity, that that protected activity was a causal factor in her termination, and that EPA failed to prove its affirmative defense. I disagree with these conclusions finding they were not supported by substantial evidence. I also find that the ALJ's legal analysis contained reversible error.

The ARB reviews ALJ findings, including credibility findings, for substantial evidence.¹²⁷ In defining the term "substantial," the Board and the federal courts have required that substantial evidence be the kind that "a reasonable mind might accept as adequate to support a conclusion,"¹²⁸ a logical relationship between evidence and a finding of fact. The fact finding must "take into account whatever in the record fairly detracts from its weight,"¹²⁹ having a sufficient contextual strength. A finding of fact lacks contextual strength and substantial evidence if "the [adjudicator] ignores, or fails to resolve, a conflict created by countervailing evidence"¹³⁰ or "if it is overwhelmed by other evidence or if it really constitutes mere conclusion."¹³¹ "For an ALJ to consider only evidence that supports a particular conclusion is error. An administrative adjudicator must consider not only evidence that would support a particular finding of fact but also "whatever in the record fairly detracts from its weight."¹³²

The challenge before the ARB is that the sanctions the ALJ imposed against the EPA, though appropriate under the circumstances, created the very condition that prevents the ALJ from establishing a factual foundation sufficient to support appellate review of the alternative ruling. Specifically, since the ALJ's sanction led to the premature conclusion of the hearing and the institution of a default judgment against EPA, it is unclear whether both Jenkins and the EPA were able to fully brief their claims and defenses as to the protected activity. We do know that the EPA made indirect mention that Jenkins's protected activity was old and did not contribute to her termination.¹³³ Since there is insufficient factual development around this contention, the ALJ's finding was conclusory and the analysis was insufficient for appellate review.¹³⁴

¹²⁷ 29 C.F.R. § 24.110(b) ("The ARB will review the factual findings of the ALJ under the substantial evidence standard.").

¹²⁸ *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 7 (ARB June 29, 2006).

¹²⁹ *Universal Camera Corp.*, 340 U.S. at 488.

¹³⁰ *Dorf v. Bowen*, 794 F.2d 896, 901 (3d Cir. 1986).

¹³¹ *Dalton v. U.S. Dep't of Labor*, No. 01-9535, 2003 WL 356780, at *445 (10th Cir. Feb. 19, 2003) (quoting *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989)). See also *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, -159; ALJ No. 2005-STA-063, slip op. at 7-8 (ARB June 30, 2008) (citations omitted).

¹³² *Universal Camera*, 340 U.S. at 488, (citing the Administrative Procedure Act at 5 U.S.C.A. § 556(d) (an order may not be issued except on consideration of the whole record)).

¹³³ See *Williams v. U.S. Dep't of Labor*, 157 Fed. Appx. 564, 2005 WL 3087895 (4th Cir. 2005) (teacher's whistleblowing activities initially protected but lost their protected status after resolution

The ALJ's credibility determinations regarding Jenkins were not supported by substantial evidence

The ALJ's decision indicates that she considered Dellinger's proffered reasons for not reporting the death threat until days after the alleged incident. The ALJ found that the circumstances surrounding Dellinger's report cast doubt on whether the death threat actually occurred. D. & O. at 40. The ALJ cites four "circumstances" that produced this doubt: (1) the ALJ makes note that Dellinger did not discuss the death threat with Winick when he was discussing Jenkins's MSPB matter via email before and after the death threat; (2) the ALJ noted that Dellinger referred to Jenkins's manner as being "nice as pie;" (3) the ALJ cited Dellinger's responses for why he waited to report as equivocal and evasive; and (4) the ALJ cited a discrepancy between Winick's position that Dellinger wanted to wait to discuss the matter with other managers and Dellinger's own statement that waiting to discuss the matter with others was not part of his reason for waiting until May 10 to report the death threat. In short, the ALJ considered Dellinger's explanations, but simply chose not to accept them because she found Dellinger's testimony and demeanor lacked credibility.¹³⁵

The ALJ's credibility determination will not be disturbed except for exceptional circumstances—for example, when that "credibility determination is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all."¹³⁶

The ALJ provided a clear explanation for her credibility determination with respect to Dellinger. I find that the determination is supported by substantial evidence.

of her safety complaints); *Carter v. Marten Transp.*, ARB Nos. 06-101, -159; ALJ No. 2005-STA-063, slip op. at 9 (ARB June 30, 2008) (affirming rule that old protected activity isn't necessarily protected).

¹³⁴ *Carter v. Marten Transp.*, ARB No. 09-117, ALJ No. 2009-STA-031 (ARB July 21, 2011) ("two conclusory statements related to USIS's liability . . . are insufficient to allow us to review the ALJ's reasons for his conclusions.")¹³⁴

¹³⁵ The ALJ stated:

Mr. Dellinger's reason for waiting so long to report the alleged threat was not convincing. He stated that he was "Still trying to figure out exactly what my—what my role as a manager was in dealing with the incident. It had [taken] me a while to determine what the right action was." CX-116 (Dellinger Deposition) at 125. He was not ready—he was "struggling with the whole threat issue. And it took me awhile to determine that I—you know, that I had to take some kind of an action."

D. & O. at 40.

¹³⁶ *NLRB v. CWI of Md., Inc.*, 127 F.3d 319, 326 (4th Cir. 1997) (internal quotation marks omitted).

But the ALJ did not subject Jenkins's credibility determination to a similar analysis. Instead, one conclusory sentence appears to justify this determination:

I had the opportunity to observe the demeanor of both of these witnesses at the hearing. I found the Complainant to be fully credible on this issue, and her testimony consistent and forthright. In contrast, I found Mr. Dellinger to be evasive and equivocal in his testimony in general, and on this issue in particular.

D. & O. at 43.

Even if it is assumed that the ALJ was correct in finding Jenkins to be credible during the hearing (or at least more credible than Dellinger), the alternative ruling requires actual evidence of a death threat to be upheld. But when looking at the record as a whole, information existed that raised serious questions regarding Jenkins's workplace conduct over the years. In fact, the record contains several facts, many of which are not disputed, that arguably impugn Jenkins's credibility.¹³⁷

¹³⁷ Rudzinski's December 30, 2010 final decision (RX-5) and Dellinger's July 9, 2010 proposal (RX-14) contain a timeline of Jenkins's behavior that the EPA used in recommending her termination.

April 6, 2007, Jenkins threatens to spray what she represented as poison into the face of an IT professional who was working in her cubicle. Jenkins perceived the individual as wearing too much cologne and would not leave when asked.

On August 3, 2007, Dellinger issued a letter of counseling to Jenkins directing her to treat co-workers courteously. Dellinger specified what Jenkins should do if someone in her vicinity is wearing too much cologne.

On February 18, 2009, and again on February 24, 2009, Jenkins violated this August 2007 directive against a co-worker, whom Jenkins thought was wearing too much perfume. According to Dellinger, the co-worker was very distraught over Jenkins's hostility toward her and considered leaving the division.

On March 19, 2009, EPA considered content in Jenkins's email to another co-worker as "threatening and discourteous."

On April 10, 2009, Jenkins acted aggressively and discourteously to Stephen Hoffman in connection with the March 19 email. The EPA cited Jenkins for attempting to force Hoffman to refrain from a conversation by refusing to remove herself from his workspace until the conversation ceased. Dellinger considered this to be a "total disregard" of his directive.

On June 5, 2009, Jenkins's supervisor proposed a five-day suspension for Jenkins's threatening and discourteous behavior. That proposal went to Dellinger for approval as a second-line decision-maker.

The ALJ should have weighed this information against Jenkins's testimony and demeanor during the hearing. The ALJ's conclusory, one-sentence determination on Jenkins's credibility is insufficient to support appellate review and fails to consider the record as a whole.¹³⁸

Although the ALJ's credibility determination will not be disturbed except for exceptional circumstances, the ARB's deference to an ALJ's factual findings is not unlimited. An ALJ must still conduct "an appropriate analysis of the evidence to support his conclusion."¹³⁹ I find that the ALJ's order is deficient in considering Jenkins's background and history. For an ALJ to consider only evidence that supports a particular conclusion is error. An administrative adjudicator must consider not only evidence that would support a particular finding of fact but also "whatever in the record fairly detracts from its weight."¹⁴⁰

It is unclear whether the ALJ considered facts that contradicted her credibility findings. Therefore, I cannot say that the finding [within the ALJ's alternative ruling] that Jenkins did not

On July 20, 2009, Dellinger concurred in Jenkins's suspension, but reduced that suspension from 5 days to 2 days.

April 9, 2010, Jenkins claimed that Dellinger and co-workers vandalized her car with perfume. She reported that incident to the Federal Protective Service on April 12, 2010. During her oral reply following the July 2010 proposal, she recanted that she may have smelled a perfume in the elevator or perhaps the garage attendant was playing a joke on her.

Rudzinski considered Jenkins's report and recant of report as a factor in deeming Jenkins not credible. Rudzinski rejected Jenkins's assertion that Dellinger made up the death threat to retaliate against her for the vandalism report because there was no evidence that Dellinger knew of the vandalism allegation or that the FPS investigated Dellinger or the other suspects.

¹³⁸ *NLRB v. Cutting, Inc.*, 701 F.2d 659, 665 (7th Cir. 1983); *Kent v. Schweiker*, 710 F.2d 110, 116 (3d Cir. 1983) (conclusory wholesale rejection of testimony did not meet substantial evidence test); *Cotter v. Harris*, 642 F.2d 700, 706-707 (3d Cir. 1981) (full explanation required as to why evidence was rejected since fact finder "cannot reject evidence for no reason or for the wrong reason").

¹³⁹ *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) (quoting *Milburn Colliery Co.*, 138 F.3d 524, 529 (4th Cir. 1998)).

¹⁴⁰ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), citing the Administrative Procedure Act at 5 U.S.C.A. § 556(d) (an order may not be issued except on consideration of the whole record); *see also Hall v U.S. Army Dugway Proving Ground*, ARB No. 02-108, ALJ No. 1997-SDW-005 (ARB Dec. 30, 2004); *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 962 (D.C. Cir. 2003) (the court "may not find substantial evidence 'merely on the basis of evidence which in and of itself justified [the agency's decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.'").

make the death threat was supported by substantial evidence. “[A] reviewing court must be able to “discern what the ALJ did and why he did it.”¹⁴¹

The ALJ’s causation and affirmative defense holdings included reversible error

Even if I were to assume that the ALJ’s credibility determinations were supported by substantial evidence, the ALJ’s Causation and Affirmative Defense holdings were otherwise deficient.

To prevail on her CAA complaint, Jenkins must establish by a preponderance of the evidence: (1) that she engaged in protected activity; (2) that EPA was aware of the protected activity; (3) that she suffered an adverse employment action; and (4) that EPA took the adverse action because of her protected activity. To show that an adverse action was taken “because of” protected activity, Jenkins must show that her protected activity was a “motivating” factor in the EPA’s decision to dismiss her.¹⁴² If Jenkins prevails in establishing her burden, the EPA may avoid liability by showing that it would have taken the same action in the absence of protected activity¹⁴³. Interestingly, the record does contain information relevant to determining whether Jenkins’s claims of protected activity were connected to the EPA’s termination decision.¹⁴⁴ But in light of the ALJ’s use of the incorrect legal standard discussed below, I need not decide whether factual support for the ALJ’s causal relationship existed . . . other than to point out that this represents yet another instance where the ALJ failed to analyze the record as a whole.

The ALJ erroneously applied a lighter causal standard to Jenkins’s claim by using “contributing factor,” which follows the AIR 21 model of causation standards and burdens. 49 U.S.C.A. § 42121(b) (Thomas Reuters 2016). On page 41 of the ALJ’s D. & O., the ALJ wrote:

¹⁴¹ *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); cf. *Consolidation Coal Co. v. Filer*, No. 95-1270, 1996 WL 139196, at *5 (4th Cir. Mar. 26, 1996) (“Decisions on conflicting evidence . . . must be addressed and explained at the administrative level before judicial review under the substantial evidence standard can be accomplished meaningfully.”).

¹⁴² *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 2004-CAA-005 (ARB Nov. 29, 2006). In *Lopez*, the ARB addressed a similar mistake in using “contributing factor” instead of “motivating factor.” *See id.* at n.6.

¹⁴³ *Seetharaman v. Stone & Webster*, ARB No. 06-024, ALJ No. 2003-CAA-004 (ARB Aug. 31, 2007).

¹⁴⁴ The death threat follows a series of warnings, directives, and violations by Jenkins. Dellinger included all of Jenkins’s prior disciplines and warnings as factors and considerations in his termination proposal. RX-14. Rudzinski also considered prior discipline and deemed the death threat a second offense. RX-5. The ALJ’s affirmative-defense analysis, beyond finding the death threat pretext, required more to support the inference that CAA-protected activity filled the void or whether the termination was nonetheless for Jenkins’s non-protected behavior set out in the July 20, 2007 Letter of Counseling; the July 20, 2009 Suspension; the July 9, 2010 proposed termination; and the December 30, 2010 final termination.

Accordingly, I find that the Complainant engaged in protected activities under the whistleblower provisions of the above-cited environmental statutes; that the Respondent was aware of the Complainant's protected activities; that the Complainant suffered an adverse action when she was fired; that the Complainant's protected activities were a contributing factor to her dismissal; and that the Respondent did not have a legitimate, non-pretextual reason for its decision to fire her.

The Clear Air Act, and the other environmental whistleblower statutes (with the exception of the Energy Reorganization Act), prohibit retaliation because of protected activity. Under these statutes, courts and the DOL have interpreted "because of," without further clarification, to mean "motivating factor."¹⁴⁵

The EPA was harmed by the ALJ's erroneous use of a lighter causal standard. Unlike the case where the ALJ erroneously applied a higher standard to a complainant but found that standard met, which is harmless error,¹⁴⁶ here, the ALJ erroneously applied a lower standard to Jenkins's claim and found that standard met. This is harmful error to the EPA, and the ALJ's causation standard cannot be affirmed.

The ALJ's affirmative defense holding is similarly deficient. There is a question as to whether the ALJ applied the appropriate legal standard in concluding that the EPA failed to establish that it would have terminated Jenkins's employment absent the CAA-protected activity.

The ALJ wrote: "the Respondent did not have a legitimate, non-pretextual reason for its decision to fire her." This is an incomplete statement of the EPA's affirmative defense. The ALJ erroneously substituted a showing of pretext for a finding that the EPA did not show, by a preponderance of the evidence, that it would have terminated Jenkins in the absence of CAA protected activity. The full affirmative defense standard requires a determination whether the EPA met its burden to prove that it would have taken the same unfavorable personnel action in the absence of the protected activity.¹⁴⁷

The ALJ's finding on the death threat, if supported by substantial evidence on the record as a whole, does not end the CAA retaliation inquiry. Pretext must be analyzed, but it is not the end issue to be proved or disproved. The ALJ has to complete the analysis to state that the EPA failed to show, by a preponderance of the evidence, that it would have taken the same action in the absence of CAA-protected activity. "It's true that if a jury finds that an employer's explanation for an adverse employment action is false, it may infer that the employer's real

¹⁴⁵ *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 2004-CAA-005 (ARB Nov. 29, 2006).

¹⁴⁶ *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011).


¹⁴⁷ *Seetharaman v. Stone & Webster*, ARB No. 06-024, ALJ No. 2003-CAA-004 (ARB Aug. 31, 2007).

reason for the action was unlawful.”¹⁴⁸ “The critical inquiry in a pretext analysis “is not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge. . . . Moreover, if the discipline was wholly unrelated to protected activity, as the ALJ found, whether it was fairly imposed is not relevant to the FRSA causal analysis.”¹⁴⁹ Since the ALJ failed to apply the appropriate legal standard in her affirmative defense analysis, the holding cannot be affirmed.¹⁵⁰

Conclusion

While it was permissible for the ALJ to make adverse inferences regarding the EPA’s affirmative defense as a sanction for failing to comply with multiple discovery orders, upholding the ALJ’s alternate ruling required a more substantive analysis of the record that was before the ALJ. Here, the ALJ’s analysis was premised on the credibility determinations of Jenkins and Dellinger. While there is substantial evidence to support her determination with respect to Dellinger, there is no indication that Jenkins’s workplace history of discipline, factual retractions, and instances of discourteous and alleged threatening behavior were appropriately analyzed in Jenkins’s credibility determination. In addition, the ALJ did not apply the correct legal standards in determining that Jenkins’s protected activity was causally related to her discipline, and in determining that the EPA failed to rebut the casual relation with a legitimate reason. This was error.

In light of the foregoing, I decline to affirm the ALJ’s alternative ruling although, as previously mentioned, I join in affirming the ALJ’s default judgment against the EPA.


LEONARD J. HOWIE III
Administrative Appeals Judge

¹⁴⁸ *Koziara v. BNSF*, 2016 WL 6407246, *4 (7th Cir. 2016); cf. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) (noting that a finding of pretext does not compel a finding of intentional discrimination).

¹⁴⁹ *Gunderson v. BNSF Railway Co.*, 850 F.3d 962, 969-70 (8th Cir. 2017).

¹⁵⁰ As stated above, there is no indication that the ALJ evaluated the role of Jenkins’s history of discipline and threatening behavior in the workplace, and whether these actions supported or rejected the likelihood that a death threat was made. Such an evaluation could have informed whether or not there existed a temporal connection between Jenkins’s earlier protected activities and the 2010 termination of her employment. *Gunderson*, 850 F.3d at 969 (“Second, Gunderson’s prior safety-related activities were remote in time and disconnected from the disciplinary proceedings by an “intervening event that independently justified adverse disciplinary action”—union president Campen complaining to management that two members were being harassed.”) (citation omitted). But, as discussed in the causal relationship analysis, the ALJ’s legal error makes it unnecessary to decide whether the holding was supported by substantial evidence.