



In the Matter of:

WILLIAM VINNETT,

ARB CASE NO. 08-104

COMPLAINANT,

ALJ CASE NO. 2006-ERA-029

v.

DATE: July 27, 2010

mitsubishi power systems,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

William Vinnett, *pro se*, Winter Park, Florida

For the Respondent:

Pedro P. Forment, Esq., *Ford & Harrison LLP*, Miami, Florida

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Wayne C. Beyer, *Administrative Appeals Judge*.

DECISION AND ORDER OF REMAND

William Vinnett, filed a retaliation complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Mitsubishi Power Systems (MPS), terminated his employment because he made safety-related complaints to management. OSHA investigated the retaliation complaint under Section 211 of the Energy Reorganization Act¹ and its implementing regulations.² OSHA concluded that the

¹ 42 U.S.C.A. § 5851 (West 2003) (ERA). The ERA was amended after Vinnett filed this complaint. Energy Policy Act of 2005, Pub. L. 109-58, title VI, § 629, 119 Stat. 785 (Aug. 8, 2005).

complaint lacked merit. Vinnett filed objections and requested a hearing before a Department of Labor Administrative Law Judge (ALJ). Both parties filed motions for summary judgment. Vinnett also requested additional time to prepare and file a motion to compel MPS to respond to discovery requests. The ALJ granted MPS's motion for summary decision because he found that Vinnett failed to set forth specific facts on an issue upon which he would bear the ultimate burden of proof at trial: that he had engaged in activity protected under the ERA, that MPS knew that he engaged in the protected activity, or that MPS would not have terminated him even absent his alleged protected activity.³ The ALJ also denied Vinnett's request for additional time to file a motion to compel. Vinnett appealed to the Board. We reverse and remand to the ALJ for further proceedings consistent with this Order of Remand.

BACKGROUND

MPS inspects and performs periodic maintenance on turbines and generators in both nuclear and non-nuclear power plants.⁴ Vinnett began working for MPS in July 2004 as a Field Project Engineer. Vinnett was hired and supervised by John Daniels, Operations Manager for Steam Turbine Services.⁵

We need not decide here whether the amendments would apply to this case, which was filed before their effective date, because even if the amendments applied, they are not at issue in this case and thus would not affect our decision.

² 29 C.F.R. Part 24 (2007). The ERA's implementing regulations, found at 29 C.F.R. Part 24 (2007), have been amended. 72 Fed. Reg. 44,956 (Aug. 10, 2007). It is unnecessary for us to determine whether the amendments apply to Vinnett's complaint because they are not implicated by the summary judgment issue presented and thus, even if the amendments were applicable to this complaint, they would not affect our decision.

³ Decision and Order Denying Complainant's Motion for Summary Decision and Granting Respondent's Motion for Summary Decision & Dismissing Complaint (D. & O.).

⁴ On appeal, as well as in its briefing before the ALJ, MPS states that it "does not perform work on, or with, nuclear equipment/materials." Appellee's Reply Brief at 4-5 (citations omitted); Statement of Undisputed Facts in Support of Respondent [MPS]'s Motion for Summary Judgment at 2 (citations omitted). MPS does not contend, however, that performing work on or with nuclear equipment/materials is a prerequisite for ERA coverage or that it is not a covered employer within the meaning of the ERA. Indeed, MPS does not dispute that its work at the Palisades Nuclear Power Plant was governed by Nuclear Regulatory Commission (NRC) regulations as well as the ERA. The Complainant submitted that MPS's own website states that it inspects and overhauls nuclear power plant equipment. Appellant William Vinnett's Appellate Brief (Vinnett's Appeal Brief) at 11-12, 22-23 (citation omitted); Complainant's Reply in Support of Summary Judgment, and Opposition to Respondent's [MPS America] Motion for Summary Judgment (Complainant's Reply) at 11 (citation omitted).

⁵ D. & O. at 2.

MPS assigned Vinnett to work at the Palisades Nuclear Power Plant (Palisades) in Michigan during the scheduled 2004 Fall outage from August through October, 2004.⁶ Vinnett was the vibration engineer at Palisades. Vinnett alleges that he became concerned about technical errors, procedural deficiencies, and damage to a pressurized vessel during his tenure at Palisades.⁷ Vinnett contends that he verbally reported his concerns to his supervisor on several occasions.⁸ Vinnett also alleges that he e-mailed John Daniels, Project Manager Gregory Tidwell, and contractor Dan Munini on September 9, 2004, and on one other date in September, attaching corrections to the defective procedures.⁹

Vinnett alleges that he noticed additional procedural violations while preparing the Palisades outage report after returning to MPS's Orlando office.¹⁰ Vinnett sent the draft report to Daniels for revision on December 3, 2004.¹¹ Vinnett alleges that he requested meetings with Daniels several times and finally e-mailed Daniels requesting a meeting to discuss his concerns about the Palisades project.¹²

MPS managers Daniels and Human Resources Director Bailey Weaver met with Vinnett on January 6, 2005, and gave him a letter warning him that he must improve his job performance or risk dismissal.¹³ Vinnett contends that he signed the letter under duress and told Weaver that he did not understand the negative feedback regarding his job performance, as he was not the Project Field Manager, but his work was limited to vibration engineering.¹⁴ Vinnett allegedly told Daniels and Weaver about procedural deficiencies on the Palisades outage, including several engineers filing incomplete reports and leaving the worksite without permission.¹⁵

⁶ *Id.*

⁷ *Id.*; Deposition of William Vinnett (Dep.), Vol. I at 78-82; Vol. II at 232-234; Vinnett's Appeal Brief at 9, 11, 14-15.

⁸ Dep., Vol. I at 80, 84, 178, 192-193-195; Vinnett's Appeal Brief at 9.

⁹ D. & O. at 2-3; Dep., Vol. I at 78-82, 86-116; Vol. II at 211-214; Vinnett's Appeal Brief at 12, 23 (citations omitted).

¹⁰ D. & O. at 3-4; Dep., Vol. I at 84-86.

¹¹ Dep., Vol. I at 200, 209; Vinnett's Appeal Brief at 24 (citations omitted).

¹² D. & O. at 2; Dep., Vol. I at 169-172, 175-176; Vinnett's Appeal Brief at 9.

¹³ D. & O. at 2; Dep., Vol. I at 153-169.

¹⁴ *Id.*; Vinnett's Appeal Brief at 14.

¹⁵ D. & O. at 2; Vinnett's Appeal Brief at 14-15.

Vinnett alleges that MPS began retaliating against him because of his whistleblowing “by giving him an over-abundance of assignments, failing to timely process his weekly expense accounts, providing him with conflicting management directions, and unfairly holding him responsible for the loss of an expensive missing instrument.”¹⁶ On February 22, 2005, Vinnett approached Daniel Walsh, a high level management official, to request a meeting about the Palisades outage.¹⁷ MPS terminated Vinnett’s employment on February 25, 2005.¹⁸

Vinnett filed his ERA complaint on July 26, 2005, alleging that MPS terminated his employment in retaliation for protected activity. The ALJ granted summary decision in favor of MPS on June 11, 2008. Vinnett petitioned the Board for review of the ALJ’s decision and order and the matter is now before us.

ISSUES

On appeal, we decide whether the ALJ committed reversible error in dismissing Complainant Vinnett’s complaint on the ground that there is no genuine issue of material fact concerning an essential element of his claim. Additionally, we decide whether the ALJ erred in denying the Complainant’s request for additional time to file a motion to compel.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (Board) to issue final agency decisions in cases arising under the ERA’s employee protection provisions.¹⁹ The Board reviews an ALJ’s grant of summary decision de novo.²⁰ The ALJ’s standard for granting summary decision also governs the Board’s review and is essentially the same as that governing summary judgment in the federal courts.²¹ Summary decision is appropriate “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters

¹⁶ D. & O. at 2; Dep., Vol. II at 239-245, 249.

¹⁷ Dep., Vol. I at 195-197, 207-208; Vinnett’s Appeal Brief at 9-10, 13.

¹⁸ D. & O. at 2.

¹⁹ See Secretary’s Order 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 24.110.

²⁰ *Holland v. Ambassador Limousine/Ritz Transp.*, ARB No. 07-013, ALJ No. 2005-STA-050, slip op. at 1 (ARB Oct. 31, 2009); *King v. BP Prod. N. Am., Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4 (ARB July 22, 2008).

²¹ See Fed. R. Civ. P. 56.

officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”²²

The Board will grant summary decision in favor of the moving party if, after viewing the evidence in the light most favorable to the non-moving party, we conclude that there is no genuine issue of material fact and the ALJ has correctly applied the relevant law.²³ The moving party may prevail by pointing to the “absence of evidence proffered by the nonmoving party.”²⁴ The nonmoving party, however, may not rest upon the mere allegations, speculation or denials of his pleadings, but instead must set forth specific facts which could support a finding in its favor.²⁵ In reviewing an ALJ’s summary judgment decision, we do not weigh the evidence or determine the truth of the matters asserted.²⁶

The Board reviews an ALJ’s determinations on procedural issues and evidentiary rulings under an abuse of discretion standard, i.e., whether, in ruling as he did, the ALJ abused the discretion vested in him to preside over the proceedings.²⁷ The Board “construe[s] complaints and papers filed by pro se complainants ‘liberally in deference to their lack of training in the law’ and with a degree of adjudicative latitude.”²⁸

²² 29 C.F.R. §18.40(d).

²³ *Santamaria v. United States Env'tl. Prot. Agency*, ARB No. 04-063, ALJ No. 2004-ERA-006, slip op. at 4 (ARB May 31, 2006); *Demski v. Ind. Mich. Power Co.*, ARB No. 02-084, ALJ No. 2001-ERA-036, slip op. at 3 (ARB Apr. 9, 2004); *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ No. 2000-ERA-036, slip op. at 4 (ARB Mar. 25, 2003).

²⁴ *Holland*, ARB No. 07-013, slip op. at 2 (citation omitted).

²⁵ See 29 C.F.R. § 18.40(c).

²⁶ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985); *Hasan v. Enercon Services, Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027, slip op. at 6 (ARB May 29, 2009); *Seetharaman v. G.E. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004).

²⁷ *Stalworth v. Justin Davis Enter., Inc.*, ARB No. 09-038, ALJ No. 2009-STA-001, slip op. at 3 (ARB June 16, 2010); *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114,-115, ALJ Nos. 2004-SOX-020, -036, slip op. at 8 (ARB June 2, 2006); *Waechter v. J.W. Roach & Sons Logging and Hauling*, ARB No. 04-183, ALJ No. 2004-STA-043, slip op. 2 (ARB Dec. 29, 2005).

²⁸ *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 8 (ARB Mar. 31, 2010) (citations omitted).

DISCUSSION

1. The Legal Standard

Section 211 of the ERA provides, in pertinent part, that “No employer may discharge or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).”²⁹

To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity; (2) the employer knew about the protected activity; (3) the employer subjected him to an adverse action; and (4) his protected activity was a contributing factor in the adverse action.³⁰ Protected activity under the ERA includes making an informal complaint about safety hazards to a supervisor, but such complaints must relate to nuclear safety “definitively and specifically.”³¹ The employee, however, does not have to prove an actual violation of a nuclear safety law or regulation; a reasonable belief of a violation is sufficient.³² “Relief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action” in the absence of the protected activity.³³

²⁹ 42 U.S.C.A. § 5851(a)(1)(A).

³⁰ 42 U.S.C.A. § 5851(b)(3)(C); *Muino v. Florida Power & Light Co.*, ARB Nos. 06-092, -143, ALJ Nos. 2006-ERA-002, -008, slip op. at 7 (ARB Apr. 2, 2008); *Hibler v. Exelon Generation Co., LLC*, ARB No. 05-035, ALJ No. 2003-ERA-009, slip op. at 19 (ARB Mar. 30, 2006); *Hasan v. Southern Co., Inc.*, ARB No. 04-040, ALJ No. 2003-ERA-032, slip op. at 2, 4 (ARB Mar. 29, 2005); *Demski*, ARB No. 02-084, slip op. at 3.

³¹ *American Nuclear Res., Inc. v. U.S. Dep’t of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 7 (ARB Sept. 24, 2009); *Carpenter v. Bishop Well Servs. Corp.*, ARB No. 07-060, ALJ No. 2006-ERA-035, slip op. at 1 (ARB Sept. 16, 2009); *Muino*, ARB Nos. 06-092, -143, slip op. at 7; *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 4 (ARB Sept. 30, 2003).

³² *Speegle*, ARB No. 06-041, slip op. at 7-8; *Muino*, ARB Nos. 06-092, -143, slip op. at 7-8; see *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 2003-ERA-006, slip op. at 10-11 (ARB July 14, 2000), and cases cited therein.

³³ 42 U.S.C.A. § 5851(b)(3)(D); *Benson v. North Ala. Radiopharmacy, Inc.*, ARB No. 08-037, ALJ No 2006-ERA-017, slip op. at 7 (ARB Apr. 9, 2010); *Muino*, ARB Nos. 06-092, -143, slip op. at 7; *Hibler*, ARB No. 05-035, slip op. at 20.

The party bringing the motion for summary decision bears the burden of proof.³⁴ To support its motion for summary judgment, MPS must demonstrate that Vinnett did not present evidence to support an essential element of his claim. To avoid summary decision in MPS's favor, Vinnett does not have to show that he will ultimately prevail on the merits of his complaint. The summary decision standard requires only that Vinnett establish the existence of "a fact dispute concerning the elements of his claim" that could affect the outcome of the case.³⁵ The Board must review the entire record and determine whether the ALJ could rule in the non-movant's favor.³⁶

2. Protected Activity

Protected activity under the ERA is an essential element of Vinnett's claim, without which he cannot prevail. In its Motion for Summary Judgment, MPS argued that "Vinnett cannot establish that he engaged in protected activity while working for MPS at the Palisades Project" and "cannot establish that he was terminated by MPS on February 25, 2005, in retaliation for making alleged complaints regarding safety violations at the Palisades Project."³⁷ MPS further stated that "Complainant never engaged in any protected activity while employed by Respondent, and moreover, was terminated for gross performance problems which were the subject of concern and disciplinary action prior to termination."³⁸

In his Reply to MPS's summary judgment motion, Vinnett argued that he performed well while working at MPS; he blew the whistle on MPS; and, MPS retaliated against him.³⁹ Vinnett stated that he successfully completed two field project assignments for MPS "before he was assigned to troubleshoot a vibration excursion at the Palisades Nuclear Plant in Michigan."⁴⁰ Vinnett argued that he engaged in protected activity at the Palisades Nuclear Power Plant. He stated that he "noticed significant amount of technical errors on procedures that were ready to be implemented at Palisades nuclear turbine outage."⁴¹ Vinnett stated that he "color coded his revised procedures notifying [MPS] Manager Mr. John Daniels, independent contractor Field Project Manager Mr. Gregory Tidwell, and the procedure author who was also an independent

³⁴ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

³⁵ *Muino*, ARB Nos. 06-092, -143, slip op. at 8.

³⁶ *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

³⁷ Respondent's Memorandum In Support of its Motion for Summary Judgment at 1.

³⁸ Respondent Mitsubishi Power Systems' Motion for Summary Judgment at 2.

³⁹ Complainant's Reply.

⁴⁰ Complainant's Reply at 3.

⁴¹ *Id.*

contractor Mr. Dan Munini. These revised procedures were sent via [MPS] e-mail in a form of attachments.”⁴² Vinnett states that these “work practices compromised safety and integrity.”⁴³ Vinnett also cited his deposition testimony, where MPS’s counsel questioned him about an allegation that he had noticed several deep cuts that were in the wall of the pressurized vessel. Vinnett testified “it was a safety and integrity of the vessels. It was a safety concern that I have.” He testified that “Mr. Daniels asked me not to report these issues.”⁴⁴ Vinnett asserted that the MSR structure damage was logged in the Palisades Outage Report, Palisades Outage Log Book that Complainant requested during discovery, but [MPS] refused to reproduce, and decided not participate in the discovery phase of the investigation process.”⁴⁵

Vinnett also identified protected activity at the MPS Orlando office. He stated that he discovered other violations while writing the outage report, including “hold point not signed at the time the components were worked. The hold points were signed in a later date, after the equipment internal components were assembled. The work packages were signed by individuals that had nothing to do or worked on those specifics [sic] components.” Vinnett also alleged that “[a] critical piece of a nuclear turbine equipment such as the Main Stop Valves (MSV) internal components were not assembled per the Original Equipment Manufacturer (OEM) specifications. The finding revealed that these components warranted repair.”⁴⁶ Vinnett asserted that he “communicated these concerns verbally several times to a [MPS] Manager.” Vinnett also alleged that “[s]imultaneously with the verbal warning to Mr. John Daniels, Complainant showed specifics [sic] examples of the uncompleted datasheets filled by the components engineers that needed to be included in the outage report, which were in direct violation of maintenance procedures maintenance [sic] at Nuclear Power Plants NRC Title 10 C.F.R. 50.56.”⁴⁷

The summary of the Complainant’s allegations in the D. & O. suggests that the ALJ recognized that Vinnett’s complaint, deposition testimony, and other documents filed with the Office of Administrative Law Judges (OALJ) raised fact issues regarding protected activity. The ALJ made the following observations: 1) that during the Complainant’s assignment at Palisades “he noticed significant technical errors in the official procedure packages that instruct mechanics how to perform their jobs;” 2) that the Complainant revised the procedures and allegedly sent two e-mails to Daniels “noting errors in his procedure packages;” 3) that “[w]hile writing the outage report, the Complainant noticed that inspection sheets were unfinished and unreliable, due to the fact that there was no traceability of the inspection records, which he claimed was a ‘NRC

⁴² Complainant’s Reply at 3, citing documents submitted to the ALJ on 2/11/2007, Bates stamped 000207-000216, 000240-000259.

⁴³ *Id.*, citing document 000101.

⁴⁴ Complainant’s Reply at 5, citing Dep., Vol. II, pp. 232-234.

⁴⁵ Complainant’s Reply at 5.

⁴⁶ Complainant’s Reply at 6, citing documents 000322, 000332, 000343, and 000261.

⁴⁷ Complainant’s Reply at 6-7, citing documents 000321-000370.

Violation of Title 10 CRF [sic] 50.65 – Requirements for Monitoring the Effectiveness of Maintenance at Nuclear Power Plants;” 4) that the Complainant also “discovered that there was no list of spare parts recommended for the next outage, which he also claimed was the same NRC violation;” 5) that the Complainant “claimed that he reported both of these discoveries to Mr. Daniels in December of 2004;” 6) that on January 6, 2005, the “Complainant told Mr. Daniels and Mr. Weaver, who was with human resources, that component engineers failed to provide reports corresponding to their work performed during the outage and that some engineers left the site without being released;” 7) that the Complainant stated that “the engineers’ actions made [MPS] ‘liable since [it has] to rely only on the functional tests to close the work packages;” 8) that “the Complainant alleged that he reported several deep cuts . . . inside the wall of the pressurized vessel during the inspection of the MSR-9B” and stated that he “was concerned about the safety, and integrity of the MSR (moisture separator reheate[r]), and [MPS] contractual liabilities in case of a failure during operation,” that he reported his findings during a turnover meeting, and that Daniels told him “to stop reporting such failures;” 9) that the Complainant “alleged that he was assigned to write a report concerning components that he did not work on himself,” that he had to read approximately 60 work packages to understand the tasks associated with the component engineers before he could write the report, and that this practice compromised safety; 10) that the Complainant reported this concern to Daniels and Weaver. In sum, the ALJ noted that the Complainant “noticed a significant number of technical errors on procedures that were ready to be implemented at the Palisades Plant, . . . found structural damages in a pressurized vessel that [MPS] was attempting to hide, [stated] reports were not signed at the time the components ‘were worked,’ that work packages were signed by individuals who had not worked on those specific components, and that some components engineers turned in incomplete datasheets.” In addition, the ALJ stated that the “Complainant also noted that critical pieces, such as the Main Stop Valves, of a nuclear turbine were not assembled according to the Original Equipment Manufacturer (OEM) specifications” and stated that he “made sure that [MPS] knew of this safety concern.”⁴⁸

The ALJ reviewed the Complainant’s deposition testimony and record documents and concluded that the activity described in the two e-mails (his concern about incorrect procedures and his request for equipment to review vibration data) allegedly sent to Daniels did not constitute protected activity.⁴⁹ The ALJ examined a record document dated January 3, 2007, discussing “significant technical errors in official procedure packages that instruct mechanics how to perform their jobs.”⁵⁰ The ALJ noted that Vinnett revised the procedures and concluded, “[I]t appears that updating procedures is a part of Complainant’s job responsibilities.”⁵¹

⁴⁸ D. & O. at 7-9.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.* at 7.

⁵¹ *Id.*

In discussing Vinnett’s safety concerns about the MSR vessel, the ALJ concluded that “[s]imply informing his superior that he found a problem with some equipment does not constitute a violation of the ERA. [MPS] is a company that, in part, provides services for the maintenance and repair of steam and gas turbine generators. Examining the equipment in a plant appears to be a component of Complainant’s job, and reporting the problems he found with the vessel does not appear to constitute the type of safety concern that is protected by the ERA.”⁵² The ALJ further emphasized, in a footnote, that because MPS’s “job at the Palisades Plant was, at least in part, to examine equipment for possible safety problems, reporting a safety concern with a piece of equipment at the plant does not automatically constitute protected activity.”⁵³

The Complainant also alleged that “he was assigned to write a report concerning components that he did not work on himself. . . . This situation alone compromised safety and business integrity.” He stated that he reported his concerns to Daniels and Weaver. The ALJ concluded that this was a business decision which “does not represent a violation of the ERA simply because Complainant disagrees with Respondent’s decision and labels it as being ‘unsafe.’”⁵⁴

The ALJ stated in his D. & O. that the “Complainant also noted that critical pieces, such as the Main Stop Valves, of a nuclear turbine were not assembled according to the Original Equipment Manufacturer (OEM) specifications” and expressed his safety concern to MPS. The ALJ again concluded that the Complainant was just doing his job. “Examining the equipment, and notifying someone if problems are found, appears to be the reason [MPS] was hired at Palisades Plant. Therefore, simply informing [MPS] that he noticed an alleged safety problem with a piece of equipment does not constitute the type of safety concern that is protected by the ERA.”⁵⁵

The ALJ held that Vinnett “did not set forth specific facts on an issue upon which he would bear the ultimate burden of proof at trial: that he engaged in protected activities under the ERA or the AEA and then informed the Respondent about some violation of the ERA, and that Respondent took retaliatory action against him because of his protected activities.”⁵⁶ The ALJ erred as a matter of law in concluding, without citation to any authority to support his rationale, that Vinnett’s communications about safety were not protected because they were merely part of Vinnett’s job, rather than a report of safety-related violations for whistleblower purposes. The Board has never taken the position that an employee’s job duties can remove him from the whistleblower protection provisions of the ERA. To the contrary, the Board has consistently

⁵² *Id.* at 8.

⁵³ *Id.* at 8, n.2.

⁵⁴ *Id.* at 8.

⁵⁵ *Id.* at 9.

⁵⁶ *Id.* at 7.

found that employees who report safety concerns that they reasonably believe are violations of the ERA or AEA are engaging in protected activity, regardless of their job duties. The federal appellate courts have upheld the Board in these cases.⁵⁷

Finally, there is nothing in the language of the ERA that carves out an exception limiting whistleblower protection based on an employee's job duties. To the contrary, the statute protects "any employee" who engages in protected activity. Congress passed the ERA in 1974 as part of its continuing effort to regulate the production, use, and control of nuclear energy. An employee protection provision was added in 1978 to protect employees who assist or participate in any proceeding to administer or enforce the requirements of the ERA or the Atomic Energy Act of 1954.⁵⁸ Nuclear safety is encouraged by protecting workers from retaliation because they report safety concerns. "The whistleblower provision in the [ERA] is modeled on, and serves an identical purpose to, the provision in the Mine Health and Safety Act [sic]. They share a broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality."⁵⁹ As the court in *Mackowiak* observed, "The [Secretary's] ruling simply forbids discrimination based on competent and aggressive inspection work. In other words, contractors regulated by [the ERA] may not discharge quality control inspectors because they do their jobs too well."⁶⁰ Congress amended the ERA in 1992 to expand its whistleblower protection to

⁵⁷ See, e.g., *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098 (10th Cir. 1999) (finding employee of national laboratory engaged in protected activity by exposing health and safety issues regarding the lab's storage and disposal of radioactive and toxic wastes, but did not prove adverse action); *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997) (finding foreman who complained about fire safety at nuclear power plant was engaged in protected activity); *Bartlik v. U.S. Dep't of Labor*, 73 F.3d 100 (6th Cir. 1996) (finding engineer at nuclear power plant engaged in protected activity, but failed to establish retaliation); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995) (finding carpenter who questioned procedures for handling radioactive tools at nuclear power plant engaged in protected activity); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985) (holding quality control inspector at nuclear power plant engaged in protected activity when he filed safety complaints); *Mackowiak v. University Nuclear Sys.*, 735 F.2d 1159 (9th Cir. 1984) (holding quality control inspector's internal safety and quality control complaints were protected activity). But, c.f., *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1352 (Fed. Cir. 2001) (finding that protected activity did not include "reporting in connection with assigned normal duties" under the federal Whistleblower Protection Act, 5 U.S.C. § 1211 *et seq.*); see also *Sasse v. U.S. Dep't of Labor*, 409 F.3d 773, 780 (6th Cir. 2005) (finding that Assistant U.S. Attorney's "investigation and prosecution of environmental crimes were not protected activities because he had a duty, as an [AUSA] to perform them.") (Clean Air Act, Solid Waste Disposal Act, and Clean Water Act).

⁵⁸ *Evans v. U.S. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003 slip op. at 4 (ARB Apr. 30, 2010); *Pastor v. Veterans Affairs Med. Cent.*, ARB No. 99-071, ALJ No. 1999-ERA-011, slip op. at 8-9 (ARB May 30, 2003).

⁵⁹ *Mackowiak*, 735 F.2d 1159, 1163 (citing *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984) (internal citation omitted).

⁶⁰ *Id.*

workers who report safety violations to their employers. Because the ALJ erroneously concluded that Vinnett had not engaged in protected activity because he was just doing his job, the ALJ committed reversible error.⁶¹

In determining whether Vinnett had raised a genuine issue of fact as to whether MPS was aware of his protected activity, the ALJ noted that while Vinnett alleged that he contacted management about a violation of NRC regulations, MPS submitted the affidavit of Daniels “which stated that Complainant never brought any violations of the ERA to his attention.”⁶² The ALJ, however, disregarded Vinnett’s deposition testimony refuting Daniels’s affidavit, in which Vinnett stated that he verbally reported his safety concerns to Daniels several times.⁶³ Vinnett’s burden at this stage of the case, however, is only to show that there is a genuine issue of material fact in dispute.⁶⁴ Vinnett has shown that there is a dispute regarding whether he engaged in protected activity and whether MPS knew about it.

2. MOTION TO COMPEL

The ALJ referred to Vinnett’s “disjointed” deposition testimony and the absence of documents in the record that establish MPS’s knowledge of protected activity.⁶⁵ It is important to note that Vinnett is proceeding pro se. Thus, MPS controlled the deposition testimony and bears some responsibility for the fact that it was “disjointed.” It is also worth noting that, although Vinnett belatedly sought more time to file a motion to compel, he had complained throughout the litigation that MPS was not cooperating in the discovery process.⁶⁶ Thus, Vinnett requested documents that could have provided him with evidence to support his claim that he

⁶¹ Even if the ERA did incorporate such a rule, which it does not, it would be a matter of fact, not law, whether or not Vinnett’s safety-related communications were part of his regular duties.

⁶² D. & O. at 10.

⁶³ See n.6, *supra*.

⁶⁴ *Morriss v. LG&E Power Servs., LLC*, ARB No. 05-047, ALJ No. 2004-CAA-014, slip op. at 35 (ARB Feb. 28, 2007).

⁶⁵ The ALJ concluded, based on his review of Vinnett’s deposition and only two of the weekly reports, that the Complainant offered no evidence that MPS knew of his alleged protected activity. “[N]one of the documents Complainant pointed to suggests that Complainant informed Respondent that he was concerned about a safety violation, or any other ERA violation.” The ALJ concluded that the information contained in the weekly reports Vinnett submitted to MPS, even when read “as generously as possible” would not “reasonably alert management that any violation of the ERA or AEA had been alleged.”

⁶⁶ Dep., Vol. I at 187; Reply at 2-3.

engaged in protected activity and was terminated because of it, but MPS did not produce any documents, except a partial excerpt from Vinnett's personal log, which was heavily redacted.

Vinnett asks the ARB to force MPS to comply with discovery. In his rebuttal brief, Vinnett suggests that because MPS refused to produce a complete copy of his personal log, the ARB should draw an inference that the log book contains evidence that he complained of violations. MPS filed a Reply brief on appeal. With respect to Vinnett's allegations of discovery abuse, MPS states that it "produced the relevant portions of Appellant's 'personal log'."⁶⁷

The Board has held that ALJs have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion.⁶⁸ A pro se litigant "cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance."⁶⁹ The OALJ Rules of Practice and Procedure, however, provide that "[t]he [ALJ] may deny the motion [for summary judgment] whenever the moving party denies access to information by means of discovery to a party opposing the motion."⁷⁰ We have said that adjudicators must accord a party appearing pro se fair and equal treatment. Given that Vinnett, a pro se litigant, complained to the ALJ on more than one occasion that MPS was not cooperating in discovery, the ALJ could have alerted Vinnett of his right to file a motion to compel early on in the proceedings.⁷¹ We suggest, therefore, that the ALJ either reconsider his decision denying Vinnett's request to file a motion to compel, or order MPS to produce the requested documents, thus permitting Vinnett to access documents in the possession and control of MPS, including, e.g., the Palisades outage log, all of the weekly reports that Vinnett sent to MPS during the Palisades project; Vinnett's personal log, which he left at MPS on the date of his termination, not just the parts that MPS decided were relevant; Vinnett's personnel file; and the e-mails Vinnett and Daniels exchanged during the dates of his employment. Only after such documents are produced should the ALJ determine

⁶⁷ MPS also contends that Vinnett's whistleblower complaint was limited to the dates he worked at the Palisades Project, a point with which Vinnett strongly disagreed, arguing that the ALJ's Order No. 1 indicates that the entire period of his employment is covered. On remand, the ALJ should clarify the scope of his order.

⁶⁸ See *Daryanani v. Royal & Sun Alliance d/b/a Arrowpoint Capital Corp.*, ARB No. 08-106, ALJ No. 2007-SOX-079, slip op. at 6 (ARB May 27, 2010); *Robinson v. Martin Marietta Servs., Inc.*, ARB No. 96-075, ALJ No. 1994-TSC-007, slip op. at 4 (ARB Sept. 23, 1996).

⁶⁹ *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 1997-ERA-052, slip op. at 10 n.7 (ARB Feb. 29, 2000), quoting *Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983).

⁷⁰ 29 C.F.R. § 18.40(d).

⁷¹ See, e.g., *Hooker v. Westinghouse Savannah River, Co.*, ARB No. 03-036, ALJ No. 2001-ERA-016, slip op. at 9 (ARB Aug. 26, 2004) (ALJ should have given "fair notice" to pro se litigant of his right to file affidavits or other responsive material in response to summary judgment motion).

whether a genuine issue of fact exists concerning whether or not MPS knew about Vinnett's protected activity and fired him because of it.⁷²

CONCLUSION

For the foregoing reasons, we **REVERSE** the ALJ's Decision & Order, **DENY** MPS's motion for summary decision, and **REMAND** this matter for further proceedings consistent with this Decision and Order of Remand.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

⁷² The ALJ found that on January 6, 2005, the Complainant was told to sign a warning letter for job performance. The ALJ concluded that the "Complainant has failed to submit any evidence, such as progress reports indicating good performance, etc. to establish that Respondent fired him for his whistleblower activities, rather than for reasons related to his job performance." D. & O. at 12. The ALJ concluded that the Complainant "has offered nothing but conjecture and allegations as to why he received a warning letter or why his employment was terminated." *Id.* The ALJ again disregarded Vinnett's deposition testimony in which he testified that he had never been reprimanded about his performance prior to being presented with the warning letter on January 6, 2005. *See Celotex Corp.*, 477 U.S. at 324 (a party's sworn deposition testimony is considered affirmative evidence). Vinnett, who had been employed by MPS for seven months, did not have a yearly performance appraisal; Vinnett had requested his personnel file in discovery, but MPS did not produce it.