



In the Matter of:

MINGHUA CHEN,

ARB CASE NO. 09-058

COMPLAINANT,

ALJ CASE NO. 2006-ERA-009

v.

DATE: March 31, 2011

DANA-FARBER CANCER INSTITUTE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Minghua Chen, pro se, Cherry Hill, Massachusetts

For the Respondent:

Frank F. Reardon, Esq.; James J. Horgan, Esq.; Jassam & Reardon, Boston, Massachusetts

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*, dissenting

FINAL DECISION AND ORDER

Minghua Chen alleged that her employer, the Dana-Farber Cancer Institute, violated the whistleblower protection provisions of the Energy Reorganization Act of 1974 (ERA), as amended,¹ when it fired her in 2004. A Department of Labor (DOL) Administrative Law

¹ 42 U.S.C.A. § 5851 (West 2003 & Supp. 2010).

Judge (ALJ) dismissed Chen's complaint. She appealed to the Administrative Review Board (ARB). We affirm.

BACKGROUND

Our review of the record supports the ALJ's lengthy recitation of the facts.² We summarize.

Chen³ earned a medical degree from Zhejiang University and worked as a research assistant in Boston and as a molecular biology professor in China.⁴ On August 30, 2004, Arthur Pardee, head of the breast cancer research project at the institute, hired her as a research fellow after he and his assistant, James Dirk Iglehart, interviewed her together. Chen began as a probationary employee for 90 days. At the end of that time, the institute would decide whether to keep her as a permanent employee.⁵

Pardee's principal researcher, Debajit Biswas, oversaw the day-to-day operations of the project's radiological laboratory and supervised Chen and another research fellow, Sindu Singh. The lab was located in Room 934 of the Smith building at the institute, but all three doctors also worked in a second non-radiological lab known as Smith 820. Biswas appointed Chen the radiation safety officer for the 934 lab, and she underwent training.⁶

Issues at work

Within weeks of starting, Chen had differences of opinion with Biswas over laboratory methods. Chen testified that she noticed almost immediately that Biswas thawed frozen cells without using an incubator and pointed out that NIH (National Institutes of Health) protocol specified such use. Chen testified that she told Biswas about the incubator and he said she could use it, but he testified differently. He explained that while that protocol was useful, it could result in contamination, so his method called for thawing the cells using a

² R. D. & O. at 3-30. The following abbreviations will be used: [Recommended] Decision and Order, R. D. & O.; Complainant's Exhibit, CX; Respondent's Exhibit, RX; administrative law judge exhibit, ALJX, and joint exhibit, JX.

³ The principal witnesses all have doctorates, but we will dispense with the honorific in the interest of brevity.

⁴ CX 2-3.

⁵ R. D. & O. at 36 n.29, CX 4-8.

⁶ CX 10, TR at 50, 56, 62-68, 70-72, 80-82.

hood and ultraviolet light to create a sterile atmosphere.⁷ Biswas added that Chen “would not listen” to him.⁸

Another issue arose when Biswas discovered that Chen was not following his procedures for dating flasks used in the lab to grow cells and for harvesting those cells. Biswas testified that he began to insist that Chen follow the lab procedures and protocols in use for more than 10 years, but she repeatedly responded to his instructions by saying, “I am not here to work with you. I’m here to work with Dr. Pardee.”⁹

In addition, co-worker Singh testified that a personality conflict between the two soon developed. She noted two instances: Chen was unhappy with Biswas’s conclusion that a chemical used in the research did not emit toxic fumes, and Biswas was chagrined when he learned that Chen was correct about a new procedure developed at Yale University. Singh testified that there were multiple instances where Biswas and Chen disagreed over laboratory procedures and that she observed interpersonal conflicts between the two prior to the November 12, 2004 radiation spill. Singh added that Chen’s discharge resulted from the experiment-related personality clash between Biswas and Chen.¹⁰

Biswas testified that he lost confidence in Chen’s ability to collaborate with others in late September after he suggested that she consult with an expert in genetic assay and sequencing, Alexander Miron, to resolve a problem she had encountered. Biswas explained that Chen did consult but wrote in her report that the expert’s system did not work and that she had found her own solution. Biswas added that he “was frustrated” that Chen would not work with an expert who had an already established system.¹¹

Another disagreement occurred during Chen’s probationary period in mid-October when Biswas asked Chen to order substances known as primers, which were used in the lab’s gene experiments. Biswas testified that he told Chen to check with him before placing the order but learned the next day from Miron that she had ordered too much – the bill would have been \$2,400.00 instead of the usual \$66.00. Chen stated that she had checked with Singh about the type of primer but typed in the “default” quantity in the order.¹² After this,

⁷ *Id.* at 82-88, 239-41, 793-95.

⁸ *Id.* at 795.

⁹ *Id.* at 788-92.

¹⁰ JX 2 at 18-22, 83-88.

¹¹ RX 13, TR at 783-92.

¹² *Id.* at 93-98, 795-97.

Biswas stated that he began to avoid direct dealings with Chen and reported to Pardee and Iglehart in mid-October that “it was not working out.”¹³

Subsequently, Biswas and Chen exchanged e-mails about the primer incident. Chen blamed Biswas for the error because, she said, he had changed his mind about telling her to check with him before ordering. She stated that as a research fellow working in Pardee’s laboratory, she did not “expect to be scolded.” Chen added that she had been paying respect to Biswas since she started and that she wished he would pay respect to her.¹⁴

Biswas responded that Chen’s e-mail surprised him because it did not tell the whole story. He stated that Chen told him late on Thursday that she had placed the order without checking with him and that he had learned on Friday that she had made a major mistake. Biswas apologized for any misunderstanding and reminded Chen that the lab had certain procedures and policies for conducting research that must be followed routinely and religiously. Biswas sent copies of his response to Pardee and Iglehart.¹⁵

On October 19, 2004, Iglehart sent an e-mail admonishing Chen and emphasizing the research game plan and overall rules in the chain of command in the laboratory. He concluded by stating that a “word to the wise should be sufficient.”¹⁶ Iglehart testified that he became concerned within the first month or two of Chen’s employment that she was unable to work under Biswas’s direction on the research project. That was a big issue, he added, because communication and chain of command determined the success of the research, and he found Chen to be “quiet, difficult to communicate with, and stubborn.”¹⁷

Radiation contamination incidents

Events involving a radioactive spill and subsequent safety surveys of the labs sparked further controversy between Biswas and Chen. Biswas conducted an experiment using radioactive materials on November 11, 2004. He testified that he checked for radiation in the lab afterwards, as required by the employee handbook, and found none but forgot to sign the required form that he had conducted a negative survey.¹⁸

¹³ *Id.* at 797.

¹⁴ CX 12.

¹⁵ CX 13.

¹⁶ *Id.*

¹⁷ TR at 996-99.

¹⁸ CX 10, TR at 815-18, 854-55.

The next day, Biswas instructed Chen to dispose of a bag of radioactive waste from the lab, which she did. She then began the required radiological survey of the lab, detected contamination on tile flooring near the work station, notified the radiation safety supervisor Eric Anderson, and covered the tiles with absorbent material. Biswas returned to the lab and was told that radioactive material had been spilled. He accused Chen of the spill, but she denied that she was responsible. Chen had to go home for new shoes after radiation on her shoe could not be removed.

Anderson detected radiation on the floor but advised Chen and Singh that the spill incident was not “a violation or punitive event” because it had been self reported.¹⁹ Anderson concluded that the contamination was most likely caused by a spill incidental to Chen’s removal of the waste bag because “it had to be fresh,” but acknowledged that the spill could have come from Biswas’s experiment the previous day. He stated in his report that the lab staff’s response was “prompt, effective, and conservative.”²⁰ Singh stated that Biswas was upset and muttered that “this is not acceptable. I’m going to get rid of her.” Singh added that she understood that Biswas meant that it was unacceptable that Chen had caused the spill.²¹

The spill incident prompted Chen and Singh to e-mail reports to Iglehart and Pardee on November 15, 2004. Chen stated that Biswas had assumed that she spilled the radioactive material, but she felt that Biswas had caused the contamination with his experiment the day before. Chen added that clarifying what had happened could prevent future radioactive contamination.²² Singh sent a similar e-mail to Iglehart and Pardee, but did not mention that Biswas had blamed Chen for the spill.²³

On November 16, 2004, Chen suggested to Anderson that he check for contamination in the second lab, Smith 820, because of the transfer of materials between it and Smith 934. Anderson’s first survey revealed no radiation but a second, more thorough test showed contamination on a bench-top tube rack. Anderson notified Biswas, who responded in a letter that “it may be presumed that one of us mistakenly brought the rack downstairs” where radioactive experimentation is not permitted. Biswas added that he talked with the lab staff about implementing separate material inventories for the two labs to resolve the problem. He asked Chen and Singh to sign the letter and they did.²⁴

¹⁹ *Id.* at 487.

²⁰ RX 7, TR at 562-65.

²¹ JX 2 at 37-40, 93-94.

²² CX 17-18.

²³ JX 2, Exhibit 2.

²⁴ RX 9-10, CX 19.

Chen's discharge

On November 24, the chief administrator for the lab e-mailed Pardee about the impending end of Chen's 90-day probationary period, noting that she had been involved in a radiation spill and reminding him to let her know if he had any concerns about her performance because her probationary period ended on November 30.²⁵ On November 29, Biswas told Chen that Pardee wanted to see her in his office.²⁶ Pardee handed her a discharge notice stating that she had been unable to demonstrate proficiency in her overall performance and had not met expectations to "effectively collaborate and follow the direction provided by [Biswas]. This has proved counterproductive to the research project and the laboratory operations." The letter added that the institute would continue Chen's salary until December 31, 2004, to allow her to seek other employment at the institute or elsewhere.²⁷

Chen filed a complaint with OSHA on December 27, 2004.²⁸ OSHA determined that the institute had violated the ERA and ordered reinstatement, payment of lost wages and \$10,000.00 compensatory damages, and expungement of the adverse action from her record. The institute requested a hearing, which began on May 24, 2007, and continued on September 17-19, 2007, and April 2, 21-22, and 24, 2008.²⁹ The ALJ found that the institute did not violate the ERA in firing Chen and dismissed her complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision and order under the environmental whistleblower statutes, including the ERA, and to issue the final agency decision.³⁰ Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the

²⁵ RX 25.

²⁶ TR at 173-74.

²⁷ CX 22.

²⁸ CX 27.

²⁹ ALJX 1-9.

³⁰ 29 C.F.R. § 24.110 (2010). *See also* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.100(a)).

powers the Secretary would possess in rendering a decision under the ERA.³¹ We review the ALJ's conclusions of law de novo.³²

When Chen filed her complaint, the ARB reviewed findings of fact under the ERA de novo.³³ The current regulations call for substantial evidence review.³⁴ Neither party has requested leave to supplement or amend its brief in light of the change. We therefore assume that neither party considers the change in standard of review material to this case.³⁵ In any event, applying either standard of review, we conclude that the institute did not violate the ERA, and Chen's complaint must be denied.

DISCUSSION

The ERA provides that an employer may not "discharge" or "otherwise discriminate" against an employee "with respect to his compensation, terms, conditions or privileges of employment" because the employee has engaged in certain protected activities.³⁶ These include making an informal complaint about nuclear safety hazards to a supervisor, but such complaints must sufficiently relate to nuclear safety.³⁷ The complainant need not prove an

³¹ See 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.100(a).

³² 5 U.S.C.A. § 557(b).

³³ See *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 4 (ARB Sept. 30, 2003).

³⁴ 72 Fed. Reg. 44,956 (Aug. 10, 2007), codified at 29 C.F.R. § 24.110(b)(2010). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). We must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party and even if we "would justifiably have made a different choice had the matter been before us de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

³⁵ *Benson v. North Alabama Radiopharmacy, Inc.*, ARB No. 08-037, ALJ No. 2006-ERA-017, slip op. at 5 (ARB Apr. 9, 2010).

³⁶ 42 U.S.C.A. § 5851(a).

³⁷ *Erickson v. U.S. Envtl. Prot. Agency*, ARB Nos. 04-024, -025; ALJ Nos. 2003-CAA-011, -019, 2004-CAA-001, slip op. at 8-9 (ARB Oct. 31, 2006).

actual violation of a nuclear safety law or regulation; a reasonable belief of a violation is sufficient.³⁸

To prevail on her ERA complaint, Chen must prove by a preponderance of the evidence that she was an employee who engaged in protected activity, that the institute took adverse action against her, and that her protected activity was a contributing factor in the adverse action.³⁹ Even if Chen proves that her protected activity was a contributing factor, the institute may avoid liability if it establishes by clear and convincing evidence that it would have fired Chen absent her protected activity.⁴⁰

The ALJ cited the applicable law correctly and found that Chen engaged in protected activity in reporting the radiation contamination incidents, that both Iglehart and Pardee knew about the incidents, that the institute fired her, and that Chen proved by a preponderance of the evidence that her protected activity contributed to her discharge.⁴¹ Relying on his credibility determinations regarding Iglehart, Pardee, Biswas, Chen, and Singh, the ALJ concluded that the institute proved by clear and convincing evidence that it would have fired Chen absent her protected activity.⁴²

Substantial evidence supports the ALJ's credibility determinations

On appeal, Chen argued that Biswas's testimony was not credible and that the ALJ should have credited her testimony instead.⁴³ She also challenged the ALJ's credibility

³⁸ *Speegle v. Stone & Webster Const., Inc.*, ARB No. 06-041, 2005-ERA-006, slip op. at 7-8 (ARB Sept. 24, 2009), citing *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 10-11, 27-28 (ARB July 14, 2000) and cases cited therein.

³⁹ 42 U.S.C.A. § 5851(b)(3)(C); *Pierce v. U.S. Enrichment Corp.*, ARB Nos. 06-055, -058, -119; ALJ No. 2004-ERA-001, slip op. at 11 (ARB Aug. 29, 2008).

⁴⁰ 42 U.S.C.A. § 5851(b)(3)(D).

⁴¹ R. D. & O. at 30-33. The ALJ reasoned that (1) Biswas was agitated by the radiation incident and muttered that he wanted to get rid of Chen; (2) the e-mail to Pardee about Chen's probationary period referred to the radiation incident; (3) Pardee relied on Biswas's complaints about Chen, which were not brought to him until near the end of her probationary period; (4) the institute had not previously fired post-doctoral research fellows; and (5) Biswas failed to follow the employee evaluation procedures. R. D. & O. at 32. The institute contests the ALJ's conclusion, but we need not consider its arguments since we affirm the ALJ's ultimate conclusion that the institute would have fired Chen absent her protected activity.

⁴² R. D. & O. at 33-37.

⁴³ Complainant's Brief at 5-10.

findings regarding Iglehart and Pardee, arguing that their testimony was untruthful, contradictory, and evasive.⁴⁴

The ARB generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable," because the ALJ, unlike the ARB, observes witness demeanor in the course of the hearing.⁴⁵ This deference is due because, 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."⁴⁶

The ALJ stated that he had significant reservations about the credibility of Biswas and Chen.⁴⁷ He noted Biswas's tendency to expound instead of answering the questions, to ramble, and to blur the distinction between what was said and what the speaker may have meant or intended. The ALJ stated that these tendencies led him to question Biswas's ability to recall pertinent events accurately, particularly who said what and when. However, the ALJ found that Biswas's proclivity for lecturing was not a sign of dishonesty, but stemmed from his sincere belief that strict adherence to established protocols and procedures was the cornerstone of reliable experimental research.

Based on Biswas's sometimes vague and inconsistent testimony, the ALJ determined that he would not rely on Biswas's factual statements that conflicted with those of a more credible and reliable witness.⁴⁸ For example, Chen argued that Biswas was untruthful when he denied accusing her of causing the spill; Biswas testified that he did not remember, and the ALJ credited Singh's testimony that Biswas was agitated and did blame Chen.⁴⁹ Also, Chen argued that Biswas lied in denying that the radiation spill had no impact on his decision to recommend her discharge; the ALJ again credited Singh's testimony that Biswas said he

⁴⁴ *Id.* at 17-28.

⁴⁵ *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 10 (ARB Apr. 7, 2010).

⁴⁶ *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).

⁴⁷ R. D. & O. at 7.

⁴⁸ *Id.* at 8-10.

⁴⁹ JX 2 at 40, TR at 857.

“was going to get rid of” of Chen.⁵⁰ Therefore, we affirm the ALJ’s credibility determination regarding Biswas as reasonable and supported by substantial evidence.

The ALJ also had significant reservations about Chen’s credibility. He explained that she was a “very reluctant” witness and sometimes “markedly uncooperative” during the hearing.⁵¹ The ALJ found that she took a lot of time to answer questions and impressed him as trying to decide what answer would support her complaint rather than responding to the questions truthfully and completely.⁵² For example, the ALJ cited Chen’s testimony about Biswas’s instruction not to use an incubator to thaw the cells. He found that until he pressed her she was not forthcoming about her conversation with Biswas when he explained the potential for contamination.⁵³ The ALJ also referred to Chen’s testimony about her prior employment and her application to the Harvard Medical School of Public Health.⁵⁴ The ALJ found that Chen’s lack of candor in discussing the details of her fellowship appointment showed that she not fully believable.⁵⁵

Other than her own belief that her testimony was credible, Chen has offered little evidence that detracts from the ALJ’s credibility findings. Even if substantial evidence supported Chen’s belief, that would not demonstrate that the ALJ’s credibility findings were not supported by substantial evidence.⁵⁶ Based on our review of the hearing transcript, we conclude that the ALJ’s finding that Chen was not fully credible is reasonable and supported by substantial evidence. Therefore, we defer to that finding.

Chen also quarrels with the ALJ’s reliance on the credibility of Iglehart and Pardee. The ALJ based his credibility assessment of Iglehart and Pardee on his observation of their demeanor.⁵⁷ He found that they answered questions directly, consistently, and without

⁵⁰ JX 2 at 46, TR at 809.

⁵¹ The transcript is replete with Chen’s evasive answers, evidenced by her frequent responses to questions from the ALJ and opposing attorneys, “What’s the question?” TR at 233-36, 242, 245-49, 272, 283, 665-68, 796.

⁵² R. D. & O. at 7-8.

⁵³ TR at 82-92.

⁵⁴ RX 16-18, TR at 345-58.

⁵⁵ R. D. & O. at 8.

⁵⁶ See *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 14 (ARB June 29, 2006) (where both parties provide substantial evidence for their positions, the ARB will uphold the findings of the ALJ).

⁵⁷ R. D. & O. at 20-23, 25-27, 33-34.

evasion, and responded candidly to questions that they had to recognize as potentially problematic for the institute's defense.

For example, Pardee admitted that Biswas never prepared an evaluation of Chen's day-to-day work during her probationary period, as stated in the staff member handbook.⁵⁸ He also acknowledged that his discussions with Biswas about Chen's performance occurred only at the "very end" of her employment, except for their disputes over lab procedures, which he heard about prior to the radiation spill.⁵⁹

Iglehart described the radiation spill incident as minor and completely resolved but candidly admitted that he thought Chen's response via e-mail was "bizarre" in that she felt somebody had to be blamed, had to be at fault. Iglehart stated that Chen's reaction led him to think that she "just wasn't communicating on the same level . . . as the rest of us." Iglehart testified forthrightly about why he did not discharge Chen earlier when Biswas first reported his concerns about her failure to follow lab procedures and Singh informed him that communications between Chen and Biswas had broken down, producing tension in the lab. He also admitted that he did not specifically discuss with Chen his concerns about her performance.⁶⁰

Substantial evidence in the hearing record supports the ALJ's credibility findings regarding Iglehart and Pardee. His conclusions based on the demeanor of these witnesses are well within his discretion as fact-finder. Because the ALJ's stated reasons for his determinations are reasonable, we reject Chen's contention that the ALJ abused his discretion.

The institute would have fired Chen absent her protected activity

As we have said, because Chen has proved by a preponderance of the evidence that her protected activity was a contributing cause of her discharge, the institute can escape liability only by establishing by clear and convincing evidence that it would have fired her absent that protected activity.

Clear and convincing evidence denotes a conclusive demonstration; it indicates "that the thing to be proved is highly probative or reasonably certain."⁶¹ "Highly probative" evidence is that which would "instantly tilt [] the evidentiary scales in the affirmative when

⁵⁸ CX 36 at 5, TR at 908.

⁵⁹ *Id.* at 893-94, 923-26.

⁶⁰ *Id.* at 1006-08, 1018, 1028-29, 1056.

⁶¹ BLACK'S LAW DICTIONARY 577 (7th ed. 1999).

weighed against [the opposing evidence].”⁶² This standard of proof is more rigorous than the preponderance-of-the-evidence standard but lower than the beyond-a-reasonable-doubt criterion of criminal cases. Thus, clear and convincing evidence that an employer would have fired the employee absent protected activity overcomes the fact that an employee’s protected activity played a role in the employer’s adverse action and relieves the employer of liability.⁶³

The ALJ noted the risk that “the influence of legal and illegal motives cannot be separated,”⁶⁴ but relied on the “highly credible and persuasive testimony” of Pardee and Iglehart in concluding that the institute established by clear and convincing evidence that it would have fired Chen absent her protected activity in reporting the radiation spill. The ALJ found “highly probative” Iglehart’s statement that he recommended termination because he believed that Chen had difficulty collaborating with Biswas and would not be an effective contributor to the research project. The ALJ also credited Pardee’s testimony that he decided to fire Chen because her conflicts with Biswas over lab procedures potentially jeopardized a vital research project and that the radiation spill incident was a peripheral matter that did not affect his decision.⁶⁵

On appeal, Chen is pro se. She makes essentially the same arguments offered in her post-hearing brief after her counsel withdrew, namely that (1) Biswas’s performance complaints were a pretext for retaliation; (2) the institute proffered shifting and inconsistent reasons for her discharge; and (3) the institute failed to follow its personnel policies. Thus, she contends that the institute could not meet its burden of proving that it would have fired her absent her protected activity.

The ALJ fully discussed his reasons for rejecting Chen’s arguments. He carefully addressed the inconsistencies in Biswas’s testimony and analyzed the nuances in the statements of Pardee, Iglehart, and Singh. The ALJ also found that verbal communications between Biswas and Chen were compromised by misunderstandings due to language differences, which resulted in a severely damaged working relationship unconnected to

⁶² *Duprey v. Florida Power & Light*, ARB No. 00-070, ALJ No. 2000-ERA-005, slip op. at 6 (ARB Feb. 27, 2003), citing *Colorado v. New Mexico*, 467 U.S. 310, 315-317 (1984).

⁶³ *Clark v. Airborne, Inc.*, ARB No. 08-133, ALJ No. 2005-AIR-027, slip op. at 9-10 (ARB Sept. 30, 2010).

⁶⁴ *Abdur-Rahman v. DeKalb County*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003, slip op. at 11 (ARB May 18, 2010), citing *Mackowiak v. Univ. Nuclear Sys.*, 735 F.2d 1159, 1164 (9th Cir. 1984).

⁶⁵ R. D. & O. at 33-35.

protected activity.⁶⁶ Substantial evidence supports the factual findings underlying the ALJ's conclusion that the institute proved by clear and convincing evidence that it would have fired Chen absent her protected activity.

First, Singh, who was deposed at Chen's behest, testified that she observed a personality conflict developing between Biswas and Chen about ten days to one month after Chen's employment began.⁶⁷ Singh corroborated that the multiple disagreements between Biswas and Chen over lab procedures occurred before the November radiation spill.⁶⁸ Singh stated that Biswas wanted Chen "to do exactly what he said," but she did not want to take "plain instructions," especially if she disagreed with the protocols that Biswas insisted on using.⁶⁹ Also, Singh was troubled enough by the broken-down communications between Biswas and Chen in the lab that she had discussions with Iglehart about the matter.⁷⁰

Pardee's testimony was straightforward. He agreed with Biswas's concerns about Chen's methods that differed from his tested and long-used techniques and acknowledged that he learned of these concerns only as Chen's probationary period was winding down.⁷¹ He also acknowledged that Biswas never evaluated Chen's performance, as the employee handbook required.⁷² Pardee convincingly testified that the November radiation spill was not important, that Chen and the others had taken care of it properly, that the incident did not discredit the lab, and that he did not consider the spill in deciding to fire Chen.⁷³ Pardee stated that Chen's inability to follow Biswas's instructions was the deciding factor and that he fired her because her conflicts with Biswas over laboratory procedures potentially jeopardized the research project, which had been going on for 12 years.⁷⁴

Iglehart's testimony was equally convincing. He explained that he interacted with Chen on a weekly or biweekly basis and found her "quiet, difficult to communicate with, and

⁶⁶ *Id.* at 7.

⁶⁷ JX 2 at 83-84.

⁶⁸ *Id.* at 18-19, 87-88.

⁶⁹ *Id.* at 23-24.

⁷⁰ TR at 1027.

⁷¹ *Id.* at 886-89, 891-94.

⁷² *Id.* at 907-08.

⁷³ *Id.* at 922-24.

⁷⁴ *Id.* at 925.

stubborn.” Iglehart stated that concerns about Chen’s performance came to him from Biswas, Miron, and Singh, and he formed an impression within a month or so that she was “incapable of meaningful communication” about the scientific work she was doing. He added that he made it clear to Chen that Biswas was in charge, but he perceived that Chen was unable to work under Biswas’s direction.⁷⁵ He recommended Chen’s discharge because he believed that she would have difficulty collaborating with Biswas, would not take direction from Biswas, and would not be an effective contributor to the cancer research project.⁷⁶

Biswas admitted that he had failed to put his concerns about Chen’s performance in writing and did not inform her prior to November 29 that she was going to be let go.⁷⁷ But he testified that after he told Chen to go to Miron to resolve the gene sequencing issue and she dismissed Miron’s system as unworkable even though the lab had been using it before, he felt frustrated and avoided dealing with her.⁷⁸ He also described her refusal to follow the lab protocol in dating the cell growth flasks so that cell harvests would be uniform.⁷⁹ Biswas added that Chen’s methods were not bad, just different from what the lab had been doing and therefore counterproductive to the research.⁸⁰ He emphasized that many times Chen responded to his instructions by stating, “I am not here to work with you. I’m here to work with Dr. Pardee.”⁸¹

In addition, the e-mails circulating among Chen, Biswas, Pardee, and Iglehart support their testimony that Chen’s discharge resulted from her performance. Chen’s October 17 e-mail regarding the primer order incident began: “Let’s scrutinize everything we did last Thursday.” Chen accused Biswas of changing his instructions to her about checking with him and then blaming others for the mistake in ordering. She stated that she “did not expect to be scolded” while working as “a research fellow in Dr. Pardee’s laboratory” and wished that Biswas could “pay respect” to people working with him.⁸²

⁷⁵ *Id.* at 990-99.

⁷⁶ *Id.* at 1002-04.

⁷⁷ *Id.* at 825-29.

⁷⁸ *Id.* at 786-88, 836-39.

⁷⁹ *Id.* at 788-90.

⁸⁰ *Id.* at 665-67, 832.

⁸¹ *Id.* at 791-92, 840-41, 847-48.

⁸² CX 12.

Biswas's response, copied to Pardee and Iglehart, noted his "surprise" because her e-mail did not reflect the whole story. Biswas stated that he tried to impress on Chen that she needed to double check the primer sequences. He added that he was disturbed when she told him that she had placed the order without checking with him or Singh because Miron then caught what could have been a costly mistake. Biswas emphasized that the lab's procedures for conducting research "should be respected and followed routinely and religiously." He concluded: "I hope you respect that. I am sorry for the misunderstanding."⁸³

Iglehart's October 24, 2004 response to Chen's e-mail was terse. It stated that Biswas was "the boss," that Miron ran the lab operations, that Pardee provided the overall direction, and that we "are here to cure breast cancer. A word to the wise should be sufficient."⁸⁴ Iglehart testified that he wanted to let Chen know directly "what the game plan and the overall rules [were] in terms of the chain of command in the laboratory."⁸⁵

It is fair to conclude that Biswas's influence was a major factor leading to Chen's termination; thus, Chen's protected activity contributed to Biswas's reasons for suggesting termination. However, Chen's relationship with Biswas was severely damaged before she engaged in protected activity and while she was working as a probationary employee. The record establishes clearly and convincingly that Biswas would have recommended termination before Chen's protected activity during the radiation spill. Consequently, it is not a fair conclusion that Biswas's entire motivation or even a majority of it stemmed from Chen's protected activity. In fact, if one were to look at the scale that weighed the reasons for termination and tipped in the direction of termination, it is clear from the record that removing the protected activity conflicts would not budge the scale.

In sum, while Chen proved that her reporting of the radiation spill was a contributing factor to her discharge, the institute is not liable under the ERA because it proved by clear and convincing evidence that it would have fired her absent that protected activity.

CONCLUSION

Substantial evidence supports the ALJ's factual findings regarding Chen's discharge. His legal conclusion that the institute proved by clear and convincing evidence that it fired Chen because of her performance is in accord with the statute and case law. Therefore, the

⁸³ CX 13.

⁸⁴ *Id.*

⁸⁵ TR at 996.

ALJ correctly concluded that the institute did not violate the ERA. Furthermore, we have considered, but rejected, Chen's additional arguments on appeal. Accordingly, we **DISMISS** Chen's complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

Joanne Royce, Administrative Appeals Judge, dissenting.

With respect, I dissent from the majority's conclusion that the institute demonstrated by clear and convincing evidence that it would have discharged Chen in the absence of her protected activity. The ALJ misapplied the "clear and convincing" legal standard to the uncontroverted facts. Further, the facts do not support a finding that the institute would have discharged Chen absent her protected activity.

Background facts

The facts particularly relevant to my dissent follow.⁸⁶ Biswas recommended that Chen be hired based on her research experience. She began work on August 30, 2004. Biswas was responsible for day-to-day supervision of the laboratory and research fellows including Chen. She had only one short conversation (unrelated to work duties) with Pardee between her pre-employment interview and her discharge on November 29, 2004.

Singh testified that she observed disagreements over laboratory procedures between Biswas and Chen beginning in October 2004. That same month, Biswas designated Chen as radiation safety officer for the laboratory.

On November 11, 2004, Biswas performed a "radioactive probe labeling experiment" in the laboratory. He testified that he checked for radiation after completing the experiment but forgot to record his negative findings as required by the institute's protocol. The following day, in Singh's presence, he asked Chen to remove a bag of radioactive waste from the lab. After disposing of the radioactive waste, Chen undertook a routine radiological survey, found several areas of radioactive contamination, and reported a radioactive spill. While Chen and Singh were waiting for the radiation safety officer to arrive, Biswas returned

⁸⁶ R. D. & O. at 3-5.

to the lab, learned of the contamination, and became angry and accusatory. He insisted that Chen must be responsible for the contamination, despite her insistence to the contrary. Singh testified that when Chen left the building to change her contaminated shoes, Biswas appeared upset and muttered, “This is not acceptable. I’m going to get rid of her.” Chen reported events surrounding the radiation spill to Iglehart and Pardee on November 15, 2004.⁸⁷

On November 24, 2004, Amy B. Porter-Tacoronte sent an e-mail message to Pardee that inferred that Chen was responsible for the radiation spill, which she had discovered and reported. She also reminded Pardee that Chen was still within her probationary period and could therefore be terminated without initiating the formal termination process.⁸⁸

Pardee testified that he concluded that Chen should be discharged based upon communications from Biswas relating to Chen’s inability to follow his instructions. Pardee explained that the decision was largely based upon discussions with Biswas near the “very end” of her probation period (i.e., after the spill incident) regarding Chen’s inability to collaborate effectively.⁸⁹ Iglehart likewise relied extensively on Biswas’s complaints regarding Chen’s failure to follow his directives. Iglehart testified that he recommended Chen’s discharge, near the end of her probationary period, based upon her failure to work as a team member or take instruction. He reasoned that she had to “get along” with Biswas to be successful in the laboratory.⁹⁰ However, he conceded that he had no independent verification of the accuracy of Biswas’s complaints about Chen.⁹¹

“Cat’s paw” liability theory

Substantial evidence in the record supports the ALJ’s comprehensive findings of fact. The ALJ correctly concluded that Chen’s activities surrounding the investigation and reporting of the radiation spill were protected activity under the ERA. His conclusion that Chen’s protected activity was a contributing factor was likewise well supported.⁹²

Without explicitly referencing it, the ALJ appeared to apply reasoning consistent with the “cat’s paw” theory of liability recently approved by the Supreme Court⁹³ In *Staub*, the

⁸⁷ *Id.* at 13-15.

⁸⁸ *Id.* at 18.

⁸⁹ *Id.* at 20-23.

⁹⁰ *Id.* at 25-26.

⁹¹ *Id.* at 28.

⁹² *Id.* at 32-33.

⁹³ *Staub v. Proctor*, 131 S. Ct. 1186 (2011).

Supreme Court held that an employer may be held liable for the discriminatory actions of a lower level supervisor who influences the decision to take adverse action by a higher level supervisor who lacks discriminatory animus. The theory and application of cat's paw liability are crucial to understanding this case and worth examining in some detail.

Staub was brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which prohibits discrimination against employees who serve in the uniformed services.⁹⁴ Proctor Hospital employed Staub, a member of the U.S. Army Reserve, as an angiography technician. Both Mulally, Staub's direct supervisor, and Korenchuk, Mulally's supervisor, resented Staub's military obligations because they felt it placed additional scheduling burdens on other employees.⁹⁵

In January 2004, Mulally issued Staub a "Corrective Action" disciplinary action, requiring Staub to notify either Mulally or Korenchuk when leaving his work area. Staub alleged the "Corrective Action" was unwarranted and retaliatory. In April 2004, one of Staub's co-workers complained to Buck, Proctor's Vice President of Human Relations, about Staub's frequent unavailability and his abruptness. Three weeks later, Korenchuk reported to Buck that Staub had violated the January "Corrective Action" by leaving his desk without notifying a supervisor. Staub claimed the accusation was false and that he had left Korenchuk a voice-mail message before leaving his desk. However, Buck relied on Korenchuk's allegation and decided to fire him.⁹⁶

Staub sued under USERRA's anti-discrimination provision claiming that although Buck, the deciding official, did not harbor hostility against his military obligations, both Mulally and Korenchuk bore such animosity, and their actions influenced Buck's ultimate decision to discharge Staub. A jury found in Staub's favor based upon a finding that his military status was a motivating factor in the decision to discharge him. The Seventh Circuit reversed, holding that a "cat's paw" case cannot succeed unless the decision maker relied almost exclusively on information provided by a non-decision maker (with discriminatory animus) in making the ultimate adverse personnel decision. The Supreme Court reversed the Seventh Circuit, finding that if a supervisor acts with anti-military animus, intending to cause an adverse employment action, and if that act is the proximate cause of the final personnel action, then the employer is liable under USERRA.⁹⁷

⁹⁴ 38 U.S.C.A. § 4311(a)(West 2002).

⁹⁵ *Staub*, 131 S. Ct. at 1189.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1190, 1192.

The Court explained that the crux of USERRA's anti-discrimination provision, like that in Title VII, lies in determining whether discrimination was "a motivating factor" in the adverse employment action.⁹⁸ Borrowing from general tort and agency law, the Court reasoned that since a supervisor is an employer's agent, when such an agent (non-decision maker) intends for discriminatory reasons that an adverse action occur, and when that agent is the proximate cause of adverse action by influencing the decision maker, the employer is liable under USERRA; "[since] a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a "motivating factor in the employer's action"

Turning to the case at hand, the ALJ applied reasoning similar to the "cat's paw" theory to find that Chen's protected activity contributed to her discharge.⁹⁹ The ALJ held that the evidence supported a finding that Biswas intended to retaliate against Chen because of her protected activity and though Pardee and Iglehart may not have personally considered Chen's protected activity, they both relied on Biswas's complaints in their decisions to discharge Chen. The ALJ explained these conclusions:

First, Singh's credited testimony shows that Biswas was agitated by the events of November 12, 2004 and was overheard muttering in regard to Chen that the situation was 'unacceptable' and that he was going to 'get rid of her.' Second, Porter-Taraconte's e-mail to Pardee about the impending end of Chen's probationary period directly referred to the radiation spill on November 12, 2004. Third, while Dr. Biswas may not have specifically recommended Chen's termination or complained about her protected activity, Pardee credibly testified that he relied on Biswas's complaints about Chen which were not brought to his attention until the very end of her probationary period. Fourth, there is no evidence that

⁹⁸ 38 U.S.C.A. § 4311(c); 42 U.S.C.A. §§ 20003-2(m).

⁹⁹ The causation element in the ERA whistleblower provision is comparable to Title VII (and USERRA) but requires only that protected activity be a "contributing factor" to adverse employment action. 42 U.S.C.A. § 5851(b)(3)(A). The "contributing factor" standard is generally understood to be an easier standard for the complainant to prove than the Title VII "motivating factor" standard; consequently, the "cat's paw" theory of indirect causation is especially pertinent in a whistleblower law context. *See Staub*, 131 S. Ct. at 1192 ("When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a 'factor' or a 'causal factor' in the decision; but it seems to us a considerable stretch to call it 'a motivating factor.'").

the institute terminated other post-doctoral research fellows for performance problems.^[100]

The ALJ correctly concludes from these facts that Chen’s protected activity was a contributing factor in her discharge. However, at this point in the ALJ’s analysis, his reasoning falters. He does not adequately address the inevitable consequences of application of a “cat’s paw” analysis wherein the basis of liability is the fact that the ultimate decision (Chen’s discharge) was based, almost wholly so in this case, on performance assessments provided by the concededly biased supervisor, Biswas.

The ALJ grants that Biswas possessed retaliatory animus against Chen and wished “to get rid of her.”¹⁰¹ The ALJ also recognizes that both Pardee and Iglehart relied extensively on Biswas’s assessments of Chen’s performance without further inquiry.¹⁰² Pardee and Iglehart based their discharge decision largely on information received from Biswas – information likely infected with Biswas’s retaliatory animus. The ALJ could not reasonably conclude that “Iglehart’s termination recommendation and Pardee’s termination decision were free from impermissible consideration of Chen’s protected activity.”¹⁰³

Certainly some of Chen’s alleged performance problems may have been accurate; however, the decision makers did nothing to validate Biswas’s biased account. Further, Biswas never recorded any of Chen’s alleged shortcomings nor had he ever notified her that he was considering her termination. Iglehart could not recall any other post-doctoral research fellow who had been terminated for failing to follow procedures. Finally, there is evidence suggesting that Biswas himself was the source of any alleged inability of Chen to be a team player: Iglehart revealed that Singh had complained to him repeatedly over the course of her two-year tenure that Biswas was “unreasonable.”

Biswas’s complaints about Chen were infected with retaliatory animus. Pardee and Iglehart largely based their decision to discharge Chen on Biswas’s biased complaints, so unless they corroborated the accuracy of some of Chen’s performance deficiencies, they could not possibly discern Biswas’s legal motives for complaining about Chen from illegal ones. Because the respondent bears the risk that “the influence of legal and illegal motives cannot be separated,”¹⁰⁴ the institute did not meet its burden of proof to demonstrate it would have discharged Chen absent her protected activity.

¹⁰⁰ R. D. & O. at 32-33.

¹⁰¹ *Id.* at 22, 25.

¹⁰² *Id.* at 23, 27, 28.

¹⁰³ *Id.* at 36.

¹⁰⁴ *Mackowiak*, 735 F.2d at 1164, quoting *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983).

“Clear and convincing” evidentiary standard

The ALJ cites case law pertaining to the “clear and convincing” standard which, though not erroneous, fails to recognize the import of the evidentiary standard, particularly in the whistleblower context. An employer’s burden of “clear and convincing” evidence is a very high burden. This statutorily created standard was first used by Congress in the Whistleblower Protection Act of 1989 (WPA).¹⁰⁵ Justification for the new standard, evincing a clear congressional intent to benefit whistleblowers, may be found in the Explanatory Statement on Senate Bill 20:

[T]his heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency’s decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.

.....

By reducing the excessively heavy burden imposed on the employee under current case law, the legislation will send a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistle-blowing and an equally clear message to those who would discourage whistleblowers from coming forward that reprisals of any kind will not be tolerated. *Whistle-blowing should never be a factor that contributes in any way to an adverse personnel action.*^[106]

In 1992, using language very similar to the WPA standard, Congress amended the the ERA’s whistleblower provisions to “facilitate relief for employees” by explicitly raising the

105 5 U.S.C. § 1221(e)(2).

¹⁰⁶ Explanatory Statement on Senate Amendment–S. 20, *reprinted in* 135 Cong. Rec. at H747–48 (Mar. 21, 1989)(emphasis added).

employer's burden of proof to "clear and convincing" evidence.¹⁰⁷ As explained by the U.S. Court of Appeals for the Eleventh Circuit:

For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves. "Recent accounts of whistleblower harassment at both NRC licensee . . . and [Department of Energy] nuclear facilities . . . suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry."^{108]}

I do not believe that the institute met this very high standard of proof. After listing half a dozen reasons why protected activity contributed to Chen's discharge, the ALJ cites in essence two bases for his determination that the institute would have discharged Chen absent her protected activity: 1) he credits Iglehart's testimony that he recommended Chen's discharge based on his assessment that she was going to have difficulty effectively collaborating with Pardee and Biswas; and 2) he credits Pardee's testimony that his decision to fire Chen was based on his conclusion that her conflicts with Biswas potentially jeopardized a vital medical research project.¹⁰⁹ But Chen's supposed failure to collaborate with Biswas effectively flowed largely from his irritation over her insistence on safe and uniform laboratory operations, including the monitoring and reporting of the radioactive spill. In this context, Chen's failure to collaborate or follow instruction was not a legitimate, non-retaliatory reason for her discharge. Viewing the evidence reasonably, I simply do not believe the institute demonstrated by clear and convincing evidence it would have fired Chen absent her protected activity.

JOANNE ROYCE
Administrative Appeals Judge

¹⁰⁷ 42 U.S.C.A. § 5851(b)(3)(D); 138 Cong. Rec., No. 142, H 11,444 (Ford). Since 1992, Congress has included the heightened "clear and convincing" burden of proof for employers in every newly enacted whistleblower statute administered by the Department of Labor. *See* Pipeline Safety Improvement Act, 49 U.S.C.A. § 60129 (Thomson/West 2007); Sarbanes-Oxley Act, 18 U.S.C.A § 1514A (Thomson/West Supp. 2010); Wendell H. Ford Aviation Investment and Reform Act, 42 U.S.C.A § 9610 (Thomson/West 2007).

¹⁰⁸ *Stone & Webster Eng'g. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997), citing H. Rep. No. 102-474(VIII), at 79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 2282, 2297.

¹⁰⁹ R. D. & O. at 32.