In the Matter of:

FELIPE FRANCHINI, **ARB CASE NO. 11-006**

COMPLAINANT, **ALJ CASE NO. 2009-ERA-014**

v. **DATE: September 26, 2012**

ARGONNE NATIONAL LABORATORY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Felipe Franchini, *pro se*, Joliet, Illinois

For the Respondent:
Andrew M. Slobodien, Esq.; Wildman, Harrold, *Allen & Dixon, LLP*, Chicago, Illinois

Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER OF REMAND

This case arises under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C.A. § 5851 (West 2003 & Supp. 2012), as implemented by regulations codified at 29 C.F.R. Part 24 (2012). Felipe Franchini filed a complaint with Occupational Safety and Health Administration (OSHA) claiming that Argonne National Laboratories, operated by UChicago Argonne, L.L.C. (Argonne)[1] terminated his employment in violation of the ERA whistleblower

[1] We note the Complainant and the Respondent identify the Respondent's name differently in the caption. The Complainant identifies Argonne National Laboratories as the Respondent, while Argonne identifies UChicago Argonne, L.L.C., as the Respondent. The parties agree that Argonne National Laboratory is a scientific research facility owned by the U.S. Department of Energy but operated by UChicago Argonne, L.L.C. The parties focus on the actions of UChicago Argonne,

provisions. OSHA dismissed his case, and Franchini filed objections and a request for hearing with the Office of Administrative Law Judges. Argonne filed a motion for summary decision, and the ALJ granted the motion. We reverse and remand due to genuine issues of material fact and errors of law on the issue of causation.

BACKGROUND

General Background and Initial Safety Concerns

Some general background facts appear to be undisputed. Argonne hired Franchini in 2000 and terminated his employment on October 10, 2008. The Department of Energy (DOE) owns Argonne National Laboratories, operated by UChicago Argonne. At Argonne, Franchini worked in the High Energy Physics (HEP) Division and in 2008 reported to Manoel Conde, his immediate supervisor, who in turn reported to Hendrick (Harry) Weerts, the HEP Division Director. Darryl Howe served as Argonne's Employee Relations Manager. Franchini asserts, without objection from Argonne, that he was promoted in or about 2005. Franchini Brief (Br.). at 2. Franchini spent a substantial amount of time working in Building 366, the focus of this case. Ken Woods was the Manager of Building 366.

Franchini also asserted without much dispute that he made several complaints throughout his employment at Argonne. He allegedly made these complaints to safety officers at Argonne and the DOE about employees wearing sandals in certain zones where shoes were required, and unsafe crane usage. OSHA Exhibit (Ex.) O-B, C, E.

It is undisputed that, in September 2007, Franchini filed an internal complaint concerning Building 366's work environment. The September complaint reiterated earlier complaints and raised complaints about tool usage, frayed electrical cords, proper disposal of hazardous material, and eating in designated areas. OSHA Ex. O-G. Building 366's working conditions were investigated in September and October 2007, and as Ron Lutha, DOE Site Manager, reported, Argonne took several corrective actions. OSHA Ex.O-I.

The parties do not dispute that Franchini raised safety complaints in 2008. In early 2008, Franchini reported about working conditions in Building 366. Franchini Deposition (Dep.) at 207-19. Franchini claimed that a Zeus container was leaking unacceptable levels of radiation. Argonne Response Brief (Resp. Br.) at 3. Franchini renewed these complaints in April or May 2008. Franchini Dep. 213, 223, 226-28; *see also* OSHA Ex. O-T. On or about May 19, 2008, Franchini reported the container complaint to Weerts, and other officials at Argonne and DOE. *See* Motion for Summary Decision (Mot. for S.D.), Ex. E; Franchini Dep. 223, 227-28. The e-mail was forwarded to Lutha on or about May 19. Franchini Rebuttal Brief (Reb.), Ex. 13. Franchini claims that a test in April 2008 showed high levels of contamination in Building 366. Franchini Dep. 249. Franchini also claims he was exposed to depleted Uranium. Franchini Dep. 224-26. According to Argonne, it investigated Franchini's report about the container and found

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L.L.C., and agree that Franchini worked for UChicago Argonne, L.L.C. Consequently, given the parties' focus on the same entity, we understand the Respondent to be UChicago Argonne, L.L.C.

"no unacceptable levels of radiation." Argonne Resp. Br. at 3; Mot. for S.D., Ex. D (declaration of radiological safety officer).

Lutha replied in writing to Franchini on June 11 noting that he (Lutha) had sent a letter to Argonne on June 6, 2008, informing Argonne of the complaint and DOE's findings. Franchini OSHA Ex. O-BB; Franchini Br. at 5. Argonne raised no objection to the copy of DOE's June 11, 2008 letter that Franchini offered as Exhibit 5 in his response to Argonne's motion for summary decision. Exhibit 5 had an "Attachment #1" and "Attachment #2" that listed a number of problems at Argonne National Laboratory, which included the following findings about the complaints: (1) "HEP did not inform all employees in Building 366 of the materials and chemicals used in work activities and potential hazards as required by hazard communication requirements (29 C.F.R. 1910.1200 and 29 C.F.R. 1910.1450)"; (2) the NOVA Project Adhesive Testing confirmed that exposures did not surpass occupational exposure standards for a "small scale" project but should not be used to predict conditions for a "full size" NOVA neutrino detector construction; and (3) employees on some projects (e.g., Argonne Wakefield Accelerator) "were not informed of the specific chemicals used, material safety data sheets (MSDS), or provided hazard information related to the NOVA project activities" and therefore all employees were not "appropriately informed." The DOE letter also expressly reminded HEP of its obligations to provide MSDS and information to individuals about chemicals such individuals have used on particular projects. The DOE Letter (Attachment #1) then reviewed eight "Complaints" and corresponding findings, as well as DOE's criticisms of Argonne pertaining to each complaint. In Attachment #2 to the DOE Letter, DOE listed approximately 30 additional criticisms following employee interviews and a walkthrough of Building 366.

Request for the Audio Tapes and Termination of Employment

On June 6, 2008, a meeting was held regarding Franchini's improper use of sick leave.[2] Argonne managers Weerts and Howe were present at the meeting. Mot. for S.D. at 3. Argonne acknowledges that, at the beginning of the meeting, it asked Franchini if he had been recording co-workers without their consent. Mot. for S.D., Ex. A ¶ 8; Ex. C ¶ 8. Franchini responded that he had made about fifty recordings since 2004, and forty-seven were obtained without the consent of the other parties. Mot. for S.D., Ex. A at ¶¶ 9, 10; Franchini Dep. at 40. During the June 6 meeting, Franchini was asked to produce the tapes and was informed that failure to produce the tapes would be considered insubordination. Mot. for S.D., Ex. A, Q. After the meeting on June 6th, Franchini went home. His lock was changed at work and allegedly his office was searched during the meeting. Franchini Dep. at 55-56. He was informed about this during the meeting.

Over the weekend, he reviewed his collection of recordings and allegedly duplicated several. On Monday, June 9th, Franchini claimed that he sent several tapes to Howe through interoffice mail. Howe stated that he never received any of the tapes. Mot. for S.D., Ex. A at ¶¶ 12, 15; Franchini Dep. at 51-56. Franchini went on extended sick leave on June 9.

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[2] Mot. for S.J., Ex. C, at 6.

On June 13, 2008, Argonne sent a written directive to Franchini claiming that he failed to return the tapes by June 9. Franchini Response to Motion for Summary Decision (Resp. Mot for S.D.), Ex. 8. Argonne gave Franchini a "direct order" to produce the tapes upon return from sick leave and informed him that refusal to do so would be considered "insubordination" and "will be cause for additional corrective action up to and including release from [the] Laboratory." Mot. for S.D., Ex I; Franchini Resp. Mot for S.D., Ex. 8. Argonne also wrote a letter to Franchini on June 18 identifying items Argonne found in his locker that might violate Argonne's policies and requesting that Franchini return his laboratory badge, pending further investigation. OSHA Ex. O-GG.

On June 18, 2008, Franchini responded in writing to Lutha. OSHA Ex. O-DD. The June 18 letter identified several additional items Lutha allegedly missed in his June 6 letter and also claimed retaliation and harassment. OSHA Ex. O-DD; Franchini Dep. at 235. He described a conversation he had on June 4, 2008, about radiation concerns related to a "mop up cleaning operation in the annex." He reiterated that he was still waiting for an MSDS, which DOE said should be provided to employees who requested such information and for employees who worked with the chemicals in question.

Argonne claimed that on October 3, 2008, it sent Franchini a prepaid FedEx box asking for the tapes and retained a FedEx delivery receipt. OSHA Ex. O-JJ; Mot. for S.D., Ex. J. Argonne claimed the October 3 letter again informed Franchini that failure to deliver the tapes may result in termination. Franchini claims he never received the package. Franchini did not respond. On October 10, 2008, Weerts terminated Franchini's employment, citing that he violated laboratory policies, including employee conduct § 7400.1 (insubordination). OSHA Ex. O-KK; Mot. for S.D., Exs. K, M. Policy 7400.1 generally refers to "insubordination" and "disrespectful" conduct without defining those terms or pointing to policies expressly discussing audio recording.

On April 1, 2009, Franchini filed a complaint with OSHA. On June 29, 2009, OSHA found that he engaged in protected activity under the ERA but that a series of intervening events occurred between his protected activity and the termination. OSHA Order at 2. OSHA found that Franchini failed to show that protected activity was a contributing factor in his termination. Franchini filed objections to OSHA's determination with the Office of Administrative Law Judges. The ALJ assigned to the case scheduled the matter for hearing.

On September 20, 2010, Argonne filed a motion for summary decision on the grounds that Franchini cannot prove that he engaged in protected activity or that such activity contributed to his termination. Mot. for S.D. at 5-11. Argonne also argued that it would have fired Franchini even if he had not engaged in protected activity. Franchini responded on October 4, 2010. After reviewing the motions, the ALJ granted Argonne's motion for summary decision.

ISSUE ON APPEAL

The issue on appeal is whether the ALJ erred in granting Argonne's motion for summary decision.

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the ERA. 42 U.S.C.A. § 5851. The Secretary has delegated that authority to the Administrative Review Board. 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). *See* 29 C.F.R. Part 24. We review a grant of summary decision de novo under the same standard that ALJ's must employ.[3]

DISCUSSION

Governing Law

ERA Section 211 provides, in pertinent part, "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.)." 42 U.S.C.A. § 5851(a)(1)(A). Subsection 5851(a)(1)(F) contains a catchall provision that prohibits discrimination against an employee who "assisted or participated or is about to assist or participate . . . in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended."

To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, suffered an unfavorable personnel action, and that his protected activity was a contributing factor in the unfavorable personnel action taken against him. 42 U.S.C.A. § 5851(a), (b)(3)(C). If the complainant's protected activity was a contributing factor in the adverse action, the employer may avoid liability only if it demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action" in the absence of the protected activity. 42 U.S.C.A. § 5851(b)(3)(D). On appeal to the Board, Argonne pursues summary decision on the element of causation and, in the alternative, its affirmative defense that it would have terminated Franchini's employment absent the alleged protected activity.[4]

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[3] *Siemaszko v. FirstEnergy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012).

[4] Argonne expressly stated that it was not seeking a review of the ALJ's finding on protected activity. *See* Argonne Resp. Br. at 8, n. 2. Because we do not address this issue, we leave it to the ALJ to decide in the first instance whether the issue of protected activity remains open and the extent to which it remains open.

Pursuant to 29 C.F.R. § 18.40(d), an ALJ may "enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d) (2012).[5] To determine whether there is any genuine issue of a material fact, the ALJ must examine the elements of the complainant's claims to sift the material facts from the immaterial.[6] Once materiality is determined, the ALJ next must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. Drawing from the federal law pertaining to summary judgment motions in federal court, we adopt the principle that a "genuine issue" exists if a fair-minded fact-finder (the ALJ in whistleblower cases) could rule for the nonmoving party after hearing all the evidence, recognizing that in hearings testimony is tested by cross-examination and amplified by exhibits and presumably more context.[7] When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the non-moving party, the complainant in this case.[8] The moving party must come forward with an initial showing that it is entitled to summary decision. 29 C.F.R. § 18.40(d).[9]

Though not very clearly, 29 C.F.R. § 18.40 appears to incorporate two well-recognized methods by which a respondent can demonstrate the lack of a genuine issue of material fact. One method is to assert that the complainant lacks evidence to support an essential element of his

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[5] *See Siemaszko,* ARB No. 09-123, slip op. at 3. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (discussing summary judgment principles in federal courts). We have previously expressed that 29 C.F.R. § 18.40 generally incorporates into the administrative proceedings the summary judgment procedure described in Rule 56 of the Federal Rules of Civil Procedure. *See Trammell v. New Prime, Inc*., ARB No. 07-109, ALJ No. 2007-STA-018, slip op. 4-5 (ARB Mar. 27, 2009).

[6] *See Hasan v. Encercon,* ARB No. 10-061, ALJ Nos. 2004-ERA-022, -027; slip op. at 4 (ARB July 28, 2011). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit" preclude summary judgment.).

[7] *Anderson*, 477 U.S. at 252 ("whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.").

[8] *Siemaszko,* ARB No. 09-123, slip op. at 3.

[9] *See Pickett v. Tennessee Valley Auth.*, ARB No. 00-076, ALJ No. 2000-CAA-009, slip op. at 3 (ARB Apr. 23, 2003). *See also American Int'l Group, Inc. v. London Am. Int'l Corp. Ltd.*, 664 F.2d 348, 351 (2d Cir. 1981) (quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975)).

case.[10] In such a case, the complainant must specifically identify facts that, if true, could meet his burden of proof at an evidentiary hearing on the merits.[11] Another method of testing the pleadings is for the respondent to attach affidavits or other documents and evidence, which purport to state the undisputed facts and challenge the complainant to produce admissible, contrary evidence that creates a genuine issue of fact. *See* 29 C.F.R. § 18.40(c). In this latter method, the opposing party must do more than identify specific facts but must go beyond asserting facts and attach admissible contradictory evidence to raise a genuine issue of material fact. If the opposing party fails to attach admissible evidence, then the judge could find that there is no genuine issue of material fact and proceed to determine whether the moving party is entitled to judgment as a matter of law. Stated more simply, the complainant must identify the specific facts and/or evidence he will bring to trial and such facts and evidence, if believed at trial, must be enough to allow for a ruling in his favor on the issue in question. The burden of producing evidence "is not onerous and should preclude [an evidentiary hearing] only where the record is devoid of evidence that could reasonably be construed to support the [complainant's] claim." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252.

In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted.[12] 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." *Hyman v. KD Res. L.L.C.,* ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 8 (ARB Mar. 31, 2010) (citations omitted). Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense. Given that the parties are not appealing the ALJ's ruling on protected activity,[13] we now examine the ALJ's summary decision on the issue of causation.

The Parties' Dispute as to Causation

In support of its motion for summary decision, Argonne essentially contends that Franchini's alleged insubordination caused the termination of his employment and that his

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[10] *See* 29 C.F.R. § 18.40(a) (allows motion to be filed "with or without affidavits"). This is similar to the rules of federal civil procedure.

[11] *Anderson*, 477 U.S. at 256 (at this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof).

[12] *Siemaszko,* ARB No. 09-123, slip op. at 3. *See also Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 6 (ARB May 29, 2009) (citation omitted); *Seetharaman v. G.E. Co.,* ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004) (citations omitted).

[13] *See* Argonne Resp. Brief at 8, n.2.

alleged protected activity played no part. More specifically, one of Franchini's managers (Weerts) claimed that he terminated Franchini for disobeying numerous directives to turn over audio recordings Franchini made of his co-workers, which the company states violated Employee Conduct Policy § 7400.1. Mot. for S.D. Exs. K, M. Argonne also asserts that Franchini violated Illinois laws by surreptitiously audio recording his co-workers. To disprove that it discriminated against Franchini due to his protected activity, Argonne claims that it embraced safety complaints, that Franchini had a long history of making such complaints without suffering any adverse action, and that Argonne made changes as a result of Franchini's non-radiological complaints. Mot. for S.D. at 10; Ex. G; Franchini Dep. at 194-96. Among other things, Argonne also provided evidence showing that Franchini received safety awards in the past for reporting unsafe conditions. Mot. for S.D. at 10.

To the contrary, Franchini argues that the demand to return the recordings was pretext for unlawful retaliation and that the tapes were not demanded until after they had discovered his protected activity. Petition for Review (Pet. For Rev.) at 3-4. As part of his protected activity, Franchini claims that his safety complaints in 2007 triggered DOE's safety investigation and that he furthered the investigation by providing additional safety complaints in 2008. Franchini Dep. at 202; *see also* Argonne Response to Petition for Review (Resp. to Pet. for Rev.) at 4, 7. As for the tapes, Franchini claims that he informed Weerts, Howe, and others in 2004 and 2007 about the recordings but that no one asked about them at that time. Franchini states that his immediate supervisor Conde had informed Argonne management about Franchini's recordings in February 2008. Franchini Reb. Br. at 6. Franchini claims that two others, Leon Reed and Manoel Conde, also recorded conversations but did not lose their jobs. Franchini Br. at 9; Franchini Dep. 40, 73, 292. Argonne disputes that Reed and Conde were similarly situated. Mot. for S.D., Exhibits A ¶ 20 (Weerts Decl.), Ex. C ¶¶ 19, 20 (Howe Decl.), and Ex. L. Unlike Franchini, Conde was not terminated allegedly because he returned the recordings when directed to do so. Mot. for S.D., Exhibits A ¶ 20 (Weerts Decl.); Mot. for S.D. at 12 & n.6. Conde allegedly had his vacation time reduced by five (5) days. Mot. for S.D., Ex. N.

The ALJ granted summary decision in Argonne's favor on the issue of causation. Essentially, the ALJ concluded that Franchini's alleged insubordination was an "intervening event" between his protected activity and the termination of his employment, expressly rejecting that his protected activity was a contributory factor. Order Granting Respondent's Motion for Summary Decision (S.D.O.) at 4-5. The ALJ mentioned temporal proximity only in passing, summarily concluding that five months was not the type of temporal proximity that established a prima facie inference of causation. The ALJ did not substantively analyze what, if any, causation inference could be drawn from temporal proximity in this case. We now turn to the ALJ's determination on causation.

The Issue of Causation in Summary Decisions

As often noted in the United States Court of Appeals for the Seventh Circuit,[14] summary decisions are difficult in "employment discrimination cases, where intent and credibility are crucial issues."[15] Obviously, the issue of causation in discrimination cases involves questions of intent and motivation when the complainant argues that the employer's asserted reasons were not the real reasons for its actions. Summary decision on the issue of causation is even more difficult in ERA whistleblower cases where Congress made it "easier for whistleblowers to prevail in their discrimination suits," requiring only that the complainant prove that his protected activity was "a contributory factor" rather than the more demanding causation standards like "motivating factor," "substantial factor" or "but for" (determinative factor) causation. *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). Contributory factor means any factor which, alone or in connection with other factors, "tends to affect in any way the outcome of the [employment] decision."[16] Even where a respondent asserts legitimate, non-discriminatory reasons for its actions, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could (1) discredit the respondent's reasons or (2) show that the protected activity was also a contributing factor even if the respondent's reasons are true.[17]

Complainants may rely on circumstantial evidence to prove that protected activity contributed to the unfavorable employment action in question.[18] For example, in some circumstances, evidence of inconsistencies in the respondent's reasons could present sufficient circumstantial evidence for the ALJ to reject the employer's asserted reasons and, if sufficiently

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[14] The U.S. Court of Appeals for the Seventh Circuit would have jurisdiction over appealable Board decisions in this matter. 29 C.F.R. § 24.112.

[15] *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993) (summary judgment standard "is applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues"). In revisiting its use of the phrase "added rigor," the court of appeals explained that it applies the same summary judgment standard in employment cases as any other case but reaffirmed that its caution in *Sarsha* meant "to stress the fact that employment discrimination cases typically involve questions of intent and credibility, issues not appropriate for this court to decide on a review of a grant of summary judgment." *Bagley v. Blagojevich*, 646 F.3d 378, 389 (7th Cir. 2011); *see also Conneen* v. *MBNA Am. Bank*, 334 F.3d 318, 325 n.9 (3d Cir. 2003).

[16] *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). *See also Addis. v. Dep't of Labor*, 575 F.3d 688 (7th Cir. 2009).

[17] *See Trimmer*, 174 F.3d at 1101 (1992 amendments to the ERA changed the causation requirement to "contributory factor" and thereby eliminated the requirement of showing pretext prove unlawful discrimination).

[18] *Pierce v. U.S. Enrichment Corp.*, ARB Nos. 06-055, -058, -119; ALJ No. 2004-ERA-001, slip op. at 12-13 (ARB Aug. 29, 2008).

persuasive, accept the complainant's claim that protected activity was a contributory factor.[19] Other circumstantial evidence may include evidence about motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, and material changes in employer practices, among other types of evidence.[20] Where circumstantial evidence supports a reasonable inference that protected activity could have been a factor, the complainant's whistleblower claim must proceed to an evidentiary hearing unless the employer can establish an affirmative defense through a properly supported motion for summary decision. In a motion for summary decision, an employer cannot nullify the complainant's evidence of contributory factor by simply presenting a different independent and lawful reason for the unfavorable employment action. The ALJ must be convinced through undisputed facts and as a matter of law that the protected activity was not a factor.

The ALJ's Decision

In considering Franchini's response to the motion for summary decision, the ALJ made three errors requiring a remand. First, the ALJ erred in summarily determining that there was insufficient temporal proximity of the protected activity to the adverse action. S.D.O. at 4. Temporal proximity is an important part of a case based on circumstantial evidence, often the "most persuasive factor." *Beliveau v. U.S. Dep't of Labor*, 170 F.3d 83, 87 (1st Cir. 1999) (environmental whistleblower case). Determining what, if any, logical inference may be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science but requires a "fact-intensive" analysis.[21] It involves more than determining the length of the temporal gap and comparing it to other cases.[22] Previous case law can be used as a guideline to determine some general parameters of strong and weak temporal relationships, but context matters.[23] Before granting summary decision on the

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[19] *Hoffman v. Bossert*, No. 1994-CAA-004, slip op. at 5 (Sec'y Sept. 19, 1995) (a respondent's shifting explanations for an adverse action often reveal that the real motive was unlawful retaliation).

[20] *See Bobreski*, ARB 09-057, slip op. at 13. *See also Addis*, 575 F.3d at 691.

[21] *See, e.g., Hicks v. Forest Preserve Dist. of Cook Cnty.*, 677 F.3d 781, 789 (7th Cir. 2012) (there are no "bright line rules to apply when considering the temporal proximity of adverse actions to protected activities").

[22] *See, e.g., Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 178 (3d Cir. 1997) (by focusing "exclusively on the gap" the court failed to engage in "the more generalized inquiry" into the impact of the plaintiff's protected activity).

[23] *See, e.g., Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (court of appeals reverses the Secretary for failing to find that a 30-day temporal gap in that case was sufficient to support an inference of retaliation). *See also Goldstein v. Ebasco Constructors, Inc.*, No. 1986-ERA-036, slip op. at 11-12 (Sec'y Apr. 7, 1992), *rev. on other grounds sub nom. Ebasco Constructors, Inc. v. Martin*, 986 F.2d 1419 (5th Cir. 1993) (causation established where seven or eight months elapsed between protected activity and adverse action).

issue of causation, the ALJ must evaluate the temporal proximity evidence presented by the complainant on the record as a whole, including the nature of the protected activity and the evolution of the unfavorable personnel action. In this case, the ALJ's summary assessment of temporal proximity in this case was incorrect.

The ALJ committed a second reversible error in ruling that Argonne's adverse action occurred five months after Franchini's protected activity (from May 19 through October 10, 2008). Even at five months, the ALJ recognized that sufficient temporal proximity of the protected activity to the adverse action may be found given precedent that six months was sufficiently close.[24] But Franchini proffered evidence that, if accepted as credible evidence at a hearing, suggests that he engaged in protected activity with DOE through his letter dated June 18, 2008. In that letter, when viewed in the light most favorable to Franchini, he raised concerns about additional radiation leaks and again reported that he had not received a requested MSDS. These types of complaints can constitute protected activity, but we will allow the ALJ the first opportunity to ultimately decide this issue.[25] Generally, under the ERA whistleblower statute, protected activity includes internal or external safety concerns which "relate to the environmental, health or safety concerns" of the ERA and Atomic Energy Act of 1954.[26] Even concerns about "important links" to a nuclear incident are protected complaints. *Williams*, ARB No. 98-030, slip op. at 23. Notably, Argonne avoided directly discussing Franchini's June 18, 2008 letter. The safety concerns raised in the June 18 letter would shorten the temporal gap to less than four months, an important factor even before considering other circumstantial evidence presented, if any. This material miscalculation in the temporal gap alone justifies a remand to the ALJ for reconsideration as to whether Franchini's protected activity may have been a contributory factor.

The ALJ made a third reversible error by finding that Franchini's alleged insubordination was an intervening event that severed any causal link between Franchini's protected activity and being fired. First, it is unclear how the ALJ determined as a matter of law that the refusal to turn over the tapes was a true reason. The record before us does not contain undisputed evidence that Franchini violated a workplace policy other than Argonne's general claim of "insubordination" and allegedly illegal recordings, which is not to say we condone the surreptitious audio recording

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[24] *See* S.D.O. at 4; *see also e.g., Livingston v. Wyeth*, 520 F.3d 344 (4th Cir. 2008); *Barker v. UBS AG*, __ F. Supp. 2d __, 2012 WL 2361211, at *8, Civ. Act. No. 3:09-CV-2084 (JCH) (D. Conn. May 22, 2012) (suggesting that a range up to five months could be a sufficiently close temporal gap to support an inference of unlawful discrimination) (SOX case).

[25] *See Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 1997-ERA-014, 018-022, slip op. at 21 (ARB Nov. 13, 2002) ("unqualified protection" for concerns about radiation exposures).

[26] *Williams*, ARB No. 98-030, slip op. at 17 (Congress amended the ERA in 1992 to expressly include complaints to a regulatory agency and internal complaints).

co-workers.[27] We can appreciate why Argonne might have demanded that Franchini turn over his audio recordings, but we are not permitted to assume without evidence in the record that Argonne had an undisputed right to make such a directive and the reason that Franchini had to comply. Moreover, the ALJ did not explain how he determined that Franchini violated Illinois law, as a matter of law. The ALJ cited no Illinois law nor pointed to evidence in the record that identified or explained this alleged violation of Illinois law. Franchini argues that these reasons were pretext for unlawful discrimination and presented temporal proximity evidence that sufficiently raises a genuine issue of material fact as to causation. Most importantly, even if Franchini's refusal to turn over his tapes was a true reason, this conclusion does not rule out protected activity as a contributing factor in the termination of his employment.

In the end, viewing the evidence in the light most favorable to the nonmoving party (Franchini) for summary decisions, the unresolved issue of temporal proximity and other material issues of fact in this case prevent us from affirming dismissal by summary decision. Contrary to the ALJ's finding in this case, there is sufficient evidence suggesting that Franchini engaged in protected activity as late as June 18, 2008, less than four months before he was fired. In June 2008, DOE sent a letter to Argonne that was very critical of Argonne's practices at Argonne National Laboratory, particularly Building 366 where Franchini worked. The June 11, 2008 DOE letter stated that it had engaged in a walkthrough of Building 366 and interviewed employees, suggesting that its investigation was no secret. Importantly, on June 6, 2008, Argonne met with Franchini to reprimand him for abuse of sick leave but it also began to pressure Franchini to turn over audio tapes he made of co-workers and threatening Franchini with termination of his employment. Franchini was allegedly locked out of his office on June 9, 2008. Argonne's efforts to obtain these tapes occurred while Franchini was still communicating with DOE about the safety concerns. The record does not contain undisputed evidence of insubordination, much less that such alleged insubordination precluded the possibility of multiple factors leading to the termination of Franchini's employment. Given the number of unresolved issues of material fact, we must remand this matter to the ALJ. Our ruling is not a final ruling that causation exists nor any kind of indication of our view of the merits of Franchini's claim of unlawful discrimination.

Issues that are Moot or Not Ripe for Review

We also comment briefly on two significant rulings made by the ALJ. In one ruling the ALJ struck part of an exhibit from Franchini's response brief that allegedly referenced a conversation with Weerts concerning safety. S.D.O. at 1-2. Given that our decision focuses on other evidence the ALJ considered, the ALJ's exclusion of Franchini's affidavit does not affect our decision. In another ruling the ALJ essentially resolved a factual dispute as to whether Franchini received a FedEx package allegedly sent on October 3, 2008, and that again ordered Franchini to deliver the tapes to Argonne. *Id.* at 4-5. In analyzing the asserted presumption of delivery, the ALJ engaged in fact-finding when he ruled that: Franchini "would have

[27] *Cf. Sarsha*, 3 F.3d at 1041 (summary judgment denied in age discrimination case partly due to conflicting evidence as to the existence of the workplace policy forming the basis for the unfavorable employment action).

mentioned" something in a letter; certain testimony "supports" a presumption, "tracking records 'prove'" that a delivery was made, and that testimony "defies belief and has been proven false." *Id*. As we previously stated, neither the ALJ nor the ARB can decide factual issues on motions for summary decisions. Nevertheless, these factual disputes related to the asserted presumption of delivery do not affect our ruling today, and we leave them for the ALJ to ultimately decide following remand. We also need not decide whether the presumption of mailing was properly applied. Pet. for Rev. at 2-3.

Argonne's Affirmative Defense of Clear and Convincing Evidence

Finally, given the record before us, we decline to address Argonne's argument that it is entitled to summary decision on its affirmative defense of "clear and convincing" evidence that it would have fired Franchini in the absence of the protected activity. Argonne carries the burden of proof on this affirmative defense and the burden is high. 42 U.S.C.A. § 5851(b)(3)(D). Like causation analysis for the plaintiff's burden of proof, Argonne's affirmative defense presents an equally challenging issue to resolve by summary decision. Such analysis requires us to determine, *on the record as a whole*, how clear and convincing Argonne's lawful reasons were for terminating Franchini's employment. In analyzing the affirmative defense, we are not required to judge the rational basis of Argonne's employment policies and decisions but we must assess whether they are so powerful and clear that termination would have occurred apart from the protected activity. However, we are reluctant to address such a fact-intensive issue that the ALJ has not addressed. The unresolved factual issues pertaining to temporal proximity also complicate the ability to rule on Argonne's affirmative defense through summary decision. The record contains contradictions we cannot resolve by summary decision. For example, Exhibit 5 of Franchini's response to Argonne's motion for summary decision purportedly represents part of a letter sent to Argonne and expressly raises radiation complaints; yet, the two managers who decided to fire Franchini asserted they did not know of Franchini's radiation complaints to DOE. *See* affidavits of Weerts and Howe, Exhibits A, C; Resp.'s Mot. for S.D. Moreover, we have mentioned the lack of undisputed evidence of workplace policies prohibiting audio recordings. We need not belabor the point that we cannot decide Argonne's affirmative defense on the record before us and it remains an open issue for the ALJ.

CONCLUSION

Accordingly, the ALJs' Order Granting Respondent's Motion for Summary Decision is **REVERSED** on the issue of causation, and the case is **REMANDED** for further proceedings consistent with this opinion.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge