



In the Matter of:

DAVID HOFFMAN,

ARB CASE NO. 12-062

COMPLAINANT,

ALJ CASE NO. 2010-ERA-011

v.

DATE: November 21, 2013

NEXTERA ENERGY, INC.
(formerly FPL Group, Inc.),¹ and
FLORIDA POWER & LIGHT CO.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Thad M. Guyer, Esq.; *T.M. Guyer and Ayers & Friends, PC*, Medford, Oregon

For the Respondents:

Mitchell S. Ross, Esq.; *Florida Power & Light Co.*, Juno Beach, Florida

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Edwards, concurring.

FINAL DECISION AND ORDER

On August 19, 2008, David Hoffman filed a complaint with the Occupational Safety and Health Administration (OSHA) against NextEra Energy, Inc. (NextEra)² under the whistleblower

¹ FPL Group, Inc., changed its name to NextEra Energy, Inc. (NextEra). It notified the ALJ of this change in a June 3, 2010 Motion for Substitution. Decision and Order – Dismissal of Nextera Energy, Inc. as a Respondent & Dismissal of Complaint (D. & O.) at 2 n.2.

protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003 & Supp. 2013) and its implementing regulations, 29 C.F.R. Part 24 (2013). Hoffman alleged that NextEra violated the ERA's employee whistleblower protection provisions when it discriminated against him and blacklisted him because he engaged in ERA-protected activities. Following an investigation, OSHA dismissed his complaint on April 1, 2010, whereupon Hoffman requested a hearing before a Department of Labor Administrative Law Judge (ALJ). On July 7, 2010, the ALJ approved an amendment to Hoffman's complaint adding Florida Power & Light, Co. (FPL) as a respondent. Following a hearing conducted from December 7 to December 10, 2010, the ALJ ruled against Hoffman in a Decision and Order issued March 27, 2012, from which Hoffman has appealed to the Administrative Review Board (ARB). For the following reasons, we affirm the ALJ's Decision and Order.

BACKGROUND³

FPL hired Hoffman to work at the Turkey Point nuclear power plant in November of 1998. D. & O. at 101. Between his hiring and May 13, 2006, FPL promoted Hoffman through several positions, increased his pay, and gave him multiple bonuses. *Id.* In March 2006, FPL promoted Hoffman to be the assistant operations manager, supervising approximately 100 people. *Id.* at 103. FPL continued to increase Hoffman's pay and offered him performance bonuses in 2007. *Id.* at 104-06.

On February 26, 2008, the two nuclear reactors at Turkey Point automatically shut down from 100% power because of an under-voltage disruption in the electrical distribution grid outside of the plant. *Id.* at 119. Michael Kiley, the plant general manager, selected 12 hours as a goal with a projected restart scheduled for 2:00 a.m. on February 27, based on the recommendation of Brian Stamp, an assistant operations manager. *Id.* at 121. Hoffman told William Jefferson, Jr., the site vice president at Turkey Point, that 12 hours would not be sufficient for a restart, to which Jefferson responded that 12 hours would be their target. *Id.* at 123. During a meeting of several people, including Richard Wright, the operations manager at Turkey Point; Kiley; and Jefferson, held around 5:00 p.m. on the 26th, John Eaton, a shift manager who reported to Hoffman, also expressed concern about a 12-hour restart. *Id.* at 124. The group understood his concerns but agreed to continue with the plan as long as the plant was ready to restart. *Id.*

² The complaint was originally filed against FPL Group, Inc., which subsequently changed its name to NextEra Energy, Inc. (NextEra), notifying the ALJ of this change in a June 3, 2010 Motion for Substitution. See Decision and Order – Dismissal of Nextera Energy, Inc. as a Respondent & Dismissal of Complaint (D. & O.) at 2 n.2.

³ In this order, we refer to the transcript as “Tr.,” the Administrative Law Judge’s Decision and Order in ALJ No. 2008-ERA-003 as “D. & O.,” Hoffman’s initial brief as “Comp. Br.,” the Respondents’ reply brief as “Resp. Br.,” Hoffman’s rebuttal brief as “Comp. Reb. Br.”

When his shift ended on February 26, at 8:00 p.m., Hoffman went home. *Id.* at 124. He had been asked to return later that night to help with the restart. *Id.* On his way home, Hoffman called several people. He told Tommin Whitler, an organizational development consultant at Turkey Point, that he was 99% sure that he was not going back to work because what they wanted him to do was unsafe and would risk his license. *Id.* at 106, 124. He told James Molden, an operations manager, that he was thinking of quitting because he could not work under conditions in which they continued to bypass him and that the 12-hour time frame was not realistic and presented a safety concern. *Id.* at 124. He told Michael Navin, an operations manager, that he could not go back in on the night shift to help the station start up the reactor without following procedures and that he was thinking of resigning to get the point across. *Id.* Navin told Hoffman that they could not restart in 12 hours because of all of the things that needed to be done and that he thought that if Hoffman wanted to resign, he should give two weeks' notice and finish up the work associated with the shutdown because it was the proper thing to do. *Id.*

Several individuals must approve a nuclear unit restart including the site vice president, the plant general manager, the engineering manager, the quality assurance manager, the work control manager, the operations manager, the assistant operations manager for shifts, and the shift manager. *Id.* at 104.

Sometime after Hoffman went home but before 11:00 p.m. the 12-hour restart goal was changed to longer than 24 hours. *Id.* at 125.

At 11:49 p.m. on February 26, 2008, Hoffman e-mailed his resignation to Wright, Kiley, and Jefferson. *Id.* at 125. He stated that he objected to being excluded from the decision-making process, that his concerns about equipment issues had been ignored, and that his objections to the 12-hour restart were ignored. *Id.* He stated that although he enjoyed his time at FPL, he was resigning. *Id.*

On February 27, 2008, Jefferson called Hoffman to talk to him about his resignation and left a message for Hoffman to call him back. *Id.* Hoffman returned Jefferson's call but did not reach Jefferson, and then decided that he did not want to discuss his e-mailed resignation. *Id.* When Wright learned of Hoffman's resignation, he told Tracy Davis, the administrative supervisor in operations, that Hoffman would probably have a hard time finding employment in the nuclear industry due to the way he resigned. *Id.* at 126.

FPL Human Resources directed Wright to ensure that Hoffman's 2007 performance bonus payment (in the amount of \$35,000) was removed from his pay report for March 6, 2008 (the date upon which the performance bonus was to be paid) because he was no longer an FPL employee on that date due to his resignation. *Id.* According to FPL policy, to receive a prior year performance bonus, a person has to be employed on the date of distribution. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB agency appellate authority to review ALJ decisions and orders issued under the ERA. Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012), 29 C.F.R. § 24.110(a). The ARB reviews the ALJ's factual determinations under the substantial evidence standard and questions of law de novo.⁴

Substantial evidence is evidence that a reasonable person might accept to support a conclusion.⁵ “[T]he determination of whether substantial evidence supports [an] ALJ's decision ‘is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion.’”⁶ In conducting our review, the ARB will uphold an ALJ's findings of fact to the extent they are supported by substantial evidence even if there is also substantial evidence for the other party, and even if the Board “would justifiably have made a different choice” had the matter been before us de novo.⁷ Nevertheless, the Board is not barred from setting aside a decision when we “cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes.”⁸ The Board will not, however, disturb an ALJ's credibility determinations unless they “conflict with a clear preponderance of the evidence” or “are ‘inherently incredible and patently unreasonable.’”⁹

⁴ 29 C.F.R. § 24.110(b); 5 U.S.C.A. § 557(b) (Thomson Reuters 2011). See *Speegle v. Stone & Webster Constr.*, ARB No. 11-029A, ALJ No. 2005-ERA-006 (ARB Jan. 31, 2013).

⁵ *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 7 (ARB June 29, 2006). See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁶ *Dalton v. United States Dep't of Labor*, 58 Fed. Appx. 442, 445 (10th Cir. Feb. 19, 2003) (quoting *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989)).

⁷ *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160; ALJ No. 2003-AIR-047, slip op. at 6 (ARB Jan. 31, 2007) (quoting *Universal Camera*, 340 U.S. at 488).

⁸ *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 7 (ARB Sept. 24, 2009) (quoting *Universal Camera*, 340 U.S. at 477-478).

⁹ *Palmer v. Western Truck Manpower*, No. 1985-STA-006, slip op. at 4 (Sec'y Jan. 16, 1987) (quoting *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978)).

DISCUSSION

1. Governing Law

The ERA governs the whistleblower claim in this case and provides, at 42 U.S.C.A. § 5851(a) that:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee) –

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

Under the plain terms of the ERA, a complainant must prove three elements to establish a whistleblower claim: (1) he engaged in activity the ERA protects; (2) the employer subjected him to an unfavorable personnel action; and (3) the protected activity was a “contributing factor in the unfavorable personnel action.” 42 U.S.C.A. § 5851(b)(3)(C).¹⁰ If Hoffman fails to prove

¹⁰ 42 U.S.C.A. § 5851(b)(3)(C) provides that “[t]he Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.” *See also Hibler v.*

any one of these three requisite elements, the entire claim fails.¹¹ If Hoffman proves that his protected activity contributed to the unfavorable employment action, the employer may escape liability only by proving with 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).¹²

2. Protected Activity

On appeal, Hoffman argues numerous errors of law, fact, and procedure. We begin our analysis by reviewing Hoffman's contentions of error on the ALJ's part regarding his findings of protected activity. Regarding protected activity, Hoffman objects to two ALJ findings: (1) that Hoffman's pre-February 26, 2008 disclosures were not protected activity, and (2) that Hoffman's resignation did not constitute protected activity. Comp. Br. at 6, 13.

A. Pre-February 26, 2008 activity

With regard to Hoffman's pre-February 26, 2008 disclosures, the ALJ found that some of the acts Hoffman alleged he engaged in as protected activity were protected, while others were not. D. & O. at 136-40. As there has been no objection with regard to the activities that the ALJ found to be protected, we only address the pre-February 26, 2008 activities that the ALJ found to be unprotected under the ERA that Hoffman challenges on appeal as clearly erroneous and legal error.¹³ Comp. Br. at 6. Hoffman argues that he disclosed safety-related staffing inadequacies

Exelon Generation Co., LLC, ARB No. 05-035, ALJ No. 2003-ERA-009, slip op. at 19 (ARB Mar. 30, 2006).

¹¹ See *McNeill v. Crane Nuclear Inc.*, ARB No. 02-002, ALJ No. 2001-ERA-003, slip op. at 5 (ARB July 29, 2005).

¹² 42 U.S.C.A. § 5851(b)(3)(D) provides that "[r]elief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."

¹³ The ALJ found that Hoffman engaged in seven protected activities including: (1) on January 12 or 13, 2008, he raised an equipment reliability concern to an NRC representative, (2) on January 17, 2008, he raised a concern to an NRC representative about a chilled environment at Turkey Point, making people reluctant to bring problems to the plant general manager, (3) on February 4, 2008, he advised Jefferson, Kiley, and Wright of his concerns about staffing issues, the absence of clear lines of authority, and what he believed to be a chilled environment that made people reluctant to raise concerns, (4) on February 4, 2008, he presented concerns he had about operating crews receiving directions and work assignments without his knowledge, a change in an approved plan for repairs of the rod position indicators, and differing operator instructions between training and other materials to the NRC representative, (5) on February 11, 2008, he advised Wright that a change in the testing methodology for a discharge check valve represented a lowering of standards, (6) on February 26, 2008, he told Jefferson, Kiley, and Wright that he objected to restarting the first reaction in 12 hours,

and maintenance defaults from mid-October 2007 to February 2008, and safety-related equipment maintenance defaults in October 2007 through 2008, all of which constitute ERA-whistleblower protected activities. *Id.*

The ALJ found that Hoffman's discussions on October 17 and 18, 2007, with Jefferson, Pearce, and Wright about staffing issues were not protected activity because they did not specifically and definitively implicate nuclear safety. D. & O. at 136.

The ALJ also found that Hoffman's discussions on October 17 and 18, 2007, with the Nuclear Regulatory Commission (NRC) plant representative about "the status of Unit Three, a failed rod position indicator, and staffing issues," did not constitute protected activity because they did not specifically and definitively implicate nuclear safety. *Id.* The ALJ noted that "Hoffman described his discussion with the NRC representative as 'routine.'" *Id.*

The ALJ also found that the following did not constitute protected activity: Hoffman's discussion about staffing with the Institute of Nuclear Power Operations (INPO) representative on October 24, 2007, was not protected activity because it did not definitively and specifically implicate nuclear safety. *Id.* at 137. Hoffman's staffing and equipment discussions with supervisors on November 7 and November 30, 2007, were not protected activity because they did not definitively and specifically implicate nuclear safety. *Id.* Hoffman's observation on November 28, 2007, that there should be a consolidated approach to solve a common problem with air compressors was not protected activity because it was merely a suggestion on how to more effectively address an equipment issue. *Id.* Hoffman's December 2007 complaint that a disparate retention package offer was discrimination was not protected activity because he did not identify the actions that he believed led to the discrimination. *Id.* at 138. Hoffman's advice to Kiley in January 2008 that the neglect of shift managers was adversely affecting morale was not protected activity because it was simply another staffing concern and therefore did not definitively and specifically implicate nuclear safety. *Id.* Finally, the ALJ found that Hoffman's February 13, 2008 question to Weeks about the risk of failure of a radiator was not protected activity because it was merely an inquiry and did not represent a complaint about a violation or directly raise a nuclear safety concern. *Id.* at 139.

Thus, the ALJ found that eight out of fifteen of Hoffman's alleged protected activities (excepting the February 26, 2008 work refusal, hereafter discussed) were not protected activities because they did not specifically and definitively implicate nuclear safety, but merely constituted non-nuclear safety related suggestions or inquiries, or otherwise did not identify actions leading to discrimination. D. & O. at 136-40. We agree. As the Board has previously held, protected activity under the ERA "must relate to nuclear safety 'definitively and specifically.'"¹⁴

and (7) on March 8, 2008, he raised concerns to the NRC about being excluded from operational decision while he was at Turkey Point. D. & O. at 138-41.

¹⁴ *Vinnett v. Mitsubishi Power Sys.*, ARB No. 08-104, ALJ No. 2006-ERA-029, slip op. at 6 (ARB July 27, 2010). See also *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042 (ARB May 25, 2011), a case arising under the Sarbanes-Oxley Act of 2002 (SOX),

Consequently, we agree with the ALJ that Hoffman did not prove that he engaged in protected activity in the eight instances detailed above because his activities either did not definitively and specifically implicate safety or were otherwise vague, or merely suggestions or inquiries.

B. Hoffman's resignation on February 26, 2008

Hoffman also argues that the ALJ's finding that his refusals and resignation over the February 26, 2008 restart did not constitute a protected refusal was clearly erroneous and legal error. Comp. Br. at 6.

With regard to Hoffman's resignation, the ALJ found that it was ultimately not protected activity because it was not objectively reasonable for Hoffman to believe that FPL would begin the restart process in 12 hours, unsafely, and in violation of the Act. *Id.* at 141. The ALJ explained that it was not objectively reasonable because: (1) a restart required many people to implement it, and that it was extremely unlikely these several people would unsafely and in violation of the Act restart the nuclear reactor, especially given INPO and NRC oversight, (2) other individuals employed and present on the job site with Hoffman on the 26th, with similar experience to his, did not consider the 12-hour directive as an order to restart in 12 hours but as a goal, and (3) Hoffman did not "ascertain prior to e-mailing his resignation just before midnight whether the situation at Turkey Point continued to justify his refusal to come back to work to

in which the ARB distinguished the requirements for establishing SOX-protected activity from the requirements under the ERA noting:

[T]he ERA protects specific activities including notifying one's employer of an alleged violation of the ERA or the Atomic Energy Act (AEA), refusing to engage in activities prohibited under the AEA, or testifying before Congress regarding any provision of the ERA or the AEA. See 42 U.S.C.A. § 5851(a)(1)(A)-(D). In addition, the ERA includes a catch-all provision that protects employees who, among other things, assist or participate in "a proceeding . . . or any other action [designed] to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended." 42 U.S.C.A. § 5851(a)(1)(F). The ERA does not define the phrase "any other action to carry out the purposes of this chapter" as set forth in subsection (F). Consequently, the [ARB and] courts [have] construed the phrase as requiring, in light of the ERA's overarching purpose of protecting acts implicating nuclear safety, that an employee's actions implicate safety "definitively and specifically" to constitute whistleblower protected activity under subsection (F).

Sylvester, ARB No. 07-123, slip op. at 17.

restart the first reactor at 2 a.m.” *Id.* at 141-42.¹⁵ The ALJ further found that even if Hoffman’s refusal to work had been objectively reasonable, his resignation lost protection because he denied his employer the opportunity to provide an explanation and show that conditions were safe when he refused to talk to them to allow them to address his concerns and offer a satisfactory response. *Id.* at 142.

Substantial evidence supports the ALJ’s finding that it was not objectively reasonable that FPL would unsafely begin the restart process prematurely. Substantial evidence also supports the ALJ’s finding that even if Hoffman’s resignation had been objectively reasonable, it lost protection because Hoffman did not give FPL the opportunity to correct any improper action. If Hoffman had inquired as to whether FPL was going to actually restart in 12 hours, he would have learned that they were not going to do so. As substantial evidence supports the ALJ’s findings, we agree with the ALJ that Hoffman’s resignation did not constitute protected activity.

3. Adverse Action

Hoffman also objects to the ALJ’s finding that his resignation over the February 26, 2008 restart did not constitute a constructive discharge.¹⁶ *Comp. Br.* at 6.

The ALJ found that FPL did not constructively discharge Hoffman. *D. & O.* at 165. The ALJ found that Kiley did not give an order to restart within 12 hours, but simply announced a “goal” of restarting within that timeframe, and that Kiley’s decision not to change the 12-hour target after Hoffman objected to it, did not change the nature of it as a goal. *Id.* at 164. The ALJ also found that “[t]he interdisciplinary and multi-layered restart procedures in place at Turkey Point precluded any one person, such as Kiley, from ordering a restart.” *Id.* The ALJ further found that “other avenues remained available to Mr. Hoffman to object” to the goal of a 12-hour restart. *Id.* Therefore, after a thorough analysis, the ALJ found that “Hoffman’s working conditions on February 26, 2008, were not so intolerable or aggravated that an objectively reasonable person would be forced to resign.” *Id.* The ALJ further analyzed the constructive

¹⁵ See, e.g., *D. & O.* at 44-45 (summarizing testimony of Richard Wright (*Tr.* at 836-939)); *D. & O.* at 34-36 (summarizing testimony of Michael Kelly (*Tr.* at 614-790)); *D. & O.* at 50 (summarizing testimony of Terry Jones (*Tr.* at 940-974)); *D. & O.* at 62-64 (summarizing testimony of Virginia Berry (*Tr.* at 1175-1232)); *D. & O.* at 67 (summarizing testimony of Brian J. Stamp (*Tr.* at 1233-1254)).

¹⁶ In his petition for review, Hoffman identified the ALJ’s conclusions that he did not suffer the adverse actions of being subjected to a hostile work environment, a diminution in professional duties, denial of bonuses, constructive discharge, and blacklisting as erroneous conclusions on the part of the ALJ. *Petition for Review*, at 3. However, the only ALJ finding of non-adverse action Hoffman briefed and argued on appeal is the ALJ’s conclusion that he was not constructively discharged. Consequently, we only address whether Hoffman’s resignation constituted constructive discharge.

discharge issue under the law of the Eleventh Circuit, which has jurisdiction over the appeal of this decision, to find that FPL did not “deliberately” set out to cause Hoffman to quit.¹⁷

Under Board precedent, a complainant can prove that a constructive discharge has occurred if he can show that “working conditions were so difficult or unpleasant that a reasonable person in the employee’s shoes would have found continued employment intolerable and would have been compelled to resign.”¹⁸ To establish that a constructive discharge occurred, the complainant must prove that there was a work environment that is more offensive than that required for establishing a hostile work environment claim.¹⁹

Substantial evidence in the records supports the ALJ’s finding that Hoffman was not constructively discharged. As the ALJ noted, several other individuals who were present when 12 hours was mentioned as a time for restart, did not view the 12-hour time as an order but instead saw it as a goal only.²⁰ D. & O. at 159-60. Furthermore, no one person, including Kiley, the plan general manager, had the authority to order the restart of the nuclear reactor. *Id.* at 161; Tr. at 872, 991-92. Moreover, as the ALJ found, Hoffman did not have to do anything improper because of the stated 12-hour goal; he was able to continue to carry out his duties until he left the plant at around 8 p.m. D. & O. at 162; Tr. at 213-16, 365-69, 384. Also, many people at the plant that day were responsible for its restart other than Hoffman, and none of these similarly situated individuals felt forced to resign. D. & O. at 162; Tr. at 373-74, 432, 856-57, 865, 869-72, 1264-65. We agree with the ALJ that it would not be reasonable to believe that all of the people responsible for a restart would collude to restart in a dangerous manner, under NRC and

¹⁷ The ALJ cited *Bryant v. Jones*, 575 F.3d 1281, 1298 (11th Cir. 2009).

¹⁸ *Hooker v. Westinghouse Savannah River Co.*, ARB No. 03-036, ALJ No. 2001-ERA-016, slip op. at 7 (ARB Aug. 26, 2004) (citing *Martin v. Dept. of Army*, ARB No. 96-113, ALJ No. 1993-SDW-001, slip op. at 7 (ARB July 30, 1999)).

¹⁹ *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-014, slip op. at 60 (ARB Nov. 13, 2002), *aff’d sub nom. Williams v. Admin. Review Bd.*, 376 F.3d 471 (5th Cir. July 15, 2004) (citation omitted).

²⁰ Ms. Berry, a unit supervisor, saw the 12 hours “as a target and never given as an order.” D. & O. at 159; Tr. at 1196-97. Likewise, Timothy Jones, the shift manager on duty, saw the 12 hours as a “goal,” and Pearce, the previous Turkey Point plant general manager, saw the 12 hours as “a target for the group.” D. & O. at 159; see also Tr. at 1012, 1019, 1263, 1272. Jefferson testified that he saw the 12 hours “as a target and not an unconditional order,” and Wright indicated that he never heard the 12 hours given as an order. D. & O. at 159; see also RX 48 at 71-73, 130; Tr. at 857-60. Likewise, Terry Jones and Stamp, who had both served in the same position at Turkey Point as Hoffman did at one time, and who were both present on February 26, 2008, both saw the 12 hours as a goal and not as an order or directive. D. & O. at 160; see also Tr. at 948, 1248. Indeed, even Eaton, who (as previously noted) had objected to a 12-hour restart, did not consider the 12-hour pronouncement to be an order. D. & O. at 160; see also Tr. at 1116, 1121-22.

INPO oversight, no less. D. & O. at 162. Finally, Hoffman had other means available to object to the 12-hour restart without a threat of being terminated or charged with insubordination including confidential complaints to the NRC representative or directly to the NRC. D. & O. at 163, 164; RX 48 at 51-52; Tr. at 303, 353, 381-82, 1107. Thus, we affirm the ALJ's finding that Hoffman was not constructively discharged on February 26, 2008.

4. Causation

Regarding causation, the ALJ found that Hoffman's NRC complaints were not a contributing factor in the non-payment of Hoffman's 2007 performance bonus because FPL did not know about the NRC complaints when the non-payment occurred on March 6, 2008. D. & O. at 151. Next, the ALJ found that the preponderance of the evidence, particularly the credible testimony of Jefferson and Bryce, established that FPL company policy required that an individual be an employee on the distribution date to receive a performance bonus for the prior year because the bonus partially represented an incentive for future performance. *Id.* The ALJ next analyzed the circumstantial evidence associated with animus, pretext, disparate treatment, and temporal proximity. *Id.* at 152-54. The ALJ found that the circumstantial evidence was insufficient to establish a bias in favor of production over safety by Jefferson, Kiley, and Wright that could have motivated them to deny Hoffman his 2007 performance bonus. *Id.* at 152.

The ALJ found that the actors who could have affected the performance bonus payment did not have animosity toward Hoffman or if they did, that it did not affect the nonpayment of the performance bonus. *Id.* at 152-554. The ALJ also found that the record established that HR "ordered the removal of the performance bonus payment from the March 6, 2008 paycheck" *Id.* at 153. The ALJ found that Hoffman was not treated disparately because "Davis' credible testimony demonstrates that typically a prior year performance bonus is paid the first payday in March of the following year," and that "the preponderance of the probative evidentiary record demonstrates that the non-payment of Mr. Hoffman's 2007 performance bonus occurred under a consistently applied FPL policy because Mr. Hoffman was not an FPL employee on the March 6, 2008 payment date for the bonus." *Id.* at 154.

The ALJ noted that Hoffman had strong circumstantial evidence of temporal proximity, but found that an intervening event occurred between Hoffman's protected activities and the non-payment of the bonus – that Hoffman changed his status to a non-employee when he resigned – which greatly reduced the probative force of the temporal proximity. *Id.* at 154. The ALJ stated that the evidence of record showed that FPL consistently applied its policy that an individual must be an FPL employee on the distribution date to receive a prior year bonus and that there was an absence of pretext. *Id.* Thus, the ALJ concluded that "none of Mr. Hoffman's protected activities were a contributing factor to FPL's non-payment of his \$35,000, 2007 performance bonus." *Id.* at 155.

The ALJ went on to assume that even if Hoffman was subjected to the two other alleged adverse actions that the ALJ found did not constitute adverse action (regarding a second

retention package and a hostile work environment), that Hoffman failed to prove that his protected activity was a contributing factor to either.

Hoffman asserts that the ALJ did not undertake the correct contributing factor analysis. Comp. Br. at 16; Comp. Reb. at 10. He argues that “nothing in the statute or regulations allows the proven inference to be rebutted by evidence of poor performance or attendance, or the employer’s dissatisfaction with the employee on either.” Comp. Br. at 16. Hoffman further argues that the ALJ was required to determine the existence of a prima facie case. *Id.* at 17.

However, Hoffman misunderstands the applicable law. Once a case goes to hearing before an ALJ, proof of contributing factor is required by a preponderance of the evidence; whether there has been a prima facie showing is irrelevant.²¹ Thus, a causal link is established if Hoffman showed by a preponderance of the evidence that his protected activity was a “contributing factor” in the adverse action taken against him.²² “Contributing factor” means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.²³

The substantial evidence in the record supports the ALJ’s findings of fact. Substantial evidence supports the ALJ findings that Hoffman engaged in several protected activities and that FPL engaged in one adverse action against him by not giving him his 2007 bonus. Substantial evidence also supports the ALJ finding that on the issue of causation, Hoffman’s protected activity was not a contributing factor in any of the three alleged adverse actions (only one of which the ALJ found to constitute adverse action). Additionally, the ALJ correctly applied the applicable law in reaching his conclusions of law. Thus, we affirm the ALJ.

5. The ALJ’s dismissal of NextEra as a respondent

We also hold that the ALJ properly dismissed NextEra as a respondent. The ALJ dismissed NextEra because Hoffman failed to put forth evidence “to establish that NextEra itself holds an NRC license, has applied for an NRC license, or is a contractor/subcontractor of an NRC licensee or license applicant” as the statute requires ERA-covered employers to be.²⁴ Hoffman appeals the ALJ’s dismissal of NextEra and cites to evidence he appended to his brief on appeal that is not in the record of the proceedings before the ALJ, asking that we take judicial

²¹ *Kester v. Carolina Power & Light, Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 6 (ARB Sept. 30, 2003). *See also Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (distinguishing complainant’s respective burdens of proof at the investigatory and hearings stages of litigation under AIR 21).

²² 42 U.S.C.A. § 5851(b)(3)(C).

²³ *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

²⁴ D. & O. at 133. *See* 42 U.S.C.A. § 5851(a)(2)(A)-(G).

notice of it. Comp. Br. at 4. Respondents counter that this evidence was available at the time of the hearing and should have been offered then, and that in any event the documentation now proffered to the ARB on appeal shows only that three of NexEra’s indirect subsidiaries own and operate nuclear power plants, which Respondents argue does not change the fact that NextEra “is not and has never been an NRC licensee.” Resp. Br. at 29 n.15.

When deciding whether to consider new evidence, the Board relies upon the standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, at 29 C.F.R. § 18.54(c), “which provides that ‘[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.’”²⁵ Hoffman has not made such a showing. Thus, we will not consider the evidence Hoffman has presented to the ARB. Based on the evidence of record, we hold that the ALJ properly dismissed NextEra as a respondent because that evidence does not establish that NextEra is subject to the ERA whistleblower protection provision.

CONCLUSION

Substantial evidence of record supports the ALJ’s findings as to whether and to what extent Hoffman engaged in ERA-protected whistleblower activity. Substantial evidence of record similarly supports the ALJ’s findings regarding whether Hoffman was subjected to adverse employment action and whether, to the extent Hoffman was subjected to adverse action, that employment action was causally related to any of his ERA-protected activities. For the reasons stated, we further conclude that the ALJ’s findings and determinations regarding protected activity, adverse action, and causation are in accord with applicable law.

Accordingly, for the foregoing reasons, the ALJ’s Decision and Order is **AFFIRMED**.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Lisa Wilson Edwards, *Administrative Appeals Judge*, concurring:

I concur with the majority’s decision affirming the ALJ’s ruling on the merits, and dismissing Hoffman’s complaint. The ALJ below dismissed NextEra as respondent, holding that

²⁵ *Johnson v. U.S. Bancorp*, ARB No. 13-014, ALJ No. 2010-SOX-037, slip op. at 4 n.16 (ARB May 21, 2013).

Hoffman failed “to establish that NextEra itself holds an NRC license, has applied for an NRC license, or is a contractor/subcontractor of an NRC licensee or license applicant as ERA-covered employers are required to be by the statute.” D. & O. at 133. Hoffman petitions the ARB for review, and urges that we take judicial notice of certain evidence outside the administrative record in support of his argument that NextEra is a licensee within the meaning of the ERA. Comp. Br. at 4. The ARB holds that the ALJ correctly dismissed NextEra. See *supra* at 12. However, in view of our ruling on the merits affirming the ALJ’s decision below, we need not address the ALJ’s order dismissing NextEra as respondent. Even with the addition of NextEra as respondent, there appear to be no facts that would change the determination that Hoffman failed to prove his ERA case.

LISA WILSON EDWARDS
Administrative Appeals Judge