



**In the Matter of:**

**SHIH-PING KAO,**

**ARB CASE NO. 16-090**

**COMPLAINANT,**

**ALJ CASE NO. 2014-ERA-004**

**v.**

**DATE: April 30, 2018**

**AREVA INCORPORATED,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Kellee Boulais Kruse, Esq.; *The Employment Law Group, P.C.*; Washington, District of Columbia**

*For the Respondent:*

**Abigail E. Murchison, Esq.; *Gentry Locke*; Roanoke, Virginia**

**Before: Joanne Royce, *Administrative Appeals Judge*; and Leonard J. Howie III, *Administrative Appeals Judge***

### **DECISION AND ORDER OF REMAND**

This case arises under the whistleblower protection provision of the Energy Reorganization Act (ERA), as amended, and its implementing regulations.<sup>1</sup> Shih-Ping Kao filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Areva, Inc. terminated his employment after he engaged in protected activity, in violation of the ERA. OSHA found that there was no reasonable cause to believe that Areva, Inc. violated the ERA because Kao failed to provide “any credible evidence to suggest his protected activity was a contributing factor in the decision to terminate his employment,” and dismissed the complaint.

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<sup>1</sup> 42 U.S.C.A. § 5851 (Thomson Reuters 2012) (ERA); 29 C.F.R. Part 24 (2017).

Kao filed objections and a request for hearing before an Administrative Law Judge (ALJ). Before the ALJ, Areva filed a motion for summary decision. Both parties filed briefs with supporting documentation.<sup>2</sup>

On August 25, 2016, the ALJ granted Areva's motion for summary decision and dismissed Kao's complaint. After making findings of fact, and assuming that Kao had established his prima facie case under the ERA, the ALJ concluded that Areva proved by clear and convincing evidence that Kao's protected activities "did not contribute to the termination" and that Areva would have terminated Kao's employment in the absence of his protected activity because Kao engaged in insubordinate conduct.<sup>3</sup> Kao appealed the ALJ's decision to the ARB. For the following reasons, the Board vacates and remands with an order for the ALJ to proceed to an evidentiary hearing on the merits.

## BACKGROUND<sup>4</sup>

Areva hired Kao as an engineer in 2008 in Marlborough, Massachusetts. In 2010, Areva transferred him to an Areva facility in Charlotte, North Carolina. Kao's primary duty was to perform loss-of-coolant analyses (LOCA) by running computer simulations to model the reactor coolant system's (RCS) response to a postulated loss of coolant.<sup>5</sup> Kao engaged in protected activities in May to July of 2013.<sup>6</sup> On June 21, 2013, one of these occasions, Kao raised a safety

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<sup>2</sup> Decision and Order Granting Respondent's Motion for Summary Decision and Order Dismissing Complaint (D. & O.) at 1-2.

<sup>3</sup> *Id.* at 74. The ALJ's statement that Areva proved that Kao's protected activities "did not contribute to the termination" is inconsistent with the ALJ's presumption that Kao proved contribution, an element of his prima facie case. The temporal proximity alone is sufficient to demonstrate the element of "contributing factor" in this case. Kao submitted evidence showing that there was close temporal proximity (the same day to approximately one month) between some of his protected activities and both the termination decision and the actual termination. Such close temporal proximity, while not necessarily dispositive, creates not only a strong inference of causal connection, but may also establish retaliatory intent. *Riess v. Nucor*, ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 5 (ARB Nov. 30, 2010).

<sup>4</sup> The background is meant to summarize the most significant aspects of this matter and we derived it from the ALJ's August 25, 2016 decision. Nothing in this background section should be considered as constraining any fact findings the ALJ makes on remand after a hearing.

<sup>5</sup> D. & O. at 5.

<sup>6</sup> The complaint alleged the protected activity occurred on or after May 30, 2013, and included protected activity on June 3, 2013; June 4, 2013; June 25, 2013; June 27, 2013; June 28, 2013; and July 3, 2013. *Id.* at 4-5. More detail regarding these protected activities found in the D. & O. at 55-68.

concern about a design flaw in the Evolutionary Power Reactor (EPR) In-containment Refueling Water Storage Tank (IRWST).<sup>7</sup> During May and June 2013, Kao allegedly engaged in insubordinate behavior. During the May 28, 2013 incident, Kao hung up the phone on his supervisor, Molseed (supervisor of the Containment Safety Analysis Group), during an hour-long heated discussion in which Molseed raised his voice regarding differences between approaches to LOCA analysis.<sup>8</sup> Several weeks later on June 25, 2013, Molseed sent an email to Bret Boman, Manager of Nuclear Analysis at Areva, stating that Kao's misbehavior continued and specifically referencing Kao's unprofessional behavior at a meeting between Kao, Molseed, and another engineer on June 24, 2013.<sup>9</sup>

On or about June 25, 2013, Boman made the decision to fire Kao.<sup>10</sup> He notified Areva's Human Resources department of his decision, and the Head of HR, D. Lancaster, expressed a reservation about firing Kao because Areva did not issue a written warning before the termination decision.<sup>11</sup> While Areva had a process that would result in a written disciplinary action notice and a process for performance improvement plans, Boman did not consider these before firing Kao.<sup>12</sup> In an email dated July 2, 2013, Boman recommended to HR that Areva terminate Kao's employment, stating that Kao "has caused us to be late on the US EPR and cost us tens of thousands of dollars."<sup>13</sup> The next day, Areva fired Kao. The termination letter stated in part: "Over the course of several weeks, your supervisor, manager, and I have counseled you regarding your demeanor, unprofessionalism, disrespect and insubordination. Management has given you opportunity to make changes based on their counsel and yet your behavior has not improved and has continued to the point of being counterproductive and disruptive."<sup>14</sup>

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<sup>7</sup> D. & O. at 5, 12, 61; Resp. Ex 47 (June 21, 2013 e-mail). According to Respondent, an EPR is a pressurized water reactor. D. & O. at 5.

<sup>8</sup> *Id.* at 5, 59, 60.

<sup>9</sup> *Id.* at 16-17.

<sup>10</sup> *Id.* at 13-14.

<sup>11</sup> *Id.*; Comp. Ex. 97-A at 38-39; see Resp. Ex. 66 (Susan Catanzano, an HR business partner at Areva, asked Boman in emails on June 26 and July 2, 2013, whether Kao was given a warning before the decision to terminate). See also Resp. Ex. 85 at 8, 15 (Susan Gearhart (formerly Susan Catanzano), testified by deposition that Bret Boman approached her about Kao's conduct late in June 2013, and her department had questions about whether Kao had been warned.).

<sup>12</sup> *Id.* at 14.

<sup>13</sup> *Id.* at 5, 7, 14.

<sup>14</sup> *Id.* at 11.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the ERA.<sup>15</sup> The ARB reviews an ALJ's grant of summary decision de novo, applying the same standard that ALJs employ under 29 C.F.R. § 18.72.<sup>16</sup>

## DISCUSSION

Pursuant to 29 C.F.R. § 18.72(a), upon a motion, an ALJ “shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” In deciding on such a motion, the evidence is viewed in the light most favorable to the nonmoving party.<sup>17</sup> When deciding whether to grant a motion for summary decision, the evidence is not weighed to determine the truth of the matters asserted.<sup>18</sup> We have held that “a genuine issue exists if a fair-minded fact-finder [] 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.”<sup>19</sup> Denying summary decision because there is a genuine dispute as to a material fact simply means that an evidentiary hearing is required to resolve those issues; it is not an assessment on the merits of any particular claim or defense.<sup>20</sup> Again, the analysis performed is the threshold matter “of whether there is the need for a trial—whether . . . there are any genuine factual issues that

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<sup>15</sup> See Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378-69, 380 (Nov. 16, 2012).

<sup>16</sup> *Franchini v. Argonne Nat'l Lab.*, ARB No. 13-081, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept. 28, 2015) (citations omitted).

<sup>17</sup> *Id.* (citations omitted).

<sup>18</sup> *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 9 (ARB Oct. 26, 2012); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (“it is clear . . . that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”).

<sup>19</sup> *Henderson*, ARB No. 11-013, slip op. at 7-8; see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (summary decision cannot be granted if there is a genuine dispute about a material fact, “genuine” meaning “if the evidence is such that a reasonable [fact finder] could [decide in favor of] the nonmoving party.”).

<sup>20</sup> *Henderson*, ARB No. 11-013, slip op. at 9.

properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.”<sup>21</sup>

We vacate the ALJ’s decision and remand the case because the ALJ made several errors. Namely, he weighed the evidence, made findings of fact when there had not been a hearing, and misstated a respondent’s affirmative defense.<sup>22</sup>

At the outset, we note that because a respondent’s affirmative defense burden is high, and because “it is a fact intensive determination, involving questions of intent and motivation” for taking adverse action, resolving this issue on summary decision is challenging.<sup>23</sup> Here, despite comprehensively identifying much of the evidence, the ALJ impermissibly weighed the evidence and determined that he believed the employer’s version of events, which is not appropriate at the summary decision stage of a case.<sup>24</sup> In weighing the evidence, the ALJ failed to view the evidence in the light most favorable to Kao and overlooked the disputed nature of the evidence supporting Areva’s affirmative defense and its resultant unsuitability for summary decision. Instead, the ALJ made findings of fact as if there had been a hearing. The ALJ not only included a findings of fact section,<sup>25</sup> he decided an ultimate question of fact, namely, the question of whether Areva proved by clear and convincing evidence that it would have terminated Kao’s employment absent any protected activity. This is reversible error because Kao submitted a large amount of rebuttal evidence in response to Areva’s motion for summary decision demonstrating, at a minimum, that there is a genuine issue as to whether Areva would have fired Kao absent his protected activity.

In determining whether a respondent has met its burden of proving that it would have taken the same unfavorable personnel action in the absence of protected activity, the Board has considered the combined effect of a number of factors applied flexibly on a case-by-case basis including (1) the independent significance of the non-protected activity cited as justification for the personnel action; (2) the facts that would change in the absence of the complainant’s protected activity; and (3) the existence and strength of any motive to retaliate on the part of the employer.<sup>26</sup> We have further held that a respondent should “demonstrate through factors

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<sup>21</sup> *Anderson*, 477 U.S. at 250.

<sup>22</sup> *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 7 (ARB Sept. 26, 2012) (“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.”).

<sup>23</sup> *Henderson*, ARB No. 11-013, slip op. at 13.

<sup>24</sup> *Id.* at 15 (the ALJ “improperly weighed the evidence of disputed facts” on a summary decision motion).

<sup>25</sup> D. & O. at 81-82.

<sup>26</sup> *See Pattenau v. Tri-am Transp., LLC*, ARB No. 15-007, ALJ No. 2013-STA-037, slip op. at 16, 21-22 (ARB Jan. 12, 2017) (citation omitted).

extrinsic to [complainant's] protected activity that the discipline to which [complainant] was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations. . . .”<sup>27</sup> Kao makes a number of supported arguments<sup>28</sup> that must be taken as true, demonstrating animus, motive, inconsistent application of procedures and pretext—all of which undermine Areva’s ability to show clearly and convincingly that it would have fired Kao in the absence of his protected activity. For example, there was deposition testimony that Areva deviated from policy in how it handled Kao’s termination.<sup>29</sup> This evidence of deviation from or inconsistent application of internal company policy suggests disparate treatment and raises questions of fact which preclude Areva, at the summary judgment stage, from clearly and convincingly proving that it would have fired Kao in the absence of his whistleblowing.<sup>30</sup> Deposition testimony also revealed that Boman was concerned that Kao’s protected activities and technical disputes threatened to increase the cost of the project and delay Areva’s application to the Nuclear Regulatory Commission (NRC).<sup>31</sup> A reasonable factfinder could infer that Areva’s managers had a strong motive to fire Kao if they felt his protected activity was obstructing the company’s crucial objective to obtain design certification from the NRC for its Evolutionary Power Reactor (U.S. EPR).

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<sup>27</sup> *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 13-14 (ARB Sept. 30, 2015).

<sup>28</sup> This discussion of Kao’s arguments regarding his case is not exhaustive and not meant to limit Kao’s arguments in any way.

<sup>29</sup> Boman testified that Areva had policies providing for both written disciplinary action notices and performance improvement plans but he did not consider these options for Kao. After Boman initiated termination proceedings for Kao on or about June 25, 2013, the Head of Human Resources expressed reservations because Kao had not first been issued a warning. D. & O. at 14.

<sup>30</sup> *See DeFrancesco*, ARB No. 13-057, slip op. at 13-14.

<sup>31</sup> Kao stated that “[o]n May 16, 2013, I produced another set of results for GOTHIC containment pressure/temperature responses to Mr. Molseed that showed that the containment had failed the design limits. Approximately ten minutes later, Mr. Molseed responded to my email and rejected my results. Reporting my results showing containment failure to the NRC would have postponed AREVA’s application for U.S. EPR design certification, at the minimum, or disqualified it, at the maximum.” D. & O. at 67; see also, email from Boman to S. Catanzano of HR stating: “The situation is that we have an employee whose performance has never been above average, whose current performance has caused us to be late on the US EPR and cost us tens of thousands of dollars, whose refusal to do as directed by his supervisor (insubordination) has led us to being late/over budget . . .”. D. & O. at 14.

The ALJ also gave short shrift to Kao's evidence that his alleged insubordination was in essence protected activity and that, at a minimum, the two were inextricably intertwined.<sup>32</sup> Areva alleged, and the ALJ ultimately found, that Kao's insubordinate and inflexible behavior towards Molseed during May and June 2013, led to Boman's initiation of the termination of Kao's employment.<sup>33</sup> Kao submitted evidence which challenges the validity of his alleged performance problems and this disputed evidence further undermines a summary decision on Areva's affirmative defense.<sup>34</sup> But an ultimate determination of whether Areva would have fired Kao in the absence of his protected activity is further complicated by evidence that any insubordinate behavior on Kao's part was inextricably intertwined with his protected activity. Evidence supplied by both parties show that Kao's alleged insubordination and protected activity are interrelated and overlap sequentially. For example, Kao testified that the reason he did not do as his supervisor asked was because doing so would be contrary to NRC directions and he did not "think NRC [would] let us change our initial assumption at this stage of time."<sup>35</sup> Kao testified that he refused to follow Molseed's instructions because he believed Molseed lacked the authority to make changes to the Emergency Operating Procedures (EOPS); rather, "it is up to the design engineer to make that decision."<sup>36</sup> Kao explained that "Molseed pressured me again and again to apply the transition criteria and terminate [the] RELAP5 runs. Molseed's insistence on this transition worried me and made me believe that Molseed's intention was to stop me from finishing my calculations, because once my conclusions were final, AREVA would have had to report containment failure to the NRC, which would have resulted [in] a delay in its application for U.S. EPR design certification. Because of these fears, I did not yield to Molseed's requests and produced a plot showing why the transition criteria were not met."<sup>37</sup>

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<sup>32</sup> When an employer's stated reasons for adverse action flow entirely or almost entirely from the protected activity, a fact finder may find that retaliation was the actual reason for adverse action. *Abdur-Rahman v. DeKalb Cty.*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003; slip op. at 5 and n.21 (ARB Feb. 16, 2011) (alleged insubordination included the protected safety concerns); see also *Dodd v. Polysar Latex*, No. 1988-SWD-004, slip op. at 8 (Sec'y Sept. 22, 1994) (supervisor claimed he recommended termination after considering complainant's deteriorating relationships, attitude, and performance, but his testimony as a whole showed that he recommended termination solely because of complainant's conflict with another manager over complainant's protected activities); *Passaic Valley Sewerage Comm'rs v. U.S.D.O.L.*, 992 F.2d 474, 481 (3d Cir. 1993).

<sup>33</sup> D. & O. at 7, 81.

<sup>34</sup> *Id.* at 13. For example, Boman testified that he counseled Molseed (as well as Kao) on his allegedly unprofessional interactions with other employees, but there is no evidence that Molseed was formally disciplined for his behavior. *Id.* at 13, 15.

<sup>35</sup> *Id.* at 61.

<sup>36</sup> *Id.* at 78.

<sup>37</sup> *Id.* at 68.

As these examples illustrate, Kao has alleged and provided support for the proposition that he was fired because of his protected activities and that the alleged insubordination arose solely in the context of his protected activities. Viewing the evidence in the light most favorable to the nonmoving party, a fact finder could find that the termination of Kao's employment would not have occurred absent his protected activities.<sup>38</sup> Thus, any fact findings to the contrary must be made after a hearing to settle this genuine dispute about a material fact. Because Kao *could* prevail on the evidence submitted, he also prevails now, on summary decision.

Finally, it is not clear to us that the ALJ correctly applied the affirmative defense standards. For instance, the ALJ misstated Respondent's burden on the affirmative defense as to establish "by clear and convincing evidence that the Complainant's [protected activity] did not contribute to his termination of employment."<sup>39</sup> It appears from this statement that the ALJ confused the affirmative defense with a complainant's burden to prove that his protected activity contributed to the adverse action decision. As the ALJ presumed Kao's prima facie case, contribution was also presumed, and could not be called into question during the affirmative defense analysis. At the affirmative defense stage, an employer is not required to prove that there was no contributing factor, but by the same token, it is not enough for an employer to show merely that the employee's conduct violated company policy or constituted a legitimate business reason justifying the adverse personnel action. The express language of the statute requires that the "clear and convincing" evidence prove what the employer "would have done," not what it "could have done," in the absence of protected activity.<sup>40</sup> Instead, the employer is "required to demonstrate through factors extrinsic to [complainant's] protected activity that the discipline to which [complainant] was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations."<sup>41</sup> On remand, the ALJ should make clear that the affirmative defense does not require disproving contributing factor but neither is it met merely by demonstrating a legitimate business reason; the employer must prove that it would have taken the same action absent protected activity, despite there being contributing factor causation.<sup>42</sup>

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<sup>38</sup> D. & O. at 8-9; See *Brucker v. BNSF Ry. Co.*, ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 9 (ARB July 29, 2016) (in which the ALJ overlooked the complainant's evidence that created a material issue of fact as to whether the respondent would have fired him if he had not engaged in protected activities).

<sup>39</sup> *Id.* at 74. Likewise, the ALJ attempted to restate Areva's affirmative defense, including the idea of contribution: "that the alleged protected activity by the Complainant did not contribute to the decision to terminate the Complainant's employment and that the Complainant's employment would have occurred in the absence of the alleged protected activity." D. & O. at 11.

<sup>40</sup> See *Speegle v. Stone & Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014).

<sup>41</sup> *DeFrancesco*, ARB No. 13-057, slip op. at 13-14.



## **CONCLUSION**

As a matter of law, Kao, the nonmoving party, has submitted enough evidence to raise questions of material fact on the issue of whether Areva proved by clear and convincing evidence that it would have terminated Kao's employment absent protected activity. Therefore, the ALJ's Decision and Order is **VACATED** and this matter is **REMANDED** for a hearing on the merits.

**SO ORDERED.**

**LEONARD J. HOWIE III**  
**Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**