



In the Matter of:

STEVEN ONYSKO,

ARB CASE NO. 11-023

COMPLAINANT,

ALJ CASE NO. 2009-SDW-004

v.

DATE: January 23, 2013

**STATE OF UTAH, DEPARTMENT OF
ENVIRONMENTAL QUALITY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Steven J. Onysko, Ph.D., *pro se*, Park City, Utah

For the Respondent:

Glen E. Davies, Esq., *Assistant Utah Attorney General*, Salt Lake City, Utah

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

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300(j)-9(i) (Thomson Reuters 2012), and its implementing regulations, 29 C.F.R. Part 24 (2012). Complainant Steven Onysko filed three complaints with the Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that his employer, the State of Utah's Department of Environmental Quality (DEQ), retaliated against him in violation of the SDWA. OSHA investigated and dismissed the complaints on April 3, 2009. Onysko objected and requested a hearing with the Office of Administrative Law Judges. An Administrative Law Judge (ALJ) conducted an evidentiary hearing from June 21 to June 24, 2010. On December 22, 2010, the ALJ issued a Decision and Order (D. & O.) dismissing the complaint. Onysko petitioned for review on January 13, 2011. We affirm.

INTRODUCTION

While Onysko challenged many of the ALJ's rulings, we find that focusing on the essential element of causation resolves this appeal. Onysko presented circumstantial evidence in attempting to prove that whistleblower discrimination motivated the Respondent to take several unfavorable employment actions against him. He attempted to show temporal proximity, procedural irregularities, early termination of a probationary promotion, and interpersonal conflicts among the parties. Ultimately, the ALJ rejected Onysko's evidence and believed the Respondent's non-discriminatory reasons for its employment actions. On appeal, Onysko reargued his circumstantial evidence case but did not demonstrate where the ALJ committed *reversible error* in rejecting his claim that his protected activities were motivating or substantial factors in the Respondent's unfavorable employment actions.

The Board's role in this SDWA whistleblower case is to focus on whether protected activity was a motivating or substantial factor in an unfavorable employment action based on the record as a whole.¹ Onysko's evidence pointed to protected activity but it was not clear that it was particularly troubling to the Respondent, making his whistleblower claim less persuasive. Moreover, as we elaborate below, there was substantial evidence supporting the Respondent's contrary reasons that the ALJ believed.² Ultimately, the record as a whole reveals that the relevant periods in 2007 and 2008 involved many diverse and separate events and individuals that Onysko attempts to connect unsuccessfully with the singular thread of whistleblower discrimination.

BACKGROUND

A. Facts

The facts set out below are taken from the ALJ's summary of evidence from the hearing held June 21 through 24, 2010, and that are set out in the background section of the ALJ's decision. See D. & O. at 4-42; see also *supra* at 2 n.2. While all of these facts may not be reflected in the portion of the ALJ's decision captioned as findings of fact and conclusions of law (see D. & O. at 42-62), the facts are based on evidence admitted into the administrative record.

¹ See, e.g., *Dalton v. U.S. Dept. of Labor*, 58 Fed. App'x 442, 450 (10th Cir. 2003) (court indicated under a similar review standard that the Board commits reversible error by failing to adopt findings of fact that are supported by substantial evidence).

² We agree with Onysko that a good portion of the ALJ's decision merely recited testimony (D. & O. at 4-42) without a section separately identifying the ALJ's "findings of fact;" nevertheless, the ALJ interspersed sufficient fact findings throughout his "Analysis" to support the dismissal of the Complainant's claims. D. & O. at 42-63. In reviewing SDWA cases, where substantial evidence supports the ALJ's reasons for believing a respondent's reasons and disbelieving a complainant's whistleblower reasons, we cannot simply substitute our view of the facts for the ALJ's view.

1. *Onysko's Promotion to Engineering Section Manager and DEQ complaints*

Onysko has worked as an engineer for 35 years. D. & O. at 5 (citing Hearing Transcript (Tr.) at 740). He holds a PhD in engineering, and is licensed as a mining engineer in Nevada and a professional engineer in Utah. *Id.* Onysko is credentialed in water and wastewater operations and engineering. *Id.* (citing Tr. at 740).

Onysko began working for DEQ in July 1998 as an Engineer III, and in this role had various responsibilities, including performing sanitary surveys and water treatment plant inspections, interacting with water system staff and employees, completing monthly reports, maintaining professional licenses, and understanding and applying the agency's Operating Principles. *Id.* (citing Complainant's Exhibit (CX) 1713-32). Onysko generally received overall ratings of "successful" on his performance evaluations while working as an Engineer III, but his evaluations stated that he needed to "complete certain work in a more timely or rapid fashion, . . . review and study 'modern personnel management techniques,' and work on building better relationships with co-workers." D. & O. at 5-6 (quoting CX 1720, 1724) (citations omitted).

a. *Onysko's May 2007 complaint to DEQ related to Pheasant Meadows Subdivision Project*

Onysko's job title changed from Engineer III to Environmental Engineer for one year – from July 2006 to June 2007. D. & O. at 6 (citing CX 1711-12). During this year, he received a positive job evaluation, with his manager stating that he "could continue to improve the efficiency of his work pace and better meet deadlines." *Id.* (citing CX 1712). Around May 14, 2007, Onysko discovered problems with the water line during an inspection at the Pheasant Meadows Subdivision Project. Onysko found "'an apparent egregious under-sizing of the already-constructed [sic] waterlines responsible for supplying normal-use drinking water and emergency-use fire-flow water' to the subdivision associated with the Pheasant Meadows Project." D. & O. at 47 (quoting Administrative Law Judge Exhibit (ALJX) 18 at 34). Onysko reported the problem to Kenneth Bousfield, DDW's Executive Secretary. D. & O. at 48. The agency agreed that Onysko disclosed a potential danger of "'backflow and contamination of water' within the line." *Id.* at 47. Expert evidence at trial disclosed that the backflow problem that Onysko discovered and reported to his supervisor "could result in 'backsiphonage of water from some other source into [a] drinking water system.'" *Id.* at 47 (citing Tr. at 137 (testimony of Michael Moss)).

b. *Onysko's 2007 promotion to Engineering Section Manager*

Sometime between May 30 and July 1, 2007, the agency's Engineering Section was divided into an "Engineering Section" and a "Construction Assistance Section." D. & O. at 6 & n.7 (citing ALJX 20 at 1, Respondent's Exhibit (RX) 1 at 292). Onysko was promoted to Engineering Section Manager, where his duties included developing and adopting rules, developing a tracking system for rule exceptions, managing DDW's engineering section, implementing the agency's operating principles, keeping the Division Director informed of customer concerns, and providing weekly intra-section reports. *Id.* Onysko's promotion provided for a twelve-month career mobility period giving DEQ the right to terminate or end the manager position, without prior notice, at any time and for any reason. *Id.* Under the terms of

the contract, if Onysko completed the twelve-month period as Engineering Section Manager, he would be permanently placed in the position. *Id.*

Early in Onysko's tenure as Engineering Section Manager, he began having conflicts with his co-workers. *Id.* at 7. William Sinclair, a DDW Deputy Director, who oversees agency engineers, commented on Onysko's management performance in memoranda dated October 12 and 15, 2007. *Id.* at 8 (citing RX10 at 245; RX 9 at 244; Tr. at 958). In the October 12 memorandum, Sinclair noted, based on talks with another DDW manager, that Onysko had "'circumvented' a [subordinate] District Engineer . . . charged with making certain county planning decisions" and that after this incident the subordinate engineer requested a change in his performance plan to "remove the responsibility of interacting with DDW employees." *Id.* (citing RX 10 at 245; RX 9 at 244; see also Tr. at 958). Sinclair further indicated that Onysko had unreasonable standards that "could . . . impose additional costs on operators," and that Onysko engaged in "micro-managing everything" such that Onysko could be so "heavily involved in [an employee's] position beyond what is really required . . ." *Id.*

In the October 15 memorandum, Sinclair stated that, based on further discussions with another agency manager, Onysko had "a serious process issue" pertaining to his role as a manager, and that the issue was "rooted in the length of time it took [Onysko] to review plans as well as the existence of 'several instances where complaints have been [made] that [Onysko] is 'too' focused on his interpretation of the rules.'" *Id.* at 9 (citing RX 11). Sinclair's memo proposed ways to address Onysko's employment issues: these options included presenting Onysko with the concerns set out in Sinclair's memo and allowing him to "improve on such behavior with an understanding that failure to do so could result in demotion," or placing Onysko "back in his former nonmanagerial engineering position." *Id.* at 9 (citing RX 11 at 248).

Onysko had other communication and relationship issues with individuals he worked with in his role as Engineering Section Manager. Evidence showed that Onysko refused to meet with a consultant or a DEQ project manager about the Slate Canyon Project. D. & O. at 17, 60 (citing RX 9, CX 141-49); see also Tr. at 1072-76. A conversation between Onysko and the consultant, which the consultant repeatedly tried to arrange, "would have resolved one of two major issues with the Slate Canyon Project[.]" but Onysko refused to communicate. D. & O. at 60. Moreover, Onysko's engineering manager, Sinclair, received e-mails from at least four District Engineers whom Sinclair supervised, complaining about Onysko's management performance. See RX 7 at 242 (e-mail chain among district managers containing statements such as: "Do you guys spend more time dealing with [the Complainant] than reviewing projects?"); see also D. & O. at 11 ((citing Tr. at 956) (Sinclair testifying that District Engineers had "'difficulties . . . in terms of getting project accomplished, going through' Complainant."); Tr. at 963-964 (Sinclair testifying that conversations with District Engineers "centered generally on 'issues related to communication, collaboration, [and] micro-management' on the part of Complainant.")). Based on these complaints, Sinclair believed that problems with Onysko "inhibited the District Engineers' ability to do their own jobs efficiently, specifically their ability 'to get operating permits that needed to be accomplished out the door.'" D. & O. at 11, citing Tr. at 964; see also D. & O. at 24-29 (summarizing testimony of district engineers Ariotti and Hacking complaining about their interactions with Onysko).

c. Onysko's October 4, 2007, complaint to DEQ regarding water pipeline construction on Slate Canyon Project

Onysko worked on the Slate Canyon project for DEQ. The project involved rebuilding a water pipeline from a spring privately owned by the Utah State Hospital in the mountains. Tr. at 193, 195. Another DEQ engineer had approved the plans and specifications for the water pipeline prior to its construction. Tr. at 181-182. Onysko was assigned to the project at the final inspection stage prior to the issuance of the final operating permit. Tr. at 182-183. During Onysko's inspection of the pipeline on October 4, 2007, he complained to Bousfield about the use of certain sealants and glues and the installation of certain air valves on the pipeline associated with the Slate Canyon Project that did not meet safety standards set out in the Utah Administrative Rules for Public Drinking Water Systems." D. & O. at 49; see also D. & O. at 22-24.

d. Onysko's October 25, 2007, demotion from management position, and renewed complaint to DEQ regarding Slate Canyon Project water pipeline

On October 25, 2007, DEQ issued Onysko a letter demoting him from the position of Engineering Section Manager to Environmental Engineer. D. & O. at 51. The letter stated that Onysko was demoted for failing to follow Operating Principles associated with (1) organizing appropriate meetings for the Slate Canyon Project; (2) promptly reviewing plans; and (3) circulating a letter advising clients to explore funding from a federal agency, when the clients were ineligible for such funding. D. & O. at 29-30. The Demotion Letter stated that Onysko has "demonstrated the inability to work with others[,] [citing District Engineers, Construction Assistance Section staff, and Secretarial staff], which is in violation of [the agency's] Operating Principles and [Onysko's] specific performance plan." The Letter advised Onysko to "remedy the described behavior" and "included a caveat that failure to do so 'may result in corrective and/or disciplinary action.'" *Id.* at 30.

After being informed of his demotion, Onysko, later that day, again notified Sinclair that the glues and sealants used on the Slate Canyon water pipeline project did not meet state safety standards. D. & O. at 47, citing ALJX 18 at 42; see also D. & O. at 50-51. DEQ issued an Operating Permit Letter for the Slate Canyon Project on October 29, 2007. D. & O. at 51, citing CX at 520-22. The Operating Permit Letter refers to problems with the glues and sealants, and contains Onysko's initials, but states that these problems did "not preclude issuance of the Operating Permit." CX at 520-22.

2. Events following Onysko's demotion to Engineer III

On June 1, 2008, Onysko filed his first OSHA complaint alleging DEQ retaliated against him in violation of the SDWA whistleblower provisions when it demoted him from Engineering Section manager. D. & O. at 1.

The next month, July 3, 2008, Onysko received a performance evaluation; out of seven objectives, Onysko received marks of "successful" for six and "unsuccessful" for one. D. & O. at 31. The unsuccessful mark included Bousfield's comments that Onysko "views DEQ's Operating Principles (DEQ-Ops) as an impediment to enforcing the Safe Drinking Water Act

and Rules,” an “unwillingness to see that one can achieve compliance with rules by implementing DEQ-Ops,” an “unwilling[ness] to accept management’s directions regarding DEQ-Ops,” and that this “disconnect between DEQ-Ops and Rule compliance overshadows [Onysko’s] good work and showed he was not ready for leadership with DDW.” D. & O. at 32 (citing RX 26 at 215). Onysko received an overall “unsuccessful” rating; Bousfield concluded that Onysko’s failure to adhere to DEQ-Ops “overrode” the other six categories. D. & O. at 32, RX 26 at 214. Onysko disputed the evaluation. D. & O. at 32.

Following the performance evaluation, Onysko filed his second OSHA complaint on July 8, 2008.

On July 18, 2008, Onysko sent an e-mail to two co-workers, Sean Jordan and Scott Hacking. D. & O. at 56. Onysko’s e-mail to Jordan told him to “be very careful who he took direction from,” and the e-mail to Hacking accused him of “getting his wish to have [Onysko] demoted.” *Id.* at 56 (citing RX-27 at 286). DEQ issued Onysko a Warning Letter on August 11, 2008. D. & O. at 56.

Onysko sought DEQ public documents on Fred Duberow, a consultant specializing in water resource and municipal engineering projects, pursuant to the state’s Government Records Access and Management Act (GRAMA), on May 12, 2009. *Id.* at 57. Duberow had worked with Onysko through Duberow’s presentation of plans for DEQ’s review, which occurred three to six times annually. *Id.* at 20. Onysko believed that Walt Baker, the Division Director for the Division of Water Quality, notified Bousfield about his government records request pertaining to communications related to Duberow. *Id.* at 57; see also Tr. at 415.

On August 19, 2009, DEQ Acting Executive Director Amanda Smith notified Onysko that she had removed the July 3, 2008 Performance Evaluation and the August 11, 2008 Warning Letter, from his personnel file. D. & O. at 37 (citing CX 813). Smith removed the July 3 evaluation after consulting with the Utah Attorney General’s Office, and DEQ’s Human Resources Management; she replaced the August 19 warning letter with a verbal warning. *Id.* Smith states in the August 19 letter that Onysko’s “review from October 25, 2007 through June 30, 2008 – for which period Complainant received an overall evaluation score of “Exceptional,” CX 71-72 – was ‘an adequate review of [Complainant’s] work year subsequent to [his] career mobility.’” *Id.* (quoting CX 813).

B. ALJ Decision

Following extensive discovery proceedings, the ALJ held a four-day evidentiary hearing in this case in June 2010. On December 22, 2010, the ALJ entered a Decision and Order dismissing Onysko’s complaint.

1. ALJ’s determination on Onysko’s protected activity

Onysko alleged three protected activities: (1) reporting to DEQ managers the back flow water problems at the Pheasant Meadows Project on or around May 14, 2007; (2) reporting to managers the water pipeline sealant and valve problems that he discovered during his Slate Canyon Project inspection on October 4, 2007; and (3) renewing his concerns about the water pipeline sealants at the Slate Canyon Project on October 25, 2007. D. & O. at 47 (citing ALJX 18 at 34, 37, 42).

The ALJ determined that Onysko's reporting of the backflow water problems at Pheasant Meadows was protected activity under the Act. D. & O. at 48. The ALJ held that the "record demonstrates [Onysko] informed his superior, Bousfield, about a low-pressure water-line hazard which clearly carried with it a risk of contamination of drinking water." *Id.* Based on Onysko's technical knowledge and witness testimony, the ALJ determined that he "harbored an actual and reasonable belief that the undersizing of the Pheasant Meadow Project's water line carried with it this hazard." *Id.*; see also *id.* at 49-50.

The ALJ held that Onysko's reporting to Bousfield of the use of certain sealants and glues on the Slate Canyon Project was protected activity under the Act, but the ALJ did not find that his reporting on the use of air vents in place of air valves was protected. *Id.* at 49. As to the sealants and glues used on the project, the ALJ observed additional witness testimony by a project consultant "admit[ing] his firm used 'the wrong type of material' in terms of glues and sealants on the Slate Canyon Project's water line." *Id.* However, the ALJ held that Onysko presented "no evidence to support that a [risk of back siphonage] accompanied the use of air vents in place of air valves on the [water line project]." *Id.*

The ALJ found that Onysko verbally communicated to supervisors on October 25, 2007, renewing his concerns about the use of improper glues and sealants at the Slate Canyon water line project. *Id.* at 50-51. The ALJ found that language in the October 29, 2007 Operating Permit Onysko initialed conveyed concerns protected by the Act. *Id.* at 51.

2. ALJ's determinations on Onysko's adverse actions

Onysko alleged four adverse actions that the ALJ addressed: (1) Onysko's demotion from Engineering Section Manager to Environmental Engineer on October 25, 2007; (2) the July 3, 2008 performance evaluation; (3) receipt of the Warning Letter in October 2008; and (4) circumstances associated with a colleague informing Bousfield of Onysko's May 12, 2009 GRAMA request.³ *Id.* at 51.

The ALJ determined that Onysko failed to timely file his OSHA complaint within 30 days of his demotion, and that the action thus fell outside the scope of his first June 1, 2008 OSHA complaint. *Id.* at 51-52. The ALJ observed that SDWA requires that complaints be filed within 30 days of an adverse action. *Id.* at 52. In this case, Onysko's OSHA complaint was filed over seven months after the alleged adverse action, and the adverse action thus fell outside the scope of the June 2008 complaint. *Id.*

The ALJ analyzed the July 3, 2008 evaluation, in which Onysko received an "overall unsuccessful rating" for the period July 1, 2007 to October 25, 2007. *Id.* at 52-56. Onysko argued that the rating adversely affected his "future earning potential" and precluded him from fairly competing for a management position at the agency. *Id.* at 52. The agency argued the evaluation had no effect. *Id.* The ALJ analyzed the performance evaluation to determine "whether a reasonable employee in complainant's position would be dissuaded from engaging in

³ The ALJ did not address another alleged adverse action, a warning letter Onysko received on February 25, 2008, because Onysko did not timely file a complaint based upon the warning letter. D. & O. at 51; see also *id.* at 32 n.29.

protected activity by the consequences and circumstances associated with receipt of the . . . Evaluation.” *Id.* at 53, citing *Burlington Northern and Sante Fe Ry. Co. v. White*, 548 U.S. 53, 67-69 (2006). The ALJ concluded that the July 3 performance evaluation was not adverse action for purposes of the Act. D. & O. at 56. The ALJ determined that the evaluation was only “job-related constructive criticism,” *Id.* at 55, and Onysko failed to substantiate his claim that an overall unsuccessful rating in a performance evaluation at the agency resulted in a denial of pay increases or promotions. *Id.* at 56.

The ALJ determined that the August 2008 Warning Letter did not constitute adverse action under the Act. *Id.* The ALJ held that warning letters “are not disciplinary actions but instead tools used by management to help employees recognize corrective behavior,” and “have no effect on an employee’s pay or benefits.” D. & O. at 56, citing *Melton v. Yellow Transp. Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 12 (ARB Sept. 30, 2008) (stating that warning letters – without further accompanying consequences or effects – did not constitute adverse action).

Finally, the ALJ determined that communications to Bousfield pertaining to Onysko’s May 12, 2009 GRAMA request for information relating to Duberow was not a timely action that fell within the scope of Onysko’s OSHA complaint. D. & O. at 57. The ALJ observed that Onysko filed his final OSHA complaint on September 29, 2008; any communications regarding the GRAMA request would have occurred after May 12, 2009, and there is no evidence of an OSHA complaint filed by Onysko within 30 days after that date. *Id.*

3. ALJ’s causation determination

Despite finding that Onysko failed to prove a timely filed adverse action on which to base his whistleblower complaint, the ALJ analyzed whether Onysko showed, by a preponderance of evidence, that any protected activity was a “motivating factor” for subsequent adverse action. *Id.* at 58-62 (quoting 29 C.F.R. § 24.109(a)). Onysko advanced four theories for causation: (1) that a causal connection existed between the Warning Letter and his first two OSHA complaints on June 1 and 8, 2008; (2) that “defamatory comments” about Onysko and his work performance show animus attributable to Sinclair; (3) that Bousfield misapplied the Operating Principles as reflected in the demotion letter and July 3 evaluation; and (4) transferring documents from Onysko’s personnel file to a confidential file shows retaliatory animus. *Id.* at 58-59. The ALJ rejected these contentions.

The ALJ first determined that there was no temporal proximity between the warning letter and Onysko’s two OSHA complaints; the ALJ observed that Onysko filed his OSHA complaints on June 1 and July 8, 2008, but that his supervisor, Bousfield, was not aware of the complaints until September 29, 2008, when he received a letter from OSHA. *Id.* at 59. Bousfield responded to the OSHA letter on October 4, 2008. *Id.* Based on these findings, the ALJ concluded that DEQ “did not possess knowledge of [the] OSHA complaints prior to August 11, 2008,” when Onysko received his Warning Letter. *Id.*

The ALJ next rejected Onysko’s contention that Sinclair, a DEQ Deputy Director, displayed “retaliatory animus” against him. *Id.* at 59-60. The ALJ found that many of Sinclair’s characterizations of Onysko’s “shortcomings as Engineering Section Manager” were “valid based on the record of the case” and that no accusations Sinclair made resulted from protected activity. *Id.* at 60.

The ALJ rejected Onysko's contention that Bousfield's actions against him were motivated by retaliatory intent. *Id.* at 61-62. Bousfield's dissatisfaction with Onysko's performance was framed in part by an October 23, 2007 e-mail from Duberow (a consultant) criticizing the length of time that Onysko took to notify Duberow of a DEQ plan approval. *Id.* at 61. The ALJ determined that Bousfield's reliance on the e-mail from Duberow was "reasonable and in no way evidence of protected activity motivating [DEQ] to take any adverse action against him." *Id.* at 61. The ALJ also rejected Onysko's claim that his July 3 Performance Evaluation rating of "unsuccessful" was a "deviation from normal procedures" and evidence of retaliatory animus." *Id.* The ALJ "found credible [Bousfield's] testimony that the category in which [Onysko] received the mark of 'unsuccessful' was pervasive enough to influence the overall review." *Id.* The ALJ concluded that any such deviation "does not rise to the level of demonstrating retaliatory animus." *Id.* at 61-62.

Finally, the ALJ rejected Onysko's contention that the transfer of his documents from his personnel file to another confidential file stemmed from retaliatory animus. *Id.* at 62. The ALJ found that DEQ managers' conduct was "in accordance with its August 19th letter" and removed the "Warning Letter and July 3rd Evaluation . . . from [Onysko's] personnel file." *Id.* The ALJ concluded that Onysko's assertions that retaliatory animus motivated changes to his personnel file lacked merit.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to the Board to issue final agency decisions under the SDWA. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012). The ARB reviews the ALJ's factual findings for substantial evidence, 29 C.F.R. § 24.110(b), and conclusions of law de novo, *Jay v. Alcon Labs., Inc.*, ARB No. 08-089, ALJ No. 2007-WPC-002, slip op. at 3 (ARB Apr. 10, 2009).

DISCUSSION

A. Statutory Framework and Burden of Proof Standard

The whistleblower provision of the Safe Drinking Water Act states:

(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 any person acting pursuant to a request of the employee) has -

(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,

(B) testified or is about to testify in any such proceeding, or

(C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

42 U.S.C.A. § 300(j)-(9)(i); see also 29 C.F.R. § 24.102(b) (“[i]t is a violation for any employer to . . . retaliate against any employee because the employee has” engaged in protected activity). To prove a violation of the Act, complainants must “demonstrate[] by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint.” 29 C.F.R. § 24.109(b)(2). When this showing is made, an employer can avoid liability by “demonstrat[ing] by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.” *Id.*

The ALJ found that Onysko engaged in activity the Act protects, but that he suffered no adverse action due to that activity. See *supra* at 7. Alternatively, the ALJ ruled that even if Onysko had suffered adversely from actions he alleged, he failed to prove by a preponderance of evidence that protected activity motivated any such actions by DEQ. *Id.* at 8-9.

Despite the ALJ’s determination that Onysko failed to prove that he suffered adverse action covered by the Act, we do not resolve this case on that grounds. Instead, we resolve this case on the ALJ’s alternative ground that Onysko failed to prove by a preponderance of evidence that his alleged protected activity was the *motivating factor* for any alleged adverse action, and hold that substantial evidence supports the ALJ’s determination.

B. Substantial evidence supports the ALJ’s determination that protected activity was not the motivating factor for the adverse action taken against Onysko

“A complainant must prove more when showing that protected activity was a “motivating” factor than when showing that such activity was a “contributing” factor. *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 2004-CAA-005, slip op. at 3 n.6 (ARB Nov. 29, 2006); see also *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 5-7 (ARB Sept. 30, 2003); *Van der Meer v. Western Ky. Univ.*, ARB No. 97-078, ALJ No. 1995-ERA-038, slip op. at 3 (ARB Apr. 20, 1998). A “motivating factor” is “conduct [that is] . . . a ‘substantial factor’” in causing an adverse action. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); see also *Hulen v. Yates*, 322 F.3d 1229, 1237 (10th Cir. 2003). The ALJ determined that Onysko failed to show that an alleged protected activity was the motivating factor for his asserted adverse action because of the evidence showing that Onysko failed to prove himself in the role of Engineering Section Manager. D. & O. at 62. Prior to his promotion to management, Onysko had a successful career as a company engineer. *Id.* at 5, 62. He generally received overall ratings of “successful” during the eight years he worked as a company engineer. D. & O. at 5. However, based on evidence in the record, the ALJ reasonably concluded that it was not any protected activity that motivated the company to demote Onysko, but it was his unsuccessful performance as Engineering Section Manager. *Id.* at 62. Substantial evidence supports that determination.

The record supports the ALJ’s rejection of Onysko’s May 4, 2007 protected activity as a motivating factor for unlawful discrimination. Onysko argued that temporal proximity supports his case that his protected activity on May 4, 2007 partly motivated the Respondent to retaliate four months later. Yet, soon after the May 4, 2007 protected activity and inconsistently with a

retaliatory motive, the Respondent confirmed its decision to promote Onysko to Engineering Section Manager. See RX1 and 2 (promotional documents executed May 4 and July 2, 2007).

Similarly, Onysko asserted that protected activity on October 4 and 26, 2007, served as motivating factors for his demotion on October 25, 2007. But, again, the employer presented evidence of management conflicts and difficulties occurring throughout the Complainant's probationary promotion, long before the October 25th protected activity.⁴ See RX3 through 10, 12-17 (various e-mails in September and October 2007 documenting management problems).

When DEQ promoted Onysko to Engineering Section Manager, he signed a Career Mobility Agreement, which gave the agency the "the right to terminate or end his assignment, without prior notice, at anytime for any reason." D. & O. at 6 (quoting RX 1 at 292). In this role, and indeed as a DEQ employee, he was required to comply with the terms of the agency's Operating Principles. D. & O. at 32. The Operating Principles (CX 1735-1745) expressly "require[] that *all* DEQ employees display professionalism in their interactions with co-workers and customers and conduct themselves in such a way as to maintain the public trust." CX 1735 (emphasis added). The Operating Principles establish further specific standards for ensuring quality customer service, including "communicating appropriately through . . . the sounds and tone of your voice [and in] email exchanges," and "[i]dentifying, understanding, and anticipating the needs of your customers by . . . knowing their time requirements[,] being attentive[,] developing the skill to read your customer and understand what your customer may need or want." CX 1736.

The record and the ALJ's decision identifies several incidents showing that as a manager, Onysko had many conflicts with co-workers and outside consultants/contractors in contravention of the agency's Operating Principles. Complaints about Onysko's interactions with co-workers began shortly after his promotion to Engineering Section Manager. See, e.g., *supra* at 4-5. For instance, Sinclair, whom the ALJ found credible, testified about e-mails that he received from various District Engineers critical of Onysko's performance as a manager. D. & O. at 10-11. More complaints about Onysko are set out in October 12 and 15, 2007 memoranda that Sinclair sent to Bousfield, the DDW Director, and Onysko's direct manager. *Id.* at 8-10. Contrary to a retaliatory motive, in Sinclair's memoranda, he outlined four options to address Sinclair's management concerns related to Onysko, including an option to train and keep Onysko in that role as a section manager (option 1). RX 11.

Onysko asserts that Kenneth Wilde was out to get him and that he manipulated Sinclair, but the record evidence shows that different individuals complained about the Complainant. D. & O. at 60. Even Bousfield, who was instrumental in obtaining Onysko's promotion, was concerned. See RX 1, RX 2 (promotional documents) and RX18 (reassignment letter). Bousfield testified at the hearing about Onysko's performance problems stemming from his inability to act in a timely manner. D. & O. at 14-20. Another witness, Duberow testified further about delays he experienced working with Onysko. *Id.* at 20-21. The ALJ found

⁴ While we consider all of Onysko's factual claims as part of his circumstantial evidence of unlawful retaliation, we agree with the ALJ that Onysko's complaint with regard to his demotion was untimely. Onysko was demoted on October 25, 2007, but did not file his complaint until June 1, 2008, long after the thirty days that the SDWA provides for filing after an adverse action occurs. See D. & O. at 52 (42 U.S.C.A. § 300j-9(i)(2)(A)).

Bousfield and Duberow credible. *Id.* at 44-45. The ALJ, in contrast, found Onysko less credible because of his conduct at the hearing, including his habit of “argu[ing] with witnesses who did not agree with his phrasing of events,” and practice of “sometimes infus[ing] [questions] with extreme characterizations of events and descriptions of circumstances.” *Id.* at 42-43. We defer to the ALJ’s credibility determinations here. *See Caldwell v. EG&G Def. Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-001, slip op. at 12 (ARB Oct. 31, 2008) (quotation omitted) (ARB defers to ALJ credibility rulings unless “inherently incredible or patently unreasonable.”).

The significance of Onysko’s July 2008 performance appraisal is also debatable. Onysko asserts that the July 2008 negative appraisal was suspiciously timed, but again another document shows that such an appraisal was planned a year before. RX2. Although the unsuccessful rating seemed to deviate from normal practices, the ALJ supported his conclusion that the overall unsuccessful rating was a foregone conclusion given that Onysko’s probationary promotion ended in a demotion and was, in fact, unsuccessful. D. & O. at 61.

Despite Onysko’s problems as a DEQ manager, the ALJ found Onysko “to be of superior technical capability as an engineer, perhaps unmatched within [DEQ’s] organizational structure.” *Id.* at 62. The ALJ found further, however, that the record is “permeated with instances evincing [Onysko’s] shortcomings as a communicator and manager as well as his antagonizing responses toward those who disagree with his opinions.” *Id.* *See also, Diercks v. West Linn-Wilsonville Sch. Dist.*, ARB No. 02-001, ALJ No. 2000-TSC-002, slip op. at 6-7 (ARB June 30, 2003) (ARB affirms ALJ’s causation ruling based on a record of “a plethora of e-mails authored by [complainant] whose contents demonstrate recurring problems in her interpersonal communications with her colleagues and her principal”). Based on the evidence from the hearing, the ALJ reasonably concluded that Onysko failed to “show any protected activity engaged [in] by him *motivated* [DEQ] in any way to take adverse action against him.” *Id.* at 62 (emphasis added). Substantial evidence supports the ALJ’s causation finding, and we affirm on that narrow basis.⁵

⁵ While we do not address the issue of adverse action in this case, the ALJ’s holding as to the adverse actions Onysko alleged may be error. Both Onysko’s July 3, 2008 Performance Evaluation, and August 11, 2008 Warning Letter may constitute adverse actions under the SDWA’s whistleblower provision. *See, e.g., Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-044 (ARB Dec. 29, 2010) (“[A] written warning or counseling session is presumptively adverse where: (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline.” *Williams*, ARB No. 98-018, slip op. at 11), (“[T]he term ‘adverse actions’ refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Williams*, ARB No. 98-018, slip op. at 15; compare 29 C.F.R. § 1979.102(b) and 29 C.F.R. § 24.102(b)). The regulations for AIR 21 and the SDWA prohibit substantially similar activity. Under the regulation in *Williams*, it was a violation for an employer to “intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against any employee because the employee has” engaged in protected activity. 29 C.F.R. § 1979.102(b) (2010). Under the SDWA regulation in existence in 2008, an employer violated the SDWA if it “intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has” engaged in protected activity. 29 C.F.R. § 24.2(b) (2008).

CONCLUSION

The ALJ's Decision and Order dismissing the complaint is **AFFIRMED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

LUIS A. CORCHADO⁶
Administrative Appeals Judge

JOANNE ROYCE, Administrative Appeals Judge, dissenting.

I would reverse the ALJ's dismissal of Onysko's complaint because the ALJ erred as a matter of law in finding that the July 3, 2008 Performance Evaluation and the August 11, 2008 Warning Letter did not constitute adverse action. Because the majority affirmed on the ground of failure to prove causation, they did not address the ALJ's findings on adverse action. They noted however that "[b]oth Onysko's July 3, 2008 Performance Evaluation, and August 11, 2008 Warning Letter may constitute adverse actions under the whistleblower provision of the SDWA." *See supra* note 2.

Shortly after the ALJ issued his opinion, we decided *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-044 (ARB Dec. 29, 2010) in which we held that "the term 'adverse actions' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Williams*, ARB No. 98-018, slip op. at 11. Additionally, we held that adverse activity under the AIR 21 whistleblower provision includes that which would dissuade a reasonable employee from engaging in protected activity. *Williams*, ARB No. 98-018, slip op. at 15. As the majority noted above, the AIR 21 regulations interpreted in *Williams* are very similar to the regulations pertaining to adverse action contained in the SDWA. Both are remedial statutes, and I would therefore adopt the *Williams* standards for interpreting adverse action under the SWDA. Under the *Williams* standards there is no question that the July 3rd Evaluation constituted adverse action.

The July 3, 2008 Evaluation, though issued on that date, was placed in Onysko's personnel file to create a record of his performance for an earlier period, from July 1, 2007, to October 25, 2007, when he served as Engineering Section Manager. Long after he was demoted from that position, the Human Relations Manager discovered that the Respondent had neglected to evaluate Onysko's performance during his 4-month tenure as Manager. D. & O. at 53. The ALJ cites both Sinclair and Bousfield as confirming that the July 3, 2008 Evaluation was "documentation . . . for the record" following the termination of the Complainant's career

⁶ Judge Corchado agrees that Onysko failed to demonstrate a reversible error and concurs in the affirmance of the ALJ's dismissal of Onysko's whistleblower claims.

mobility agreement on October 25, 2007. *Id.* at 53-54. The uncontested purpose of the July 3rd Evaluation, which reflected an overall rating of “unsuccessful,” was to document his performance during his earlier tenure as Manager and to justify his demotion from that position. *See Id.* at 55. As such, the July 3rd Evaluation documented an adverse action and was itself one.

Because the July 3rd Evaluation documented Onysko’s tenure as Manager (beginning a year earlier) and his demotion, it effectively reached back to that demotion for its substance and cause. Consequently, I believe that it was error for the ALJ to fail to address causation in connection with the demotion itself – i.e., whether Onysko’s protected activity was a motivating factor in his October 25th, 2007 demotion. The ALJ correctly ruled that Onysko’s demotion from the position of Engineering Section Manager was not actionable, since Onysko failed to file his first OSHA complaint within the 30-day statute of limitations under SDWA. Nevertheless, to properly analyze whether protected activity caused the July 3rd Evaluation documenting the demotion, the ALJ needed to address whether protected activity caused the demotion itself. Arguably, the Respondents “tolled” the statute of limitations by addressing the demotion in the “after-the-fact” July 3rd Evaluation. In any event, the July 3, 2008 Evaluation was an actionable adverse action and because it documented Onysko’s earlier demotion on October 25, 2007, the ALJ should have determined whether Onysko’s protected activity was a motivating factor in his demotion.

Certainly an inference of retaliation may be drawn from the timing of the demotion. On October 4, 2007, Onysko discovered and communicated to his superiors about “‘glues, sealants, etc., not allowed under the Utah Administrative Rules for Public Drinking Water Systems,’ and the ‘substitution of substandard air relief valves’ associated with the Slate Canyon Project.” D. & O. at 47 (quoting ALJX 18 at 37). On October 25, 2007, Onysko renewed his previous findings regarding the Slate Canyon Project. D. & O. at 47. That same day, on October 25, 2007, DEQ demoted Onysko from the position of Engineering Section Manager to Environmental Engineer. *Id.* at 51.

I would remand to the ALJ to consider whether Onysko’s protected activity motivated the October 25, 2007 demotion and, if so, I believe that the July 3, 2008 Evaluation must likewise be considered as having been motivated by protected activity – since it was drafted to document and justify that demotion.

JOANNE ROYCE
Administrative Appeals Judge