



In the Matter of:

FREDERICK B. WRIGHT,

ARB CASE NO. 16-068

COMPLAINANT,

ALJ CASE NO. 2015-SDW-001

v.

DATE: JAN 12 2018

**RAILROAD COMMISSION
OF TEXAS,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Frederick B. Wright; *pro se*; Houston, Texas

For the Respondent:

Julie C. Tower, Esq.; *Jackson Lewis, P.C.*; Austin, Texas

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*, Joanne Royce, *Administrative Appeals Judge*, and Tanya L. Goldman, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

The Complainant, Frederick Wright, filed a retaliation complaint under the employee protection provisions of the Safe Drinking Water Act (SDWA) and the Federal Water Pollution Control Act (FWPCA), and their implementing regulations.¹ He alleged that the Railroad Commission of Texas violated the SDWA and FWPCA whistleblower protection provisions when it retaliated and discriminated against him because he raised concerns about requiring oil and gas operators to comply with rules regulating drilling wells to protect sources of underground drinking water. Following a hearing, a Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Wright's complaint because he found that Wright did not meet his

¹ 42 U.S.C.A. § 300j-9(i) (Thomson Reuters 2011); 33 U.S.C.A. § 1367 (Thomson Reuters 2016); 29 C.F.R. Part 24 (2017).

burden of showing that any protected activity motivated the termination of his employment. We **VACATE** and **REMAND** for further proceedings.

BACKGROUND

The findings of fact are set forth in the ALJ's Decision and Order (D. & O.) at pages 6 to 12. They are summarized below in pertinent part.

On October 1, 2007, the Railroad Commission of Texas hired Wright to work as an engineer specialist in Houston, Texas.² The Railroad Commission is the certifying agency for federal permits under sections 401 and 404 of the FWPCA for oil and gas exploration and production projects and is the state agency responsible for administration and enforcement of a program under the SDWA for wells associated with oil and gas exploration and production. As an engineer specialist, Wright's job included working with the regulated industry to secure compliance by oil and gas operators with the rules and statutes for which the Railroad Commission is responsible. Two of Wright's responsibilities with regard to a particular program involving variance approvals for building oil and gas wells were to 1) insure that operators were going to circulate cement to the surface, and 2) determine the number of centralizers that were going to be used.³

On his first three performance evaluations, Wright received ratings of "meeting the requirements of the position."⁴ At his next evaluation, Wright received the same rating "but was told that he needed to improve his relations with personnel in the office and industry who hesitated to approach him because they perceived [that he] was unwilling to work out amenable solutions at times."⁵ At his October 28, 2011 evaluation, the Railroad Commission rated Wright as average but suggested that he work for better relations with operators to assist them in keeping wells on production as well as comply with the rules and regulations and view violations from a "practical standpoint 'in addition to the straight rules and regulations.'" At the next year's evaluation, the Railroad Commission indicated that Wright still needed improvement regarding relations with operators with the goal of "providing excellent customer service and making the path to compliance quick and uncomplicated" Throughout Wright's employment, operators complained that Wright was unable or unwilling to provide practical solutions to drilling problems.

On December 7, 2012, Wright filed an internal complaint by e-mail to Gil Bujano, the Railroad Commission's Oil and Gas Division Director, stating that Charles Teague, District

² The citations in this paragraph are to the D. & O. at 6.

³ The parties' definitions for technical and industrial terms applicable to this case are in the D. & O. at 3-6.

⁴ The citations in this paragraph are to the D. & O. at 7-9.

⁵ This evaluation occurred on October 28, 2010.

Director and Wright's supervisor, removed him from assignments to demean him and to impair his ability to make operators comply with the rules.⁶ On April 4, 2013, Wright filed a hostile work environment complaint with Railroad Commission management reporting that Railroad Commission's leadership 1) were willing to ignore their responsibility to require operators to comply with the rules, 2) were not requiring operators to bring their wells into compliance on several occasions, and 3) demonstrated a lack of concern for protected fresh water when they gave an approval to an operator on September 3, 2012, among other things.⁷

On May 17, 2013, the Railroad Commission conducted a "Performance Counseling" session regarding Wright.⁸ During the session, the Railroad Commission told Wright that operators complained about his relationship with them and reported that he was "difficult to work with," exhibited rude behavior, was condescending, and that he called people names.⁹ In response to this counseling, Wright appealed and asked for specific incidents supporting the events discussed in his performance counseling session, to which Bujano replied, indicating that Wright's "response demonstrated resistance to supervisor guidance, which if not corrected could lead to his termination."¹⁰

In early 2013, Kathryn Jaroszewicz, a consultant with one of the operators the Railroad Commission regulated, submitted a casing exception request to Wright using a form that Teague had approved in January 2013.¹¹ On May 31, 2013, Wright informed Jaroszewicz that she needed to use an older form that was attached to his e-mail and asked her to list the correct number of centralizers. Teague learned that Wright had asked that Jaroszewicz use the old form and told her that she did not have to. Teague told Jaroszewicz that she could e-mail or call Wright to inform him how many centralizers were required. Teague e-mailed Wright and told him that the new form contained enough information to approve Jaroszewicz's request about circulating cement to the surface.¹² Wright e-mailed Teague and told him that the new form did not provide enough information because "operators made errors in the past that did not comply with the regulations intended to protect fresh water."¹³ Wright "allegedly insisted on using the

⁶ D. & O. at 9 (citing CX 33).

⁷ *Id.* (citing CX 56-59); Hearing Transcript (Tr.) at 566. Wright has pointed out on appeal that while this exhibit was not admitted at the hearing, it was cited by the ALJ in his decision. We address this issue in the Discussion section of this decision.

⁸ The citations in this paragraph are to the D. & O. at 10.

⁹ *Id.* (citing RX-20).

¹⁰ *Id.* (citing RX-20 at 2; RX-24).

¹¹ The citations in this paragraph are to the D. & O. at 11-12; see RX 23.

¹² See RX-23.

¹³ *Id.* at 1.

January form to protect underground sources of drinking water in furtherance of the Safe Drinking Water Act.”¹⁴ In the e-mail to Teague, Wright stated that it appeared that Teague was telling him that he could not “request information from the operators regarding whether they were planning on using sufficient amounts of cement to comply with the rules,” and was therefore restricting him from doing his job.¹⁵

On June 6, 2013, Teague recommended further disciplinary action against Wright based on this incident concerning Jaroszewicz’s request. Four days later, Jaroszewicz submitted the correct number of centralizers to Wright, and on that same day, Wright approved her request.

The Railroad Commission fired Wright on June 20, 2013, because he refused “to comply with Commission directives to work with management and staff and to assist operators in resolving compliance problems, including the most recent issue of assisting an operator on how to resolve a casing exception request.”¹⁶ Thus, Wright’s request to Jaroszewicz, which according to the Commission exemplified Wright’s misconduct, ultimately led (or contributed) to his termination.¹⁷

Wright filed this action with the DOL, alleging that the Railroad Commission violated the SDWA and the FWPCA when it terminated his employment. After an investigation, OSHA issued findings stating that it found no reason to believe that the Railroad Commission violated either statute and dismissed Wright’s claim. Wright timely objected to OSHA’s findings and requested a hearing before an ALJ.¹⁸ The ALJ held a hearing in Houston, Texas on December 9 and 10, 2015.

At the hearing, Ramon Fernandez, who had been the Railroad Commission’s Deputy Director of Field Operations for its Oil and Gas Division, testified that he and Bujano recommended to Milton Rister, Executive Director, that Wright be fired for unprofessional and unacceptable behavior with operators and staff. This decision was based, in part, on direct reports by operators and outside experts who claimed that Wright had been rude, called them “stupid” and “liars,” and refused to work with them in resolving problems.¹⁹ Teague testified that Wright presented unnecessary obstacles to approval, held up the approval of requests for minor issues, issued vague requests for information, told individuals to refile applications instead of advising them of deficiencies over the telephone, and otherwise “made compliance

¹⁴ D. & O. at 12 (citing Tr. at 518-19).

¹⁵ *Id.* at 12-13.

¹⁶ *Id.* at 7, 12.

¹⁷ *Id.* at 15, n.10.

¹⁸ *See* 29 C.F.R. § 24.106(a).

¹⁹ D. & O. at 13. Fernandez was retired at the time of the hearing. Peter Fisher and Teague both directly reported to Fernandez as their supervisor. *Id.* at 7, n.5.

unnecessarily difficult and unpleasant.”²⁰ Mark Bogan, the Railroad Commission’s Human Resources Director, testified that Wright was fired for “not following [the Commission’s] procedures.”²¹

On May 19, 2016, the ALJ found that Wright failed to meet his burden of showing that he engaged in protected activity that was a motivating factor in the termination of his employment and dismissed the complaint.²² Wright appealed the D. & O. to the Board.²³ On appeal, he argues that the Railroad Commission retaliated against and fired him because he participated in actions to carry out the purposes of the SDWA and FWPCA. He also objects to many of the ALJ’s evidentiary rulings. Additionally, Wright has moved to strike several of the Railroad Commission’s exhibits from the record for various reasons. The Railroad Commission asserts that the ALJ’s findings of fact are supported by substantial evidence.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to decide this matter on appeal from the ALJ’s decision to the ARB.²⁴ The ARB reviews the ALJ’s factual findings under the substantial evidence standard.²⁵ The Board reviews the ALJ’s conclusions of law de novo.²⁶ We liberally construe pro se pleadings.²⁷

²⁰ *Id.* at 15.

²¹ *Id.* at 7, 16 (citing Tr. at 752-53).

²² *Id.* at 1.

²³ *See* 29 C.F.R. § 24.110(a).

²⁴ Secretary’s Order 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110.

²⁵ 29 C.F.R. § 24.110(b).

²⁶ 5 U.S.C.A. § 557(b).

²⁷ *Droog v. Ingersoll-Rand Hussman*, ARB No. 11-075, ALJ No. 2011-CER-001, slip op. at 3 (ARB Sept. 13, 2012).

DISCUSSION²⁸

The ALJ committed legal error in concluding that Wright did not engage in protected activity because he did not explicitly reference the SDWA or FWPCA. Based on the record evidence, we hold that if Wright had a reasonable belief that he was furthering the purposes of the acts when he e-mailed his supervisor to protest that he was being restricted from performing his job to protect drinking water and in complaints he made in a hostile work environment complaint about lack of sufficient oversight of operators to protect fresh water, then he engaged in protected activity. As the ALJ did not assess whether Wright had a reasonable belief when he engaged in the activities he alleges were protected, we remand for further fact finding and consideration.

The purpose of the SDWA “is to assure that water supply systems serving the public meet minimum national standards for protection of public health.”²⁹ In addition to “establishing overall minimum drinking water protection standards for the nation,” the statute provides “for delegation of specific regulation and enforcement to states,” including state primary enforcement of underground injection processes to protect sources of drinking water.³⁰ Respondent is a state agency with administration and enforcement obligations under the SDWA.³¹

The Congressional declaration of goals and policy for the FWPCA provides that “[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³² “Respondent . . . serves as the certifying agency for federal permits under sections 401 and 404 of the . . . FWPCA, for projects associated with oil and gas exploration and production activities.”³³

The SDWA and the FWPCA contain anti-retaliation provisions prohibiting employers from discriminating against employees who have participated in activities protected by the statutes. Specifically, the SDWA prohibits employers from discriminating against an employee who “assisted or participated . . . in any other action to carry out the purposes of this subchapter,” and the FWPCA prohibits employers from discriminating against an employee who “filed,

²⁸ Neither party has appealed the ALJ’s decision regarding Respondent’s sovereign immunity challenge.

²⁹ H.R. REP. 93-1185, 1974 U.S.C.C.A.N. 6454, 1974 WL 11641, 6454 P.L. 93-523; *see also Nat. Res. Def. Council, Inc. v. E.P.A.*, 812 F.2d 721, 723 (D.C. Cir. 1987).

³⁰ *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1232 (10th Cir. 2000), as amended on denial of reh’g and reh’g en banc (Mar. 30, 2000) (citing 42 U.S.C. § 300h).

³¹ D. & O. at 6.

³² 33 U.S.C.A. § 1251.

³³ D. & O. at 6 (citing Tr. at 211-213; 40 C.F.R. § 147.2201).

instituted, or caused to be filed or instituted any proceeding under this chapter or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.”³⁴ Under the environmental whistleblower statutes, for a complainant’s acts to be protected, the complainant must show that he reasonably believed that he raised environmental or public health and safety concerns governed by or in furtherance of the relevant act(s).³⁵

To prevail on a whistleblower complaint, a complainant must establish by a preponderance of the evidence “that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint.”³⁶ If a complainant makes this showing, “relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.”³⁷

In his complaint, Wright alleged that he complained to management about being asked to approve completion reports and certify that operators had complied with rules protecting fresh water when the operators had not complied.³⁸ His specific allegations of protected activity are the following: 1) he requested that a consultant for an operator, Kathryn Jaroszewicz, send him information using the January form on May 31, 2013, to obtain sufficient information needed to protect underground sources of drinking water to further the SDWA; 2) he e-mailed Teague on June 5, 2013, protesting that the Railroad Commission was restricting him from doing his job to protect drinking water in denying his request to ask for the old form; and 3) he alleged numerous instances of protected activity within a hostile work environment complaint he had submitted internally on April 4, 2013, about protecting drinking water.³⁹

Regarding the first two numbered allegations above, the ALJ found that Wright had not engaged in protected activity because there was no evidence that Wright ever referred specifically to the two statutes in this case, ever notified or accused the Railroad Commission of any violations of these specific statutes, ever refused to engage in any practice made unlawful by the statutes, or filed or testified before Congress or in any other proceedings regarding any provision of the statutes.⁴⁰ The ALJ noted that “Complainant . . . appears to be a person who

³⁴ 42 U.S.C.A. 300j-9(i) and 33 U.S.C.A. § 1367.

³⁵ *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001 (ARB Dec. 28, 2012).

³⁶ 29 C.F.R. § 24.109(b)(2).

³⁷ *Id.*

³⁸ D. & O. at 2.

³⁹ *Id.* at 11, 12, 20; RX 23 at 3, 1; CX 56-60 (this exhibit appears to be included also within RX 22, but with comments by Teague; Peter Fisher, the Railroad Commission’s Deputy District Director; and Fernandez).

⁴⁰ *Id.* at 20.

prides himself on attention to detail.” He thus concluded that “[i]f Complainant was concerned about Respondent’s alleged disregard of the SDWA or FWPCA, then it is only logical that he would have referred to such in his correspondence with Respondent, which he failed to do. Accordingly, I find no credible evidence of protected activity.”⁴¹

The ALJ’s restrictive view of protected activity is not legally sustainable. A complainant is not required to explicitly mention the statutes by name or to otherwise allege a violation of the statute to engage in activity the SDWA protects. The language of the SDWA simply prohibits employers from discriminating against employees who have “participated in activities to carry out the purposes” of the act.⁴² This is broad language, some of the broadest of any of the statutes the ARB has the responsibility to adjudicate. While the FWPCA’s language is not as broad, neither the SDWA nor the FWPCA’s language requires a complainant to cite the statute specifically⁴³ or to report a “violation.”⁴⁴ And under both statutes, a “proceeding” does not have to be a formal proceeding.⁴⁵ Thus, we vacate the ALJ’s legal conclusion regarding protected activity because the ALJ did not conduct the proper legal analysis and we conduct our own

⁴¹ *Id.* at 21.

⁴² 42 U.S.C.A. 300j-9(i).

⁴³ *See, e.g., DeKalb Cty. v. U.S. Dep’t of Labor*, 812 F.3d 1015, 1021 (11th Cir. 2016). In *DeKalb Cty.*, the Eleventh Circuit affirmed the ARB’s conclusion that complainants—compliance experts—engaged in protected activity under the FWPCA where they sought records of restaurant sewer spills, suspected the County was hiding information about sewer spills, and informed “coworkers and supervisors that ‘the County could get in trouble’ with the State as a result,” in addition to confronting a supervisor about ongoing compliance problems. The supervisor “viewed their questions as ‘insubordination’ and informed them they were being ‘too thorough or scientific.’” *Id.* at 1018. The court’s opinion does not reflect that complainants ever referenced the specific statute at issue in holding that they engaged in protected activity.

⁴⁴ While there is some ARB caselaw in environmental whistleblower cases that suggests that a complainant must report a violation of the underlying statute, or a threat to the environment, it is the language of the statute that prevails. As neither of these statutes requires a violation to be reported for there to be protected activity, it is not a requirement. *Cf. Williams*, ARB No. 12-024; *Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005 (ARB Dec. 30, 2004) (“An employee engages in protected activity when he reports actions that he reasonably believes constitute environmental hazards, irrespective of whether it is ultimately determined that the employer’s actions violate a particular environmental statute.”) (citation omitted); *Abu-Hjeli v. Potomac Elec. Power Co.*, No. 1989-WPC-001, slip op. at 6-7 (Sec’y Sept. 24, 1993).

⁴⁵ *Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) (affirming ARB’s interpretation of FWPCA and holding that the “statute’s purpose and legislative history allow, and even necessitate, extension of the term ‘proceeding’ to intracorporate complaints.”); *DeKalb Cty.*, 812 F.3d at 1020 (“The Secretary has interpreted ‘proceeding’ to shield from retaliation employees who make ‘informal’ or ‘internal’ complaints to supervisors and coworkers, even if those complaints ultimately lack merit.”) (citations omitted)).

analysis based on the facts the ALJ found and under the definitions of protected activity the statutes express.

The ALJ found that not only was it the Railroad Commission's responsibility to regulate certain programs under the FWPCA and the SDWA, it was Wright's responsibility to work with the regulated industry, the oil industry, to secure compliance by oil and gas operators with those same statutes and any other rules for which the Railroad Commission was responsible. Regardless of whether asking for the older version of the form itself was protected activity,⁴⁶ Wright's protest in his e-mails to Teague that he should have been able to ask for the additional information the older form required, was protected by the statutes. Wright e-mailed Teague and told him that he asked for the old form because the new form did not provide enough information and operators had "made errors in the past that did not comply with the regulations intending to protect fresh water."⁴⁷ He wanted the information from the old form that apparently would unearth any errors and thereby ensure that operators were complying with the rules, rather than simply trusting that there were none. Wright also told Teague that it appeared to him that Teague was telling him that he could not request information from the operators about whether they were planning on using sufficient amounts of cement to comply with the rules. This is clearly a protest that he is being restricted from doing his job, of which one of his primary duties was to secure compliance by operators with the statutes at issue in this case. Wright's e-mail to Teague was in furtherance of the SDWA and therefore constitutes protected activity, if Wright reasonably believed that he was doing so. Wright's complaint to his supervisor would also constitute protected activity under the FWPCA, as it was a "proceeding resulting from the administration or enforcement of the" FWPCA, again, if Wright had the reasonable belief that he was raising environmental or public health and safety concerns.⁴⁸

Wright's hostile work environment complaint (CX 56-60) also contained potential protected activity, subject to the same caveat regarding a reasonable belief.⁴⁹ Wright's

⁴⁶ We cannot determine whether use of the old form versus the new form is protected activity without additional fact finding. Therefore, on remand, the ALJ should reanalyze whether use of the old form was protected activity, taking into account the broad purview of protected activity.

⁴⁷ RX 23 at 1.

⁴⁸ 33 U.S.C.A. § 1367.

⁴⁹ The ALJ apparently did not consider the hostile work environment claim as protected activity. The record on this is confusing, but there was some discussion during the hearing about the claim, as an adverse action, being excluded as time barred. While CX 56-60 was not admitted as an exhibit at the hearing, the ALJ cited it as a part of his fact finding in his decision and order. D. & O. at 9. The ALJ either believed that he admitted the exhibit or otherwise mistakenly excluded it, as it contains allegations of protected activity, which cannot be time barred. In any event, on remand, the ALJ should either admit or make clear that he already admitted this exhibit into the record. Excluding it would be an abuse of discretion. *Shactman v. Helicopters, Inc.*, ARB No. 11-049, ALJ No. 2010-AIR-004, slip op. at 3 (ARB Jan. 25, 2013) (noting that ALJ's evidentiary rulings are reviewed under an abuse of discretion standard).

statements within this exhibit fall squarely into the category of protected activity under both the SDWA and the FWPCA. These statements include, but are not limited to, the following: reports that the Railroad Commission's District Director and Assistant Director were willing to ignore their responsibility to require operators to comply with the rules; they did not require operators to bring their wells into compliance on several occasions; and they demonstrated a lack of concern for protected fresh water when they gave an approval to an operator on September 3, 2012.⁵⁰ For example, he noted that Fisher "approved the remedial squeezing of the surface casing of a new well in a fashion that would not properly isolate the fresh water reservoirs"; that Teague's approvals to an operator "demonstrated a misunderstanding of well configurations and a lack of concern for protecting fresh water"; and that Teague "was willing to approve completion reports without them being in compliance the rules."⁵¹

We conclude that Wright's June 5, 2013 e-mail to Teague (protesting that the Railroad Commission was restricting him from doing his job to protect drinking water in denying his request to require the use of the old form) and allegations within Wright's hostile work environment complaint are protected activities if Wright reasonably believed he was raising environmental or public health and safety concerns when he acted in each instance. Wright's insistence on using the old form to request information may also constitute protected activity, which the ALJ will decide on remand. Because determinations about whether Wright had a reasonable belief in each instance requires fact findings that are not within the Board's purview to make, we remand the case to the ALJ to make those findings.⁵²

Further, we make clear that the Board is not making any directives or suggestions to the ALJ with respect to any other aspect of this case, and leaves it to the ALJ to determine issues of

⁵⁰ While the FWPCA's language is less broad than the SDWA's regarding protected activity, Wright's complaint about management's failure to require operators to comply with rules intended to protect underground water sources falls within the FWPCA's prohibition against discrimination by employees who file proceedings resulting from the administration or enforcement of the provisions of the FWPCA. A "proceeding" includes an initial internal or external statement or complaint of an employee relating to the administration or enforcement of the provisions of the FWPCA. *Abdur-Rahman v. DeKalb Cty.*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, 2006-WPC-003; slip op. at 7-8 (ARB May 18, 2010) (citation omitted), *aff'd sub nom, DeKalb Cty. v. U.S. Dep't of Labor*, 812 F.3d 1015 (11th Cir. 2016).

⁵¹ CX 56-60.

⁵² See *Lee v. Parker-Hannifin Corp.*, ARB No. 10-021, ALJ No. 2009-SWD-003, slip op. at 12 (ARB Feb. 29, 2012) ("[B]ecause a determination of the reasonableness of his belief requires findings of fact that are not within the ARB's purview to make, we remand this case to the ALJ to make those findings and for such further proceedings as are warranted."); *Williams*, ARB No. 12-024, slip op. at 14 ("The fact question nevertheless remains as to whether Williams subjectively believed he was raising environmental concerns. The ALJ did not resolve this issue, and we cannot resolve it on the record before us.").

causation and the affirmative defense on remand.⁵³ Finally, if the ALJ finds that Wright engaged in protected activity on April 4, May 31, and June 5, 2013, temporal proximity to the June 20 termination and to the June 6 recommendation of further disciplinary action, supports an inference of causation.⁵⁴

CONCLUSION

The ALJ found that Wright failed to prove that any protected activity played any role in the termination of his employment. We **VACATE** the ALJ's decision regarding protected activity. We **AFFIRM** the ALJ's finding that there was adverse action. We **VACATE** the ALJ's decision regarding the issues of causation and the affirmative defense because he must reanalyze these issues in light of the expansive definition of protected activity. Finally, we **REMAND** the ALJ's D. & O. for further consideration. On remand, with regard to exhibits, the ALJ shall clarify with specificity which exhibits were admitted and which rejected at the hearing and admit CX 56-60, if not already admitted. All of Wright's motions to strike exhibits are

⁵³ We recognize that the ALJ also analyzed in his opinion whether the alleged protected activity was a motivating factor in Complainant's discharge and whether Respondent would have terminated Complainant's employment in the absence of any protected activity. A remand is still necessary, however, because this analysis is incomplete without recognition of the scope and nature of the protected activity. The ARB has previously noted that "strained relations between regulators and producers are to be expected." *White v. Osage Tribal Council*, ARB No. 96-137, ALJ No. 1995-SDW-001, slip op. at 5 (ARB Aug. 8, 1997). We have also cautioned that the line between insubordination and whistleblowing may be thin or even nonexistent. *See, e.g., Kenneway v. Matlack, Inc.*, No. 1988-STA-020, at 3 (Sec'y June 15, 1989) (noting that intemperate language, impulsive behavior, and even alleged insubordination are often associated with protected activity). We do not prejudge the outcome of this case, but remand to ensure that the analysis separates protected activity from insubordination.

⁵⁴ *Forrest v. Smart Transp. Servs. Inc.*, ARB No. 08-111, ALJ No. 2007-STA-009, slip op. at 5, n.6 (ARB Sept. 21, 2010) (While not necessarily dispositive, "temporal proximity may support an inference of retaliation.").

denied—the ALJ did not abuse his discretion in admitting the exhibits that Wright now objects to; further, Wright did not object to their admission at the hearing.

SO ORDERED.

[REDACTED]

TANYA L. GOLDMAN
Administrative Appeals Judge

[REDACTED]

PAUL M. IGASAKI
Chief Administrative Appeals Judge

[REDACTED]

JOANNE ROYCE
Administrative Appeals Judge

