



In the Matter of:

ALFRED LEAK, Jr.,

**ARB CASE NOS. 07-043
07-051**

COMPLAINANT,

ALJ CASE NO. 2006-SOX-012

v.

DATE: May 29, 2009

**DOMINION RESOURCES SERVICES,
INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard Sternberg, Esq., R. David Briggs, Esq., Akron, Ohio

For the Respondent:

**Kenneth B. Stark, Esq., James P. Smith, Esq., *Little Mendelson*, Cleveland,
Ohio**

FINAL DECISION AND ORDER

Alfred Leak, Jr. filed a complaint with the United States Department of Labor alleging that his former employer, Dominion Resources Services, Inc. (Dominion) violated the employee protection sections of the Pipeline Safety Improvement Act of 2002 (PSIA)¹ and the Sarbanes-Oxley Act of 2002 (SOX)² when it discharged him from

¹ 49 U.S.C A. § 60129(a) (West Supp. 2005).

² 18 U.S.C.A. § 1514A (West 2007).

employment. After a hearing, a Labor Department Administrative Law Judge (ALJ) dismissed Leak's complaint. Both parties appealed that decision. We affirm.

BACKGROUND

Dominion operates electric and natural gas utilities in several states, including Ohio. It employed Leak as a Technical Specialist in its Gas Planning Group. His supervisor was Timothy McNutt, manager of the Gas Planning Group.

The Public Utilities Commission of Ohio (PUCO) regulates Dominion's natural gas operations in Ohio. In early 2003 PUCO conducted a safety audit of those operations and issued a Notice of Probable Non-Compliance (Notice) to Dominion on April 18, 2003. The Notice required Dominion to provide further information on six issues identified during the audit. One of those issues was that Dominion did not have sufficient documentation to justify how it established the maximum allowable operating pressure (MAOP) for portions of its gas pipeline operations in Northeast Cleveland (the Northeast Shop).³

On or about June 22, 2004, Dominion assigned Leak to serve as lead on a project (the Project) to resolve the MAOP deficiencies cited in the Notice.⁴ Leak was responsible for gathering historical records containing information about the MAOPs of systems in the Northeast Shop, performing field work to determine the current operating pressure of those systems, and comparing the current operating pressures with the historical records.⁵

Dominion maintained a geographical database, the Strategic Asset Management System (SAMS), which contained information about Dominion's pipeline systems. As part of the Project, Leak was expected to ensure that the MAOP numbers from the SAMS matched the MAOP values maintained by the Northeast Shop and Planning Department.⁶

Leak was also required to run computer models to determine if the documented MAOP values were capable of distributing gas to customers on peak days.⁷ To create these computer models, information was to be extracted from the SAMS and fed into modeling software that Dominion used. If a model indicated that the documented MAOP could not provide customers with gas on a peak day, Leak was expected to develop

³ ALJ's Initial Decision and Order (I. D. & O.) at 3; Respondent's Exhibit (RX) 1.

⁴ Hearing Transcript (Tr.) 96; Complainant's Exhibit (CX) 96.

⁵ I. D. & O. at 4; CX L; RX 7.

⁶ Tr. 90, 1079; RX 7.

⁷ I. D. & O. at 4; Tr. 305-07, 668-69, 678-79.

different options to remedy the deficiency.⁸ Leak was then expected to forward his models and options to Clarence Moore, Dominion's Manager of Compliance, who would make the final decision about which options Dominion would provide to PUCO for review.⁹

As the Project progressed, Leak met weekly with McNutt.¹⁰ In October 2004, McNutt was concerned that Leak was not making sufficient progress on the MAOP Project. McNutt decided to create a document describing steps Leak would need to follow to complete the Project.¹¹

On November 19, 2004, Leak submitted a memorandum to McNutt; Bob Majikas, Dominion's Area Manager; and Mike Andrejcek, Northeast Shop Operations Supervisor, the subject of which was four pipeline systems in the Northeast Shop, designated NM 2, 8, 9, and 11.¹² Leak opined that these four systems were connected or "looped," and therefore must be operated at an MAOP of 25 psig, which was the lowest MAOP of those four systems.¹³ Leak and McNutt discussed the content of this memorandum on November 23, 2004. McNutt disagreed with Leak's conclusion and explained to him that he needed to consider alternative operational models, such as allowing each system to operate under a separate and distinct MAOP.¹⁴

Leak and McNutt met several times in December 2004. In January 2005, Leak believed that NM 2, 8, 9, and 11 were unsafe because they were operating above 25 psig.¹⁵ McNutt disagreed with Leak's conclusion. Brian Witte, Dominion's Consulting Engineer, testified that the pipelines in those systems could handle up to 3000 psig, so Dominion was operating the systems well below the strength of the pipelines.¹⁶

⁸ I. D. & O. at 4, citing Tr. 245-46, 349, 679-81, 856-57.

⁹ I. D. & O. at 4.

¹⁰ Tr. 153, 697.

¹¹ *Id.* at 698-99.

¹² "NM" was an abbreviation used to refer to medium pressure systems in the Northeast Shop. For example, NM 2 would refer to Northeast Shop medium pressure system number 2. Tr. 652; I. D. & O. at 4.

¹³ CX S; RX 8; Tr. 119-121.

¹⁴ Tr. 704-06, 829-32.

¹⁵ *Id.* at 388-90.

¹⁶ *Id.* at 545.

On February 7, 2005, McNutt gave Leak his annual performance evaluation. He gave Leak a B+ rating for his overall performance and a B for his work on the Project. A B performance rating indicated that an employee had performed below expectations.¹⁷ Pursuant to Dominion's employment policies, an employee who receives a B rating is typically placed on a development plan designed to improve aspects of his or her performance.¹⁸

McNutt and Kathleen Johnson, a Human Resources Generalist, discussed placing Leak on a development plan. They also discussed options for transitioning Leak to another position if he did not improve under the development plan.¹⁹ Leak asked McNutt what options were available if he disagreed with his performance evaluation. In response, McNutt provided Leak with information regarding Dominion's Problem Resolution process. The purpose of Dominion's Problem Resolution process is "[t]o provide a way for employees to resolve employment-related issues, to seek clarification, and/or to appeal decisions regarding their jobs or policy interpretations."²⁰

Leak filed two Problem Resolutions on February 11, 2005. One was in response to his performance evaluation, and the other was based on his concerns regarding the Project.²¹ Leak indicated that he was concerned that work product was being produced under his name that did not reflect justifiable MAOPs for the Northeast Shop.²² Leak submitted copies of the Problem Resolutions to Ken Barker, Vice President of Dominion. Also on February 11, Leak placed an anonymous phone call to a Dominion hotline that allowed employees to express concerns regarding ethical issues within the company.²³

On February 23, 2005, Leak met with McNutt; Johnson; and Phillip Powell, Director of Planning and Reliability, to discuss his Problem Resolutions. Early in the meeting, Leak asked if he could tape record the meeting. None of the attendees knew Dominion's policy regarding recording meetings. During the meeting, Powell realized that Leak was in fact recording the meeting. The meeting was stopped so they could ascertain Dominion's policy regarding recording meetings from Robert Westbrooks, Dominion's in-house counsel.²⁴

¹⁷ RX 31.

¹⁸ Tr. 1008, 1013.

¹⁹ *Id.* at 841-43, 925.

²⁰ *Id.* at 173-74; CX MM.

²¹ CX QQ, RR; RX 32.

²² I. D. & O. at 10, citing Tr. 176.

²³ Tr. 177; CX OO, TTTT.

²⁴ *Id.* at 196-201; RX 38.

Leak was called back to the meeting. He was told that he could not tape the meeting and that he would be subject to disciplinary action if he removed the tape he had already created from Dominion's premises.²⁵ Although the meeting reconvened, the attendees did not resolve the issues raised in the Problem Resolutions. After the meeting, Powell spoke with McNutt and Johnson and decided that a development plan was necessary for Leak.²⁶

Leak and McNutt met on March 11, 2005, to discuss several systems in the Northeast Shop. Leak asked McNutt to sign MAOP justification records that Leak had completed as part of the Project. According to Leak, McNutt needed to sign these documents to "underscore the value of a collaborative effort" and ensure "the inclusion of key documentation,"²⁷ including uprate files. Uprate files were collections of documents used to justify increases to system pressures.²⁸ McNutt told Leak that he "did not see any value in ... signing the documents and was not going to sign them."²⁹

On March 15, 2005, Leak contacted Lane Miller, a training instructor at the United States Department of Transportation's Transportation Safety Institute. Leak testified that he contacted Miller to get his interpretation of regulations governing operating pressures and shared information with Miller regarding the Project. According to Leak, Miller asked him, "Have you been caught yet?"³⁰ Leak also learned from Miller that the looped systems in the Northeast Shop could be isolated with a blind plate, thereby unlooping those systems and permitting them to operate under different pressures.³¹

Two days later Leak attended a meeting with McNutt and Witte. During this meeting, Leak again asked McNutt to sign the MAOP justification records.³² McNutt refused to sign the records. McNutt testified that Leak indicated that he would not

²⁵ I. D. & O. at 12, citing Tr. 201; CX CCC.

²⁶ Tr. 750, 755-57, 791, 937.

²⁷ CX QQQ; RX 17, 40.

²⁸ Tr. 48, 130, 262, 293.

²⁹ CX III.

³⁰ Tr. 216, 443.

³¹ *Id.* at 316.

³² *Id.* at 215.

perform further work on the Project without McNutt's signature on those records.³³ Leak also told McNutt and Witte that he had contacted Miller and discussed the Project with him. McNutt indicated that he was concerned that Leak chose to circumvent Dominion's safety personnel and that it was not Leak's responsibility to perform code interpretation.³⁴

Powell met with McNutt, Johnson, Westbrooks, Moore, HR manager Charles Johnston, and Dominion counsel Kenneth Stark on March 21, 2005. They decided to determine if Leak had legal or safety reasons for insisting that McNutt sign the justification records, and based on what Leak told them, they would determine whether to give Leak an Employment Decision Day.³⁵ During an Employment Decision Day a manager meets with an employee and then sends that employee home for a day to allow the employee to decide if he wants to continue employment with Dominion. Management provides the employee with certain forms at the meeting. If the employee chooses to stay, the employee must complete the forms and indicate how he is going to improve his performance. An Employment Decision Day may be issued without verbal or written warning.³⁶

Johnston provided McNutt and Johnson with a script for the Employment Decision Day meeting and forms for Leak to complete.³⁷ Johnson testified that McNutt and she had planned to ask Leak at the meeting if he had any legal or safety reasons for being so insistent that McNutt sign the forms. If Leak could not provide any legal or safety reason, they would proceed with the meeting and give Leak an Employment Decision Day.³⁸

On March 23, 2005, McNutt requested that Leak come to his office, where Johnson and he were waiting to discuss the Employment Decision Day. McNutt had not given Leak advance notice about this meeting. McNutt began by telling Leak that they had reached an impasse on the MAOP Project. Leak then asked about the purpose of the meeting, and McNutt told him that the purpose was explained in the document that was on the table in front of Leak.³⁹ Leak asked if he could record the meeting, and both

³³ *Id.* at 574.

³⁴ *Id.* at 870.

³⁵ I. D. & O. at 16.

³⁶ CX FFFF, QQQQ; RX 47-48; Tr. 776-77, 780-83, 1004-05, 1048.

³⁷ RX 47-48.

³⁸ Tr. 1022-1024.

³⁹ RX 49-51; Tr. 226-30.

McNutt and Johnson told him “no.”⁴⁰ According to McNutt and Johnson, Leak replied that if he could not tape the meeting, then the meeting was “over.”⁴¹ Leak testified that he then asked to be excused from the meeting.⁴²

Leak got up and started to walk out of the office. McNutt told Leak, “If you leave my office, you’re terminated.”⁴³ Leak testified that he heard McNutt say, “If you leave the room you’re going to be terminated.”⁴⁴ According to McNutt and Johnson, Leak replied, “Then terminate me.”⁴⁵ McNutt then said, “You’re terminated.”⁴⁶

McNutt and Johnson followed Leak to his desk and asked him if he would take a copy of the document that they had attempted to give him during the meeting, and Leak said “no.”⁴⁷ McNutt directed Leak to shut his computer down. Leak gathered his personal belongings and began to leave the premises. McNutt and Johnson met Leak in a stairwell and retrieved Leak’s identification badge and company cell phone.⁴⁸

Later that day Dominion issued a letter discharging Leak from employment. The letter, written by McNutt, stated that Leak was discharged for insubordinate conduct:

This morning Kathy Johnson and I attempted to hold a meeting with you to discuss your recent insubordinate conduct in refusing to perform your assigned duties in connection with the MAOP project. ... At the beginning of the meeting this morning, you refused to participate unless you could tape record the meeting. ... In an effort to convince you to meet without a tape recorder, we attempted to show you the agenda, or “script” of topics we wanted to discuss. You rose to leave the meeting, and I informed you

⁴⁰ Tr. 229.

⁴¹ RX 50-51; Tr. 883-84.

⁴² Tr. 229.

⁴³ *Id.* at 884.

⁴⁴ *Id.* at 230; *see also* CX HHHH (Leak’s Meeting Notes)(“if you leave the office you are fired.”).

⁴⁵ RX 50-51; Tr. 884, 1026-28.

⁴⁶ Tr. 884.

⁴⁷ *Id.* at 884, 1027.

⁴⁸ *Id.* at 232-233.

that if you left, your employment would be terminated. You replied “then terminate me.” Further efforts to convince you to meet without the tape recorder were unsuccessful, and you left us with no choice but to terminate your employment, effective today, due to your insubordinate refusal to attend the meeting.^[49]

Procedural History

Leak filed a complaint with the Labor Department’s Occupational Safety and Health Administration (OSHA) on May 6, 2005. He alleged that Dominion violated the PSIA and the SOX by discharging him in retaliation for voicing concerns that the company was “failing to maintain their gas distribution systems at the pressure levels required by the Federal Code of Regulations.”⁵⁰ OSHA investigated and found “no reasonable cause to believe that [Dominion] violated [Leak’s] rights under SOX or [PSIA].” Leak filed timely objections to OSHA’s findings and requested a hearing before an ALJ.

On April 17, 2006, Dominion filed a Motion for Summary Decision, seeking dismissal of the complaint. Leak filed his own Motion for Summary Decision on April 27, 2006, arguing that he was entitled to judgment as a matter of law. On May 12, 2006, the ALJ issued an Order Granting in Part and Denying in Part Respondent’s Motion for Summary Decision, and Denying Complainant’s Motion for Summary Decision. The ALJ dismissed the SOX portion of Leak’s complaint, but denied Dominion’s request for dismissal of the entire complaint because a genuine issue of material fact existed with respect to Leak’s claim of PSIA retaliation.

The ALJ held a formal hearing from May 23 to May 26, 2006, and from July 12 to July 13, 2006, in Cleveland, Ohio. Both parties appeared and were represented by counsel. On January 26, 2007, the ALJ issued an Initial Decision and Order. The ALJ held that Leak proved that he engaged in several instances of PSIA-protected activity while working on the Project, but he failed to prove that his protected activity was a contributing factor in Dominion’s decision to terminate his employment.⁵¹

Leak filed a Petition for Review with the Administrative Review Board (ARB or Board) on February 12, 2007, seeking reversal of the ALJ’s ruling on his complaint.⁵²

⁴⁹ CX LLLL.

⁵⁰ Complaint at 1.

⁵¹ I. D. & O. at 29.

⁵² Leak did not appeal the ALJ’s dismissal of the SOX portion of his complaint. Complainant’s Petition for Review, *see* 29 C.F.R. § 1981.110(a) (“The petition for review must specifically identify the findings, conclusions or orders to which exception is taken.

We issued a Notice of Review and Briefing Schedule, and both parties filed briefs. Dominion also filed a Petition for Review on February 12, taking exception to three specific conclusions of law contained in the ALJ's I. D. & O. We issued a separate Notice of Review and Briefing Schedule for Dominion's Petition, and both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's I. D. & O.⁵³ As in cases arising under the employee protection provisions of the environmental and nuclear whistleblower statutes, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision.⁵⁴ The Board reviews the ALJ's findings of fact under the substantial evidence standard.⁵⁵ The ARB engages in de novo review of the ALJ's conclusions of law.⁵⁶

DISCUSSION

1. Governing Law

Congress passed the PSIA to enhance the safety of the nation's pipeline systems. The PSIA's employee protection provision prohibits discrimination against an employee who engages in certain types of protected activity:

(1) In general. – 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) –

Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.”).

⁵³ 49 U.S.C.A. § 60129(b)(3), 29 C.F.R. § 1981.110 (2008).

⁵⁴ See Administrative Procedure Act, 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8 (2006). See also Secretary's Order No. 1-2002, 67 Fed. Reg. 64, 272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

⁵⁵ 29 C.F.R. § 1981.110 (b).

⁵⁶ See Administrative Procedure Act, 5 U.S.C.A. § 557(b).

(A) provided, caused to be provided, or is about to provide or cause to be provided, to the employer or the Federal Government information relating to any violation or alleged violation of any order, regulation, or standard under this chapter or any other Federal law relating to pipeline safety;

(B) refused to engage in any practice made unlawful by this chapter or any other Federal law relating to pipeline safety, if the employee has identified the alleged illegality to the employer;

(C) provided, caused to be provided, or is about to provide or cause to be provided, testimony before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or any other Federal law relating to pipeline safety;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or any other Federal law relating to pipeline safety, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or any other Federal law relating to pipeline safety;

(E) provided, caused to be provided, or is about to provide or cause to be provided, testimony in any proceeding described in subparagraph (D); or

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or any other Federal law relating to pipeline safety.^[57]

To prevail, Leak must “demonstrate” that he engaged in activity that the PSIA protects and that the activity “was a contributing factor in the unfavorable personnel action” Dominion took against him, i.e., the discharge.⁵⁸ “Demonstrate” means to prove by a preponderance of the evidence.⁵⁹ A “contributing factor” is “any factor which, alone

⁵⁷ 49 U.S.C.A. § 60129(a).

⁵⁸ See 49 U.S.C.A. § 60129(b)(2)(B)(iii).

⁵⁹ *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004) (interpreting “demonstrate” in employee protection section of Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (West 2008)).

or in combination with other factors, tends to affect in any way the outcome of the [unfavorable personnel] decision.”⁶⁰

2. Leak Engaged in PSIA-Protected Activity and Dominion Was Aware of his Protected Activity.

We agree with the ALJ’s conclusion that Leak engaged in several PSIA-protected activities while working on the Project.⁶¹ The PSIA protects an employee who provides information to his employer regarding “any violation or alleged violation”⁶² of pipeline safety law. An employee who refuses to perform a task because of such a safety concern need not establish that the allegedly illegal practice in which he has refused to engage actually violated a Federal law relating to pipeline safety. He need only prove that his refusal to work “was properly communicated to the employer and was based on a reasonable and good faith belief that engaging in that work was a practice made unlawful by a Federal law relating to pipeline safety.”⁶³

The ALJ held that Leak engaged in protected activity by sending the November 19, 2004 memorandum to McNutt, Majikas, and Andrejcek, and by discussing the looped status of the Northeast Shop with McNutt on November 23, 2004. The memo contained Leak’s opinion that four of the Northeast Shop pipeline systems must be operated at a 25 psig MAOP. The ALJ found that “a person with Leak’s training and experience ... could have reasonably interpreted the Project, the events giving rise to its inception, and those dictating its completion in the manner in which [Leak] did.”⁶⁴ Substantial evidence supports this holding and rationale. When he created the memorandum, Leak was concerned that certain documents generated during the Project “did not reflect what actually happened in the field.”⁶⁵ Furthermore, Leak testified that at the November 23 meeting, McNutt told him that NM systems 2, 8, 9, and 10 could be separated.⁶⁶ He

⁶⁰ *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)(1)).

⁶¹ I. D. & O. at 20.

⁶² 49 U.S.C.A. §60129(a)(1)(A).

⁶³ *See* Procedures for the Handling of Discrimination Complaints under Section 6 of the Pipeline Safety Improvement Act of 2002, 70 Fed. Reg. 17,889, 17,890-91 (Apr. 8, 2005).

⁶⁴ I. D. & O. at 20 n.25.

⁶⁵ Tr. 120; see also RX 8.

⁶⁶ Tr. 133.

testified that he told McNutt that unlooping those systems “mov[ed] away from the letter and the spirit of the pipeline safety rules and regulations.”⁶⁷

The record also supports the ALJ’s conclusion that Leak engaged in protected activity by submitting the Problem Resolutions to Dominion on February 11, 2005, and by transmitting copies of those documents to Ken Barker on March 18, 2005.⁶⁸ In one of the Problem Resolutions, Leak opined that Dominion needed to reduce the MAOP for ninety percent of the Northeast Shop. He also expressed his concern that Dominion might review, negate, or purge key documents from the Project.⁶⁹ Thus, the record contains evidence that Leak was worried about operating pressure in Dominion’s pipeline system and about documents relating to that pressure.

Substantial evidence supports the ALJ’s conclusion that Leak engaged in protected activity by insisting that McNutt sign the MAOP justification records and by refusing to work without the signature.⁷⁰ Leak apparently believed that unless McNutt signed the records, portions of which contained Leak’s analysis, pipeline safety would be compromised. The fact that Johnson and McNutt had planned to ask Leak at the March 23, 2005 meeting if he had any legal or safety reasons for being so insistent that McNutt sign the records underscores the reasonableness of Leak’s concern about pipeline safety.⁷¹

Finally, the record supports the ALJ’s conclusion that Leak’s phone calls to the Department of Transportation’s Miller and Dominion’s complaint hotline constituted protected activity. In his call to the hotline, Leak stated that he believed that Dominion was not complying with PUCO’s MAOP requirements.⁷² And he testified that, when he spoke to Miller, he discussed aspects of the Project related to the PUCO mandate.⁷³

Dominion argues that Leak’s conversation with Miller does not constitute protected activity because Leak “contacted Mr. Miller regarding a regulatory issue – not a safety issue,” and therefore his conversation “did not implicate safety definitively and specifically.”⁷⁴ But that argument is based only upon Leak’s stated purpose for making

⁶⁷ Tr. 143.

⁶⁸ I. D. & O. at 9-10, 20.

⁶⁹ CX QQ, RR, XXX; RX 32.

⁷⁰ I. D. & O. at 20, 23.

⁷¹ Tr. 1022-23; RX 48.

⁷² CX OO, PP.

⁷³ Tr. 216, 316-19.

⁷⁴ Initial Brief of Respondent Dominion Resources Services, Inc. at 7.

the phone call to Miller and ignores what Leak told Miller. The ALJ found that “[Leak]’s notes reflect that he discussed specific aspects of the Project with Mr. Miller, aspects that Leak believed would result in a violation of pipeline safety rules and regulations.”⁷⁵ Therefore, Leak’s testimony and his notes about the conversation with Miller constitute substantial evidence to support the ALJ’s finding.⁷⁶

In sum, the record clearly indicates that Leak engaged in PSIA-protected activity prior to being discharged.⁷⁷ Furthermore, Dominion does not dispute that it was aware of these activities prior to discharging Leak.⁷⁸

3. Leak Did Not Prove that His Protected Activity Was a Contributing Factor in the Decision to Discharge Him.

Discharging Leak constitutes an unfavorable personnel action.⁷⁹ As noted earlier, Leak must prove by a preponderance of the evidence that his protected activity contributed to Dominion’s decision to fire him. The company argues that it discharged Leak because he refused to attend the March 23, 2005 meeting. The ALJ held that Leak failed to prove that his protected activity was a contributory factor in his discharge.⁸⁰

Leak did not present direct, i.e., “smoking gun,” evidence that protected activity contributed to Dominion’s decision. Even so, he could prevail if he proved by a preponderance of the evidence that Dominion’s reason for discharging him was a pretext for discrimination. In proving pretext, Leak must prove not only that the asserted reason is false, but also that discrimination was the true reason for the discharge.⁸¹

⁷⁵ I. D. & O. at 21.

⁷⁶ Tr. 216, 316-19; CX RRR.

⁷⁷ In its Petition for Review, Dominion contends that the ALJ erred by concluding that Leak’s refusal to consider alternative MAOP scenarios that did not reflect the actual status of the Northeast shop constituted protected activity. Respondent’s Petition for Review at 1. Because substantial evidence supports the ALJ’s conclusion that Leak engaged in other protected activities, we do not rule on this alleged error.

⁷⁸ At the hearing McNutt and Powell testified that Dominion was not aware that Leak made the anonymous hotline complaint. Tr. 790-91, 941. Dominion does not dispute knowledge of the hotline complaint before us.

⁷⁹ 49 U.S.C.A. § 60129(a)(1).

⁸⁰ I. D. & O. at 22-28.

⁸¹ See *Calhoun v. United Parcel Serv*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 5 (ARB Nov. 27, 2002) citing *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) and *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

In his post-hearing brief to the ALJ, Leak argued that he was discharged for refusing to “engage in the unlawful activity of misrepresenting to the PUCO the true state of Dominion’s Northeast Medium Pressure Shop.”⁸² He contended that McNutt conspired with Johnson to “get rid of” him because he “refused to participate in what he perceived to be Dominion’s fraud” regarding its documentation of MAOPs. Leak also argued that the temporal proximity between his telephone call to Miller and his discharge is evidence of causation.⁸³ In his brief before us, Leak does not repeat the temporal proximity argument he presented to the ALJ. Instead, he provides a more elaborate explanation of the alleged conspiracy by McNutt and Johnson to discharge him from employment.

We understand Leak’s argument to be as follows. According to Leak, McNutt told him to provide McNutt with unsupported analyses that would justify increasing MAOPs despite Leak’s belief that such an increase would compromise pipeline safety. When Leak refused to do so, McNutt and Johnson decided to give him an Employment Decision Day and thereby “blackmail” him into complying with McNutt’s instructions. Leak argues that the meeting was a ruse, that its purpose all along was “to force him to abandon this protected activity or lose his job.” Leak contends that Dominion’s explanation for discharging him his – insubordinate refusal to attend the meeting – is phony because once at the meeting, McNutt and Johnson carried out their plan by “provoking” him into leaving, and thus being insubordinate, when they refused to permit him to tape record.⁸⁴

The ALJ found that the meeting was scheduled to discuss Leak’s safety and legal reasons for insisting that McNutt sign the MAOP justification records and, depending on Leak’s explanation, the company was going to issue Leak an Employment Decision Day. The ALJ thus rejected Leak’s contention that the reason for convening the meeting was a ruse.⁸⁵ The ALJ further found that McNutt and Johnson did not provoke Leak. He wrote:

When the March 23, 2005 meeting was convened, neither Mr. McNutt nor Ms. Johnson could have anticipated the way in which Leak reacted at the meeting, so as to be reasonably accused of crafting a plan to provoke and entrap him in advance. The discussion regarding safety and the possibility of an Employment Decision Day were not

⁸² Complainant’s Post-Hearing Brief at 18.

⁸³ *Id.* at 22-24.

⁸⁴ Initial Brief at 17-27.

⁸⁵ I. D. & O. at 23-24.

reached. Leak's own behavior . . . short-circuited the meeting and precipitated his ultimate termination.^[86]

The ALJ therefore concluded that Leak had failed to demonstrate that the purpose of the March 23, 2005 meeting or the reaction to his insubordination at the meeting were pretexts.⁸⁷

The ALJ's recommended decision reflects a very thorough analysis of all of the evidence before him.⁸⁸ We have examined the entire record and find that substantial evidence in the record as a whole supports the ALJ's pretext findings. Leak has not convinced us that the ALJ's conclusion is unfounded. He merely repeatedly asserts that "the record substantiates" his version of the facts, or that "all of these facts taken together clearly establish" that the meeting was a ruse.⁸⁹ Leak does not inform us, for instance, when or where the ALJ ignored record evidence or that the ALJ assigned disproportionate weight to certain evidence. Essentially, Leak argues that the ALJ erred by not accepting his version of the evidence. But the substantial evidence standard requires us to uphold findings of fact that are supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice" had the matter been before us de novo.⁹⁰

CONCLUSION

Since substantial evidence supports the ALJ's conclusion that Leak did not demonstrate that his protected activity contributed to Dominion's decision to discharge him, his claim fails. As a result we **DENY** Leak's complaint.

Furthermore, we hold that substantial evidence supports the ALJ's finding that Leak's phone calls to the Department of Transportation's Miller were protected activity. We also conclude that given our concurrence with the ALJ's finding that Leak engaged in

⁸⁶ *Id.* at 24.

⁸⁷ *Id.* Dominion argued that the ALJ erred in inferring that McNutt was biased because he participated in the March 23rd meeting and decided to terminate Leak's employment at the meeting. The ALJ made it clear that this inference alone was not enough to prove that Dominion retaliated. Therefore, since we find in Dominion's favor here, we do not find it necessary to address Dominion's argument.

⁸⁸ *Id.* at 2-18.

⁸⁹ Initial Brief at 15, 16.

⁹⁰ *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

some protected activity and our ultimate determination that Dominion prevails in this case, it is unnecessary for us to address the two remaining grounds for Dominion's appeal. Accordingly, we **DENY** Dominion's petition for review.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge