



In the Matter of:

ROBERT M. ARMSTRONG,
COMPLAINANT,

ARB CASE NO. 14-023

ALJ CASE NO. 2012-ERA-017

v.

DATE: September 14, 2016

FLowsERVE US, INC.,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Robert M. Armstrong, *pro se*, Mt. Holly, North Carolina

For the Respondent:

**Melissa M. Goodman, Esq. and Arrissa K. Meyer, Esq.; *Hayes and Boone, LLP*;
Dallas, Texas**

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*. Chief Administrative Appeals Judge Igasaki, concurring.

DECISION AND ORDER OF REMAND

This case arises under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C.A. § 5851 (Thomson Reuters 2012), as implemented by regulations codified at 29 C.F.R. Part 24 (2015). Complainant Robert M. Armstrong filed a complaint alleging that Respondent Flowserve US, Inc. violated the ERA by discharging him from employment. On January 15,

2014, an Administrative Law Judge (ALJ) issued a Decision and Order Granting Respondent's Motion for Summary Decision and Dismissing the Complaint (D. & O.). We hold that Armstrong raised a genuine issue of material fact regarding the cause of the adverse actions taken against him and that summary judgment should not have been granted. For the following reasons, we reverse the ALJ's D. & O. and remand the case for an evidentiary hearing on the merits.

FACTUAL AND PROCEDURAL BACKGROUND¹

Flowserve is a corporation that manufactures pumps, valves, and seals for use in a variety of industries, including nuclear power generation. Armstrong began his employment with Flowserve in 1978. During his employment he held various positions, but at the time of his discharge, he was a machinist at Flowserve's Charlotte Nuclear Service Center. In December 2011, Armstrong became concerned about defects in a discharge spacer on a pump that Flowserve was producing. At that time, he expressed his concern to his co-workers. According to Armstrong, Doug Miller, a Flowserve employee certified to perform magnetic particle tests, performed a preliminary test on the spacer and told him that it failed the test. Christopher Carter, another employee certified to perform magnetic particle tests, performed a subsequent test on the spacer and reported that the part passed.²

Despite Carter's report, Armstrong continued to believe that the part was defective. Consequently, in February 2012, Armstrong initiated a "Part 21 Meeting"³ where he discussed his concerns about the defective part with Miller, Carter, Christopher Robinson (General Manager of Operations), Keith Wilson (Production Supervisor), and two other employees.⁴ Around the same time, Armstrong also contacted the NRC to report his concerns about the

¹ The facts for the Background section are taken from the undisputed facts, the Affidavit of Robert M. Armstrong (Armstrong Affidavit) and other evidence in the record. For the purposes of determining whether summary decision is proper, this evidence is viewed in the light most favorable to the party opposing summary decision, i.e., Armstrong.

² Armstrong Affidavit at 3.

³ "Part 21" refers to Part 21 of Title 10 of the Code of Federal Regulations, which describes companies' obligations to inform the Nuclear Regulatory Commission of safety violations. The parties do not recount the events of this meeting.

⁴ The date of this meeting is not identified but the record suggests that it occurred sometime after the spacer was first formally tested on February 9, 2012. Respondent Flowserve US, Inc.'s Motion for Summary Decision and Brief in Support (Motion), Exhibit (RX) C-12.

defective spacer and improper testing.⁵ Following the Part 21 Meeting, Robinson ordered another test of the part. The spacer was tested again on February 22, 2012.⁶ The part again passed, but Armstrong did not believe that the test was performed correctly.⁷ The parties dispute whether Armstrong complained about the spacer after the final test.

Armstrong asserts that following his reports of the suspected defects, “there was a noticeable difference in the way I was treated”⁸ On February 29, 2012, after working on a machine that needed oiling, Armstrong forgot to return an oil can to the storage locker. The following day, Flowserve gave him a written warning for failing to replace the oil can. Armstrong suspected the warning was in retaliation for the Part 21 Meeting because previously, other employees, including himself, had failed to return hazardous materials to the storage lockers, but no other employee had ever been reprimanded for failing to do so.⁹

On March 8, 2012, Armstrong left a voicemail informing James Wilson, his supervisor, that he intended to take time off on March 13, and 14, 2012. The following day, Wilson denied Armstrong’s request. Armstrong then told Wilson that he would take the two days off without pay, and he understood that Wilson agreed.¹⁰ When Armstrong returned to work, Flowserve gave him a “Final Written Warning” for failure to report to work as scheduled on March 13 and 14. Again, Armstrong suspected that the warning was retaliation for the Part 21 Meeting since Flowserve had never before denied his advance request for vacation time.

On May 15, 2012, Wilson and Robinson told Armstrong that, to complete a critical work order, he would be required to perform line-bore work during an additional 12-hour shift. Robinson announced the importance of this order to all Charlotte Nuclear Service Center employees. The parties dispute the timing of Respondent’s order as well as whether Armstrong’s presence was necessary. According to Armstrong, he told Robinson that he had pre-existing personal obligations as well as knee trouble that he worried would preclude him from working the second shift. Armstrong also asserts that he explained to Robinson that he

⁵ Respondent submitted a document attached to its summary decision motion entitled “Armstrong’s Statement to Melanie Checkle of the NRC,” but it is undated. RX C-11. This document contains a detailed description of Armstrong’s concerns about defects in spacer and improper testing performed on the part.

⁶ RX C-13.

⁷ Armstrong Affidavit at 3.

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.* at 5.

could finish the necessary work within the deadline without working the second shift. Armstrong did not work the second shift. The following day, Armstrong stayed late to instruct another employee to operate the necessary equipment, and that employee finished the job within 6 hours.¹¹

On May 15, 2012, Flowserve initiated a “Termination Review,” recommending Armstrong’s discharge. The review included the warnings he received for the oil can violation and his absences in March and May 2012. Four Flowserve managers approved the Termination Review. On May 23, 2012, three of those managers met with Armstrong and informed him that his employment was terminated. Armstrong believed the termination was retaliatory since never, in his 34-year tenure, had Flowserve required him to work a second shift. Flowserve issued Armstrong a letter describing the reasons for his discharge on April 3, 2012.¹²

Armstrong filed a complaint with the Occupational Safety and Health Administration (OSHA) on June 1, 2012, alleging that Flowserve violated the ERA by discharging him for reporting a safety violation. OSHA dismissed his complaint, and Armstrong requested a hearing before an ALJ. Prior to any hearing, Flowserve filed a Motion for Summary Decision and Brief in Support (Motion), with exhibits. Flowserve acknowledged that Armstrong engaged in ERA-protected activity prior to his discharge but argued that Armstrong’s disciplinary history “demonstrates that his protected activity was not a contributing factor” in his discharge.¹³

Armstrong responded to the Motion by filing a Response and Brief in Opposition to Respondent’s Motion for Summary Decision (Response to the Motion), with exhibits. He argued that questions of fact remained as to whether his ERA-protected activity contributed to his discharge. In an affidavit included with the Response to the Motion, Armstrong stated: “I believe all the warnings occurring after February 2012, as well as my termination on May 23, were in retaliation for my protected activity three months prior, i.e. reporting defects in February 2012.”¹⁴

On January 15, 2014, the ALJ issued a Decision and Order Granting Respondent’s Motion for Summary Decision (D. & O.). The ALJ concluded that because Armstrong “failed to establish through specific evidence submitted for consideration the existence of a genuine issue of a material fact as to the essential element of the complaint, that protected activity was a

¹¹ *Id.* at 5-6.

¹² RX C-17 (“Your employment with Flowserve Corporation is terminated effective today May 23, 2012, due to violation of Flowserve’s policies, including but not limited to the Code of Business Conduct, and US Work Rules & Conduct Policy.”).

¹³ Motion at 13.

¹⁴ Armstrong Affidavit at 7.

contributing factor to the adverse employment action, the complaint must fail.”¹⁵ We find, however, that the ALJ misapplied the applicable law, improperly weighed conflicting evidence, and disregarded admissible evidence that he was bound to view in the light most favorable to Armstrong. In sum, Armstrong raised genuine issues of fact precluding summary judgment.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the ERA.¹⁶ The ARB reviews a grant of summary decision de novo under the same standard that ALJs must employ.¹⁷ Under 29 C.F.R. § 18.40(d)(2013), an ALJ may “enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”¹⁸

When reviewing a motion for summary judgment, the ALJ must assess the evidence, including all inferences that can reasonably be drawn from the evidence, in the light most favorable to the non-moving party. The moving party must come forward with an initial showing that it is entitled to summary decision.¹⁹ In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted.²⁰ Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.

¹⁵ D. & O. at 13.

¹⁶ Secretary’s Order No. 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. § 24.110.

¹⁷ *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 5 (ARB Sept. 26, 2012).

¹⁸ *See Siemaszko v. First Energy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (discussing summary judgment principles in federal courts). We have previously stated that 29 C.F.R. § 18.40 generally incorporates into the administrative proceedings the summary judgment procedure described in Rule 56 of the Federal Rules of Civil Procedure. *See Trammell v. New Prime, Inc.*, ARB No. 07-109, ALJ No. 2007-STA-018, slip op. 4-5 (ARB Mar. 27, 2009).

¹⁹ 29 C.F.R. § 18.40(d); *see, e.g., Siemaszko*, ARB No. 09-123, slip op. at 3.

²⁰ *Siemaszko*, ARB No. 09-123, slip op. at 3.

DISCUSSION

ERA Section 211 provides, in pertinent part, “No employer may discharge or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.)” 42 U.S.C.A. § 5851(a)(1)(A). Subsection 5851(a)(1)(F) contains a catchall provision that prohibits discrimination against an employee who “assisted or participated or is about to assist or participate . . . in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.”

To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, suffered an unfavorable personnel action, and that his/her protected activity was a contributing factor in the unfavorable personnel action. A “contributing factor” is any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the unfavorable personnel action.²¹ If the complainant establishes that protected activity was a contributing factor in the adverse personnel action, the respondent may nevertheless avoid liability if it demonstrates “by clear and convincing evidence that it would have taken the same unfavorable personnel action” in the absence of the protected activity.²²

An ALJ may enter summary judgment for a party if the evidence submitted shows that there is no genuine issue as to any material fact. The burden of producing evidence on summary

²¹ *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). *See also Addis v. Dep’t of Labor*, 575 F.3d 688, 691 (7th Cir. 2009).

²² 42 U.S.C.A. §§ 5851(b)(3)(C), (D); 29 C.F.R. § 24.109(b)(1); *Hoffman v. NextEra Energy, Inc.*, ARB No. 12-062, ALJ No. 2010-ERA-011 (ARB Dec. 17, 2013). We note that both parties, despite citing applicable law, appeared to apply, improperly, the three-part *McDonnell Douglas* burden shifting framework to this action. Respondent Flowserve US, Inc.’s Motion for Summary Decision at 15-16; Complainant’s Response and Brief in Opposition to Respondent’s Motion for Summary Decision at 11. The ERA, however, sets forth an independent, two-part evidentiary framework under which it is the complainant’s burden to demonstrate that his protected activity contributed to an adverse action. If he does so, the burden switches to the respondent to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. “For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves.” *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997). Under the ERA evidentiary framework, a complainant may prevail despite proving neither retaliatory motive nor pretext. *See Blackie v. D. Pierce Transp., Inc.*, ARB No. 13-065, ALJ No. 2011-STA-055, slip op. at 10 (ARB June 17, 2014).

decision “is not onerous and should preclude [an evidentiary hearing] only where the record is devoid of evidence that could reasonably be construed to support the [complainant’s] claim.”²³ Drawing from the federal law pertaining to summary judgment motions in federal court, we adopt the principle that a “genuine issue” exists if a fair-minded fact-finder (the ALJ in whistleblower cases) could rule for the nonmoving party after hearing all the evidence, recognizing that in hearings, testimony is tested by cross-examination and amplified by exhibits and presumably more context.²⁴

Summary decisions are difficult in “employment discrimination cases, where intent and credibility are crucial issues.”²⁵ And summary decision on the issue of causation is even more difficult in ERA whistleblower cases where Congress made it “easier for whistleblowers to prevail in their discrimination suits,” requiring only that the complainant prove that his protected activity was “a contributory factor” rather than the more demanding causation standards like “motivating factor,” “substantial factor,” or “but for” (determinative factor) causation.²⁶ Because direct evidence of retaliation is rare, complainants may rely on circumstantial evidence to prove that protected activity contributed to the unfavorable employment action in question. Even where a respondent asserts legitimate, non-discriminatory reasons for its actions, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could (1) discredit the respondent’s reasons or (2) show that the protected activity was also a contributing factor even if the respondent’s reasons are true.²⁷ Further, it is not enough for

²³ *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

²⁴ *Id.* (citing *Anderson*, 477 U.S. 242, 251-252 (“whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”)).

²⁵ *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993) (summary judgment standard “is applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues”). In revisiting its use of the phrase “added rigor,” the court of appeals explained that it applies the same summary judgment standard in employment cases as any other case but reaffirmed that its caution in *Sarsha* meant “to stress the fact that employment discrimination cases typically involve questions of intent and credibility, issues not appropriate for this court to decide on a review of a grant of summary judgment.” *Bagley v. Blagojevich*, 646 F.3d 378, 389 (7th Cir. 2011); *see also Conneen v. MBNA Am. Bank*, 334 F.3d 318, 325 n.9 (3d Cir. 2003).

²⁶ *Franchini*, ARB No. 11-006, slip op. at 9 (citing *Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999)).

²⁷ *See Trimmer*, 174 F.3d at 1101 (1992 amendments to the ERA changed the causation requirement to “contributory factor” and thereby eliminated the requirement of showing pretext prove unlawful discrimination).

Flowserve to point to evidence showing that Armstrong’s conduct violated company policy and constituted a legitimate basis upon which to fire him. Rather, Flowserve must show clearly and convincingly that Armstrong “would have” been fired—not simply that he “could have” been fired—in the absence of his protected activity.²⁸

At the summary decision stage, a complainant need not *prove* causation by a preponderance of the evidence, but need only produce admissible evidence sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.²⁹ Causation may be inferred from timing alone where an adverse action closely follows protected activity.³⁰ In this case, the ALJ failed to credit the inference of causation arising from the close temporal proximity of Armstrong’s protected activity to the adverse actions he suffered. In connection with his causation analysis, the ALJ also failed to favorably view material evidence and reasonable inferences therefrom, of the nature of the protected activity and the evolution of the unfavorable personnel action.³¹ As we explain below, Armstrong raised genuine issues of fact surrounding both causation and Respondent’s alleged reasons for the adverse action taken, thus precluding summary judgment.

Causation

Flowserve does not contest that Armstrong’s complaints about the spacer constituted ERA-protected activity, that Flowserve was aware of the protected activity, or that Flowserve took adverse action against him shortly after his protected activity.³² Flowserve argues however that temporal proximity in this case does not support an inference of causation because Armstrong’s protected activity and termination were separated by intervening rule violations that severed any possible causal link. The ALJ similarly reached his finding that Armstrong failed to

²⁸ *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014).

²⁹ *See Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009); *cf.* 29 C.F.R. § 24.104(f)(3)(an OSHA investigation will be conducted only if, among other things, complainant meets her burden to show “contributing factor” which “may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, giving rise to the inference that it was a contributing factor in the adverse action.”).

³⁰ *See Van Asdale*, 577 F.3d at 1003.

³¹ *Franchini, v. Argonne Nat’l Lab.*, ARB No. 13-081, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept. 28, 2015).

³² Motion at 11-12.

demonstrate “contributing factor” by discounting Armstrong’s circumstantial evidence of causation in favor of Flowserve’s evidence of legitimate business reasons.

Temporal Proximity and Knowledge

It is undisputed that following the Part-21 meeting, the alleged defective spacer was tested again. Respondent’s Exhibit C-13 provides evidence that the test occurred on February 22, 2012. While it is undisputed that the part again passed the test,³³ Armstrong explained in detail to the NRC why the test was inadequate. Respondent claims that Armstrong made no further comments about the defective part after this test.³⁴ Armstrong however testified that within a week of the Part-21 meeting and the final test, he again expressed concern about the defective part to Robinson and requested that the part be disassembled and retested in Vernon, California. According to Armstrong, Robinson became irritated with him and stated that the part had been tested enough.

Viewing the evidence in the light most favorable to Armstrong, as we must for purposes of summary decision, Armstrong’s protected activity occurred repeatedly beginning in January, continuing throughout February, and ending just days before February 29, 2012, when Respondent’s disciplined him for failing to properly store an oil can after use. The ALJ correctly recognized that when evaluating temporal proximity in the context of a causation analysis, the relevant time frame is not necessarily when Respondent terminated Armstrong’s employment but when the conduct leading up to the discharge began.³⁵ Because only a matter of days, at most a week, separated Armstrong’s protected activity from adverse action that contributed to his termination, causation may be inferred. Less than one month after Armstrong’s Part 21 meeting, he suffered another adverse action in the form of a written warning for failing to report to work on March 12 and 13. Finally, three months after his protected activity, Respondent issued Armstrong a final written warning and terminated his employment shortly thereafter.

Although the ALJ properly recognized that this evidence of close temporal proximity raised an inference of causation, he proceeded to improperly discount the evidence in light of Respondent’s proffer of evidence of legitimate business reasons. However, in a motion for summary decision, an employer cannot nullify the complainant’s evidence of contributory factor

³³ It was undisputed that Miller tested the part a second time, however Respondent’s Exhibits C-12 and C-13 suggest that Carter conducted both tests, given that he appears to have signed both tests under “Examiner’s Signature.”

³⁴ RX A at 3.

³⁵ D. & O. at 9; see *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013).

by simply presenting an independent lawful reason for the unfavorable employment action.³⁶ As we have explained in prior cases:

The complainant's burden of proving contributory causation may be met notwithstanding the existence of evidence demonstrating that the employer also had a legitimate reason for the unfavorable employment action taken against the employee. Because under the 'contributing factor' burden of proof standard a complainant is not required to prove that his protected activity was the only or the most significant reason for any adverse action taken against him, it is enough that the complainant establish that the protected activity affected in any way the adverse action at issue notwithstanding other factors cited by an employer in defense of its action.^[37]

And at the summary decision stage, a complainant need only produce admissible evidence sufficient to raise the inference that the protected activity was a contributing factor in the adverse action. It is well established under ERA and similar statutes that causation may be inferred from timing alone where an adverse action closely follows protected activity.³⁸ Here, undisputed facts in the record established not only close temporal proximity but also knowledge by the deciding officials.³⁹ Evidence of close temporal proximity *plus knowledge* raises an even stronger inference of causation than temporal proximity alone, and such evidence is widely recognized as sufficiently probative of a causal link to withstand summary decision.⁴⁰ As the Sixth Circuit

³⁶ *Franchini*, ARB No. 11-006, slip op. at 10, 12.

³⁷ *Franchini*, ARB No. 13-081, slip op. at 17.

³⁸ *See Van Asdale*, 577 F.3d at 1003; *Lockheed Martin Corp.*, 717 F.3d at 1136.

³⁹ As the ALJ indicated, both Wilson and Robinson knew of Armstrong's protected activity. D & O. at 10-12. Wilson was the deciding official in the first two adverse actions taken following Armstrong's protected activity, and Robinson was the deciding official in the final adverse action taken against Armstrong.

⁴⁰ *See, e.g. Franchini*, ARB No. 11-006, slip op. at 10 ("Even at five months, the ALJ recognized that sufficient temporal proximity of the protected activity to the adverse action may be found given precedent that six months was sufficiently close."); *Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357, 1361 (Fed. Cir. 1998)(the Whistleblower Protection Act contains a *per se* knowledge/timing test, such that when "a whistleblower demonstrates both that the deciding official knew of the disclosure and that the removal action was initiated within a reasonable time of that disclosure, no further nexus need be shown"); *see also Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 578-579 (4th Cir. 2015)(in an ADA retaliation claim, temporal proximity of three weeks plus evidence of knowledge found sufficient to establish a disputed issue of fact as to the causation element of the prima facie case).

stated in the context of the Age Discrimination in Employment Act standard for proving causation (higher than that of ERA): “[w]here an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation.”⁴¹ Armstrong claims Wilson and Robinson treated him differently shortly after his reports to them of suspected defects, as evidenced by a series of written warnings issued against him.⁴² A reasonable fact-finder could find that the string of adverse actions culminating in Armstrong’s termination is evidence that his protected activity was a contributing factor in those adverse actions, and exercising de novo review, we so conclude.⁴³

Motive

Armstrong also presented circumstantial evidence of motive, which bolsters his causation showing and further supports his theory of retaliatory discharge. The ALJ noted that Armstrong expressed additional concerns about the defective part in the context of a “NRC Part-21 meeting,” but the ALJ otherwise failed to consider the possible significance of this meeting. We take judicial notice that “Part 21” refers to Part 21 of Title 10 of the Code of Federal Regulations, which describes companies’ obligations to inform the Nuclear Regulatory Commission of safety violations. Though the meeting’s details are not in the record, the record does contain evidence that Armstrong convened the Part-21 meeting with six other Flowserve employees, including Robinson and Wilson, and informed them that he was elevating his concerns to the NRC. Respondent’s Exhibit C-11 is identified as “Armstrong’s Statement to Melanie Checkle of the NRC” that details Armstrong’s concerns about the defective spacer including his statement that the “management at Flowserve Charlotte I feel is more concerned with the numbers for the end of the month and shipping product. I fully respect that, but a defective product in a safety related pump for nuclear power plant is not acceptable.”⁴⁴

Robinson (Operations Manager) and Wilson (Production Supervisor) were managers responsible for Flowserve’s performance. Armstrong’s repeated concerns about the spacer had the potential to slow production and, though the part was ultimately shipped, Armstrong’s criticism of that decision, as well as his allegations of improper testing of the part, may have

⁴¹ *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir. 2008).

⁴² Armstrong Affidavit at 4-7.

⁴³ *See Mahony v. Keyspan Corp.*, 2007 WL 805813, *6 (E.D.N.Y. Mar. 12, 2007).

⁴⁴ RX C-11.

irritated his managers.⁴⁵ Given that evidence suggests that Armstrong, dissatisfied with Flowserve's response, took his safety complaints to the regulating agency, a factfinder could reasonably infer that Flowserve had a motive to retaliate against Armstrong, and again, reviewing the evidence de novo, we so conclude.⁴⁶ Accordingly, he raised genuine issues of material fact pertaining to causation that preclude summary decision on that element.

Pretext/ Legitimate business reasons

As mentioned above, Armstrong claims that Flowserve began treating him differently because he complained about the spacer. The ALJ failed to properly credit this and other evidence of pretext Armstrong presented. Less than a week after his protected activity, Flowserve reprimanded him for leaving an oil can outside of its locker. He states that “[t]here have been numerous times when other employees have forgotten to return hazardous materials to the appropriate storage lockers after working on the machine. To the best of my knowledge, no one has ever been reprimanded for doing so.”⁴⁷ The ALJ failed to view this admissible evidence of disparate treatment in the light most favorable to Armstrong and also improperly weighed the evidence against Flowserve's contrary evidence. In ruling on a motion for summary decision, neither the ALJ nor the Board may weigh the evidence to determine the truth of the matters asserted.⁴⁸ Although the ALJ stated the correct burden a non-movant must satisfy in responding to a motion for summary decision,⁴⁹ he misapplied the standard. Armstrong is only required to

⁴⁵ Armstrong states that following the Part-21 meeting and the second magnetic particle test, he asked Robinson that the part containing the defective spacer be disassembled and tested again. According to Armstrong, Robinson grew irritated and told him the part had been tested enough. Armstrong Affidavit at 3-4.

⁴⁶ See *English v. General Elec. Co.*, 496 U.S. 72, 89 (1990) (“[M]any, if not most, retaliatory incidents come about as a response to safety complaints that employees register with federal regulatory agencies.”).

⁴⁷ Armstrong Affidavit at 4. It is not altogether clear why the ALJ declined to credit Armstrong's disparate treatment testimony. D. & O. at 9. In any case, a “party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment.” *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 53 (1st Cir. 2000).

⁴⁸ *Siemaszko*, ARB No. 09-123, slip op. at 3. See also *Covarrubias v. CitiMortgage, Inc.*, --- Fed. Appx. ---, 2015 WL 5106376 (4th Cir. 2015) (“In our review of summary judgment, we do not weigh the evidence or make credibility determinations); *Jacobs*, 780 F.3d at 568-69 (“Summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits The court therefore cannot weigh the evidence or make credibility determinations.”).

⁴⁹ See D. & O. at 2-3 (“When an employer ‘asserts [in a motion for summary decision in an ERA case] legitimate, nondiscriminatory reasons for [the employer's decision and action], the

“point to specific evidence” to raise a question of material fact. Once he does so, the fact is disputed and must be resolved at a hearing.

Armstrong received another adverse personnel action within weeks of his protected activity. On March 8, 2012, Armstrong’s request for two days of leave (on March 13 and 14) was denied. Armstrong states that he had never been denied vacation time in his 34-year tenure with Respondent.⁵⁰ Armstrong testified that when he asked Wilson why he was not granted leave, Wilson replied that “he had better not comment.” When Armstrong insisted on a justification, Wilson stated that the plant was busy, and Armstrong was needed to complete necessary work. After Armstrong failed to show up, he was given a “Final Written Warning” on March 15 for taking an unapproved absence. Armstrong additionally presented evidence that there was no real business necessity, as Flowserve claimed, justifying its refusal to grant Armstrong leave. By asserting that his co-workers told him that they did not have enough work to perform on March 13 and 14 to keep them busy, Armstrong presented evidence showing that he may be able discredit Flowserve’s justification for denying him leave and insisting that he work on the days in question. The ALJ failed to view this evidence of pretext in the light most favorable to Armstrong and discounted it after improperly weighing it against Flowserve’s counter evidence.⁵¹ The ALJ committed clear error by conducting a “deliberation on the specific evidence submitted” by the parties and concluding that “the substantial evidence of record indicates” that Armstrong’s protected activities did not contribute to his discharge.⁵²

On May 15, 2012, Wilson and Robinson told Armstrong that, to complete a critical work order, he would be required to perform line-bore work during an additional 12-hour shift. The parties dispute the circumstances surrounding this order. Respondent claims it notified Armstrong of the schedule on the morning of May 15 so he would have time to go home, rest, and be ready to work the second shift.⁵³ Armstrong testifies however that he was not notified until approximately 2:00 pm and was told he would have to immediately begin working a 12-hour shift. He further testified that he notified Robinson that he had pre-existing obligations and, in any case, he did not feel he was physically capable of working the additional shift. He also explained to Robinson that he would certainly be able to finish the necessary work prior to the deadline without working a second shift. It is undisputed that he did not work the second shift on May 15 and that Respondent initiated a termination review the same day and terminated his

employee must point to specific evidence that demonstrates a dispute still exists in spite of the respondent’s proffered reasons [for the employer’s decision and action].”).

⁵⁰ Armstrong Affidavit at 4 (“Prior to making the report in February, I never had a vacation request denied.”).

⁵¹ D. & O. at 11.

⁵² *Id.* at 9, 13.

⁵³ RX A at 4.

employment effective May 23, 2013.⁵⁴ Armstrong stated that never in the course of his 34-year tenure with Respondent had he been required to work a second shift.⁵⁵ Here again, it appears the ALJ improperly weighed competing evidence: “After deliberation on the specific evidence submitted, this Administrative Law Judge finds”⁵⁶ The ALJ also failed to credit Armstrong’s circumstantial evidence of pretext—namely, that in 34 years he had never before been required to work a second shift, as well as other the evidence tending to indicate that the order to work the second shift was suspect.

After reviewing the evidence submitted on summary decision, we conclude that the ALJ engaged in improper fact-finding, failed to view certain evidence in the light most favorable to Armstrong, and disregarded evidence that could allow a finding of pretext.⁵⁷ A “party’s own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment.”⁵⁸ With respect to each adverse action taken against him, Armstrong presented sufficient evidence of disparate treatment, as well as evidence tending to show that his employer’s demands were unreasonable, to raise an inference of pretext, thus establishing additional disputed facts as to causation.

Respondent’s Affirmative Defense

If the complainant’s protected activity was a contributing factor in the adverse action, the employer may avoid liability only if it demonstrates “by clear and convincing evidence that it would have taken the same unfavorable personnel action” in the absence of the protected activity. 42 U.S.C.A. § 5851(b)(3)(D).⁵⁹ The burden of proof under the “clear and convincing” standard is more rigorous than the “preponderance of the evidence” standard and denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.⁶⁰ The U.S. Supreme Court has observed that the clear-and-convincing standard is

⁵⁴ RX C-15, C-17.

⁵⁵ Armstrong Affidavit at 6 (“In the 34 years that I worked for Flowserve, I had never been required to work second shift.”).

⁵⁶ D. & O. at 13.

⁵⁷ *Jacobs*, 780 F.3d at 570 (the district court improperly credited movant’s evidence and ignored key evidence offered by non-movant).

⁵⁸ *Santiago-Ramos*, 217 F.3d at 53.

⁵⁹ *Speegle*, ARB No. 13-074, slip op. at 11.

⁶⁰ *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

“reserved to protect particularly important interests in a limited number of civil cases.”⁶¹ Similarly, two circuit courts have commented, “For employers, this is a tough standard, and not by accident.”⁶²

The ARB has held that in determining whether a respondent has met this high burden, consideration is required of the combined effect of at least three elements applied flexibly on a case-by-case basis: (1) the independent significance of the non-protected activity cited by the respondent in justification of the personnel action; (2) the facts that would change in the absence of the complainant’s protected activity; and (3) “the evidence that proves or disproves whether the employer would have taken the same adverse actions [in the absence of protected activity].”⁶³ With respect to the last element, we explained that the respondent is “required to demonstrate through factors extrinsic to [complainant’s] protected activity that the discipline to which [complainant] was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations.”⁶⁴ The Federal Circuit has developed a similar three-part test for determining whether a respondent has met its burden under the Whistleblower Protection Act⁶⁵ of proving, by clear and convincing evidence, that it would have taken the same personnel action in the absence of a complainant’s whistleblowing: “[1] the strength of the agency’s evidence in support of its personnel action; [2] the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and [3] any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.”⁶⁶

In this case, the ALJ thoroughly addressed Flowserve’s evidence justifying the adverse actions taken against Armstrong. However, as we explained above, it is not enough for

⁶¹ *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90, 93 (1981).

⁶² *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013)(quoting *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)).

⁶³ *Speegle*, ARB No. 13-074, slip op. at 12; *see also Whitmore v. Dep’t of Labor*, 680 F.3d 1353, 1374 (Fed. Cir. 2012).

⁶⁴ *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 13-14 (ARB Sept. 30, 2015).

⁶⁵ The Whistleblower Protection Act contains affirmative defense language nearly identical to that contained in STAA, 49 U.S.C.A. §31105(b) (adopting the legal burdens of proof set forth in 49 U.S.C.A. §42121(b)). *Compare* 5 U.S.C.A. § 1221(e)(2) to 49 U.S.C.A. § 42121(b)(2)(B)(iv).

⁶⁶ *Carr v. Social Security Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). *Accord Whitmore*, 680 F.3d at 1370-1375.

Flowserve to point to evidence showing that Armstrong's conduct violated company policy and constituted a legitimate basis upon which to fire him. Flowserve must show convincingly, not only that it "could have," but also that it "would have" fired Armstrong in the absence of his protected activity. The surest way for an employer to prove what it "would have done" is to proffer evidence of similar discipline taken against non-whistleblower employees who committed similar transgressions. As a practical matter, employers have far greater control over evidence of disciplinary actions taken against its employees than an employee does. Here, the only documentary evidence of any discipline taken by Flowserve against one of its employees was that taken against Armstrong. Without evidence that Flowserve disciplined employees in an evenhanded, nondiscriminatory manner, it is difficult for an employer to demonstrate clearly and convincingly that it would have acted against an employee in the absence of protected activity.⁶⁷

Moreover, Armstrong proffered evidence of disparate treatment, motive, and other evidence tending to discredit Flowserve's justifications for discipline. Even under the lower burden of proof for employers in Title VII cases, a plaintiff may withstand summary judgment with sufficient evidence of unlawful motivation for the adverse action even if that evidence does not directly contradict or disprove an employer's proffered reasons for its actions.⁶⁸ As explained above, Armstrong's continuing concerns about a possibly defective part culminated in a Part-21 safety meeting and complaints to the NRC. The potential for this protected activity to slow production, attract the attention of a regulatory body, and reflect poorly on his managers is sufficient to impute retaliatory motive.

Armstrong's evidence of pretext provides additional support for an inference of retaliatory intent or motive. A complainant is not required to prove either pretext or retaliatory motive to prevail under the ERA. But a proffer of such evidence is sufficient to preclude summary judgment in a respondent's favor, since evidence of pretext creates a genuine issue of disputed fact regarding the legitimacy of respondent's reasons for discipline. Even in the context of Title VII—where a plaintiff's burden is higher and a defendant's burden is lower than under ERA—most circuits have held that evidence of pretext compels the denial of a defendant's motion for summary judgment.⁶⁹ As one commentator explained:

⁶⁷ *Accord Whitmore*, 680 F.3d at 1374 (the absence of any evidence that the agency took similar actions against similarly-situated non-whistleblowers may well cause the agency to fail to prove its case overall).

⁶⁸ *See, e.g., Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) ("In evaluating motions for summary judgment in the context of employment discrimination, we have emphasized the importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses.").

⁶⁹ *See, e.g., Jacobs*, 780 F.3d 562 (4th Cir. 2015); *Fasold v. Justice*, 409 F.3d 178 (3d Cir. 2005); *see also Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015); Leland Ware, *Inferring Intent from Proof of Pretext; Resolving the Summary Judgment Confusion in Employment*

When the plaintiff has proof of pretext, there are always unresolved questions regarding the employer's actual motive. . . . This inference (from evidence that purported legitimate reason is false) permits a plaintiff to prevail on the merits solely on the basis of evidence establishing pretext. At the summary judgment stage this is tantamount to a compulsory inference. The circuits that require evidence beyond proof of pretext are not drawing 'all justifiable inference' in the nonmovant's favor."^{70]}

Because the reasons for the adverse action are disputed, Respondent's evidence is insufficient to meet its affirmative defense burden.

Flowserve introduced solid evidence justifying the adverse actions taken against Armstrong. Nevertheless, Flowserve failed to offer any evidence that it subjected similarly situated non-whistleblowers to comparable discipline. Furthermore, Armstrong introduced evidence of retaliatory motive and pretext which raise questions of material fact regarding the legitimacy of Flowserve's business reasons. Accordingly, Flowserve cannot point to undisputed evidence that shows "clearly and convincingly" that Armstrong would have been terminated absent his protected activity.

CONCLUSION

Armstrong has created genuine issues of material fact as to both whether his ERA-protected activity contributed to his discharge, and whether Flowserve would have fired him in the absence of his protected activity. Accordingly, the ALJ's D. & O. is **REVERSED**, and the case is **REMANDED** for further proceedings consistent with this opinion.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

Discrimination Cases Alleging Disparate Treatment, 4 EMPLOYEE RTS. & EMP. POL'Y J. 37, 61 (2000).

⁷⁰ Leland Ware, *Inferring Intent from Proof of Pretext; Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 37, 71 (2000).

Chief Judge Igasaki, concurring:

I concur with the result of this decision only.

PAUL M. IGASAKI
Chief Administrative Appeals Judge