U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

PATRICIA BOOKER,

COMPLAINANT,

v.

EXELON GENERATION CO., LLC,

RESPONDENT.

ARB CASE NO. 2022-0049

ALJ CASE NO. 2016-ERA-00012
ALJ DREW A. SWANK

DATE: September 21, 2023

Appearances:

For the Complainant:
Patricia Booker; *pro se*; Delta, Pennsylvania

For the Respondent:
Donn C. Meindertsma, Esq.; *Conner & Winters, LLP*; Washington, District of Columbia

Before HARTHILL, Chief Administrative Appeals Judge, and PUST, Administrative Appeals Judge

DECISION AND ORDER AFFIRMING IN PART AND VACATING AND REMANDING IN PART

PUST, Administrative Appeals Judge:

This case arises under the whistleblower protections of the Energy Reorganization Act (ERA) and its implementing regulations.[1] On June 21, 2022, a United States Department of Labor (Department) Administrative Law Judge (ALJ) issued a Decision and Order Denying Complainant's Claims (D. & O.). The ALJ determined that Patricia Booker's (Complainant or Booker) whistleblower claim failed because Complainant failed to establish by a preponderance of the evidence

[1] 42 U.S.C. § 5851; 29 C.F.R. Part 24 (2023).

that her protected activity contributed to removal of certain job duties and the suspension of her Unaccompanied Access Authorization (UAA) which ultimately led to the termination of her employment from Exelon Generation Company, LCC (Respondent or Exelon). Specifically, the ALJ found that Respondent had legitimate reasons for altering Complainant's job duties and revoking her UAA, and her protected activity did not contribute to Respondent's decisions. The ALJ also found that Complainant did not establish that she experienced intentional harassment related to her protected activity, so her hostile work environment claim also failed. Complainant timely filed a Petition for Review with the Administrative Review Board (ARB or Board). We affirm, in part, and vacate and remand, in part.

BACKGROUND[2]

1. Relationship Between the Parties

Exelon Generation Company, LCC owns and operates nuclear power plants including, during the relevant timeframe,[3] the Peach Bottom Atomic Plant in Delta, Pennsylvania (Peach Bottom plant).[4] Respondent operates its nuclear facilities as a party to operating licenses issued by the National Regulatory Commission (NRC).[5] NRC regulations dictate the terms and processes by which individuals are granted and maintain unescorted access to nuclear facilities.[6]

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[2] Upon review of the evidentiary record, it is apparent that the ALJ's Factual History section omits many events that are pertinent to Complainant's whistleblower claim. In reciting these background facts noted in the evidentiary record, the Board makes no findings of fact but recites record evidence that is relevant to the underlying arguments on appeal.

[3] Due to a corporate divestiture in 2022, the Peach Bottom plant is no longer owned and operated by Exelon but instead by Constellation Energy Generation, LLC. Respondent's Brief (Resp. Br.) at 1 n.1.

[4] D. & O. at 1.

[5] *Booker v. Exelon Generation Co.*, LLC, ALJ No. 2016-ERA-00012, slip op. at 2 (ALJ Apr. 4, 2017) (Order Granting Motion for Summary Disposition).

[6] *See* 10 C.F.R. § 37.23 (2015); *see* Miscellaneous Corrections, 80 Fed. Reg. 45841, 48543 (Aug. 3, 2015) (effective Sept. 2, 2015). Throughout this Decision and Order, the Board cites to the NRC regulation that was in effect at the time relevant to Complainant's complaint. Since the time of Complainant's complaint, the NRC has made revisions, including technical revisions, to the relevant regulations. Thus, the Board cites to the version of the regulation that was in effect at the time of Complainant's complaint, which is not always the same year.

Complainant began working for Respondent as a temporary clerical employee in 1984, and at the time her UAA was revoked in 2014 she was a full-time Administrative Coordinator in the Maintenance Planning unit.[7] Complainant's responsibilities included typical administrative support work and also included processing work packages.[8] This work required her to obtain and review documents related to assigned maintenance tasks to "make sure that everything was complete, and to then . . . send it to final to be scanned, to be kept permanently for reference and as needed."[9] If Complainant identified discrepancies in the work package documentation, such as missing or illegible dates or signatures,[10] she would return the documents to the technicians for completion and re-return to her.[11]

From 2009 to 2014, Tom Powell (Powell) was the Maintenance Planning Manager for Respondent, and Complainant's supervisor.[12] As part of Complainant's duties to help maintain his schedule and communications, beginning in 2009, Powell granted Complainant access to his email inbox so she could update him about issues that arose while he was in a meeting or otherwise busy.[13]

When Powell was transferred to a different work unit at the Peach Bottom plant, John Connelly (Connelly) became the Maintenance Planning Manager. On April 7, 2014, Connelly took over Powell's duties, including the supervision of Complainant.[14]

2. Complainant's Protected Activity

In late 2013, Complainant raised a concern to Respondent's Nuclear Oversight group (NOS).[15] NOS is an internal, self-policing group made up of independent auditors that examine issues related to regulatory compliance.[16]

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7 Order Granting Motion for Summary Disposition at 1; D. & O. at 1.

8 Order Granting Motion for Summary Disposition at 2 (citation omitted).

9 Hearing Testimony (Tr.) at 16.

10 *Id.* at 777.

11 *Id.* at 17.

12 D. & O. at 1.

13 *Id.*

14 Tr. at 514.

15 D. & O. at 1-2.

16 *Id.* at 2.

Employees reported issues to NOS by authoring a condition report, also known as an incident report (IR).[17] Respondent's employees were encouraged to report issues to NOS,[18] and Complainant had been submitting IRs to NOS since 2007.[19]

When Complainant contacted NOS in September of 2013, she reported that technicians had been backdating safety-related procedure documents.[20] Specifically, she reported that when she noted missing signatures upon processing work packages after projects were completed, signatures would be added without any notation in the final documentation that they were initially missing.[21] NOS advised Complainant that backdating documents was a violation of required procedure.[22] When Complainant asked NOS to write an IR on the backdating issue, NOS issued "AR 01587659 Report."[23]

On January 14, 2014, Complainant contacted NOS and asked for a status update on her earlier report.[24] When NOS informed Complainant that her report had been assigned to Powell and then closed without resolution, Complainant asked NOS to reopen the report.[25] NOS reopened the report and reassigned it to Powell.[26] On January 16, 2014, Complainant reported her concerns to Charles Breidenbaugh

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17 *Id.*

18 Order Granting Motion for Summary Disposition at 3 (citation omitted) (noting that 14,830 IRs were initiated at the Peach Bottom plant in 2013).

19 *Id.* (Complainant submitted 20 IRs in 2012, 12 in 2013, and 19 in 2014) (citations omitted).

20 *Id.* (noting this was an undisputed fact) (citation omitted); D. & O. at 2.

21 D. & O. at 2.

22 *Id.*

23 *Id.*; Order Granting Motion for Summary Disposition at 3. The report stated that workers were not initialing "Worker Verifications" on hard copies of work orders, and in some instances were not initialing "Independent Verification" or "Quality Verification" after the work order/procedure was completed. NOS noted in the report that this process was contrary to Procedure Use and Adherence requirements. The report also described instances of workers initialing and backdating work orders weeks after the work was performed (using the date the work was performed) after the missing signatures were identified. D. & O. at 2.

24 Tr. at 20-21.

25 *Id.* at 21. Powell maintained that he "inadvertently" closed out the assignment by mistake. *Id.* at 790.

26 *Id.* at 21.

(Breidenbaugh), Respondent's Maintenance Department head at the Peach Bottom plant and Powell's supervisor, and asked him why the IR was closed without attention and why there had not been more attention to correcting the issue.[27] On January 31, 2014, Complainant met with Respondent's Regulatory Assurance manager to discuss her backdating concerns.[28]

On January 31, 2014, Powell implemented guidance encouraging accurate recordkeeping and oversight of documentation.[29] The new guidance was provided in writing and discussed with management.[30] Powell had developed the guidance as a solution to the issues raised in the AR 01587659 Report, and he discussed the solution with other employees, including Complainant.[31]

3. Respondent's Removal of Complainant's Job Duties

On February 1, 2014, Powell revoked Complainant's access to his email inbox.[32] Later that day, Complainant emailed Rush in HR explaining that she no longer had access to Powell's email inbox although she had access the day before, and asked Rush if "this [is] considered a 'chilling' environment."[33]

In early 2014,[34] Breidenbaugh decided to change Respondent's procedure for handling overtime approval, a process in which Complainant was involved, because

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27 *Id.* at 22.

28 *Id.* at 22, 125.

29 D. & O. at 2; Tr. at 225; Complainant's Hearing Exhibit (CX) 4 (Powell's Memorandum re: "Work Package Closure") at 1.

30 D. & O. at 2.

31 *Id.*

32 The ALJ stated that Powell removed Complainant's access in April of 2014, D. & O. at 3, but the record indicates that Powell removed her access on February 1, 2014. CX 7 (email on February 1, 2014, from Complainant to Rush) at 1 ("I no longer have access to Tom Powell's Inbox. I had access yesterday. I checked it this morning after I received [Breidenbaugh's] email on the overtime tracking."). Powell removed Complainant's email access because "things [] had transpired earlier in the week that made me recognize that she might have been looking at other things besides what we had agreed upon when I gave her access initially." Tr. at 817.

33 CX 7 at 1.

34 Tr. at 622.

Respondent was over budget for overtime expenditures.[35] Breidenbaugh streamlined the process by limiting the number of administrative assistants involved and assigning them duties related to coordination of managers' review.[36] On February 1, 2014, Breidenbaugh sent an email to the affected administrative staff explaining the new procedure for handling overtime approval.[37] One minute later Breidenbaugh forwarded that email to two administrative staff who had been inadvertently left off the first email, one of which was Complainant, indicating that he "should have cc'd you."[38] Complainant responded to Breidenbaugh's email at 10:46 a.m., copying Brian Zukauckas (Zukauckas), Respondent's Human Resources (HR) manager,[39] and Laura Rush (Rush), Respondent's Senior HR Generalist.[40] In her response, Complainant questioned why this responsibility was removed from her after she had escalated an issue to NOS and asked HR to look into the matter which she stated "feels like retaliation."[41]

Complainant contacted the NRC on February 7, 2014, reported that Respondent had been backdating documentation, and filed a complaint with the NRC against Respondent alleging retaliation for her attempts to address the backdating issue.[42] Zukauckas informed Connelly of Complainant's pending action

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35 D. & O. at 2; Tr. at 621-22.

36 D. & O. at 2; Tr. at 621-22. The new overtime process involved requests being coordinated by three administrative staff and then formally reviewed by managers to ensure that the appropriate amount of overtime was approved. *Id.* at 621-22.

37 D. & O. at 2-3; Respondent's Hearing Exhibit (RX) 42 (Breidenbaugh's February 1, 2014, email chain re: "Department Budget Shortfalls - Overtime") at 1-2.

38 RX 42 at 1.

39 Tr. at 188.

40 RX 67 (Declaration of Laura M. Rush) at 1.

41 RX 42 at 1. Complainant asked Breidenbaugh whether "there [is] some reason that you have taken away my responsibilities? When you asked me to review a draft email on this issue last week, I had not been removed from my duties. It seems odd that you are giving my responsibilities to other admins after I have escalated an issue . . . Laura – can I get HR determination on these questions. It doesn't feel right. It feels like retaliation since I told [Breidenbaugh] yesterday (1/31/14) that I had a meeting with Pat Navin on Monday (2/3/14)." *Id.*

42 Tr. at 54, 195-96, 201; *Booker v. Exelon Generation Co.,* ALJ No. 2016-ERA-00012, slip op. at 2 (OALJ Jan. 21, 2021) (Order Denying Respondent's Motion to Dismiss); Order Granting Motion for Summary Disposition at 7.

with the NRC when Connelly came on board as her supervisor in April 2014.[43] On July 31, 2014, the NRC conducted an alternative dispute resolution session with Complainant regarding her retaliation claims.[44] When this did not resolve her concerns, the NRC investigation continued.[45]

4. Respondent's Behavioral Observation Program (BOP)

Because Respondent owns and operates nuclear power plants, it must comply with certain NRC regulations, including the NRC's UAA requirements and its related Behavioral Observation Program (BOP).[46] Consistent with NRC regulations, Respondent's UAA program requires employees to undergo an annual review ("Annual BOP Supervisory Review") of their behavior as part of the BOP.[47] Employees may be subject to suspension of or holds on their UAA if they are not determined to be "trustworthy and reliable"[48] based on the results of their Annual BOP Supervisory Review.[49] An employee's UAA may also be temporarily withheld while action is taken to complete or update an element of the UAA requirements.[50] Respondent required Complainant to have unaccompanied access under its UAA program in order to perform her job duties.[51]

While an employee's UAA is suspended or on hold, they may remain on disability leave for a period not to exceed 18 months if they qualify for such leave.[52]

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43 Tr. at 661.

44 Tr. at 87. Connelly knew that Complainant had a meeting with the NRC around this time, but he did not know what the meeting was about. CX 38 (Connelly's OSHA Witness Statement) at 3 ("I was aware that [Complainant] had a meeting with the NRC around July 31, 2014 or August 6, 2014. I was aware that it was an all-day meeting. She never told me and I never asked what the meeting was about. I was not aware of the reason for the meeting. I was only aware that she spent all day meeting with the NRC.").

45 Comp. Br. at 17.

46 D. & O. at 3.

47 *Id.*

48 10 C.F.R. § 37.23(a)(2) (individuals granted unescorted access authorization must be "determined to be trustworthy and reliable").

49 D. & O. at 3.

50 *Id.* Before the events in the current case, Complainant's UAA had previously been withdrawn and later reinstated after completing the required treatment. *Id.*

51 *Id.* at 3.

52 *Id.* at 5.

Respondent's policy is to discharge employees who are unable to return to work from disability leave after 18 months.[53]

During the relevant timeframe, Kevin Concannon (Concannon) worked as Respondent's access authorization lead for the Peach Bottom plant, and other plants.[54] As lead, Concannon would determine which employees obtained and retained UAA based on safety rules and procedures.[55] He would routinely refer abnormal behavior reported on Annual BOP Supervisory Review forms to Respondent's Medical Review Officer (MRO), Dr. Barbara Pohlman (Pohlman), for review and further action.[56] Pohlman is a licensed physician in internal medicine and provided services to Respondent through her business, Triangle Occupational Medicine, P.A.[57]

On September 2, 2014, Connelly was advised that he needed to complete the Annual BOP Supervisory Review form for Complainant.[58] On September 8, 2014, Connelly completed the form, noting that "Patricia goes out of her way to avoid contact with certain individuals. She will change her route on purpose so she doesn't have to engage with the person," and "Patricia has been talking to herself a

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53 *Id.* at 5-6.

54 *Id.* at 3.

55 *Id.*

56 *Id.* As the Medical Review Officer, Pohlman's duties were defined by NRC regulation as follows:

> The primary role of the MRO is to review and interpret positive, adulterated, substituted, invalid, and at the licensee's or other entity's discretion, dilute test results obtained through the licensee's or other entity's testing program and to identify any evidence of subversion of the testing process. The MRO is also responsible for identifying any issues associated with collecting and testing specimens, and for advising and assisting FFD [Fitness for Duty] program management in planning and overseeing the overall FFD program.

10 C.F.R. § 26.183(c) (2008); Fitness for Duty Programs, 73 Fed. Reg. 16966, 17108-09 (Mar. 31, 2008) (effective April 30, 2008).

57 RX 72 (Declaration of Barbara L. Pohlman) at 1; Tr. at 412.

58 D. & O. at 3; RX 46 (September 2, 2014 email to Connelly notifying him to complete Annual BOP Supervisory Review form).

lot lately. She will sit at her desk talking out loud to no one."[59] Connelly sent the completed form to Concannon.[60] Concannon reviewed the form and determined that Complainant's behavior was abnormal.[61] Concannon informed Susan Techau (Techau), Respondent's "Reviewing Official,"[62] of Connelly's report[63] and referred the matter to MRO Pohlman.[64] After reviewing Connelly's report, MRO Pohlman signed "Attachment 2" to the "Access Authorization/Fitness for Duty Determination of Fitness Review Form" on September 15, 2014 indicating that Complainant should be required to complete a mandatory evaluation through Respondent's Employee Assistance Program (EAP) within ten days.[65]

On September 16, 2014, the NRC interviewed Complainant as part of its ongoing investigation of her filed complaint.[66] After Complainant's meeting with the NRC that day, Connelly and Rush met with Complainant to discuss the results of her Annual BOP Supervisory Review and to inform her that she was being referred

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[59] D. & O. at 3-4; RX 50 (Connelly's completed Annual BOP Supervisory Review form for Complainant) at 2.

[60] D. & O. at 3.

[61] *Id.* at 4.

[62] Under applicable NRC regulations, an entity licensed to own and operate a nuclear plant must designate a "Reviewing Official" as the individual responsible to "determine whether to grant, certify, deny, unfavorably terminate, maintain, or administratively withdraw an individual's unescorted access or unescorted access authorization status, based on an evaluation of all of the information required by this section." *See* 10 C.F.R. § 73.56(h)(1)(i) (2012); Technical Corrections, 77 Fed. Reg. 39899, 39909 (July 6, 2012) (effective Aug. 6, 2012). The NRC's Fitness for Duty (FFD) regulations define a "Reviewing Official" as "an employee of a licensee or other entity specified in § 26.3(a) through (c), who is designated by the licensee or other entity to be responsible for reviewing and evaluating any potentially disqualifying FFD information about an individual, including, but not limited to, the results of a determination of fitness, as defined in § 26.189, in order to determine whether the individual may be granted or maintain authorization." 10 C.F.R. § 26.5 (2008); Fitness for Duty Programs, 73 Fed. Reg. 16966, 17179-81 (Mar. 31, 2008) (effective April 30, 2008)..

[63] RX 69 (Declaration of Susan Techau) at 3-4.

[64] D. & O. at 4.

[65] RX 47 (Attachment 2 of the Access Authorization/Fitness for Duty Determination of Fitness Review Form signed by Pohlman) at 1.

[66] Tr. at 226-27, 521-22.

to EAP.[67] MRO Pohlman issued a written notification to Complainant regarding the EAP referral a few days later.[68]

Through EAP, Complainant was referred to counselor Mary Lou Kunkle (Kunkle) with Pennsylvania Counseling Services,[69] who saw Complainant on September 23, 2014.[70] On September 24, 2014, Kunkle recommended to EAP that Complainant "attend six (6) counseling sessions to help her deal with intimidation, ways to resolve issues and to improve interpersonal communication."[71] Kunkle determined Complainant was "trustworthy and reliable" to maintain her UAA while she completed therapy.[72] MRO Pohlman did not recommend any action be taken against Complainant's UAA at that time, and Complainant remained in work status on site at the Peach Bottom plant.[73]

5. Ongoing Workplace Discord

On September 25, 2014, Complainant approached Connelly after a quarterly review team meeting and accused another employee of being "inattentive," which Connelly understood as "a nuclear word for sleeping."[74] Connelly investigated the matter and, two hours later, told Complainant that no one else saw the employee being inattentive at any point during the meeting.[75] After this conversation, Complainant contacted HR and alleged that Connelly had been physically aggressive and raised his voice at her during the meeting.[76] HR investigated the incident, interviewed other employees, and concluded that Connelly was direct in

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67 *Id.* at 522-23. The meeting was originally scheduled for the morning of September 16, but was rescheduled to the afternoon to accommodate Complainant's meeting with the NRC. *Id.* at 522. The decision to meet with Complainant was made before Connelly knew of her meeting with the NRC. *Id.* at 523.

68 D. & O. at 4.

69 Tr. at 289-90; RX 30 (Kunkle's September 24, 2014 letter to EAP) at 1.

70 RX 30 at 1.

71 *Id.*

72 D. & O. at 4.; RX 30 at 2.

73 Tr. at 419.

74 *Id.* at 560-61.

75 *Id.* at 560-62.

76 D. & O. at 11; Tr. at 46-47.

nature but did not raise his voice or act aggressively toward Complainant during the conversation.[77]

On October 1 and 2, 2014, Complainant spoke to Respondent's Employee Concerns Program (ECP) regarding Connelly.[78] Complainant reported that Connelly was mishandling documents by keeping a work order document unsecured in his office.[79] Complainant also identified this issue to the NRC.[80]

On October 2, 2014, Connelly documented a "Performance Management Intervention – Verbal Coaching" entry for Complainant in Respondent's electronic program for inputting employee observations,[81] indicating that she refused to meet with him to go over her midyear review.[82]

On October 3, 2014, Connelly went into Complainant's cubicle and asked her to inform him if a foreign exchange student that his family was hosting attempted to contact him while he was in a meeting.[83] After Connelly left her cubicle, Complainant contacted HR to ask them to have Connelly remain outside of her

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77 D. & O. at 11. The ALJ states that Zukauckas conducted the fact-finding investigations into both incidents, *id.*, but Zukauckas testified that he believed it was Rush who conducted the September 25 investigation. Tr. at 670.

78 CX 15 (email chain on September 30, 2014 and October 1, 2014, between Complainant and A. Kirk Pedersen, Respondent's Employee Concerns Investigator) at 1-2 (Complainant stated that "[m]y issue is with my Manager who held on to a quality document in a way that did not protect it and for 2 months after it exceeded the timeframe for closure by 3 times.").

79 *Id.* Complainant reported that Connelly was keeping quality documents in his office although "[t]hey have to be handled per procedure in a specific way and preserved to make sure that they weren't damaged. He had it under his desk, on top of his recycle pile, so that I couldn't get it." Tr. at 60.

80 CX 15 at 2.

81 Tr. at 559.

82 RX 39 (Respondent's electronic recordkeeping system entries for Complainant between February 12, 2013, and October 2, 2014) at 1 ("Insubordination - Printed out a copy of Trish's mid-year review and gave it to her. I told her that we would be meeting at 14:30 and that Laura Rush from HR would be in attendance. She told me she did not want to meet today. I told her it was important that we meet and complete this review. She told me she was dealing with corporate and that she would go to Mike Massaro if she had to. I asked again 'Trish, are you refusing to meet with me today at 14:30'? She replied 'Yes.'").

83 D. & O. at 11.

cubicle.[84] Zukauckas investigated the incident and determined that Connelly stood in Complainant's cubicle entrance with his arm resting on the top of the cubicle, but determined that Connelly had not engaged in intimidating or threatening behavior.[85]

6. Respondent's Decision to Revoke Complainant's UAA and Complainant's Subsequent Termination

Following these instances, Zukauckas initiated a conference call with an interdisciplinary group internal to Respondent[86] because he was concerned about Complainant's "escalating" behaviors.[87] On October 7, 2014, several managers, including Barbara Stevens (Stevens), Respondent's Director of Occupational Health and Regulatory Medical Services,[88] Reviewing Official Techau, Zukauckas, and Connelly discussed Complainant's behavior via conference call.[89] During the call, Stevens shared her medical opinion that Complainant's behaviors were aberrant and that Complainant sounded "delusional" in that "[i]t's not normal for an employee to talk to herself in a professional work environment or to hum" or cry in the workplace, all of which were signs to Stevens that Complainant had "an escalating mental health problem."[90] Based on the information shared on the call, Techau authorized the decision to place Complainant's UAA on an administrative hold pending further evaluation.[91] That same day, Zukauckas informed

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84 *Id.*

85 *Id.* Complainant later relied on this instance, in addition to the September 25th incident, as the basis for her claim of intentional harassment. *Id.*

86 This group, known as the Employee Issues Advisory Council (EIAC), was made up of representatives from Respondent's Occupational Health Services department, HR, and its legal department, and reviewed employee concerns, discussed investigations, and provided insight on next steps. Tr. at 676-78; RX 69 at 4.

87 Tr. at 676-77.

88 Tr. at 481.

89 Resp. Post-Hearing Br. at 8.

90 Tr. at 486-87.

91 D. & O. at 4-5; RX 69 at 5; *see* 10 C.F.R. § 73.56(f)(3) ("If the reviewing official has a reason to believe that the reported individual's trustworthiness or reliability is questionable, the reviewing official shall either administratively withdraw or terminate the individual's unescorted access or unescorted access authorization *while completing the re-evaluation or investigation*.") (emphasis added).

Complainant of this decision.[92] Two weeks later, on October 21, 2014, Respondent changed the status of Complainant's UAA from administrative hold to temporary hold.[93]

On October 8, 2014, Connelly emailed himself a document, titled "Viper," that described his interactions and observations of Complainant.[94] Connelly initially created the document after he noted "a change in [Complainant]" following the September 16, 2014 meeting in which Complainant was told to report to EAP. Connelly used the document to keep a record of his interactions with Complainant in order to protect himself and his reputation given that Complainant had accused him of retaliation for her having made a report to the NRC.[95]

On December 1, 2014, Kunkle recommended that Complainant be allowed to return to work beginning December 9, 2014, with the following conditions for three months:

> Ms. Booker has been reporting to two bosses. I am recommending a temporary change in the primary boss she reports to for her to be able to report to Elizabeth Haupin who she works well with. Also, that she be able to move her desk to an open space in the same office nearer that boss.[96]

Techau interpreted Kunkle's recommended conditions to include that Complainant be reassigned "to report to a female manager [] and to move to a cubicle location closer to the female manager."[97] Pohlman interpreted Kunkle's recommended conditions to be "a huge red flag" which suggested that Complainant "is not at all

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92 D. & O. at 5.

93 RX 69 at 5. Under Respondent's interpretation of NRC regulations, a temporary hold on a UAA can last "from one day to ten years" or more and no appeal rights are associated with that action. Tr. at 376.

94 *See* RX 53 (Connelly's October 8, 2014 email with the subject line "Viper" and attachment named "Viper.docx") at 1-10. Connelly testified that he named the document "Viper" because he had a Dodge Viper at the time, his dream car, and he wanted to name the document something easy to remember knowing he "would have to go back to this document multiple times[.]" Tr. at 555.

95 Tr. at 540.

96 RX 30 at 9.

97 RX 69 at 5.

stable [] that she has to require a specific boss and a specific desk location."[98] On December 2, 2014, Pohlman rejected Kunkle's recommendations, finding Complainant "[n]eeds full/complete [release-to-work] with NO restrictions."[99] Techau agreed with Pohlman, and so kept the temporary hold of Complainant's UAA badge in place until she received a full clearance to return to work without restrictions.[100]

On February 27, 2015, upon Techau's request[101] Pohlman sent Respondent a letter stating that Complainant appeared "unable to achieve her prior level of functioning," and that the restrictions Kunkle recommended (a change in the primary boss she reported to and a move of her office space) were "not acceptable in a secure nuclear environment."[102] Pohlman recommended that Complainant's UAA not be reinstated.[103] Without a UAA, Complainant remained on both short-term and long-term disability leave.[104] After 18 months on disability leave, Complainant's employment was terminated.[105]

7. Procedural History and ALJ Decision

On June 25, 2014, Complainant filed ERA whistleblower and hostile work environment complaints with the Department's Occupational Safety and Health Administration (OSHA).[106] Complainant later filed a second complaint with OSHA alleging continued retaliation.[107] OSHA dismissed both of Complainant's complaints on July 10, 2016, determining that the evidence did not support a finding that her

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98 D. & O. at 5; Tr. at 423.

99 D. & O. at 5; RX 55 (Pohlman's December 2, 2014, Access Authorization/Fitness for Duty Determination of Fitness Review Form) at 2.

100 RX 69 at 6.

101 *Id.*

102 RX 58 (Pohlman's February 27, 2015 letter to Techau at 1 ("When her condition has stabilized such that she no longer requires a specific female manager to supervise her work and be physically nearby, her suitability for access authorization can be re-evaluated.").

103 D. & O. at 5.

104 *Id.*

105 *Id.* at 6.

106 *Id.*

107 *Id.*

protected activity was a contributing factor in any adverse employment action.[108] On July 16, 2016, Complainant filed her objection to OSHA's dismissal and requested a formal hearing before the Department's Office of Administrative Law Judges (OALJ).[109] The case was assigned to ALJ Thomas M. Burke.[110]

On February 9, 2017, Respondent filed a Motion for Summary Decision, which ALJ Burke granted in his Order Granting Motion for Summary Disposition on April 4, 2017.[111] ALJ Burke held that Complainant did not establish that her protected activity contributed to the loss of certain job duties and her UAA, or the refusal to reinstate her UAA which ultimately led to her termination,[112] and that the harassment she experienced was not sufficiently detrimental to affect a reasonable person to constitute a hostile work environment.[113] Complainant appealed ALJ Burke's order to the Board.[114]

On July 31, 2019, the Board vacated ALJ Burke's decision and remanded the matter for the ALJ to proceed with an evidentiary hearing on the merits.[115] The Board concluded that the ALJ "improperly weighed the evidence and made findings of fact as if he was resolving the case on its merits based on the record before him in the absence of a hearing."[116] The Board found significant that Complainant submitted evidence that supported her allegations of harassment as well as evidence that Connelly started the process of withdrawing her UAA with retaliatory intent because of her protected activity.[117] Thus, the Board concluded that Complainant submitted sufficient evidence that there remained questions of material fact as to whether Respondent harassed Complainant and whether

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108 *Id.*; *Booker v. Exelon Generation Co., LCC*, ALJ No. 2016-ERA-00012, slip op. at 1 (ALJ June 25, 2021) (Order Denying Complainant's Motion to Compel).

109 D. & O. at 6; Order Denying Complainant's Motion to Compel at 1.

110 D. & O. at 6.

111 Order Granting Motion for Summary Disposition at 6, 15.

112 *Id.* at 15.

113 *Id.* at 7.

114 D. & O. at 6.

115 *Booker v. Exelon Generation Co., LLC*, ARB No. 2017-0038, ALJ No. 2016-ERA-00012 (ARB July 31, 2019) (Decision and Order of Remand).

116 *Id.* at 7.

117 *Id.* at 8-10.

Respondent revoked her UAA status in retaliation for engaging in protected activity.[118]

On remand, the case was reassigned to ALJ Drew A. Swank.[119] On May 14, 2020, Respondent filed a Motion for Summary Decision arguing that the ALJ lacked legal authority to review Respondent's actions, which ALJ Swank denied on January 21, 2021.[120] The ALJ held a formal hearing which started on September 14, 2021, and continued on seven days over several months until its completion on February 22, 2022.[121]

On June 21, 2022, ALJ Swank issued a D. & O. in which he found that Complainant engaged in protected activity when she filed complaints with her superiors and the NRC regarding backdated safety documents, and that she suffered adverse actions in the revocation of her UAA, which ultimately led to her termination, and the reassignment of various of her work duties.[122] But the ALJ found that Complainant failed to establish that her protected activity contributed to the Respondent's adverse actions against her.[123] As support for this determination, ALJ Swank found that Complainant's evidence in support of the contributing factor element of her claim merely amounted to temporal proximity, which was insufficient to establish contributing factor in this case.[124] Regarding her hostile work environment claim, the ALJ found that Complainant failed to show that intentional harassment occurred at all, thus she failed to establish that any intentional harassment occurred because of her protected activity.[125]

On June 27, 2022, Complainant appealed ALJ Swank's decision to the Board. Both parties timely filed briefs.

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118 *Id.* at 10-11.

119 D. & O. at 6.

120 *Id.*

121 *Id.* at 7.

122 *Id.* at 8-9.

123 *Id.* at 10.

124 *Id.*

125 *Id.* at 12.

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the ERA.[126] The Secretary of Labor has delegated authority to the Board to review ALJ decisions under ERA.[127] The Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.[128]

DISCUSSION

To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that she engaged in protected activity, suffered an adverse personnel action, and that her protected activity was a contributing factor in the adverse personnel action taken against her.[129] If a complainant demonstrates that her 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 adverse action in the absence of any protected activity."[130]

To prevail on a hostile work environment complaint, a complainant must establish that she engaged in protected activity, that she suffered intentional harassment related to that activity, that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment, and that the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant.[131]

At the hearing below, Complainant asserted that her protected activity contributed to Respondent's decision to alter certain of her job duties and revoke her

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126 42 U.S.C. § 5851.

127 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

128 29 C.F.R. § 24.110(b); *Tran v. S. Cal. Edison Co.*, ARB No. 2018-0024, ALJ No. 2017-ERA-00008, slip op. at 2 (ARB Oct. 24, 2019).

129 42 U.S.C. § 5851(b)(3)(C); 29 C.F.R. § 24.109(b)(1).

130 42 U.S.C. § 5851(b)(3)(D); 29 C.F.R. § 24.109(b)(1).

131 *Williams v. Mason & Hanger Corp.*, ARB No. 1998-0030, ALJ Nos. 1997-ERA-00014, -00018, -00019, -00020, -00021, -00022, slip op. at 11-12 (ARB Nov. 13, 2002), *aff'd*, 376 F.3d 471 (5th Cir. 2004).

UAA, which ultimately led to the termination of her employment, and that she suffered intentional harassment related to her protected activity. On appeal, Complainant asserts that the ALJ's D. & O. did not consider all the evidence in the record or her arguments as they related to her claims, and instead solely relied on Respondent's evidence in making his decisions.[132]

Respondent did not file a cross-appeal of the ALJ's decision. Nevertheless, in its response brief Respondent raises an issue for review by arguing that the Board does not have jurisdiction over Complainant's claims. Respondent asserts that the Department is precluded from reviewing decisions denying unescorted access to nuclear power workers as these decisions relate to national security clearances.[133]

After considering the parties' arguments, we conclude that the Board has jurisdiction to examine Respondent's decision to revoke Complainant's UAA in the context of her claims. Having reviewed the evidentiary record, we conclude that the ALJ failed to fully analyze and weigh all of the evidence in the record on the issue of contributing factor as to Complainant's whistleblower claim. We affirm the ALJ's finding that Complainant failed to meet her burden of demonstrating that she experienced intentional harassment related to her protected activity; thus, her hostile work environment claim fails.

1. The Board has Jurisdiction to Review this Matter

Without properly raising this issue for consideration,[134] Respondent asserts that the Board lacks jurisdiction to review Respondent's decision to revoke and

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[132] Comp. Br. at 13.

[133] Resp. Br. at 10-13.

[134] Respondent did not move for reconsideration of the ALJ's denial of its motion to dismiss but instead simply included a footnote in its post-hearing brief insisting that "the DOL lacks jurisdiction to reconsider an NRC licensee's compliance with UAA regulations." Resp. Post-Hearing Br. at 17 n.13. Respondent cited not to *Egan* but to three district court cases, none of which arose within the applicable circuit court for appeal of this matter pursuant to 29 C.F.R. § 24.112(a)) and all of which are factually and legally distinguishable. *Id.* (citing *Patel v. Dep't of the Army*, No. 1:20-cv-1016, 2021 WL 1656845 (E.D. Va. 2021) (addressing a government contractor's alleged due process violations); *Reed v. Tenn. Valley Auth.*, No. 1:17-cv-00232, 2018 WL 1440829 (E.D. Tenn. 2018) (addressing claims for common law interference with employment and statutory interference with employment under a state statute); and *Coppett v. Tenn. Valley Auth.*, 987 F. Supp. 2d 1264 (N.D. Ala.2013) (addressing alleged Rehabilitation Act violations). Respondent also did not file a petition for review before the Board raising this issue as required by 29 C.F.R. § 24.110(a),

refuse to reinstate Complainant's UAA, citing *Department of the Navy v. Egan*.[135] According to Respondent, "*Egan* mandates that . . . the reviewing official and the MRO, and not an ALJ, the Board, or the courts, make decisions about who roams unfettered in nuclear power plants."[136] According to applicable law, *Egan's* reach extends nowhere near as far as Respondent claims.

In *Egan*, the U.S. Supreme Court addressed the "narrow question" of whether an administrative agency could review "the substance of [the Navy's] underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action" in a case involving an employee who maintained nuclear-armed submarines.[137] The Court found that review was not allowed in that case in light of the Executive Branch's constitutionally delegated authority to "classify and control access to information bearing on national security" and to determine who should be granted "access to such information[.]"[138] In *Egan,* the Court "emphasized that the decision to grant or deny security clearance requires a '[p]redictive judgment' that 'must be made by those with the *necessary expertise in protecting classified information*[,]'[139] and that "[i]t is this expert, predictive judgment made by 'appropriately trained' personnel [about access to classified information] that *Egan* insulates from judicial review."[140] Under *Egan* and its progeny, it is clear that

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but simply addressed the issue in its brief filed in response to Complainant's petition. The Board historically adheres to the principle that "'[a] party who neglects to file a cross-appeal may not use his opponent's appeal as a vehicle for attacking a final judgment in an effort to diminish the appealing party's rights thereunder.'" *Batyrbekov v. Barclays Cap.*, ARB No. 2013-0013, ALJ No. 2011-LCA-00025, slip op. at 8 (ARB July 16, 2014) (quoting *Sueiro Vazquez v. Torregrosa de la Rosa*, 494 F.3d 227, 232 (1st Cir. 2007) (citation omitted)). However, in light of the legal question raised regarding *Egan's* applicability, the Board has proceeded to address the issue. *See Avlon v. Am. Express Co.*, ARB No. 2009-0089, ALJ No. 2008-SOX-00051, slip op. at 5 (ARB Sept. 14, 2011) (Order Denying Reconsideration) ("While issues . . . may be considered waived, courts can exercise discretion to 'consider waived arguments' when it is 'necessary . . . or where the argument presents a question of law . . . .'") (citations omitted).

135 484 U.S. 518 (1988).

136 Resp. Br. at 12.

137 *Egan*, 484 U.S. at 520.

138 *Id.* at 527.

139 *Rattigan v. Holder,* 689 F.3d 764, 767 (D.C. Cir. 2012) (*Rattigan II)* (quoting *Egan*, 484 U.S. at 529) (emphasis added)).

140 *Id.* (citing *Rattigan v. Holder*, 643 F.3d 975, 983 (D.C. Cir. 2011) (*Rattigan I*) (alterations added).

neither federal courts nor administrative agencies may review the merits of the government's[141] decision to grant or deny a security clearance.[142]

Egan's jurisdictional bar arose from and remains focused on decisions made by experts trained to make the required predictive judgments related to granting or denying security clearances.[143] Decisions related to granting, suspending, denying

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[141] Only one of the four decisions Respondent relies upon in its post-hearing brief applied *Egan* to bar a claim involving a private employer, and that case did so without addressing the private nature of the employment. *See Goforth v. Tennessee Valley Auth.*, No. 1:20-CV-254, 2022 WL 1198213, at *1 (E.D. Tenn. 2022) (one of the two defendants was the TVA, which "is an executive-branch corporate agency of the United States"); *compare Delgado v. Gonzales*, 428 F.3d 916 (10th Cir. 2005) (defendants were the U.S. Attorney General and the Director of the FBI), *and Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990) (defendants included the head of the Directorate for Industrial Security Clearance Review for the Defense Legal Services Agency within the Department of Defense, the Secretary of Defense, and the United States), *with Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 2002-0108, 2003-0013, ALJ No. 1997-SDW-00005 (ARB Dec. 30, 2004), *aff'd*, 476 F.3d 847 (10th Cir. 2007), *cert. denied*, 552 U.S. 993 (2007) (sole defendant was the U. S. Army Dugway Proving Ground of America). In its motion to dismiss before the ALJ, Respondent did cite to the one Circuit Court case that applied *Egan* to a private employer, *Beattie v. Boeing Co.*, 43 F.3d 559 (10th Cir. 1994), *cert. denied*, 514 U.S. 1127 (1995), but it did not do so in its filings with the Board. Given that our decision is reached on other grounds, we do not reach this issue in the present case.

[142] *Makky v. Chertoff*, 541 F.3d 205, 212 (3d Cir. 2008) (finding under *Egan* that "there is no judicial review of the merits of a security clearance decision"); *Zeinali v. Raytheon Co.,* 636 F.3d 544, 549 (9th Cir. 2011) (noting that Egan bars "review of the merits of the security clearance decision."); *Van Winkle v. Blue Grass Chem. Activity/Blue Grass Army Depot (Van Winkle)*, ARB No 2009-0035, ALJ No. 2006-ERA-00024, slip op. at 9 (ARB Feb. 17, 2011) ("*Egan's* limitation [is the] court's authority to review a denial, revocation or suspension of a security clearance") (citations omitted); *Hall v. U.S. Dep't of Labor, Admin Rev. Bd.,* 476 F.3d 847, 852 (10th Cir. 2007) *cert. denied*, 552 U.S. 993 (2007) (affirming Board's determination that employee's claim of retaliatory revocation of his security clearance is unreviewable under *Egan*).

[143] Even recent Circuit Court cases that have pushed against the analytical boundaries identified in *Egan* have done so within factual scenarios involving a security clearance related decision. *See e.g., Mowery v. Nat'l Geospatial-Intel. Agency*, 42 F.4th 428, 435 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 783 (2023) (applying *Egan* to bar review of application for agency's Human Reliability Program certification, which required same predictive judgment as a security clearance given that applicants "'must already possess or obtain . . . the Department of Energy's highest level of security clearance ['Top Secret security clearance with Sensitive Compartmented Access approval'] . . . .") (citing *Foote v. Moniz*,

and/or reinstating unescorted access to a nuclear facility are not equivalent.[144] Therefore, Respondent's decision to revoke and refuse to reinstate Complainant's UAA is not unreviewable under *Egan*.

The ALJ properly found as such, relying principally on *Summerland v. Exelon Generation Co*.[145] In *Summerland I,* because the employee's position required only badge access to a nuclear facility and not "a government-issued security clearance" the court held that *Egan* did not prohibit review:

> [A]s the Fifth Circuit correctly explained, "[s]ecurity clearances are different from building access." The review, grant, and revocation of security clearances are subject to procedures, imposed by Executive Order, that address who may access *classified information*—not who may enter and access *buildings*. The review, grant, and revocation of

751 F.3d 656, 658-59 (D.C. Cir. 2014) (same Human Reliability Program parameters)); *see also Sanchez v. U.S. Dep't of Energy*, 870 F.3d 1185 (10th Cir. 2017) (same).

144 *Toy v. Holder*, 714 F.3d 881, 885-86 (5th Cir. 2013), *cert. denied*, 571 U.S. 1025 (2013) (noting that "security clearances are different from building access") (citations omitted)); *see also Mowery*, 42 F.4th at 436 (citing with approval the Fifth Circuit's refusal in *Toy* to expand *Egan* to apply to "mere revocation of building access" and the Sixth Circuit's determination in *Hale v. Johnson*, 845 F.3d 224, 231 (6th Cir. 2016), that *Egan* does not apply to "'an agency's determination regarding an employee's physical capacity' to perform their duties at a nuclear plant.").

145 455 F. Supp. 3d 646 (N.D. Ill. 2020) (*Summerland I*). The *Summerland* case involved an administrative employee at a nuclear plant who suffered from mental health conditions but "responsibly manage[d] her treatment" and so maintained a "discipline-free work record." *Summerland I*, 455 F. Supp. 3d at 653. After unilaterally revoking the employee's UAA, Pohlman, functioning as Exelon's MRO, placed the employee on "'a last chance agreement'" and warned her that if she continued to request leave for mental health reasons her UAA would be permanently revoked, admonishing her that "she 'did not work at Walmart.'" *Summerland v. Exelon Generation Co.*, 510 F. Supp. 3d 619, 625 (N.D. Ill. 2020) (*Summerland II*) (citations omitted). Unconvinced by Exelon's claim that its actions involved matters of national security, the court found that "[n]o law or regulation provides for such [a last chance] agreement; rather, Pohlman invented it to punish Summerland for having requested an ADA accommodation and FMLA leave," and so allowed various claims to proceed, including against Pohlman. *Summerland II*, 510 F. Supp. at 625-33. Although Respondent was a named party and therefore aware of the case which involved a claim of mental health-related discrimination related to the actions of the same MRO (Pohlman) involved in the present case, Respondent did not reference *Summerland* in its motion to dismiss before the ALJ.

> unescorted building access to nuclear power plants, by contrast, are governed by a wholly distinct set of regulations. Given the significant distinctions in the legal regimes governing security clearances and building access, Defendants fail to show that unescorted access to a nuclear power plant is the practical or legal equivalent to a security clearance for *Egan* purposes.[146]

The *Summerland I* court likewise was not persuaded that *Egan* applied to employment decisions related to "sensitive positions,"[147] noting that the record did not establish that Summerland held a position classified by the federal government as "sensitive" as opposed to "nonsensitive."[148]

In denying Respondent's motion to dismiss in the present case, the ALJ held that Respondent had failed to establish that granting unescorted access to a nuclear plant is the legal equivalent to granting a security clearance.[149] Relying on *Summerland,* the ALJ determined that "*Egan* and its progeny do not prohibit a proper determination as to whether the revocation of Complainant's UAA was a pretext for discrimination."[150]

At hearing following the motion's denial, Respondent did not factually establish that Complainant's claims involved a security clearance or that she

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146 *Summerland I*, 455 F. Supp. 3d at 646 (emphasis in original). The *Summerland* court noted that *Egan* did not preclude its ability to review the merits of the employee's claims as nothing in the pleadings established that her position at or access to Exelon's facility required a security clearance. *Id.* (citing *Hale*, 845 F.3d at 231 (for its "holding that *Egan* d[oes] not apply where 'physical fitness' requirements, not security clearance determinations, [a]re at issue"); *Toy*, 714 F.3d at 885 (declining to extend *Egan* beyond security clearances to building access decisions); *Rattigan II*, 689 F.3d at 768 (declining to apply *Egan* to security clearance-related decisions made by "'FBI employees who merely report security concerns'" and lacked training or specialized expertise)).

147 *Summerland I*, 455 F. Supp. 3d at 657 (acknowledging Seventh Circuit's decision in *Whitney v. Carter*, 628 F. App'x 446, 456-57 (7th Cir. 2016), extending *Egan* to decisions involving "sensitive positions" in recognition of the parallelism between those positions and holding a security clearance).

148 *Id.* (quoting *Egan*, 484 U.S. at 528 ("[T]he [federal] [g]overnment classif[ies] jobs in three categories: critical sensitive, noncritical sensitive, and nonsensitive.") (alterations in original)).

149 Order Denying Respondent's Motion to Dismiss at 6.

150 *Id.*

occupied a position classified as "sensitive." According to Complainant, she performed typical secretarial duties and her position was not classified as sensitive.[151] Having reviewed the record below, we find that the ALJ properly determined that *Egan's* national security exception does not apply to bar review of an employer's actions related to the granting, denial or refusal to reinstate an employee's UAA.[152]

Respondent's decision to revoke Complainant's access badge and to terminate her employment was based on the routine judgments of its non-governmental medical and human relations staff. Such judgments are a world apart from the kind of expert, non-reviewable judgments rendered by governmental national security specialists and insulated from review under *Egan*. For the reasons stated above, and on the factual record established at hearing and now closed, we find that the ALJ correctly determined that there was no jurisdictional bar to his review of this matter. Likewise, there is no bar to ours.

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[151] Tr. at 77.

[152] In this case, we affirm the ALJ's determination that *Egan* does not bar review because Complainant's claim did not involve a security clearance but merely the revocation and non-reinstatement of her UAA. Even when *Egan* does apply, however, it does not bar review of "whether a security clearance was denied, whether the security clearance was a requirement of the [employee's] position, [or] whether the procedures set forth in [the applicable statute] were followed[.]" *Zeinali*, 636 F.3d at 550 n.5 (last alteration in original) (quoting *Romero v. Dep't of Def.,* 527 F.3d 1324, 1328 (Fed. Cir. 2008) (quoting *Hesse v. Dep't of State,* 217 F.3d 1372, 1376 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1154 (2001)). Focusing on claims of procedural impropriety, courts have long recognized "the 'distinction between challenging the merits of a clearance revocation and challenging the revocation process,' noting [courts'] authority over the latter but not the former." *Kristof v. Dep't of the Air Force,* No. 2021-2033, 2023 WL 2182281, at *3 (Fed. Cir. Feb. 23, 2023) (quoting *Romero*, 527 F.3d at 1329 (declining to interpret *Egan* as having precluded "an employee['s . . .] challenge [to] an agency's failure to comply with the agency's own regulations with respect to a security clearance decision."); *see also El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 183 (3d Cir. 2010) (noting that there is a distinction between reviewing the merits of a security clearance revocation decision and reviewing the merits of constitutional claims arising from a security clearance revocation process) (citations omitted); *Duane v. U.S. Dep't of Def.,* 275 F.3d 988, 993 (10th Cir. 2002) (noting that it was not "precluded from reviewing a claim that an agency violated its own procedural regulations when revoking or denying a security clearance . . . "); *Jamil v. Sec'y, Dep't of Defense,* 910 F.2d 1203, 1208 (4th Cir. 1990) (noting that court "possesses the authority to require an agency . . . to follow its own regulations in making a security clearance determination and in dismissing an employee.").

2. The ALJ's Contributing Factor Analysis does not Demonstrate that the ALJ Considered or Weighed All the Evidence in the Record

Under the ERA, the ALJ must determine whether a preponderance of the evidence establishes that Complainant engaged in protected activity, that she suffered an adverse personnel action, and that her protected activity was a contributing factor in the adverse personnel action taken against her,[153] and if all those elements are met Respondent may still avoid liability if it "demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity."[154] Not being barred by *Egan* from any component of our typical review, the ALJ was fully authorized to consider all facts in the record to determine whether any non-compliance by Respondent with required procedures was evidence relevant to any of the required components of the ERA claim, including pretext for retaliatory actions,[155] not to determine whether such non-compliance was "unreasonable or erroneous for other reasons" giving rise to other causes of action.[156]

On review, the Board has the same authority and obligation. The Board reviews the ALJ's factual findings under the substantial evidence standard.[157] A finding of fact lacks contextual strength and substantial evidence if the fact finder ignores, or fails to resolve, a conflict created by countervailing evidence or "if it is overwhelmed by other evidence or if it really constitutes mere conclusion."[158] "The ARB's appellate review requires that the ALJ conduct an appropriate analysis of

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153 29 C.F.R. § 24.109(b)(1).

154 *Id.*

155 *Palmer v. Canadian Nat'l Ry./Illinois Cent. R.R. Co.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 53-54 (ARB Sept. 30, 2016) (reissued Jan. 4, 2017) ("Showing that an employer's reasons are pretext can of course be enough for the employee to show protected activity was a 'contributing factor' in the adverse personnel action.") (citing *Bechtel v. Competitive Techs., Inc.*, ARB No. 2009-0052, ALJ No. 2005-SOX-00033, slip op. at 13 ("[I]f a complainant shows that an employer's reasons for its action are pretext, he or she may, through the inferences drawn from such pretext, meet the evidentiary standard of proving by a preponderance of the evidence that protected activity was a contributing factor.").

156 *Van Winkle*, ARB No. 2009-0035, slip op. at 11.

157 29 C.F.R. § 24.110(b).

158 *Dalton v. U.S. Dep't of Lab.*, 58 F. App'x 442, 445 (10th Cir. 2003) (citations omitted); *Carter v. Marten Transp., Ltd.*, ARB Nos. 2006-0101, -0159; ALJ No. 2005-STA-00063, slip op. at 8 (ARB June 30, 2008).

the evidence to support his findings."[159] It is essential that the ALJ "adequately explain why he credited certain evidence and discredited other evidence."[160] Although an ALJ "need not address every aspect of [a party's claim] at length and in detail," the findings "must provide enough information to ensure the Court that he properly considered the relevant evidence underlying [the party's] request."[161] A reviewing court must be able to "discern 'what the ALJ did and why he did it.'"[162]

Although he applied the correct legal standard for the contributing factor element of the claim, the ALJ did not adequately analyze the evidentiary record or Complainant's arguments in the related analysis. A review of the evidentiary record shows that the ALJ did not mention, discuss, or evaluate the following evidence in the D. & O.:

- Other Peach Bottom plant employees with UAA holds eventually returned to work between 2013 and 2014.[163]
- January 2014 – The effect, if any, of Powell's reportedly "inadvertent" closure of AR 01587659 without resolution and Complainant's subsequent request to NOS to reopen the issue.[164]
- January 31, 2014 – Complainant met with Respondent's Regulatory Assurance Manager to discuss her backdating concerns.[165]
- February 7, 2014 – Complainant contacted the NRC to report the backdating of documentation and filed a claim of retaliation by Respondent in response to her addressing the backdating issue after Respondent's alteration of her job duties on February 1, 2014.[166]
- April 2014 – At the time Connelly becomes Complainant's new supervisor

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159 *Clem v. Comput. Scis. Corp.*, ARB No. 2016-0096, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 17 (ARB Sept. 17, 2019).

160 *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) (citations omitted).

161 *Mori v. Dep't of the Navy*, 917 F. Supp. 2d 60, 65 (D.D.C. 2013).

162 *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (citation omitted).

163 CX 44 (chart of Peach Bottom employees with UAA Holds, 2013-2014) at 1-5. Concannon testified that the MRO allowed another Peach Bottom employee in the past to return to work despite still being in treatment. Tr at. 390-391.

164 Tr. at 21-22.

165 *Id.* at 22, 125.

166 *Id.* at 195-96; Order Denying Respondent's Motion to Dismiss at 2.

he is told about her NRC pending issue(s).[167]

- September 8, 2014 – New supervisor Connelly reports on BOP form that Complainant avoids old supervisor and talks out loud to herself at her desk, which leads Respondent to determine that Complainant's behavior is "escalating."[168]
- September 16, 2014 – After a meeting with the NRC, Complainant met with Connelly and Rush on the same day to discuss the results of her Annual BOP Supervisory Review when she was informed that she was being referred to EAP (after Connelly's submission of the BOP supervisory form and Concannon's forwarding the form to Pohlman).
- October 1, and 2, 2014 – Complainant reported to the NRC and ECP her allegation that Connelly mishandled a document in his office.[169]
- October 2, 2014 – Connelly made a "Performance Management Intervention – Verbal Coaching" entry in Respondent's electronic HR database regarding Complainant.
- October 7, 2014 – Conflicting evidence about whether Connelly provided any input during the October 7, 2014 meeting, during which the decision was made to put Complainant's UAA on hold pending further evaluation.[170]
- Connelly's October 8, 2014 email and word document titled "Viper" describing his interactions and observations of Complainant.[171]
- October 21, 2014 – In its submissions to the NRC, Respondent indicated that on October 21, 2014, Complainant was notified that she was required to participate in a psychological assessment but she declined the required testing to return to work, and that she did not make herself available to participate in the testing.[172] Complainant contends that she never

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167 Tr. at 661.

168 *Id.* at 677 (testimony of Zukauckas), 487 (testimony of Stevens).

169 CX 15 at 1-2; Tr. at 60.

170 Connelly testified that he "did not, repeat, did not give any input on that call," Tr. at 587, but Connelly's OSHA Witness Statement states that he attended the meeting and "[b]ased on input from myself and HR and the interactions HR had had [stet] with Complainant, it was decided at [the] end of [the] meeting that her access would be put on hold and that she would be told to leave the site and not return until she was contacted by Exelon. I had no role in the decision to put her access on hold. I provided input." CX 38 at 9.

171 RX 53.

172 CX 33 (Respondent's documentation for the NRC, or "Evaluation Report," for Complainant) at 1 (documenting that Kunkle, after Complainant's third counseling session

declined testing but instead Respondent refused to schedule her for the required testing until she was cleared to return to work without restrictions.[173] Complainant would not be able to return to work until after that testing was completed.[174]

- The role of Techau, if any, in the actions that gave rise to the claim.
- Pohlman's authority, if any, to recommend that a full clearance, free of conditions, was required for reinstatement of UAA.[175]
- Complainant's allegations concerning Respondent's failures to comply with regulatory directives, which she asserts as evidence of pretext.[176]

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on October 16, 2014, recommended counseling for three weeks and then she would reassess Complainant's return to work, and that on October 21, 2014, "Access Authorization subsequently notified Ms. Booker that she was required to participate in a psychological assessment with the Access Authorization Clinical Psychologist . . . but she declined at the time, stating that she was 'not ready.' Ms. Booker has yet to make herself available to participate in the psychological assessment."); CX 43 (NRC's August 10, 2016 correspondence to Complainant) at 3 (NRC advised Complainant that after her third counseling session, "[t]he [Access Authorization] group subsequently notified you that they wanted you to participate in a psychological assessment with the AA Clinical Psychologist but you declined, stating that you were not ready.").

[173] CX 27 (transcript of November 3, 2014 voicemail message of Bob Pilkey, Respondent's site healthcare professional at Peach Bottom and case manager for Complainant) at 1 ("[W]e are not going to do the PAI or the interview until after you are cleared by EAP. . . .[W]hen you are done and ready to come back to work . . . I need to get clearance from EAP, then we can start setting you up for that interview and the PAI.""); Tr. at 458-59. At the hearing, Complainant argued that this voice message "show[s] that Exelon told the NRC that I denied the required testing as required under NRC regulations for the testing, and that was a false statement. [T]he answering machine messages specifically . . . show that I did not deny, that I was not eligible to do the testing when I received my first call." Tr. at 70.

[174] Pilkey did not schedule the meeting or interview, Respondent's standard protocol process once an employee's medical conditions are cleared and a clearance is made to return to work, "because [Complainant] had not been cleared to return to work full duty. We were waiting for that clearance and then an assessment would've been set up." Tr. at 468, 472.

[175] *See* 10 C.F.R. § 73.56(e)(6) (During psychological reassessments, *if the licensed psychologist or psychiatrist* identifies or discovers any information . . . .") (emphasis added).

[176] The factual record appears to reveal the following with respect to Respondent's compliance with NRC regulatory requirements. The regulations clearly allow the Reviewing Official—Techau in this case; not Pohlman—to place an administratively hold on Complainant's UAA "while completing [a] re-evaluation", 10 C.F.R. § 73.56(f)(3), a process defined to include review of a criminal history update, a credit re-evaluation, and a

The ALJ also did not make any credibility findings or credit or discredit any testimony after seven days of hearings. Despite the extensive record, the ALJ's contributing factor analysis spans roughly two pages, and contains a factual error.[177] "The ARB's appellate review requires that the ALJ conduct an appropriate analysis of the evidence to support his findings,"[178] and a review of the evidentiary record demonstrates that the ALJ failed to do so in this case and his analysis consists of mere conclusions.[179]

Without a thorough analysis, the Board is unable to ascertain how the ALJ reached his ultimate findings concerning whether Complainant's protected activity was or was not a contributing factor in the Respondent's adverse action in light of

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psychological assessment, if necessary to determine the employee's continued fitness for duty. 10 C.F.R. § 73.56(i)(1)(vi). A psychological assessment, if required, must be completed by a licensed psychologist or psychiatrist. 10 C.F.R. § 73.56(e)(1). Pohlman was neither. Respondent refused to refer Complainant for a psychological assessment with its long-standing contracted psychologist because her EAP counselor had recommended that she return to work not "without restrictions" but with the recommended accommodation that she be allowed to report to one, not both, of her two supervising managers and that her desk be moved. Tr. at 374-75; CX 27 at 1. During the same timeframe, Respondent allowed other employees, including one with mental health issues, and another one in ongoing treatment for substance abuse, to return to work. Tr. 390-92; CX 44 at 1-2. Without the psychological assessment, Complainant could not be determined fit, or unfit, to return to work. CX 27 at 1; Tr. at 468, 472. Respondent maintained the "Temporary Hold" on Complainant's UAA, which it understood it could do "for up to 10 years" or more without providing any appeal procedures. Tr. at 374-378. Meanwhile, 10 C.F.R. § 73.56(l) provides that every NRC licensee must adhere to a process that includes "provisions for the review . . . of a denial or unfavorable termination of unescorted access . . . [must] allow . . . an opportunity . . . for an impartial and independent internal management review."

177 Although the ALJ correctly noted in his factual history section that it was Concannon who reviewed Connelly's completed Annual BOP Supervisory Review form for Complainant and forwarded it to Pohlman, the ALJ states in his contributing factor analysis section that it was "Zukauckas [who] determined that Complainant's BOP form contained abnormal behavior." D. & O. at 9.

178 *Clem*, ARB No. 2016-0096, slip op. at 17.

179 The ALJ concluded that "Complainant's arguments merely amount to a temporal proximity between her protected activity and unfavorable personnel actions. Showing that one occurred after the other is insufficient," D. & O. at 10, but the ALJ reached this conclusion regarding temporal proximity without considering a majority of the events presented by Complainant's evidence in the record.

the record taken as whole.[180] For example, the ALJ's analysis does not mention Connelly, or otherwise discuss any of his actions. The ALJ did not credit or discredit any of Connelly's testimony. The ALJ also failed to analyze and weigh evidence that could establish Complainant's protected activity was a factor in Connelly's actions towards Complainant, including Complainant's October 2, 2014 report to ECP concerning Connelly, Connelly's October 2, 2014 electronic database entry for insubordination, and Connelly's "Viper" document describing his interactions and observations of Complainant. Consequently, the ALJ ignored Complainant's "cat paw's theory" argument that she presented in her post-hearing brief and the evidence in support of her argument that her protected activity was a factor in Connelly's decisions that affected the outcome of the October 7th meeting.[181] It may be that the ALJ found that Complainant's protected activity was not a factor in any of Connelly's actions towards Complainant at any point of the relevant timeline, but without any specific findings or analysis to that effect the Board cannot reasonably discern the ALJ's decision-making process in this case.

Although an ALJ does not need to address every aspect of a complainant's claim at length or in detail, the ALJ in this case failed to even mention relevant factual history or arguments, and his contributing factor analysis did not adequately weigh the evidence or explain how he credited or discredited certain evidence in support of his findings. Because we conclude that the ALJ's finding as to contributing factor is insufficient to show that he considered or weighed evidence by the appropriate burden of proof, we remand this matter to the ALJ to fully analyze the record and make revised findings on the issue of contributing factor in such a way that explains how the ALJ credited and discredited the parties' arguments and the supporting or undermining evidence.

3. The ALJ's Hostile Work Environment Analysis does not Demonstrate that the ALJ Considered or Weighed All the Evidence in the Record

The ERA "protects employees who raise nuclear safety-related concerns from retaliation . . . [and this] protection has been construed to prohibit retaliatory

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180 *See Clem*, ARB No. 2016-0096, slip op. at 16-17.

181 In her post-hearing brief submitted before the ALJ, Complainant argued that "Connelly and Zukauckas who knew of my pending NRC actions provided false information that was used to revoke my badge, invoking the Cat's Paw Theory." Comp. Post-Hearing Br. at 8. An employer can be liable on the cat's-paw theory if a non-decisionmaker's act proximately caused the adverse action. *Crosbie v. Highmark Inc.*, 47 F.4th 140, 144-45 (3d Cir. 2022).

harassment that creates a [hostile work environment]."[182] To prevail on her hostile work environment claim, Complainant was required to establish, by a preponderance of the evidence, that:

> (1) [s]he engaged in protected activity;
> (2) [s]he suffered intentional harassment related to that activity;
> (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and
> (4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect [C]omplainant.[183]

"Hostile work environment claims involve repeated conduct or conditions that occur 'over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.'"[184] "Proving a hostile work environment claim is a high bar."[185] The conduct complained of must be "sufficiently severe or pervasive to alter the conditions of the [complainant's] employment and create an abusive working environment."[186] Discourtesy or rudeness is not harassment, "nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing . . ."[187] Circumstances relevant to the assessment of whether conduct amounts to a hostile work environment include "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes

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182 *Mason & Hanger Corp.,* ARB No. 1998-0030, slip op. at 11.

183 *Id.* at 11-12 (citations omitted).

184 *Lewis v. U.S. Env't Prot. Agency*, ARB No. 2004-0117, ALJ Nos. 2003-CAA-00005, -00006, slip op. at 5 (ARB June 30, 2008), *aff'd*, 368 F. App'x 20 (11th Cir. 2010) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002)).

185 *Forrand v. FedEx Express*, ARB No. 2019-0041, ALJ No. 2017-AIR-00016, slip op. at 6 (ARB Jan. 4, 2021).

186 *Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062, slip op. 13 (ARB June 17, 2019) (citing *Williams v. Nat'l R.R. Passenger Corp.*, ARB No. 2012-0068, ALJ No. 2012-FRS-00016, slip op. at 6-7 (ARB Dec. 19, 2013) (other citation omitted)).

187 *Brune v. Horizon Air Indus., Inc.*, ARB No. 2004-0037, ALJ No. 2002-AIR-00008, slip op. at 10 (ARB Jan. 31, 2006) (citations omitted).

with an employee's work performance."[188] A claim of hostile work environment can be based on the aggregate or cumulative effect of separate acts, which together establish sufficiently "severe and pervasive" intentional harassment to create an abusive working environment.[189]

The ALJ determined that Complainant failed to meet her burden of demonstrating she experienced intentional harassment related to her ERA-protected activity: reporting the back-dating of safety-related procedure documents.[190] In reaching this conclusion, the ALJ considered the following limited itemization of Complainant's allegations: (1) that Connelly "hollered" at her and was physically aggressive on September 25; (2) that Connelly acted in a physically

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188 *Id.* at 11 (citations omitted).

189 *See Stucke v. City of Philadelphia*, 685 F. App'x 150, 153-54 (3d Cir. 2017) (rejecting district court's reliance upon the "'bright-line distinction between discrete acts,' on the one hand, and the aggregate of non-actionable individual acts that could form the basis of a hostile work environment claim on the other," finding this rationale inapposite when timeliness is not at issue and concluding that the court "should have considered all of the acts alleged, regardless of whether they were individually actionable."); *Greb v. Potter*, 176 F. App'x 260, 263-64 (3d Cir. 2006) (Title VII sex discrimination) ("[W]e analyze the aggregate effect of all evidence and reasonable inferences therefrom, including those concerning incidents of facially neutral mistreatment, in evaluating a hostile work environment claim."); *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 279 (3d Cir. 2001) (Title VII discrimination and state law discrimination) ("No one event alone stands out from the rest, but all of the events could be found to aggregate to create an environment hostile to a person of [the employee's] religion."); *Onysko v. Utah Dep't of Env't Quality*, ARB No. 2019-0042, ALJ Nos. 2017-SDW-00002, 2018-SDW-00003, slip op. at 2 n.3. (ARB Dec. 16, 2020) (Decision and Order), *aff'd sub nom. Onysko v. Walsh*, *Admin. Rev. Bd., U.S. Dep't of Lab.*, Nos. 21-9529, 21-9530, 2022 WL 1251071 (10th Cir. 2022) (affirming the ALJ "because even viewing the listed alleged adverse actions in the aggregate, there is no hostile work environment claim" in that "'the workplace [was not] permeated with 'discriminatory intimidation, ridicule, and insult,' that was 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment[.].'") (citations omitted); *Jenkins v. U.S. Env't Protect. Agency*, ARB No. 1998-0146, ALJ No. 1988-SWD-00002, slip op. at 43-44 (ARB Feb. 28, 2003) ("[T]he other 11 personnel actions involving the 'satisfactory' evaluations and reduction in work assignments . . . were not in the aggregate 'sufficiently severe or pervasive . . . to create an abusive working environment' and 'detrimentally affect'" the complainant's work.") (citations omitted); *see also Noviello v. City of Boston*, 398 F.3d 76, 93 (1st Cir. 2005) (Title VII discrimination and state antidiscrimination statute) ("The only question is whether the bad acts, taken in the aggregate, are sufficiently severe or pervasive to constitute actionable harassment.").

190 D. & O. at 11-12.

threatening manner while in her cubicle during the October 3 incident; (3) the "rocky relationship" which Complainant had "over the years" with "supervisors and colleagues," described as comparatively "like husband and wife"; and (4) Complainant's allegation that she "did not get along" with another named employee.[191] With respect to the two dated incidents involving Connelly, the ALJ relied on the separate fact-finding investigations conducted by HR, both of which concluded that Complainant's allegations were not substantiated.[192] With respect to the remaining allegations, the ALJ relied on the hearing testimony of various witnesses, including Complainant describing her "less than ideal work relationships" with her co-workers, and determined that Complainant had failed to show that these difficulties arose after her protected conduct occurred or that they constituted intentional harassment that developed before her protected activity occurred.[193]

On appeal, Complainant argues in support of her hostile work environment claim that the ALJ ignored Kunkle's December 1, 2014 report stating that Complainant's "diagnosis was changed to Post-Traumatic Stress Disorder [] after a few sessions. She has been dealing with work stress and some prior abuse issues."[194] She also argues that the ALJ ignored other smaller incidents that, when considered collectively, demonstrated intentional harassment, including the removal of her job duties, allegations of HR mishandling its investigations into the September 25 and October 3 incidents, and Respondent's failure to treat her as similarly situated employees were treated when their UAAs were revoked due to mental health and/or substance abuse treatment but later reinstated even as treatment continued.[195]

Our review of the ALJ's determinations relevant to Complainant's hostile environment claim reveals a lack of consideration of not only the matters identified on appeal by Complainant, but also a lack of consideration of the discrete, and aggregated, issues identified in Section 2 above. In the absence of credibility determinations and lacking the ALJ's specific evaluation of all of the Complainant's

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191 *Id.* at 11.

192 *Id.*

193 *Id.* at 11-12.

194 RX 30 at 9.

195 Comp. Br. at 31-32. *See Smith v. Dep't of Lab.*, 674 F. App'x 309, 315-16 (4th Cir. 2017) (ERA whistleblower claim) (noting the propriety of considering whether an "employer is selectively enforcing rules or selectively imposing extraordinarily harsh discipline against whistleblowers as a pretext for unlawful retaliation").

allegations in light of the admitted evidence, the Board is unable to determine whether the ALJ correctly determined that Complainant's evidence failed to meet the "high bar" required to establish a hostile environment claim. It may well not.[196] Even so, the Board can, and does, conclude that the ALJ erred by failing to consider all of the evidence in the record with respect to this claim, and by failing to identify and address his consideration of such in the D. & O. Either way, on this record the Board is unable to ascertain how the ALJ reached his ultimate findings concerning whether Complainant's protected activity was or was not related to these occurrences, and whether the occurrences, discretely or in the aggregate, constitute intentional harassment that is sufficiently severe or pervasive such that a

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[196] *See, e.g.*, *Overall v. Tennessee Valley Auth.*, ARB No. 2004-0073, ALJ No. 1999-ERA-00025, slip op. at 17 (ARB June 29, 2007) (reissued July 16, 2007) (affirming finding of intentional harassment as to 12 incidents related to protected activity, including anonymous telephone calls and voice messages which the caller blows a whistle, anonymous notes left at his home and on his truck and at work in his office and on the wall of the men's bathroom ("Go home all whistleblowers now"), a fake bomb left in the back of his truck while parked at a shopping center, and a comment made by his second line supervisor to him that engineers were "not to make up problems but to find them and correct them"); *Mason & Hanger Corp.*, ARB No. 1998-0030, slip op. at 44-45 (ERA-complainants established intentional harassment related to their protected activity by showing multiple incidents involving "contentious [and mocking] remarks made by co-workers and supervisory personnel in response to the Complainants' safety-related concerns" and "four incidents involving express or implied threats of violence" as these "harassing incidents were severe, frequent and pervasive"); *Smith v. Esicorp, Inc.*, Case No. 1993-ERA-00016, slip op. at 12-13 (Sec'y Mar. 13, 1996) (holding that multiple (at least four or five) sarcastic and derogatory cartoons, which depicted the complainant as a NRC whistleblower and displayed in a common workplace area on a drawing board for two-and-a-half months, constituted pervasive and intentional harassment); *cf. Onysko v. State of Utah, Dep't of Env't Quality*, ARB No. 2019-0042, ALJ Nos. 2017-SDW-00002, 2018-SDW-00003, slip op. at 2-3 & 2-3 n.3 (ARB Feb. 4, 2021) (Order Denying Reconsideration), *aff'd sub nom. Onysko v. Walsh*, *Admin. Rev. Bd., U.S. Dep't of Lab.*, Nos. 21-9529, 21-9530, 2022 WL 1251071 (10th Cir. 2022) (finding that the eighty-seven enumerated incidents (including name-calling, such as "troublemaker," being accused of not being cooperative and of poor customer service, being ordered to attend a meeting, not being allowed to speak during a meeting, having grievances denied, and having complaints and counter complaints filed against him citing his behavior) lacked "severe or pervasive conduct" to "create a hostile work environment claim"); *Reed v. Am. Airlines, Inc.*, ARB No. 2021-0044, ALJ No. 2020-AIR-00001, slip op. at 21 (ARB Dec. 16, 2021) (being subjected to a fact-finding investigation during which the employee was out of service, name-calling, denial of access to pay and benefits monitoring program, and frequent work assignments that deviated from normal business practices, when considered together, were "not 'extremely serious or serious and pervasive' enough to meet the high bar of proving a hostile work environment'") (citing *Brune*, ARB No. 2004-0037, slip op. at 10).

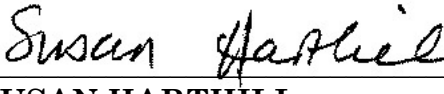
reasonable person would have been detrimentally affected by them, as Complainant claims to have been. As such, we remand this matter for more complete findings and analysis on the hostile work environment claim. [197]

CONCLUSION

The Board **AFFIRMS** the ALJ's determination that the agency retained jurisdiction to consider the claim. Concluding that the ALJ failed to fully analyze and weigh the evidence on the issue of contributing factor, the Board **VACATES** the ALJ's determination that Complainant failed to establish by the preponderance of the evidence that her protected activity was a contributing factor to the removal of certain job duties and her UAA, which led to termination of her employment, and hereby **REMANDS**, directing the ALJ to fully analyze the record and reexamine the issue of contributing factor. Likewise, the Board **VACATES** the ALJ's determination that Complainant failed to establish her hostile work environment claim and **REMANDS**, directing the ALJ to fully address the allegations of intentional harassment in light of applicable law.

SO ORDERED.[198]

TAMMY L. PUST
Administrative Appeals Judge



SUSAN HARTHILL
Chief Administrative Appeals Judge

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197 *See Clem*, ARB No. 2016-0096, slip op. at 16-17.

198 In any appeal of this Decision and Order, the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.