U.S. Department of Labor

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

IN THE MATTER OF:

THOMAS MAY,

COMPLAINANT,

v.

AGL SERVICES COMPANY,

RESPONDENT.

ARB CASE NO. 2022-0015

ALJ CASE NO. 2020-PSI-00001
ALJ STEVEN D. BELL

DATE: September 14, 2023

Appearances:

For the Complainant:
Thomas May, Esq.; *pro se*; Rittman, Ohio

For the Respondent:
Benjamin D. Briggs, Esq., Honore N. Hishamunda, Esq., and Cary R. Burke, Esq.; *Seyfarth Shaw LLP*; Atlanta, Georgia

Before PUST and WARREN Administrative Appeals Judges

DECISION AND ORDER

PUST, Administrative Appeals Judge:

This case arises under the employee protection provisions of the Pipeline Safety Improvement Act of 2002 (PSIA or Act),[1] and its implementing regulations.[2] Thomas May (Complainant) filed a whistleblower complaint against AGL Services Co. (Respondent) for alleged retaliation under the PSIA. A U.S. Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) denying the claim based on the ALJ's finding that Complainant failed to establish

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[1] 49 U.S.C. § 60129.

[2] 29 C.F.R. Part 1981 (2023).

that his protected activity was a contributing factor to the adverse personnel action he suffered.[3] Complainant timely appealed the ALJ's decision to the Administrative Review Board (ARB or Board). We affirm.

BACKGROUND

Complainant began working for Respondent as a fire investigator in December 2018.[4] Respondent, through Nicor, Inc., is a distributor of natural gas to residences and businesses in the suburbs of Chicago, Illinois.[5] In 2018, Nicor, Inc. began installing gas meters able to directly report gas usage through a lithium battery-powered communications link throughout its service area. These new gas meters are referred to herein as "Sensus AMI meters."[6]

During the spring and summer of 2019, four properties suffered fires, all serviced by Respondent and located on residential streets in the suburbs of Chicago, as follows: (1) DaVinci Drive in Hampshire, Illinois on May 14, 2019; (2) Clover Ridge in Itasca, Illinois on June 7, 2019; (3) Eider Drive in Plainfield, Illinois on July 5, 2019; and (4) Meadow Court in Hampshire, Illinois on August 10, 2019.[7] With respect to these four properties, the record clearly establishes that only the one located on Meadow Court in Hampshire, Illinois was equipped with a Sensus AMI meter. [8]

At some point following the DaVinci Drive fire on May 14th and the Clover Ridge fire on June 7th, Complainant developed concerns that Sensus AMI meters may have caused the fires.[9] At the time he developed these concerns, Complainant was unaware that neither the DaVinci Drive property or the Clover Ridge property were equipped with Sensus AMI meters, though he had access to a computer database that would have confirmed that information.[10]

On June 8, 2019, Tommy Sipsy (Sipsy), Complainant's supervisor, returned to the office after being on leave for approximately one month, and became aware of

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3 D. & O. at 36.

4 *Id.* at 2.

5 *Id.* Nicor, Inc. is a subsidiary of Southern Company Gas, which is in turn a subsidiary of Southern Company. *Id.*

6 Sensus manufactures the Sensus AMI gas meters. *Id.*

7 *Id.* at 2, 11.

8 *Id.* at 11. It is unclear when Complainant became aware of this. *Id.* at 34-35.

9 *Id.* at 3-5.

10 *Id.* at 5.

Complainant's concerns regarding the Sensus AMI meters.[11] Sipsy inquired into the Sensus AMI meters' safety.[12] On July 19, 2019, Sipsy sent Complainant a memorandum which noted that no fires were associated with the millions of installed units and concluded that the meters did not pose a safety risk.[13] Complainant continued to voice his concerns about the Sensus AMI meters, including in an August 7, 2019 memorandum he sent to Respondent's in-house counsel suggesting that Respondent should investigate the safety of the Sensus AMI meters, but in which he did not suggest that the meters had caused any fires.[14]

At some point in August, Sipsy scheduled a meeting with Complainant for August 15, 2019, to discuss Complainant's job performance.[15] Before the meeting, Complainant filed an internal ethics complaint, alleging that Sipsy was retaliating against him for raising safety concerns.[16] Complainant also informed Charles Mangan (Mangan), Sipsy's supervisor, that, if Sipsy attempted to counsel him about his job performance he would file a complaint against Sipsy with the Illinois Commerce Commission (ICC).[17] Complainant also informed Mangan that "Complainant intended to 'bully Tommy [Sipsy] like he's never been bullied before.'"[18] As a result, Mangan assigned a security officer to accompany Sipsy to the meeting.[19]At the meeting, Complainant yelled at Sipsy, denigrating Sipsy's character, education, and personal appearance, which Sipsy stated, "shook me up. It shook me up bad."[20] The security officer later reported to Mangan that Complainant had been yelling at and chastising Sipsy during the meeting.[21]

On August 23, 2019, Complainant met with Respondent's executives and urged them to investigate the Sensus AMI meters.[22] At an unknown point in time, Respondent appointed an investigative team to determine if the Sensus AMI meters

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11 *Id.* at 6-7, 32.

12 *Id.* at 8-10.

13 *Id.*

14 *Id.* at 12.

15 *Id.*

16 *Id.* at 17.

17 *Id.* at 12.

18 *Id.*

19 *Id.* at 15.

20 *Id.* at 16.

21 *Id.*

22 *Id.* at 17-19.

posed a safety risk.[23] Complainant was a member of the investigative team, which continued its work even after Complainant's employment was terminated.[24]

As part of her assigned duties, Katrina Oliver (Oliver) conducted the investigation of Complainant's internal August 13, 2019 ethics complaint against Sipsy. She noted that Complainant reported that Sipsy had been "micromanaging" him since approximately February 2019, and referred to Sipsy as "incompetent" and exhibited a "general feeling of disgust" about Sipsy's qualifications to manage him.[25] Oliver eventually concluded that Complainant's ethics complaint against Sipsy was unsubstantiated.[26] Thereafter, on September 12, 2019, Respondent hired Ginger McRae (McRae), an outside investigator, to evaluate whether Complainant's treatment of Sipsy violated the company's code of ethics.[27]

On September 16, 2019, Sipsy emailed Complainant regarding administrative issues.[28] On September 18, 2019, Complainant replied and accused Sipsy of being "'an ethically challenged individual' attempting to 'promulgate a fabricated untruth.'"[29] Complainant then addressed Sipsy directly, writing, "You don't have any SHAME, do you? Please cease with the unprincipled buffoonery and focus on completing your individual and supervisory demands in an honest and principled manner. Thank you in advance for your full cooperation going forward."[30] Complainant added several carbon copy recipients to the email.[31]

On September 19, 2019, Pamela Wimberly (Wimberly), a human resources representative, suspended Complainant's employment pending McRae's investigation.[32] On September 24, 2019, McRae presented to Mangan, Wimberly, and Sheree Sturgis (Sturgis), Respondent's Director of Ethics and Compliance Office, her finding that Complainant's actions were inconsistent with Respondent's

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23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at 19 (citing Hearing Transcript (Tr.) at 821 and Joint Exhibit (JX) 19 at 4). This citation is incorrect. The correct transcript citation is Tr. at 817.

27 D. & O. at 19 (citing Tr. at 878, JX 22). This citation is incorrect. The correct transcript citation is Tr. at 873-74.

28 D. & O. at 21.

29 *Id.* at 21-22.

30 *Id.*

31 *Id.*

32 *Id.* at 23 (citing Tr. at 697). This citation is incorrect. The correct citation is Tr. at 696.

code of ethics.[33] On September 26, 2019, Respondent terminated Complainant's employment.[34]

On October 8, 2019, Complainant filed a whistleblower complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that Respondent retaliated against him in violation of the PSIA.[35] On December 31, 2019, OSHA determined there was no probable cause for the complaint and dismissed the case.[36]

Complainant requested a hearing before an ALJ with the Office of Administrative Law Judges. The hearing took place on June 14-18, 2021.[37] On November 16, 2021, the ALJ issued a Decision and Order in which he concluded that Complainant had engaged in protected activity when he questioned the safety of the Sensus AMI meters, but that this protected activity was not a contributing factor to the adverse employment actions he suffered, and therefore dismissed the complaint.[38]

Complainant timely appealed to the Board.[39] Both parties filed briefs.[40] On March 27, 2023, Complainant filed a petition to unseal the record.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear appeals concerning questions of law or fact from an ALJ's final determinations under the PSIA.[41] The Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence.[42] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate

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33 D. & O. at 23.

34 *Id.*

35 OSHA's Determination Letter at 1.

36 *Id.*

37 D. & O. at 26.

38 *Id.* at 39-40.

39 Complainant's (Comp.) Petition for Review.

40 Comp. Brief (Br.), Respondent's (Resp.) Br., Comp. Reply Br.

41 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. 13,186 (Mar. 6, 2020).

42 29 C.F.R. § 1981.110(b); *Reed v. Jacobs Eng'g Grp.*, ARB Nos. 2019-0062, -0066, ALJ No. 2017-PSI-00001, slip op. at 5 (ARB Mar. 31, 2021).

to support a conclusion."[43] The Board reviews an ALJ's determinations on procedural and evidentiary rulings under an abuse of discretion standard.[44]

DISCUSSION

The PSIA's employee protection provision prohibits discrimination against an employee who engages in certain types of protected activity.[45] To prevail on a PSIA whistleblower complaint, Complainant must demonstrate, by a preponderance of the evidence, that he (1) he engaged in protected activity; (2) he suffered an unfavorable or adverse employment action; and (3) the protected activity was a contributing factor to the adverse employment action.[46] If Complainant meets this burden, relief may not be ordered if Respondent can demonstrate, by clear and convincing evidence, that it would have taken the same adverse employment action even if Complainant had not participated in the protected activity.[47]

1. The ALJ's Factual Findings are Supported by Substantial Evidence

Complainant challenges several of the ALJ's factual findings, often without citing to the record or explaining how these purported errors would impact the result reached in the case. Citations to materials without specificity are insufficient because "[w]e are not required to scour through hundreds of pages of deposition transcript in order to verify an assortment of facts . . . ."[48] Moreover, as discussed in more detail below, we find that substantial evidence in the record supports the ALJ's factual findings.

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43 *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938) (citations omitted).

44 *Furlong-Newberry v. Exotic Metals Forming Co., LLC,* ARB No. 2022-0017, ALJ No. 2019-TSC-00001, slip op. at 22 (ARB Nov. 9, 2022) (citing *James v. Suburban Disposal, Inc.*, ARB No. 2010-0037, ALJ No. 2009-STA-00071, slip op. at 4 (ARB Mar. 12, 2010)).

45 49 U.S.C. § 60129(a); 29 C.F.R. § 1981.100.

46 *See* 29 C.F.R. § 1981.109(a) ("A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.").

47 *Id.* ("Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.").

48 *Shah v. Albert Fried & Co.*, ARB No. 2020-0063, ALJ No. 2019-SOX-00015, slip op. at 8 n.39 (ARB Aug. 22, 2022) (quoting *Friend v. Valley View Cmty. Unit Sch. Dist., 365U*, 789 F.3d 707, 710-11 (7th Cir. 2015).

2. Complainant Engaged in Protected Activity

The ALJ found that Complainant engaged in protected activity when he questioned whether Respondent's Sensus AMI meters posed a fire risk.[49] Neither Complainant nor Respondent challenges the ALJ's finding that Complainant engaged in protected activity.[50] Substantial evidence in the record supports the ALJ's finding.[51] Thus, we affirm the ALJ's finding that Complainant engaged in protected activity.

3. Complainant Suffered an Adverse Employment Action

The ALJ found that Complainant suffered adverse employment actions when he was suspended from work on September 19, 2019, and when Respondent terminated his employment on September 26, 2019.[52] Neither Complainant nor Respondent challenges the ALJ's findings, which are supported by substantial evidence in the record.[53] Thus, we affirm the ALJ's finding that Complainant suffered adverse employment action.

4. Complainant's Participation in Protected Activity was not a Contributing Factor to the Adverse Employment Actions

The ALJ found there was no direct or circumstantial evidence that Complainant's employment was terminated because of his participation in protected activity.[54] Further, the ALJ found that any chain of inference that might have existed between Complainant's protected activity and his employment termination was broken by two intervening acts: (1) Complainant's unprofessional behavior at the August 15, 2019 meeting and (2) the disrespectful and unprofessional September 18, 2019 email that Complainant wrote and widely distributed.[55] The ALJ found that Respondent terminated Complainant's employment solely because

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49 D. & O. at 34.

50 Complainant contends that the ALJ did not comprehensively examine the facts that support the finding that he engaged in protected activity, specifically the safety issues regarding Sensus AMI meters. Comp. Br. at 1-4. The ALJ was tasked with analyzing whether Complainant established the elements of his whistleblower claim, not whether the Sensus AMI meters posed an actual safety risk. *See* 29 C.F.R. § 1981.109(a).

51 D. & O. at 34-35.

52 *Id.* at 35.

53 *Id.* at 35-36.

54 *Id.* at 36-39.

55 *Id.* at 36-37.

of Complainant's unprofessional behavior directed toward Sipsy.[56] Thus, the ALJ concluded that Complainant's protected activity was not a contributing factor with respect to the adverse actions he suffered.[57]

A contributing factor is any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision.[58] Employees may meet their evidentiary burden to establish this element of the claim with circumstantial evidence.[59] Circumstantial evidence may include, but is not limited to, temporal proximity, inconsistent application of an employer's policies, pretext, shifting explanations by the employer, or antagonism.[60]

The record supports the ALJ's finding that Complainant behaved unprofessionally at the August 15, 2019 meeting. Sipsy testified that Complainant "verbally abus[ed]" him for approximately fifteen minutes, during which time Complainant denigrated Sipsy's character, education, and personal appearance.[61] Sipsy's testimony was bolstered by McRae's testimony and September 23, 2019 report specifically because Complainant expressed his contempt for Sipsy to McRae and denigrated Sipsy's education and job performance.[62] Complainant's testimony also supports the ALJ's finding. Complainant testified that at the August 15, 2019 meeting, he "dealt with a bully the way a bully needed to be dealt with," used the threat of reporting Sipsy "as a shield," and "put [Sipsy] in his place."[63]

Substantial evidence in the record also supports the ALJ's finding that Respondent terminated Complainant's employment related to the September 18, 2019 email that Complainant wrote and widely distributed. Complainant's email, on its face, was unprofessional, demeaning, and inappropriate. The email states, in part, that Sipsy's original email was "yet another dishonest attempt by an ethically-challenged individual to promulgate a fabricated untruth" and "[y]ou don't have ANY shame, do you? Please cease with the unprincipled buffoonery and focus upon

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56 *Id.* at 38.

57 *Id.* at 39.

58 *Williams v. QVC, Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 12 (ARB Jan. 17, 2023) (citing *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, 2014-FRS-00154, slip op. at 53 (Sept. 30, 2016), *reissued with full dissent*, Jan. 4, 2017).

59 *Id.* (citing *Palmer*, ARB No. 2016-0035, slip op. at 55).

60 *Id.* (citing *Acosta v. Union Pacific R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 8-9 (ARB Jan. 22, 2020) (citing *Loos v. BNSF Ry. Co.*, 865 F.3d 1106, 1112-13 (8th Cir. 2017), *rev'd on other grounds*, 139 S. Ct. 893 (Mar. 4, 2019)).

61 D. & O. at 16; Tr. at 528-29.

62 D. & O. at 19-21; JX 22; Tr. at 875-76.

63 D. & O. at 14-15; Tr. at 390-92.

completing your individual and supervisory demands in an honest and principled manner."[64] Thus, we find that substantial evidence in the record supports the ALJ's finding that Complainant's protected activity was not a contributing factor to Respondent's decision to terminate his employment.

Despite the substantial evidence that Respondent terminated Complainant's employment solely because of his unprofessional misconduct and insubordination, Complainant contends that the ALJ erred in reaching this conclusion for several reasons.[65] We address, and reject, each in turn.

A. Temporal Proximity

Complainant contends that the record demonstrates an inference of causation based on the temporal proximity between when he engaged in protected activity and when Respondent terminated his employment.[66] Any inference of contributing factor causation raised by temporal proximity may be rebutted or negated where a complainant engaged in intervening events of insubordinate conduct.[67] As the Board has explained, "[t]he insufficiency of temporal proximity as a basis for proving causation is [ ] apparent when the facts reveal an *intervening event* occurring between the protected activity and the adverse personnel action."[68]

Complainant engaged in protected activity beginning on or around June 8, 2019, when he raised his concerns about the Sensus AMI meters to Sipsy upon Sipsy's return from leave, and continued until Respondent terminated his employment.[69] Complainant did not experience an adverse action until after he

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64 D. & O. at 22; JX 20 at 2.

65 Comp. Br. at 48-49.

66 *Id.* at 12.

67 *See Smith v. CRST Int'l, Inc.*, ARB No. 2015-0004, ALJ No. 2006-STA-00031 (ARB Dec. 21, 2016) (example where a respondent successfully rebutted the inference of causation established by temporal proximity); *Rathburn v. The Belt Ry. Co.*, ARB No. 2016-0036, ALJ No. 2014-FRS-00035 (ARB Dec. 8, 2017) (example where a respondent successfully negated the inference of causation established by temporal proximity); *but see Occhione v. PSA Airlines, Inc.*, ARB No. 2013-0061, ALJ No. 2011-AIR-0012, slip op. at 12 n.54 (ARB Nov. 26, 2014) ("In any event, the occurrence of an 'intervening event' does not necessarily cancel the inference of causation resulting from temporal proximity but may merely compromise it. '[O]ther evidence may establish the link between' the protected activity and adverse action despite the intervening event. Whether an intervening act will break causation may be decided one way or the other depending on 'how proximate the events actually were, and the context in which the issue' arose.") (internal citations omitted).

68 *Williams*, ARB No. 2020-0019, slip op. at 14 (quoting *Acosta*, ARB No. 2018-0020, slip op. at 8) (emphasis added).

69 D. & O. at 32, 34-35.

began behaving in an unprofessional manner. As the ALJ found, the chain of inference between Complainant's protected activity and the adverse actions was broken by Complainant's behavior at the August 15, 2019 meeting and in the September 18, 2019 email Complainant wrote and distributed.[70] Moreover, the event most proximate to Complainant's employment termination was that McRae presented her findings concluding that Complainant's behavior was inconsistent with Respondent's code of ethics to Mangan two days before Respondent terminated Complainant's employment.[71] Thus, we affirm the ALJ's finding that any purported chain of inference between Complainant's protected activity and his termination was broken by these intervening acts.

B. Pretext

Complainant next asserts that Respondent's purported reason for terminating his employment was pretextual. In appropriate circumstances, pretext may serve as circumstantial evidence of contribution.[72] "The critical inquiry in a pretext analysis is . . . whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge."[73]

Complainant contends that Respondent's purported reason for terminating his employment is pretextual based on Respondent's "shifting rationalizations."[74] Specifically, Complainant asserts that Respondent first alleged poor job performance as its reason for terminating his employment, only to later claim that Respondent terminated his employment because of unprofessional conduct.[75]

Complainant fails to cite to anything in the record in support of his assertion that Respondent shifted its rationalization for terminating Complainant's employment. Although Sipsy met with Complainant on August 15, 2019, to discuss Complainant's performance review, substantial evidence in the record supports the ALJ's finding that Respondent terminated Complainant's employment due to Complainant's insubordination and unprofessional treatment of Sipsy. Notably, Complainant testified that Mangan informed him that Respondent was terminating

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70 *Id.* at 36.

71 D. & O. at 23; JX 23 at 7.

72 *Reed v. American Airlines, Inc.*, ARB No. 2021-0044, ALJ No. 2020-AIR-00001, slip op. at 18 (ARB Dec. 16, 2021).

73 *Carter v. BNSF Ry. Co.*, ARB No. 2021-0035, ALJ No. 2013-FRSA-00082, slip op. at 13 (ARB Sept. 26, 2022) (quoting *BNSF Ry. Co. v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 867 F.3d 942, 947 (8th Cir. 2017)).

74 Comp. Br. at 14-16.

75 *Id.*

his employment due to his insubordination.[76] In addition, on September 12, 2019, Respondent hired McRae to investigate whether Complainant's behavior violated Respondent's code of ethics.[77] One day after McRae presented her findings that it did, Respondent terminated Complainant's employment.[78] Thus, we conclude that Complainant has failed to establish that Respondent had a shifting rationalization for terminating complainant's employment.

Next, Complainant contends that pretext is also demonstrated by the timing of his job performance critique.[79] Complainant alleges that Respondent only critiqued his job performance after he began engaging in protected activity.[80] Complainant has not cited to the record in support of this argument. The aspect of Complainant's job performance that Sipsy critiqued related to Complainant's failing to maintain the calendar he shared with Sipsy, who needed to monitor Complainant's job performance in Naperville, Illinois from Atlanta, Georgia.[81] The record demonstrates that Sipsy first counseled Complainant on maintaining his shared calendar on February 19, 2019, two months before the DaVinci Drive fire occurred and thus two months before any protected conduct took place.[82] Thus, Complainant has not established that the timing of his job performance critiques demonstrates pretext.

C. Inconsistent Application of Respondent's Policies

Complainant contends that Respondent did not follow its policy of discipline, and that the decision-making process that led to the termination of his employment was tainted and could not have been independent.[83] The ALJ did not make a finding about whether Respondent had a progressive discipline policy in place, and Complainant has not cited to any evidence in the record of such a policy. Moreover, Sturgis testified that, during the period of Complainant's employment, Respondent did not have a progressive discipline policy in place and instead disciplinary matters were handled "based on the egregiousness of the infraction."[84] Thus, we find that Complainant failed to establish an inconsistent application of Respondent's policies with respect to his termination.

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76 Tr. at 408-09.

77 D. & O. at 19.

78 *Id.* at 23.

79 Comp. Br. at 16-20, 22, 33-36.

80 *Id.*

81 D. & O. at 37.

82 *Id.*; Tr. at 495.

83 Comp. Br. at 12-14, 40.

84 Tr. at 812-13.

D. Disparate Treatment

Complainant contends that the ALJ erred in finding that other employees who were not engaging in protected activity suffered comparable discipline after engaging in similar insubordination.[85] "A whistleblower who argues that disparate treatment occurred 'must prove that similarly-situated employees' who were 'involved in or accused of the same or similar conduct were disciplined differently.'"[86] Disparate treatment requires that both employees committed similar conduct with comparable seriousness.[87] Notably, the ALJ did not make any finding related to disparate treatment. In addition, Complainant has not referenced another employee or situation involving comparable insubordination. As there is no evidence in the record of any such situation, we conclude that Complainant has not demonstrated that he suffered any disparate treatment.

E. Respondent's Motivation

Finally, Complainant contends that the ALJ erred in finding there was no motivation for Respondent to retaliate against Complainant.[88] The record substantially supports the ALJ's finding that Respondent took Complainant's safety concerns seriously and investigated them. Sipsy investigated the safety of the Sensus AMI meters.[89] In addition, Respondent formed a committee to investigate the safety of Sensus AMI meters, which investigation Complainant was part of and which continued after Complainant's employment was terminated.[90]

For the reasons stated and based on substantial evidence in the record, we affirm the ALJ's conclusion that Respondent established a credible, legitimate, and non-retaliatory basis for terminating Complainant's employment and that Respondent terminated Complainant's employment on that basis. Therefore, we

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85 Comp. Br. at 20-21.

86 *Graff v. BNSF Ry. Co.*, ARB No. 2021-0002, ALJ No. 2018-FRS-00018, slip op at 12 (ARB Sept. 30, 2021) (quoting *Smith v. BNSF Ry. Co.*, ARB No. 2015-0055, ALJ No. 2013-FRS-00071, slip op. at 5 (ARB Apr. 11, 2017)). This test "is a rigorous one." *Bone v. G4S Youth Servs., LLC*, 686 F.3d 948, 956 (8th Cir. 2012) (quoting *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 853 (8th Cir. 2005)).

87 *Graff*, ARB No. 2021-0002, slip op at 12.

88 Comp. Br. at 47-48.

89 D. & O. at 37.

90 *Id.* at 17, 35.

affirm the ALJ's finding that Complainant's protected activity was not a contributing factor to the adverse employment actions he suffered.[91]

5. The ALJ Did Not Abuse his Discretion in the Issuance of Pre-Trial Orders

Complainant contends that the ALJ erred in issuing several pre-trial orders. As noted above, the Board reviews procedural and evidentiary rulings under an abuse of discretion standard.[92] "ALJs have wide discretion to set or limit the scope of discovery and will be reversed only when such evidentiary and discovery rulings are arbitrary or an abuse of discretion."[93]

First, Complainant asserts that the ALJ erred in denying his pre-trial motion for the appointment of an expert witness to educate the court about lithium batteries and fire.[94] Complainant does not cite any authority to establish that the ALJ's ruling was arbitrary or an abuse of discretion.[95] The ALJ correctly held that Complainant did not need to prove that the Sensus AMI meters posed a fire safety risk, only that Complainant "acted reasonably when he raised questions about the safety of the Sensus AMI meters with his employer," an issue that "did not depend on scientific evidence or expert opinion about the actual cause of the 2019 fires."[96] The ALJ determined that Complainant met this burden, and thus found in Complainant' favor on the issue of protected conduct without the need of expert

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91 Since the ALJ found that Complainant's protected activity was not a contributing factor to the adverse employment actions he suffered, the ALJ did not reach the same action defense analysis.

92 *Furlong-Newberry*, ARB No. 2022-0017, slip op. at 22 (citing *James v. Suburban Disposal, Inc.*, ARB No. 2010-0037, ALJ No. 2009-STA-00071, slip op. at 4 (ARB Mar. 12, 2010)).

93 *Id.* (quoting *Nieman v. Se. Grocers, LLC*, ARB No. 2018-0058, ALJ No. 2018-LCA-00021, slip op. at 21 (ARB Oct. 5, 2020)).

94 Comp. Br. at 43.

95 *See Santiglia v. Sun Microsystems, Inc.*, ARB No. 2003-0076, ALJ Co. 2003-LCA-00002, slip op. at 7 (ARB July 29, 2005) (acknowledging ALJ's "considerable latitude in ordering proceedings" and finding denial of expert testimony to be "appropriate and legally sound.").

96 D. & O. at 25-26 (quoting ALJ's May 11, 2020 Order denying Complainant's Motion for the Appointment of an Expert). *See also Elbert v. True Value Co.*, ARB No. 2007-0031, ALJ No. 2005-STA-00036, slip op. at 2-3 n.5 (ARB Nov. 24, 2010) (Order Denying Reconsideration) ("An employee's complaint based upon a reasonable, albeit mistaken, belief that a potential or actual violation of a . . . safety regulation . . . occurred is sufficient to establish protected activity.").

testimony.[97] Thus, we affirm the ALJ's denial of Complainant's motion for the appointment of an expert witness.

Next, Complainant contends that the ALJ erred in denying his motion for a referral of court-filed discovery documents to the ICC.[98] Complainant has not explained how the ALJ's denial of Complainant's motion harmed his case or how the ALJ abused his discretion, nor do we find any evidence of such. Thus, we affirm the ALJ's order denying Complainant's motion.

Complainant further contends that the ALJ erred in issuing a protective order in this case.[99] The protective order set forth a procedure for parties to designate certain defined information as "confidential," subject to the opposition's right to challenge any such designation, and prohibited the parties from sharing confidential information outside of limited circumstances absent a designation challenge or request for modification of the protective order brought before the ALJ.[100]

An ALJ has authority to grant a protective order "to protect against undue disclosure of privileged communications, or sensitive or classified matters."[101] To appropriately do so, the ALJ must determine "whether 'good cause' exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality.'"[102]

The ALJ determined that certain information should be subject to protection given its sensitive nature.[103] Complainant received all documents in dispute prior to the close of discovery and was allowed to examine and cross-examine witnesses.[104] By its terms, the protective order remains subject to a request for modification made to the ALJ. Further, Complainant has not pointed to anything to show that the protective order prejudiced the preparation for or presentation of his case or that the ALJ abused his discretion in issuing it. By its terms, the protective order does not "address claims of confidentiality made for any documents or information

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97 D. & O. at 34.

98 Comp. Br. at 23.

99 *Id.* at 48.

100 Protective Order at 1-3 (Dec. 14, 2020).

101 29 C.F.R. § 18.85(a).

102 *Furlong-Newberry*, ARB No. 2022-0017, slip op. at 30 (citing *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir. 2010) (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002))).

103 Protective Order at 1.

104 Resp. Br., EX A at 17.

which the parties will introduce during any public hearing in this case," and the order itself remains subject to a request for modification made to the ALJ.[105] Thus, we find no abuse of discretion in the ALJ's issuance of the protective order.

6. The ALJ Did Not Improperly Exclude Witnesses

Complainant contends that the ALJ erred in excluding several witnesses from testifying at the hearing, including Dirk Dunlap, Rachel Daly, and Joseph Worthan.[106] An ALJ is granted broad discretion to control discovery and hearing procedures, and will only be reversed upon a showing that the ALJ abused their discretion.[107] Complainant has not offered any evidence that the ALJ's decision was either arbitrary or an abuse of his discretion. The ALJ provided both parties with an opportunity to call and examine witnesses.[108] When the ALJ, Respondent, and Complainant discussed which witnesses would be called, Complainant specifically agreed to exclude Daly as a witness.[109] In addition, on the last day of the hearing when the ALJ asked Complainant if there were any other witnesses Complainant wanted to call, Complainant replied, "No. I can rest, Your Honor, thank you."[110] Thus, we find that the ALJ did not improperly exclude Complainant's witnesses.

7. The ALJ's Credibility Determinations

The ALJ made specific credibility determinations in his written decision. He found Mangan to be a "particularly credible witness" whose testimony he gave "great weight."[111] The ALJ found Respondent's other witnesses to be "generally credible," and found Complainant's credibility to be "negatively affecte[ed] by his continued failure to voluntarily disclose the "critically important fact" that there were no Sensus AMI meters at three of the four fires.[112]

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105 Protective Order at 1, 3.

106 Comp. Br. at 23-24, 36-37.

107 *Neely v. The Boeing Co.*, ARB No. 2020-0071, ALJ No. 2018-AIR-00019, slip op. at 23 (ARB May 19, 2022) (citing 29 C.F.R. § 18.12(b); *Huang v. Ultimo Software Sols., Inc.*, ARB Nos. 2009-0044, -0056, ALJ No. 2008-LCA-00011, slip op. at 2-3 (ARB Nov. 10, 2011) (Order Denying Reconsideration)).

108 D. & O. at 26.

109 Tr. at 662-63.

110 *Id.* at 1103.

111 D. & O. at 22, 33, 36.

112 *Id.* at 31-33.

Complainant contends that the ALJ erred in finding Mangan, Oliver, and Sipsy to be credible witnesses.[113] Complainant contends that Mangan and Oliver had memory issues,[114] and that the ALJ's credibility assessment of Sipsy is contrary to the evidence with respect to Complainant's argument that Sipsy told him not to investigate the DaVinci Drive fire.[115]

The Board gives considerable deference to an ALJ's credibility determinations and defers to such determinations unless they are inherently incredible or patently unreasonable.[116] "[I]f a 'decision is based on testimony that is coherent and plausible, not internally inconsistent, and not contradicted by external evidence,' the Board will defer to an ALJ's credibility determinations.[117]

Complainant does not point to anything in the record that would demonstrate that Mangan, Oliver, or Sipsy's testimony was incoherent, implausible, internally inconsistent, or contradicted by external evidence. On the contrary, and after a thorough review of the record, we conclude that the ALJ's credibility assessments of Mangan, Oliver, and Sipsy are supported by substantial evidence in the record, including the ALJ's finding that Sipsy was out of the office on leave during the DaVinci Drive fire which undermined Complainant's insistence that Sipsy directed him not to investigate his concerns.[118] Thus, we defer to and find no error with respect to the ALJ's credibility determinations.

8. Motion to Unseal the Record

On March 27, 2023, Complainant filed with the Board a Petition to Unseal Record.[119] Complainant contends it is necessary to unseal the record so that he may disclose public safety dangers.[120]

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113 Comp. Br. at 40-43.

114 *Id.*

115 *Id.* at 44-47.

116 *Furlong-Newberry*, ARB No. 2022-0017, slip op. at 21 n.153 (quoting *Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 2012-0002, ALJ No. 2006-WPC-00001, slip op. at 6 (ARB Aug. 29, 2012) (quotation omitted); *see also Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054, slip op. at 13 n.3 (ARB May 19, 2020).

117 *Furlong-Newberry*, ARB No. 2022-0017, slip op. at 23 (citing *Jenkins v. U.S. Env't Prot. Agency*, ARB No. 2015-0046, ALJ No. 2011-CAA-00003, slip op. at 39 (ARB Mar. 1, 2018) (quoting *Bobreski v. J. Givoo Consultants*, ARB No. 2013-0001, ALJ No. 2008-ERA-00003, slip op. at 26 (ARB Aug. 29, 2014))).

118 D. & O. at 3, 32, 35.

119 Complainant's Petition to Unseal Record at 1.

120 *Id.*

Complainant's argument is misdirected and without merit. The ALJ has not sealed the record in this case. Rather, the ALJ issued a protective order on December 14, 2020, regarding select categories of documents designated as "confidential information" by either of the parties, as earlier addressed.[121]

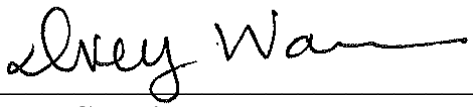
As discussed above, Complainant has not demonstrated that the ALJ abused his discretion in issuing the protective order, nor does the record indicate that the Complainant has requested modification of the protective order's controls before the ALJ. As there is no order sealing the record currently in place, the Board need not explore whether Complainant's Petition meets the legal standard required to undo an order to seal the administrative record. Thus, we deny Complainant's Petition to Unseal Record.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Decision and Order.[122] In addition, we **DENY** Complainant's Petition to Unseal the Record on the grounds specified herein.

SO ORDERED.

TAMMY L. PUST
Administrative Appeals Judge



IVEY S. WARREN
Administrative Appeals Judge

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121 Protective Order at 1-3.

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