

**U.S. Department of Labor**

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



**IN THE MATTER OF:**

**JEFFREY L. GREGORY,**

**ARB CASE NO. 2023-0049**

**COMPLAINANT,**

**ALJ CASE NO. 2021-CAA-00001**

**ALJ PATRICK M. ROSENOW**

**v.**

**DATE: January 29, 2026**

**NATIONS CABINETRY, LLC,  
d/b/a BJ TIDWELL CABINETRY,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Thomas J. Crane, Esq.; *Law Office of Thomas J. Crane*; San Antonio,  
Texas**

***For the Respondent:***

**Matthew C. Powers, Esq.; *Graves, Dougherty, Hearon & Moody, P.C.*;  
Austin, Texas**

**Before JOHNSON, Chief Administrative Appeals Judge, and KAPLAN,  
BURRELL, and KIKO, Administrative Appeals Judges; BURRELL,  
Concurring in Part and Dissenting in Part**

## **DECISION AND ORDER REVERSING AND REMANDING**

This case arises under the employee protection provisions of the Clean Air Act (the CAA) and its implementing regulations.<sup>1</sup> On August 29, 2023, Administrative Law Judge (ALJ) Patrick M. Rosenow issued a Decision and Order (D. & O.) finding that Complainant Jeffrey L. Gregory established that Respondent Nations Cabinetry, LLC engaged in unlawful retaliation against him in violation of the CAA. The ALJ further found that Respondent established an affirmative defense that it would have taken the same adverse action in the absence of

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<sup>1</sup> 42 U.S.C. § 7622; 29 C.F.R. Part 24 (2025).

Complainant's protected activity. Because substantial evidence does not support the ALJ's finding as to Respondent's affirmative defense, we reverse.

### BACKGROUND AND PROCEDURAL HISTORY

In December 2017, Respondent hired Complainant to serve as Chief Operating Officer of Nations Cabinetry.<sup>2</sup> Complainant's job description indicated that his responsibilities included "participat[ing] with the Senior Management of the Company in creating operational strategies and communicating such strategies to management and the ownership team" as well as "instituting systems that provide for effective internal management."<sup>3</sup> Complainant was also responsible for "providing strategic leadership and oversight to all operations functions" and partnering with other members of management and the Board to "ensure that business processes are performed with the highest degree of ethics and integrity."<sup>4</sup> In addition to working with other members of the senior management team, Complainant was charged with liaising with Respondent's corporate parent by "provid[ing] clear communication to Miami Nation Enterprises that ensure they are continually and accurately informed of the status of all operations at" Nations Cabinetry.<sup>5</sup>

Within a month of hiring Complainant, Respondent hired J.W. Coady to serve as Chief Executive Officer.<sup>6</sup> Beginning early in their partnership, Complainant expressed concerns to Coady about various operational issues. On June 28, 2018, Complainant, at Coady's direction, sent Coady an email laying out eight areas of concern he had with Respondent's operations.<sup>7</sup> The first three topics related to Respondent's compliance with state and federal environmental laws, including the company's unlawful operation of equipment without a required permit and the company's possible noncompliance with emission standards.<sup>8</sup> The other areas of concern ranged from staffing and purchasing decisions to communication between management and the plant floor. Complainant emphasized that the first three issues relating to environmental compliance and permitting, "not only hinder performance for myself and the plant but directly conflict with my personal and

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<sup>2</sup> D. & O. at 3.

<sup>3</sup> RX 2 at 1 (Chief Operating Officer Job Description for BJ Tidwell Cabinetry).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> D. & O. at 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; CX 9 at 1 (Email from Jeffrey Gregory to JW Coady, dated June 28, 2018).

professional ethics.”<sup>9</sup> Complainant told Coady that these three issues had “a grossly negative impact” on him.<sup>10</sup>

In August 2018, Complainant spoke with Derek Douglas, the COO of Miami Nation Enterprises (MNE), Respondent’s corporate parent, and expressed his concerns about Respondent’s environmental compliance, as well as other misgivings he had about Coady’s decisions.<sup>11</sup> Following this conversation, Coady called Complainant into his office to ask whether Complainant supported him and was on his team.<sup>12</sup> Complainant testified that during this conversation, Coady essentially threatened to fire him.<sup>13</sup> After being threatened with termination, Complainant ceased directly bringing up issues related to the company’s environmental compliance and permitting obligations.<sup>14</sup>

On March 1, 2019, Coady completed Complainant’s annual performance review, which covered his performance during 2018. The performance review stated that “this was a year of 2 segments. Segment 1 was very disappointing . . . . Segment 2, after our final talk, was a strong self recalibration.”<sup>15</sup> The performance review noted that Coady had seen good progress with regard to Complainant “rebuilding trust at the senior level” but it was “a long road to rebuild.”<sup>16</sup>

On March 3, 2020, Complainant attended an MNE board meeting. Before the meeting was called to order, Peter Murphy, the CEO of MNE asked Coady about the status of the environmental permits. Coady responded that he was working on it but still had outstanding items to complete before the permits could be finalized.<sup>17</sup> When asked about the risk of running equipment without the required permit,

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<sup>9</sup> CX 9 at 1-2.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> D. & O. at 3.

<sup>12</sup> *Id.* at 8.

<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Id.* at 9.

<sup>15</sup> CX 18 at 3 (Performance Review of Jeffrey Gregory, dated March 1, 2019). In what is likely a typographical error, the D. & O. states that segment one covers the period from December 2018 through May 2019, dates that are also included in Respondent’s post-trial briefing, where they are erroneously described as “Mr. Gregory’s first six months. However, we note that the performance review is dated March 1, 2019 and indicates that it covers 2018. Additionally, Mr. Gregory’s first six months were late December 2017 through late June 2018, Accordingly, we view it as highly probable that “segment 1” refers to the period from Mr. Gregory’s hire in December 2017 through the middle of 2018.

<sup>16</sup> *Id.*

<sup>17</sup> D. & O. at 8.

Coady responded that it was not a big deal and if the company got caught, they would shut down the equipment, pay a fine, and move on.<sup>18</sup> Complainant was taken aback by this exchange because Coady had previously informed him that the company had already received preliminary approval for the equipment and was only waiting on final paperwork from the state.<sup>19</sup> Complainant resolved to reach out to MNE's board of directors to discuss the issue and then, if necessary, reach out to state environmental regulators.<sup>20</sup> While at home, Complainant shared this incident with his wife as part of his regular practice of talking with her about workplace issues.<sup>21</sup>

On March 13, 2020, Complainant's wife (hereinafter Kelly Gregory) travelled—without Complainant's knowledge or support—to MNE's headquarters and met the following day with HR Director Gena Lankford in order to talk to Lankford about the environmental permitting issues as well as an unrelated workplace issue.<sup>22</sup> During this meeting Kelly Gregory brought up a litany of other grievances related to Coady's management, in addition to expressing concerns related to the environmental permit and the emissions compliance issue.<sup>23</sup> Kelly Gregory also made the unsubstantiated allegation that Coady had misstated revenues by one to two million dollars.<sup>24</sup> A week later, Coady and HR Director Oscar Rodriguez called Complainant and informed him that he was being placed on leave effective immediately for failure to protect confidential information, in violation of his employment contract.<sup>25</sup> On March 31, 2020, Respondent terminated Complainant's employment "based on [his] unauthorized disclosure of confidential Company information to [his] wife, Kelly Gregory, and [his] ongoing lack of support for Nation's management and the direction of Nation's business operations."<sup>26</sup>

On April 22, 2020, Complainant filed a complaint against Respondent with the Occupational Safety and Health Administration (OSHA). OSHA investigated the complainant and dismissed it on February 10, 2021. Complainant timely filed

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<sup>18</sup> *Id.*

<sup>19</sup> Tr. 289.

<sup>20</sup> D. & O. at 8.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 4; Tr. 491.

<sup>23</sup> D. & O. at 4.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; Ex. K to Resp. Mot. for Summ. Decision at 1-2, *Gregory v. Nations Cabinetry, LLC*, ALJ No. 2021-CAA-00001 (hereinafter Resp. Mot. for Summ. Decision).

<sup>26</sup> D. & O. at 4; CX 12 at 1 (Jeffrey Gregory Termination Letter, dated March 31, 2020).

an objection and request for hearing with the Department of Labor's Office of Administrative Law Judges.

## 1. Complainant's Reporting of Environmental Compliance Issues

### A. The Makor Permit

The more significant of the two issues Complainant raised regarding Respondent's compliance with environmental laws and regulations was the operation of a Makor paint sprayer without the permit required by the Texas Commission on Environmental Quality (TCEQ). The existence of this issue slightly predates Complainant's employment with Respondent. On November 16, 2017, about a month before Complainant was hired, Respondent submitted a Permit Amendment Application to TCEQ in order to operate a Makor sprayer at Respondent's plant located at 4600 W US Highway 90 in San Antonio, Texas.<sup>27</sup> Shortly thereafter, on November 30, 2017, TCEQ provided a letter to Respondent identifying thirteen deficiencies (including 26 subparts) that needed to be corrected before the application could be considered administratively complete.<sup>28</sup>

The November 30 letter identified numerous inconsistencies with the application and noted that "many critical representations are not current and are inconsistent."<sup>29</sup> The letter further stated that "[d]ue to the widespread nature of the deficiencies identified in the application package," Respondent should resubmit "an entire stand-alone permit application package."<sup>30</sup> In the letter, Respondent was informed that a response must be provided to TCEQ by December 10, 2017, and failure to provide a response (or providing an incomplete response) would result in the application being voided. TCEQ's letter was addressed to Oscar Rodriguez, Respondent's HR Director who was acting as the point person for the permit application. Respondent did not timely correct the deficiencies identified by TCEQ and on December 13, 2017, TCEQ issued Respondent a letter indicating the permit application "has been voided and removed from the pending list."<sup>31</sup> From this point until after Complainant was terminated, Respondent operated the Makor sprayer without the required permit.

Complainant first learned of the voided permit in early June 2018 when he, through a mail mix-up, received a letter from TCEQ that had been intended for

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<sup>27</sup> RX 11 at 1.

<sup>28</sup> *Id.* at 3.

<sup>29</sup> *Id.* at 1.

<sup>30</sup> *Id.* at 3.

<sup>31</sup> Ex. J to Resp. Mot. for Summ. Decision, at 4.

Rodriguez.<sup>32</sup> The letter—issued six months after the permit was voided—informed Respondent that a new permit application would be required due to the amount of time that had elapsed.<sup>33</sup> Complainant immediately brought this issue to the attention of Coady and was instructed to coordinate with Rodriguez. Shortly afterwards, on June 15, 2018, Complainant joined a call with Rodriguez and two employees of Source Environmental Sciences, Inc. (Source Environmental), a third-party firm contracted by Respondent to assist with environmental compliance issues.<sup>34</sup> During the call, Complainant expressed his concern that the Makor system was not allowed to operate now that the permit application was voided.<sup>35</sup> It was during this call that Complainant learned that the permit application had been voided more than six months, on December 13, rather than only a few days before.<sup>36</sup> After Complainant and the Source Environmental consultants discussed and ruled out possible authorizations under which the Makor system could be operated, Rodriguez asked what the ramifications would be if Respondent continued operating the Makor system without a permit.<sup>37</sup> Rodriguez mentioned that a company he had previously worked at only received a letter of noncompliance in response to a similar issue. One of the consultants explained that “my experience is that when you operate without authorization, that’s a serious issue.”<sup>38</sup> At the conclusion of the call, Rodriguez suggested including Complainant in all communications between Respondent and Source Environmental going forward in order to help expediate the process of completing and resubmitting the permit application.<sup>39</sup>

Later that day, Complainant and Rodriguez called Coady to provide him with an update on the permit application. During this call, Complainant informed Coady that “we’re in a position where we shouldn’t [be] running the Makor, because it’s not permitted.”<sup>40</sup> Complainant explained that even if an application could be

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<sup>32</sup> Tr. 263.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 270.

<sup>35</sup> CX 15 at 8-9 (June 15, 2018 Audio Transcript).

<sup>36</sup> *Id.* at 11.

<sup>37</sup> *Id.* at 13.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 19 (“I think that we make it a habit of including Jeff. This way, whether I’m available or not, Jeff is available.”).

<sup>40</sup> Ex. F to Resp. Mot. for Summ. Decision at 23 (June 15, 2018 Audio Transcript). One June 15 recording between Complainant, Rodriguez, and Source Environmental was submitted to the ALJ at hearing. CX 15. A second June 15 recording between Complainant, Rodriguez, and Coady was submitted by Respondent as an exhibit to its motion for

resubmitted, there were multiple 30-day notice and comment and waiting periods that had to transpire before an interim permit would be issued, at which point the Makor sprayer could be lawfully operated again.<sup>41</sup> Coady asked if that meant that “tactically [sic] we’ve been running the Makor noncompliant,” which Complainant confirmed was the case.<sup>42</sup> Coady informed Complainant and Rodriguez that not running the Makor system was a “showstopper” and his priority was to “minimize any kind of time we’re noncompliant.”<sup>43</sup> After Coady left the call, Complainant and Rodriguez continued to discuss the possibility of running the Makor sprayer without the required permits:

Complainant: At the end of the day, it’s the question I asked you and George on the phone. “Can I run the Makor? Yes or no”. At the end of the day, that’s the piece. It’s up to you and Roger and Chris and George to keep us compliant. I just want to know, “Can we run?”

Rodriguez: The answer to that is yes. Can you run? Sure you can.

Complainant: Well, not compliant, I can’t now.

Rodriguez: But that’s not what you asked. You asked, ‘Can I run?’

Complainant: Okay, let me say, ‘Can I legally run?’ That’s the question. That’s just a question for I guess all of us to weigh in on. But at the end of the day, that’s all I was trying to figure out.<sup>[44]</sup>

Five days later, on June 20, 2018, Complainant emailed Coady to check on the status of the permit application and let Coady know that he was “increasingly uncomfortable continuing to run the way we are without consent.”<sup>45</sup> This exchange

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summary decision. Ex. F, of Resp. Mot. for Summ. Decision. Both parties acknowledged at hearing that Ex. F was part of the record and available for review. *See* Tr. 273, 340-41.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 24.

<sup>43</sup> *Id.* Both Gregory and Coady testified that, during this call, Coady said that not running the Makor would be a “showstopper.” D. & O. at 7-9; *see also* Tr. 51 (Coady testimony), 270 (Gregory testimony).

<sup>44</sup> Ex. F to Resp. Mot. for Summ. Decision at 29-30.

<sup>45</sup> CX 11 (Email from Jeffrey Gregory to JW Coady about the Makor, dated June 20, 2018).

occurred just a week before Complainant emailed Coady on June 28 with his list of workplace concerns. The first issue on that list was a lack of trust with HR based on “the significant lack of integrity shown by the HR manager” who he alleged was allowed “to conduct business with a completely different set of ethics, or lack thereof, than the rest of the organization.”<sup>46</sup> In his testimony, Complainant explained that this lack of trust related to the environmental issues.<sup>47</sup> The second issue on Complainant’s list was the Makor sprayer, which he stated was “[c]urrently running illegally[.]”<sup>48</sup> Complainant explained that running the Makor sprayer without a permit “has significant legal implications,” and that he had to “reach out continuously” to find out the status of the permit application even though he was responsible for the Makor equipment.<sup>49</sup>

On July 13, 2018, TCEQ sent Respondent a letter indicating that it had received a new Permit Amendment Application, which was under review. The letter included eighteen issues (including 31 total subparts) that needed to be addressed before the application could be considered administratively complete.<sup>50</sup> As with earlier deficiency notices from TCEQ, the letter stated that the application contained “numerous inconsistent representations” and that “[d]ue to the widespread nature of the deficiencies identified in the application package submitted,” Respondent should resubmit an entire stand-alone permit application package.<sup>51</sup> The letter gave Respondent ten days to address the deficiencies in its application. Respondent failed to correct all of the deficient items in time and on August 6, 2018, TCEQ sent a letter to Respondent informing it that “the deficient items were not corrected and accordingly the application . . . has been voided and removed from the pending list.”<sup>52</sup>

In August 2018, after being rebuffed when he asked for additional status updates from Rodriguez and Coady, Complainant spoke with Derek Douglas, the chief operating officer of MNE.<sup>53</sup> Complainant informed Douglas of the letters from TCEQ and that the Makor was running without a permit.<sup>54</sup> Complainant testified

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<sup>46</sup> CX 9 at 1.

<sup>47</sup> Tr. 356. Complainant testified that he “did not trust HR, specifically Oscar Rodriguez, to negotiate through that to get it done so [Respondent] could be in good standing with TCEQ and EPA[.]”

<sup>48</sup> CX 9 at 1.

<sup>49</sup> *Id.*

<sup>50</sup> CX 4 at 1 (Letter from TCEQ to Oscar Rodriguez, dated July 13, 2018).

<sup>51</sup> *Id.* at 1-3.

<sup>52</sup> CX 2 at 1 (Letter from TCEQ to Oscar Rodriguez, dated August 6, 2018).

<sup>53</sup> Tr. 279.

<sup>54</sup> *Id.*

that shortly after this conversation, Coady called Complainant into his office and asked Complainant whether he supported him and was on his team. Coady also told Complainant that Douglas had suggested terminating him, which Complainant understood as a threat.<sup>55</sup> After this conversation, Complainant periodically emailed Coady and Rodriguez to ask about the status of the permanent application but otherwise stopped bringing it up.<sup>56</sup> Complainant testified that towards the end of 2019 Rodriguez informed him that TCEQ had granted a preliminary approval and the company was only waiting on documents at that point.<sup>57</sup> Contrary to what Rodriguez was telling Complainant, however, during this period TCEQ sent multiple letters to Respondent outlining deficiencies with the re-submitted permit application; it would be years before a permit was issued.<sup>58</sup>

Neither Rodriguez nor Coady provided Complainant with any further substantive updates about the status of the permit application process prior to the March 2020 board meeting during which Complainant overheard Coady updating MNE CEO Peter Murphy about the permit's status.<sup>59</sup> Coady testified that the news that the permit application had not yet been submitted, coupled with what he viewed as Coady's attempt to mislead Murphy about the severity of the issue, made him sick and left him "deflated."<sup>60</sup>

### *B. Volatile Organic Compound (VOC) Emission Limits*

The other environmental compliance issue that Complainant raised with Respondent's management was the calculation of volatile organic compound (VOC) emission figures and the company's compliance with regulations governing the release of VOCs. Complainant testified that he became aware in January 2018 that the VOC emission calculations the company included in its permits applications were wrong.<sup>61</sup> Complainant learned about this when he pulled the air permits for both of Respondent's locations as part of a standard assessment he was

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<sup>55</sup> Tr. 279-81.

<sup>56</sup> D. & O. at 9.

<sup>57</sup> Tr. 289.

<sup>58</sup> CX 3 (Letter from TCEQ to Oscar Rodriguez, dated October 12, 2018). These letters were dated October 12, 2018; November 28, 2018; and January 4, 2019. A final permit was granted on April 12, 2021.

<sup>59</sup> Tr. 304-06.

<sup>60</sup> Tr. 305-08.

<sup>61</sup> Tr. 254-62. Respondent contends that Complainant's calculations were wrong and that Respondent, with the aid of its third-party compliance consults, properly calculated VOC emission rates. Because raising the issue is itself protected activity, it is not necessary for us to resolve this disagreement over whether Complainant or Respondent's calculations were accurate.

conducting.<sup>62</sup> In the permits for the Timco plant, Respondent provided VOC emission calculations based on an eight-hour day with a run time of roughly seven hours per day. Despite what was included in the permits, the company was running VOC-releasing equipment 16 hours per day.<sup>63</sup> Complainant identified the same issue in the permit for the Highway 90 plant.<sup>64</sup> The result of running machinery significantly longer than the time specified in the permits was that each plant had VOC emissions that were—by Complainant’s calculations—“significantly higher than the allowable emissions that were identified on [the] permit.”<sup>65</sup>

Complainant initially raised this issue with Rodriguez, believing the error with the calculations to be an oversight.<sup>66</sup> However, Rodriguez rebuffed Complainant, questioning why he was looking into this at all, given that environmental compliance was Rodriguez’ responsibility.<sup>67</sup> Following this, Complainant brought his concerns to Coady, who instructed Complainant to further investigate the matter, including by visiting TCEQ’s office in Houston to obtain historic permit documents.<sup>68</sup> After digging into the issue at Coady’s direction, Complainant reported his findings to Coady but found that Coady’s demeanor had shifted. Coady appeared less interested in looking into the issue or hearing what Complainant had been able to uncover, instead telling Complainant that resolving any environmental issue was the responsibility of the company’s third-party environmental compliance consultants.<sup>69</sup>

In the June 28, 2018 email concerning workplace concerns, the third issue Complainant identified was the errors regarding VOC emission calculations.<sup>70</sup> Complainant stated that the calculations he performed indicated that Respondent was “grossly out of compliance in both Timco and the main plant” and that his “efforts to bring this information forward so it can be corrected appeared to be dismissed.”<sup>71</sup> Complainant pointed out that Texas had “several open environmental regulatory compliance pressures,” which added to his concern.<sup>72</sup> Similarly, when

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<sup>62</sup> Tr. 254-55.

<sup>63</sup> Tr. 255.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 258.

<sup>67</sup> D. & O. at 9; Tr. 258.

<sup>68</sup> Tr. 261.

<sup>69</sup> Tr. 262.

<sup>70</sup> CX 9 at 1.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

Complainant spoke to Derek Douglas at MNE, he walked Douglas through his calculations on the VOCs and explained why he believed the plants were operating well above allowable emission levels.<sup>73</sup> After their conversation, Complainant did not hear back from Douglas on this topic.<sup>74</sup> As with the Makor permit, this issue resurfaced when Kelly Gregory travelled to MNE headquarters and mentioned it to Lankford.

## 2. Complainant's Relationship with Coady

Throughout Complainant's employment with Respondent, there was a degree of tension between Complainant and Coady. Although Complainant's outspokenness regarding the Makor permit and the VOC calculations explains some of this friction, the record is clear that the two executives butted heads on a variety of topics unrelated to Complainant's protected activity. Complainant testified that his disagreements with Coady, other than those relating to environmental compliance, included:

- The timing and rollout of the company's new DreamCraft line of cabinets;
- Coady's demeanor and Coady's decisions related to equipment investment;
- How to handle freight in the warranty budget; and
- Coady's practice of providing floor workers with contradictory or confusing directions.<sup>75</sup>

As the ALJ noted, this testimony was consistent with the June 28, 2018 email in which Coady, after identifying the environmental compliance issues, also identified (i) staffing decisions, (ii) purchasing decisions, (iii) communications given to shop floor workers; (iv) a lack of orders; and (v) the overextension of operations teams resources as sources of workplace stress for him.<sup>76</sup> Coady's testimony, too, indicates that there was disagreement between Coady and Complainant on issues such as purchasing decisions, hiring decisions, and the decision to launch the DreamCraft furniture line.<sup>77</sup>

In March of 2019, Coady provided Complainant with his first and only performance review. The performance review covered 2018 and gave Complainant a 6 out of 10 as his overall rating. This overall score belied both Complainant's underperformance during the first part of 2018 and the improvement that Complainant exhibited in the second half of the year. Multiple sections of the

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<sup>73</sup> Tr. 279.

<sup>74</sup> *Id.*

<sup>75</sup> D. & O. at 17.

<sup>76</sup> CX 9 at 1-2.

<sup>77</sup> Tr. 46.

performance review, including “Functional Knowledge and Skills,” “Building Trust,” and “Collaboration” emphasized that Complainant had a disappointing first half of the year and a better second half.<sup>78</sup> Coady’s final comments in the rating section further emphasized this point. Coady wrote:

Jeff, this was a year of 2 segments. Segment 1 was very disappointing. Its (sic) central theme was your way or no way. This drove dissension across the team; polarized people into varying camps and put you at odds with senior management and the Board. . . . Segment 2, after our final talk, was a strong self recalibration. You committed to rebuilding trust at the senior level and addressing divides in the business. I have seen good progress made in this regard but it’s a long road to rebuild.<sup>[79]</sup>

Although the performance review itself does not specify what behaviors Complainant changed or which disagreements Complainant learned to keep quiet about between the first and second half of 2018, Complainant testified that “the only thing [he] changed” from the first half of the year to the second half was becoming “much more careful” about what he said relating to the Makor permit and other environmental compliance issues.<sup>80</sup> Complainant also testified that, in contrast to his change in approach when it came to the environmental issues, he continued to bring up his concerns about the DreamCraft line, his concerns about Coady’s response to a ransomware attack, and other disagreements.<sup>81</sup> One incident from the second part of 2018 that stands out occurred toward the end of the year when Coady unveiled the DreamCraft furniture line to a team of sales people. The unveiling did not go well and afterwards, Coady went to Complainant’s office and began verbally attacking him, at one point getting inches from his face.<sup>82</sup>

### 3. Complainant’s Termination

On March 13, 2020, the week after the board meeting during which Complainant heard Coady talking to Murphy about the Makor permit application,

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<sup>78</sup> CX 18 at 1-2. The comments in these sections included: “1<sup>st</sup> half was very disappointing ... [y]ou made a commitment to me in July that I accepted, I want to see the current path continue;” “1<sup>st</sup> half of year you had a lot of missed opportunity to be a valued resourced to the team;” and “Team is on a nice pace right now . . . [e]arly direct style was heavily biased to your way and your team.”

<sup>79</sup> *Id.* at 3.

<sup>80</sup> Tr. 293.

<sup>81</sup> Tr. 293-94.

<sup>82</sup> D. & O. at 11; Tr. 303-04.

Complainant’s wife traveled—without Complainant’s knowledge or approval—to MNE’s headquarters in Oklahoma.<sup>83</sup> When she arrived at MNE’s offices, Kelly Gregory requested to meet with HR Director Lankford the following day. During this meeting, Kelly Gregory shared a number of grievances she had with Coady and Rodriguez. These complaints related to Coady’s handling of a ransomware attack, Coady’s decision not to invest in equipment upgrades, Rodriguez’s lack of qualifications, Coady’s hiring decisions, and the calculation of warranty revenue.<sup>84</sup> Specifically, Kelly Gregory alleged that Coady may have been overreporting warranty revenue by as much as \$1 million.<sup>85</sup> Kelly Gregory also talked to Lankford about Coady and Rodriguez’s handling of the Makor permit and the VOC emissions calculation. Kelly Gregory told Lankford that the exchange between Coady and Murphy at the March 2020 board meeting—specifically her husband’s distress over the exchange—was “what got [her] to the point [of] just showing up” at MNE’s headquarters.<sup>86</sup>

Six days later, Coady informed Complainant that he was suspended indefinitely, effective immediately. Coady told Complainant that the suspension was for “failure to protect and support privileged and confidential meeting contained in a closed door board meeting . . . in violation of [his] signed employment contract.”<sup>87</sup> On March 31, 2020, Respondent terminated Complainant’s employment. In a letter to Complainant, Respondent stated that the decision to terminate Complainant was “based on your unauthorized disclosure of confidential Company information to your wife, Kelly Gregory, and your ongoing lack of support for Nation’s management and the direction of Nation’s business operations.”<sup>88</sup>

On April 22, 2020, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that he was retaliated against in violation of the CAA. On February 10, 2021, OSHA dismissed the complaint. Complainant timely objected and requested a hearing before the Department of Labor’s Office of Administrative Law Judges (OALJ). Respondent filed a Motion for Summary Decision, arguing that (1) neither Kelly Gregory’s independent communications nor Complainant’s internal complaints could constitute protected activity under the CAA; (2) there was no genuine issue of material fact as to whether Complainant’s communications played any role in the decision to

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<sup>83</sup> D. & O. at 4.

<sup>84</sup> D. & O. at 19; RX 10.

<sup>85</sup> D. & O. at 18; RX 10.

<sup>86</sup> RX 10 at 11 (Transcript of Conversation Between Kelly Gregory and Gena Lankford, dated March 14, 2020).

<sup>87</sup> Ex. K to Resp. Mot. for Summ. Decision at 2; D. & O. at 4.

<sup>88</sup> CX 12 at 1.

terminate him; and (3) there was no genuine issue of material fact as to whether Respondent would have taken the same adverse action even in the absence of Complainant's protected activity.<sup>89</sup>

The ALJ granted, in part, the Motion for Summary Decision, dismissing the complaint insofar "as it relates to any alleged protected activity by Complainant's spouse."<sup>90</sup> The ALJ rejected Respondent's argument regarding internal communications and the lack of genuine issues of material fact. Subsequently, the ALJ held a two-day hearing and issued a decision finding that Complainant had established that Respondent violated the CAA's employee protection provisions by proving that protected activity was a motivating factor in Respondent's decision to terminate Complainant's employment, but Respondent had proven its affirmative defense that it would have taken the same adverse action in the absence of Complainant's protected activity.<sup>91</sup> Complainant timely appealed the ALJ's decision to the Board.

On appeal, Complainant argues that the ALJ erred when he found that Respondent satisfied its burden of proving, by a preponderance of the evidence, that Respondent would have taken the same adverse action even in the absence of Complainant's protected activity.<sup>92</sup> We agree.

Respondent did not file a cross-appeal but nonetheless argues that the ALJ erred when he held that Complainant's internal complaints constitute protected activity under the CAA.<sup>93</sup> We disagree.

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<sup>89</sup> Resp. Mot. for Summ. Decision.

<sup>90</sup> Order on Respondent's Motion for Summar Decision and Complainant's Motion to Strike at 6, *Gregory v. Nations Cabinetry, LLC*, ALJ No. 2021-CAA-00001 (ALJ Nov. 8, 2021).

<sup>91</sup> D. & O. at 20-21.

<sup>92</sup> Comp. Br at 21.

<sup>93</sup> Ordinarily, the Board 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." *Booker v. Exelon Generation Co., LLC*, ARB No. 2022-0049, ALJ No., 2016-ERA-00012, slip. op at 18-19 n.134 (ARB Sept. 21, 2023). However, in light of the legal question raised concerning the scope of protected activity under the CAA, the Board has proceeded to address the issue. *See Booker*, ARB No. 2022-0049, slip. op at 18-19 n.134 (addressing legal issue that a party raised without filing a cross-appeal); *see also 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).

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to hear appeals from ALJ decisions and to issue agency decisions in cases arising under the CAA.<sup>94</sup> In CAA cases, the Board reviews questions of law presented on appeal de novo and reviews the ALJ’s factual findings under a substantial evidence standard.<sup>95</sup> Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>96</sup>

### DISCUSSION

#### 1. Clean Air Act Legal Standards

Under the CAA’s employee protection provisions, an employer may not “discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee” engaged in protected activity.<sup>97</sup> To prevail in a retaliation case under the CAA, a complainant must prove by a preponderance of the evidence that they engaged in protected activity and that the protected activity was a motivating factor in the adverse employment action taken against them.<sup>98</sup> If a complainant meets this burden of proof, the respondent may avoid liability if it proves by a preponderance of the evidence that it would have taken the same adverse action in the absence of the complainant’s protected activity.<sup>99</sup>

#### 2. Complainant’s Protected Activity

On appeal, Respondent argues that Complainant’s alleged protected activity is best characterized as “internal complaints” and that such complaints do not constitute protected activity under the CAA.<sup>100</sup> Respondent raised the same

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<sup>94</sup> Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

<sup>95</sup> *Fagan v. Dep’t of the Navy*, ARB No. 2023-0006, ALJ No. 2021-CER-00001, slip op. at 6 (ARB Feb. 28, 2024); 29 C.F.R. § 24.110(b) (“The ARB will review the factual findings of the ALJ under the substantial evidence standard.”).

<sup>96</sup> *Jones v. Exclusive Jets, LLC*, ARB No. 2023-0034, ALJ No. 2022-AIR-00003, slip op. at 9 (ARB Dec. 31, 2024) (quoting *Mazenko v. Pegasus Aircraft Mgmt.*, ARB No. 2021-0032, ALJ No. 2019-AIR-00001, slip op. at 10 (ARB June 18, 2024) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951))).

<sup>97</sup> 42 U.S.C. § 7622(a).

<sup>98</sup> 29 C.F.R. § 24.109(b)(2).

<sup>99</sup> *Id.*

<sup>100</sup> Respondent’s Brief (Resp. Br.) at 6.

argument in its motion to dismiss filed below. Respondent argued that “under the caselaw of the Fifth Circuit, the statutory language of the Clean Air Act still excludes internal complaints from the scope of protected activity.”<sup>101</sup> In his Order on Respondent’s Motion for Summary Decision and Complainant’s Motion to Strike (Order on Summary Decision), the ALJ rejected this argument, noting that the Secretary of Labor and the Administrative Review Board have “consistently issued decisions recognizing internal complaints as protected activity.”<sup>102</sup> The ALJ further noted that this view is the one that Circuit Courts have “almost unanimously” adopted.<sup>103</sup>

Respondent now asks us to find that the ALJ erred on this issue and, as a result, Complainant did not engage in protected activity and cannot prove a prima facie case of unlawful retaliation. As this is a pure question of law, we review the ALJ’s decision de novo.

The statutory text of the Clean Air Act makes it unlawful to retaliate against an employee because the employee has:

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,

(2) testified or is about to testify in any such proceeding, or

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.<sup>[104]</sup>

Neither the statute nor its implementing regulations define “proceeding” or “any other action to carry out the purposes of this chapter.” Nonetheless, the Secretary of Labor, the Administrative Review Board, and the federal courts have all interpreted these terms broadly such that they cover intracorporate or other “internal”

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<sup>101</sup> Resp. Mot. for Summ. Decision. at 2.

<sup>102</sup> Order on Respondent’s Motion for Summary Decision and Complainant’s Motion to Strike at 6, *Gregory v. Nations Cabinetry, LLC*, ALJ No. 2021-CAA-00001 (ALJ Nov. 8, 2021).

<sup>103</sup> *Id.*

<sup>104</sup> 42 U.S.C. § 7622(a); *see also* 29 C.F.R. § 24.102(b).

complaints relating to public health or the environment.<sup>105</sup> We have recognized that “proceeding” “encompasses all phases of a proceeding that relate to public health or the environment, including the initial statement of the employee that points out a violation, whether or not it generates a formal or informal ‘proceeding’.”<sup>106</sup>

Federal courts have taken the same view as the Secretary and the Administrative Review Board. In one decision analyzing identical language in the Clean Water Act, the Third Circuit recognized that the Secretary’s interpretation of “proceeding” to cover intracorporate complaints “gives effect to the intent of Congress.”<sup>107</sup> In another decision involving then-identical<sup>108</sup> language from the Energy Reorganization Act (ERA), the Eleventh Circuit observed that, other than the Fifth Circuit, every circuit to address the scope of protected activity under the environmental statutes “has agreed with the Secretary’s interpretation that . . . when an employee makes informal complaints, such acts constitute protected activity.”<sup>109</sup>

In support of its claim that internal complaints are not protected under Fifth Circuit case law, Respondent cites a single decision: *Macktal v. U.S. Department of Labor*, an ERA case decided in 1999.<sup>110</sup> The Fifth Circuit’s decision in *Macktal* was based on *Brown & Root v. Donovan*, an earlier decision in which the Fifth Circuit held that the ERA as then written did not protect purely internal reports.<sup>111</sup> Respondent’s reliance on *Macktal* and *Brown & Root* is misplaced. We have

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<sup>105</sup> See generally *Iwaseczko v. Teton Cnty. Weed & Pest Control Dist.*, ARB No. 2022-0059, ALJ Nos. 2018-ACA-00001, 2019-ACA-00002, slip op. at 19-22 (ARB Aug. 14, 2025) (discussing how the concept of a “proceeding” in whistleblower protection statutes has evolved over time).

<sup>106</sup> *Sasse v. Off. of the U.S. Att’y, U.S. Dep’t of Just.*, ARB No. 2002-00077, ALJ No. 1998-CAA-0007, slip op. at 11 (ARB Jan. 30, 2004) (citation omitted).

<sup>107</sup> *Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Lab.*, 992 F.2d 474, 480 (3d Cir. 1993).

<sup>108</sup> In 1992, Congress passed the Energy Policy Act, which amended the ERA to clarify that it protects whistleblowers who make internal complaints. See *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1576 (11th Cir.1997) (“The legislative history of the 1992 Energy Policy Act, too, makes clear that Congress intended the amendments to codify what it thought the law to be already. Congress sought “to *explicitly* provide whistleblower protection for nuclear industry employees [who] (1) notify their employer of an alleged violation rather than a federal regulator.””).

<sup>109</sup> *Bechtel Const. Co. v. Sec’y of Lab.*, 50 F.3d 926, 931 (11th Cir. 1995).

<sup>110</sup> Resp. Br. at 14-15 (citing *Macktal v. U.S. Dep’t of Lab.*, 171 F.3d 323 (5th Cir. 1999)).

<sup>111</sup> *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1035 (5th Cir. 1984) (“The structure of the ERA indicates that section 5851 is designed to protect “whistle blowers” who provide information to governmental entities, not to the employer corporation.”).

previously recognized that “*Brown & Root* is applicable only to the ERA and did not purport to interpret” the Clean Air Act or the other environmental whistleblower laws under which the Board issues final decisions.<sup>112</sup> Additionally, after *Brown & Root* was decided, Congress passed the 1992 Energy Policy Act, which amended the ERA to explicitly cover intracorporate complaints. The Fifth Circuit has acknowledged that, by passing this amendment, “Congress clarified by statute that *Brown & Root* was incorrect in holding that complaints to employers were not protected under 42 U.S.C. § 5851.”<sup>113</sup> Other circuits have also recognized that the legislative history of the 1992 Energy Policy Act “makes clear that Congress intended the amendments to codify what it thought the law to be already.”<sup>114</sup>

Put simply, the Fifth Circuit’s *Brown & Root* line of cases neither applies to the Clean Air Act, nor does it remain good law following Congress’ 1992 amendments to the ERA. Respondents do not cite, nor have we found, any more recent decision in which the Fifth Circuit adhered to its previous view regarding the scope of protected activity under either the ERA or the CAA. When Complainant repeatedly raised concerns to Rodriguez, Coady, and Douglas about the company operating the Makor sprayer without the required permit and the miscalculation of VOC emissions, his actions fell squarely within the scope of protected activity under the CAA.

### 3. Respondent’s Affirmative Defense

The central issue on appeal is whether substantial evidence supports the ALJ’s finding that Respondent would have taken the same adverse action against Complainant even in the absence of his protected activity.<sup>115</sup> In his decision, the

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<sup>112</sup> *Willy v. Coastal Corp.*, ALJ No. 1985-CAA00001, slip op. at 7, 1994 WL 897203 (Sec’y June 1, 1994).

<sup>113</sup> *Willy v. Admin. Rev. Bd.*, 423 F.3d 483, 489 n.11 (5th Cir. 2005); *see also Stone & Webster Eng’g Corp.*, 115 F.3d at 1576 (“Congress sought ‘to explicitly provide whistleblower protection for nuclear industry employees [who] (1) notify their employer of an alleged violation rather than a federal regulator.’”) (quoting H.R. No. 102–474(VIII), at 78, reprinted in 1992 U.S.C.C.A.N.1953, 2282, 2296).

<sup>114</sup> *Stone & Webster Eng’g Corp.*, 115 F.3d at 1576 (“The legislative history of the 1992 Energy Policy Act, too, makes clear that Congress intended the amendments to codify what it thought the law to be already.”).

<sup>115</sup> *See* 29 C.F.R. § 24.109(b)(2). In his discussion of Respondent’s affirmative defense, the ALJ correctly stated the required legal showing that a respondent must make: to prove by a preponderance of the evidence that the respondent would have taken the same adverse action in the absence of the complainant’s protected activity. Although we have frequently referred to this as a “same action” defense, the ALJ refers to this as an “inevitable adverse action” defense. We point this out because there are circumstances where the inquiry into whether an adverse action was inevitable and the inquiry into whether a respondent would have taken the adverse action in the absence of protected activity are not identical.

ALJ considered Respondent’s various explanations of why it terminated Complainant, all of which Respondent argued would have led them to terminate Complainant even in the absence of his protected activity. The ALJ concluded that three of the reasons proffered by Respondent were not credible.<sup>116</sup> Specifically, the ALJ rejected Respondent’s arguments that it would have terminated Complainant because of (i) a March 2020 incident in which he used the word “crap” in an office email; (ii) an April 2018 incident in which Complainant either tapped or kicked another employee from behind; and (iii) Complainant’s regular disclosure of confidential information to his wife.<sup>117</sup> Nonetheless, the ALJ concluded that a fourth explanation proffered by Respondent—that Complainant failed to support Coady and respect his authority as the company’s final decision maker—was corroborated by the evidence and sufficient for Respondent to carry its burden of proving an affirmative defense.<sup>118</sup> We review this finding under a substantial evidence standard.

As the Supreme Court has stated, “[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>119</sup> Under this standard, the “threshold for such evidentiary sufficiency is not high.”<sup>120</sup> Additionally, when reviewing decisions under a substantial evidence standard, the Board is precluded from “deciding the facts anew, making credibility determinations, or re-weighing the evidence.”<sup>121</sup>

The Board is *not*, however, required to put on blinders and look only at the evidence that supports the ALJ’s decision. As the Supreme Court has recognized, a determination as to whether a decision is supported by substantial evidence must “take into account whatever in the record fairly detracts from its weight.”<sup>122</sup> We have also made clear that a “single piece of evidence will not satisfy the substantiality test if the [adjudicator] ignores, or fails to resolve, a conflict created

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Nonetheless, reviewing the decision as a whole, we are satisfied that the ALJ applied the correct legal standard when analyzing Respondent’s same action affirmative defense.

<sup>116</sup> D. & O. at 12-16.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 17-20.

<sup>119</sup> *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938).

<sup>120</sup> *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019).

<sup>121</sup> *Stone & Webster Const., Inc. v. U.S. Dep’t of Lab.*, 684 F.3d 1127, 1133 (11th Cir. 2012) (quoting *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005)).

<sup>122</sup> *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 2009-0057, ALJ No. 2008-ERA-00003, slip op. at 8-9 (ARB June 24, 2011) (quoting *Universal Camera Corp.*, 340 U.S. at 488).

by countervailing evidence.”<sup>123</sup> Additionally, we have recognized that “evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion.”<sup>124</sup> Lastly, although the threshold for evidentiary sufficiency under this standard of review is not high, a reviewing court need not have a “definite and firm conviction” that an error has been committed in order to reverse.<sup>125</sup>

In his analysis of Respondent’s affirmative defense, the ALJ made conclusory statements without reference to any evidence that could support such conclusions, based his determination largely on two short answers provided during the hearing, and failed to consider overwhelming countervailing evidence. Accordingly, we find that the ALJ’s conclusion that “[h]ad Complainant never mentioned the Makor permit, but engaged in the remainder of his actions, the outcome would have been the same” is not supported by substantial evidence.<sup>126</sup>

A. *The ALJ Failed to Consider Respondent’s Shifting Explanations for Complainant’s Termination*

As detailed in the ALJ’s decision, Respondent now offers four different explanations as to why it decided to terminate Complainant. Not all of these reasons were provided at the outset, however. On March 20, 2020, when Coady called Complainant into his office and suspended him, Coady told Complainant that he was being suspended for failing to “protect and support privileged and confidential information” in violation of [his] signed employment contract.<sup>127</sup> During this initial conversation, Coady provided no other justification for the suspension. About two weeks later, Respondent provided Complainant with a termination letter that reiterated that his termination was based on his unauthorized disclosure of confidential information and added a second reason: Complainant’s ongoing lack of support for the company’s management and the direction of its business operations.<sup>128</sup> Only a month later, in a letter to the Texas Workforce Commission in response to Complainant’s application for unemployment benefits, additional justifications emerged. This letter, which was written by Rodriguez, mentioned the 2018 incident in which Complainant either kicked or tapped a coworker, Complainant’s more recent use of the word “crap” in an email

<sup>123</sup> *Bobreski*, ARB No. 2009-0057, slip op at 9 (quoting *Dorf v. Bowen*, 794 F.2d 896, 901 (3d Cir. 1986)).

<sup>124</sup> *Bobreski*, ARB No. 2009-0057, slip op. at 8 (quoting *Dalton v. U.S. Dep’t of Lab.*, 58 F. App’x 442, 445 (10th Cir. 2003)).

<sup>125</sup> *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (contrasting the substantial evidence standard with the clearly erroneous standard of review).

<sup>126</sup> D. & O. at 20.

<sup>127</sup> Ex. K to Resp. Mot. for Summ. Decision.

<sup>128</sup> CX 12 at 1.

exchange, the accusations Kelly Gregory made to Lankford, and Complainant's "proclivity to disclose [the] Company's confidential and propriety information."<sup>129</sup> The letter concluded that Complainant's termination was due to his "negligent disclosure and release of confidential business information, mismanagement of his position, false allegations of fraud, and past misconduct and transgressions."<sup>130</sup> The letter made absolutely no mention of Complainant's alleged failure to support Coady. Although not a record produced by the Company, OSHA conducted an investigation of Complainant's claim and determined that "Respondent's decision to terminate Complainant's employment was because Complainant improperly disclosed confidential business information to his wife."<sup>131</sup>

In its post-hearing brief, Respondent cited each of the foregoing reasons as justifications for why it terminated Complainant (and as reasons why it would have terminated Complainant even in the absence of his protected activity).<sup>132</sup> Respondent's focus, however, was on Complainant's purported breaches of confidentiality which it described as "wide-ranging" and "most egregious[.]"<sup>133</sup>

The ALJ rejected the first three proffered reasons (the tap/kick, the cursing incident, and the breaches of confidentiality) as wholly lacking in credibility.<sup>134</sup> We give ALJ credibility determinations "great deference" and rely on them unless they are "inherently incredible or patently unreasonable."<sup>135</sup> Here, the ALJ found that "[n]either Coady nor Rodriguez were particularly credible in their testimony about" cursing in the workplace.<sup>136</sup> Similarly, when considering testimony from both Rodriguez and the employee who was allegedly kicked, the ALJ found that "Rodriguez's testimony is inconsistent" with that of the employee who was kicked and, to the extent the two accounts of the tap/kick differed, the other witness' account was more credible.<sup>137</sup> Most damningly, the ALJ found that it "appears

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<sup>129</sup> Ex. D-7 To Comp. Response to Resp. Mot. for Summ. Decision.

<sup>130</sup> *Id.*

<sup>131</sup> Sec'y's Findings, Case #6-1550-20-062, Occupational Safety and Health Admin. (Oct. 18, 2021).

<sup>132</sup> Resp. Post-Hearing Br. at 13-19.

<sup>133</sup> *Id.* at 13, 19; Resp. Mot. for Summ. Decision at 12.

<sup>134</sup> D. & O. at 13, 15, 16.

<sup>135</sup> *See, e.g., Cottier v. Bayou Concrete Pumping, LLC*, ARB No. 2020-0069, ALJ No. 2019-STA-00046, slip op. at 15 (ARB Jan. 18, 2022); *Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 2012-0002, ALJ No. 2006-WPC-00001, slip op. at 6 (ARB Aug. 29, 2012) (quoting *Caldwell v. EG&G Def. Materials, Inc.*, ARB No. 2005-0101, ALJ No. 2003-SDW-00001, slip op. at 12 (ARB Oct. 31, 2008)).

<sup>136</sup> D. & O. at 13.

<sup>137</sup> *Id.* at 14.

much more likely that” that both the kicking incident and the reprimand for using the word “crap” were “opportunity[ies] to build a case against Complainant.”<sup>138</sup> Although the ALJ did not find Coady or Rodriguez’s testimony about confidentiality issues to be particularly incredible, he noted that both Coady and Rodriguez testified that during Complainant’s employment the Company did not have a formal policy about confidential information.<sup>139</sup> The ALJ further determined that Coady understood that Complainant and his wife discussed business-sensitive information and Coady even had conversations with Complainant about matters involving confidential information “with the knowledge, if not the intent, that Kelly Gregory was present.”<sup>140</sup>

Despite finding that multiple explanations put forward by Respondent were incredible, the ALJ made no mention of how Respondent’s proffered explanations shifted over time. In the context of determining causation, we have held that “shifting explanations for an employer’s adverse action often indicate that its asserted legitimate reasons are pretext.”<sup>141</sup> We have made the same observation when it comes to an employer’s same action defense.<sup>142</sup> Courts have similarly recognized that “the fact that an employer offers shifting explanations for its challenged personnel action can itself serve to demonstrate pretext.”<sup>143</sup> In one case that was affirmed by the Fifth Circuit, we affirmed an ALJ decision finding pretext when an employer gave shifting reasons for its termination of a complainant starting with its first filing with the Texas Workforce Commission just a few weeks after the employee’s termination.<sup>144</sup>

When Coady, acting at the behest of MNE CEO Peter Murphy, suspended Complainant, Coady stated that the suspension (which would quickly segue into a termination) was being imposed because Complainant failed to protect confidential information. Before long, that straightforward explanation morphed into a laundry list of different justifications. One new justification was added when Respondent provided Complainant with a termination letter. A few more were unveiled when

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<sup>138</sup> *Id.* at 14, 15.

<sup>139</sup> *Id.* at 16.

<sup>140</sup> *Id.*

<sup>141</sup> *Clemmons v. Ameristar Airways, Inc.*, ARB No. 2008-0067, ALJ No. 2004-AIR-00011, slip op. at 9 (ARB May 26, 2010).

<sup>142</sup> *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 2008-0070, 2008-0074, ALJ No. 2006-AIR-00014, slip op. at 14-16 (ARB Sept. 30, 2009) (observing that “an employer’s shifting explanations for its adverse action may be considered evidence of pretext . . .”).

<sup>143</sup> *Vieques Air Link, Inc. v. U.S. Dep’t of Lab.*, 437 F.3d 102, 110 (1st Cir. 2006).

<sup>144</sup> *Clemmons*, ARB No. 2008-0067, slip op. at 8-9, *aff’d sub nom Ameristar Airways, Inc. v. Admin. Rev. Bd., U.S. Dep’t of Lab.*, 650 F.3d 562, 569 (5th Cir. 2011).

Respondent was communicating with the Texas Workforce Commission. And when litigation began, Respondent put forth the full list of justifications, claiming that everything from a two-year old horseplay incident to Kelly Gregory's surreptitious trip to corporate headquarters were reasons why Respondent terminated Complainant's employment.

The ALJ, however, makes no mention of how these justifications changed over time, not even to say that he found Respondent's shifting explanations to be justified by something other than Respondent throwing everything at the wall in the hope that at least one non-retaliatory explanation would stick. This was a mistake. Respondent's shifting explanations are strong evidence of pretext and should have been considered by the ALJ. The ALJ's failure to address the evolving nature of Respondent's rationale for terminating Complainant is particularly damning in light of the ALJ finding that all but one of the reasons presented during litigation were not credible. Although the dissent points out that the most egregious examples of shifting reasons tend to be when an "employer's subsequent reasons plainly contradict prior reasons,"<sup>145</sup> our precedent is clear that continuously adding new justifications for an adverse action, even if an employer does not abandon any of its earlier justifications, can be evidence of pretext.<sup>146</sup> Respondent's reasons, although not mutually exclusive, relate to unconnected incidents that occurred almost two years apart. In our view, this represents a high degree of inconsistency, even if Respondent has not abandoned any of its prior justifications.<sup>147</sup>

It is notable that the sole reason the ALJ found to be credible—Complainant's failure to support management—was conspicuously missing from much of the previous documentation of Complainant's termination. Although it was included in the termination letter, it was not given as a reason when Coady suspended Complainant nor was it mentioned in the letter reasons Respondent

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<sup>145</sup> *Infra*, at 58.

<sup>146</sup> *See, e.g. Clemmons*, ARB No. 2008-0067, slip op. at 8-9 (finding pretext where an employer provided a terminated employee with one reason, provided an additional reason during the OSHA investigation, and provided two additional reasons in an appeal to the TWC, all within two months of terminating the employee).

<sup>147</sup> Respondent's different explanations (Complainant's use of a swear word, the kicking incident, breaches of confidentiality, and failure to support leadership) are not explanations "whose only difference lay in their level of generality," which the Fifth Circuit has not generally considered to be inconsistent. *Minnis v. Bd. of Sup'rs of La. State Univ. & Agr. & Mech. Coll.*, 620 F. App'x 215, 220 (5th Cir. 2015) (citing *Hamilton v. AVPM Corp.*, 593 F. App'x 314, 322 (5th Cir. 2014)).

provided to the Texas Workforce Commission. This partial absence from previous documentation is additional evidence of pretext that the ALJ failed to consider.<sup>148</sup>

*B. Complainant's Alleged Failure to Support Coady is Part and Parcel of Complainant's Protected Activity*

Assuming, arguendo, that Respondent's claim that it terminated Complainant because of his failure to support Coady is not pretextual, that would still be insufficient for Respondent to prevail on its same action defense. This is because the central issues on which Complainant failed to support Coady were the environmental compliance concerns, *i.e.*, Complainant's protected activity. Our precedent makes clear that "[w]hen an employer applies an otherwise legitimate criterion in such a way that it interferes with the exercise of specific whistleblower rights, . . . the employer acts in violation of the employee protection provision of the corresponding statute."<sup>149</sup> The same applies to an employer's affirmative defense. The record in this case demonstrates that although Complainant and Coady disagreed on a wide range of issues, it was Complainant repeatedly bringing up his concerns about environmental compliance issues that was seen by Respondent as the most serious instance of failing to support Coady.

The strongest evidence of this comes from Complainant's performance review. As previously discussed, the performance review was prepared by Coady and describes a year in two parts. The first part of the year was "disappointing" and marked by "dissension," with Complainant insisting on his way or no way.<sup>150</sup> The second half of the year, by contrast, was a "strong self recalibration" during which Complainant "committed to rebuilding trust at the senior level and addressing the divides in the business."<sup>151</sup> In the evaluation, Coady was clear that he had "seen good progress made in this regard."<sup>152</sup> So what changed from the first half of the year to the second half of the year? Complainant testified that "the only thing [he] changed" from the first part of the year to the second part was becoming "much more careful" about what he said relating to the Makor permit and other environmental compliance issues.<sup>153</sup> Respondent does not challenge that the middle of 2018 is when Complainant's protected activity ceased: Coady testified that

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<sup>148</sup> See *Bobreski*, ARB No. 2009-0057, slip op at 19 (stating that pretext can be shown by "demonstrating that the proffered reasons were conspicuously missing from previous documentation.").

<sup>149</sup> *Timmons v. Franklin Elec. Coop.*, ARB No. 1997-0141, ALJ No. 1997-SWD-00002, slip op. at 7 (Sec'y Dec. 1, 1998).

<sup>150</sup> CX 18 at 3.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Tr. 293.

August 2018 is the last time he had any conversation with Complainant regarding environmental compliance matters.<sup>154</sup> Additionally, in both its pre- and post-hearing briefing before the ALJ, as well as its brief filed with the Board, Respondent goes to lengths to emphasize that Complainant did not continue to discuss environmental compliance with Coady or other members of management beyond August 2018. Just as importantly, Respondent does not contest that Complainant continued to butt heads with Coady on other issues (most notably the DreamCraft cabinet line) after August 2018.

Despite this, the ALJ summarily rejects the view that Complainant backed off on the permit and VOC issues but continued to clash with Coady on other topics, stating that it is “unsupported in the record.”<sup>155</sup> We cannot agree. The ALJ cites Complainant’s testimony that, following Coady’s threat to terminate him, he “was much more careful what I said and did regarding those circumstances, those things, the permits *and different things like that* and lo and behold, it actually improved my evaluation.”<sup>156</sup> This response came immediately prior to Complainant stating that the environmental permits were “the only thing [he] changed.”<sup>157</sup> In context, the most natural reading of “and different things like that” is as a reference to the VOC emission calculations and ancillary environmental issues relating to the air permits.

The ALJ’s conclusion that it is “more likely that Complainant tried to hold his tongue, not just as to the permit but as to all areas” is unsupported by the evidence and directly contradicted by the very next paragraph of his decision. As the ALJ notes, both Complainant and Coady testified at length about an incident in which Coady “verbally attacked” Complainant after a presentation demonstrating the DreamCraft line to the sales team that went poorly.<sup>158</sup> In Complainant’s recounting of this incident, after this presentation, “Coady rushed into his office and got within six inches of his face and threatened to fire [Complainant] if they couldn’t get it done right.”<sup>159</sup> What is notable about this incident is that occurred not during Complainant’s troublesome first segment of 2018 but at the end of 2018, during the period Coady described as a “strong self recalibration.”<sup>160</sup> The ALJ made no effort to

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<sup>154</sup> Tr. 78.

<sup>155</sup> D. & O. at 10.

<sup>156</sup> Tr. 293.

<sup>157</sup> *Id.*

<sup>158</sup> D. & O. at 9.

<sup>159</sup> *Id.*

<sup>160</sup> The exact date of the DreamCraft unveiling, after which Coady verbally attacked Complainant, is not entirely clear from the record. Complainant testified that it was “towards the end of” 2018. Tr. 303. Complainant also stated that it was “the latter part of

address, let alone resolve, the contradiction between a performance review that praised Complainant’s performance during the second part of 2018 with uncontroverted evidence that Complainant and Coady continued to disagree—in some instances vehemently—on matters unrelated to the protected activity in the second segment of 2018 and beyond.

The dissent claims that the record does not show hostility from Coady in response to Complainant expressing his concerns about the Makor permit.<sup>161</sup> We disagree. The heated exchange between Coady and Complainant following the latter’s call to Douglas to discuss his environmental concerns is but one example of Complainant’s protected activity resulting in hostility. And although Respondent alleges that the content of that call to Douglas covered more than just the environment compliance issues, Complainant offered uncontroverted testimony that during the start of his employment he would talk to Douglas “at least once a week, if not multiple times a week[.]”<sup>162</sup> This accords with Complainant’s job description that listed keeping the board and the corporate parent apprised of the status of all operational issues as one of his responsibilities. Neither party has suggested that these earlier calls provoked the same negative reaction from Coady. These regular calls between Complainant and Douglas also cast doubt on the ALJ’s framing of the August 2018 call as Complainant going “over Coady’s head to complain to Douglas.”<sup>163</sup> Respondent is unable to explain what made the August 2018 call—during which Complainant brought up the Makor permit and VOC calculations—different from all the other calls that did not result in threats to terminate Complainant.

The dissent also argues that substantial evidence supports the claim that Respondent and its senior management were diligently working toward getting the Makor permitted.<sup>164</sup> This argument misses the mark for two reasons. The first is that an “employer cannot ‘cure’ protected activity or erase that it occurred by admitting to wrongdoing, by apologizing, or by agreeing with the employee about a safety concern.”<sup>165</sup> Additionally, even if this claim is only intended to show that

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’18, maybe the beginning of ’19.” TR. 408. Regardless of the exact date, it is clear that the incident took place after Complainant’s “strong self recalibration.”

<sup>161</sup> *Infra*, at 33 (“[W]hen Complainant brought concerns about Makor to Coady and Rodriguez, they accepted and appreciated his concerns[.]”).

<sup>162</sup> Tr. 286.

<sup>163</sup> D. & O. at 19.

<sup>164</sup> *Infra*, at 34 (“The dialogue between Coady, Rodriguez, and Complainant in the second call demonstrates a degree of cooperation and urgency concerning getting the Makor permitted”).

<sup>165</sup> *Jones*, ARB No. 2023-0035, slip op. at 14-15 (quoting *Sewade v. Halo-Flight, Inc.*, ARB No. 2013-0098, ALJ No. 2013-AIR-00009, slip op. at 8 (ARB Feb. 13, 2015)).

Respondent and its management did not take issue with Complainant raising concerns about environmental permitting and thus discount Complainant's protected activity as a source of friction between him and Coady, it misstates what exactly Coady and Complainant disagreed on when it came to the Makor permit. The disagreement relating to the permit did not stem exclusively (or even primarily) from the (in)sufficiency of Respondent's efforts to get a new permit in place but from Respondent's decision to unlawfully operate the Makor sprayer after the existing permit lapsed and before a new permit was obtained.

That Respondent's decision to keep operating the Makor without a valid permit was a major source of friction was first evident during the June 15, 2018 call between Complainant and Rodriguez when Complainant had to explain to Rodriguez that his concern was not whether he could practically run the Makor but whether he could *legally* run it.<sup>166</sup> Any doubt over the source of Complainant's discontent should have been put to rest when Complainant emailed Coady five days after that call to say that he was "increasingly uncomfortable continuing to run [the Makor] the way we are without consent."<sup>167</sup> And, returning once again to the June 28, 2018 email, Complainant explained that one of his concerns was that the Makor sprayer was "[c]urrently running illegally[.]"<sup>168</sup> Even if we were to overlook the repeated deficiencies with Respondent's subsequent permit applications and grant that the company was making a diligent and good-faith effort to obtain a new permit as expeditiously as possible, it is no mystery why these efforts did not redress Complainant's unease.<sup>169</sup> Complainant was responsible for ensuring that operations were conducted in an ethical (and, by extension, lawful) manner and was uncomfortable with Respondent's decision to continue operating the Makor sprayer without a permit. Although Respondent's management may have wanted to, as Coady put it, "minimize any kind of time we're noncompliant," they were ultimately willing to illegally operate the Makor sprayer until a permit could be obtained and this was what caused tension between Complainant and management. Thus, although we agree with the dissent's characterization that the "tone of Complainant's communications had changed between June 15 and June 20, 2018," we view this as evidence that Complainant's primary concern was not simply that the Makor permit lapsed, but that Respondent choose to continue running the

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<sup>166</sup> Ex. F to Resp. Mot. for Summ. Decision at 29-30.

<sup>167</sup> CX 11.

<sup>168</sup> CX 9 at 1.

<sup>169</sup> The 31 deficiencies that were identified by TCEQ in its July 31, 2018 letter concerning Respondent's re-submitted permit application (many of which were carried over from previous submissions), coupled with the length of time it took for Respondent to properly complete the permit application, cast doubt on Respondent's characterization that it was working diligently and expeditiously to get a permit in place either after the prior permit lapsed or after TCEQ voided the permit amendment application.

equipment without the legally required permit.<sup>170</sup>

The record, along with the testimony credited by the ALJ, paints a rather clear picture: Complainant, after being threatened with termination in August 2018 for going over Coady's head to report environmental compliance issues, held his tongue on those issues. He continued, however, to speak his mind when it came to product decisions and the variety of other issues over which he and Coady disagreed. As his end of year performance review shows, this was perfectly fine from Coady's perspective. Dropping the Makor permit and VOC issues but continuing to clash over the DreamCraft line and issues like payroll and purchasing was sufficient for Coady to describe the second half of the year as a period during which Complainant committed to and made good progress in rebuilding trust and addressing divides. The only conclusion that can reasonably be drawn from this is that Complainant's "ongoing lack of support for Nation's management" was really an ongoing lack of support for Nation's management's approach to handling the illegally operating Makor sprayer and VOC calculations. The unlawful operation of the Makor sprayer and the potentially inaccurate VOC calculations were the issues that "put [Complainant] at odds with senior management and the Board" as Coady put it in Complainant's performance review. And those were the issues that resurfaced during the board meeting and got Kelly Gregory "to the point of just showing up" at MNE's headquarters.<sup>171</sup>

When an employer gives a reason for termination that is "reducible in essence to the problem of inconvenience" caused by a complainant's protected activity, it does not meet its burden of showing that it would have taken the same adverse action in the absence of the complainant's protected activity.<sup>172</sup> Because Respondent's assertion that it terminated Complainant over his failure to support management is really an assertion that it terminated Complainant over his failure to support management in its (mis)handling of the permitting issues, Respondent did not make the showing required to prevail on its same action defense.

*C. The ALJ's Finding that Complainant's Lack of Support for Management was a Result of His Desire to be CEO is Conclusory*

Despite the significant evidence demonstrating that Complainant's protected activity was the primary source of friction between him and management, the ALJ reaches the conclusion that it was actually Complainant's frustration over not being

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<sup>170</sup> *Infra*, at 37.

<sup>171</sup> Ex. I. to Resp. Mot. for Summ. Decision.

<sup>172</sup> *Cf. Passaic Valley Sewerage Comm'rs*, 992 F.2d at 481 (affirming a Board decision finding for a complainant where his alleged personality problem and deficiency of interpersonal skills was reducible in essence to the problem of the inconvenience caused by his pattern of complaints).

made CEO that produced the friction between him and Coady.<sup>173</sup> This is not supported by substantial evidence. In support of this view, the ALJ points to two brief excerpts from Complainant's testimony. While being cross-examined, Complainant was asked about his role as COO:

- Q) In fact, [you're] the second highest ranking officer of the company, right?  
 A) Yes. Well, in title, yes.

This one-line answer was described by the ALJ as "among the most probative evidence in the case" that "explains [Complainant] and his spouse's actions."<sup>174</sup> Although it is reasonable to interpret this response as evidence that Complainant felt that he was being sidelined as the company's COO, the ALJ provides no explanation of how it relates to Complainant's alleged failure to support leadership. After all, the ALJ credited Ignacio Gonzales' and Joshua Morones' testimony that Complainant never voiced any resentment or disagreement on the shop floor.<sup>175</sup> On top of this, the evidence indicates that Complainant's view that he was being sidelined as COO is closely tied to his protected activity. Complainant's responsibilities, as detailed in his employment forms, included ensuring that "business processes are performed with the highest degree of ethics and integrity."<sup>176</sup> Complainant was also responsible providing "clear communication to Miami Nation Enterprises that ensure they are continually and accurately informed of the status of all operations" at the Company.<sup>177</sup> Complainant was doing exactly that when he reported serious environmental compliance violations first to his immediate supervisor and then to COO Douglas only to be threatened with termination and asked where his loyalties lie. Although this was not the only issue where Complainant felt his experience and views were being minimized, it is neither surprising nor particularly telling that a COO who was rebuked when carrying out essential compliance functions would feel like a COO in title only.

The ALJ also quoted another exchange from Complainant's testimony, this one regarding the DreamCraft line:

- Q) It sounds like your interactions with Mr. Coady about this DreamCraft product line were fairly contentious. Is that right?  
 A) Only because he made them that way.

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<sup>173</sup> D. & O. at 19-20.

<sup>174</sup> *Id.* at 17.

<sup>175</sup> *Id.* at 19.

<sup>176</sup> RX 2 at 1.

<sup>177</sup> *Id.*

For one thing, we note that this response does not relate to Complainant’s supposed frustration over not being named CEO. Additionally, as the ALJ notes, Coady in his testimony identified Complainant as the one responsible for the friction between the two of them.<sup>178</sup> That the CEO and COO each blamed the other is hardly noteworthy. We cannot agree that Complainant blaming Coady for the disagreements between the two of them has any probative value as to Respondent’s affirmative defense. These two exchanges, when considered alongside all the other evidence in this case, do not rise to the level of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>179</sup>

*D. The ALJ Failed to Consider Significant Countervailing Evidence*

As the Supreme Court has recognized, a reviewing tribunal’s determination of whether evidence is substantial must “take into account whatever in the record fairly detracts from its weight.”<sup>180</sup> Because of this requirement, the Board has made clear that “the substantial evidence standard does not require us to affirm the ALJ’s findings of fact merely because there is evidence in the record which would justify them, without taking into account other - contrary - evidence in the record.”<sup>181</sup> The ALJ failed to consider the significant evidence that contradicts his findings.<sup>182</sup> A review of the evidentiary record shows that the ALJ did not discuss or evaluate the following evidence in his D. & O.:

- Complainant’s job description, which included communicating with MNE to keep the parent company accurately informed of the status of all operations at Nations Cabinetry;
- Complainant regularly calling Douglas prior to the August 2018 call in which environmental compliance issues were discussed;

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<sup>178</sup> D. & O. at 18; Tr. 73-74.

<sup>179</sup> *Consol. Edison Co. of New York*, 305 U.S. at 229.

<sup>180</sup> *Bobreski*, ARB No. 2009-0057, slip op. at 8-9 (quoting *Universal Camera Corp.*, 340 U.S. at 488).

<sup>181</sup> *Poulter v. Cent. Cal Transp., LLC*, ARB No. 2018-0056, ALJ No. 2017-STA-00017, slip op. at 12 (ARB Aug. 18, 2020) (quoting *Dalton v. Copart, Inc.*, ARB No. 2001-0020, ALJ No. 1999-STA-00046, slip op. at 7 (ARB July 19, 2001)).

<sup>182</sup> In a footnote, the ALJ states that “I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.” D. & O. at 2. A single footnote stating that evidence not mentioned or cited in the decision was nonetheless considered does not alter the substantial evidence standard under which we review findings of fact.

- The timing of Complainant’s disagreements with Coady over the DreamCraft line and other issues, and how that timing fits with Complainant’s “strong self recalibration;”
- Kelly Gregory’s explanation of why she travelled to MNE headquarters at the time she did;
- The reasons for terminating Complainant that Respondent included in its communications with the Texas Workforce Commission; and
- How Respondent’s explanation for why it terminated Complainant shifted over time.

Our review of the record convinces us that the ALJ’s finding that Respondent would have terminated Complainant even in the absence of his protected activity is not supported by substantial evidence. The ALJ failed to consider the shifting nature of Respondent’s explanations for terminating Complainant, all but one of which he found to be wholly pretextual. The ALJ further failed to consider how Complainant’s protected activity was the predominant source of the tension between Complainant and Coady. Finally, the ALJ’s finding that it was Complainant’s supposed desire to be CEO that caused tension that would later be characterized as a failure to support management is unsupported by the record when viewed as a whole.

#### CONCLUSION

Because the ALJ’s decision is not supported by substantial evidence, we **REVERSE** the ALJ’s finding that Respondent established by a preponderance of the evidence that it would have taken the same adverse action in the absence of Complainant’s protected activity, and we **REMAND** this matter for the purpose of calculating damages.

**SO ORDERED.**

**RANDEL K. JOHNSON**  
**Chief Administrative Appeals Judge**

**ELLIOT M. KAPLAN**  
**Administrative Appeals Judge**

**PHILIP G. KIKO**  
**Administrative Appeals Judge**

***Judge Burrell, Concurring in Part and Dissenting in Part:***

Respectfully, I concur in part and dissent in part from my colleagues. With the majority, I would affirm the ALJ’s findings of protected activity and motivating factor as supported by substantial evidence. Parting from my colleagues’ order reversing and remanding for damages, I would also affirm the ALJ’s findings concerning Respondent’s same-action defense as supported by substantial evidence in the record.

In a matter decided after hearing, the Board’s job is not to reweigh evidence or sit in the shoes of the ALJ as arbiter of fact. Under the Clean Air Act (CAA), the Board reviews an ALJ’s findings for substantial evidence.<sup>183</sup> As the United States Supreme Court has noted, “[t]he threshold for such evidentiary sufficiency is not high.”<sup>184</sup> Substantial evidence is “‘more than a mere scintilla.’ It means—and means only—‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”<sup>185</sup> Under the substantial evidence rule, a reviewing court does not rule as they would if they had been the fact-finder. Neither does the court decide that there is another finding contrary to the ALJ’s finding which is supported by substantial evidence.<sup>186</sup> The Board is not a super-personnel department weighing Respondent’s decision-making at various points and deciding whether some business decision was the fairest or most business savvy.<sup>187</sup> We simply review the ALJ’s findings and the record to determine whether those findings are supported by substantial evidence of the record as a whole.

As the majority states, the CAA outlines specific obligations for a successful complainant to prove. To prevail, a complainant must show that protected activity was a motivating factor in the adverse action.<sup>188</sup> Even so, a respondent may avoid

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<sup>183</sup> 29 C.F.R. § 24.110(b). The ARB reviews an ALJ’s legal conclusions de novo. *Saporito v. Progress Energy Serv. Co.*, ARB No. 2011-0040, ALJ No. 2011-ERA-00006, slip op. at 4 (ARB Nov. 17, 2011).

<sup>184</sup> *Biestek*, 587 U.S. at 102-03.

<sup>185</sup> *Id.* (citing and quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>186</sup> See *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 7-8 (ARB June 29, 2006); *Sharpe v. Supreme Auto Transp.*, ARB No. 2017-0077, ALJ No. 2016-STA-00073, slip op. at 5 (ARB Dec. 23, 2019).

<sup>187</sup> See *Gale v. Ocean Imaging & Ocean Res., Inc.*, ARB No. 1998-0143, ALJ No. 1997-ERA-00038, slip op. at 13 (ARB July 31, 2002); *Jones v. U.S. Enrichment Corp.*, ARB Nos 2002-0093, 2003-0010, ALJ No. 2001-ERA-00021, slip op. at 17 (ARB Apr. 30, 2004).

<sup>188</sup> 29 C.F.R. § 24.109(b)(2).

relief if it can show by a preponderance of evidence that it would have taken the same adverse action in the absence of protected activity.<sup>189</sup>

There is no genuine dispute here that Complainant's grievances to management in 2018 about the Makor permit constitute protected activity. However, as the ALJ found, differences between Complainant and Respondent went well beyond Makor. Complainant was fired on March 31, 2020. The ALJ found that mixed motives were at issue and that Respondent had shown by a preponderance of the evidence that it would have fired Complainant even if he had not engaged in protected activity concerning the Makor.<sup>190</sup> Respondent considered Complainant's conduct as a whole as not supporting senior leadership.<sup>191</sup> Certain events in 2020 pushed that tension over the edge. Respondent had lost confidence in Complainant's ability to be a functioning part of the team. For the reasons below, I would find substantial evidence supports the ALJ's finding.

### **1. Respondent Was Working to Get the Makor Permitted Before and After Complainant's Employment with Respondent**

Complainant on appeal argues that Respondent's warnings in 2018, performance evaluation in 2019, and ultimate termination in 2020 for not supporting management should be construed as Complainant not supporting management (J.W. Coady and Oscar Rodriguez) in re addressing the Makor permit rather than not supporting management on matters unrelated to Makor.<sup>192</sup> Respondent counters, among other arguments, that they did not retaliate against Complainant because of his Makor complaints. Rather, it was Complainant's nonsupport on matters unrelated to Makor that resulted in his suspension and termination.<sup>193</sup> Respondent's position is supported by the record. As the ALJ cited, when Complainant brought concerns about Makor to Coady and Rodriguez, they accepted and appreciated his concerns but explained that it was being handled by third-party consultants (Source Environmental) and Rodriguez as point man.<sup>194</sup> Respondent further argues Complainant's Makor complaints were "so remote in time" that there is a significant temporal gap between the protected activity in 2018

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<sup>189</sup> *Id.*; *Martin v. Akzo Nobel Chem., Inc.*, ARB 2002-0031, ALJ No. 2001-CAA-00016, slip op. at 4 n.3 (ARB July 31, 2003).

<sup>190</sup> D. & O. at 17-21.

<sup>191</sup> *Id.* at 10-12, 17-21.

<sup>192</sup> Complainant's Brief (Comp. Br.) at 23-25, 28.

<sup>193</sup> Resp. Br. at 9-11.

<sup>194</sup> D. & O. at 7, 8-9; Tr. 50 ("we would do whatever it took to get the Makor compliant"), Tr. 53 (Oscar was point person on Makor), Tr. 65 (Oscar Rodriguez worked with Source Environmental on permit).

and Complainant's termination in 2020.<sup>195</sup> Additionally, the record shows that Respondent had been in the process of obtaining a permit for Makor since 2017 before Complainant started working for Respondent.<sup>196</sup> This process was completed in 2021.<sup>197</sup>

*A. June 15, 2018 Phone Calls between Complainant, Respondent, and Source Environmental*

The ALJ cites or references two June 15, 2018 recorded phone calls between Complainant, Respondent, and Source Environmental wherein they discuss recent developments in the Makor permit and getting the necessary documentation for permitting.<sup>198</sup> Complainant suggests that during the second call, Coady showed a lack of concern for Makor compliance when he stated not using Makor would be a "showstopper."<sup>199</sup> Reviewing cited portions of the transcript in full confirms management's effort to obtain the permit. Management acknowledged that the Makor spray machine was not in compliance, and there was a small amount of remaining documentation needed to complete the submission. The dialogue between Coady, Rodriguez, and Complainant in the second call demonstrates a degree of cooperation and urgency concerning getting the Makor permitted.<sup>200</sup> Complainant and others were to get the data to Source Environmental and Rodriguez to file the necessary documents to resubmit material to the Texas Commission on Environmental Quality (TCEQ):

*JW Coady:*

Okay. So what are we saying? Tactically, we've been running the Makor noncompliant.

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<sup>195</sup> Resp. Br. at 9-10; D. & O. at 7.

<sup>196</sup> Resp. Br. at 9. TCEQ had issued a construction permit in October 2017 but this had lapsed on or about December 13, 2017. RX 11 (Nov. 30, 2017 letter from TCEQ indicating that it had received Respondent's November 16, 2017 Permit Amendment Application, and it was under review, listing several deficiencies); Resp. Mot. for Summ. Decision, Ex. J (Dec. 13, 2017 letter from TCEQ).

<sup>197</sup> Tr. 213.

<sup>198</sup> D. & O. at 8. One June 15 recording between Complainant, Rodriguez, and Source Environmental was submitted to the ALJ at hearing. CX 15. A second June 15 recording between Complainant, Rodriguez, and Coady was submitted by Respondent as an exhibit to its motion for summary decision. Ex. F, of Resp. Mot. for Summ. Decision. Both parties acknowledged at hearing that Ex. F was part of the record and available for review. Tr. 273, 340-41.

<sup>199</sup> Comp. Br. at 8, 12.

<sup>200</sup> Ex. F to Resp. Mot. for Summ. Decision, at 21.

*Jeffrey Gregory:*

Yeah, it looks like this . . . From what they were saying on the phone, this permit actually died on the 13th of December, and the timeframe between December and . . .

*Oscar Rodriguez:*

June.

*Jeffrey Gregory:*

. . . and June was the timeframe to basically go back and say, "Why did it die? What can we do to keep it from dying"? And then the deadline in June was, "We missed that. What do we do to keep it from dying?" timeframe.

*JW Coady:*

So now we're resubmitting.

*Jeffrey Gregory:*

Now we have to resubmit.

*Oscar Rodriguez:*

We've always been in the mode of resubmitting. When the application was rejected from the state initially, we started the process again to gather up all of the data. We just happened to miss the June 13th deadline. The June 13th deadline, the significance with that was reapplying with a fee of \$1,100. The fee-

*JW Coady:*

The \$1,100 doesn't bother me. Not running the Makor, that bothers me. That's a showstopper, right? There's the challenge. I just need to get all this paperwork done, file whatever fee. I think if there's a way to expedite, pay more, I'm interested in that. We need to get this thing moving and going, minimize any kind of time we're noncompliant. We've got to get our heads around what does that mean for continuing to serve our customers, keep the business moving, which it's disappointing to hear,

really what I'm hearing. We've got an issue now with the Makor. And have had for a while, yes. All right.

*JW Coady:*

So job one, we've got to get after all this paperwork, get it over to George [of Source Environmental], get these drawings, get the resubmission going, ask him about any kind of ability to expedite for extra money. Sometimes states have that, sometimes they don't. Don't know. It doesn't hurt to ask. And see how fast we can get this thing moving through the process. I'll be back in the office Monday morning, and we'll do a huddle and see where our heads are at, and what's our plan to finish going forward. We've got to figure that one out. Right? Did I miss anything?

*Oscar Rodriguez:*

Nope.<sup>201</sup>

Coady, Rodriguez, and Complainant concluded this portion of the meeting with a game plan for getting the data together for resubmission through Source Environmental. The effort on June 15 from all involved seemed cordial. It was known that Makor was not compliant, but they were collecting and assembling data for the submission to TCEQ and discussing cost-effective alternatives to address the problem.

*B. The Record Demonstrates Respondent's Significant Efforts to Obtain the Necessary Permit*

Following the June 15 call, Respondent submitted a filing with TCEQ in late June or early July (hereinafter June 30, 2018).<sup>202</sup> On July 13, 2018, TCEQ replied by letter to Rodriguez stating that they had identified deficiencies and asked for responses within ten days, July 23, 2018, or the application would be voided.<sup>203</sup> Respondent submitted a response to the listed deficiencies but that, too, was rejected by TCEQ. On August 23, 2018, Respondent's third-party contractor, Source Environmental, submitted a new permit amendment application.

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<sup>201</sup> Ex. F to Resp. Mot. for Summ. Decision, at 24-25.

<sup>202</sup> The record contains a July 13, 2018 response from TCEQ to Respondent in reference to Respondent's "Permit Amendment Application" but does not provide the date of the submission to which it is responding. CX 4. Parties do not contest the June 30 date.

<sup>203</sup> CX 4.

The dialogue between Respondent and TCEQ continued throughout 2018.<sup>204</sup> Respondent submitted data and answered inquiries. TCEQ responded with comments and additional data requests. On October 12, 2018, TCEQ wrote a letter to Rodriguez stating that they needed significant additional information to complete their review.<sup>205</sup> TCEQ acknowledged the technical difficulty in obtaining a permit:

Permitting a wood cabinet manufacturing facility is a complex process requiring a thorough understanding of: all emission generating processes at the site; the emission generating equipment used at the site. The building ventilation system; location and size of building and individual room openings where emissions may escape to the atmosphere; an understanding of emission capture as it relates to the building, rooms within the building, and individual process equipment such as paint booths; as well as emission calculation and air dispersion modeling techniques.<sup>[206]</sup>

TCEQ asked for the requested information within 30 days.

Shortly thereafter, the effort to obtain the permit encountered difficulty. Respondent had to void the permit application in late 2018.<sup>207</sup> It is not clear what efforts took place thereafter in 2019. A permit was obtained in 2021.<sup>208</sup>

## **2. Complainant's Efforts to Undermine Senior Leadership**

### *A. Complainant's June 20 and June 28, 2018 Emails to Coady*

The tone of Complainant's communications had changed between June 15 and June 20, 2018. As noted above, Complainant and Respondent discussed the permit on June 15. At the conclusion of the June 15 meeting, individuals were to get the data to Rodriguez and Source Environmental for filing by the end of the month. Some tension manifested between the phone calls of June 15 and Complainant's June 20 email informing Coady that Rodriguez is not responding to him. Complainant wrote in his June 20 email:

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<sup>204</sup> CX 6 (TCEQ air quality permit dated Oct. 18, 2017); CX 1 (email correspondence between Respondent and TCEQ in the fall 2018); CX 4; CX 3.

<sup>205</sup> CX 3.

<sup>206</sup> *Id.*

<sup>207</sup> CX 1.

<sup>208</sup> Tr. 213.

JW,

I wanted to check in and see if you have heard anything from Oscar on the Makor? I haven't heard anything yet and am increasingly uncomfortable continuing to run the way we are without consent. Would you please check in with Oscar and see if he has made any progress on the permit and let me know what I can do to assist?

Thanks so much!!

JG.<sup>209</sup>

Coady responded to Complainant's email that he had contacted Rodriguez and felt they will have the information by the end of the week.<sup>210</sup> Coady continued that management will work with Source Environmental to get documents filed correctly.

Jeff

I just spoke with Oscar, he feels we will have all our info ready by end of week. We will work with outside resources to ensure we get all material documents filed correctly.

Thanks

JW.<sup>211</sup>

Coady's response is consistent with his testimony. Coady did not rebuff Complainant's concerns on Makor but declined Complainant's request for involvement vis-à-vis Rodriguez and Source environmental—answering that “we” will work with Source Environmental to get the permit material submitted.<sup>212</sup> The record shows that Respondent did submit documents to TCEQ on or about June

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<sup>209</sup> CX 10 (Email exchange between Jeffrey Gregory and JW Coady, dated June 20, 2018).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* Complainant sent his email to Coady at 9:00 a.m. on June 20. At 2:42 p.m. on June 20, Coady responded to Complainant with the above email. Also at 2:42 p.m., Complainant immediately forwarded Coady's response to his wife's personal email address. *Id.*

<sup>212</sup> *Id.*; see also D. & O. at 9; Tr. 108-09 (Coady answering ALJ's question that it was reasonable for Complainant to be concerned but they were working on it with Rodriguez and Source Environmental; Source Environmental does the measurements and calculations).

30, consistent with the goal discussed in the June 15 call.<sup>213</sup> While Complainant grieved that Rodriguez was not answering Complainant's calls and Complainant was not able to evaluate Rodriguez's progress on Makor, there is no indication that Rodriguez was to report to Complainant. Rather, it is undisputed that Respondent placed Rodriguez as point on Makor.<sup>214</sup> Respondent had been working on Makor permitting before Complainant had started employment with Respondent. Yet, Complainant believed he was in charge of or responsible for Makor as COO.<sup>215</sup> Coady promptly responded to Complainant's email but did not take up Complainant's cue to intervene with Rodriguez on Complainant's behalf. The ALJ found "Coady and Rodriguez essentially told him they understood his concerns, but compliance was not his job and they were managing the issue without his help."<sup>216</sup>

Shortly thereafter, Complainant sent Coady a June 28, 2018 email with the subject line "Exercise # 2 update."<sup>217</sup> The email began with Complainant's introspection as to what creates stress in the workplace outside of normal business operations. Complainant outlined for Coady eight categories of grievances with two to three subcategories per category.

In the email, Complainant displayed his increasing hostility toward Rodriguez and Rodriguez's role in Makor. Just as with the June 20 email, the ALJ correctly found that the June 28 email contained protected activity<sup>218</sup> but was also correct that it reveals Complainant's mindset toward senior leadership.<sup>219</sup>

Category # 1 was Complainant's "lack of trust" of Rodriguez and his ethics "or lack thereof."<sup>220</sup> Complainant identified in Category # 2 Makor's current non-compliant status<sup>221</sup> discussed previously on June 15 and June 20 but repeated that

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<sup>213</sup> *Supra* note 202.

<sup>214</sup> *Supra* note 194.

<sup>215</sup> CX 9; *see infra* note 226 (June 28 email).

<sup>216</sup> D. & O. at 9; *see also* Tr. 108-09.

<sup>217</sup> CX 9.

<sup>218</sup> D. & O. at 8-9. That Complainant's motive was to get rid of management does not prevent his communication from constituting protected activity. *Id.* at 7 n.22.

<sup>219</sup> *Id.* at 10, 17.

<sup>220</sup> CX 9.

<sup>221</sup> Complainant characterizes Makor as running "illegally." Coady testified that it was not running illegally or unlawfully. Tr. 50, 65-68. Respondent had an open amendment application that had been rejected numerous times in 2018. *Id.* at 50.

he had received “no communication” from Rodriguez. Complainant continued that he believed he was responsible for equipment including Makor, but:

I must reach out continuously to find out what the progress is. This has significant legal implications that I have no control to address, which is completely outside my standard of doing business.<sup>[222]</sup>

Complainant felt Rodriguez was being “favored” and “allowed to conduct business” contrary to Complainant’s vision for the company.<sup>223</sup> Category # 3 is a related issue of volatile organic compounds (VOC) and the integrity of information to and from Source Environmental.<sup>224</sup>

Complainant’s June 28 email as a whole demonstrates that Complainant wanted more power to execute and influence business outcomes.<sup>225</sup> Under a heading “Staffing operations area,” Complainant placed himself and his reputation at the helm of staffing. He states:

Again, this is an area that I will ultimately be accountable for and I am not in control of how to execute my strategies. All decisions are made by the CEO. I believe I was hired for and have a reputation for achieving results. I have extensive experience with staffing operations and I am not currently permitted to make those decisions.<sup>[226]</sup>

Complainant had similar charges in re Coady’s leadership in areas of “purchasing items and improvements.”<sup>227</sup> Complainant wrote in the email:

I have not been permitted to make decisions regarding needs/wants though I am operating inside budget. I have

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After Complainant was terminated, he informed TCEQ of his concerns on the Makor. They investigated but took no action. Tr. 215, 362; RX 12 (July 17, 2020 letter from TCEQ stating “[n]o violations are being alleged as a result of the investigation”).

<sup>222</sup> CX 9; Resp. Br. at 9.

<sup>223</sup> CX 9.

<sup>224</sup> Coady testified that Source Environmental was the expert on VOC data. Tr. 53. Sherwin Williams sent data to Source Environmental. *Id.* at 52-54. Source Environmental ran the numbers and performed the calculations. *Id.* at 51-52.

<sup>225</sup> D. & O. at 17.

<sup>226</sup> CX 9.

<sup>227</sup> *Id.*

been responsible for maintaining budgets for 10+ years yet I do not have the control to make purchases that aid in achieving the strategic vision even when I am inside the parameters of the budget itself.<sup>[228]</sup>

Complainant further objected that Coady as CEO was discussing items directly with shop floor employees which sent mixed signals and interfered with Complainant's control over day-to-day operations. Complainant concluded that Coady's involvement "undermines [Complainant's] influence on my team."<sup>229</sup>

Although the June 28 email was addressed to the CEO and sent to Coady's email, Complainant challenged the CEO's leadership in many respects. Complainant concluded his email to the Coady with the sentence:

Connect with me when you would like to review any or all of these. Also, please note that my intent is to provide insight into my thoughts so that we may develop a tighter relationship in moving the organization forward as a team.<sup>[230]</sup>

These emails confirm both of the ALJ's findings: that Complainant was concerned with running Makor as is without a permit as well as that Respondent perceived Complainant's tone as hostile toward Coady's and Rodriguez's leadership. The ALJ described the email as follows:

In the [June 28] email, [Complainant] complains about Rodriguez's lack of ethics, being overridden by the CEO on staffing decisions, being prevented from making purchasing decisions, inconsistent directions to staff from leadership, being unable to tactically manage operations, and poor personnel resource allocations. Complainant explained he was frustrated by being held accountable for execution but restricted from performing the job he was hired to do.<sup>[231]</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* After Complainant wrote the June 28, 2018 email, he forwarded it to his personal email account the same day.

<sup>231</sup> D. & O. at 17.

*B. Complainant Undermined Coady in Meeting with MNE COO*

Complainant's charge against Respondent's senior leadership was confirmed in an event that took place several weeks after Complainant's June 28 email. Complainant took his grievances against Coady and Rodriguez to Derek Douglas, COO of Respondent's parent company, Miami Nations Enterprise, in or around August 2018. As with the June emails, the parties concede that Complainant raised concerns as to how Makor was being handled.<sup>232</sup> However, the ALJ found that Complainant raised more than the Makor to Douglas in August 2018.<sup>233</sup> Complainant conveyed to Douglas his criticism of CEO Coady, including Coady's direction on DreamCraft, Coady's spending decisions, Coady's interactions with shop-floor workers, and Coady's creating havoc with customers.<sup>234</sup>

Douglas sided with Coady. As the ALJ stated "Douglas told him Coady was in charge and he needed to get in line."<sup>235</sup> Both Coady and Complainant testified that Douglas responded that it was important for Complainant to support the CEO and the way he chose to run the plant and not go around his back.<sup>236</sup> Complainant acknowledged that Douglas instructed Complainant of his role vis-à-vis Coady's role as CEO.<sup>237</sup>

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<sup>232</sup> *Id.* at 10. Complainant did not record this phone call or enter a transcript into the record if a recording exists. Accordingly, the record is less clear on the contents of the discussion.

<sup>233</sup> *Id.* at 3, 7-8, 10, 17. Complainant conceded that there were non-environmental topics in the conversation with Douglas that Douglas felt were undermining Coady's role as CEO. Tr. 352-53.

<sup>234</sup> D. & O. at 17; *see also* Tr. 349-52, 355 (Complainant communicated his disagreement with Coady's veering off course), Tr. 59, 77 (Coady testified that Douglas discussed with him Complainant's concerns about Coady's providing directions on the shop floor).

<sup>235</sup> D. & O. at 20.

<sup>236</sup> Tr. 59-60, 280-81, 349-50.

<sup>237</sup> Tr. 351.

Q: Well, you already testified that Mr. Douglas explained to you what your role was vis-a-vis the CEO, correct?

A: In his view, yes.

Q: And so at least as far --- are you saying that Mr. Douglas did not have authority to articulate the board's position on these issues?

A: No, what I'm saying is as I view my responsibility to Mr. Douglas, the board, the 500 people that worked at the organization, my responsibility was to bring up risk and risk mitigation. When we were putting the livelihood of 500 people and their direct dependence in play by languishing around DreamCraft at the time we did and not being able to produce,

After the meeting, Douglas informed Coady about Complainant's attempt with the comment that if Complainant were undermining you as CEO, we should let him go.<sup>238</sup> Coady met with Complainant to discuss the Douglas meeting. Coady did not terminate Complainant's employment but sought to ensure that Complainant would work with management as opposed to against them.<sup>239</sup> Complainant agreed to support Coady as part of the resolution going forward.<sup>240</sup>

*C. The ALJ's Finding that Complainant Wanted to be CEO*

The Douglas meeting follows the substance of the June 28 email. Complainant, as COO, was not on board with the direction of the company. Respondent received Complainant's grievances as not supporting the CEO's leadership.<sup>241</sup> The ALJ summarized Coady's testimony:

[Coady] was purchasing processing equipment and Complainant thought they should be purchasing painting equipment. Complainant didn't agree with hiring, wage rates, shipping, or the structure of the company. Complainant wanted to outsource a lot of material. [Coady] wanted to do more in-house. Douglas told [Coady] one of the things Complainant was complaining about was that [Coady] was giving directions on the shop floor.<sup>[242]</sup>

The ALJ observed that when Coady decided to open a new product line, DreamCraft, around February 2018, Complainant "deeply disagreed" with this decision and believed that resources should be directed at current product line problems.<sup>243</sup> In a separate incident over DreamCraft, Complainant testified that

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creating havoc with our customers, havoc with our shipping, havoc with our production environment, I felt like it was my obligation to move those risks and issues forward because they weren't being heard by Mr. Coady.

*Id.* at 351-52.

<sup>238</sup> Tr. 59-60; *id.* at 280-81.

<sup>239</sup> *Id.* at 59-60, 77 (Coady's testimony), *id.* at 280 (Complainant's testimony).

<sup>240</sup> *Id.* at 280-81 (Complainant testified that Coady said: "Are you on my team? Are we all on the same page," those kinds of things and then ultimately said, "Derek told me everything you said. I don't understand why you wouldn't come to me first.").

<sup>241</sup> D. & O. at 18.

<sup>242</sup> *Id.* at 18; Tr. 46-48.

<sup>243</sup> D. & O. at 3, 17.

Coady verbally attacked him and got within six inches of his face and threatened to fire him over this grievance.<sup>244</sup>

The ALJ found that Complainant was under the impression for a time that he was in line for the CEO position before Coady was hired as CEO. The ALJ stated as follows:

The evidence paints a relatively clear picture that after Complainant talked to Douglas and was hired, he anticipated becoming CEO or at least having a significant say in both the strategic and tactical management of the company.<sup>[245]</sup>

The ALJ cited comments from Complainant's answer to a question asking whether he was second-in-charge, to which he responded "**yes, Well, in title,**" alluding to the point that Complainant believed his de facto position might be leader.<sup>246</sup> Other references gave the appearance that Coady's decision-making on DreamCraft was the cause of the hostility "**only because [Coady] made it that way.**"<sup>247</sup> The ALJ treated these comments as confirming Complainant's desire to be CEO. The ALJ found these answers to be the "most probative evidence in the case." Complainant's desire to be CEO "distill[s] his litany of complaints and [his] relationship with Coady and explains his and his spouse's actions."<sup>248</sup>

These incidents support the ALJ's finding that Complainant had an agenda for more power in the company.<sup>249</sup> Complainant's attitude toward Coady and Rodriguez is confirmed by the tone of his communications in the emails and with Douglas. While these events contain protected activity, this protected activity is repetitive of what Respondent had known before Complainant had been hired—that running Makor required a change to Respondent's permit to be in compliance. Respondent was not retaliatory toward Complainant on Makor; Respondent was receptive to his concerns. Respondent placed that effort with Rodriguez and Source Environmental. Respondent was in the process of submitting documents to TCEQ. In fact, though Complainant may have been out of the loop because of his conflicts with Rodriguez, Respondent and Source Environmental submitted permit documents on June 30, 2018—in line with the goal discussed in the June 15 phone

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<sup>244</sup> *Id.* at 11; Tr. 302-03.

<sup>245</sup> D. & O. at 19.

<sup>246</sup> *Id.* at 18 (emphasis in original).

<sup>247</sup> *Id.* (emphasis in original).

<sup>248</sup> *Id.* at 17-18.

<sup>249</sup> *Id.* at 18, 19-20.

calls. What Respondent, Coady, and Douglas were concerned with was Complainant’s conduct towards senior leadership and ongoing lack of support of Coady.

### 3. Events in 2019

#### A. Performance Evaluation in March 2019

Respondent’s perception that Complainant did not support the company’s senior leadership was reiterated in Complainant’s 2018 performance evaluation in March 2019.<sup>250</sup> In that evaluation, Coady marked down Complainant for failing to support the vision of senior leadership during the first half of 2018 but noted that he improved in the second half of 2018. Coady provided as follows in the “building trust” section:

Trust is earned and very quickly spent. 1st half was very disappointing—team was divided, focus was at individual level and in no way moved Nations forward. I did not feel that as COO you were supporting me through actions or words. You made a commitment to me in July that I accepted, I want to see the current path continue.<sup>[251]</sup>

The ALJ recounted Coady’s testimony:

In March 2019, [Coady] gave Complainant a poor evaluation. It was based on Complainant’s divisive behavior, his unwillingness to support the direction of the company, and his building cliques around people. When he was reviewing his new closet line at the board meeting Complainant objected that they were expanding too quickly and should focus on what they were already doing.<sup>[252]</sup>

Complainant argued to the ALJ that his complaints about the Makor permit were responsible for the low rating, but the ALJ found that predicate to be unsupported by the record.<sup>253</sup> To the contrary, there were grievances with the CEO’s leadership including Coady’s decision to pursue DreamCraft. The ALJ also cited Coady’s testimony that “[i]n [the] summer of 2018, they suffered a ransomware attack. He

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<sup>250</sup> CX 18.

<sup>251</sup> *Id.*

<sup>252</sup> D. & O. at 18.

<sup>253</sup> *Id.* at 10.

thought they should continue to ship, using hard copy paperwork to manually load the trucks, and continue supplying product to customers. Complainant disagreed.”<sup>254</sup> This difference created significant pressure between Coady and Complainant.<sup>255</sup>

The majority relies upon the fact that Coady’s performance review cites to poor performance in the first half of 2018 but includes a comment about improved performance in the second half of 2018.<sup>256</sup> Complainant’s theory is that he continued to raise all of his other grievances in the second half of 2018 but stopped raising Makor complaints because he felt that he had been threatened in August 2018 with termination for raising Makor complaints to Douglas.<sup>257</sup> Thus, according to Complainant, Respondent’s problems with his performance overlap with Makor protected activity but not with non-Makor grievances.

There are a few problems with Complainant’s argument. The ALJ was correct to reject it.<sup>258</sup> First, the majority places too much weight on Coady’s general timeline in 2019 and not enough weight on the undisputed fact that these non-Makor heated disputes did happen. Coady’s reflection on the timing of the 2018 events when writing the performance review in 2019 is loose. Upon review of the actual dates, many of the significant events took place in the second half of the year. The Makor protected activity took place in June 2018 and the Douglas undermining CEO event took place in August 2018.<sup>259</sup>

Second, the majority relies upon Complainant’s testimony that a significant blowup over DreamCraft took place in the second half of 2018 and should have been noted in Coady’s performance review for the second half if non-Makor events were a significant component of the performance problems.<sup>260</sup> Complainant’s testimony on the dates for this blowup are vague and shifting. Complainant states “Judge, I can’t

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<sup>254</sup> *Id.* at 18.

<sup>255</sup> RX 10 at 9, 10 (Kelly Gregory stating to the parent company that divisions between the two almost resulted in Complainant losing his job).

<sup>256</sup> *Supra*, at 11-12.

<sup>257</sup> D. & O. at 10-11.

<sup>258</sup> *Id.* at 10-11.

<sup>259</sup> If the Douglas meeting took place in August, Coady’s cite to a July reconciliation in the performance review appears to be off. Tr. 59, 77 (Coady explaining that he had a meeting to improve Complainant’s performance on undermining him with shop floor employees around August 2018 after a meeting with Douglas).

<sup>260</sup> *Supra*, at 25-26.

say that I remember. It [hostile interaction at DreamCraft’s unveiling<sup>261</sup>] was towards the end of 2018” but Complainant is not clear on which month.<sup>262</sup> Later, Complainant testifies the heated exchange with Coady over DreamCraft’s unveiling could have been the beginning of 2019 but he could not remember.<sup>263</sup> Elsewhere, he testified more confidently that DreamCraft disputes “persisted all the way through 2019 and the beginning of 2020.”<sup>264</sup> The ALJ correctly rejected Complainant’s argument on the timing of non-Makor performance problems.

Third, the performance review itself is consistent with blowups and poor performance also taking place in the second half as well. It states that Complainant’s conduct was worse in the first half but improved in the second half, not that Complainant behaved perfectly without incident in the second half of 2018.<sup>265</sup> From Coady’s perspective, he could have viewed Complainant’s effort to exclude him from managing shop floor employees or going over his head to undermine his role as CEO more poignant in Complainant’s insubordination than the ongoing DreamCraft conflicts. The point relevant to Complainant’s appeal is that the heated exchanges: (1) occurred, (2) were not related to Makor, and (3) were a significant, ongoing problem and one of many examples of Complainant’s undermining and not supporting Coady as CEO.

### *B. Protected Activity Post-August 2018*

After August 2018, Complainant’s grievances on Makor dissipated. The ALJ noted a “direct contradiction” between Complainant and Respondent as to whether complaints about Makor continued into 2019.<sup>266</sup> The ALJ cited Complainant’s lack of evidence for expressed complaints on Makor in 2019 while there is an abundance of evidence, including multiple tape recordings and emails, from Complainant for complaints on Makor in mid-2018.<sup>267</sup> Ultimately, the ALJ concluded there were some passing references about the Makor permits after August 2018 into 2019.<sup>268</sup>

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<sup>261</sup> Complainant had strong objections to Coady’s pursuing the DreamCraft line in early 2018 when Coady came on board. D. & O. at 3, 17. This was a source of tension. There was also a heated exchange during the unveiling of DreamCraft. *Id.* at 11.

<sup>262</sup> Tr. 303.

<sup>263</sup> Tr. 408-09.

<sup>264</sup> *Id.* at 367.

<sup>265</sup> CX 18 (“you made a nice correction in 2d half of year on receiving input and redirecting your focus.”); Resp. Br. at 3 (“Mr. Gregory still faced ‘a long road to rebuild.’”).

<sup>266</sup> D. & O. at 9.

<sup>267</sup> *Id.* at 9; *Id.* at 6 & n.19 (noting that there were some comments about the last protected activity being in August 2018 when Complainant spoke to Derek Douglas).

<sup>268</sup> *Id.* at 9.

Complainant testified that his communications sometime between September and November of 2019 were casual, “minor” follow-up questions on Makor, and did not elicit any threat of termination or hostility.<sup>269</sup>

#### 4. Events in 2020

This brings us to 2020 and the main events triggering Complainant’s suspension and termination. The following constitutes additional substantial support for the ALJ’s findings that Respondent would have terminated Complainant’s employment in the absence of protected activity concerning Makor.

##### *A. March 3, 2020 Board Meeting and Kelly Gregory’s Drive to MNE Headquarters*

Respondent held a board meeting on March 3, 2020.<sup>270</sup> Complainant, Coady, and Peter Murphy (CEO of the parent company MNE) were present. According to Complainant’s testimony, shortly before the meeting began, Coady answered Murphy’s question on the status of the Makor permit by affirming that they were still in the process of getting approval.<sup>271</sup> According to Complainant’s testimony, this was the last straw, he went home, became ill, and discussed the issue with his wife, Kelly Gregory.<sup>272</sup>

Ten days after the board meeting, Complainant’s wife inexplicably left her house at 11:00 pm for a twelve-hour drive to MNE headquarters in Oklahoma.<sup>273</sup> Kelly Gregory located the HR director, Gena Lankford, and was able to schedule a meeting the next day. Mrs. Gregory recorded the meeting. Taking her cues from Complainant’s notes from the Board meeting and communications with her husband,<sup>274</sup> she unloaded on Coady’s and Rodriguez’s moral turpitude, competence, and leadership. The ALJ summarized Complainant’s grievances with senior leadership:

- The Makor permit
- Investing in DreamCraft rather than equipment to meet current demand
- Investing in a new closet line when unable to support current products
- Implementing a hiring freeze when workforce couldn’t meet current demand

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<sup>269</sup> Tr. 429.

<sup>270</sup> RX 4 (slide deck for Board meeting).

<sup>271</sup> D. & O. at 9.

<sup>272</sup> *Id.* at 8.

<sup>273</sup> RX 10 at.4; Tr. 249.

<sup>274</sup> RX 5 (Complainant’s notes from meeting).

- Continuing to operate when ransomware brought the computers down
- Describing a significant ransomware attack as a “software glitch”
- Running short of cash because of ransomware and DreamCraft decisions
- Reporting that down days were taken for the rodeo when they were in reality for low sales
- Reprimanding Complainant for reporting problems to Douglas
- Repeatedly threatening to fire Complainant
- Spending \$30,000 on unsuccessful paycheck implementation
- Purposefully misapplying freight on warranties and overstating revenue by \$1-2M<sup>275</sup>

As reported through Kelly Gregory, Complainant had severe disagreements with and a lack of confidence in Respondent’s leadership, specifically criticizing Coady’s and Rodriguez’s honesty among other faults. The ALJ found that Complainant’s wife’s statements “corroborat[e]” Complainant’s view of Coady’s mismanagement of the company.<sup>276</sup> The ALJ found “[t]he record is clear that the allegations she made to [Lankford] came from Complainant.”<sup>277</sup> Summarizing, Kelly Gregory reported that Complainant believed Coady was not competent to run the business, was abusive, and that the company, under current leadership, was engaging in fraudulent activity.<sup>278</sup> Kelly Gregory stated:

. . . and this isn’t about him against JW or anything else. But I’m going to look you straight in the face and tell you, JW, he’s not qualified and he’s blowing snow over most of these people.<sup>[279]</sup>

She continued:

Put [Coady] in a room by himself and ask him to do the math on anything, truly. Ask him to show his work and then I’ll be a little exaggerating, but he doesn’t know. He throws out words. He’s a phrase guy. . . .<sup>[280]</sup>

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<sup>275</sup> D. & O. at 19.

<sup>276</sup> *Id.* at 12.

<sup>277</sup> *Id.* at 20; *Id.* at 4 (Mrs. Gregory “presented a series of grievances her husband had discussed with her about Coady’s mismanagement.”).

<sup>278</sup> *Id.* at 18.

<sup>279</sup> RX 10 at 10.

<sup>280</sup> *Id.* at 10.

She urged Lankford to keep her investigation confidential because if someone tells Coady or Rodriguez before Monday, “all the lies will be covered up and you won’t find anything out.”<sup>281</sup>

According to Mrs. Gregory, Coady was responsible for people leaving Respondent:

. . . I’m going to tell you straight up right now, if [Coady] has a breath, you’re screwed . . . Because he will throw anybody under the bus.<sup>[282]</sup>

She then went on an extended discussion as to how Coady “threw Josh [Marones] under the bus.”<sup>283</sup> Josh is the son-in-law of Kelly Gregory and Complainant.<sup>284</sup>

She summarized Respondent’s poor business decisions and Coady’s spending capital:

Also, [Coady] lied about equipment expenses and things like that. So essentially he was saying that they invested, it was like 60 million dollar revenue, 58 million dollar revenue comes from BJ Tidwell, the rest from DreamCraft, maybe. And there’s essentially been no money invested in upgrading equipment that’s 35 years old, that’s breaking down on a daily basis. I mean, it’s sort of been the JW show on that side and really just not smart investing in the money making side of the machine.<sup>[285]</sup>

In 2018, Respondent suffered a ransomware event that paused operations. Complainant and Coady disagreed as to how to inform customers.<sup>286</sup> From Mrs. Gregory’s statement, the void between Coady and Complainant on the ransomware incident was so severe that Complainant thought he might be fired for conflicting with what Coady wanted to do.<sup>287</sup>

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<sup>281</sup> *Id.* at 27.

<sup>282</sup> *Id.* at 28.

<sup>283</sup> *Id.* at 29-31.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 14.

<sup>286</sup> *Id.* at 9; Tr. 89-90.

<sup>287</sup> RX 10 at 9.

Kelly Gregory provided extended comments about “scary money spending” and spending additional money on new product lines on top of that extravagant spending.<sup>288</sup>

. . . [Complainant] said we can't make money on DreamCraft right now. He said, first of all, he said none of our customers even like JW. They can't stand him, because he's such an asshole. He's me, mine, I, me, mine, I and he's so rude to them that nobody wants to do business with him and he's investing all of this money into something that isn't selling. Why are we not building the business that is selling? So that then we can put money into what we want to build on. Then let's do DreamCraft. He [Complainant] says, I'm not saying let's not do it [DreamCraft], but why are we doing that when we've got machines that are older than my kids. That are breaking down, that are supporting the business. So that actually was the closet line, that's why I write it in there. That's when he started crying.<sup>[289]</sup>

Mrs. Gregory identified alleged financial malfeasance concerning calculating warranty revenue.<sup>290</sup> As the ALJ summarized, Complainant's complaint was that mismanagement resulted in a million-dollar fraud for overreporting warranty revenue.<sup>291</sup>

Complainant's complaints were not limited to Coady. Lankford asked Kelly Gregory if Complainant had tried to speak to Oscar Rodriguez. She replied Oscar was a big part of the problem, too,<sup>292</sup> that Rodriguez would do whatever Coady told him to do,<sup>293</sup> and that “Oscar is completely unqualified. I wish you would go spend some time with him.”<sup>294</sup> According to Complainant's wife, Oscar was mismanaging paycheck administration, headcounts, and other personnel management.<sup>295</sup>

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<sup>288</sup> *Id.* at 14.

<sup>289</sup> *Id.* at 15.

<sup>290</sup> *Id.* at 17.

<sup>291</sup> D. & O. at 18; *see also* RX 10 at 17-18, 20-21; RX 5.

<sup>292</sup> RX 10 at 5.

<sup>293</sup> *Id.* at 6.

<sup>294</sup> *Id.* at 15.

<sup>295</sup> *Id.* at 15-16.

Complainant's wife discussed Makor as one of the grievances involving Rodriguez.<sup>296</sup> She recounted a short summary of the mid-2018 conversations discussed above. She reported that Coady had said at the Board meeting, in response to Murphy's question about the status, that the problem with getting the permit "was the third-party vendor's fault and that it was all being taken care of."<sup>297</sup> Since Complainant had been out of the loop, Kelly Gregory conceded Complainant's knowledge was incomplete. But as far as Complainant was aware, the Makor permit was being "glossed over . . . and nothing has been done since then [2018] . . . but now that may not be true, to be fair."<sup>298</sup> Kelly Gregory acknowledged that Complainant had first-hand knowledge in 2018 but was not involved in more recent activity and did not know the current status of efforts taken by Respondent, third-party vendors, or TCEQ.<sup>299</sup>

Kelly Gregory had a number of good things to say about Complainant. For the most part, most people go to Complainant to handle their problems rather than Coady because Complainant was helpful but Coady was abusive and always swearing.<sup>300</sup>

### *B. Suspension Recording and Termination Letter*

Respondent acted swiftly after the Kelly Gregory meeting. Roughly one week later, on March 20, 2020, Complainant was called into a suspension meeting pending further investigation into allegations made by Kelly Gregory.<sup>301</sup> Coady informed Complainant that he just completed a phone call with the Board's attorney and Murphy, and he had to suspend Complainant indefinitely:

For failure to protect and support privileged and confidential information contained in a closed door board meeting . . . in violation of your signed employment contract dated December 1st, 2017.<sup>[302]</sup>

Complainant expressed dismay and asked what information he divulged. Coady explained that he was not privy to all of the details, but Kelly Gregory had

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<sup>296</sup> *Id.* at 5, 11.

<sup>297</sup> *Id.* at 13.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 12-13.

<sup>300</sup> *Id.* at 18, 19.

<sup>301</sup> RX 13.

<sup>302</sup> *Id.*

delivered the information to the Board in person. Complainant asked follow-up questions, but Coady did not have answers only that:

Private information that was only in that board meeting somehow got to your wife. Your wife somehow got that to the board. There will be an investigation and we'll go from there. You know what I know.<sup>[303]</sup>

Most of the facts necessary for Complainant's case arise from the hostility and interaction between Coady and Complainant. Yet, the suspension in part came from the parent company—to whom Kelly Gregory had complained roughly one week earlier. The ALJ observed:

Complainant testified Coady told him “I just got off the phone with Peter Murphy and our lawyers. Effective immediately, you are suspended for distributing confidential information.” Complainant agreed that both Coady and Rodriguez appeared to be surprised by the call and suspension and did not believe either was involved in any sort of effort to get him placed on suspension.<sup>[304]</sup>

In fact, Coady seemed to have a bit of sympathy for Complainant during the suspension meeting, stating “I wish if there was a problem you would have fricking come to me . . . .”<sup>305</sup>

The suspension meeting was followed by an investigation and termination on March 31, 2020.<sup>306</sup> The termination letter stated that Complainant was being terminated for violating company confidentiality as well as the ongoing lack of support for Respondent's management and the direction of Respondent's business operations.<sup>307</sup> It states:

The decision to terminate your employment is based on your unauthorized disclosure of confidential Company information to your wife, Kelly Gregory, and your ongoing lack of support for Nation's management and the direction of Nation's business operations. It is the opinion of the

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<sup>303</sup> *Id.*

<sup>304</sup> D. & O. at 11.

<sup>305</sup> *Id.* (citing transcript of suspension phone call).

<sup>306</sup> CX 12.

<sup>307</sup> *Id.*

Company's management that we must go in a different direction at this time.<sup>[308]</sup>

The ALJ summarized Coady's testimony concerning the investigation and final termination decision, which the ALJ found to be consistent with Complainant's account:

[Coady] had conversations with the attorney for the board, Gena Lankford, and Peter Murphy. Their discussions were around the allegations that Kelly Gregory had made to Lankford and the four-page document she left. He primarily answered questions about the allegations. They asked if [Coady] had lost confidence in Complainant and his answer was yes, because of the false allegations. He also noted Complainant's repeated lack of support for the direction he wanted to take the company. Complainant would begrudgingly go off and make a half-hearted attempt to get something done. He had no objection to Complainant raising the risks of a decision, but the false allegations he made regarding financial misgivings and wrongdoings were beyond the pale. Complainant was also at odds with Rodriguez and Dobson, the vice-president of sales. Complainant would make it very well-known to his team or to the shop team his dissatisfaction with the company direction and in fact would undermine his decisions. On the final conversation with Peter Murphy, they agreed to terminate Complainant, having been advised by the corporate counsel.

Even if Kelly Gregory had not gone to Lankford, he believes Complainant would still have been terminated, because his performance was declining and he was continuing his behavior of not supporting the direction of the company. The termination came right on the heels of Kelly Gregory's trip because she asserted financial wrongdoing, along with accusing him of foul language and a litany of other complaints. The company attorneys looked into it and there was no basis for it.<sup>[309]</sup>

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308 *Id.*

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

*C. Substantial Evidence Supports the ALJ's Findings that Respondent Would Have Terminated Complainant for Failing to Support Senior Leadership Even in the Absence of Protected Activity*

The above constitutes substantial evidence supporting the ALJ's finding that Respondent had proven its same-action defense that it would have suspended and terminated Complainant for not supporting Respondent's leadership even if he had not made the complaint concerning the Makor. This evidence is found in:

(1) the tone of Complainant's communications to Coady and Douglas, (2) the testimony of Complainant, Coady, and Rodriguez showing the conflicts between Complainant and Respondent on non-Makor topics; (3) Respondent's prior warning to Complainant about supporting management and Complainant's poor performance review for lack of support; (4) the Kelly Gregory incident reflecting Complainant's acidic views toward senior leadership and Respondent's immediate reaction thereafter; (5) the suspension record; and (6) the termination letter showing that after an investigation, Respondent decided to fire Complainant for, among other reasons, "ongoing lack of support" for management.

There is no doubt that Makor was a part of Complainant's reporting. Yet, Complainant's grievances and conduct went far beyond the Makor permit and rose to the level of challenging Respondent's basic business direction, competence, and leadership. The ALJ cited Coady's perception that Complainant's false allegations (through Kelly Gregory and Complainant's notes) regarding financial wrongdoing were "beyond the pale."<sup>310</sup> There was undisputed significant tension between Complainant's vision for corporate spending and Coady's direction. The record, including Complainant's testimony, shows two bitter interactions in particular that nearly resulted in Complainant's termination: (1) spending and the DreamCraft line and (2) differences in how to mitigate the fallout from the ransomware attack. Complainant testified that Coady verbally attacked him and got within six inches of his face and threatened to fire him following a DreamCraft dispute.<sup>311</sup> As the ALJ noted this was "notably . . . unrelated to the Makor permit."<sup>312</sup> Kelly Gregory reported that Complainant's disagreement with Coady regarding decision-making after the ransomware attack almost got him fired.<sup>313</sup> This is supporting evidence how hostile the non-Makor disputes became between Complainant and Coady. Respondent cited Complainant in 2018 and again in his 2019 performance review for not supporting the CEO and senior leadership.<sup>314</sup>

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<sup>310</sup> D. & O. at 11.

<sup>311</sup> *Supra* note 244.

<sup>312</sup> D. & O. at 11; *see also id.* at 17 (citing Complainant's testimony in the ALJ's same-action defense analysis).

<sup>313</sup> RX 10 at 9, 17.

<sup>314</sup> D. & O. at 10-11.

The record strongly supports the ALJ's finding that Kelly Gregory's communications precipitated Complainant's suspension, the investigation into that complaint, and ultimately, Complainant's termination from employment.<sup>315</sup>

From a causal lens in March 2020, the protected activity concerning Makor was old. As early as fall 2017, before Complainant started his employment with Respondent, Respondent had known about and was in the process of addressing the Makor problem. As noted above, these efforts to obtain a permit for Makor align with Complainant's concerns on compliance. Respondent appreciated Complainant's voicing concerns on Makor.<sup>316</sup> Respondent was working on submitting documentation to TCEQ through Rodriguez and Source Environmental.<sup>317</sup> Coady explained to the Board in March of 2020 that they had hired a new third-party consultant to obtain the permit.<sup>318</sup> The premise that the company, making such an effort at getting a permit for compliance before and after Complainant's protected communications, would retaliate against one of their employees for identifying the very goal they were working to accomplish is counterintuitive and not particularly well placed in this record.<sup>319</sup>

The ALJ rejected the argument that Respondent's frustration with Complainant was pretext for retaliation for protected activity:

The evidence paints a relatively clear picture that after Complainant talked to Douglas and was hired, he anticipated becoming CEO or at least having a significant say in both the strategic and tactical management of the company. When Coady took over, his expectations were frustrated. That frustration became much more pronounced as he watched Coady make what in his view were a series of bad decisions that constituted existential threats to the company and its employees. Complainant chafed at being told the decisions were above his level of authority and he needed to support them, whether he

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<sup>315</sup> *Id.* at 12.

<sup>316</sup> *Supra* notes 194, 214, and 216.

<sup>317</sup> *Id.*; *supra* notes 196-97.

<sup>318</sup> D. & O. at 9; RX 10 at 13.

<sup>319</sup> *Cf. Dafoe v. BNSF Ry. Co.*, 164 F. Supp. 3d 1101, 1115 (D. Minn. 2016) (finding BNSF Railway responded positively to the employee's safety complaints, which undermined the employee's retaliation claim); *Reid v. Neighborhood Assistance Corp. of Am.*, 749 F.3d 581, 589 (7th Cir. 2014) (declining to find an inference of retaliatory intent where complaints did not escalate for six months prior to termination but became less serious and termination was immediately preceded by an intervening event unrelated to complaints).

agreed with them or not. He went over Coady's head to complain to Douglas and was told the same thing. In short, Coady and Douglas' citation to their dissatisfaction with Complainant's failure to support the CEO is fully supported by the evidence and not a pretext without substantiation.<sup>[320]</sup>

In reversing the ALJ's decision, the majority emphasizes that Respondent shifted reasons for terminating Complainant, and this is evidence of pretext.<sup>321</sup> I disagree. When presented with Complainant's serrated views of Coady's and Rodriguez's incompetence, lack of honesty, and financial malfeasance through Mrs. Gregory, Respondent suspended him pending an investigation for violating company confidentiality rules. An investigation followed, and the termination letter included both a violation of company confidentiality and added the ongoing lack of support of Coady and Rodriguez. Respondent's reasons never contradicted this core component.<sup>322</sup>

Complainant filed a claim of retaliation for whistleblowing in violation of the CAA. That Complainant's entire personnel file was introduced into the litigation in responding to Complainant's claim of retaliation is not grounds for a finding that Respondent's reasons were evidence of pretext. The majority's argument misstates what constitutes "shifting reasons" for purposes of supporting a finding of pretext. When the employer's subsequent reasons plainly contradict prior reasons, courts are on better footing for deeming "shifting reasons" as evidence of pretext.<sup>323</sup>

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<sup>320</sup> D. & O. at 19-20; Resp. Br. at 10-11.

<sup>321</sup> *Supra*, at 20-24.

<sup>322</sup> The majority cites Respondent's letter to Texas Workforce Commission in response to Complainant's request for unemployment benefits. *Supra*, at 20-21. According to the majority, Respondent's answer exhibits shifting reasons. In its response, Respondent provided broad language for Complainant's discharge including "discharge from his position . . . for misconduct connected to his job. . . [discharge for] past misconduct and transgressions." Rodriguez Dep. Ex., C (April 27, 2020 Letter to Texas Workforce Commission). The letter signed by Rodriguez is consistent with the March 20, 2020 suspension and March 31, 2020 termination reasons given by Respondent and relied upon by the ALJ. *Wesolowski v. Napolitano*, 2 F. Supp. 3d 1318, 1345 (S.D. Ga. 2014) (granting summary judgment where proffered non-discriminatory reasons did "not give the Court any pause, nor could it for any rational fact finder, that . . . testimony is so inconsistent as to imply that Defendant's stated reasons are pretexts for retaliation"); cf. *Hale v. Husfelt*, 772 F. App'x 782, 784 (11th Cir. 2019) (no pretext shown when employer first stated it wanted to "go in a different direction" but then gave additional reasons in response to plaintiff's express request for more specific feedback about his performance).

<sup>323</sup> An employer's inconsistent explanations for an employment decision "cast doubt" on the truthfulness of those explanations. *Gee v. Principi*, 289 F.3d 342, 347-48 (5th Cir. 2002); see also *Pate v. Chilton Cnty. Bd. of Educ.*, 853 F. Supp. 2d 1117, 1133 (M.D. Alab. 2012)

Courts do not generally treat expanding or cumulative reasons as “shifting reasons” for purposes of circumstantial evidence supporting a finding that the employer’s reasons were pretextual.<sup>324</sup> Here, Respondent never contradicted these bases of violating confidentiality and ongoing lack of support of senior leadership. Rather Respondent’s litigation briefing, including abusive language and inappropriate physical contact, is an expansion upon Respondent’s contemporaneous suspension and termination reasons.<sup>325</sup>

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(“The new reasons relied on in litigation must plainly contradict the reasons relied on at the time of the decision to be found to be pretextual. The reasons must contradict each other, and not merely be cumulative.”); *see generally* *Bechtel Constr. Co.*, 50 F.3d at 935 (“During the proceeding, the ALJ asked Bechtel whether Nichols’ job performance or medical condition of arthritis were issues in the case. Bechtel indicated that they were not, attributing his dismissal rather to his attitude, his “gung ho nature.” Yet, on appeal, petitioner’s argument is cast entirely as if the layoff was due to poor job performance, exacerbated by Nichols’ arthritic condition. Given that, on the record, Bechtel has indicated that these issues were not factors in Nichols’ termination, we will not now consider them.”).

<sup>324</sup> *Musser v. Paul Quinn Coll.*, 944 F.3d 557, 564 (5th Cir. 2019) (“It is true that ‘[a]n employer’s inconsistent explanations for an employment decision’ may give rise to an inference of pretext in some cases. But in those cases, the employers gave fundamentally different reasons for their decisions on appeal than they did in the district court or before litigation commenced.”) (internal citations omitted); *Tidwell v. Carter Prods.*, 135 F.3d 1422, 1428 (11th Cir. 1998) (holding that additional, but undisclosed, reasons for an employer’s decision do not demonstrate pretext); *Zaben v. Air Prod. & Chem., Inc.*, 129 F.3d 1453, 1458-59 (11th Cir. 1997) (concluding that the plaintiff failed to show pretext where, although the employer offered differing explanations for its decision, its reasons were not necessarily inconsistent).

<sup>325</sup> *Minnis*, 620 F. App’x at 220 (“We conclude, though, that proof of an employer’s reasons becoming more detailed as the dispute moves beyond the initial notice to an employee and enters into adversarial proceedings, is insufficient to create a jury question regarding pretext absent an actual inconsistency.”).

In conclusion, I would hold substantial evidence supports the ALJ's finding that Respondent would have terminated Complainant's employment in the absence of protected activity. The Makor permit, while constituting a part of Complainant's grievances, was not part of the overall problem Respondent had with Complainant's rejecting leadership decisions and direction. Kelly Gregory's meeting exacerbated and substantiated Respondent's perception of Complainant's conduct—for which he had been warned multiple times. With serious allegations against senior leadership having been found to be without merit, Respondent had lost confidence in Complainant's ability to be part of the company and decided to part ways. I would affirm the ALJ's opinion and deny the petition.

**THOMAS H. BURRELL**  
**Administrative Appeals Judge**