U.S. Department of Labor

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

IN THE MATTER OF:

PATRICIA BOOKER,

COMPLAINANT,

v.

CONSTELLATION ENERGY GENERATION, LLC, f/k/a EXELON GENERATION CO., LLC,

RESPONDENT.

ARB CASE NO. 2024-0049
2024-0050

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

DATE: September 29, 2026

Before JOHNSON, Chief Administrative Appeals Judge, and BURRELL, Administrative Appeals Judge; Judges Johnson and Burrell, Concurring

DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower protections of the Energy Reorganization Act (ERA) and its implementing regulations.[1] On June 5, 2024, Administrative Law Judge (ALJ) Drew A. Swank issued a Decision and Order Denying Complainant's Claims on Remand (D. & O. on Remand). The ALJ, after reconsidering and reexamining the evidence in the record, determined that Patricia Booker (Complainant) "failed to establish that her protected activity was a contributing factor in Respondent's adverse personnel actions[.]"[2] The ALJ further found that, even if Complainant had been able to make this showing, Constellation Energy Generation (Respondent or Exelon) demonstrated "by clear and convincing evidence that it would have taken the same adverse personnel actions absent any protected activity" thus proving its affirmative defense.[3] The ALJ also found that

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1 42 U.S.C. § 5851; 29 C.F.R. Part 24 (2026).

2 D. & O. on Remand at 30.

3 *Id*.

Complainant failed to meet her burden to prove a hostile work environment claim.[4] Complainant appealed to the Administrative Review Board (ARB or Board). Respondent filed a cross-appeal with the Board. For the following reasons, we affirm the ALJ's findings as supported by substantial evidence.

BACKGROUND AND PROCEDURAL HISTORY

1. Complainant's Reporting of Backdating Concerns

This case is now before the Board for the third time. The full factual background and procedural history is set forth in the Board's Decision and Order Affirming in Part and Vacating and Remanding in Part (2023 Remand Order), which the Board issued on September 21, 2023, and is incorporated here by reference. A brief recounting of this matter's factual background and procedural history is as follows.

Respondent owns and operates nuclear power plants including the Peach Bottom Atomic Plant (Peach Bottom) in Delta, Pennsylvania.[5] Respondent operates its nuclear facilities through operating leases issued by the National Regulatory Commission (NRC).[6] In late 2013, while working as an Administrative Coordinator in the Maintenance Planning unit under the supervision of Maintenance Planning Manager Tom Powell, Complainant raised concerns regarding employees backdating maintenance documents.[7] Complainant raised these concerns with Respondent's Nuclear Oversight Group (NOS), an independent group comprised of auditors that test for regulatory compliance. In response to these concerns, NOS issued an incident report (IR), AR 01587659 Report.[8] On January 14, 2014, Complainant contacted NOS and asked for a status update on her report.[9] NOS informed her that the report had been assigned to Powell who had closed it without resolution. Upon learning this, Complainant asked NOS to reopen the report, which

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4 *Id*.

5 Prior to a corporate divestiture in 2022, the Peach Bottom plant was owned and operated by Exelon Generation Co., LLC.

6 D. & O. on Remand at 2.

7 *Id*. at 3.

8 *Id*.

9 *Id*.

NOS did.[10] On January 16, 2014, Complainant reported her concerns regarding the backdating of maintenance documents to Charles Breidenbaugh, Respondent's Maintenance Department head at Peach Bottom and Powell's supervisor.[11]

On January 31, 2014, Complainant met with Respondent's Regulatory Assurance manager to discuss the backdating concerns.[12] That same day, Powell implemented guidance regarding recordkeeping and oversight of documents.[13] The new guidance was in writing and shared with employees, including Complainant. At around the same time, Breidenbaugh changed Respondent's overtime approval policy, specifically by reducing the number of administrative assistants involved in the overtime approval process.[14] On February 1, 2014, Breidenbaugh sent an email to the affected administrative staff explaining the new overtime approval procedure. Having left Complainant and one other administrative staff member off the email, Breidenbaugh forwarded the email to the two of them one minute later and explained that he should have copied them on the original email.[15] Complainant objected to the new policy to Breidenbaugh, as well as to Brain Zukauckas, Respondent's Human Resources Manager, and Laura Rush, Respondent's Senior Human Resources. Complainant told Breidenbaugh, Zukauckas, and Rush that the new process effectively removed some of her existing responsibilities and "feels like retaliation" related to her "escalati[ion] of an issue."[16] Also on February 1, 2014, Powell revoked Complainant's access to his email inbox because he believed she may have been misusing her inbox access privileges.[17] Complainant again reached out to Rush to ask if "this [is] considered a chilling environment."[18]

The following week, on February 7, 2014, Complainant filed a complaint with the NRC, alleging that Respondent was retaliating against her because of her

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10 *Id*.

11 *Id*. at 4.

12 *Id*.

13 *Id*.

14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Id*.

attempts to address the backdating issue.[19] On April 7, 2014, John Connelly took over from Powell as Maintenance Planning Manager and became Complainant's supervisor.[20] On July 31, 2014, NRC conducted an alternative dispute resolution session with Complainant regarding her retaliation claims and when this did not resolve her concerns, NRC continued its investigation.[21] On September 16, 2014, the NRC interviewed Complainant as part of its investigation into her complaint.[22]

2. Complainant's BOP Review and UAA Hold

Pursuant to NRC regulations, Respondent is required to maintain a Behavioral Observation Program (BOP).[23] Respondent's BOP requires that employees undergo an annual review of their behavior. Additionally, employees who, through the BOP, are determined not to be "trustworthy and reliable" are liable to have their Unaccompanied Access Authorization (UAA) suspended or held.[24] Complainant's UAA was required in order to complete her job duties.[25] Respondent's policy is to permit employees whose UAA is suspended or held to remain on disability leave (if they qualify for such leave) for a period of up to 18 months, after which they will be discharged if they are unable to return to work.[26] During the relevant time, Kevin Concannon worked as Respondent's access authorization lead for the Peach Bottom plant.[27] One of his duties in this role was to determine which individuals would obtain UAA based on safety rules and procedures.[28] Additionally, Concannon referred abnormal behavior from the annual behavioral reviews to Respondent's Medical Review Officer, Dr. Barbara Pohlman, a licensed physician in internal medicine, for review and further action.[29]

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19 *Id*. at 4-5.

20 *Id*. at 5.

21 *Id*.

22 *Id*. at 6.

23 *See* 10 C.F.R. § 73.56(f); *see generally* 10 C.F.R. Part 26 (2026).

24 D. & O. on Remand at 5.

25 *Id*.

26 *Id*.

27 *Id*.

28 *Id*.

29 *Id*.

On September 2, 2014, Connelly was notified that he would need to complete an annual BOP review for each of the individuals he directly supervised, which included Complainant.[30] On September 8, 2014, Connelly completed a BOP form for Complainant, noting that Complainant went out of her way to avoid contact with certain individuals: "She will change her route on purpose so she doesn't have to engage with the person." Connelly also added that "[Complainant] has been talking to herself a lot lately. She will sit at her desk talking out loud to no one."[31] Concannon reviewed the BOP form, determined that Complainant's behavior was abnormal, and referred the matter to Dr. Pohlman. Concannon also informed Respondent's Reviewing Official, Susan Techau, of the report.[32]

On September 15, 2014, Dr. Pohlman signed documents indicating that Complainant should be required to complete a mandatory evaluation through Respondent's Employee Assistance Program (EAP) within ten days.[33] On September 19, 2014, Dr. Pohlman issued a written notification to Complainant regarding the EAP referral.[34]

As part of the EAP, Complainant was treated by Dr. Mary Lou Kunkle, a counselor who evaluated Complainant, recommended that Complainant complete six counseling sessions to work on interpersonal communication issues, and determined that Complainant was "trustworthy and reliable to maintain her UAA while she completed therapy."[35] At this point, Dr. Pohlman did not recommend any additional action be taken against Complainant and she was permitted to remain in work status.

On September 25, 2014, Complainant approached Connelly and reported that she had witnessed another employee sleeping during a meeting. After Connelly investigated the issue and informed Complainant that no one else had seen the employee sleeping, Complainant contacted Human Resources (HR) to report that Connelly had been physically aggressive and raised his voice while speaking to

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30 *Id*.

31 *Id*. at 6.

32 *Id*.

33 *Id*.

34 *Id*.

35 *Id*.

her.[36] HR investigated this complaint and determined that it lacked merit.[37] A few days later, on October 1 and 2, 2014, Complainant reported to Respondent's Employee Concerns Program (ECP) that Connelly was mishandling documents by keeping a work order document unsecured in his office.[38] Also on October 2, 2014, Connelly entered a "Verbal Coaching" entry for Complainant indicating that she refused to meet with him to go over her midyear review.

On October 7, 2014, HR Manager Zukauckas initiated a conference call with several managers because he was concerned about Complainant's "escalating" behaviors.[39] During the call, Respondent's Director of Occupational Health and Regulatory Medical Services, Barbara Stevens, shared her opinion that Complainant's behaviors were aberrant, and that Complainant sounded "delusional" and showed signs of an "escalating mental health problem."[40] Based on the information discussed on this call, Reviewing Official Techau authorized placing Complainant's UAA on administrative hold pending further evaluation.[41]
The following day, Connelly emailed himself a document titled "Viper" which was originally created on September 25, 2014, and described his interactions with and observations of Complainant.[42]

On October 21, 2014, Respondent changed the status of Complainant's UAA from administrative hold to temporary hold. That day, Respondent informed NRC that it had notified Complainant that she was required to participate in a psychological assessment, but that she declined the testing.[43]

On December 1, 2014, Dr. Kunkle recommended that Complainant be allowed to return to work the following week. Doctor Kunkle also recommended that Complainant report to Elizabeth Haupin, based on their prior good working relationship, and that Complainant's desk be moved to an open space of the office

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36 *Id*. at 6-7.

37 *Id*. at 7.

38 Complainant also identified this issue to the NRC.

39 D. & O. on Remand at 7; Hearing Transcript (Tr.) at 676-78.

40 D. & O. on Remand at 7.

41 *Id*.

42 *Id*. at 7-8.

43 *Id*. at 8.

near Haupin.[44] Doctor Pohlman objected to this recommendation, interpreting it as a "huge red flag" that suggested Complainant "is not at all stable [if] she has to require a specific boss and a specific desk location."[45] Accordingly, Dr. Pohlman rejected Dr. Kunkle's recommendations and indicated that Complainant would only be permitted to return to work if she was able to do so "with NO restrictions."[46]

On February 27, 2015, at Techau's request, Dr. Pohlman sent Respondent a letter stating that Complainant appeared "unable to achieve her prior level of functioning," and that the restrictions Dr. Kunkle recommended were "not acceptable in a secure nuclear environment."[47] Based on this, Dr. Pohlman recommended that Complainant's UAA not be reinstated.[48] After 18 months on disability leave, Respondent terminated Complainant's employment, consistent with Respondent's policy.[49]

3. Procedural History

On June 25, 2014, Complainant filed ERA whistleblower and hostile work environment complaints with the Department of Labor's Occupational Safety and Health Administration (OSHA). Complainant later filed a second complaint with OSHA alleging continued retaliation.[50] OSHA dismissed both of Complainant's complaints on July 10, 2016, determining that the evidence did not support a finding that her protected activity was a contributing factor in any adverse employment action.[51] Complainant timely filed objections to OSHA's dismissal and requested a hearing with the Department of Labor's Office of Administrative Law Judges. The case was assigned to ALJ Thomas M. Burke.

On February 9, 2017, Respondent filed a Motion for Summary Decision, which the ALJ granted in his Order Granting Motion for Summary Disposition on

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44 *Id*.

45 *Id*.

46 *Id*.; RX-55 at 2.

47 D. & O. on Remand at 8.

48 *Id*.

49 *Id*.

50 *Id*. at 1.

51 Sec'y's Findings, Case #3-3500-14-049, Occupational Safety and Health Administration (July 10, 2016).

April 4, 2017. Complainant appealed this order to the Board. On July 31, 2019, the Board vacated the ALJ's decision and remanded the matter for the ALJ to proceed with an evidentiary hearing on the merits. The Board concluded that the ALJ "improperly weighed the evidence and made findings of fact as if he was resolving the case on its merits based on the record before him in the absence of a hearing."[52] The Board further determined that Complainant had created a genuine issue of material fact as to whether Respondent harassed Complainant and whether Respondent retaliated against Complainant for engaging in protected activity.[53]

On remand, the case was reassigned to ALJ Drew A. Swank. On May 14, 2020, Respondent filed a Motion for Summary Decision arguing that the ALJ lacked legal authority to review Respondent's actions, which ALJ Swank denied on January 21, 2021. Following a seven-day formal hearing that was held over several months, the ALJ issued a Decision and Order Denying Complainant's Claims in which he found that Complainant engaged in protected activity when she filed complaints with her superiors and the NRC regarding backdated safety documents and that she suffered adverse actions, including reassignment of some of her work duties and Respondent's revocation of her UAA, which ultimately led to her termination. The ALJ further found, however, that Complainant failed to establish that her protected activity contributed to the Respondent's adverse actions against her.[54] The ALJ also found that Complainant failed to show that she suffered any intentional harassment and thus failed to establish a claim of a hostile work environment in violation of the ERA.

On appeal, the Board affirmed the ALJ's conclusion that the Department of Labor had jurisdiction to decide the case but vacated the ALJ's determination that Complainant failed to establish by the preponderance of the evidence that her protected activity was a contributing factor in the removal of certain job duties and Respondent's revocation of her UAA, as well as the ALJ's determination that Complainant failed to establish her hostile work environment claim. The Board identified more than a dozen pieces of evidence that "the ALJ did not mention, discuss, or evaluate" in his decision and order.[55] The Board remanded the case to

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[52] *Booker v. Exelon Generation Co., LLC*, ARB No. 2017-0038, ALJ No. 2016-ERA-00012, slip op. at 7 (ARB July 31, 2019) (Decision and Order of Remand).

[53] *Id*. at 8.

[54] Decision and Order Denying Complainant's Claims (2022 ALJ Decision).

[55] 2023 Remand Order at 25.

the ALJ in order for him to fully analyze the record and reexamine the issue of contributing factor causation and to address Complainant's allegations of intentional harassment in light of applicable law.[56]

On remand, the ALJ re-examined the evidence and made specific references to much of the evidence that the Board had noted was not mentioned in his earlier decision. In his Decision and Order Denying Complainant's Claims on Remand, the ALJ reached the same conclusions, again finding that Complainant engaged in protected activity and suffered adverse employment actions but had not demonstrated that her protected activity was a contributing factor in the adverse employment actions.[57] Similarly, the ALJ concluded that, even if Complainant had proven contributing factor causation, Respondent proved by clear and convincing evidence that it would have taken the same actions. Lastly, the ALJ concluded that Complainant failed to establish that she experienced intentional harassment or experienced a hostile work environment.

On appeal, Complainant raises a number of issues, challenging virtually all aspects of the ALJ's decision. In the broadest sense, Complainant argues that (1) the ALJ failed to fully analyze the record and reexamine the issue of contributing factor causation; and (2) the ALJ failed to fully analyze the record and adequately consider the evidence regarding her claim of intentional harassment, in both cases as instructed to do so by the Board in the 2023 Remand Order.[58] Respondent has also filed an appeal, challenging again both the Board and the ALJ's conclusion that the Department of Labor has jurisdiction over Complainant's claim that Respondent unlawfully retaliated against her when it suspended her UAA.

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 ERA.[59]

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56 *Id*. at 34.

57 D. & O. on Remand at 31.

58 Petition for Review at 4-18.

59 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020); 29 C.F.R. § 24.110(a).

In ERA cases, the Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings that are supported by substantial evidence.[60] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[61] The Board affords great deference to an ALJ's credibility determinations and will only overturn such findings if they "conflict with a clear preponderance of the evidence" or "are inherently incredible or patently unreasonable."[62]

DISCUSSION

1. Complainant's Protected Activity

The ERA prohibits an employer from discharging or otherwise discriminating against an employee with respect to his compensation, terms, conditions, or privileges of employment because that employee has:

> **(A)** notified his employer of an alleged violation of . . . the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);
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> **(B)** refused to engage in any practice made unlawful by . . . the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
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> **(C)** testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of . . . the Atomic Energy Act of 1954;
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> **(D)** commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under . . . the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any

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[60] 29 C.F.R. § 24.110(b); *Tran v. S. Cal. Edison Co.*, ARB No. 2018-0024, ALJ No. 2017-ERA-00008, slip op. at 2 (ARB Oct. 24, 2019).

[61] *Mazenko v. Pegasus Aircraft Mgmt., LLC*, 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) (other citations omitted)).

[62] *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 2009-0057, ALJ No. 2008-ERA00003, slip op. at 9 (ARB June 24, 2011) (citation omitted); *see also Folger v. SimplexGrinnell, LLC*, ARB No. 2015-0021, ALJ No. 2013-SOX-00042, slip op. 4 n.8 (ARB Feb. 18, 2016).

> requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> **(E)** testified or is about to testify in any such proceeding or;
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> **(F)** assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of . . . the Atomic Energy Act of 1954, as amended.[63]

The parties do not dispute that Complainant engaged in protected activity. Specifically, Complainant engaged in protected activity under subclauses (A) and (D) when she: (1) reported concerns about the backdating of documents to the NOS; (2) reported concerns about backdating to Maintenance Department head Breidenbaugh; (3) met with Respondent's Regulatory Assurance manager to discuss her concerns about the backdating of documents; and (4) contacted and filed a complaint with the NRC regarding backdating and alleged retaliation in response to it. The ALJ correctly determined that Complainant engaged in protected activity and neither party contests that finding on appeal.[64]

2. Respondent's Adverse Action

The ALJ determined that Complainant took certain adverse actions against Complainant. Specifically, he determined that Respondent (1) rescinded some of Complainant's work duties, including her access to Powell's email inbox and her role in the overtime approval process; (2) told Complainant that if she wanted to talk to the NRC, she was required to do so on-site at Peach Bottom in order for the time spent talking to the NRC to count as work hours; (3) placed Complainant's

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63 42 U.S.C. § 5851(a)(1).

64 *See* D. & O. on Remand at 10. As the ALJ correctly noted, Complainant is only required to show that her complaints about backdating were based on a reasonable belief that the complaints were related to an unlawful practice under federal law regarding nuclear safety. *See, e.g. Williams v. Mason & Hanger Corp*., ARB No. 1998-0030, ALJ No. 1997-ERA-00014, slip op. at 18 (ARB Nov. 13, 2002) *aff'd*, 376 F.3d 471 (5th Cir. 2004) ("[A] whistleblower's objection to practices, policies, directives or occurrences is covered if the whistleblower reasonably believes that compliance with applicable nuclear safety standards is in question; it is not necessary for the whistleblower to cite a particular statutory or regulatory provision or to establish a violation of such standards.") (citations omitted).

UAA on administrative and then temporary hold; and (4) declined to reinstate Complainant's UAA, which resulted in Complainant's termination.[65] We find no error in the ALJ's analysis. As the Board has recognized, "stripping an employee of job duties or altering the quality of an employee's duties" can be actionable adverse actions.[66] Similarly, we have recognized that revocation of an employee's UAA can constitute adverse action, particularly when the affected employee is in a position that requires UAA.[67]

3. The Board has Jurisdiction to Review the Revocation of Complainant's UAA

Before considering whether Complainant's protected activity was a contributing factor in the adverse actions taken by Respondent, we necessarily must address Respondent's argument that its decision to revoke Complainant's UAA is unreviewable by Board—as well as by the ALJ, the Secretary of Labor and, ultimately, the federal courts. This argument was raised by Respondent and rejected by the Board when this case was last before us.[68] Respondent's argument presents a pure question of law, yet Respondent does not cite any new authority that has been issued since the Board considered and rejected this argument in its 2023 Remand Order. Respondent's argument is reducible to the claim that the Board erred when it rejected Respondent's invitation to extend *Department of the Navy v. Egan* to cover not just decisions relating to government-issued security clearances but to decisions relating to private entities' building access programs. However, we need not decide this issue in the instant proceedings, as liability has been resolved on other grounds.

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65 D. & O. on Remand at 11.

66 *See Jenkins v. Env't Prot. Agency*, ARB No. 1998-0146, ALJ No. 1988-SWD-00002, slip op. at 20 (ARB Feb. 28, 2003) (citation omitted).

67 *See, e.g., Nelson v. Energy Nw.*, ARB No. 2013-0075, ALJ No. 2013-ERA-00002, slip op. at 5 (ARB Sept. 30, 2015) (in which the Board noted and left undisturbed as not appealed, the ALJ's conclusion that revocation of an employee's UAA badge was unquestionably adverse action).

68 At the time, we noted that Respondent did not file a petition for review with the Board as required by 29 C.F.R. § 24.110(a), but nonetheless elected to address Respondent's arguments in light of the legal question raised regarding *Egan*'s applicability." 2023 Remand Order at 19 n.134. Respondent filed a Conditional Cross Petition for Review to re-raise its *Egan* argument in this appeal.

4. Contributing Factor Causation

Under the ERA, Complainant bears the burden of proving by a preponderance of the evidence that her protected activity was a contributing factor in Respondent's adverse actions.[69] A contributing factor is "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision."[70] Further, "the level of causation that a complainant needs to show is extremely low[.]"[71] To meet its burden, an employee only needs to demonstrate that the protected activity played some role; the protected activity's role "need not be 'significant, motivating, substantial or predominant."[72] Indeed, federal courts have recognized that "[f]or employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves."[73]

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[69] 29 C.F.R. § 24.109(b)(1).

[70] *Jones v. Exclusive Jets*, *LLC*, ARB No. 2023-0034, ALJ No. 2022-AIR-00003, slip op. at 15 (ARB Dec. 31, 2024) (quoting *Mazenko*, ARB No. 2021-0032, slip op. at 26; *Printz v. STS Aviation Grp.*, ARB No. 2022-0045, ALJ No. 2021-AIR-00013, slip op. at 29 (ARB Dec. 15, 2023)); *see also Addis v. Dep't of Lab.*, 575 F.3d 688, 691 (7th Cir. 2009) (citing Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed.Cir.1993)).

[71] *Printz*, ARB No. 2022-0045, slip op. at 31 (quoting *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-000154, slip op. at 15 (ARB Sept. 30, 2016)).

[72] *Dick v. USAA*, ARB No. 2022-0063, ALJ No. 2018-STA-00054, slip op. at 14 (ARB Apr. 16, 2024) (quoting *Simpson v. Equity Transp. Co.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 9 (ARB May 13, 2020)); *Addis*, 575 F.3d at 691 (citing *Marano,* 2 F.3d at 1140). Both the Board and federal courts have recognized that "Congress intended that ERA's contributing factor standard provide complainants a lower hurdle to clear than the bar set by other employment statutes." *Addis*, 575 F.3d at 690 (citing *Williams v. Admin. Review Bd.*, 376 F.3d 471, 476 (5th Cir. 2004)).

[73] *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (superseded in part by regulation on other grounds). As the House Report on the National Energy Policy Act of 1992 (which amended the ERA) noted, "[r]ecent accounts of whistleblower harassment at both NRC licensee [] and DOE nuclear facilities [] suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry. These reforms are intended to address those remaining pockets of resistance." H. Rep. No. 102–474(VIII), at 79 (1992).

A. Complainant's Loss of Email Inbox Privileges

With regard to Complainant's access to Powell's email inbox being removed, the ALJ concluded that "Powell revoked Complainant's email inbox access for solely nonretaliatory reasons and not, in any part, because of her protected activity."[74] The ALJ noted the temporal proximity between Complainant reporting concerns to the NOS in January 2014 and Powell removing her access to his inbox on February 1, 2014, but concluded that this temporal proximity did not import a causal connection because, prior to removing Complainant's email inbox access, "Powell implemented new guidance to address [Complainant's] concern."[75] Taken alone, this would be insufficient to justify the ALJ's conclusion that "Powell revoked Complainant's email inbox access for solely nonretaliatory reasons and not, in any part, because of her protected activity."[76] As we have recognized in the protected activity context, "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."[77] This applies with equal force in the contributing factor analysis; an employer admitting to, apologizing for, or even correcting a safety issue may have *some* probative value but does not act as a shield that bars a factfinder from finding that the protected activity was a contributing factor in any adverse actions undertaken by the Respondent.

Here, however, the ALJ also credited Powell's explanation that he revoked Complainant's access to his email because of her misuse of that privilege.[78] Specifically, Powell testified that Complainant only had access to Powell's inbox for the purpose of alerting him to urgent emails that he received while in meetings.[79] Shortly before he removed Complainant's access to his inbox, Powell discovered that Complainant had (mis)used her inbox privilege to read an email that another

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74 D. & O. on Remand at 14.

75 *Id.* at 13. The ALJ does not mention that Powell's decision to remove Complainant's inbox access occurred only one day after Complainant spoke to Respondent's Regulatory Assurance manager on January 31, 2014, about her backdating concerns.

76 *Id.* at 14.

77 *Sewade v. Halo-Flight, Inc.*, ARB No. 2013-0098, ALJ No. 2013-AIR-00009, slip op. at 8 (ARB Feb. 13, 2015).

78 D. & O. on Remand at 13-14.

79 Tr. at 816.

manager sent to Powell with feedback on how that manager believed Powell should handle an interpersonal dispute between Complainant and another assistant.[80] After discussing this incident with other managers and his wife, Powell decided to revoke Complainant's access to his inbox.[81] The ALJ's decision to credit Powell's explanation of why he chose to remove Complainant's access to his email inbox—and, just as importantly, why he chose to do so on February 1, 2014—is entitled to great deference, and we will not disturb it.[82] Accordingly, we find that the ALJ's conclusion regarding whether Complainant's protected activity was a contributing factor in Powell's decision to remove her access to his email inbox is supported by substantial evidence.

B. Complainant's Loss of Certain Job Duties

Complainant also alleges that, due to her protected activity, Respondent (i) took away her payroll/overtime duties for the CMO Department; (ii) took away her her payroll/overtime duties for the Planning Department; (iii) removed her from the overtime approval process; and (iv) temporarily removed her duty of inputting payroll for Pete Dalgaard, an employee in the Planning Department.[83] The first three allegations all relate to a change in overtime approval processing that was announced on February 1, 2014.[84] The fourth allegation concerns events that occurred in late September 2014. With regard to each of these allegations, the ALJ concluded that Complainant's protected activity played no role in the decision to remove her responsibilities.[85]

On February 1, 2014, Breidenbaugh sent an email to ten employees, including relevant administrative staff, stating:

> I was informed yesterday that our overtime expenses for the month of January were 3 times the money that was budgeted. Some of the expenses were beyond our control

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80 *Id.* at 816-18.

81 *Id.* at 818.

82 *See, e.g., Bobreski*, ARB No. 2009-0057, slip op. at 9.

83 D. & O. on Remand at 8-9.

84 *Id.* at 4; RX-42.

85 D. & O. on Remand at 14-15.

> (weather related issues[,] icing, snow removal and treatment, priority work lists, TSA windows).
>
> Some of this overrun was because I didn't do a good job to challenge the requests. I need your help to get us back on track. I realize that these requests bypass you and sometimes the results do not get properly communicated back to the supervisors.[86]

The email explained that, moving forward, Respondent would utilize a new protocol for overtime approval. Under the new process, the responsibility for soliciting overtime requests from supervisors in the CMO and I&C departments was assigned to Heidi Pabis and the responsibility for soliciting overtime requests from supervisors in the FIN and Planning departments was assigned to Joanie Froman.[87] The email also laid out a six-step process for how overtime approval would work. One minute after sending out the email, Breidenbaugh forward it to Complainant and another administrative assistant with the note "FYI I should have cc'd you on this message."[88] Complainant promptly replied to ask why Froman would be handling requests for the Planning Department, stating that "CMO belongs to me – it has for as long as I can remember. Is there some reason that you have taken away my responsibilities? When you asked me to review a draft email on this issue last week, I had not been removed from my duties."[89]

Despite the temporal proximity between this change in how overtime requests would be processed and Complainant's protected activity the previous day, the ALJ's conclusion that Complainant's protected activity was not a contributing factor in this decision is supported by substantial evidence.[90] As an initial matter,

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86 RX-42.

87 *Id*. Additionally, the responsibility for soliciting overtime requests from supervisors in the Electrical & Mechanical and Support departments was assigned to Edie Nelson. Complainant does not allege that this was previously one of her responsibilities.

88 *Id*.; D. & O. on Remand at 4.

89 RX-42.

90 As with the ALJ's discussion of Powell removing Complainant's access to his email inbox, the ALJ points out that "Powell implemented new guidance to address the concern" prior to allegedly removing Complainant's duties. *See* D. & O. on Remand at 14. For the reasons previously explained, this is of only limited probative value when determining

the contemporaneously-provided rationale for the change in the overtime approval process—that the relevant departments' overtime costs for the previous month had greatly exceeded the amount that was budgeted—is plausible on its face. At trial, Complainant did not provide evidence demonstrating that this reason was pretextual. Additionally, the policy change was one that affected multiple administrative staff members, not only Complainant. While not dispositive, this undercuts Complainant's argument that the policy change was retaliation for her reporting concerns about backdating.

In addition to this, Complainant struggled to demonstrate that some of the supposedly reassigned responsibilities had even belonged to her prior to the policy change. For instance, when asked what responsibilities were taken away from her in relation to the payroll/overtime process for the CMO Department, Complainant stated "I'm not quite sure. I didn't do the work so, I'm sorry, I can't answer something that I'm not sure what it all entailed."[91] When asked again, Complainant stated "I didn't do the work, so I'm not sure. All I know is CMO was my work."[92] Importantly, nothing relating to CMO was included in Complainant's job description.[93] Although Complainant credibly testified that she had been responsible for handling overtime for the Planning Department prior to the change, when asked if all that was taken away from her was the responsibility for sending out four or five emails per week (one to each manager or supervisor in the department) asking about upcoming overtime, she testified "If that's what was required. I didn't do the work."[94] Complainant also argues that Breidenbaugh had originally drafted an email explaining the new policy and in this earlier version of the email, he did not remove any of her responsibilities. [95] This argument is undermined by Complainant's testimony that the draft email she reviewed did not state that she would remain responsible for handling overtime requests for the CMO and Planning departments and that the email did not list any of the

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whether a complainant's protected activity was a contributing factor in the employer's adverse action.

91 Tr. at 152.

92 *Id*.

93 *Id*. at 137.

94 *Id*. at 153.

95 *Id*. at 141-42.

administrative assistants who, from then on, would be responsible for handling overtime for the various departments.[96]

Similarly, the ALJ's conclusion that Complainant's protected activity was not a factor in the temporary removal of Complainant's responsibility for inputting payroll for Dalgaard is supported by substantial evidence.[97] This alleged removal of job responsibilities lasted for five days, during a period in which Dalgaard was placed on disciplinary leave.[98] Connelly credibly testified that he took over inputting Dalgaard's payroll during this brief period at the direction of human resources (HR) in order "to protect the individual and maintain some confidentiality on why they're not at work."[99] This was confirmed by Complainant's own testimony when she stated that she spoke with the HR representative and was informed that HR had directed Connelly to enter payroll for Dalgaard during the time of his suspension.[100]

Complainant testified that despite this measure, she was fully aware that Dalgaard had been suspended and that "HR doesn't know what the process is for payroll because they only see their own."[101] Whether HR's instruction to have Connelly input Dalgaard's payroll made sense is immaterial to the analysis of whether Connelly's action was influenced even in part by Complainant's protected activity. If anything, that this temporary change occurred at HR's direction rather than Connelly's weakens Complainant's argument.

In sum, substantial evidence supports the ALJ's conclusion that Complainant's protected activity was not a factor in the decision to remove certain job responsibilities from her in February and September 2014.

C. Requiring Complainant to Speak to the NRC While on Site

The ALJ determined that Complainant's protected activity was not a contributing factor in Powell telling her that, if she wanted to talk to NRC, she

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96 *Id*.

97 D. & O. on Remand at 15.

98 Tr. at 523-24.

99 *Id*.

100 *Id*. at 168-69.

101 *Id*. at 169.

must do so on site at Peach Bottom.[102] In support of this conclusion, the ALJ pointed out that this action occurred after Powell implemented new guidance regarding the backdating of documents.[103] We do not find this to be particularly persuasive, given that Complainant's relevant protected activity—filing a complaint with the NRC—occurred after Powell implemented the backdating guidance. Still, we review the ALJ's findings of facts under a deferential standard and our review of the record convinces us that Complainant's protected activity was not a contributing factor in Powell requiring that she speak to the NRC on site.

For one thing, the record indicates that Powell did not bar Complainant from speaking with the NRC from home; rather, he simply informed her that calls she made from home would be on her own time rather than work time.[104] This undercuts Complainant's argument that the requirement was imposed with retaliatory intent or to limit her ability to speak freely and openly with the NRC investigator. Additionally, Powell offered to "arrange to have a private place on site for [Complainant] to make these calls if required."[105] Although Complainant would have preferred to speak with the NRC from home and be able to have the time spent doing so count as work hours, she has not carried her burden of demonstrating that her protected activity was a contributing factor in Powell's refusal to agree to that request.

D. Changes to Complainant's UAA

The ALJ determined that Complainant's protected activity was not a factor in any of the following decisions related to her UAA: (i) Connelly's submission of the BOP form; (ii) Respondent's decision on or about October 7, 2014, to place Complainant's UAA on administrative hold pending further evaluation; (iii) Respondent's decision on October 21, 2014, to change the status of the UAA hold from an administrative hold to a temporary hold; and (iv) Respondent's

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102 D. & O. on Remand at 15.

103 The ALJ also noted that Complainant testified that Human Resources had approved for her to speak with the NRC from home and that there "there's no real ability to have a confidential conversation" on site. D. & O. on Remand at 15 (citing Tr. at 136). To the extent this has any probative value, it supports Complainant's argument.

104 CX-64.

105 *Id*.

decision not to reinstate Complainant's UAA even after Dr. Kunkle recommended that Complainant be allowed to return to work.[106]

In reaching this conclusion, the ALJ pointed out Respondent's repeated failures to comply with NRC regulations related to behavioral observation programs and unaccompanied or unescorted access. Specifically, the ALJ found that Respondent failed to comply with 10 C.F.R. § 73.56(l), which requires that NRC licensees adhere to a process that includes "provisions for the review . . . of a denial or unfavorable termination of unescorted access" and must "allow . . . an opportunity . . . for an impartial and independent internal management review."[107] The ALJ also found that Respondent failed to comply with 10 C.F.R. § 73.56(e)(6), which requires that fitness for duty and reliability or trustworthiness determinations be made by a licenses psychologist or psychiatrist, rather than a physician (as Dr. Pohlman was).[108]

i. Connelly's Submission of the BOP Form

The ALJ determined that Connelly "honestly completed the BOP form for nonretaliatory reasons and submitted the BOP form in accordance with his job duty to do so. Thus, Complainant's protected activity played no role in Connelly's submission of the BOP form."[109] Although the ALJ included minimal discussion of the evidence he relied upon in order to reach this conclusion, our review of the record persuades us that this conclusion is supported by substantial evidence. For one thing, the requirement to complete the BOP form and the timing of its completion are standardized as part of Respondent's Access Authorization Program, which requires a "supervisory review conducted on a nominal annual basis for each individual with UAA/UA, maintained for 365 consecutive days, by the individual's immediate supervisor[.]"[110] At trial, Connelly credibly testified that although BOP forms were not completed on an annual basis down to the exact date, they were completed every 12 months" and Connelly thus had no control over when the form

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106 D. & O. on Remand at 16-19.

107 D. & O. on Remand at 19 (citing 10 C.F.R. § 73.56(l)).

108 *Id*. at 19-20 (citing 10 C.F.R. § 73.56(e)(6)).

109 *Id*. at 15.

110 RX-7 at 2.

was required to be submitted.[111] This severely undercuts Complainant's argument that the timing of Connelly's submission of the form was retaliatory.

Further, Complainant did not present evidence that either of the two remarks Connelly included on her form were inaccurate.[112] In fact, at multiple times Complainant acknowledged that she had engaged in the behavior described by Connelly (talking out loud to herself), or at least a behavior similar to it. Specifically, Complainant questioned why Connelly viewed the behavior as unusual,[113] and implied that the behavior was not a change in behavior,[114] in each instance to argue that the behavior did not merit inclusion on the BOP form. The evidence in the record demonstrates that Connelly truthfully and accurately completed the BOP at the time he was required to do so pursuant to company policy. The ALJ's conclusion that Complainant's protected activity was not a contributing factor in Conelly completing the BOP form is supported by substantial evidence.

ii. Respondent's Administrative Hold on Complainant's UAA

The ALJ determined that "a combination of Complainant's ongoing abnormal behavior and negative interactions with Human Resources triggered the conference call between several managers which resulted in [Reviewing Official] Techau authorizing the decision to place Complainant's UAA on administrative hold."[115] The ALJ also added that "Complainant's ongoing abnormal behavior played the foremost role in the decision to place her UAA on administrative hold" and found

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111 Tr. at 576-77.

112 In a space reserved for descriptions of changes in behavior identified by the supervisor, Connelly wrote that "Patricia will change her route on purpose so she doesn't have to engage with the person" and that "Patricia has been talking to herself a lot lately. She will sit at her desk talking out loud to no one." Although Complainant alleges that the talking to herself involved verbal prayer, Connelly disputed this characterization. *See* Tr. at 532-33 ("I can tell you what I heard coming from her cubicle was not praying or at least not praying from any religion I am aware of.").

113 Tr. at 63 ("I have no way to explain why they would think that humming out loud was an unusual behavior.").

114 Tr. at 603. During Complainant's cross examination of Connelly, she asked, while questioning him about his comment on the BOP form that she spoke out loud to herself, whether Connelly had previously worked with Complainant during an outage. Complainant also testified that she managed episodes of post-traumatic stress disorder by praying. Tr. at 252.

115 D. & O. on Remand at 17.

"that Complainant's complaints were not a factor – not even an insignificant or insubstantial factor – in the decision to place her UAA on administrative hold."[116] The ALJ's conclusion is supported by substantial evidence.

Although it was Zukauckas who initiated the October 7 conference call, he credibly testified that he did so upon the recommendation of Karen Greig, Respondent's Vice President of Human Resources.[117] Grieg was the chairperson of Respondent's Employee Issues Advisory Council (EIAC), which was composed of representatives from various departments including Occupational Health Services, HR, and legal, and was tasked with reviewing employee concerns, discussing investigations, and providing guidance about next steps.[118] Other than a bare allegation that everyone who "was involved in the strategizing meeting" retaliated against her, Complainant has not alleged that Grieg retaliated against her, had animus toward her, or even had knowledge of Complainant's protected activity prior to the October 7 call.[119]

On appeal, Complainant notes that the October 7 call included multiple corporate executives, along with local employees who were aware of her protected activity, and argues that this alone is sufficient to demonstrate that Techau's decision to place her UAA on administrative hold (which Complainant refers to as "revok[ing]" her UAA) was done at least in part due to her protected activity.[120] The problem with this line of reasoning is that Complainant has not shown that her protected activity was discussed during this meeting. Rather, individuals in the meeting credibly testified that the discussion was focused on her recent behavior (such as speaking to herself) and the unsubstantiated allegations she made against Connelly (regarding yelling at her and intimidating her by standing insider her cubicle).[121] Barbara Stevens, Respondent's Director of Occupational Health and Regulatory Services, attended the meeting and concluded that Complainant's

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116 *Id*.

117 Tr. at 676-77.

118 2023 Remand Order at 12 n.86.

119 Tr. at 134. In her opening brief, Complainant states that the ALJ erred in interpreting this testimony as an allegation that the individuals on the call retaliated against her. Rather, she "presented this evidence only to show Corporate knowledge of protected acts" prior to Respondent revoking her UAA. Comp. Br. at 36.

120 Petition for Review at 6.

121 Tr. at 485-87, 677.

behavior was "aberrant" and potentially delusional, and that her "mental health was deteriorating[.]"[122] Importantly, Stevens—like Greig—was not aware of Complainant's complaints to the NRC or her concerns regarding backdating at this time.[123]

Complainant argues that Connelly and Zukauckas, both of whom were aware of Complainant's protected activity and allegedly sought to retaliate against her because of it, provided input during the October 7 meeting and "[t]heir input is why [the] UAA hold was applied."[124] When we remanded this case, we did so with instructions for the ALJ to evaluate the contradiction between Conelly's testimony that he "did not, repeat, did not give any input on that call" and his OSHA witness statement in which he stated"

> Based on input from myself and HR and the interactions HR had had [stet] with Complainant, it was decided at [the] end of [the] meeting that her access would be put on hold and that she would be told to leave the site and not return until she was contacted by Exelon. I had no role in the decision to put her access on hold. I provided input."[125]

On remand, the ALJ took Connelly's contradictory statements into account and deemed "Connelly's testimony regarding the conference call unreliable."[126] The ALJ concluded that Connelly "likely provided input during the conference call[.]"[127] Thus, even after discounting Connelly's testimony, the ALJ concluded that Complainant had not demonstrated that her protected activity was in any way a factor in Respondent's decision to place an administrative hold on her UAA. In reaching this conclusion, the ALJ cited the witness testimony regarding Complainant's "ongoing abnormal behavior" and her negative interactions with HR (on matters unrelated to her protected activity).[128] There is, of course, evidence in the record that would support a different conclusion. Yet under a substantial

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122 *Id.* at 486-87.

123 Tr. at 484.

124 Comp. Br. at 15.

125 2023 Remand Order at 26; Tr. at 587; CX-38 at 9.

126 D. & O. on Remand at 16.

127 *Id.*

128 *Id.* at 16-17.

evidence standard of review, "we must uphold an ALJ's findings of fact to the extent they are supported by substantial evidence even if there is also substantial evidence for the other party, and even if we justifiably disagree with the finding."[129] Upon our review of the record, we are satisfied the ALJ's conclusion is supported by substantial evidence.

On appeal, Complaint argues that the ALJ did not address her "cat's paw" theory of liability.[130] Although the ALJ did not explicitly refer to that theory of liability, it is clear that—unlike when this case was previously before the ALJ—he did consider it. After considering the evidence, the ALJ rejected Complainant's cat's paw theory, finding instead that it was Stevens sharing her view that Complainant's behaviors were aberrant that prompted Techau to place an administrative hold on Complainant's UAA.[131] Even if we grant that Stevens learned of Complainant's behavior through reports or other documents prepared by Connelly and Zukauckas, that would not be enough for Complainant to prevail on a cat's paw theory. The record makes clear that although some of the specific behaviors that caused alarm among Stevens, Dr. Pohlman, and Techau were identified by Connelly and Zukauckas, multiple other employees, including station nurse Bob Pilkey[132] and security manager Phil Simmons,[133] also documented and raised concerns about Complainant's behavior.

iii. Respondent's Temporary Hold on Complainant's UAA

On October 16, 2014, Dr. Kunkle's office provided a status report to Pilkey, Concannon, and Dr. Pohlman stating that Dr. Kunkle "is recommending the employee remain off work at this time. She is also recommending the employee attend outpatient counseling 2x per week for the next 3 weeks. She will reassess the

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[129] *Bobreski*, ARB No. 2009-0057, slip op. at 8 (quoting *Hirst v. Se. Airlines, Inc.*, ARB Nos. 2004-0116, -0160, ALJ No. 2003-AIR-00047, slip op. at 6 (ARB Jan. 31, 2007)); *Clark v. Hamilton Hauling, LLC*, ARB No. 2013-0023, ALJ No. 2011-STA-00007, slip op. at 4 (ARB May 29, 2014).

[130] Complainant's Opening Brief (Comp. Br.) at 10, 15-16.

[131] D. & O. on Remand at 7.

[132] Tr. at 485-87.

[133] RX-68.

employee for return to work in 3 weeks."[134] On October 21, 2014, Respondent changed the status of Complainant's UAA from administrative hold to temporary hold.[135] In the two weeks that elapsed after Respondent placed Complainant's UAA on administrative hold, Complainant attended outpatient counseling with Dr. Kunkle.

It was Concannon, in his role as authorization lead, who changed the status of Complainant's UAA from an administrative to a temporary hold.[136] Both when her UAA was on administrative hold and when it was on temporary hold, Complainant was not permitted to work at the Peach Bottom plant. Since there were no developments related to Complainant's report to the NRC regarding backdating between October 7, 2014, and October 21, 2014, the ALJ determined that Complainant's protected activity was not a contributing factor in Respondent taking this action for the same reasons that her protected activity was not a contributing factor in the October 7, 2014 decision to place her UAA on administrative hold.[137] We see no error with this conclusion.

The ALJ also rejected Respondent's argument that it could maintain the temporary hold on Complainant's UAA for an indefinite period of time without providing any appeal procedures.[138] The ALJ noted that this view is directly contradicted by the applicable regulations, which provide that NRC licensees must provide "provisions for the review, at the request of the affected individual, of a denial or unfavorable termination of unescorted access or unescorted access authorization that may adversely affect employment."[139] At trial, Concannon acknowledged that the temporary hold placed on Complainant's UAA was a revocation of her access but explained that he believed that the regulations providing employees a right of review applied only to denials of UAA, not

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134 RX-30 at 6. Doctor Kunkle provided additional status reports to Pilkey, Concannon, and Dr. Pohlman on October 30, 2014, and November 3, 2014. In both of these reports she indicated that she was not recommending that Complainant return to work.

135 RX-69 at 5.

136 Order Granting Motion for Summary Disposition at 10.

137 D. & O. on Remand at 18 ("No relevant facts occurred during this two-week lapse.").

138 *Id.*; Tr. at 376 ("You can be on temporary hold for one day or for 10 years until the issue's cleared up, if that's what you're asking. There's no time limit on a temporary hold.").

139 10 C.F.R. § 73.56(l).

revocations.[140] This view was rejected by the ALJ and has been rejected by multiple federal courts.[141] The ALJ concluded, however, that Respondent "failed to comply with regulatory directives due to misunderstanding of the applicable law."[142]

On appeal, Complainant assails this conclusion, arguing that "there is NO reference to 'misunderstanding' NRC regulations in any document ever submitted by Respondent[.]"[143] Complainant also points out that Respondent, in its briefing on remand, "doubles down" on its argument that it was complying with NRC regulations.[144] None of this helps Complainant's argument, however. Respondent's insistence that its action complied with applicable regulations, to the extent it has *any* bearing on the contributing factor analysis, would tend to support a finding that Respondent failed to provide Complainant with a mechanism by which she could appeal the hold placed on her UAA not in an effort to retaliate against her but because Respondent believed—and still believes—that such an appeal right was not required under the NRC regulations.

iv. Respondent's Decision not to Reinstate Complainant's UAA

On December 1, 2014, Dr. Kunkle provided Pilkey, Concannon, and Pohlman with a status report in which she recommended that Complainant "return to work with nuclear access starting 12/9/14."[145] In a cover letter to the report, Dr. Kunkle stated that "[i]n my professional opinion, Ms. Booker is trustworthy and reliable to perform her duties, including her nuclear access to protected areas[.]"[146] The status report also included Dr. Kunke's recommendation that Complainant be provided with the following accommodations for a period of three months: "1) the employee be

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140 Tr. at 376-77.

141 *See, e.g., Exelon Generation Co., LLC v. Loc. 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 573-75 (7th Cir. 2012) (holding that 10 C.F.R. § 73.56(l) applies to denials or revocations of access authorizations); *Pub. Serv. Elec. & Gas Co. v. Loc. 94 Int'l Bhd. of Elec. Workers*, 140 F. Supp. 2d 384, 392 (D.N.J. 2001), *aff'd*, 27 F. App'x 127 (3d Cir. 2002) (finding that "the NRC's intent was to permit an arbitration provision to be utilized as the appeal process for revocation or denial of site access authorization when appropriate[.]").

142 D. & O. on Remand at 19.

143 Comp. Br. at 6.

144 *Id*.

145 RX-30 at 10.

146 *Id*. at 9.

able to report to a female manager and 2) the employee's desk be moved near the female manager."[147] Doctor Kunkle also recommended that Complainant continue with outpatient counseling upon her return to work.[148] Upon receiving this recommendation, Dr. Pohlman completed an Access Authorization / Fitness for Duty Review Form in which she rejected Dr. Kunkle's recommendations and stated that Complainant "[n]eeds full/complete [release-to-work] with NO restrictions."[149]

On February 27, 2015, Dr. Pohlman sent Techau, Respondent's Reviewing Official, a letter stating that Complainant "appears unable to achieve her prior level of functioning," and that the restrictions Dr. Kunkle recommended were "not acceptable in a secure nuclear environment" because it was "simply impossible to guarantee that a specific manager will be physically nearby at all times."[150] The letter concluded by noting that Complainant's suitability for access authorization could be re-evaluated "[w]hen her condition has stabilized such that she no longer requires a specific female manager to supervise her work and be physically nearby[.]"[151] On the same date, Techau informed Complainant via letter that "the MRO [Dr. Pohlman] has concluded that your current condition is not sufficiently stable and controlled to meet the standards, under the NRC's regulations and the Company's Access Authorization Program, to warrant recommending reinstatement of your unescorted access at this time."[152]

In his decision, the ALJ observed that "Doctor Pohlman was not qualified, per applicable regulations, to make the recommendation or determination of fitness at issue with respect to Complainant" and since Dr. Pohlman is not a licensed psychologist nor psychiatrist, she lacked the authority to recommend that a full clearance, free of conditions, was required for reinstatement of Complainant's UAA.[153] On appeal, Respondent argues that the ALJ misinterpreted the regulation, which only applies to psychological assessment for "[i]ndividuals who are applying for *initial* unescorted access or unescorted access authorization, or who have not maintained unescorted access or unescorted access authorization for *greater than*

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147 *Id*. at 10.

148 *Id*.

149 D. & O. on Remand at 8; RX-58 at 2.

150 RX-58

151 *Id*.

152 RX-57.

153 D. & O. on Remand at 19 (citing 10 C.F.R. § 73.56(e)(6)).

365 days, shall be subject to a psychological assessment" (emphasis in original).[154] Although part of the regulation deals with the psychologic assessment for initial UAA, the subparagraph that the ALJ cited applies, by its own terms, to "psychological reassessments[.]"[155] We find no error with the ALJ's conclusion on this point. Even so, the mere fact of Respondent's noncompliance with NRC regulations is not enough for Complainant to carry her burden.

In short, the ALJ conclusion that "Complainant's protected activity played no role in Respondent's decision" not to approve Dr. Kunkle's recommendation that Complainant be permitted to return to work with accommodations is supported by substantial evidence. [156] At trial, Dr. Pohlman testified that never in her 35 years of practice as an occupational medicine physician had she written or approved a return-to-work recommendation with similar accommodations.[157] Doctor Pohlman also testified that she would view other types of accommodation requests, such as a request that an employee work only "a certain number of days or only a certain number of hours" as a sign that the employee's condition is not stable and they are not fit to work in a nuclear environment.[158] Similarly, when Complainant had her unescorted access authorization suspended in 2010 and sought to return to work with restrictions, Dr. Candeletti, a psychologist working with Respondent, wrote to Concannon stating "normally, I do NOT recommend someone for work unless it is WITHOUT restrictions. Either you are stable and reliable or you are NOT. You cannot be stable and reliable WITH restrictions."[159]

The ALJ also concluded that Complainant's protected activity played no role in Respondent informing the NRC, as part of the NRC's investigation of Complainant's complaints, that Complainant had declined to participate in a psychological assessment with the Access Authorization Clinical Psychologist and "has yet to make herself available to participate in the psychological assessment."[160] Complainant testified that she did not decline testing, but knew that she since had not been released from the EAP (through which she was seeing Dr. Kunkle) she was

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154 Respondent's Response Brief (Resp. Br.) at 6-7 (citing 10 C.F.R. § 73.56(e)).

155 10 C.F.R. § 73.56(e)(6).

156 D. & O. on Remand at 19.

157 Tr. at 423.

158 *Id.* at 425

159 RX-29.

160 CX-33; D. & O. on Remand at 20.

not yet eligible for the psychological testing.[161] Assuming for the sake of argument that Respondent's statement to the NRC was an adverse action, we conclude the ALJ's finding that Complainant's protected activity was not at all a factor in Respondent providing that statement to the NRC to be supported by substantial evidence,

5. Respondent's Affirmative Defense

Under the ERA, if a complainant satisfies his burden of proof, the respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[162] Under Board precedent, it is not enough for an employer to show that it *could* have taken the same adverse action; it must show that it *would* have done so even in the absence of protected activity.[163] We have previously said that for the assessment of an employer's affirmative defense "it is not enough to confirm the rational basis of [the employer's] policies and decisions. Instead, we must assess whether they are so powerful and clear that [the adverse action] would have occurred apart from the protected activity."[164]

In his analysis, the ALJ concluded that Respondent demonstrated by clear and convincing evidence that it would have taken the same challenged actions even if the absence of Complainant's protected activity.[165] However, Because substantial evidence supports the ALJ's conclusion that Complainant did not prove that Respondent violated the ERA, we "need not reach the question of whether

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161 Tr. at 295.

162 42 U.S.C. § 5851(b)(3)(D); 29 C.F.R. § 24.109(b)(2).

163 *See, e.g., Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-000154, slip op. at 57 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 2013-0074, ALJ No. 2005-ERA-00006, slip op. at 10-11 (ARB Apr. 25, 2014). Similarly, the Board has recognized that an employer cannot carry its burden by showing that it *might have* taken the same adverse action against an employee. *Jones*, ARB No. 2023-0034, slip op. at 20 (citing *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 2008-0070, -0074, ALJ No. 2006-AIR00014, slip op. at 17 n.108 (ARB Sept. 30, 2009)).

164 *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 2011-0013, ALJ No. 2010-FRS-00012, slip op. at 15 (ARB Oct. 26, 2012).

165 D. & O. on Remand at 24.

[Respondent] demonstrated that it would have taken the same unfavorable action in the absence" of Complainant's protected activity.[166]

6. Complainant's Hostile Work Environment Claim

The ERA "protects employees who raise nuclear safety-related concerns from retaliation . . . [and this] protection has been construed to prohibit retaliatory harassment that creates a [hostile work environment]."[167] To prevail on a hostile work environment claim, a complainant is required to establish, by a preponderance of the evidence:

> (1) that he engaged in protected activity;
> (2) that he suffered intentional harassment related to that activity;
> (3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and
> (4) that the harassment would have detrimentally affected a reasonable person and did detrimentally affect Complainant.[168]

As we noted in the 2023 Remand Order, "[p]roving a hostile work environment claim is a high bar."[169] Hostile work environment claims involve "repeated conduct or conditions that occur over a series of days or perhaps years."[170]

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166 *See Hasan v. Burns & Roe Enters., Inc.*, ARB No. 2000-0080, ALJ No. 2000-ERA-00006, slip op. at 6 n.7 (ARB Jan. 30, 2001); *see also Robinson v. Nw. Airlines, Inc.*, ARB No. 2004-0041, ALJ No. 2003-AIR-00022, slip op. at 7 n.5 (ARB Nov. 30, 2005) ("We need not reach the respondent's burden of proof in this case because Robinson failed to prove that his protected activity was a contributing factor in Northwest's adverse employment actions."); *Turin v. Maiden Holdings, LTD*, ARB No. 2021-0066, ALJ No. 2010-SOX-00018, slip op. at 4-5 (ARB June 29, 2023) (declining to reach other questions after affirming the ALJ's conclusion that complainant did not engage in protected activity).

167 *Williams*, ARB No. 1998-0030, slip op. at 11.

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

169 2023 Remand Order at 30 (quoting *Forrand v. FedEx Express*, ARB No. 2019-0041, ALJ No. 2017-AIR-00016, slip op. at 6 (ARB Jan. 4, 2021)).

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

Importantly, the conduct complained of must be "sufficiently severe or pervasive to alter the conditions of the [complainant's] employment and create an abusive working environment."[171] Circumstances relevant to determining whether a hostile work environment exists include "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance."[172]

We have already established that the Complainant engaged in protected activity, thus satisfying the first element she is required to show to prevail on a hostile work environment claim. It is the second element—intentional harassment—where Complainant's argument and evidence fall short. In his analysis, the ALJ concluded that the conduct Complainant proffered as examples of intentional harassment "do not constitute intentional harassment" either when considered separately or taken together.[173] He further found that the complained of conduct "did not create an abusive work environment that was pervasive and regular, nor harsh, abusive, or discriminatory."[174] Because these findings are supported by substantial evidence, we affirm.

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

172 *Hoffman v. Netjets Aviation, Inc.*, ARB No. 2009-0021, ALJ No. 2007-AIR-00007, slip op. at 12 (ARB Mar. 24, 2011) (citation omitted).

173 D. & O. on Remand at 30.

174 *Id.*

Judge Burrell, Concurring:

I concur in the outcome reached in the per curiam decision. The ALJ's decision that Complainant failed to prove that protected activity was a contributing factor in any of the adverse actions she may have suffered is supported by substantial evidence and legally sound. I would also affirm the ALJ's affirmative defense findings as legally sound and supported by substantial evidence. After briefly reviewing the ALJ's findings, I write separately to address a few observations regarding the ARB's 2023 decision on *Department of the Navy v. Egan*.[175]

1. Protected Activity Did Not Contribute to Complainant's Adverse Actions[176]

A. Complainant's Adverse Actions Before Losing Her UAA

As recounted in the per curiam opinion and the several ALJ and ARB opinions preceding this opinion, Complainant engaged in protected activity concerning proper recordkeeping and dating of safety-related documents.[177] Regarding these concerns, Complainant first filed internal complaints in late 2013 and early 2014 with Respondent and then elevated those concerns to the NRC in February 2014.[178] The ALJ found that Complainant's then supervisor, Tom Powell, embraced Complainant's concerns about proper dating of records and instituted guidance to correct practices once becoming aware of the problem through Complainant's reporting.[179] The ALJ wrote as follows (2022):

> In February 2014, after the NRC's Condition Report regarding the back-dating, Respondent implemented guidance encouraging accurate recordkeeping and

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175 484 U.S. 518 (1988).

176 I would apply the same reasoning below to affirm the ALJ's affirmative defense analysis.

177 ALJ 2024 D. & O. on Remand at 1-2 (procedural history of the case to date), 3-4 (describing Complainant's protected activity), 10-11 (same). Neither party appealed the ALJ's findings regarding protected activity and adverse action. They were not part of the ALJ's D. & O. on Remand. *Id.* at 11.

178 *Id.* at 3-5.

179 *Id.* at 4, 14.

> oversight of documentation. RX-41. Specifically, Tom Powell developed a solution to the issues raised in AR 01587659. TR 792. Powell discussed the solution with other employees, including Complainant, to ensure the plan addressed the problems that had occurred. TR 792. Powell's new guidance was provided in writing and in discussions with management. RX-43; TR 795-96. Powell testified that he was glad that Complainant raised the issue because it was something that the safety governance and procedure did not address. TR 821-22.[180]

Complainant stated that she suffered several adverse actions beginning in early 2014, including, among others, being removed from access to Powell's email, being removed from certain overtime procedures, having her duties changed, and being required to meet with the NRC at work in order to be paid for the meeting.[181] The ALJ found that protected activity did not contribute to any of the adverse actions she alleged.[182] As noted above, throughout the ALJ's 2024 D. & O. on Remand, the ALJ credited the fact that Respondent embraced Complainant's protected activity. Instead, the changes to Complainant's work environment were either administrative in nature or Respondent's response to Complainant's own behavior.

B. Complainant's Loss of UAA

Complainant worked at Respondent's nuclear power plant. Several regulations regarding security and access to the premises apply to operation of the plant.[183] One of those regulations provides that employees who have Unaccompanied Access Authorization (UAA) be subject to the Behavioral Observation Program (BOP), which requires an annual certification to determine "trustworthiness and reliability."[184] Complainant required a UAA as part of her duties at the plant.[185] Complainant's supervisor, at the time Jack Connelly, filed an

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180 ALJ 2022 D. & O. at 2.

181 ALJ 2024 D. & O. on Remand at 8-9.

182 *Id.* at 13-15.

183 *Id.* at 5.

184 10 C.F.R. § 73.56.

185 ALJ 2024 D. & O. on Remand at 5.

annual BOP review of Complainant on September 8, 2014, in which he indicated Complainant's abnormal behavior of talking to herself and unusual social distancing from others.[186]

The ALJ found that protected activity played no role in the submission of the BOP.[187] Substantial evidence supports that Connelly filed an annual BOP review of Complainant on September 8, 2014, not because of protected activity but because it was an annual certification for all employees who had UAA at the nuclear power plant.[188] Complainant was directed to attend medical and psychological evaluation services.[189] Complainant received medical treatment in mid-September and no further action was taken.[190]

Around this time, Complainant's behavior deteriorated with Connelly.[191] Complainant accused Connelly of aggressive behavior on or about September 25, 2014. Human Resources (HR) investigated and found this to be without merit.[192] On or about October 1 and 2, 2014, Complainant made a second complaint against Connelly for allegedly mishandling documents. On October 2, 2014, Connelly in turn filed a performance intervention against Complainant because she would not meet with him to go over her mid-year review.[193] On October 3, 2014, Complainant filed another complaint against Connelly for allegedly intimidating behavior, which HR found to be without merit.[194]

On October 7, 2014, several managers discussed Complainant's behavior and UAA via a conference call.[195] The meeting was arranged following evaluations received as part of Complainant's medical treatment following the BOP and referral as well as Complainant's interactions with Connelly and HR following initial

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186 *Id.* at 5-6, 15.

187 *Id.* at 15, 18-19.

188 *Id.* at 5, 15-16.

189 *Id.* at 6.

190 *Id.* at 6.

191 *Id.* at 6-7.

192 *Id.* at 6-7; ALJ 2022 D. & O. at 11.

193 ALJ 2024 D. & O. on Remand at 7.

194 *Id.* at 7; ALJ 2022 D. & O. at 11.

195 ALJ 2024 D. & O. on Remand at 7.

treatment.[196] Based on the abnormal behavior discussed in the call, Respondent's Reviewing Official, who was also on the call, decided to place Complainant's UAA on an administrative hold and then a temporary hold.[197] These events occurred because of Complainant's behavior and not because of her protected activity. The ALJ observed that Complainant made allegations shortly before the October 7 call but that the October 7 meeting was called because of Complainant's overall behavior including, among other items, failing to meet Connelly for her mid-year review and filing multiple complaints against Connelly found to be without merit.[198]

Complainant's UAA was not reinstated because she did not agree to return except under specified conditions.[199] Complainant's counselor recommended that upon her return Respondent should change her desk arrangement and assign her to a different supervisor.[200] Respondent rejected the restrictions, and Complainant and Respondent entered an impasse.[201] The ALJ found the decision to reject Complainant's conditions-based return was not because of protected activity.[202] Because Complainant's UAA was not restored and she did not comply with reinstatement requirements, Complainant's employment was terminated.[203]

2. The ARB's 2023 Decision on *Department of Navy v. Egan*'s Application to Nuclear Power Plants

I write separately to add a few observations concerning Respondent's cross-appeal objecting to the ARB's 2023 decision concerning *Department of Navy v. Egan*.[204] The ARB held that *Egan* does not cover the referral of Complainant's aberrant behavior to Respondent's UAA officials because a UAA is not sufficiently analogous to the security clearances at issue in *Egan*. According to Respondent,

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196 *Id.* at 16-17.

197 *Id.* at 5, 7-8, 16-18; ARB No. 2022-0049 2023 Remand Order, slip op. at 12-13.

198 ALJ 2024 D. & O. on Remand at 17.

199 *Id.* at 8, 18.

200 *Id.* at 8; ARB No. 2022-0049 2023 Remand Order, slip op. at 13-14.

201 ALJ 2024 D. & O. on Remand, slip op. at 18-19.

202 *Id.* at 18-20.

203 *Id.* at 8, 18-19.

204 484 U.S. 518 (1988).

Respondent's UAA officials are involved in the trustworthiness and reliability[205] assessment for the nuclear power plant, and, following a rationale analogous to *Egan*, those decisions are not subject to judicial review and evaluation because of the national security interest in unaccompanied access at a nuclear facility.[206]

Egan involved officials from the Navy denying a security clearance to an employee with access to a nuclear submarine.[207] The Supreme Court stated that the Merit Systems Protection Board did not have authority to review the denial of the security clearance. Security clearance determinations, the Court explained, require a "[p]redictive judgment" about "whether, under compulsion of circumstances or for other reasons, [an individual] might compromise sensitive information."[208] The Court reasoned that the security clearance had been committed to an appropriate agency of the Executive Branch.[209] The President and his officers classify and control access to information bearing on national security and to whether an individual is "sufficiently trustworthy" to occupy a position with such access.[210]

When this case was previously before the ARB in September 2023, the panel ruled that *Egan* does not apply to UAA at Respondent.[211] The ARB chiefly relied upon *Summerland v. Exelon Generation, Co*.[212] In particular, the ARB block-quoted from *Summerland* wherein the district court stated that the UAA involved only access to a nuclear facility and was not analogous to a government-issued security clearance.[213] The ARB and the *Summerland* decision equated UAA at a nuclear

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205 10 C.F.R. § 73.56(c) ("The licensee's or applicant's access authorization program must provide high assurance that the individuals who are specified in paragraph (b)(1), and, if applicable, paragraph (b)(2) of this section are trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security, including the potential to commit radiological sabotage.").

206 Respondent's Opening Brief (Resp. Opening Br.) at 14-15.

207 484 U.S. at 520.

208 *Id.* at 528-29.

209 *Id.* at 527.

210 *Id.*

211 ARB No. 2022-0049 2023 Remand Order, slip op. at 18-23.

212 *Summerland v. Exelon Generation Co.*, 455 F. Supp. 3d 646 (N.D. Ill. 2020). There are several subsequent cases following *Summerland*, mostly in the Illinois district courts.

213 ARB No. 2022-0049 2023 Remand Order, slip op. at 21-22.

power plant to "building access," for which courts had denied *Egan*'s application.[214] The ARB also focused on Complainant's day-to-day duties as nonsensitive, nonclassified, and secretarial.[215] The ARB sharply distinguished "as a world apart" predictive judgments involved in national security and security clearances from the UAA at issue for nuclear power plants.[216]

I briefly address several shortcomings in the ARB's 2023 decision. As set out below, the fulcrum of the *Egan* analysis is whether: (1) the UAA at a nuclear power plant involves national security entrusted to the Executive Branch or to personnel delegated from that authority and (2) the decision under review involves predictions about someone's future conduct related to that national security interest. If the answer to both is yes, then *Egan* and its progeny apply to preclude the courts and tribunals from second-guessing that decision.

Egan, as the per curiam opinion notes, involved a security clearance under executive authority. Because an agency derives its authority to grant or deny security clearances from the President's Article II authority, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[217] Like security clearances, nuclear power plants are regulated by a panoply of federal regulations including statutes and executive orders.[218]

Security clearances and UAA have many things in common. Courts have applied *Egan* to security clearances even though those clearances did not involve

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214 The defendants argued to the district court that *Egan* should apply to the nuclear power plant the same way it applies to security clearances. The district court disagreed, analogizing UAA with access to buildings. *Summerland*, 455 F. Supp. 3d at 656 ("Defendants are incorrect because, as the Fifth Circuit correctly explained, '[s]ecurity clearances are different from building access.' *Toy*, 714 F.3d at 885. The review, grant, and revocation of security clearances are subject to procedures, imposed by Executive Order, that address who may access classified information—not who may enter and access buildings.").

215 ARB No. 2022-0049 2023 Remand Order, slip op. at 22-23.

216 *Id.* at 23.

217 *Egan*, 484 U.S. at 530.

218 Exelon's UAA program is derived from regulatory requirements imposed by the Nuclear Regulatory Commission (NRC), which receives its authority by statute 42 U.S.C. § 5841 (creation of the NRC), and Executive Order 11,834 of January 19, 1975.

"classified" information.[219] Both clearances and UAA involve background investigations including identity verification, assessment of history (education, military), criminal background, substance abuse review, and financial assessments. The issuance of both security clearances and UAA rely upon principles of trustworthiness and reliability through fitness for duty (FFD) standards.[220] Unlike suitability background checks, Part 73 has an extensive psychological assessment and Behavioral Observation Program.[221] UAA's BOP program is similar to, if not more demanding than, the continuous vetting and evaluation protocol for holders of security clearances. This is likely due to the significant risk of severe radiological disaster at a nuclear power plant.[222]

As noted above, the 2023 ARB remand and *Summerland* decision leaned heavily on the comparison of UAA to FBI building access, citing *Toy v. Holder*.[223] The Fifth Circuit in *Toy* wrote as follows:

> No court has extended *Egan* beyond security clearances, and we decline to do so. Security clearances are different from building access; security-clearance decisions are

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[219] *Kaplan v. Conyers*, 733 F.3d 1148, 1157-58 (Fed. Cir. 2013) (en banc) (extending *Egan* to "sensitive" materials clearances because of the national security component); *Foote v. Moniz*, 751 F.3d 656, 657-59 (D.C. Cir. 2014) (*Egan* applies to the Department of Energy's (DOE) Human Reliability Program (HRP)).

[220] *Compare* 5 C.F.R. Parts 731 *with* 10 C.F.R. Parts 26, 73 and 5 C.F.R. Part 732. UAA under Part 73 does not automatically grant access to classified material within a nuclear facility, but as mentioned above courts have extended *Egan* beyond "top secret" and "classified." *Supra* note 220.

[221] 10 C.F.R. 73.56(e); *Foote*, 751 F.3d at 659 (identifying the psychological evaluation for DOE's HRP certification within the category of predictive judgment under *Egan*); *Mowery v. Nat'l Geospatial-Intelligence Agency*, 42 F.4th 428, 439 (4th Cir. 2022) (observing that the psychological evaluation was to ensure that an applicant's employment was "clearly consistent with national security" and to evaluate an applicant's "reliability, trustworthiness, judgment, and ability to protect classified information" and that "a psychological evaluation like this is *precisely* the type of predictive assessment protected by *Egan*.").

[222] The access authorization program must "provide high assurance that the individuals who [are granted unescorted access] are trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security, including the potential to commit radiological sabotage." 10 C.F.R. § 73.56(c). To accomplish that purpose, all individuals who are granted unescorted access are subject to a Fitness-For-Duty ("FFD") program. 10 C.F.R. Part 26.

[223] *Toy v. Holder*, 714 F.3d 881 (5th Cir. 2013).

> made by specialized groups of persons, charged with guarding access to secured information, who must make repeated decisions.[6] There is also significant process involved in granting security clearances,[7] the kind of process that allows agencies to make the deliberate, predictive judgments in which they specialize.[224]

It is not clear this characterization of FBI building access would apply to nuclear power plants with the rigorous UAA and national security interests.[225] The UAA is required to enter the protected area of the nuclear plant, which includes the operational facility.[226] In a sense, UAA is "access" to the facility, but equating a building with a nuclear power plant defies common sense.

Additionally, the Fifth Circuit in *Toy* rejected one of the government's arguments relying upon *Berry v. Conyers*[227] because the Federal Circuit had granted en banc rehearing in that case. Thereafter, the Federal Circuit issued *Kaplan v. Conyers* which extended *Egan* beyond security clearances to include access to "sensitive" information.[228] Applicable regulations defined "sensitive" as that which may have an effect on national security.[229]

Subsequent to *Toy*, courts have followed *Kaplan* and extended *Egan* when national security is present and decisions on national security derive from Article II

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224 *Toy*, 714 F.3d at 885.

225 10 C.F.R. Part 73; *id.*, Appendix B.

226 The ARB focused on Complainant's day-to-day duties as nonsensitive, nonclassified, and secretarial. ARB No. 2022-0049 2023 Remand Order, slip op. at 22-23. Respondent takes issue with the point that Booker was in a secretarial position and not intimately involved in sensitive nuclear processes. Respondent notes security is about access to the facility, not the particular job duties of personnel. Resp. Opening Br. at 17. Indeed, nuclear security extends beyond job duty classification because one cannot assume that an employee intending nuclear sabotage would stay within their job classification and not exploit other opportunities, such as unaccompanied access to sensitive and operational facilities within the plant.

227 *Berry v. Conyers*, 692 F.3d 1223 (Fed. Cir. 2012).

228 *Kaplan v. Conyers*, 733 F.3d 1148, 1151, 1155-56 (Fed. Cir. 2013) ("This rationale applies to *all* prediction of risk regarding national security. Thus, absent congressional action, judicial review of national security matters is generally prohibited.").

229 *Id.* at 1151 n.3.

authority.[230] In *Foote v. Moniz*, the court began with the principle that "the Government has a substantial national security interest in denying unreliable or unstable individuals access to nuclear devices, materials, and facilities, a point that requires no extended discussion."[231] The employee was denied a certification that required a psychological evaluation as part of the Department of Energy's Human Reliability Program established under Executive Order, the same E.O. underlying security clearances at issue in *Egan*.[232] The court in *Foote* extended *Egan* to the denial of the certification because it "carefully evaluates employment applicants for certain positions, such as those where the employees would have access to nuclear devices, materials, or facilities."[233] The court refused to second-guess the DOE's psychological evaluation of the plaintiff, which formed the basis of the denial of the certification.[234] In *Sanchez v. U.S. Department of Energy*, the Tenth Circuit held that the revocation of a Human Reliability Program certification "was a security-clearance decision" under *Egan* because the certification had the same security characteristics: (1) the agency derived its authority from the President's Article II authority; (2) the decision implicated national security concerns; and (3) the decision "involve[d] predictions about someone's future conduct."[235] The ARB's 2023 decision cited these cases in a footnote but failed to engage the substance of the holdings.

Contrary to *Summerland*, a number of cases have found *Egan* applies to UAA at nuclear facilities, namely those run by the Tennessee Valley Authority (TVA),

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230 *Mowery*, 42 F.4th at 435-36 (extending *Egan* beyond security clearances to other areas of national security authorization decisions involving predictive judgments and implicating the concerns discussed in *Egan*).

231 751 F.3d at 658.

232 *Id.* at 658-59.

233 *Id.* at 657.

234 *Id.* at 659 ("The psychological evaluation component of the Human Reliability Program determines whether an applicant (1) Represents a security concern; or (2) Has a condition that may prevent the individual from performing duties in a reliable and safe manner.") (cleaned up).

235 870 F.3d 1185, 1193 (10th Cir. 2017). The HRP at issue in *Foote* and *Sanchez* is distinguishable from the Part 73 UAA because applicants had to possess or obtain a Q access authorization which is the DOE's highest level of security clearance. *Id.* at 1193. Though, this attribute was not critical for the court, citing *Kaplan v. Conyers*, 733 F.3d 1148, 1160 (Fed. Cir. 2013) for the point that "national security is what matters in an *Egan* analysis, and not that a position requires access to classified information."

a government-owned corporation.[236] The ARB's 2023 Remand decision distinguished TVA nuclear plants from private nuclear plants, like Respondent, in a footnote.[237] Courts have extended *Egan* to TVA nuclear power plant facilities because nuclear power plants involve national security, same as security clearances.[238] TVA and Respondent are more alike in their structure and orientation to the NRC and UAA than they are different and distinguishable.[239]

In *Coppett v. Tennessee Valley Authority*, the district court addressed a claim asserting that a denied clearance at a nuclear power plant was the result of unlawful discrimination under federal and state law.[240] Co-workers had complained to Coppett's supervisor about Coppett's behavior as well as problems arising from physical conditions due to Coppett's illness.[241] Coppett's supervisor believed that he was compelled under UAA to submit this information to TVA's UAA organization.[242] The supervisor submitted an annual BOP review, noting concerns about Coppett's behavior and social interaction:

> [The supervisor] indicated that there had been changes in plaintiff's work behavior, social interaction behavior, and personal health behavior. He elaborated that plaintiff's attention to detail and quality of work had declined over the past month, that plaintiff seemed to be dismissing or

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236 *Goforth v. Tenn. Valley Auth.*, No. 1:20-CV-254, 2022 WL 1198213, at *8 (E.D. Tenn. Feb. 7, 2022) (cleaned up) (applying *Egan* and thus declining to treat the revocation of UAA as an actionable adverse action because it would require weighing motives for revocation); *see also Reed v. Tenn. Valley Auth.*, No. 1:17-CV-00232, 2018 WL 1440829, at *3 (E.D. Tenn. Mar. 22, 2018) (*Egan* applies where a "plaintiff['s] claims would require the court to weigh the validity of TVA's proffered reasons for revoking [his] security clearances, judicial review would constitute precisely the sort of interference criticized in *Egan*.").

237 ARB No. 2022-0049 2023 Remand Order, slip op. at 20 n.141.

238 The NRC protects public health and safety and advances the nation's common defense and security by enabling the safe and secure use and deployment of civilian nuclear energy technologies and radioactive materials through efficient and reliable licensing, oversight, and regulation for the benefit of society and the environment. https://www.nrc.gov/docs/ML2503/ML25035A025.pdf.

239 Both TVA and private licensees like Exelon are subject to NRC regulations, including 10 C.F.R. Parts 50, 52, 73.

240 987 F. Supp. 2d 1264, 1267 (N.D. Ala. 2013).

241 *Id.* at 1275-76.

242 *Id.* at 1276.

> rationalizing errors when coached, that coworkers had reported plaintiff's inability to focus, and that plaintiff did not cooperate with his co-workers and chain of command. [The supervisor] also stated that plaintiff had repeatedly voiced animosity toward his co-workers and superiors, acted withdrawn and sulky when he did not get his way, demonstrated increasingly argumentative behavior, and become less receptive to reason. Finally, [the supervisor] stated that co-workers had observed an increase in plaintiff's body shakes, a decrease in his muscle control, a propensity for plaintiff to call security personnel to assist him to his vehicle, and a tendency to express concern about a conspiracy against him.[243]

Under TVA's fitness for duty policy, when "there are indications that an individual may be in violation of [the] FFD policy or is otherwise unable to safely and competently perform his or her duties," TVA suspends the employee's UAA.[244] Because his UAA was necessary for his work, he was not permitted to return without further FFD evaluation. Under the FFD, Coppett was required to submit to two psychological evaluations by licensed psychologists of TVA's choosing.[245] After evaluation, these doctors determined that Coppett did not suffer from "a behavioral condition that would prevent safe, stable, and reliable performance in the workplace or warrant unescorted access disqualification for psychological reasons."[246] The assessment team recommended restoring Coppett's UAA. Based on the results of those psychological examinations, TVA's UAA team determined that Coppett was fit for duty. Consequently, plaintiff's clearance was restored, and he returned to work.

Coppett sued, asserting that TVA's suspension of his UAA pending an FFD review was retaliation. TVA responded arguing that *Egan* covers TVA's issuance or revocation of the UAA.[247] The district court agreed, analogizing to security clearance cases involving military personnel despite the fact that this case involved

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243 *Id.* (footnote omitted).

244 *Id.*

245 *Id.*

246 *Id.* at 1276-77.

247 *Id.* at 1287.

nuclear power plant operators.[248] The court stated as follows:

> The safety and security concerns underlying clearance determinations for access to nuclear power organizations are no less significant than the safety and security concerns underlying military intelligence clearance determinations.
> In summary, because this court does not have jurisdiction to review the suspension of plaintiff's nuclear unescorted access, it also does not have jurisdiction over his retaliation claim. Summary judgment is due to be granted in defendants' favor on that claim. Moreover, because the court does not have jurisdiction over plaintiff's retaliation claim, there is no need to address defendants' arguments that the claim was untimely asserted, and that the claim should fail on its merits.[249]

Coppett is analogous to our facts here. While the TVA is owned by the government and Exelon is a private company, the government-private distinction is not insurmountable. Courts have extended *Egan* to facilities operated by private companies when the same national security interests are at issue and authority has been delegated by the government. In *Beattie v. Boeing Co.*,[250] the Tenth Circuit extended *Egan*'s shield to a claim against a private employer because the Executive Branch "delegated" security clearance decisions to the private employer. Concerning a contract for the construction of Air Force One planes, the facility had both unescorted access and escorted access to the area of construction.[251] Only the Air Force could grant unescorted access. However, Boeing could grant escorted access, subject to Air Force override. Beattie was denied escorted and unescorted access to the Air Force One area and later sued Boeing. The Tenth Circuit commented that *Egan* precluded review authority of Boeing's decision:

> To be sure, the case before us involves a private party rather than a government agency. However, Boeing's

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248 *Id.* at 1289-90.

249 *Id.*

250 43 F.3d 559 (10th Cir. 1994).

251 *Id.* at 560.

> limited authority to grant or deny escorted access clearance derived solely from its contract with the Air Force. Boeing's authority was thus delegated to it by the Air Force, and hence by the Executive Branch. We see no compelling reason to treat the security clearance decision by Boeing differently than the similar decision made by the Air Force. Both decisions represent the exercise of authority delegated by the Executive Branch and are entitled to appropriate deference by the federal courts. Therefore, we conclude that we may not review Boeing's action or that of the Air Force in denying Beattie access to the Air Force One area.[252]

The ARB's opinion concluding that *Egan* did not apply to Respondent's UAA did not, in my opinion, sufficiently grapple with these nuances. Nonetheless, I recognize that case law is mixed and reserve further discussion for a different time. Because we affirm the ALJ's dismissal of Booker's complaint, revisiting the *Egan* issue would not change the outcome.

THOMAS H. BURRELL
Administrative Appeals Judge

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252 *Id.* at 566 (internal citations omitted).

Chief Judge Johnson, Concurring:

In *Department of Navy v. Egan*, the Supreme Court considered the "narrow question" of "whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action."[253] In sum, relying on the President's Article II powers over foreign affairs, national security and the importance of controlling access to sensitive information bearing on national security, the Court answered that question in the negative. Unsurprisingly, in the decades since, *Egan* has spawned an extensive progeny and courts have extended *Egan*'s reach to other factual circumstances in some cases and declined to do so in others. As also discussed by my colleague in his concurring opinion, the case law is now extensive and varied. [254] The legal commentary is not far behind.[255]

As night follows day, we can expect that the defense bar will continue to argue for an expansion of *Egan*'s underlying theories in defense of their clients' interests. Indeed, to not do so would border on legal malpractice; and we saw the same type of litigation following the Supreme Court's decisions in *Securities and*

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253 484 U.S. 518 (1988).

254 For cases applying *Egan* to other factual circumstances, *see, e.g.*, *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013) (finding that *Egan* barred review of a Department of Defense determination that an employee was not eligible to occupy a "noncritical sensitive" position); *Foote v. Moniz*, 751 F.3d 656 (D.C. Cir. 2014) (applying *Egan*'s bar on judicial review in a case regarding certification under the Department of Energy's Human Reliability Program); *Sanchez v. U.S. Dep't of Energy*, 870 F.3d 1185 (10th Cir. 2017) (same). For cases in which courts declined to extend *Egan, see, e.g.*, *Rattigan v. Holder*, 689 F.3d 764, 768 (D.C. Cir. 2012) (concluding that *Egan*'s "absolute bar on judicial review covers only security clearance-related decisions made by trained Security Division personnel and does not preclude all review of decisions by other FBI employees who merely report security concerns."); *Toy v. Holder*, 714 F.3d 881 (5th Cir. 2013) (declining to apply *Egan*'s bar on judicial review in a Title VII case brought by an FBI employee who alleged that the FBI revoked her access to its offices); *Hale v. Johnson*, 845 F.3d 224 (6th Cir. 2016) (declining to extend *Egan* in a case where an NRC licensee determined that an employee did not meet physical fitness requirements).

255 *See, e.g.,* Shreeya Singh, *National Security or Nothing to See? Clearances As the Site of Executive Overreach*, 78 Stan. L. Rev. Online 30 (2025); Jason Rathod, *Not Peace, but A Sword:* Navy v. Egan *and the Case Against Judicial Abdication in Foreign Affairs*, 59 Duke L.J. 595 (2009); Max Jesse Goldberg, *Security-Clearance Decisions and Constitutional Rights*, 132 Yale L.J. Forum 55 (2022); Demetri Blaisdell, *Title VII Challenges to Security Clearance Referrals: Rattigan Points the Way*, 4 Colum. J. Race & L. 177 (2014).

Exchange Commission v. Jarkesy[256] and *Lucia v. Securities and Exchange Commission*.[257] These are but the most obvious examples.

My colleague has expressed his views on the factors to be considered when deciding whether *Egan* applies, and I will not here attempt to summarize all of the elements that courts have found determinative or not determinative. In the instant case we were not required to resolve the reach of *Egan* and (fortunately) were able to decide the case on other grounds. Nevertheless, it is likely that the ARB will, in a future case, be forced to consider whether or not *Egan* bars review of the reasons an employer denies or revokes an employee's UAA[258] and whether that denial or revocation violated an applicable whistleblower law. Because of this, I feel it important to emphasize that if *Egan* is found to apply, the end result would preclude any consideration of those reasons[259]—*Egan* is, in effect, apparently an absolute shield which no tribunal's inquiry can pierce.[260]

It is therefore important, I believe, to reassert what I hope would be obvious: that whistleblower laws were created to protect employees who raise legitimate complaints to managers and regulators about how an operation is running or who report violations of applicable standards or requirements, violations which usually carry potentially major safety or health implications.[261] In the nuclear industry in

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256 603 U.S. 109 (2024).

257 585 U.S. 237 (2018).

258 Although this case deals with UAA, subsequent cases in which an employer invokes *Egan* could well involve claims of other types of security access.

259 *See Rattigan*, 689 F.3d at 768 (describing *Egan*'s holding as an "absolute bar on judicial review").

260 I note that courts have drawn a distinction between the substance of a security clearance denial, which is unreviewable under *Egan*, and the process by which the security clearance is denied or revoked, including allegations that the process violated constitutional rights. *See, e.g. Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996); *Romero v. Dep't of Def.*, 527 F.3d 1324 (Fed. Cir. 2008); *Duane v. U.S. Dep't of Def.*, 275 F.3d 988 (10th Cir. 2002); *Nat'l Fed'n of Fed. Emps. v. Greenberg*, 983 F.2d 286 (D.C. Cir. 1993); *but see Lee v. Garland*, 120 F.4th 880, 888 (D.C. Cir. 2024) (finding that *Egan* forecloses review of constitutional claims).

261 *See* House Report on the Energy Policy Act of 1992, which "broaden[ed] and deepen[ed]" the whistleblower protection provisions of the Energy Reorganization Act. In it, Congress explained that the "ability of nuclear industry employees to come forward to either their employers or to regulators with safety concerns without fear of harassment or retaliation is a key component of our system of assuring adequate protection of public health and safety[.]" H. Rep. No. 102–474(VIII), at 78-79 (1992).

particular, these are not complaints involving mere trivialities. As such, unduly expanding the reach of *Egan* could perversely undermine national security by insulating problems at critical infrastructure locations that would otherwise have been corrected because legitimate whistleblowers will fear retaliation and be left without a realistic avenue to vindicate their rights.[262] The ARB should therefore, in my view, proceed cautiously as other cases in this area come before us.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

[262] The realities of litigation are such that rarely will an employee have the resources to pursue a cause of action to vindicate his or her rights in the face of an aggressive, usually well-heeled, employer asserting certain defenses where the law is unclear except where those defenses are completely frivolous.