



**In the Matter of:**

**PATRICIA REED,  
ADMINISTRATRIX OF  
THE ESTATE OF  
S. SCOTT SITTNER,**

**ARB CASE NOS. 2019-0062  
2019-0066**

**ALJ CASE NO. 2017-PSI-00001**

**COMPLAINANT,**

**DATE: March 31, 2021**

**v.**

**JACOBS ENGINEERING GROUP,  
SOUTHERN CALIFORNIA GAS,  
and SEMPRA ENERGY,**

**RESPONDENTS.**

**Appearances:**

***For Patricia Reed, Administratrix of the Estate of S. Scott Sittner:***  
**Richard E. Condit, Esq.; Cleveland Lawrence III, Esq.; Ezra  
Bronstein, Esq.; Mehri & Skalet PLLC; Washington, District of  
Columbia**

***For the Respondent:***  
**Rick Bergstrom, Esq.; Koree Blyleven, Esq.; Jones Day; San Diego,  
California; Nikki L. McArthur, Esq.; Jones Day; Washington, District  
of Columbia**

**Before: James D. McGinley, Chief Administrative Appeals Judge, James A.  
Haynes and Stephen M. Godek, Administrative Appeals Judges**

## DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129 (2020) (PSIA), and its implementing regulations at 29 C.F.R. Part 1981 (2020). S. Scott Sittner<sup>1</sup> filed a complaint alleging that Respondents Jacobs Engineering Group (Jacobs), Southern California Gas (SoCalGas), and Sempra Energy (Sempra) retaliated against him because he engaged in PSIA-protected activities. On June 13, 2019, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) denying the complaint. For the following reasons we affirm the ALJ.

### BACKGROUND

Jacobs, a technical and scientific services company, provided project management consulting services to SoCalGas, a distributor of natural gas in California. SoCalGas is indirectly owned by Sempra.

The California Public Utilities Commission (CPUC) required SoCalGas to maintain a Pipeline Safety Enhancement Plan (PSEP) for testing and replacing pipelines. Jacobs administered a PSEP Quality Plan (Quality Plan) as a service for SoCalGas to organize documents related to SoCalGas' pipeline construction activities.

The Quality Plan was not mandated by CPUC or any federal or state law or regulation.<sup>2</sup> It was developed, implemented, and utilized by Jacobs' Quality Auditors. The Quality Auditors were not responsible for inspections, testing, engineering, or construction but instead were required to "ensure that there was agreement and consistency" in Quality Plan documents.<sup>3</sup>

In 2015, Jacobs decided to hire a PSEP Quality Manager whose duties would include managing Quality Auditors and updating the Quality Plan. Phillip Andrew, a Jacobs Program Director, was responsible for hiring and supervising the Quality Manager. Delia Meraz, a SoCalGas Quality Risk and Compliance Manager, participated in the selection process because the new Quality Manager would interact with her on a regular basis.<sup>4</sup>

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<sup>1</sup> On September 17, 2020, Sittner's counsel filed a Motion for Substitution of Party, informing the Board that Sittner had passed away on December 19, 2019. The Board granted the Motion on September 22, 2020.

<sup>2</sup> D. & O. at 21.

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

<sup>4</sup> *Id.* at 8.

Sittner applied for the position and, instead of hiring him as a permanent employee, Jacobs hired him for a two-month trial period in order to determine if he would be suitable for the position. Jacobs made no guarantee that Sittner's employment would be extended beyond this trial period.<sup>5</sup> Soon after being hired Sittner tried to convince one of the Quality Auditors to tell Andrew that he had another job offer, in the hopes that this would "manipulate the situation" and lead to him being hired as a permanent employee.<sup>6</sup>

Sittner's first day of employment was June 8, 2015. Early in his tenure he was engaged in a number of professional and personal conflicts with Jacobs' staff. He performed his supervisory duties in a "brusque and confrontational manner."<sup>7</sup> He made derogatory comments about employees and engaged in at least one "heated argument."<sup>8</sup> Sittner also expressed his dissatisfaction with the qualifications of the Quality Auditors.<sup>9</sup> By Sittner's third week of employment, Andrew had on multiple occasions spoken to Sittner about his behavior. Around this same time Sittner sent Meraz an email expressing his belief that Quality Auditors were not properly utilizing audit checklists.<sup>10</sup>

Sittner understood that Andrew and Meraz expected him to make the Quality Plan update his top work priority. But by the end of his fourth week, Meraz informed Andrew that she had not seen any progress from Sittner regarding the Quality Plan. Andrew met with Sittner and told him that the likelihood of him being hired as a permanent employee "was not looking good."<sup>11</sup>

At the end of Sittner's fifth week of employment Meraz rated his performance as "very low."<sup>12</sup> Sittner had demoralized staff and failed to produce any tangible work product related to a revision of the Quality Plan.<sup>13</sup> But he had continued to

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<sup>5</sup> Joint Exhibit (JX) 24 at 2 ("Temporary Employment Dates – Begin June 1, 2015. End on July 31, 2015. This is our preferred timing. There is no guarantee of future efforts.").

<sup>6</sup> D. & O. at 15.

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> *Id.* at 12-14.

<sup>10</sup> JX 57 ("Instead of being thorough on the checklist, they use the report as the final catch of information and are even filling out the checklist after they have done the report ... Adequate, properly documented training and written procedures/desk instructions detailing the processes they are evaluating supports your stance as a manager.").

<sup>11</sup> D. & O. at 24.

<sup>12</sup> *Id.* at 17.

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

express his dissatisfaction with what he perceived as a lack of auditor training. On July 8, 2015, Sittner sent an email from his work account to his personal account documenting his concerns and opining that the absence of proof of training created a “stop work situation.”<sup>14</sup> The email does not indicate that such documentation was required by law.

On July 11, 2015, Sittner sent an email with twelve numbered paragraphs to Andrew and Ted Potter, Andrew’s supervisor. In the twelfth paragraph Sittner stated: “As the only Certified ANSI/ASME Quality Auditor in this effort, I can honestly state that a Stop Work condition has existed for at least a year or more. Sempra just doesn’t have procedures that would permit it. Which I suppose is a stellar idea.”<sup>15</sup> Andrew did not know what Sittner meant by a “Stop Work” condition.

Andrew met with Sittner on July 13, 2015, to discuss the July 11 email. During the meeting Andrew came to believe that Sittner felt a “Stop Work” condition existed because “the quality audits and Quality Auditors had not been certified or trained by [Sittner].”<sup>16</sup> Andrew did not believe Sittner’s statement addressed a safety regulation or standard that applied to the gas industry, and he did not believe that Sittner had reported a safety concern or violation. Andrew also began to question Sittner’s general understanding of the natural gas industry.<sup>17</sup>

After meeting with Sittner, Andrew discussed Sittner’s performance with Meraz. They agreed that Sittner’s performance had been unsatisfactory. Andrew then met with Potter, and they discussed Sittner’s unprofessional behavior and lack of progress in updating the Quality Plan. Andrew decided to end Sittner’s trial period two weeks prior to its anticipated eight-week term. On July 16, 2015, Sittner met with Andrew, Potter, and Paul Gemmel, Jacobs’ Human Relations Business Manager. They informed Sittner that his temporary employment would end on July 24, 2015. He was told that his employment was ending because he failed to update the Quality Plan and had performed his job in an unprofessional and disruptive manner.<sup>18</sup>

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<sup>14</sup> JX 68 at 1 (“1) I informed Delia for the 2<sup>nd</sup> time that the auditors had no official training. 2) She said that is why they have [on-the-job training. 3) I asked her what documentation she had and she said none. 4) I said we need to document all training (I had stated this before). 5) As well the question comes up that if nobody in the group is certified and qualified how did they qualify to be auditors? 6) Essentially this is a stop work situation.”).

<sup>15</sup> JX 75 at 2.

<sup>16</sup> D. & O. at 18.

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

<sup>18</sup> *Id.*, citing Transcript (Tr.) 162-63, 594-95, 727-28.

Sittner filed his PSIA complaint with the Occupational Safety and Health Administration (OSHA) on January 18, 2016. On November 18, 2016, OSHA issued its determination stating that: “Complainant has requested that OSHA terminate its investigation and issue a determination. Based on the information gathered thus far in its investigation, OSHA is unable to conclude that there is reasonable cause to believe that a violation of the statute occurred.”

Sittner thereafter requested a hearing on his complaint with the Office of Administrative Law Judges, which the ALJ conducted from July 23 to July 27, 2018. Following the hearing the ALJ issued a Decision and Order concluding that Sittner failed to prove that he engaged in protected activity under the PSIA and Respondents demonstrated that they would have taken the same personnel action in the absence of Sittner’s asserted protected activity.<sup>19</sup>

Sittner appealed the ALJ’s ruling on his complaint to the Board. SoCalGas and Sempra filed a cross-appeal asking the Board to dismiss them as parties to this matter.

#### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under the PSIA.<sup>20</sup> The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ’s factual determinations if they are supported by substantial evidence.<sup>21</sup> Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>22</sup> The Board will also uphold ALJ credibility determinations unless they are “inherently incredible or patently unreasonable.”<sup>23</sup>

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<sup>19</sup> D. & O. at 29.

<sup>20</sup> Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

<sup>21</sup> 29 C.F.R. § 1981.110(b).

<sup>22</sup> *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

<sup>23</sup> *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB May 9, 2019); accord *Formella v. U.S. Dep’t of Labor*, 628 F.3d 381, 391 (7th Cir. 2010) (“[T]he resolution of [a credibility contest] belongs in all but the extraordinary case to the judge who heard and observed the witnesses first hand.”).

## DISCUSSION

Congress passed the PSIA to enhance the safety of the nation's pipeline systems. The PSIA's employee protection provision prohibits discrimination against an employee who engages in certain types of protected activity, including (1) providing to an employer or the Federal Government information relating to any violation or alleged violation of any Federal law relating to pipeline safety; (2) refusing to engage in any practice made unlawful by the PSIA; (3) providing testimony before Congress or at any Federal or State proceeding regarding any Federal law relating to pipeline safety; or (4) commencing, assisting or participating in a proceeding under any Federal law relating to pipeline safety.<sup>24</sup>

To prevail on his complaint, Sittner must prove that he engaged in PSIA-protected activity, was subjected to an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action.<sup>25</sup> Relief may not be ordered if the Respondents demonstrate by clear and convincing evidence that they would have taken the same unfavorable personnel action in the absence of any protected activity.<sup>26</sup>

Sittner suffered an adverse personnel action when his trial period was terminated and he did not receive an offer of permanent employment. But the ALJ concluded that Sittner never engaged in PSIA-protected activity during his trial period. We agree.

Sittner's alleged protected activities include his assertion that a "Stop Work" condition existed as well as complaints about the qualifications and methods of the Quality Auditors.<sup>27</sup> None of his assertions or complaints constitute PSIA-protected activity. Sittner's belief that a "Stop Work" condition existed was based on his belief that the Quality Auditors had been inadequately trained. But the Quality Auditors tasks were governed only by the Quality Plan.

The Quality Plan was an internal auditing process that Jacobs and SoCalGas created as a business practice that was "separate and distinct from the PSEP requirements imposed on them by the C.F.R. and CPUC."<sup>28</sup> The reports the Quality Auditors produced contained language indicating that "PSEP QRC review is intended to provide feedback regarding the content and completeness of the

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<sup>24</sup> 49 U.S.C. § 60129(a).

<sup>25</sup> *See* 49 U.S.C. § 60129(b)(2)(B)(iii).

<sup>26</sup> 29 C.F.R. § 1981.109(a).

<sup>27</sup> D. & O. at 20-21; *see also* Complainant's Brief (Comp. Br.) at 18-26.

<sup>28</sup> D. & O. at 21.

documents provided. This review does not validate the accuracy of the information represented in the documents . . .”<sup>29</sup>

Sittner argues that, “[b]ecause the auditors were responsible for reviewing and confirming information and documents related to those activities, the quality auditors’ undocumented and otherwise inadequate training and insufficient audit procedures can be reasonably viewed as potential violations of federal standards.”<sup>30</sup> But he provided no legal support for this assertion or proof that the Quality Auditors were performing their tasks in violation of any law. We therefore affirm the ALJ’s conclusion that Sittner failed to prove that he engaged in activity protected by the PSIA.<sup>31</sup>

Additionally, the record supports the ALJ’s conclusion that Sittner’s alleged protected activity did not contribute to the termination of his trial period. Sittner performed his job duties in an unprofessional manner and antagonized a number of employees at Jacobs.<sup>32</sup> Andrew and Meraz were dissatisfied with Sittner’s performance prior to any communication that could potentially qualify as protected activity. Andrew told Sittner at the mid-point of his trial period that it was unlikely that he would be offered a permanent position. And Sittner admitted that he acted unprofessionally and purposely misrepresented his knowledge of applicable regulations.<sup>33</sup> We therefore agree with the ALJ’s conclusion that “Sittner’s work

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<sup>29</sup> See, e.g., JX 103 at 2.

<sup>30</sup> Comp. Br. at 38.

<sup>31</sup> Sittner argues on appeal that the ALJ erred by finding that “Respondents did not discuss Sittner’s protected activity before they agreed to fire him.” Complainant Scott Sittner’s Reply Brief at 22. This is incorrect. The ALJ found that “[t]here is no doubt that Mr. Andrew consulted Ms. Meraz about Complainant’s past e-mail communications. Similarly, he also discussed Complainant’s e-mails with Mr. Potter and Mr. Gemmel.” D. & O. at 26. The ALJ acknowledged that Respondents’ managers were aware of Sittner’s July 11, 2015 email, which included his concerns, and concluded that Sittner’s “Stop Work” assertion did not contribute to his discharge despite the temporal proximity between the two. See D. & O. at 24-27.

<sup>32</sup> See, e.g., *Id.* at 10 (referred to an employee as a “dumb girl” who “should just be able to do what he wants”); 12 (bluntly criticized members of the Quality Team in a manner they found unprofessional or personally offensive); 13 (demonstrated an intent to use embarrassment and intimidation as tools to motivate the Quality Auditors, sent an email stating “[a] couple team meetings should pull it off, where I pistol whip with a pencil,” and an e-mail stating that “Jacobs has no clue what is going on” and characterized the Quality Auditors as “weak people”) and 14 (failed to fully grasp that he was creating a hostile work environment, referred to other employees as “dumb” or an “idiot,” injected “chaos” into team relationships, and caused “discontent” among the quality auditing team).

<sup>33</sup> *Id.* at 28.

conduct and performance never approached anything that could be legitimately described as satisfactory to Respondents.”<sup>34</sup>

Finally, on August 14, 2019, Respondents SoCalGas and Sempra filed a Petition for Review asking the Board to find that they cannot be responsible for providing relief to Sittner because they neither employed him nor acted in any capacity as his employer.<sup>35</sup> SoCalGas and Sempra raised this issue before the ALJ.

The PSIA prohibits “employers” from retaliating against “employees.” The ALJ noted that the parties in this matter have stipulated that it was Jacobs that hired Sittner. But the ALJ did not make specific findings of fact regarding which Respondents were liable as “employers” under the PSIA. Instead, the ALJ concluded that, because he was dismissing the complaint, it was “unnecessary to resolve the contested issue of whether [SoCalGas and Sempra] are also liable as employers under this claim.”<sup>36</sup>

We agree with this conclusion. As we are affirming the ALJ’s dismissal of the complaint, we need not remand this case to the ALJ to issue additional findings that would allow us to determine which Respondents would be liable under the PSIA in Sittner had prevailed in this matter.

#### CONCLUSION

Sittner failed to prove that he engaged in PSIA-protected activity, and Respondents have proven that Sittner’s alleged protected activities did not contribute to the decision to end his employment. We therefore **AFFIRM** the ALJ’s D. & O. and **DENY** the complaint.

**SO ORDERED.**

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

<sup>35</sup> Respondents’ Brief in Support of Cross-Petition for Review of D. & O. at 4.

<sup>36</sup> D. & O. at 20, n.6.