

U.S. Department of Labor

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



IN THE MATTER OF:

CHRISTOPHER BUSH,

ARB CASE NO. 2024-0009

COMPLAINANT,

ALJ CASE NO. 2022-TAX-00006

ALJ WILLOW EDEN FORT

v.

DATE: December 30, 2025

DONATO'S PIZZA,

RESPONDENT.

Appearances:

For the Complainant:

Christopher Bush; *Pro Se*; Midway, Kentucky

For the Respondent:

**Matthew T. Lockaby, Esq., and John Ghaelian, Esq.; *Lockaby PLLC*;
Lexington, Kentucky**

**Before JOHNSON, Chief Administrative Appeals Judge, and BURRELL,
and KIKO, Administrative Appeals Judges; Judge Burrell, *concurring***

DECISION AND ORDER

This case arises under the employee protection provisions of the Taxpayer First Act of 2019 (TFA or Act) and its implementing regulations.¹ Complainant Christopher Bush filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent Donato's Pizza unlawfully retaliated against him for engaging in protected activity. On November 21, 2023, a United States Department of Labor Administrative Law Judge (ALJ) issued an Order Granting Summary Decision in Favor of Respondent.

¹ 26 U.S.C. § 7623(d); 29 C.F.R. Part 1989 (2025).

Complainant petitioned the Administrative Review Board (ARB or Board) for review of the ALJ's Order. For the following reasons, we affirm.

BACKGROUND

Complainant was employed as a delivery driver for Respondent from September 30, 2015, until February 23, 2019, when Respondent terminated his employment.²

On July 2, 2019, Complainant filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging age discrimination violations by Respondent, including his termination.³ On June 29, 2021, the EEOC closed its investigation without any findings and issued a Dismissal and Notice of Rights.⁴ Complainant did not file a lawsuit against Respondent following this decision. Instead, on or about September 27, 2021,⁵ Complainant filed a complaint with the Internal Revenue Service (IRS) alleging violations of federal tax law by Respondent. Then, on October 6, 2021, Complainant sent a letter to Respondent stating the following:

² See Order Granting Summary Decision in Favor of Respondent; Order of Dismissal (Order Granting Summary Decision) at 4-5; Order Upon Pleadings at 10; Respondent's Memorandum of Points and Authorities in Support of its Motion for Summary Decision (Respondent's Memorandum) at 2.

³ Respondent's Memorandum at 3, Exhibit (Ex.) 5; Supplemental Complaint of Chris Bush Against Donato's (Supplemental Complaint), Ex. 5.

⁴ Respondent's Memorandum at 3, Ex. 7.

⁵ The record is inconsistent as to the IRS complaint's filing date. Respondent's Memorandum at 3-4, Ex. 8 at 1, notes the filing date as September 27, 2021; Complainant's Supplemental Complaint at 5, notes the filing date as "Oct. of 2021"; and the Order Granting Summary Decision at 6, notes the filing date as October 6, 2021. The ALJ cited to Supplemental Complaint, Ex. 7 in support of the October 6, 2021, filing date. However, this exhibit does not corroborate this fact. Exhibit 7 is a letter, dated October 6, 2021, from the Department of the Treasury to Complainant. The letter informed Complainant that the IRS received his complaint, assigned him a claim number, and advised him of the investigation process. The letter does not indicate the date on which Complainant filed the IRS complaint. Accordingly, given these inconsistencies, the fact that Respondent conceded that Complainant filed the complaint on September 27, and viewing the evidence in the light most favorable to Complainant, the Board recognizes September 27 as the IRS complaint filing date.

(1) I have filed a Whistleblower Complaint w/ the IRS re Donato's use of Uber Eats Drivers who are Incorrectly as Independent Contractors instead of Statutory Employees; (2) Such Whistleblower Complaint also references that Donato's Drivers are likewise misclassified as Employees instead of Statutory Employees; (3) I am seeking my job back- at the same or higher pay, at the same hours, w/ the same or higher seniority; my wrongful termination in February, 2019, was not corroborated by an independent review of same by the EEOC as being for cause; moreover, Donato's did not appeal the finding of the EEOC re same; (4) Per the Taxpayer First Act of July 1, 2019 (TFA), any whistleblower complaint lodged after July 1, 2019- where an Employer retaliates- such retaliation is prohibited under the TFA; such retaliation would include failure to hire an employee/former employee and/or a person making such complaint, per Title 49, which is referenced by the TFA; the Whistleblower complaint referenced herein was made after July 1, 2019; (5) If Donato's fails to rehire me w/i 5 business days of this letter, I will pursue my rights accordingly under the TFA.^[6]

Respondent did not rehire Complainant.⁷ On March 21, 2022, Complainant filed an OSHA complaint alleging that Respondent failed to rehire him in retaliation for protected conduct under the TFA.⁸ OSHA dismissed the complaint, and Complainant filed objections with the Office of Administrative Law Judges (OALJ).

Before the OALJ, the assigned ALJ issued several procedural orders, including an Order Upon Pleadings. The Order Upon Pleadings listed several elements and facts no longer in contest as well as "material allegations made by Complainant and admitted by Respondent."⁹ Following the Order Upon Pleadings, both parties filed timely motions for summary decision and responses to the

⁶ Order Granting Summary Decision at 5 (formatting not in original).

⁷ *Id.*

⁸ *Id.*

⁹ Order Upon Pleadings at 3-10.

motions.¹⁰ On November 21, 2023, the ALJ issued an Order Granting Summary Decision. On December 21, 2023, Complainant timely filed a Petition for Review with the Board. For the reasons discussed below, we affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to review appeals from ALJ decisions and to issue agency decisions in cases arising under the TFA.¹¹ The Board reviews an ALJ's grant of summary decision de novo under the same standard the ALJ applies.¹² The Board reviews an ALJ's procedural rulings under an abuse of discretion standard.¹³

DISCUSSION

1. Governing Law

To prevail in a retaliation claim under the TFA, complainants must prove by a preponderance of evidence that they engaged in protected activity, suffered an adverse action, and that the protected activity was a contributing factor in the

¹⁰ Order Granting Summary Decision at 1-3. We note that Complainant argues on appeal that Respondent untimely filed its Motion for Summary Decision. Brief of Complainant to Administrative Review Board (Comp. Br.) at 35. The record supports that Respondent timely filed its Motion for Summary Decision on September 15, 2023. Order Granting Summary Decision at 1. The Motion for Summary Decision was served and received by the ALJ. For whatever reason, Complainant did not receive the Motion even though he was listed on the Certificate of Service. On appeal, Complainant has not shown how he was harmed or prejudiced as the ALJ rectified any issue by providing Complainant an additional thirty days to respond to the Motion. Order Affording Complainant Thirty Days From October 12, 2023 to Respond to Respondent's Motion for Summary Decision, Order Canceling Hearing at 1-2.

¹¹ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 29 C.F.R. § 1989.110(a).

¹² *Jahanbin v. The Boeing Co.*, ARB No. 2024-0035, ALJ No. 2023-AIR-00023, slip op. at 3-4 (ARB Mar. 13, 2025) (citing *Xanthopoulos v. Mercer Inv. Consulting*, ARB No. 2022-0032, ALJ No. 2021-SOX-00017, slip op. at 10 (ARB Sept. 28, 2023)).

¹³ *Iwaseczko v. Teton Cnty. Weed & Pest Control Dist.*, ARB No. 2022-0059, ALJ Nos. 2018-ACA-00001, 2019-ACA-00002, slip op. at 16 (ARB Aug. 14, 2025) (citation omitted).

adverse action taken against them.¹⁴ A contributing factor is any factor, which, alone or in combination with other factors, affects the outcome of the decision.¹⁵ If the employee prevails on the elements of his or her claim, he or she may be awarded remedies.¹⁶ To avoid relief, however, the employer must prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity.¹⁷

For the Complainant's case in chief, the ALJ resolved all but the contributing factor element in her Order Upon Pleadings.¹⁸ In particular, the ALJ concluded that it was not disputed that Complainant engaged in protected activity when he submitted the IRS complaint and informed Respondent of that fact.¹⁹ Both parties moved for summary decision on the contributing factor element.²⁰ The ALJ granted summary decision in favor of Respondent, concluding that "Complainant cannot show that their protected activity was a contributing factor in Respondent's failure to hire."²¹

On appeal, Complainant argues that the ALJ erred in granting summary decision.²² We carefully considered Complainant's arguments and conclude they are without merit or otherwise would not change the outcome. For the following reasons, we affirm the ALJ's order granting summary decision in favor of Respondent.²³

¹⁴ 26 U.S.C. § 7623(d)(2)(B)(iii) (incorporating 49 U.S.C. § 42121(b)); 29 C.F.R. § 1989.109(a).

¹⁵ *Iwaseczko*, ARB No. 2022-0059, slip op. at 38 (citing *Williams v. QVC, Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 12 (ARB Jan 17, 2023)).

¹⁶ 26 U.S.C. § 7623(d)(3); 29 C.F.R. § 1989.109(d)(1).

¹⁷ 29 C.F.R. § 1989.109(b).

¹⁸ *See* Order Upon Pleadings at 9.

¹⁹ *Id.* at 6.

²⁰ Order Granting Summary Decision at 1-3.

²¹ *Id.* at 4.

²² Comp. Br. at 8-21.

²³ We note that the ALJ cited *Murray v. UBS Secs., LLC*, 43 F.4th 254 (2nd Cir. 2022) in the Order Granting Summary Decision. Since the Order Granting Summary Decision, the United States Supreme Court reversed the Second Circuit Court of Appeals' holding requiring a complainant to make a showing that their employer acted with "retaliatory intent" to satisfy the contributing factor element. *Murray v. UBS Secs., LLC*, 601 U.S. 23 (2024). As we only affirm the ALJ's conclusion that Complainant's protected activities were

2. Summary Decision Standard

Summary decision is appropriate where “there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.”²⁴ In considering a motion for summary decision, the Board views the evidence and makes all reasonable inferences in the light most favorable to the non-moving party.²⁵ If the moving party demonstrates an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact that could affect the outcome of litigation.²⁶ The non-moving party may not rest upon mere allegations, speculation, or denials, but must instead set forth specific facts on each issue upon which the non-moving party would bear the ultimate burden of proof.²⁷ If the non-moving party fails to show an essential element to their case, there can be no “genuine issue as to any material fact,” since a complete failure of proof concerning an essential element necessarily renders all other facts immaterial.²⁸

3. Contributing Factor Analysis

Preliminarily, we note that the ALJ’s contributing factor analysis is awkward. The ALJ determined that Complainant’s complaint with the IRS was not a bona fide protected activity because by the very terms of Complainant’s letter to

not a contributing factor in the no-rehire decision, if there was any error here, it is harmless. Appellate courts have recognized that they may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented on appeal. *Chongris v. Bd. of Appeals*, 811 F.2d 36, 37 n.1 (1st Cir. 1987) (citations omitted); *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007) (citation omitted); *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (citations omitted); see also *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (“[I]n reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason.”) (citation and internal quotation omitted).

²⁴ 29 C.F.R. § 18.72(a).

²⁵ *Jahanbin*, ARB No. 2024-0035, slip op. at 4 (citing *Feldman v. Risk Placement Servs., Inc.*, ARB No. 2020-0068, ALJ No. 2019-SOX-00052, slip op. at 4 (ARB Sept. 29, 2021)).

²⁶ *Id.* (citation omitted).

²⁷ *Id.* (citation omitted).

²⁸ *Id.* (citation omitted).

Respondent, the IRS complaint was to become bona fide only if Respondent did not meet Complainant's demand to be rehired within five business days.²⁹ We observe that the TFA and its implementing regulations require the Complainant to have a reasonable belief of a violation of relevant law.³⁰ To have a reasonable belief that there is a violation of relevant law, a complainant must subjectively believe that the conduct is a violation and that belief must be objectively reasonable.³¹ Even assuming arguendo that this was an error by the ALJ, such error was harmless as we affirm the ALJ's conclusion that Complainant failed to establish a genuine issue of material fact that his protected activities were a contributing factor in Respondent's no-rehire decision.

A. *Temporal proximity and intervening event*

Complainants may meet their evidentiary burden for the contributing factor element with circumstantial evidence.³² Circumstantial evidence may include, but is not limited to, temporal proximity, inconsistent application of an employer's policies, pretext, shifting explanations by the employer, or antagonism.³³

Before the ALJ, Complainant relied solely upon the temporal proximity between his not being rehired by Respondent and the protected activity of submitting an IRS complaint and informing Respondent of that fact in the October 6, 2021 letter.³⁴ The record clearly demonstrates temporal proximity between the

²⁹ Order Granting Summary Decision at 6. The ALJ expanded upon this, that the "bona fide" protected activity "took place only because, and **after** Respondent refused to rehire them." *Id.* (emphasis original).

³⁰ 29 C.F.R. § 1989.102(b)(1).

³¹ Procedures for the Handling of Retaliation Complaints Under the Taxpayer First Act, 87 Fed. Reg. 12,575, 12,577 (Mar. 7, 2022) (Interim Final Rule). The Department of Labor issued its Final Rule, which adopted the Interim Final Rule with one technical change not relevant to this appeal. Procedures for the Handling of Retaliation Complaints Under the Taxpayer First Act, 88 Fed. Reg. 15,271 (Mar. 13, 2023).

³² *Iwaseczko*, ARB No. 2022-0059, slip op. at 38 (citing *Williams*, ARB No. 2020-0019, slip op. at 12).

³³ *Id.* (citation omitted).

³⁴ Complainant argued that he learned of the TFA sometime in late summer or September of 2021, and such date was close in time to the IRS complaint and his attempt to be rehired. Declaration in Support of Motion for Summary Decision at 10. Prior to this statement, Complainant's only other reference to "contributing factor" is a word-for-word excerpt from the Order Upon Pleadings. The excerpt is as follows:

alleged protected activities and Respondent’s no-rehire decision, as these events occurred only days apart. Although the Board recognizes that temporal proximity is an important part of a case based on circumstantial evidence, and is often the most persuasive factor, the causal inference that temporal proximity gives rise to may be severed by a legitimate intervening event, especially one undertaken by the complainant.³⁵

In this case, the content of the October 6 letter operated as both an alleged protected act³⁶ and an intervening event. On its face, this letter served to notify Respondent of the IRS complaint and alleged IRC violations. However, upon reviewing the subsequent terms of this letter, it also included the following ultimatum—rehire Complainant within five business days or else he would pursue his rights under the TFA.³⁷ This ultimatum represented an intervening event as it was a new and independent action on the part of Complainant—a direct demand for reemployment or face a complaint with OSHA.

Although the Board agrees with Complainant that the TFA does not expressly deny relief based on “threats” or “demands” directed at an employer,³⁸ the Board and courts interpreting analogous whistleblower provisions have held that these protections cannot be used to shield a complainant from the consequences of their own misconduct or failures.³⁹ Here, Complainant attempted to shield himself

Complainant also pleads that the temporal proximity between their report to the IRS in October of 2021 and Employer’s failure to rehire them in that same month show circumstances sufficient to raise the inference that their protected activity was a contributing factor in the adverse action.

Id. at 8-9.

³⁵ *Jones v. Exclusive Jets, LLC*, ARB No. 2023-0035, ALJ No. 2022-AIR-00003, slip op. at 16 (ARB Dec. 31, 2024) (citations omitted).

³⁶ Order Upon Pleadings at 5-6.

³⁷ Order Granting Summary Decision at 5.

³⁸ Comp. Br. at 8-16.

³⁹ *Johnson v. Stein Mart, Inc.*, 440 F.App’x. 795, 803-04 (11th Cir. 2011) (rejecting the complainant’s attempt to hide behind her protected activity as a means to evade dismissal for performance-related deficits); *Trimmer v. U.S. Dep’t of Lab.*, 174 F.3d 1098, 1104 (10th Cir. 1999) (concluding that the complainant could not use his whistleblower status to avoid the consequences of his inaction in seeking gainful employment); *Kahn v. U.S. Sec’y of Lab.*, 64 F.3d 271, 279 (7th Cir. 1995) (rejecting the complainant’s attempt to hide behind his protected activity as a means to evade a non-discriminatory adverse action).

from the consequences of his own rehire-demand scheme. As the ALJ stated, “[t]he TFA does not, however, provide an employee with a means by which to use threats to force an employer to hire them. The undisputed facts show that was the case here.”⁴⁰

B. Complainant was ineligible for rehire

Respondent also reiterates on appeal that Complainant was ineligible for rehire.⁴¹ According to Respondent, Complainant was ineligible for rehire as he was previously terminated for “act[ing] in a belligerent, insubordinate, disruptive, and unprofessional manner.”⁴² Even where a respondent asserts legitimate, non-discriminatory reasons for its actions, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could discredit the respondent’s reasons or show that the protected activity was also a contributing factor even if the respondent’s reasons are true.⁴³ Apart from asserting that he was not terminated for cause in February 2019,⁴⁴ Complainant provides no specific facts or evidence that create a genuine issue of fact that his alleged protected activities contributed to Respondent’s no-rehire decision and/or would discredit Respondent’s explanation that Complainant was ineligible for rehire.⁴⁵ Complainant may not rely on his whistleblower status to avoid an adverse action imposed for legitimate, non-discriminatory reasons.

⁴⁰ Order Granting Summary Decision at 6.

⁴¹ Respondent’s Response Brief at 5 n.2.

⁴² *Id.*; see Respondent’s Memorandum at 3, 13-15, Exs. 1, 3-4.

⁴³ *Armstrong v. Flowserve US, Inc.*, ARB No. 2014-0023, ALJ No. 2012-ERA-00017, slip op. at 7 (ARB Sept. 14, 2016) (citing *Trimmer*, 174 F.3d at 1011).

⁴⁴ Comp. Br. at 18-19. Complainant alleges that he was not terminated for cause but instead was terminated because he informed Respondent that they were filing fraudulent W-2 Federal Wage and Tax Statements in 2019. *Id.*

⁴⁵ See, e.g., *Saporito v. Exelon Generation Co., LLC*, ARB No. 2012-0034, ALJ No. 2010-ERA-00012, 2013 WL 4715034, at *7 (ARB Aug. 22, 2013) (holding that complainant provided no evidence refuting the company’s showing that hiring officials decided to only consider internal applicants and students for the open technician position); see also *Levi v. Anheuser Busch Cos., Inc.*, ARB No. 2008-0086, ALJ No. 2008-SOX-00028, slip op. at 6 (ARB Sept. 25, 2009) (holding that the complainant was unable to offer evidence showing that he was not hired because of his protected activity).

CONCLUSION

For the reasons stated above, we **AFFIRM** the ALJ's Order Granting Summary Decision.⁴⁶ Accordingly, Complainant's complaint is **DENIED**.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge

BURRELL, Administrative Appeals Judge, concurring:

I concur with the panel affirming the ALJ's Order Granting Summary Decision. I write separately to highlight a few points about the Complainant's theory of the case and how it intersects with traditional legal concepts relevant to the ALJ's Order.

As the majority opinion lays out, Complainant was terminated for cause in February 2019.⁴⁷ On July 2, 2019, he filed a complaint against Respondent with the EEOC alleging age discrimination. The EEOC closed the case on June 29, 2021.⁴⁸

⁴⁶ As mentioned earlier in this Decision and Order, we carefully considered Complainant's other arguments, including but not limited to: the ALJ erred by holding that OALJ does not have jurisdiction over IRS investigations, the ALJ violated Complainant's due process and equal protection rights, and the ALJ abused her discretion in accepting Respondent's "untimely" Motion for Summary Decision. Comp. Br. at 22-43. Because Complainant failed to show an essential element of his claim, these other arguments are moot, and we decline to make any determination on those arguments

⁴⁷ *Supra* note 2.

⁴⁸ *Supra* notes 3-4.

In October 2021, roughly two months after the EEOC resolution but more than two-and-half years after his termination, Complainant attempted to regain employment with Respondent under a scheme arising under the TFA.⁴⁹ The TFA was enacted on July 1, 2019, and became effective that day.⁵⁰ Because Complainant was fired several months before the TFA was enacted, he could not pursue his termination for cause under the TFA directly. Complainant bypassed that presumption against retroactivity by seeking a rehire on October 6, 2021, which Respondent foreseeably denied.⁵¹ Thereafter, Complainant sued under the adverse action of “failure to rehire,” which is timely under the TFA.⁵²

Under the TFA’s statutory and regulatory framework, Complainant, though he was fired for cause, is not prohibited from seeking reemployment and suing for being denied reemployment under a “failure to rehire” theory of the case.⁵³ The TFA, along with many whistleblower statutes, protects employees from retaliation by former and prospective employers. “Employee” is defined as “an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by, another person.”⁵⁴ “Person” broadly includes individuals and corporations (employers).⁵⁵ Under 29 C.F.R. § 1989.102(a):

⁴⁹ Taxpayer First Act, Pub. L. 116-25, §1405(b), 133 Stat. 981, 997-98 (2019) (codified at 26 U.S.C. § 7623(d)).

⁵⁰ *Id.* § 1001(e)(1).

⁵¹ *Supra* notes 6-7. Courts construe laws as prospective in application unless Congress has unambiguously instructed retroactivity. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994).

⁵² 26 U.S.C. § 7623(d)(2)(B)(iv) (“A complaint under subparagraph (A)(i) shall be filed not later than 180 days after the date on which the violation occurs.”); *supra* note 8 (Complainant’s complaint filed with OSHA on March 21, 2022).

⁵³ Under a failure to hire theory, a successful complainant must establish: (1) that he applied and was qualified for a job for which the employer was seeking applicants; (2) that, despite his qualifications, he was rejected; and (3) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications. *Levi*, ARB No. 2008-0086, slip op. at 5 (citations omitted).

⁵⁴ 29 C.F.R. § 1989.101.

⁵⁵ *Id.*

No employer . . . may discharge, demote, suspend, threaten, harass, or in any other manner retaliate against, including, but not limited to, intimidating, restraining, coercing, blacklisting, or disciplining, an employee in the terms and conditions of employment in reprisal for the employee having engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section.

The ability of a former employee fired for cause to unsuccessfully litigate the termination and then turn around and litigate a failure to rehire is a paradox as it effectively gives a complainant a second bite of the apple. In his failure to rehire litigation, Complainant before the ALJ and on appeal argued for a hearing with the express purpose of relitigating his termination for cause.⁵⁶

Complainant's efforts are similar to a model occasionally pursued by litigants in whistleblower cases. In the nuclear safety field, a complainant, Syed Hasan, pursued several cases against prospective and former employers under the Energy Reorganization Act.⁵⁷ Over the course of decades, Hasan sent resumes and

⁵⁶ Comp. Br. at 16, 18-19, 21.

⁵⁷ See, e.g., *Hasan v. Sargent & Lundy*, ARB No. 2003-0030, ALJ No. 2000-ERA-00007 (ARB July 30, 2004), *aff'd sub nom.*, *Hasan v. U.S. Dep't of Lab.*, 400 F.3d 1001 (7th Cir. 2005); *Hasan v. Stone & Webster Eng'rs & Constructors, Inc.*, ARB No. 2003-0058, ALJ No. 2000-ERA-00010 (ARB June 27, 2003), *aff'd sub nom.*, *Hasan v. Sec'y of Lab.*, No. 03-1981, 2004 WL 574520 (1st Cir. Mar. 24, 2004); *Hasan v. J.A. Jones, Inc.*, ARB No. 2002-0121, ALJ No. 2002-ERA-00018 (ARB June 25, 2003), *aff'd sub nom.*, *Hasan v. U.S. Dep't of Lab.*, No. 03-1852, 2004 WL 1539635 (4th Cir. July 9, 2004); *Hasan v. J.A. Jones, Inc.*, ARB No. 2002-0123, ALJ No. 2002-ERA-00005 (ARB June 25, 2003), *aff'd sub nom.*, *Hasan v. U.S. Dep't of Lab.*, No. 03-15469, 2004 WL 1121580 (11th Cir. May 11, 2004); *Hasan v. Fla. Power & Light Co.*, ARB No. 2001-0004, ALJ No. 2000-ERA-00012 (ARB May 17, 2001), *aff'd sub nom.*, *Hasan v. U.S. Dep't of Lab.*, No. 01-12953, 2002 WL 833328 (11th Cir. Apr. 11, 2002); *Hasan v. Wolfe Creek Nuclear Operating Corp.*, ARB No. 2001-0006, ALJ No. 2000-ERA-00014 (ARB May 31, 2001), *petition denied sub nom.*, *Hasan v. U.S. Dep't of Lab.*, 298 F.3d 914 (10th Cir. 2002); *Hasan v. Commonwealth Edison Co.*, ARB Nos. 2001-0002, -0003, -0005, ALJ Nos. 2000-ERA-00008, -00011, -00013 (ARB Apr. 23, 2001), *aff'd sub nom.*, *Hasan v. U.S. Dep't of Lab.*, No. 01-1130, -1131, -2177, 2002 WL 448410 (7th Cir. Mar. 19, 2002); *Hasan v. Burns & Roe Enters., Inc.*, ARB No. 2000-0080, ALJ No. 2000-ERA-00006 (ARB Jan. 30, 2001), *aff'd sub nom.*, *Hasan v. U.S. Sec'y of Lab.*, No. 01-1322, 2004 WL 1055257 (3d Cir. Apr. 23, 2004); *Hasan v. Intergraph Corp.*, ARB Nos. 1997-0016, -0051, ALJ Nos. 1996-ERA-00017, -00027 (ARB Aug. 6, 1997), *aff'd sub nom.*, *Hasan v. Dir., Admin. Rev. Bd., U.S. Dep't of Lab.*, 180 F.3d 269 (11th Cir. Apr. 15, 1999); *Hasan v. Commonwealth Edison Co.*, ARB No. 2000-0028, ALJ No. 2000-ERA-00001 (ARB Dec. 29,

applications to former or prospective employers, and when he was not hired, he filed a claim of whistleblower retaliation.⁵⁸ Ensuring that his prospective employers were aware of his prior whistleblowing activity, he expressly informed the employers of this fact in his applications. This process was repeated multiple times with several employers. While Hasan's litigation against one employer was pending, Hasan filed applications with a different prospective employer, repeating the process of informing them that he was a whistleblower in the application and entreating them not to retaliate against his application for that reason. In a case against Sargent & Lundy, Hasan sued Sargent and Lundy for failing to hire him after he applied. During the litigation, Hasan *filed another application* for employment with Sargent and Lundy. Again, he was not hired. Hasan *then filed another OSHA complaint* claiming retaliation for that non-rehire.⁵⁹

Complainant's claim fits this mold. On October 6, he informed Respondent of his protected activity with the IRS and the TFA's protection of former employees against retaliation in re-employment. He then demanded to be rehired with a threat of the consequences if he was not rehired.⁶⁰

These cases present a special situation that requires close scrutiny on the part of the factfinder. Notwithstanding the dynamics of the original termination decision and litigation, a complainant may be able to repackage a deficient case into a much more complex case in the form of failure to rehire.⁶¹ In addition to bypassing

2000), *aff'd sub nom., Hasan v. U.S. Dep't of Lab.*, Nos. 01-1130, -1131, -2177, 2002 WL 448410 (7th Cir. Mar. 19, 2002).

⁵⁸ *Hasan v. Enercon Servs., Inc.*, ARB No. 2004-0045, ALJ No. 2003-ERA-00031 (ARB May 18, 2005); *Hasan v. Enercon Servs., Inc.*, ARB No. 2005-0037, ALJ Nos. 2004-ERA-00022, -00027 (ARB May 29, 2009); *Hasan v. Enercon Servs., Inc.*, ARB No. 2012-0096, ALJ Nos. 2004-ERA-00022, -00027 (ARB Mar. 14, 2013), *petition denied sub nom., Hasan v. U.S. Dep't of Lab.*, No. 13-1886, 553 F.App'x. 135 (3d Cir. Jan. 30, 2014); *Hasan v. Enercon Servs., Inc.*, ARB No. 2012-0063, ALJ No. 2012-ERA-00003 (ARB Aug. 20, 2013).

⁵⁹ *Hasan v. Sargent & Lundy*, ARB No. 2005-0099, ALJ No. 2002-ERA-00032, slip op. at 2-3 (ARB Aug. 31, 2007).

⁶⁰ *Supra* note 6.

⁶¹ Rehire cases may also be abused in the context of remedies. In *Johnson v. Union Pac. R.R.*, the plaintiff sued the employer and obtained a large judgment under Federal Employers Liability Act (FELA) for physical pain and suffering, past and future; mental pain and suffering, past and future; permanent disability; loss of employment of life; past lost wages; future lost earning capacity and fringe benefits; unpaid past medical expenses; and future life care needs and medical expenses of life expectancy. *Johnson v. Union Pac. R.R. Co.*, ARB No. 2021-0041, ALJ No. 2019-FRS-00005, slip op. at 2 (ARB Jan 25, 2022).

nonretroactivity, a complainant can rehabilitate an untimely case following termination for cause into a timely failure to rehire. Theoretically, the protected activity in the second timely failure to rehire case is the unsuccessful untimely termination litigation in the prior complaint. Under the same reasoning, a complainant with no protected activity in litigation 1 may convert his unsuccessful case into one with protected activity in litigation 2, failure to hire. The fact that he filed a claim in litigation 1 itself may constitute protected activity in litigation 2 even if that adjudication in litigation 1 resulted in a dismissal for lack of protected activity.⁶²

A rehire case may also change causation dynamics as compared with the initial litigation. Traditional legal adjudication credits temporal proximity as circumstantial evidence creating an inference of causation. In certain cases, courts deem this inference sufficient to avoid summary decision.⁶³ In contrast to the facts of the original termination decision, an adverse rehire decision may be temporally proximate with protected activity. On a case-by-case basis, a factfinder may decide the failure to hire case has to go to hearing or the employer must defend its decision under the same-action or affirmative defense.

The jury awarded \$1,227,739 in damages, of which \$832,739 was for future lost earning capacity and future lost fringe benefits. The amount was reduced to \$993,121.60. Asserting that the injuries were permanent, plaintiff was paid for money he would not be able to earn due to his injury. *Id.* Less than one year later, the complainant expressed an interest in returning to work. *Id.* He reapplied, and the employer determined he was estopped from returning to service. *Id.* at 3. Johnson filed a complaint under the Federal Railroad Safety Act (FRSA) for whistleblower retaliation. Significant litigation ensued. OSHA denied the complaint. *Id.* Johnson took the case to the ALJ. *Id.* The ALJ held hearing and ruled against Johnson. *Id.* Johnson appealed the case to the ARB. Ultimately, the ARB concluded that, assuming there was protected activity, Johnson failed to show that protected activity was a contributing factor in the refusal to permit Johnson to return to work. *Id.* at 5.

⁶² *Levi*, ARB No. 2008-0086, slip op. at 5 (“Levi was not successful in his previous whistleblower complaints, *Levi I-III*. In this case, *Levi IV*, we will not reconsider our prior rulings; in particular that Levi is not entitled to reinstatement based upon alleged prior whistleblowing complaints. *Levi IV* constitutes a new request for employment with ABI. We assume for the purpose of his complaint that Levi’s act of filing three previous whistleblower complaints is protected activity. ABI officials who received Levi’s letter for rehire were aware of Levi’s previous complaints as he referred to them in the letter.”) (internal citations omitted).

⁶³ *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (citing cases where very close temporal proximity between adverse action and employer’s knowledge of protected activity may support a prima facie case to avoid summary decision).

In this case, Complainant expressly packaged his rehire application with a complaint filed with the IRS, which the ALJ found was protected activity.⁶⁴ Complainant threatened Respondent that if it did not rehire him, he would proceed with TFA rights against Respondent who had terminated him for cause more than two years earlier.⁶⁵ There is strong temporal proximity, a matter of days, between the adverse action of not being rehired and informing the employer of the protected complaint to the IRS. As Respondent notes, Complainant artificially designed it that way.⁶⁶

I concur with the ALJ and panel rejecting Complainant's effort. When dealing with a rehire attempt such as this (Respondent referred to it as a "shakedown"⁶⁷), the causal value attributed to temporal proximity should be closely scrutinized for bad faith and abuse. While temporal proximity might be grounds to avoid summary decision in certain cases, in a case like this with artificially timed protected activity, the weight given to temporal proximity is suspect and the case is appropriate for summary disposition notwithstanding very close temporal proximity. As the ALJ observed, "[l]odging a complaint only in order to exact demands meets neither the spirit nor the letter of the TFA."⁶⁸

THOMAS H. BURRELL
Administrative Appeals Judge

⁶⁴ *Supra* note 19.

⁶⁵ *Supra* note 6.

⁶⁶ Respondent's Memorandum at 15.

⁶⁷ *Id.* at 16.

⁶⁸ Order Granting Summary Decision at 6.