



In the Matter of:

JAMES J. BOBRESKI,

ARB CASE NO. 13-001

COMPLAINANT,

ALJ CASE NO. 2008-ERA-003

v.

DATE: AUG 29 2014

J. GIVOO CONSULTANTS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michael Kohn, Esq., *Kohn, Kohn and Colapinto, LLP*, Washington, District of Columbia

For the Respondent:

Alan C. Milstein, Esq., *Rose & Podolsky*, Pennsauken, New Jersey

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*. Judge Royce concurring.

DECISION AND ORDER OF REMAND

James J. Bobreski filed a complaint on May 2, 2006, against J. Givoo Consultants, Inc. (Givoo) under six different whistleblower acts.¹ He alleged that Givoo violated the ERA's

¹ Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003 & Supp. 2011), the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i) (Thomson/West 2003), the Clean Air Act, 42 U.S.C.A. § 7622 (Thomson/West 2003), the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (Thomson/West 2003), the Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001), and the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (Thomson Reuters 2009), as amended and recodified, and their implementing regulations, 29 C.F.R. Part 24 (2013).

employee protection provisions² when it failed to hire him because he engaged in whistleblower-protected activities. The Occupational Safety and Health Administration (OSHA) investigated his complaint and then dismissed it on September 27, 2007. Bobreski objected and requested a hearing before a Department of Labor Administrative Law Judge (ALJ). An ALJ conducted an evidentiary hearing on July 29, 2008, and ruled against Bobreski (Decision & Order (D. & O.) (Bullard)). Bobreski appealed to the Board, and we remanded for further findings on several issues. After the Board's remand, a second ALJ held a new evidentiary hearing, ruled against Bobreski (D. & O. (Romano)), and Bobreski again appealed to the Board. For the following reasons, we reverse and remand for a determination of damages.

INTRODUCTION

This appeal arises from Bobreski's claim that Givoo rejected him for a work project in the spring of 2006 because of his 1999 whistleblowing disclosure and successful whistleblower litigation. The whistleblower litigation centered on Bobreski's work as a Givoo employee through a service contract Givoo had with the District of Columbia Water and Sewer Authority (WASA). The parties do not dispute that Givoo terminated Bobreski's employment at WASA shortly after Bobreski reported some safety concerns. Bobreski won a liability verdict in July 2005 against WASA, who was still contracting with Givoo in 2006. The WASA litigation ended in September 2006, when the parties settled. Meanwhile, in early 2006, Givoo had its first opportunity since 1999 to hire Bobreski, and it did not hire him.

As we explain below, after we very carefully considered this matter, we find several reasons for reversing the ALJ's dismissal of Bobreski's claim. To begin with, the parties agree that Bobreski was qualified to work the Hope Creek outage in 2006, and his name appeared four times on the candidate list that Givoo managers reviewed before anyone was hired.³ After both evidentiary hearings, the ALJs doubted that the top operational manager at Givoo (Joel Givner) would ever hire Bobreski after 1999. For example, after the first evidentiary hearing, the ALJ said she was "skeptical" that Givoo's highest ranking operational manager, Joel Givner, would

² All six whistleblower statutes at issue in this matter require that Bobreski prove he engaged in protected activity and that such protected activity played some role in an unfavorable employment action taken against him, but they vary in critical respects. This opinion focuses on the ERA language, which expressly requires that Bobreski prove his protected activity was a "contributory factor" in an unfavorable employment action Givoo took against him. None of the other environmental statutes expressly defines the causation standard or adopts the "contributory factor" standard, but the implementing regulations require the more difficult "motivating factor" causation standard. If Bobreski cannot meet the lower "contributory factor" standard of proof, then he cannot meet the higher "motivating factor" standard in the other environmental statutes. Similarly, the ERA has a "clear and convincing" standard for the employer's affirmative defense, rather than the lower preponderance of the evidence. If Givoo can satisfy the ERA affirmative defense standard, then it necessarily meets the lower standard in the other environmental whistleblower statutes.

³ ALJ Bullard found that Bobreski was qualified based on the unanimous testimony of all the parties and ALJ Romano found "no reason to disturb Judge Bullard's findings on this issue." D. & O. (Bullard) at 20; D. & O. (Romano) at 9.

hire Bobreski after 1999. She also found that Givner's statement that he was willing to hire Bobreski was "inconsistent with the evidence." Both ALJs expressly indicated that Givoo's top operational manager had "animus" and "motive" to retaliate against Bobreski and that Givoo offered shifting reasons to explain why Bobreski was not hired. The first ALJ implicitly questioned the "general" credibility of another Givoo top manager (Mel Morgan), the manager who worked "side-by-side" with one other individual, Vince Law, to staff the 2006 Hope Creek project. The second ALJ referred to Law's reasons for rejecting Bobreski as "vague and subjective."

Aside from the ALJs' numerous suspicions about the decision-makers, four independent reasons convince us to reject the final ALJ's finding of no causal link between Bobreski's protected activity and Givoo's refusal to hire him. The ALJ's rationale for rejecting a causal link ultimately rests on Givoo's final version of the reason for rejecting Bobreski: that a non-Givoo employee, Vince Law, unilaterally decided not to hire Bobreski. First, even if Givoo's explanation was true, Law's role does not address the hiring that occurred before Law allegedly had any authority to make hiring decisions. Second, Law's role does not explain the fact that Morgan admits to rejecting Bobreski when Morgan told Bobreski there was a hiring freeze. Third, the ALJs reached opposite conclusions as to who had final authority for rejecting Bobreski, which we reconcile to mean that Givoo and Shaw jointly rejected Bobreski. Fourth, the ALJ's basis for rejecting the causal link does not rest on substantial evidence, which leaves a mountain of evidence all pointing to Bobreski's successful whistleblower lawsuit against Givoo's contractor, WASA, as a contributing factor if not the most substantial reason that Givoo rejected Bobreski. Plus, the ALJ was required to weigh Givoo's rebuttal evidence against all of Bobreski's circumstantial evidence, and Bobreski's evidence overwhelms Givoo's rebuttal evidence. In the end, the overwhelming evidence shows that this "partnership" trio (Givner, Morgan, Law) worked together to decide who to hire and not hire for the 2006 Hope Creek outage, and the trio expressly or implicitly understood that Bobreski could not work for Givoo. Lastly, the overwhelming evidence of contributory factor, and lack of any other stated reasons for rejecting Bobreski, eliminates Givoo's ability to argue that it would have made the same decision in the absence of protected activity; therefore, we remand this matter for the ALJ's determination of damages.

BACKGROUND⁴

The Key Participants: Bobreski, Givner, Morgan, and Law

The four central individuals involved in this matter are Bobreski, Joel Givner, Mel Morgan, and Vincent Law. Givner serves as Givoo's Manager of Plant Services and corporate secretary. His wife owns Givoo, but he runs the day-to-day operations. Morgan, Director of Business Development, had worked for Givoo for some time period in the 1990s, but began working for Givoo again in October 2005 and continued to work for Givoo until at least April 3, 2012, the date of the second hearing. Morgan considers Givner his boss and friend. Law worked intermittently for Givoo from 1990 to 1998, and again from March 2008 through at least the second evidentiary hearing in 2011, a fact that ALJ Bullard found "significant." When Bobreski was rejected for the Hope Creek 2006 outage, Law was the foreman for Shaw Stone & Webster at Hope Creek and working in "partnership" with Givoo to staff the outage. Givner, Morgan, and Law each testified that they would have hired Bobreski had positions been available or that they had no reason not to hire Bobreski, or to both statements.⁵

Bobreski is an instrument and control technician (I&C Technician). I&C Technicians install and repair instruments, control systems, gauges, valves and related components of nuclear power plants and other industrial facilities.⁶

Givoo contracts directly or indirectly with industrial utility plants, including nuclear power plants, to provide instrumentation and control (I&C) technicians to service mechanical needs for various utility plants. Two utility plants relevant to this case are the Blue Plains Water

⁴ We rely primarily on the findings from the Second ALJ Decision (D. & O. Romano) and secondarily on the First ALJ Decision (D. & O. Bullard), and reasonable inferences from those decisions, as well as the undisputed facts. After the ALJ in the Second ALJ Decision conducted his own evidentiary hearing, he crafted his "factual background" from the "factual recitations contained in the ARB's June 2011 Order (ARB), ALJ Bullard's Decision and Order (D. & O.), and uncontroverted testimony adduced at the April 2012 hearing." We understand this to mean that the ALJ accepted as fact, the findings he recited from the previous ALJ and ARB decisions. Unfortunately, both ALJs summarized testimony without clearly identifying which part of the testimony was credited as fact and without providing a separate section identifying all the necessary findings of fact. Nevertheless, after extensive litigation, it appears that many background facts are undisputed, and we will infer which background facts are undisputed and include those in our background section as necessary. *See Zink v. U.S.*, 929 F.2d 1015, 1020-21 (5th Cir. 1991) (reasonable inferences may be drawn by an appellate body reviewing a trial or hearing court's findings of fact); *see also Jackson v. Comm'r.*, 864 F.2d 1521, 1524 (10th Cir. 1989) (citations omitted).

⁵ For the facts in this paragraph, see D. & O. (Bullard) at 2, 13, 11, 16, 18, 21; D. & O. (Romano) at 3, 4, 7, 12, 14; Tr. (Bullard hearing) at 30, 101-02, 106, 153-55, 193; Tr. (Romano hearing) at 81, 108, 116 and 139; CX 1 at 5; CX 4 at 25; CX 20.

⁶ D. & O. (Bullard) at 4; D. & O. (Romano) at 3.

and Sewage Treatment Plant (Blue Plains) and the Hope Creek Plant Nuclear Generating Station (the Hope Creek NGS).⁷

The Hope Creek NGS is on a small artificial island that also includes the Salem Nuclear Generating Station (Salem NGS) (collectively referred to as the Salem/Hope Creek Nuclear Plant). PSE&G Nuclear, a subsidiary of Public Service Electric & Gas, owned the nuclear reactors at the Salem/Hope Creek Nuclear Plant. Servicing the nuclear power plants occurs during temporary plant shut downs (outages).⁸

Givner would “secure contracts” and “give direction to contracts” for the company. Givoo had approximately six permanent employees in the corporate office; all other employees worked for Givoo as temporary employees.⁹

Two of Givoo’s permanent employees relevant to this case were John Moore and Mel Morgan, both high level managers who reported directly to Givner in 2006. Morgan was the Manager of Program Development. Moore was the Manager of I&C Services. During the hearing in this matter, Givner stated that “the most important and active persons at Givoo with respect to staffing and service contracts” were himself, Moore, and Morgan.¹⁰

Bobreski, Givner, Moore, Morgan, and Law have known each other since the mid-1990s and crossed paths since then. More specifically, Law has known Bobreski since 1988. Morgan knew Law for a long time, including when he previously worked at Salem for three years and Law also worked there for some of that time. Morgan worked for Givoo for a period in the 1990s, and then returned in October 2005. From 1994 through 1999, Morgan often drove to and from jobs with Bobreski and shared an apartment with him when they worked far from home. Law worked for Givoo up until about 1997.¹¹

Bobreski’s Whistleblowing as a Givoo Employee at the WASA plant

In late 1999, Bobreski’s protected activity began when he worked for Givoo at the Blue Plains wastewater treatment facility, disclosing safety-related issues internally and to the media (the Blue Plains Incident). Bobreski also accompanied a Washington Post reporter onto the Blue Plains facility. Givoo had a long-term contract with the Washington, D.C. Water and Sewer

⁷ D. & O. (Bullard) at 4-5; D. & O. (Romano) at 3.

⁸ D. & O. (Bullard) at 5; D. & O. (Romano) at 3; Tr. (Romano hearing) at 125.

⁹ D. & O. (Bullard) at 13; D. & O. (Romano) at 3; ARB Order of Remand (ARB O. R.) at 3; Tr. at 30.

¹⁰ D. & O. (Romano) at 3; CX 11, CX 12.

¹¹ D. & O. (Bullard) at 6, 12-13, 24; D. & O. (Romano) at 3 (“throughout the 1990s”); Tr. (Bullard hearing) at 30, 32, 153; Tr. (Romano hearing) at 113; CX 4 at 25; CX 5 at 2.

Authority (WASA), which operated Blue Plains. Givoo maintained that contract at least until the time of the first hearing in this matter on July 29, 2008.¹²

Bobreski's media disclosures regarding the WASA/Blue Plains facility caused friction with Givoo managers. On October 29, 1999, Givoo terminated Bobreski's employment at the request of the customer (WASA). However, during the first hearing, Givner claimed full responsibility for terminating Bobreski's employment, saying it was Givoo's decision. Additionally, Givner instructed Moore to send a letter to Givoo's site supervisor at Blue Plains reminding him and other Givoo employees that "any and all contact with the 'media'" needed to be referred to Givner.¹³

On November 3, 1999, Bobreski filed a whistleblower complaint against WASA based on these events. On November 5, 1999, the Washington Post ran a front page story about the Blue Plains Incident. Givner called Bobreski and told him that he was "very, very upset" about the Washington Post exposé.¹⁴

Although Givoo had hired Bobreski ten to twelve times before 1999, Givoo never hired Bobreski again after the Blue Plains Incident. Givner believed that Givoo and Bobreski had an understanding that it would be best if Bobreski worked elsewhere and they "parted ways for a little bit of time."¹⁵

Givner's hearing testimony evidenced his displeasure over Bobreski's disclosures at the WASA/Blue Plains facility. For example, he described Bobreski's efforts as trying to "re-engineer the whole facility" and stated that Bobreski "was not working to the direction of the supervision." ALJ Romano found that Givner harbored animus against Bobreski for his whistleblowing at WASA.¹⁶

In 2000, Givner contacted the security department at the nuclear plant where Bobreski worked and reported that Bobreski was a security risk (in response to a routine questionnaire). Givner was referring to the Blue Plains Incident in which Bobreski escorted a reporter onto the

¹² D. & O. (Bullard) at 5; D. & O. (Romano) at 3, 10; Tr. (Bullard hearing) at 36, 99.

¹³ D. & O. (Bullard) at 6, 14, 21; D. & O. (Romano) at 3, 5, 11; Tr. (Bullard hearing) at 37-46; CX 12.

¹⁴ D. & O. (Bullard) at 2, 4; D. & O. (Romano) at 5, 11; Tr. (Bullard hearing) at 41; CX 13 (the 1999 Washington Post article is titled "Plant Warnings Go Unheeded: City Ignores Lapses in Handling Toxic Chemical at Blue Plains" and reports about Bobreski's protected activity, quoting him several times).

¹⁵ D. & O. (Bullard) at 14; Tr. (Bullard hearing) at 45; Tr. (Romano hearing) at 24; CX 3.

¹⁶ D. & O. (Romano) at 11; Tr. (Bullard hearing) at 36-37.

Blue Plains facility. Givner's security advisement about Bobreski was the only security report Givner had ever made about a former employee as a security risk.¹⁷

The hearing in the WASA case occurred during intermittent weeks from December 17, 2001, to March 28, 2002. Moore was identified as a witness for this case. He was deposed in the WASA case on August 17, 2001; Givner attended this deposition.¹⁸

In 2003, with the WASA litigation still pending, Bobreski failed to secure work at the Fitzpatrick nuclear plant outage where Morgan was working, and he telephoned Morgan to ask Morgan why he had not hired him. Bobreski testified that he accused Morgan of not hiring him because of his WASA whistleblower complaint. Morgan remembered that Bobreski called him and angrily complained to Morgan about not being hired at Fitzpatrick. Morgan remembered Bobreski's tone but not specifically what he said. On this occasion, Morgan's reason for not hiring Bobreski was that he was not on the list of candidates.¹⁹

On July 11, 2005, Bobreski won his whistleblower case against WASA when ALJ Alice Craft (ALJ Craft) issued an order in his favor as to WASA's liability. In addition to the references to Bobreski (Givoo's worker), ALJ Craft also referenced Givoo or Givoo's project manager at WASA, Dan Juanillo, over 300 times throughout her 55-page opinion, including in her closing instructions to the parties for the next phase (the remedies phase) of the WASA case. ALJ Craft noted that there was "the evidence regarding the status of WASA's contract with Givoo or any successor is contradictory and incomplete."²⁰ ALJ Craft's order in the WASA case presumably required the parties to clarify how to assess damages after Givoo terminated Bobreski's employment. As previously noted, Givoo still had the long-term contract for I&C technician work at the WASA/Blue Plains facility in 2005. Because of the unsettled evidence, ALJ Craft set discovery and briefing deadlines covering the next two or three months.²¹

¹⁷ D. & O. (Bullard) at 6, 14; D. & O. (Romano) at 3.

¹⁸ CX 14 at 2; CX 16, exhibit 1; Tr. (Romano hearing) at 186-88; Tr. (Bullard hearing) at 49-50.

¹⁹ D. & O. (Bullard) at 6-7, 13, 26; D. & O. (Romano) at 4, 6.

²⁰ *Bobreski v. D.C. Water & Sewer Auth. (WASA)*, ALJ No. 2001-CAA-006, slip op. at 55 (ALJ July 11, 2005) (Online at [http://www.oalj.dol.gov/Decisions/ALJ/CAA/2001/BOBRESKI_JAMES_J_v_DISTRICT_OF_COLUMBIA_2001CAA00006_\(JUL_11_2005\)_090013_ORDER_SD_files/css/BOBRESKI_JAMES_J_v_DISTRICT_OF_COLUMBIA_2001CAA00006_\(JUL_11_2005\)_090013_ORDER_SD.HTM](http://www.oalj.dol.gov/Decisions/ALJ/CAA/2001/BOBRESKI_JAMES_J_v_DISTRICT_OF_COLUMBIA_2001CAA00006_(JUL_11_2005)_090013_ORDER_SD_files/css/BOBRESKI_JAMES_J_v_DISTRICT_OF_COLUMBIA_2001CAA00006_(JUL_11_2005)_090013_ORDER_SD.HTM)).

²¹ D. & O. (Bullard) at 5; D. & O. (Romano) at 4; CX 14 at 55; *Bobreski v. D.C. Water & Sewer Auth. (WASA)*, ALJ No. 2001-CAA-006, slip op. at 55; Tr. (Bullard hearing) at 99; Tr. (Romano hearing) at 201.

Salem/Hope Creek Before Givoo's Involvement

While litigating the WASA case, Bobreski worked many times at the Salem/Hope Creek Nuclear Plant, including spring 2004, spring 2005, and fall 2005. The fall 2005 job was his eighth time working at the Salem/Hope Creek Nuclear Plant. Law, the foreman who hired Bobreski in the spring and fall 2005, liked Bobreski, considered him very smart, and tried to hire him when he was available. Law had worked as a contractor at the Hope Creek NGS since 1989.²²

Law learned about Bobreski's successful whistleblower case after he hired Bobreski for the fall 2005 Salem NGS outage at the Salem Nuclear Plant and told Bobreski that he had heard about Bobreski's case. Law heard about the case from an individual named Glen Kingsley, which caused Law to say "Jim's down on the island. I just hired Jim [Bobreski]."²³ Sometime between September 26, 2005, and October 29, 2005, when Bobreski worked at the Salem NGS, Law asked Bobreski about his whistleblower complaint and told him that he had heard about his victory.²⁴

In 2005, Morgan also worked as a project manager at Salem/Hope Creek for another company just before going back to work for Givoo in October 2005. During this time period (fall 2005), both Law and Bobreski were also working on the island at Salem/Hope Creek. Bobreski gave undisputed testimony that someone called him about winning his case and told Bobreski that the newspaper article about it was posted on a bulletin board at the job shop at the Salem Plant. This second newspaper article, which was published in the Washington Post on July 14, 2005, was titled "Judge Rules for Fired Contractor at WASA," and stated that Givoo discharged Bobreski and that Bobreski was awarded \$66,000 in damages. Morgan acknowledged that he had run into Law while he was working at the Salem plant right before he started to work for Givoo in the fall of 2005. He also admitted that he could have seen Bobreski while he was there, but he did not remember anything like that and he offered ambiguous testimony about hearing things in the industry but staying out of it.²⁵

The WASA case did not settle until September 2006, after the events at issue in this case occurred.²⁶

²² D. & O. (Bullard) at 9, 10; CX 3; CX 4 at 25; CX 20.

²³ Tr. (Bullard hearing) at 169.

²⁴ D. & O. (Bullard) at 7, 24, 25; D. & O. (Romano) at 4; CX 3.

²⁵ D. & O. (Romano) at 3; Tr. (Bullard hearing) at 172; Tr. (Romano hearing) at 38, 108, 112, 114; CX 17 (2005 Washington Post article).

²⁶ D. & O. (Bullard) at 3.

The 2006 Hope Creek Outage

Meanwhile, in spring 2006, while WASA and Bobreski litigated the remedies issue for the WASA case, Givoo became a subcontractor for Shaw Stone & Webster at the Hope Creek NGS. Givner was involved in securing the contract with Shaw and was personally involved in the hiring process. Givner personally signed the contract for Givoo on March 24, 2006.²⁷

The contract in the record provides that Givoo, as the subcontractor, "shall supply all adequate and competent labor, supervision, technical and professional and/or other services required for the complete performance of the work generally described as I & C Support Activities for the Hope Creek RF13 Refueling Outage" The contract gave Shaw (the Company) the reserved right to also provide for staff augmentation by "mutual agreement," but this provision does not speak to a "veto" power over Givoo's staff augmentation.²⁸

Law was working for Shaw during the spring 2006 outage at Hope Creek. Law's testimony was uncontroverted that the hiring practice at the Hope Creek NGS changed when Givoo became the subcontractor for the spring outage. He had assumed that he would be in charge of staffing as previously, but Shaw told him that Givoo would be providing staffing, and he did not take this very well. Law was told to give his "list" of technicians to Givoo, that he was to share everything with Givoo, and was subsequently told that his role would be a "partnership" with Givoo for the outage. Givner saw Law's list and forwarded it to Morgan. It was the same list Law used for the fall 2005 Salem NGS outage. Bobreski's name appeared four times on that list. Givner saw Bobreski's name on the list. Bobreski was well qualified to fill the positions for which Givoo was hiring. The hiring process began with Givner, and Givner successfully insisted that an individual named Stan Myka (or Mica) be hired even though he was not on Law's list of potential candidates. Thus, and as ALJ Romano found, Givner had some influence over the hiring process. Law sent his list to Morgan by e-mail dated February 15, 2006. Givoo relied on Law's list of I&C workers to hire individuals for the Hope Creek outage. At the hearing, Givner, Morgan, and Law each referred to the staffing either as a partnership or as something that both Morgan and Law did together.²⁹

The first contract Givoo had for staffing was done under contract with PSE&G. Under this contract, Givoo hired a first wave of workers before Law was involved. Givner stated to the Department of Labor that Givoo hired Givoo's "main guys" and another 20 people, mostly for valve work. He explained that "Givoo only had 20 some people or 30 some people on the job

²⁷ D. & O. (Bullard) at 14; D. & O. (Romano) at 4; Tr. (Bullard hearing) at 60-61; CX 4 at 14; CX 9 at 10. The ALJ referred to the Shaw Group and Stone & Webster collectively as "Shaw." The Shaw Group acquired Stone & Webster at some point in its history. D. & O. (Bullard) at 8 n.11. We also refer to the group as Shaw.

²⁸ CX 9, Contract ¶¶2, 5, 6, at 4-6.

²⁹ D. & O. (Bullard) at 8-9, 13-15, 17, 20, 100-101; D. & O. (Romano) at 4, 11; Tr. (Bullard hearing) at 56-57, 60, 62, 127, 140-143, 176, 177, 185; Tr. (Romano hearing) at 134, 142, 181. Law's list is CX 1 at 7, 22-35.

when Givoo had its own contract [with PSE&G]. It was not until the Shaw contract that we started bringing in people."³⁰

It was made clear to Law that there was concern about the outage being successful, and that if it was not successful, then he would not have a job. Givoo's main office fielded phone calls from interested workers and then forwarded the names to Morgan.³¹

Givoo began considering names for the Hope Creek outage on February 10, 2006. Morgan, a high level manager at Givoo, worked with Law to select names from Law's list. Law and Morgan expressly discussed Bobreski during the hiring phase and made a "decision" about him.³² Morgan sat side-by-side with Law and said the names on his list while Law said "yes, yes, no, no" and, upon arriving at Bobreski's name, Law said "no, not at this time."³³ Givoo did not select Bobreski to fill one of the positions.³⁴

Givoo began hiring individuals for the Hope Creek outage on February 27, 2006. On that same day, Bobreski called Law, seeking employment for the spring 2006 Hope Creek job. Law told him to contact Morgan. The contract date was March 6, 2006, and Givoo and Shaw signed it on March 24 and 29, 2006, respectively. Law and Morgan knew that Bobreski was available for the spring outage at Hope Creek.³⁵

On March 20, and 21, 2006, Bobreski again called Law about a position.³⁶ Law told him that he did not have any problems with Bobreski, but that he was not the person in charge of

³⁰ D. & O. (Bullard) at 9; Tr. (Romano hearing) at 198, 205; Tr. (Bullard hearing) at 56-57, 141; CX 4.

³¹ Tr. (Bullard hearing) at 93, 142-43.

³² Law's testimony was not clear on this point. While he testified that he never told Morgan not to hire Bobreski, he also testified that a "decision" had been made not to hire Bobreski and that he participated in "the decision" to leave Bobreski off of the list of the ninety people who were hired. D. & O. (Bullard) at 11; Tr. (Bullard hearing) at 154, 168.

³³ D. & O. (Romano) at 4, 6; D. & O. (Bullard) at 12.

³⁴ D. & O. (Bullard) at 12, 20-21, 23; D. & O. (Romano) at 4; Tr. (Bullard hearing) at 154, 188; CX 1, at 3.

³⁵ D. & O. (Bullard) at 7, 12, 14, 15, 17; D. & O. (Romano) at 4; CX 4 at 28; CX 7; CX at 10. In spite of the signature blocks on the contract, and given the record, we assume that Payne signed for Shaw, and Givner signed for Givoo.

³⁶ In summarizing Bobreski's testimony, ALJ Bullard imprecisely stated that the phone records showed that Bobreski called Law on March 21 (D. & O. (Bullard) at 8) and that CX 6 showed that Bobreski called Law on March 20 (D. & O. (Bullard) at 17). CX 6 actually shows that Bobreski called Law twice, on March 20 and 21, 2006. D. & O. (Bullard) at 17; CX 6.

hiring for the outage and did not have any control over hiring. Bobreski testified that he believed that Law again told him to contact Morgan and gave him a second number for Morgan in this call. On March 20 and 21, 2006, Bobreski called Morgan to seek employment.³⁷ Morgan told Bobreski that there was a hiring freeze and that Bobreski should seek work at another power plant that Morgan thought was hiring. However, Givoo continued hiring individuals until April 3, 2006.³⁸

Of the 195 individuals³⁹ on Law's list, 89⁴⁰ technicians were hired for the spring 2006 outage.⁴¹ The list has no indication that it is in rank order. In fact, twenty-eight individuals⁴² were listed lower than Bobreski but they were hired for the Hope Creek Outage. Givner's staff had to "scramble" to hire the ninety technicians that were required to staff the Hope Creek NGS outage because it was one of the largest outages in Hope Creek's history, and there were six

³⁷ Bobreski called Morgan at two different numbers, on March 20, at 3:21 p.m. and on March 21, at 10:48 a.m. CX 6; D. & O. (Bullard) at 17. Morgan called Bobreski back from the second number on March 21, at 9:20 p.m. *Id.*

³⁸ D. & O. (Bullard) at 7-8, 10, 17; D. & O. (Romano) at 4; Tr. (Bullard) at 76-77, 245, 277; CX 6; CX 5 at 4. See also Givoo's prehearing statement, p. 2, n.l. "Givoo hired 9 technicians on February 27, 2006; 3 technicians on March 6, 2006; 1 technician on March 8, 2006; 10 technicians on March 13, 2006; 1 technician on March 20, 2006; 2 technicians on March 27, 2006; 28 technicians on March 29, 2006; 1 technician on March 30, 2006; and 35 technicians on April 3, 2006."

³⁹ Law's list actually contains several lists found in CX 1, pages 22-35. The first list is the master list (pages 22-26) and contains Bobreski's name and every name found on all of the other lists. The master list has 202 names on it but duplicates seven names (Tom Woodson, John Wilczynski, Peter Holbit, Ron Anthony, Mark Sainsott, Doug Phillips, and Phil Antone), meaning it has 195 different people. All of the other lists represent different groupings of names from the master list. Bobreski's name appears on three of the other lists for a total of four times.

⁴⁰ While the list contains 90 entries, William Beadleston is listed twice, and Givoo stipulated that only one Bill Beadleston worked the outage. Tr. (Bullard hearing) at 150.

⁴¹ Standing alone, Law's master list does not support the inference that 105 individuals were rejected for the Hope Creek outage. There was no evidence in the record that all or most of these individuals were available to work the Hope Creek outage. But there is evidence that there were six outages in the surrounding area. CX 4 at 17; Tr. (Bullard hearing) at 66-67. Additionally, at least six of the individuals on the list were listed as "retired" (R. Bomgardner, Jack McMichael, Finn Olsen, Jim Romano, Mark Sainsott, and Larry Switzer).

⁴² They were: Dave Fresch, Tom Jordan, Jim Hartley, Dick Williams, Kevin Burke, Bill Beadleston, Stan Kateusz, Juan Cintron, Jamie Flint, Robert Sloboda, Patricia Coughlin, Marty Foley, Rupert Eisgruber, Jef Santos, John Hamilton, Peter Holbit, Mitch Rybacki, Eric Miles, Rodney Kempton, Bill Byler, Donald Gebert, Steve Kulish, Don Howell, Dale Meredith, Doug Schipper, Carrol Thereo, Dan Sala, and Jeremy Redkay. CX 1, at 22-35 compared to CX 10 Hire List.

other outages in the area that made availability an issue. The final list of names of technicians to be hired had to be submitted to the customer by March 29, 2006. Givner gave varied accounts about why Givoo failed to hire Bobreski.⁴³

On May 2, 2006, Bobreski filed a complaint with OSHA in this matter. Givoo responded to the complaint by letter dated May 22, 2006, signed by Givner, and stated: (1) "Morgan was responsible for staffing the project;" (2) "On February 15, 2006, Mr. Morgan received an e-mail from Mr. Vince Law with the previous fall Salem 2005 organizational chart and a manpower list of over 200 I&C technicians with previous Salem/Hope Creek experience;" (3) Givner spoke "directly with Vince Law;" and (4) Law informed I&C techs to call Givoo, specifically Mr. Mel Morgan, and provided them with Mr. Morgan's office and cell phone telephone numbers;" Significantly, Givoo stated: "Between February, 2006 and our final hiring submittal date of March 29, 2006, Mr. Morgan received over 150 calls from technicians. At no time during this period did Mr. Morgan receive a call from Bobreski." Givner also stated to DOL that on April 3, 2006, Bobreski spoke to Morgan about the job, and Morgan told Bobreski that the job was fully staffed.⁴⁴

Givoo's written response then went on to explain that Mel Morgan allegedly followed the union guidelines to staff the project and implicitly asserted that Bobreski was not hired because he failed to follow the union guidelines. But submission of a resume was not mandatory and application requirements did not exist.⁴⁵ Elaborating further, Givoo stated: "It is Givoo's position that this unfortunate situation occurred as a result of a lack of communication or inaction [by] Bobreski." "In the future, Givoo would have no problem considering Bobreski for I&C work, either at the Salem/Hope Creek Project or similar work, throughout the country."⁴⁶

On September 22, 2006, the WASA litigation ended when the ALJ issued an order approving a settlement.

On September 27, 2007, OSHA dismissed Bobreski's complaint in this matter. Bobreski timely objected and requested a hearing, which the ALJ held on July 29, 2008. On January 26, 2009, the ALJ issued a D. & O. dismissing the complaint. In June 2011, the Board remanded for further clarifications.

On remand, an ALJ "held a re-hearing on April 3, 2012 in order to clarify certain factual ambiguities underscored by the ARB's directive and to make adequate witness credibility determinations" The second ALJ ruled against Bobreski, and he again appealed to the Board.

⁴³ D. & O. (Bullard) at 15, 16 (varied accounts), 17; D. & O. (Romano) at 4; Tr. (Bullard hearing) at 66-67, 90, 138; Tr. (Romano hearing) at 153; CX 1 at 4-5; CX 4 at 17; CX 10.

⁴⁴ CX 1, at 1, 4-5.

⁴⁵ D. & O. (Bullard) at 20.

⁴⁶ CX 1, at 1, 4-5.

JURISDICTION AND STANDARD OF REVIEW

As the Secretary's designee on appeals, we have authority to review the ALJ's decision and serve as the final executive and quasi-judicial review of whistleblower claims. Pursuant to the Secretary's regulations, the Board reviews questions of law de novo and "findings of facts" for substantial evidence.⁴⁷

The meaning of substantial evidence has loosely been described in several ways but with some repeated themes. Obviously, the "substantial evidence" test requires that there be "evidence" behind each of the ALJ's material fact findings. The more difficult part of the substantial evidence test is the word "substantial." In defining the term "substantial," the Board and the federal courts have required that substantial evidence be the kind that "a reasonable mind might accept as adequate to support a conclusion,"⁴⁸ a logical relationship between evidence and a finding of fact. The fact finding must "take into account whatever in the record fairly detracts from its weight,"⁴⁹ having a sufficient contextual strength. A finding of fact lacks contextual strength and substantial evidence if "the [adjudicator] ignores, or fails to resolve, a conflict created by countervailing evidence"⁵⁰ or "if it is overwhelmed by other evidence or if it really constitutes mere conclusion."⁵¹ Given these principles, the substantial evidence test requires us to apply a three-part analysis for each finding of fact relevant to the issues on appeal: (1) whether the ALJ and/or the parties have identified record evidence for each of the material fact findings; (2) whether the supporting evidence logically supports the fact finding; and, if so, (3) whether the record as a whole overwhelms the fact finding or contains factual disputes that expose the fact finding as still unresolved. We must be convinced that each fact finding has evidence allowing for a logical inference that arguably fits with the remaining record. We listed these three analytical steps in a self-evident progressive order, but we recognize that any one of these steps alone can expose the lack of substantial evidence and that no particular order is required.

⁴⁷ For the delegation, see Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378, § 5(c)(19) (Nov. 16, 2012). 5 U.S.C.A. § 557(b)(Thomson Reuters 2011). For the standard of review, see 29 C.F.R. § 24.110(b). See also *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015, slip op. at 5 (ARB Mar. 31, 2011).

⁴⁸ *Universal Camera v. N.L.R.B.*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 7 (ARB June 29, 2006).

⁴⁹ *Universal Camera Corp.*, 340 U.S. at 488.

⁵⁰ *Dorf v. Bowen*, 794 F.2d 896, 901 (3d Cir. 1986).

⁵¹ *Dalton v. U.S. Dep't of Labor*, No. 01-9535, 2003 WL 356780, at *445 (10th Cir. Feb. 19, 2003) (quoting *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989)). See also *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159; ALJ No. 2005-STA-063, slip op. at 7-8 (ARB June 30, 2008) (citations omitted).

Several principles of administrative review require us to be cautious in our review of findings of fact. For example, we appreciate that we must uphold an ALJ's supported findings of fact even if substantial evidence supports a contrary view, and even if we justifiably disagree with the finding.⁵² We treat even more carefully the ALJ's credibility determinations based on demeanor and overturn such findings only if they "conflict with a clear preponderance of the evidence" or "are 'inherently incredible or patently unreasonable.'"⁵³ But as for the ultimate question of contributory factor, after accepting the ALJ's findings supported by substantial evidence, we will set aside the ultimate finding if we "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes."⁵⁴

DISCUSSION

Governing Law

In deciding any whistleblower case, we look first to the ERA whistleblower statute that governs this case and provides a list of protected activity at 42 U.S.C.A. § 5851(a)(the ERA Protected Activity).⁵⁵ That section provides as follows:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee) —

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

⁵² *Hirst v. Se. Airlines, Inc.*, ARB Nos. 04-116, 04-160; ALJ No. 2003-AIR-047, slip op. at 6 (ARB Jan. 31, 2007) (quoting *Universal Camera Corp.*, 340 U.S. at 488).

⁵³ *Palmer v. W. Truck Manpower*, No. 1985-STA-006, slip op. at 4 (Sec'y Jan. 16, 1987) (quoting *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978)). See also *Jeter v. Avior Tech. Operations, Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008).

⁵⁴ *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 7 (ARB Sept. 24, 2009) (quoting *Universal Camera Corp.*, 340 U.S. at 477-478).

⁵⁵ See notes 1 and 2.

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any 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;

(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 this chapter or the Atomic Energy Act of 1954, as amended.

Subsection 5851(b)(3)(C) provides that “[t]he Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any [ERA Protected Activity] was a contributing factor in the unfavorable personnel action alleged in the complaint.” This provision creates the “violation” clause of the ERA whistleblower provisions. The plain meaning of “contributing factor” focuses on whether protected activity did or did not, in fact, contribute at all to an employer’s unfavorable employment action. Congress expressly ensured that the causation standard was not defined as meaning an essential (“but for”) or significant (“motivating”) factor as in other discrimination statutes but rather a lower causation standard of “contributory factor.” To prove that a covered employer “violated” the ERA whistleblower protection law, a complainant must establish that: (1) he engaged in activity the ERA protects; (2) the employer subjected him to an unfavorable personnel action; and (3) the protected activity was in fact a “contributing factor in the unfavorable personnel action.” 42 U.S.C.A. § 5851(b)(3)(C).⁵⁶ If a complainant proves that a violation occurred, then the focus turns to the relief that should be ordered.

The affirmative defense clause of the ERA whistleblower provisions, 42 U.S.C.A. § 5851(b)(3)(D), prevents the Secretary from ordering relief for a proven whistleblower violation “if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior” (the same decision defense). The higher standard of proof makes sense where the complainant proved, in fact, that the employer violated the ERA whistleblower provision. As the Eleventh Circuit observed in 1997, Congress deliberately sought to make it tough for violators to escape from paying for their unlawful whistleblower retaliation.⁵⁷ But this high standard applies only if the complainant first convinces the ALJ by a preponderance of all the relevant evidence presented that protected activity actually contributed to the employer’s unfavorable employment action.

⁵⁶ See also *Hoffman v. NextEra Energy, Inc., & Florida Power & Light Co.*, ARB No. 12-062, ALJ No. 2010-ERA-011, slip op. at 4 (ARB Dec. 17, 2013) (Amended Decision).

⁵⁷ *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

The Issues Pending Before the Board after Remand

In the first ALJ Decision, the ALJ found that Bobreski had proven that he engaged in protected activity and suffered an adverse action (refusal-to-hire),⁵⁸ leaving causation as Bobreski's only unproven element in his claim of a whistleblower violation. On appeal, in reviewing the issue of causation, we found that: (1) the ALJ erred by excluding whistleblower litigation in defining Bobreski's protected activity; (2) the ALJ's decision had material conflicting findings of fact and left critical questions of fact unresolved; and (3) the ALJ failed to consider the evidence as whole as required by law. All of these errors materially affected the issue of causation. We now turn to that issue.

In our remand order, we emphasized that the complainant's burden on the causation element involves a single ultimate issue after an evidentiary hearing in ERA whistleblower cases: whether the complainant proved that his protected activity was a "contributory factor" in the employer's unfavorable employment decision. To answer that question, where the complainant presents his case by circumstantial evidence, we repeatedly stated that the ALJ must consider "all" the evidence "as a whole" to determine if the protected activity did or did not "contribute." By "all" of the evidence, we mean all the evidence that is relevant to the question of causation. This requires collecting the complainant's evidence on causation, assessing the weight of each piece, and then determining its collective weight. The same must be done with all of the employer's evidence offered to rebut the complainant's claim of contributory factor. For the complainant to prove contributory factor before the ALJ, all of his circumstantial evidence weighed together against the defendant's countervailing evidence must not only permit the conclusion, but also convince the ALJ, that his protected activity did in fact contribute to the unfavorable personnel action. Because contributory factor permits unlawful retaliatory reasons to co-exist with lawful reasons, a complainant does not need to prove that lawful reasons were pretext.⁵⁹ Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence.⁶⁰ As the United States Supreme Court has stated, "[c]ircumstantial

⁵⁸ At oral argument, Givoo objected to the Board's statement that Bobreski was "rejected" for the Hope Creek outage. As the court stated in *Hasan*, for claims asserting discriminatory refusal to hire, there is no relevant difference between "not selected" and "rejected." See *Hasan v. U.S. Dep't of Labor*, 545 F.3d 248, 251 (3d Cir. 2008) ("A failure to hire a qualified individual for a position is a 'rejection' for purposes of establishing" a retaliatory refusal to hire under the ERA.).

⁵⁹ See *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 7, n.17 (ARB Sept. 26, 2012). ALJ Romano erroneously required that Bobreski prove his protected activity was "the reason" for the unfavorable employment action and that Bobreski prove "pretext" as to the employer's reasons. D. & O. (Romano) at 8.

⁶⁰ See, e.g., *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 299, 302-306 (3d Cir. 2007) (a "broad array" of circumstantial evidence may prove a causal link, such as temporal proximity, animus, antagonistic conduct, discriminatory remarks by nondecisionmakers, and inconsistent reasons). See also *Hoffman v. Bossert*, No. 1994-CAA-004, slip op. at 5 (Sec'y Sept. 19, 1995) (respondent's

evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."⁶¹

After attempting to comply with the statutory and regulatory⁶² mandate to consider the evidence as a whole, the ALJ on remand found that Bobreski failed to prove his protected activity contributed to Givoo's rejection of him in 2006. The ALJ in *Bobreski II* found no causal link ultimately on the grounds that a third party, Law, unilaterally decided not to hire Bobreski, purportedly without Givner's or Morgan's influence. Both ALJs raised serious concerns about Givner's testimony and Givoo's rebuttal evidence. Bobreski argues that the ALJ on remand failed to consider all of the evidence as a whole as the Board required and failed to consider the strong inferences created by the circumstantial evidence. In contrast, Givoo argues that the ALJ correctly ruled that Law made a unilateral decision to reject Bobreski without Givoo's influence.

We agree with Bobreski that ALJ Romano, like the first ALJ before him, failed to consider the evidence as a whole and collectively weigh all of Bobreski's evidence against all of Givoo's rebuttal evidence to determine the question of causation. Instead, as we elaborate below, both ALJs fragmented the causation question into many subparts and required Bobreski to prove each of the subparts by a preponderance of the evidence, and arguably required direct evidence.⁶³ For example, despite ALJ Romano's express finding that Givoo's top operations

shifting explanations were relevant because they strongly indicated that lack of work and low seniority were a pretext).

⁶¹ *Desert Palace, Inc., v. Costa*, 539 U.S. 90, 100 (2003) (quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957)). See also *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 161 (3d Cir. 2013) (direct evidence is not required to prove causation in a Title VII employment discrimination case) (quotation omitted).

⁶² ALJ orders must be issued "on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C.A. § 556 (d). We note that the ALJ also has a duty under applicable procedural regulations to make his or her decision based on the record as a whole. See 29 C.F.R. § 18.57(b).

⁶³ While ALJ Bullard said Bobreski did not need to "raise direct evidence," she looked at the circumstantial evidence in fragments and effectively required direct evidence in each fragment and did not consider the cumulative effect of the circumstantial evidence. D. & O. (Bullard) at 27. For example, she rejected the circumstantial evidence of Morgan's employment relationship with Givner because they did not "physically" work together" and because they did not work at a "common site on a daily basis." D. & O. (Bullard) at 24, 26-27. This suggests that for ALJ Bullard it was necessary for co-workers to sit next to each other on the exact day that a news story breaks to be convinced that Morgan knew of the seven-year long WASA litigation. ALJ Bullard said very little about the circumstantial evidence that Morgan was one of Givoo's top managers from the fall of 2005 through the Hope Creek outage in 2006. Likewise, ALJ Romano focused on Morgan's employment with Sun in July 2005 in finding that the evidence of record about Morgan's knowledge was "insufficient for [him] to infer that Mr. Morgan had knowledge of Complainant's whistleblowing." D. & O. (Romano) at 12. ALJ Romano overlooked the same mountain of circumstantial evidence Bobreski presented, like the fact that Morgan was Givoo's marketing

manager (Givner) had “animus” and “some influence” over the Hope Creek outage staffing, he, like ALJ Bullard, ultimately required the equivalent of direct evidence that Givner told Morgan and Law to reject Bobreski and direct evidence that Morgan knew of Bobreski’s WASA litigation.⁶⁴ But “[p]roof of knowledge can take the form of direct or circumstantial evidence.”⁶⁵ Not surprisingly, Bobreski had no direct evidence in this case where the Respondent’s managers are the only source of direct evidence as to what they said to each other or implicitly understood about hiring Bobreski on a Givoo contract.

In reaching our decision, we adhered to the review standards previously mentioned and we relied on the ALJs’ findings supported by substantial evidence to determine whether the ALJs made the necessary findings to reach a decision and properly dismissed Bobreski’s case. We did not reach our conclusions by reweighing all the evidence, resolving conflicts in the evidence, and making credibility determinations. We find that critical fact findings lack substantial evidence. Given that Bobreski has the burden of proof on causation, we begin our analysis by reviewing the ALJs’ findings of fact and undisputed facts related to Bobreski’s case to determine, when viewed as a whole, whether it could support a finding of whistleblower retaliation. If such evidence could not support a finding of retaliation, then our review of the merits can cease. If his evidence as a whole can support a finding of whistleblower retaliation, then we will examine the weight of Givoo’s evidence to determine if it could support an ALJ finding that it rebutted Bobreski’s claim of retaliation. If Givoo’s evidence fails to provide legally sufficient basis to rebut Bobreski’s evidence, we must consider whether a remand is necessary or whether Bobreski’s evidence is so strong that remand is unnecessary.

The ALJs’ findings regarding Bobreski’s Evidence

The ALJs’ findings of fact supported by substantial evidence and undisputed evidence demonstrate that Bobreski presented very strong evidence of whistleblower retaliation that stretched the gamut of circumstantial evidence (e.g., temporal proximity, shifting explanations and policies, pretext, significant inconsistencies, etc.). To begin with, the ALJs’ findings related to Bobreski’s prima facie evidence for a failure-to-hire claim bear upon the question of causation, including that he was well qualified for the job in question and had direct and recent experience working outages at the Salem/Hope Creek Plant twice in 2005.⁶⁶ All the decision-

manager at the Salem/Hope Creek Nuclear Plant where Law also worked, not to mention the very suspicious manner in which Givoo rejected Bobreski.

⁶⁴ D. & O. (Romano) at 12 (finding that Bobreski failed to prove Morgan’s knowledge). As implausible as it is that Morgan did not know about Bobreski’s protected activity, the “knowledge” requirement is met if the legal entity was on notice. *See, e.g., Gordon v. N.Y.C. Bd. of Educ.*, 232 F.3d 111, 113-14, 116 (2d Cir. 2000) (Title VII context).

⁶⁵ *Goodman v. Pa. Tpk. Comm’n*, 293 F.3d 655, 670 (3d Cir. 2002).

⁶⁶ Like Title VII cases, we find that evidence relevant to support a prima facie case of failure-to-hire is also relevant circumstantial evidence in ultimately proving retaliation. *Olson v. Gen. Elec. Astrospace*, 101 F.3d 947, 952 (3d Cir. 1996) (“Once the plaintiff has pointed to some evidence which sufficiently discredits the employer’s proffered reasons, plaintiff need not ‘also come forward

makers for the Hope Creek 2006 outage agreed that Bobreski was qualified to do the work, and they all said they would have hired Bobreski. The only list in the record of potential candidates had Bobreski's name on it four times. Givoo had to "scramble" to hire workers because of a shortage of available workers due to six outages in the area. Bobreski's name was actually uttered by Morgan and Law when they met together to review the list of candidates to staff the Hope Creek outage. Law had hired Bobreski twice in 2005 to work at the Salem/Hope Creek facility, but neither of those projects involved Givoo.

The ALJs' findings regarding temporal proximity substantially add to the cumulative weight of Bobreski's claim that his protected activity contributed to Givoo's rejection of him in the spring of 2006. In July 2005, Bobreski won his whistleblower retaliation claim against WASA, a utility plant operator with whom Givoo had a long-term contract stretching from at least 1999 to 2008. This was significant because Bobreski was a Givoo employee when he engaged in whistleblowing activity at WASA. Givoo tried to downplay the WASA litigation as irrelevant, but the entire case centered on Bobreski's and other Givoo employees' interactions with WASA managers. Key evidence included Bobreski's communications with Daniel Juanillo,⁶⁷ Givoo project manager at WASA. One of Givoo's high-ranking managers (John Moore) testified at a deposition for that case. In the July 2005 WASA decision, the ALJ mentioned Givoo or its project manager (Juanillo) over 300 times throughout her 55-page written order in addition to the countless references to Bobreski. Even at the conclusion of the decision, in postponing the damages issue for additional analysis, the ALJ said there was uncertainty about the damages because Bobreski was no longer working for Givoo. Givoo still held the contract for the Blue Plains facility in 2005 and 2006. In January 2006, only a few months after the WASA ruling, Givoo secured a bid to do work at the Hope Creek plant. Bobreski and WASA settled the WASA case in September 2006, after the Hope Creek outage. Consequently, the hiring decisions in this case were engulfed by the whistleblowing litigation involving one of Givoo's clients.

The ALJs' findings regarding Givner's animus and motivation add more weight to Bobreski's whistleblower claim. The first ALJ was "skeptical of Mr. Givner's testimony that he was willing to hire Complainant," finding such testimony "inconsistent with the evidence . . ."⁶⁸ She further found that Givner understood that "Complainant would not seek employment with Respondent [Givoo]."⁶⁹ The second ALJ reaffirmed this fact in finding that "Givner harbored some animus toward Complainant and had motive to retaliate against Complainant for his

with additional evidence of discrimination beyond his or her *prima facie* case.' Rather, the factfinder may consider the elements of plaintiff's *prima facie* case along with the rejection of the employer's explanation and conclude that illegal discrimination is more likely than not the true reason for the challenged employment action.'" (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)).

⁶⁷ Juanillo was fired from Blue Plains in May 2000. See *Bobreski v. D.C. Water & Sewer Auth. (WASA)*, ALJ No. 2001-CAA-006, slip op. at 40, n.100.

⁶⁸ D. & O. (Bullard) at 23.

⁶⁹ *Id.*

whistleblowing against WASA.”⁷⁰ Givoo hired Bobreski almost a dozen times before the 1999 WASA incident but never after that incident. Givner was the one who fired Bobreski at WASA in 1999. In 2000, after the Bobreski story broke on the front page of the Washington Post, Givner ordered Moore to send out a memo reminding employees that they must obtain his approval for all media contacts.

Givner’s animus toward Bobreski was critical because Givner secured the contract with Shaw a few months after the WASA liability ruling and signed the contract on Givoo’s behalf. Further, both ALJs expressly found that Givner was involved at some level in the hiring process for the outage. Givner’s wife owns Givoo and Givner serves as the top manager. The first ALJ found that the hiring process began with Givner, and Givner successfully insisted that an individual named Stan Myka (or Mica) be hired even though he was not on Law’s list of potential candidates. Law was told to turn over his “list of technicians” to Givner and Morgan, which he did, and Givner noticed Bobreski’s name on it. The first ALJ found that Givner oversaw the “day-to-day operations, including seeking contracts and managing employees.”⁷¹ This would include the PSE&G and Shaw contracts to staff the spring 2006 outage.

The ALJs’ findings regarding shifting policies and shifting explanations add yet more weight to Bobreski’s circumstantial evidence case of retaliation. A significant shift in conduct was that Law hired Bobreski twice in 2005 at the Salem/Hope Creek Plant when Givoo was not involved and then did not hire him in 2006 at the same nuclear plant when Givoo was involved, after Law learned for the first time about Bobreski’s successful whistleblower case. Although dismissing some of the shifting as “understandable,” the second ALJ expressly acknowledged that Law and Morgan “provided Complainant with ‘shifting explanations about the hiring process.’”⁷² For example, Shaw told Law that Givoo would be in charge of the staffing, not Law as previously, but in reality Givoo and Shaw acted as a partnership in making hiring decisions. Yet, when Bobreski called Law, Law told Bobreski both on February 27 and March 20 or 21 that he had nothing to do with the hiring and that Bobreski would have to call Morgan. When Bobreski spoke to Morgan on March 20th or 21st, Morgan said there was a hiring freeze, but Givoo continued to hire technicians after that date. Morgan told Bobreski that he should look for work at another plant that was hiring.

Givoo’s inconsistent explanations continued into the litigation of Bobreski’s claims. The ALJs glossed over the many inconsistencies arising during OSHA interviews, but they did not and cannot discount the inconsistencies created by Givoo’s own written statement. Givoo’s written statement to OSHA, signed by Givner, identifies entirely different reasons to explain why Bobreski was not hired and nowhere mentions that Law rejected Bobreski, much less unilaterally rejected him. In fact, the written statement identifies Morgan as the person who was in charge of staffing and nowhere mentions that Law had a decision-making role in hiring decisions. The statement also points to union protocols and lack of an updated resume as additional reasons for

⁷⁰ D. & O. (Romano) at 11.

⁷¹ D. & O. (Bullard) at 13.

⁷² D. & O. (Romano) at 11.

not hiring Bobreski. But ALJ Bullard rejected as incredible the testimony that submission of a résumé was mandatory and specifically found that application requirements did not exist. In the statement to OSHA, Givner said that Givoo did not hear from Bobreski before April 3, 2006, and “at no time during this period did Mr. Morgan receive a call from Bobreski,” but ALJ Bullard found and record evidence shows that Bobreski had called Law and Morgan multiple times between February 27 and March 21, 2006. Other reasons Givner cited in his written statement included that Givoo did not know where Bobreski was even though Bobreski had just won his lawsuit against WASA (Givoo’s client) in July 2005, was still litigating that claim in 2006, Bobreski had worked twice in 2005 for Law at the Salem/Hope Creek Nuclear Plant, and was listed four times on a list sent to Givner in February 2006. One of the most glaring inconsistencies is that Givner and Morgan said they would hire Bobreski and that he was qualified but, in fact, they did not hire him in 2006 or at any time after the WASA whistleblowing incident in 1999.⁷³ The circumstantial evidence does not end there and continues to pile up.

The ALJs’ findings about the relationships between and among the managers and decision-makers also bolsters Bobreski’s circumstantial evidence case that Givner, Morgan, and Law acted in concert to staff the Hope Creek outage consistent with Givner’s expressed or implied wishes.⁷⁴ All of them knew each other and worked with each other over a period of at least 15 years. All of them worked at some of the same east coast facilities. Givoo had only a handful of permanent employees over the years, including Morgan and Law. Givner explained that Morgan and Law worked together as partners in deciding whom to hire. Morgan was not just “close to Respondent’s management,” as the first ALJ described him, he was “management.” Returning to Givoo in October 2005, Morgan was among the top three Givoo managers working on staffing and service contracts, where Givoo employed a total of six permanent employees. Morgan worked at Salem/Hope Creek Nuclear Plant at the end of 2005, where Law and Bobreski were working at the end of 2005, circumstantial evidence the ALJs overlooked.⁷⁵

⁷³ There is no evidence of record to support that Givoo ever offered Bobreski a job after the spring 2006 outage.

⁷⁴ See *Byrd v. Ill. Dep’t of Pub. Health*, 423 F.3d 696, 708-09 (7th Cir. 2005) (“If the employer simply rubber-stamps a recommendation tainted with illegal bias, the employer is liable for the harm caused” unless the employer took action against the complaining employee for independent reasons untainted by any illegal motive.); *Willis v. Marion Cnty. Auditor’s Office*, 118 F.3d 542, 547 (7th Cir. 1997) (The “contributory factor” test prevents “an employer from escaping liability by setting up many layers of pro forma review, thus making the operative decision that of a subordinate with an illicit motive.”).

⁷⁵ Focusing too much on Morgan’s work in Canada and home in Syracuse, New York, as if he had no possible way of contacting Givoo, the ALJs overlooked the more significant facts that Morgan worked for Givoo months before the Hope Creek outage in addition to working at the Salem/Hope Creek Nuclear Plant where Law heard from a co-worker that Bobreski won his WASA case. See *Goodman*, 293 F.3d 655 at 671 (an employer’s knowledge can be inferred from circumstantial evidence, e.g., evidence that the information was well known in the workplace).

Taken as a whole, the ALJs' findings related to Bobreski's circumstantial evidence presented a very strong case that Bobreski's protected activity contributed to the reason that the Givner-Morgan-Law trio did not select him for the 2006 Hope Creek outage. The inference of retaliation in such a strong case cannot be ignored without rebuttal evidence supported by substantial evidence.⁷⁶ We next review the ALJs' findings relating to Givoo's rebuttal evidence to determine whether it provides support for ALJ Romano's ultimate finding that Bobreski's protected activity did not contribute at all to Givoo's failure to hire him for the 2006 Hope Creek outage.

Deficiencies with the ALJ's findings regarding Givoo's rebuttal evidence.

ALJ Romano concluded that Givoo's evidence rebutted Bobreski's mountain of circumstantial evidence of whistleblower retaliation ultimately because of one reason: a non-Givoo employee (Law) unilaterally rejected Bobreski for the Hope Creek outage.⁷⁷ We find four reasons why this finding fails to support the dismissal of Bobreski's claim that Givoo retaliated against him. First, this reason does not address the first wave of individuals hired by Givoo without Law's involvement. In early February 2006, Givner saw Law's candidate list with Bobreski's name appearing multiple times, and Givner did not hire him before Law's involvement. Second, the ALJ's findings establish that Morgan also rejected Bobreski on March 21, 2006, when he told Bobreski there was a "hiring freeze" and that he should look for work elsewhere; yet, the ALJ's findings establish that hiring continued after that date. Morgan contradicts his own statement that he had "no objection" to Bobreski. Consequently, Givoo's evidence that Law allegedly made a unilateral decision does not rebut the evidence of Givner's initial hiring decisions and Morgan's direct rejection of Bobreski. These gaps in the findings are

⁷⁶ Similar to motions for directed verdict, in rare instances, the complainant presents a case so strong that the fact finder cannot disbelieve it and the only reasonable conclusion is to rule in his favor. *Cf.* Trials, 9B Fed. Prac. & Proc. Civ. § 2535, n.4 (3d ed.) (discussing judgment as a matter of law for party bearing burden of proof). *See also Gatenby v. Altoona Aviation Corp.*, 268 F. Supp. 599, 602-09 (W.D. Pa. 1967) (granting plaintiff's motion for directed verdict for plaintiff and rejecting jury's defense verdict). In this case, as we explain later in our opinion, Givoo's rebuttal evidence fails to constitute substantial evidence. Consequently, regardless of whether Bobreski would be entitled to a directed verdict at the close of his case, we find that he would be entitled to a verdict as a matter of law upon the failure of Givoo's rebuttal evidence.

⁷⁷ D. & O. (Romano) at 14. In its supplemental brief to the Board, Givoo argues hypothetically that "even if Givoo made the decision not to hire Mr. Bobreski, which it did not, that that decision would have been by Melvin Morgan" who allegedly knew nothing about Bobreski's whistleblower claim. Givoo's supplemental brief at 13. (Emphasis added). This hypothetical posturing is not evidence. *See, e.g., Versarge v. Twp. of Clinton N.J.*, 984 F.2d 1359, 1370 (3d Cir. 1993) ("unsubstantiated arguments made in briefs or at oral argument are not evidence to be considered by this Court."). Givoo should know whether it did or did not make the decision (through Givner and/or Morgan) or did or did not contribute in the decision. More importantly, if "Givoo made the decision" then this would be more evidence that Morgan and Law are not telling the truth about Law's unilateral role in rejecting Bobreski.

material gaps that typically would require us to remand this matter to the ALJ for further findings, but we explain below that a remand is unnecessary.⁷⁸

The third fundamental deficiency with ALJ Romano's finding that Law unilaterally rejected Bobreski, is that it contradicts ALJ Bullard's findings. ALJ Romano ruled in *Bobreski II* as follows:

The evidence in this case indicates that Givoo and Shaw worked in partnership to select technicians to work at the Hope Creek facility, but that *Mr. Law retained final authority* to either accept or reject applicants. The evidence further indicates that Mr. Law rejected Complainant because Complainant was not high enough on Mr. Law's list of candidates and that Complainant would have been hired if there was a greater need for technicians. (Tr. p. 137.) *He did so without input from any party to this case.*^[79]

In *Bobreski I*, ALJ Bullard ruled the opposite and concluded that Morgan had the final authority, more specifically as follows:

Despite contradictory evidence, I find from the record as a whole that *Mr. Morgan was the individual responsible for hiring*. Mr. Law and Mr. Morgan both initially testified to OSHA that Mr. Morgan had been in charge of hiring. CX 2, 5. I find that the evidence establishes that *Mr. Law had significant input* in the hiring process for the spring 2006 outage, and that *Mr. Morgan acted upon his recommendations* regarding the suitability of technicians for the job, including assigning Complainant a low spot on the list of candidates. Tr. at 189. However, despite Morgan's deference to Mr. Law's suggestions, it was Morgan who was employed by the contractor that was being paid to do the hiring. Morgan was the person who notified technicians that they were hired, which suggests that *he had final approval.*^[80]

ALJ Romano adopted ALJ Bullard's findings and only sought to supplement the record evidence. But his finding as to Law's role creates a split decision on a very critical finding of

⁷⁸ See footnote 76. In addition, given our rejection of Givoo's rebuttal evidence and no indication that it can offer more evidence after years of litigation and two evidentiary hearings, we find that we must decide these issues at this point. See *Morales v. Apfel*, 225 F.3d 310, 320 (3d Cir. 2000) (deciding benefits question rather than remanding due to the years of litigation).

⁷⁹ D. & O. (Romano) at 14. (Emphasis added).

⁸⁰ D. & O. (Bullard) at 27. (Emphasis added).

fact that we must reconcile.⁸¹ Furthermore, the ALJ's inconsistent findings may render conclusions stemming from them "suspect, and we need not afford our usual deference" to such fact findings.⁸² The ALJ's contradiction on this matter is understandable given the differing explanations Givoo gave throughout this litigation. Nevertheless, we reconcile these findings to mean that both Morgan and Law were critical to the hiring process and acted jointly or as a partnership to hire or reject candidates. In fact, Givoo's witnesses repeatedly testified they were partners in the decisions, they made them together, and they both had ultimate control over who would or would not be hired.

ALJs' Ultimate Findings Lack Substantial Evidence

1. Credibility Determinations

The fourth fundamental error we find with ALJ Romano's ultimate ruling as to Law's role is the lack of substantial evidence supporting it. As we indicated earlier, the first step of the substantial evidence review requires that we understand what record evidence exists for each material fact finding. In this case, the ALJ and Givoo rely entirely on the testimony of Givner, Morgan, and Law for the finding that Law acted alone without Givoo's input.⁸³ Logically, the first determination that the ALJ must make is whether these three material witnesses were credible and the failure to do so can constitute reversible error.⁸⁴ Yet, the ALJ errs by failing to

⁸¹ See CJS, Trial § 1287 (appellate courts should endeavor to reconcile inconsistent findings). See, e.g., *Tenn. Asphalt Co. v. Purcell Enters., Inc.*, 631 S.W.2d 439, 442 (Tenn. Ct. App. 1982) ("the courts endeavor to reconcile findings which appear to be contradictory, so as to uphold the judgment if possible, and in order to do so will construe the findings as a whole and liberally in favor of the judgment; but the rule cannot be used to uphold findings that are inconsistent with each other."); *In re S.R.O.*, 143 S.W.3d 237, 241 (Tex. App. Waco 2004) ("An appellate court must attempt to reconcile conflicts in findings of fact."). See also *Oxford v. Foster Wheeler, LLC*, 99 Cal. Rptr. 3d 418, 431 (Cal. Ct. App. 2009) (It is a "fundamental proposition that a factfinder may not make inconsistent determinations of fact based on the same evidence.").

⁸² *N.L.R.B. v. New York-Keansburg-Long Branch Bus Co., Inc.*, 578 F.2d 472, 478 n.15 (3d Cir. 1978).

⁸³ Givoo submitted no exhibits during the two evidentiary hearings and relies on testimony throughout its response brief on appeal. In its brief, Givoo also argued that Law's list had 200 people and that, besides Bobreski, 60 to 100 people were not hired on this list and Bobreski was ranked low. See Respondent's Reply Brief, pp. 7-9. This argument is a red herring. It is undisputed that Morgan and Law actually rejected Bobreski, and did so more than once, while they discussed Law's list. The question in this case is why they rejected him. In addition, there is no record evidence of a ranking order. Bobreski's name appeared four times on Law's list. Givoo hired individuals listed lower than Bobreski's name on the list and individuals not even on the list.

⁸⁴ See, e.g., *Tieniber v. Heckler*, 720 F.2d 1251, 1254 (11th Cir. 1983) (ALJ must make sufficient findings on credibility where credibility is crucial on appeal); *N.L.R.B. v. New York-Keansburg-Long Branch Bus, Inc.*, 578 F.2d 472, 478, n.15 (3d Cir. 1978) (credibility findings "rest[] with the Administrative Law Judge as long as he considers all relevant factors and sufficiently explains his resolutions") (citations omitted).

provide reasons for finding these individuals credible on this point, preventing us from reviewing such determinations under the substantial evidence test. Nevertheless, we infer that the ALJ found Respondent's managers credible as to the roles they each played or did not play in Givoo's failure to hire Bobreski, and we will examine whether substantial evidence supports that implied inference.

The courts have recognized many factors that factfinders can consider when deciding whether to believe a witness: the relationship a witness has with party litigants, the witness' motivations, inconsistencies in testimony, general plausibility of testimony; etc.⁸⁵ We defer to an ALJ's fact findings when they rest on credibility determinations only when the "decision is based on testimony that is coherent and plausible, not internally inconsistent and not contradicted by external evidence."⁸⁶ But an ALJ may not "insulate his findings from review by denominating them credibility determinations"⁸⁷

In this case, none of the ALJ's findings support an implied finding that Givoo's witnesses are credible, but overwhelmingly weigh against such a finding. Both ALJs found that Givner had "animus" and a "motive" to retaliate against Bobreski.⁸⁸ ALJ Bullard did not believe Givner's testimony that he was willing to hire Bobreski. She did not believe Givoo's evidence that there were mandatory application procedures that Bobreski should have followed. Further, there is direct evidence that Givner made false statements pertaining to this matter. He wrote to OSHA in his position statement dated May 22, 2006, that "at no time [between February 2006 and March 29, 2006] did Mr. Morgan receive a call from Bobreski."⁸⁹ Yet, Morgan did receive two calls from Bobreski during this time period on March 20 and March 21, 2006.⁹⁰ Either Givner lied, or he was recklessly making an assertion without foundation to support his position

⁸⁵ An ALJ must consider "all the relevant factors" in making credibility determinations. *E. Eng'g & Elevator Co. Inc., v. N.L.R.B.*, 637 F.2d 191, 197 (3d Cir. 1980) (quoting *Edgewood Nursing Center v. N.L.R.B.*, 581 F.2d 363, 365 (3d Cir. 1978)). See also *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (some factors for determining credibility other than demeanor and inflection are documents or objective evidence that may contradict the witness' story or an internally inconsistent or implausible story such that a reasonable fact-finder would not credit it); *Altomose Constr. Co. v. N.L.R.B.*, 514 F.2d 8, 13-16 (3d Cir. 1975) (factors in determining credibility include discrepancies in testimony, relationships of the witness to the key actors, circumstances and context surrounding key events, inconsistencies between hearing testimony and sworn affidavits, a witness' incredible and self-serving testimony, past fraudulent conduct by a witness, and bias).

⁸⁶ *U.S. v. Marcavage*, 609 F.3d 264, 281 (3d Cir. 2010) (quoting *U.S. v. Igbonwa*, 120 F.3d 437, 441 (3d Cir.1997)).

⁸⁷ *Id.* (quoting *Anderson*, 470 U.S. at 575).

⁸⁸ D. & O. (Bullard) at 23; D. & O. (Romano) at 11.

⁸⁹ CX 1 at 4.

⁹⁰ D. & O. (Bullard) at 17.

and deny any wrongdoing. Either way, his OSHA statement dramatically weighs against his credibility.

Another objective credibility measure is the relationship of the parties. During both evidentiary hearings, Givner, Morgan, and Law worked for Givoo and Givner was their direct boss and the top operations manager for Givoo. Morgan was a high level manager and Givner's friend. ALJ Bullard expressly found "significant" that Givoo both employed Law in the past and had hired him again before the first hearing and that this fact was not mentioned during the hearing.⁹¹ Similarly, ALJ Romano found that Morgan and Law provided Bobreski with "shifting explanations about the hiring process."⁹² ALJ Bullard questioned Morgan's "general" credibility.⁹³

In addition to Morgan's poor general credibility, shifting explanations, and significant business and personal connection to Givoo and Givner, the general implausibility of his claimed ignorance of Bobreski's WASA litigation weighs against his credibility. Morgan started working for Givoo again in October 2005 and Givoo secured the Hope Creek contract in January 2006. Bobreski was still litigating against WASA, a former Givoo worker suing one of Givoo's current clients. The case had been pending since 1999. Morgan was the Director of Business Development, among Givoo's top three managers working on staffing and service contracts, and one of only a handful of permanent Givoo employees. He marketed the company and worked on staffing. For many years, two of the other top managers (out of three – Givner and Moore) knew about the WASA litigation, Moore having testified at a deposition in the WASA litigation.⁹⁴ Just a few months after the newspaper publicized the WASA ruling in Bobreski's favor, in the fall of 2005, Morgan was working at the Salem/Hope Creek Nuclear Plant, where both Bobreski and Law were working and where workers at that site talked to Bobreski and Law about Bobreski's victory against WASA. When Morgan worked as Givoo's marketing manager side-by-side with Law to staff the Hope Creek outage, supposedly Morgan was the only one (out of the group of

⁹¹ *Id.* at 2.

⁹² D. & O. (Romano) at 11. Rather amazingly, ALJ Romano found the shifting explanations "understandable" in spite of the fact that the business relationships in this case were governed by written contracts and Givoo's witnesses repeatedly said that Givoo and Shaw worked as a partnership. See D. & O. (Romano) at 12.

⁹³ D. & O. (Bullard) at 27. See Am. Jur. 2d Witnesses § 1008 (2011) ("Evidence of false sworn testimony given by a witness in one case conflicting with evidence given by the same witness in another case casts doubt upon his or her entire testimony"). See also *U.S. v. Gilkeson*, 431 F. Supp. 2d 270, 277 (N.D.N.Y. 2006) (partial false testimony on material issue allows but does not require rejection of entire testimony upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything).

⁹⁴ Moore even testified by deposition in this matter on January 3, 2012, that he was aware that Bobreski had won his WASA case because "[i]t was common knowledge" and when "something happens within a company, other people in the company would be aware of it in most cases." CX 16 at 40-41.

Givner, Moore, and Law) that did not know of Bobreski's WASA litigation. In the end, Morgan's denial of knowing about Bobreski's seven-year litigation against WASA and his 2005 success is highly implausible, at best, and so we reject the ALJ's finding that Morgan did not know.⁹⁵

Law's testimony also weighs against his credibility. First, he testified inconsistently in the two evidentiary hearings. In the first hearing, he denied taking any affirmative step so that Bobreski would not be selected and denied ever telling Morgan not to hire Bobreski.⁹⁶ In the second hearing, in response to ALJ Romano's questioning, Law admitted telling Morgan not to hire Bobreski when he said, "no, not at this time," with respect to hiring Bobreski.⁹⁷ Second, after trying to accept responsibility for rejecting Bobreski, he provided no substance to credit his testimony. In fact, ALJ Romano found that Law's reasons were "vague and subjective reasons,"⁹⁸ a point we address more below. Consequently, given the preceding evidence, we find the record lacks substantial evidence to support the ALJ's implicit finding that Givoo's witnesses were credible. This lack of credibility, in turn, eliminates the basis for the ALJ's finding that Law unilaterally rejected Bobreski. Logically, this lack of credibility also negatively affects all of Givoo's witness testimony that the WASA litigation had nothing to do with Givoo's rejection of Bobreski.

2. *Givoo's testimony in context with other evidence*

Apart from the lack of credibility in Givoo's testimonial evidence, such testimony fails the substantial evidence test because it is "overwhelmed by other evidence" and "really constitutes mere conclusion." ALJ Romano relied solely on testimony to conclude that Law was the final authority for the placement of 90 temporary workers at a nuclear plant to perform technical work during the nuclear plant outage. But the record contains no written contract, no memorandum of understanding, no document corroborating Givoo's bald testimony that Law had such final authority. To the contrary, as ALJ Bullard determined, the contract in the record expressly obligated Givoo, not Law, to hire the technicians. The Givoo/Shaw contract expressly and unequivocally imposed staffing and supervision obligations on Givoo. Shaw retained the

⁹⁵ In denying that he knew the details of Bobreski's WASA case, Morgan arguably admitted knowing that there was such a case. When asked how he knew to stay out of anything having to do with Bobreski's whistleblowing, he answered that he does not get involved in other people's business, he worked for a different contractor, and he "already had, you know, that message left to [him] on [his] voicemail," so "the best thing [he] figure[d] [he could] do [wa]s stay out of it." Tr. (Romano hearing) at 115-16. He also stated in response to a question about what he knew about Bobreski's whistleblower when he sat down with Law to staff the job, that he didn't know anything about it, "[he] didn't want to know anything about it. [He] didn't get involved in it. . . . [His] function was to staff a job. So [he] was in that position." *Id.* at 91.

⁹⁶ Tr. (Bullard hearing) at 164.

⁹⁷ Tr. (Romano hearing) at 157.

⁹⁸ D. & O. (Romano) at 13.

right to hire staff during the outage only by “mutual agreement” with Givoo.⁹⁹ Givoo’s final authority was further evidenced by his insistence that Myka (or Mica) be hired after seeing that he was not on Law’s list of potential candidates. ALJ Romano provided no explanation as to how it was plausible to conclude that Law had final authority to reject Bobreski where the contract suggested such authority rested with Givoo.

Givoo’s OSHA statement and the chronology of events further weaken its rebuttal testimony that Law acted alone. The OSHA statement Givner signed says Morgan was in charge and nowhere said that Law was in charge. As previously stated, Law was required to give his list to Givner; Morgan and Law acted as “partners” and they went over the list side-by-side. The record shows that Law sent his list to Morgan on February 15, 2006, before any worker started working the outage and when Law supposedly was not in charge of the hiring. Law told Bobreski on February 27, 2006, and again on March 20 or 21, 2006, that he had nothing to do with the hiring. On or about March 20, 2006, Morgan told Bobreski that there was a “hiring freeze.” Givoo had to submit the final employee names by March 29, 2006. Givoo signed the contract with Shaw on March 29, 2006. This chronology of events provides no evidence that Law allegedly unilaterally rejected Bobreski. In fact, they show the opposite.

Law’s assertion that he rejected Bobreski lacks any substance and, therefore, constitutes a bald assertion that provides no substantial evidence for Givoo’s rebuttal case. Significantly, ALJ Romano found that Law’s reasons were “vague and subjective reasons” but erroneously concluded that Law’s reasons for rejecting Bobreski were irrelevant to this case. To the contrary, if Law had no reasons or only weak reasons, then his rejection of Bobreski would be suspicious and suggest that there was another reason, such as Bobreski’s protected activity. Law hired Bobreski twice in 2005, the last time only a few months before the Givoo staffing in 2006. Law’s next opportunity to hire Bobreski after the WASA verdict was for the Hope Creek project with Givoo. Law provided no written complaints about Bobreski, no supporting documents, no specific dates about any alleged complaints about Bobreski, no specific examples, no names of any complaining parties in support of the vague reasons he had in 2006 for allegedly rejecting Bobreski. The only detail Law provided was that he learned in 2008 while working at the Limerick NGS, but long after the 2006 Hope Creek outage, that other workers had problems with Bobreski. Bobreski worked at Limerick in 2005 (before Law hired him twice in 2005).¹⁰⁰ When asked for specifics about information he knew in 2006, Law spoke vaguely about a job in 1995, ten years before the Hope Creek 2006, and occurring before Law hired Bobreski twice in 2005.¹⁰¹ He described the problem generally as one that was just getting worse over the last 15 years.¹⁰² Apparently, the vague “problem” became critically “worse” between the fall of 2005 (when he last hired Bobreski) and the spring of 2006 when Givoo was staffing the Hope Creek outage. Law vaguely explains that he “dropped” Bobreski lower on “the list,” but there is no

⁹⁹ See CX 9, Contract ¶¶2, 5, 6, pp. 4 – 6 of 34.

¹⁰⁰ CX 3.

¹⁰¹ Tr. (Bullard hearing) at 153.

¹⁰² *Id.* at 152.

document that shows a ranking or that Bobreski was ranked at the bottom. In fact, Givoo hired at least 28 workers that were listed lower than Bobreski's name on Law's list and also hired 18 people on April 3, 2006, that were not on Law's list at all.¹⁰³ This additional context further highlights that the finding about Law's role is not based on substantial evidence (the third part of the Substantial Evidence test, *supra* at 13). Ultimately, the testimony that Law unilaterally rejected Bobreski because he was a "problem" is nothing more than pretext and general unsubstantiated denials of retaliation.¹⁰⁴

In the end, we conclude that Givoo's rebuttal testimony of Law's role fails to meet the substantial evidence test standing alone and especially in context with the record as a whole. Pursuant to the ALJ's findings of fact, Bobreski presented a strong circumstantial case of retaliation that included prima facie evidence, strong temporal proximity, Givner's animus and motive, dramatic change in practice, numerous material inconsistencies, shifting policies, vague explanations, and a close relationship and "partnership" between the decision-makers. Givoo offered weak rebuttal evidence consisting of unsubstantiated and inconsistent testimony from three of its employees. Givoo's evidence did not explain why Givoo did not hire Bobreski during the initial hiring decisions that Givoo made or why Morgan told Bobreski there was a hiring freeze when there was no such freeze. Givoo's evidence was not substantial evidence or it was very weak at best.

With only Bobreski's evidence remaining, we find that it is unreasonable to conclude that Givoo's very weak evidence outweighed Bobreski's strong circumstantial evidence. The evidence overwhelmingly establishes that Givoo and Shaw worked together in deciding who to hire, jointly rejected Bobreski while working as a "partnership," and that Bobreski's protected activity contributed to Givoo's rejection of him for the Hope Creek outage. It does not matter which person actually said "no" to Bobreski's name out loud because they all knew that Bobreski was not to work for Givoo at Hope Creek in the spring of 2006. Givner and Morgan said they would hire Bobreski and that he was qualified but, in fact, they did not hire him in 2006 or at any time after the WASA incident in 1999. A remand on the question of contributory factor

¹⁰³ Comparing Law's list at CX 1 (pages 22-35) to the hire list at CX 10.

¹⁰⁴ See *Timmons v. Franklin Elec. Coop.*, ARB No. 97-141, ALJ No. 1997-SWD-002, slip op. at 6 (ARB Dec. 1, 1998) (employer's expectation that an employee be a "team player" to the point that it interferes with protected activity is prohibited); *Dodd v. Polysar Latex*, No. 1988-SWD-004, slip op. at 8 (Sec'y Sept. 22, 1994) (supervisor claimed that he recommended termination after considering complainant's deteriorating relationships, attitude, and performance, but his testimony taken as a whole showed that he recommended termination solely because of complainant's conflict with another manager over complainant's protected complaints); *Priest v. Baldwin Assocs.*, No. 1984-ERA-030, slip op. at 7, 10 (Sec'y June 11, 1986) (Secretary found pretext where "several additional facts not mentioned by the ALJ" were "highly significant" and one of the employer's proffered reasons at hearing was not previously documented) (citing *Marathon LeTourneau Co., Longview Div. v. N.L.R.B.*, 699 F.2d 248, 252 (5th Cir. 1983)). Cf. *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 481 (3d Cir. 1993) (the alleged "personality" problem or deficiency of interpersonal skills was "reducible" to the problem of the inconvenience caused by the employee's pattern of complaints).

is unnecessary and futile because the ALJ's evidence leads to one conclusion: that Givoo refused to hire Bobreski because of his whistleblower activity related to WASA. We now address whether we need to remand the question of whether Givoo can establish by clear and convincing evidence that it would have made the same decision in the absence of protected activity.

Clear and convincing evidence

As we discussed earlier, if a complainant proves his employer violated the whistleblower protection laws, the employer may avoid paying damages if it can prove by clear and convincing evidence that it would have made the same decision in the absence of protected activity. We find no reason to remand this issue.

Upon the Board's request for additional briefing on the issue of "clear and convincing" evidence, neither party objected to the Board deciding this issue.¹⁰⁵ Having the burden of proving that it would have made the same decision in the absence of protected activity, Givoo failed to point to evidence in the record that could meet its obligations under the "clear and convincing" defense.

Even cautiously viewing the record in the light most favorable to Givoo, developed after two evidentiary hearings and years of litigation, it falls short of providing the clear and convincing evidence Givoo needs to avoid paying Bobreski's damages. In *Speegle*, we explained that the plain language of the statute requires a case-by-case balancing of three factors: "(1) how 'clear' and 'convincing' the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer 'would have' taken the same adverse actions; and (3) the facts that would change in the 'absence of' the protected activity."¹⁰⁶ Morgan testified that he relied on Law and offered no reasons that can satisfy the definition of "substantial evidence." Givner claims no personal involvement related to Bobreski and, therefore, cannot and did not offer reasons for failing to hire Bobreski, much less reasons that would constitute clear and convincing evidence that Givoo would have made the "same decision." Again, ALJ Bullard concluded that Givner would not hire Bobreski. Givoo's OSHA statement said that Givoo would have hired Bobreski were it not for the "unfortunate" lack of communication, which the ALJs rejected as untrue. This leads to the inescapable conclusion that, as a matter of law, Givoo cannot show by clear and convincing evidence it would have rejected Bobreski in the absence of protected activity.

A remand is necessary on the issue of damages and so we remand for a determination of damages. In the alternative, the parties can stipulate to damages, notify the Board if they reach a stipulation on damages and ask the Board to incorporate such stipulation into our final order and certify an order as the final order of the Secretary.

¹⁰⁵ See the parties' supplemental briefs to the ARB. These briefs may be viewed online at <http://www.dol.gov/arb/briefs/13-001/index.htm>.

¹⁰⁶ *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 12 (ARB Apr. 25, 2014) (internal citations omitted).

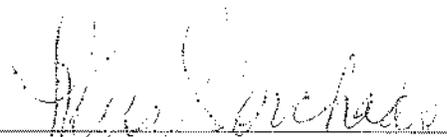
CONCLUSION

In sum, we find several independent reasons compel us to reverse ALJ Romano and find that protected activity contributed to Givoo's refusal to hire Bobreski in 2006. First, in finding against Bobreski on the causation element, the ALJ Romano's reliance on Law's role does not address the first hires that Givoo admits it made. Second, it does not address the fact that a top-level Givoo manager, Morgan, directly rejected Bobreski. Third, we reconcile the ALJs' contrary findings as to who decided to reject Bobreski to mean that Givoo and Shaw jointly rejected Bobreski. Fourth, the ALJ Romano's basis for rejecting the causal link because of Law's role does not rest on substantial evidence, which leaves a mountain of evidence all pointing to Bobreski's successful whistleblower lawsuit against Givoo's contractor, WASA, as a contributing factor if not *the* reason that Givoo rejected Bobreski. Given that Givoo and Law agreed that Givoo and Shaw worked as a partnership to staff the Hope Creek outage, the unsupported testimony that Law acted alone in rejecting Bobreski is not substantial evidence standing alone. It is unreasonable to find that the "partnership" trio of Givner, Morgan, and Law did not expressly and/or implicitly understand that Bobreski could not be hired on a Givoo project given the whistleblowing lawsuit still connecting Bobreski and Givoo. Lastly, the overwhelming evidence of contributory factor, and lack of any other stated reasons for rejecting Bobreski eliminates Givoo's ability to show by clear and convincing evidence that it would have made the same decision in the absence of protected activity; therefore, we remand this matter for the ALJ's determination of damages.

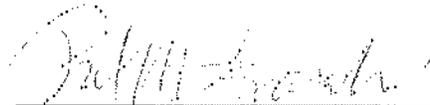
ORDER

For the foregoing reasons, the Decision and Order is **REVERSED** and we **REMAND** this case to the ALJ for a determination of damages. We will postpone the remand for ten (10) days to allow the parties to confer and determine whether they can stipulate to damages, ask the Board to incorporate such stipulation into our final order, and certify an order as the final order of the Secretary. If the Board is not so notified within ten (10) days from the date of this Order, we will remand the case to the ALJ to determine damages.

SO ORDERED.



LUIS A. CORCHADO
 Administrative Appeals Judge



PAUL M. IGASAKI
 Chief Administrative Appeals Judge

Judge Royce, concurring:

I concur in the majority's findings that (1) Bobreski's circumstantial evidence overwhelmingly established causation; (2) Givoo failed to present sufficient evidence to prove its affirmative defense under the "clear and convincing" standard; and (3) remand is necessary for a determination of damages. I write separately to clarify that I arrive at these determinations by a different route than the majority. When Congress amended the ERA whistleblower provisions in 1992, it created a statutory two-stage framework for separately weighing the parties' respective evidence pertaining to causation. It is the complainant's burden at the first "contributing factor" stage to demonstrate *by a preponderance of the evidence* that his or her protected activity was a contributing factor in the adverse action. The respondent's evidence of non-retaliatory reasons should not be weighed against the complainant's evidence of causation at this first "contributing factor" stage. The ARB has repeatedly held that to prevail, the complainant need only show that his protected activity was a "contributing factor" in the discharge or discrimination. A "contributing factor" merely constitutes "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision." Thus, a complainant may prevail even in the case where the respondent's reason is legitimate, because "while true, [the legitimate reason] is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity." *White v. Action Expediting*, ARB No. 13-015, ALJ No. 2011-STA-011, slip op. at 5 (ARB June 6, 2014); *Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ No. 2008-STA-020, slip op. at 8 (ARB May 13, 2014); *Heinrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 10 (ARB June 29, 2006); *Klopfenstein v. PCC Flow Techs Holdings*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18-19 (ARB May 31, 2006). Assuming the complainant's evidence is sufficient to sustain proof of "contributing factor" causation; the respondent's non-retaliatory reason for its action may not be weighed against the complainant's evidence of causation but instead must be weighed at the second affirmative defense stage under the higher clear and convincing evidence standard.

The ALJ erred by weighing Givoo's rebuttal evidence, pertaining to its alleged legitimate business reasons, against Bobreski's causation evidence at the first "contributing factor" stage of the ERA whistleblower framework. The majority likewise improperly weighs Bobreski's causation evidence against Givoo's non-discriminatory reasons at the first stage, but it does not ultimately affect the outcome in this case because the majority found that Bobreski proved causation. I agree with the majority that Givoo failed to show by clear and convincing evidence that it would have declined to hire Bobreski in the absence of his protected activity.



JOANNE ROYCE
Administrative Appeals Judge

ADMINISTRATIVE REVIEW BOARD
Certificate of Service

ARB CASE NAME : *James J. Bobreski v. J. Givoo Consultants*

ARB CASE NO. : **13-001**

ALJ CASE NO. : **2008-ERA-003**

DOCUMENT : **ORDER**

A copy of the attached document was sent to the following parties on

AUG 29 2014

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