



In the Matter of:

GARY JOE PIERCE,

COMPLAINANT,

v.

**UNITED STATES ENRICHMENT
CORPORATION,**

RESPONDENT.

ARB CASE NOS. 06-055

06-058

06-119

ALJ CASE NO. 2004-ERA-001

DATE: August 29, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Everett C. Hoffman, Esq., *Priddy, Cutler, Miller & Meade, PLLC*, Louisville, Kentucky; John Frith Stewart, Esq., *Stewart, Roelandt, Stoess, Craigmyle & Emery, PLLC*, Crestwood, Kentucky

For the Respondent:

Sharam Ghasemian, Esq., *United States Enrichment Corporation*, Bethesda, Maryland; Charles C. Thebaud, Jr., *Morgan, Lewis & Bockius, LLP*, Washington, District of Columbia

FINAL DECISION AND ORDER

Gary Joe Pierce filed five complaints with the United States Department of Labor alleging that his employer, United States Enrichment Corporation (USEC), violated the employee protection section of the Energy Reorganization Act (ERA or Act). The Act safeguards employees who engage in certain protected activities from employer

retaliation.¹ A Department of Labor (DOL) Administrative Law Judge (ALJ) consolidated the complaints for hearing. The ALJ concluded that USEC violated the ERA and recommended that we grant the complaint. Both Pierce and USEC filed petitions for review of the ALJ's decision with the ARB. USEC also filed a petition for review of the Attorney Fee Order in this case.²

BACKGROUND

The ALJ thoroughly discussed the facts of this case as presented at the hearing. R. D. & O. at 2-16. We summarize briefly.

At all times relevant to this decision, USEC leased and operated an enrichment plant for uranium in Paducah, Kentucky. The Department of Energy owns the plant. USEC is subject to the ERA. R. D. & O. at 2. In 1980 Pierce began working at the Paducah plant as a Machinist Trainee and worked there for 26 years. When USEC terminated Pierce's employment in January 2003, he was a Quality Control (QC) Group Manager for the plant. R. D. & O. at 3. In July 2000 the QC and Quality Assurance Divisions combined to form the Nuclear Safety and Quality Division (NS&Q) under the supervision of Jorge Labarraque. *Id.* Also in 2000, USEC laid off 29 salaried employees, including Pierce's wife, Nancey Pierce. Nancey Pierce filed allegations against USEC before the Nuclear Regulatory Commission, and in January 2001, she also filed an ERA complaint with the Department of Labor. On August 24, 2000, Pierce's attorney informed USEC that Pierce was assisting his wife with her claims against USEC. R. D. & O. at 4; CX-108.

Shortly after he took over at NS&Q, Labarraque initiated an error-free clock in the division and ordered that the clock be reset each time an error occurred. Labarraque testified that he arbitrarily set a goal of thirty days for elapsed time between errors and

¹ 42 U.S.C.A. § 5851(a) (West 2007). Congress has amended the ERA since Pierce filed this complaint. Energy Policy Act of 2005, Pub. L. 109-58, title VI, § 629, 119 Stat. 785 (Aug. 8, 2005). We need not decide whether the amendments would apply to this case, which was filed before their effective date, because even if the amendments applied, they are not at issue in this case and thus would not affect our decision.

² We hereby consolidate ARB Case No. 06-055 and 06-058 (the parties' petitions for review of the Recommended Decision and Order) with ARB Case No. 06-119 (USEC's petition for review of the Attorney Fee Order in this proceeding). We note that ALJ Gerald M. Tierney issued the R. D. & O. in this proceeding, but ALJ Daniel L. Leland issued the Attorney Fee Award. Because ALJ Tierney is no longer with the Department of Labor's Office of Administrative Law Judges, ALJ Leland was assigned to determine the appropriate attorney's fees and costs in this proceeding.

thought that he might make some adjustments after the division built up a more detailed event history. R. D. & O. at 4.

Prior to his transfer to NS&Q, Pierce had received positive annual performance reviews except for a “below expectations” rating on one of the elements in his 1995 evaluation, which still gave him an overall rating of “effective performance.” He had many “exceeds expectations” and “meets expectations” ratings during his 20 years of employment prior to his transfer. R. D. & O. at 5; CX-50. After his transfer to NS&Q, Pierce received “below expectations” ratings on two of the elements in his mid-year performance review on February 13, 2001. According to Labarraque, Pierce received the ratings because of his failure to complete an assignment to create a Synergy Survey action plan, two error clock resets, and his negative attitude. Pierce alleged through his attorney in a March 14, 2001 letter that the low ratings were in retaliation for Pierce’s support of his wife’s legal actions against USEC for wrongful termination. R. D. & O. at 5. In his 2002 mid-year evaluation, Pierce again received two “below expectations” ratings and at the end of fiscal year 2002, he received an overall rating of “needs improvement.” Labarraque placed Pierce on a Performance Improvement Plan and Commitment (PIPC) on October 7, 2002. The PIPC required that Pierce improve in the areas of error reduction and procedure compliance, management oversight, and corrective action effectiveness. R. D. & O. at 6.

One of Labarraque’s problems with Pierce’s performance was Pierce’s failure to develop an on-call program as Labarraque had directed him to do when USEC transferred the QC Group to NS&Q in July 2000. On August 17, 2000, Pierce informed Labarraque that, after conferring with Human Resources and Labor Relations personnel, he had issues with implementation of an on-call program at the plant. RX-13. Labarraque responded that Pierce should continue to work with Human Resources “so that they will provide you with the necessary support.” RX-14. In a memorandum to Labarraque dated November 29, 2000, Pierce recommended against implementation of an on-call program and detailed his problems with such a program. RX-34. Pierce testified that he completed the on-call plan and sent it to the Human Resources office for review, but he never received it back from Human Resources, and he never gave it to Labarraque. USEC offered no evidence that Pierce’s issues with the on-call program were resolved or that Human Resources ever advised the QC Group concerning implementation of the on-call program. R. D. & O. at 23.

Labarraque also was concerned about errors on QC inspectors’ records. He assigned his secretary, Linda Adams, the task of tracking documentation records. He ordered her to write an Assessment and Tracking Report (ATR) for any documentation errors and to list on the ATR the name and badge number of the document’s preparer. Among the errors assigned were errors for each time inspectors left a blank space on a form for items that were “not applicable” instead of writing “N.A.” Pierce testified that the NQA-1 quality assurance program noted that it was not necessary to indicate a “N/A” designation or provide a justification for the designation. R. D. & O. at 10; Tr. 205, 299.

According to Buchanan, the primary errors on QC records were missing signatures and dates on paperwork. Tr. 1793. Alderson explained why the QC Group was frustrated with requiring ATRs to be written for document errors:

[T]his answering ATRs took a lot of our time. It took a lot of my time, because I was having to review them in the mornings. And like I said earlier, we have to, if you have an ATR, you had to answer it by a certain date. And you had to fill out ... the forms on the ATRs to answer them, or to put in a completion date when you're going to have this done. It just took a lot of our time, lot of our wasted time, wasted time and effort that I felt had no return of investment on what we were doing, none at all.

Tr. 1998.

According to the testimony of QC supervisor, Butch Alderson, and QC inspectors, Buchanan and Gough, the QC Group never had a clear understanding of why the ATRs were being written for minor errors, such as blank spaces on inspection forms, and they felt that the ATRs were a waste of time. R. D. & O. at 8. At a July 31, 2002 meeting to determine how to incorporate the N/A requirement, Labarraque became upset with the inspectors and stormed out of the room. R. D. & O. at 10; Tr. 1902, 1821.

Labarraque was also concerned about Pierce's behavior on the job. At a staff meeting on March 1, 2002, Pierce became aggressive and intimidating, according to the testimony of Paul Beane, a lead auditor in NS&Q. On March 11, Pierce became confrontational and spoke loudly about Linda Adams writing ATRs. And at a monthly safety meeting on July 16, Pierce fell asleep during a safety film. Two days after the safety film incident, Labarraque gave Pierce a written reminder, effective until January 18, 2003, stating that Pierce had willfully violated company policies and procedures by sleeping in a safety meeting. Pierce admitted that he "probably" was sleeping, but stated also that he would not have "willfully" let himself fall asleep. R. D. & O. at 9; Tr. 1195, 3138. Pierce appealed the written reminder to the Employee Concerns Department. After an investigation, the Employee Concerns Department concluded that there was nothing to warrant modification of the written reminder. R. D. & O. at 9; CX-119.

The 337A South Crane Test

On October 18, 2002, QC inspectors Dan Brown and Charlie Beal, both of whom were certified crane inspectors with more than 20 years' experience working with overhead cranes, informed Pierce, their supervisor, of a safety issue with the 337A South Crane, which was used to lift fourteen-ton cylinders of uranium hexafluoride. An electrician had informed Brown and Beal that when the crane's power was cut off, its load accelerated and dropped uncontrollably until the brake engaged, causing the crane

trolley to rock. USEC had taken the same crane out of service on September 26, 2002, for a similar problem and had installed a limit switch. The limit switch did not solve the problem. Pierce told Brown and Beal to file an ATR, but Brown and Beal decided to see for themselves whether an ATR was necessary. Tr. 608-609, 617, 2142-2143.

On October 18, 2002, Brown and Beal met with Billy Wallace, the Plant's Shift Superintendent; Calvin Pittman, the Plant's Assistant Shift Superintendent; Stacy Marinelli, the crane systems engineer; Kelly Stratemeyer, who had responsibility for the building; and an unidentified project engineer. All agreed that the safe and appropriate procedure would be to test the crane by loading it with the same weight that the electricians had used, allowing the load to drop at the speed permitted by the electronic hoist controller, cutting off the power, and observing what happened. They also agreed that this procedure was within the scope of the existing inspection procedure for UF6 cranes and the applicable technical surveillance requirement. R. D. & O. at 11; Tr. 614, 634-639, 662, 682-684.

Brown, Beal, Marinelli, and Pittman observed the procedure. An 18,000 pound weight, which was less than half the capacity of the crane, was lifted six or seven feet off the ground with nothing underneath it and allowed to drop. The crane started dropping slowly and then picked up speed as it was coming down. Finally, the brakes set, and the crane stopped suddenly, causing the crane trolley to rock. Brown felt that there was a safety issue with the crane because it allowed the load to be "out of control," and he recommended that the crane be taken out of service. But Marinelli did not have a problem with it and did not agree that the crane should be taken out of service. Nevertheless, Brown initiated an ATR on the crane. Pierce was the "screening manager" for the ATR and wrote, "Crane should not be made operable until this problem is resolved." Tr. 630; CX-4. USEC took the crane out of service because of Brown's ATR. Labarraque sent an e-mail commending the inspectors, operators, and electricians for their approach to safety. R. D. & O. at 11; Tr. 3297; RX-165.

On October 24, 2002, Michael Duda, Section Manager of the Plant's Design Engineering Group, initiated an ATR questioning the QC inspectors' crane test on October 18 and alleging that the test constituted "an unreviewed test or experiment" that was not authorized by a procedure. On October 25, Duda filed a second ATR. Although Duda acknowledged in the second ATR that there was an applicable crane inspection procedure, he complained that the procedure did not provide adequate instructions and left too much to the judgment of the inspectors. RX-161.

USEC convened a meeting on October 28 to discuss Brown's and Duda's ATRs concerning the crane. Both Pierce and Brown were surprised that during the meeting there was no discussion of the fact that the crane had been allowed to operate in an unsafe condition for a month and a half. Tr. 685, 2180, 2184. The focus of the meeting was on the QC inspectors' performance of an allegedly improper inspection of the crane. Tr. 685, 2185-2186. Pierce vigorously defended his inspectors at the meeting. Tr. 685.

Marinelli described Pierce's behavior at the meeting as "confrontational," "somewhat disrespectful," and "negative." Tr. 2638-2639. On October 29, Pierce filed an ATR, alleging that the inappropriate response to Brown's ATR – focusing on the inspectors and ignoring the safety of the crane – and Duda's two subsequent ATRs created a chilling environment toward the QC inspectors. Brown agreed with Pierce's ATR. Tr. 2190-2191.³

USEC repaired the crane in accordance with an evaluation by the crane's vendor, and tested the crane again on November 6, using the procedures Brown and Beal used when they conducted the first test on October 18. Pierce reported to Labarraque that the repairs had been made, but Pierce, Brown, and Beal, continued to have concerns about the safety of the crane. They were particularly concerned that the post-test repair permitted a 12-inch uncontrolled drop distance. Tr. 704-705. On November 19, 2002, an Engineering Evaluation confirmed that the "crane design capacities were not exceeded" during the October 18 test and recommended that the October 18 test be performed regularly on all UF6 cranes. RX-175.

QC and engineering employees performed the same test on the South Crane several times on November 19, 2002. During this test Brown and Beal were uncomfortable with the accuracy of their visual measurements of the drop distance and wanted to discuss it with Pierce before recording the actual stopping distance, but Marinelli ignored their recommendation and recorded the actual stopping distance as nine inches. On the next day, Beal recorded the same dropping distance as a late entry.⁴ Labarraque assigned Beal's "late entry" as an error on the error clock. R. D. & O. at 12; Tr. 3336; RX-188.

On November 22, 2002, Pierce met with the Nuclear Regulatory Commission's (NRC) onsite representative, Bruce Bartlett, and filed two complaints with the NRC concerning the safety of the crane. The first complaint alleged that the crane did not comply with technical surveillance and OSHA requirements, and the second alleged that USEC chilled the inspectors because they raised safety issues with the crane. Tr. 716.

³ As the ALJ noted, Pierce was under a great deal of stress at this time. Also, from October 12 through November 18, 2002, Alderson was on leave from work. In his absence, "during the 337A south crane incident, Mr. Pierce was the only supervisor in the QC Department and was covering many of Mr. Alderson's duties." R. D. & O. at 13.

⁴ Pierce did not understand why Labarraque considered Beal's one-day delay in recording the dropping distance to be a willful violation. R. D. & O. at 12. Both Brown and Beal did not want to approve the test without first speaking to Pierce because they were not sure that it was appropriate to record a nine-inch drop based on a visual estimate by Brown standing 12 feet away from the crane. Id.; Tr. 2204. Brown thought this could be construed as falsifying a document. R. D. & O. at 12; Tr. 2210.

Pierce informed Labarraque that he would be meeting with Bartlett. On the same day, Labarraque told Pierce that he was being given a paid administrative leave of indefinite duration. Thereafter, on November 25, 2002, Pierce filed his first complaint with DOL, alleging, inter alia, that the administrative leave was in retaliation for his protected activity of raising safety concerns with regard to the crane and the chilling of QC inspectors.⁵

When Pierce returned from administrative leave on December 11, Labarraque gave him a one-day decision making leave (DML). DML is the last step before termination in the progressive discipline procedure at USEC. Tr. 5336-5337; CX-17. USEC set forth its reasons for placing Pierce on the DML in a memorandum to Pierce dated December 11, 2002:

This is to notify you that you are being placed on a one day (8 hours) paid Decision Making Leave, effective December 12, 2002. This Decision Making Leave is due to your continued lack of oversight and overall performance as QC Group Manager. You are currently under a written reminder for unprofessional behavior, have failed the success criteria for your PIPC, and continue to ignore your manager's instruction to attend the necessary work outage meetings to support plant work.

In addition, QC Group has had a long history of inattention to details that have resulted in incomplete records (i.e. missing dates, signature, incomplete recording of data, etc.) leading to NRC violations and concern with the overall quality of the QC organization.

As a manager, you are expected to set the proper example for your group and implement management expectations. The above listed issues lead to apathy of the crew, lack of procedure adherence, and proper work related techniques. Your continued lack of effective supervisory oversight, professionalism, failure to follow procedures, and performance is a violation of company policy, procedures, plant rules, 10 Pillars and generally accepted rules of business conduct for which termination can be the appropriate discipline.

⁵ Additional protected activity Pierce alleged includes assisting his spouse, Nancey Pierce, in her alleged protected activity, i.e., her participation in lawsuits against USEC.

CX-17. On December 12 Pierce filed a second complaint with DOL and the NRC, alleging that the DML was in retaliation for his first DOL complaint and the protected activity cited in that complaint. After Pierce returned from his DML, Labarraque required that he agree to a new PIPC, effective December 23, 2002. On December 22 Pierce filed a third complaint with DOL and NRC, alleging that the PIPC was in further retaliation for his previous DOL complaints and the protected activity cited in those complaints.

On January 2, 2003, Pierce met with Tony Camilleri, section supervisor of the Health Physics Department, to arrange for testing a manifold before its installation. Pierce testified that he informed Camilleri that the work could not be performed until the following Monday because employees were out on vacation. He further testified that on the next day when Camilleri approached him again about the testing, he stated, "If you're that desperate to get this installed, you can bypass this test." Camilleri's testimony about this incident was that Pierce stated, "Nah, don't worry about testing it; just go ahead and install it." Tr. 5146. Camilleri arranged to have QC inspectors conduct the testing, and on January 3, 2002, Pierce met with Camilleri and others to discuss the testing plan. Pierce testified that he told the others that the test was not necessary to meet the code requirements. He also admitted that due to the stress he was under, he lost his temper. Tr. 1415-1416. Camilleri and others who attended the meeting described Pierce's behavior as aggressive, loud, cursing, calling names, and insulting to others. They also stated that he stormed out of the meeting. At the hearing, Pierce acknowledged that their description of his behavior was probably accurate although he had no memory of the specifics. Tr. 1415-1416.

Pierce again met with the NRC representative at the plant on January 15, 2003, to discuss his two NRC complaints of November 22, 2002, and the three subsequent complaints of November 25, December 12, and December 22, all of which concerned the safety of the crane and chilling of the QC inspectors. Pierce testified that on January 14, 2003, he informed Phyllis White, Labarraque's assistant, that he would be meeting with the NRC representative on January 15. On the day after his meeting with the NRC representative, January 16, USEC terminated Pierce's employment, telling him that the incidents at the January 2 and 3 meetings with Camilleri were the reasons for his termination. RX-204. Pierce's termination letter stated that he was under a written reminder for unprofessional behavior (sleeping during a safety meeting):

On January 2 and January 3, 2003, you were involved in meetings in which you exhibited conduct and behavior that is unprofessional and inappropriate as a manager.

Your unprofessional conduct along with your inappropriate comments during these meetings violates Company rules, regulations, and generally accepted rules of business for which termination is the appropriate action.

After having been recently disciplined and placed on a Performance Improvement Commitment Plan and your continued failure to meet management's performance and conduct requirements, the Company must take this action.

RX-204. On January 16, Pierce filed a fourth complaint with DOL as well as another NRC complaint, alleging that USEC terminated his employment in retaliation for his previous DOL and NRC complaints and for his meetings with NRC investigators to discuss those complaints.

In April 2003, Ray Wright, the owner of Seminole Systems, an escort service under contract to USEC, asked Pierce if he would be interested in an escort position. After Pierce expressed his interest, Wright submitted Pierce's name to USEC for security clearance. Wright testified that when he called USEC Manager, Spence Childers, to ask about a security clearance for Pierce, Childers asked him whether he was sure he wanted to hire Pierce because Pierce had filed a lot of frivolous ATRs. Tr. 2432. Wright also testified that USEC failed to process the paperwork for Pierce's security clearance, and Wright dropped the matter because he concluded that USEC did not want Pierce. Tr. 2434. Because Pierce believed that USEC was retaliating against him by denying him a security clearance and preventing his employment at Seminole, he filed his fifth and final complaint with DOL on May 16, 2003.

DOL's Occupational Safety and Health Administration (OSHA) investigated the five complaints Pierce filed between November 25, 2002, and May 16, 2003. R. D. & O. at 1. OSHA found that the complaints had no merit, and Pierce requested a hearing before one of DOL's administrative law judges. The presiding ALJ consolidated the complaints for the hearing in Paducah, Kentucky, which began on September 14, 2004, and continued intermittently for 34 days. On January 27, 2006, the ALJ issued a decision recommending that Pierce's complaints be granted in part and dismissed in part. R. D. & O. at 25. He found that USEC violated the employee protection section of the ERA. Specifically, the ALJ concluded that Pierce had engaged in protected activity when he filed his claims with DOL, participated in NRC meetings, filed a complaint with the NRC, filed a complaint with the Employee Concerns Department, and filed an ATR regarding the safety of operating the 337A South Crane. He also found that USEC took the following adverse actions against Pierce: (1) written reminder for sleeping in a safety meeting; (2) February 2001 "below expectations" rating; (3) November 2002 administrative leave; (4) December 2002 DML; (5) December 2002 PIPC action plan; and (6) January 2003 termination. He further concluded that Pierce's protected activity contributed to the adverse actions, and that USEC failed to demonstrate by clear and convincing evidence that it would have taken the same adverse action, absent his protected activity. He ordered that USEC immediately reinstate Pierce to the position he held at the time of his termination and pay back wages of \$72,000 per year from the date of termination until the date of reinstatement as well as interest on the back wages. He also ordered Pierce's attorney to file a petition for attorney's fees and costs. Both USEC

and Pierce thereafter filed timely appeals with the Administrative Review Board (ARB or the Board).

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review the ALJ's decision.⁶ We review questions of law de novo.⁷

When the parties appealed and filed their briefs with the Board, we reviewed questions of fact under the ERA de novo.⁸ A new regulation calls for substantial evidence review.⁹ Substantial evidence is that which is "more than a mere scintilla." It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁰

Neither party addressed the standard of review in its briefs to the Board. Nor has either party requested leave to supplement or amend its brief in light of the change in the standard of review for questions of fact. We therefore assume that neither party considers the change in the standard of review material to this case.¹¹ In any event, applying either standard of review, we conclude that USEC violated the Act and that Pierce's complaint must be granted.

DISCUSSION

The ERA provides, in pertinent part, that "[n]o 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"

⁶ See Secretary's Order 1-2002, 76 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating the Secretary's authority to review ALJ recommended ERA decisions and other statutes set out at 29 C.F.R. § 24.100, 24.110 (2007)).

⁷ 5 U.S.C.A. § 557(b) (West 1996).

⁸ See *Sayre v. VECO Alaska, Inc.*, ARB No. 03-069, ALJ No. 2000-CAA-007, slip op. at 2 (ARB May 31, 2005).

⁹ 72 Fed. Reg. 44,956 (Aug. 10, 2007), codified at 29 C.F.R. § 24.110(b).

¹⁰ *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998).

¹¹ Cf. Fed. R. App. P. 28(j) (the parties have the burden of calling the court's attention to any pertinent and significant authorities that came to the parties' attention after its brief has been filed).

notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists, or participates in a proceeding under the ERA or AEA.¹²

To prevail on his ERA whistleblower claim, Pierce must prove by a preponderance of evidence that he engaged in activity that the ERA protects, that USEC knew about this activity, that USEC then took adverse action against him, and that his protected activity was a contributing factor in the adverse action USEC took.¹³ Even if Pierce proves that USEC violated the Act, USEC may avoid liability if it demonstrates “by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of” protected activity.¹⁴

To constitute ERA-protected activity, an employee’s acts must implicate nuclear safety definitively and specifically.¹⁵ “The ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern.”¹⁶ A whistleblower complaining about the employer’s violation of the ERA or AEA or their implementing regulations must have actually believed that the employer was in violation, and that belief must be reasonable for an individual in the same circumstances with the same training and experience.¹⁷ An employer engages in adverse action when it discharges or otherwise discriminates against an “employee with respect to his compensation, terms, conditions, or privileges of employment because the employee” engaged in protected activity.”¹⁸

¹² 42 U.S.C.A. § 5851 (a)(1).

¹³ See *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 8 (ARB Sept. 30, 2003).

¹⁴ 42 U.S.C.A. § 5851(b)(3)(D).

¹⁵ *American Nuclear Res., Inc. v. U.S. Dep’t of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998)

¹⁶ *Id.*, citing *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997).

¹⁷ *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 27-28 (ARB July 14, 2000).

¹⁸ 42 U.S.C.A. § 5851 (a)(1).

We have reviewed the record and find that the record as a whole supports the ALJ's factual findings. Moreover, USEC does not quarrel with the ALJ's conclusion that Pierce engaged in protected activity when he filed an ATR regarding his concern that USEC's response to the crane test would have a chilling effect on the inspectors, when he met with an NRC onsite representative about his NRC complaints, and when he simultaneously filed five complaints with the DOL and NRC; that USEC was aware of such activity;¹⁹ and that USEC discharged or discriminated against Pierce "with respect to his compensation, terms, conditions, or privileges of employment" when it placed him on DML and when it terminated him. Since there are undisputed protected activities and adverse actions in this case, we next consider whether Pierce met his ultimate burden of establishing that USEC intentionally discriminated because of his protected activity.²⁰

Contributing Factor

To establish discrimination under the ERA, Pierce must prove by a preponderance of the evidence that his ATR and DOL complaints were "contributing factors" in USEC's decisions to put him on DML and terminate his employment.²¹ Pierce need not provide

¹⁹ Pierce faxed all of his DOL complaints to onsite plant managers Russ Starkey and Steve Penrod.

²⁰ Both Pierce and USEC challenge the ALJ's findings with regard to other instances of alleged protected activity. Because we decide this case on other grounds, we decline to address the parties' additional arguments in our decision. We note, however, our disagreement with the ALJ's conclusion that Pierce's complaint to USEC's Employee Concerns Department about Labarraque's behavior in a July 31, 2002 meeting and his participation in two NRC Discrimination Task Force meetings were protected activity. "To constitute protected activity under the ERA, an employee's acts must implicate safety definitively and specifically." *Makam v. Pub. Serv. Elec. & Gas Co.*, ARB No. 99-045, ALJ Nos. 1998-ERA-022, -026, slip op. at 5 (ARB Jan. 30, 2001); *Am. Nuclear Res. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). Pierce did not argue that he engaged in any action during these meetings that was motivated by a belief that USEC was violating any nuclear laws or regulations, ignoring safety procedures, or assuming unacceptable risks that would lead us to conclude that he raised nuclear safety definitively and specifically. We cannot conclude that his mere attendance at these meetings, without more, implicated safety definitively and specifically. We also do not agree with the ALJ's conclusion that Pierce's duties as a QC Manager inherently involved protected activity. This conclusion directly conflicts with the decision of the Sixth Circuit in *Sasse v. U.S. Dep't of Labor*, 409 F.3d 773 (6th Cir. 2005).

²¹ *Tipton v. Ind. Mich. Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-030, slip op. at 5 (ARB Sept. 29, 2006).

direct proof of discriminatory intent but may instead satisfy his burden of proof through circumstantial evidence of discriminatory intent.²²

In concluding that Pierce met his burden of establishing discrimination, the ALJ relied on the temporal proximity between Pierce's protected activity and USEC's adverse action. R. D. & O. at 22. Since Pierce filed his ATR on October 29, 2002, and his first complaint on November 25, 2002, and USEC put him on DML on December 11, 2002, the record supports a finding of temporal proximity between his protected activity and the DML.²³ Moreover, since Pierce filed his complaints with DOL and the NRC on November 25, December 12, and December 22, 2002, and USEC terminated Pierce on January 14, 2003, the record supports the ALJ's finding of temporal proximity between Pierce's complaints and his termination. Finally, since Pierce met with an NRC representative to discuss his complaints on January 14, 2003, and was terminated the next day, the record fully supports the ALJ's finding of temporal proximity between Pierce's meeting with an NRC representative and his termination.

Temporal proximity between protected activity and adverse personnel action "normally" will satisfy the burden of making a prima facie showing of knowledge and causation.²⁴ While a temporal connection between protected activity and an adverse action may support an inference of retaliation, the inference is not necessarily dispositive.²⁵ For example, if an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.²⁶ On the other hand, "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation" for an adverse action.²⁷ The ultimate burden of persuasion that an employer intentionally

²² *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006).

²³ The January 16 and May 16, 2003 complaints occurred after USEC placed Pierce on DML and terminated his employment. Since the final uncontested adverse action (termination) occurred on January 15, 2003, we do not address the January and May complaints because they could not have contributed to USEC's decision to place Pierce on DML and terminate his employment.

²⁴ 29 C.F.R. § 24.104(d)(3).

²⁵ *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

²⁶ *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (ARB Apr. 28, 2006).

²⁷ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000).

discriminated because of a complainant's protected activity remains at all times with the complainant,²⁸ but proof that an employer's "explanation is unworthy of credence" . . . "can be quite persuasive."²⁹ In this case, the ALJ found that, with the exception of Pierce's warning for sleeping during a safety meeting, none of USEC's reasons for adverse action were legitimate. R. D. & O. at 23.

Decision-Making Leave

In a memorandum to Pierce dated December 11, 2002, USEC stated that it placed Pierce on DML for lack of oversight and overall performance as a QC Group Manager, specifically for (1) receiving a written reminder for unprofessional behavior (sleeping during a safety meeting); (2) failing his first PIPC (dated October 7, 2002), which he had been under for two months; and (3) ignoring instructions to attend a daily 3:45 pm work management meeting. The memorandum also noted "QC inspectors' history of inattention to detail which has resulted in incomplete records (i.e., missing dates, signature, incomplete recording of data, etc.) leading to NRC violations and concern with the overall quality of the QC organization." CX-17. The ALJ determined that, except for the written reminder, all of USEC's reasons for placing Pierce on DML were pretext. R. D. & O. at 22-23. The record evidence supports his conclusion as explained in the following paragraphs.

When USEC put Pierce on DML, he had been on his PIPC for a little over two months. But USEC stated in the DML that he had already failed it despite the fact that the PIPC gave him until January 31, 2003, to demonstrate that he met its Success Criteria. RX-154. USEC's unwillingness to allow Pierce to complete his PIPC is evidence of a discriminatory motive.

USEC also informed Pierce that it was putting him on DML for his failure to attend a daily 3:45 p.m. work outage meeting. Labarraque had informed Pierce on November 20, 2002, three weeks before the DML, that he expected Pierce to attend the 3:45 p.m. meeting daily. RX-179. The ALJ's finding that the work outage meeting was not a legitimate reason for placing Pierce on DML is supported by Pierce's testimony at the hearing. Pierce stated that he informed Labarraque "that I was not going [to the meeting] every day. But I told him I was going every Friday and when there was something that I thought was important. And I explained to him why." R. D. & O. at 7; Tr. 1356. Pierce further explained that Labarraque had agreed that Bob Farthing, a QC inspector, could cover the meeting for Pierce. Tr. 1522-1523. Pierce covered a 2:00 p.m. meeting daily. Tr. 1703-1704.

²⁸ *Martin v. United Parcel Serv.*, ARB No. 05-040, ALJ No. 2003-STA-009, slip op. at 9 (ARB May 31, 2007).

²⁹ *Reeves*, slip op. at 147.

The ALJ found, and we agree, that the incident that precipitated the decision to place Pierce on the DML is the South Crane incident, which began on October 18, 2002, and continued through November 22, 2002, when the NRC found two violations for an unauthorized test. The NRC report was issued at noon on November 22, and Pierce was sent home on administrative leave at 2:00 p.m. that same day. Tr. 711. Pierce's DML immediately followed his administrative leave.

Like the ALJ, we find that the real reason that USEC placed Pierce on DML was discriminatory. The evidence reveals that after the crane test Pierce "continued to voice the opinion of the QC Group," and that Pierce's vocal opinions (protected activity) in this matter contributed to the adverse actions that were taken against him after the NRC issued its Notice of Violation. R. D. & O. at 22. The record also reveals that after Duda cited the QC inspectors in his ATRs for an unauthorized test, Pierce voiced his safety concerns about the crane in several meetings and by filing an ATR stating that the QC inspectors had been chilled for reporting serious safety concerns with the 337A South Crane. Pierce also filed an ATR taking the crane out of service in spite of strong opposition from USEC (also protected activity).

USEC management did not want to take the crane out of service and subject it to further testing. Steven Jones of the plant's Human Resources Department told Brown that he "was not to say any more about the [crane] issue because it had been determined that this crane was now back in service, it was acceptable with a load drop that I still did not and still do not today agree with, that I would not say any more about it." He further testified that he considered that Jones' admonition was discipline. Tr. 2261.

In addition, Labarraque's finding of a willful violation and recording an error on the error clock for Beal's "late entry" of the crane dropping distance after the last crane test supports the ALJ's conclusion that USEC's reason for taking adverse action was unlawful discrimination. R. D. & O. at 13. It was reasonable for Beal to wait to talk to Pierce before signing off on the test to confirm that reliance on a visual inspection was appropriate. In fact, Labarraque had instructed the inspectors that if steps cannot be done in an inspection, they should not sign off on the inspection, but write an ATR instead. RX-179. Clearly, USEC wanted to get the crane back into service as quickly as possible.

The fact that USEC was more concerned with the QC inspectors' performance of an allegedly unauthorized test than with the danger posed by the crane suggests a discriminatory motive. The QC Group in fact felt chilled for performing the test in the first place even though the result was to make the operation of the South Crane safer. USEC held Pierce and the QC inspectors alone responsible for an unauthorized test despite the fact that several management-level employees were present at the initial test and approved of the test, including the Plant's Shift Superintendent and Assistant Shift Superintendent.

Termination

Pierce was on his second PIPC for only three weeks when USEC terminated his employment. The memorandum of termination states that his “unprofessional conduct” during his meetings with Camilleri on January 2 and 3, 2003, along with his inappropriate comments during these meetings violated USEC’s rules and regulations, and “generally accepted rules of business for which termination was the appropriate action.” RX-204.

The ALJ found that Pierce’s behavior during his meetings with Camilleri was not a legitimate business reason for his termination:

The record does not contain any evidence that Mr. Pierce had temper problems prior to being transferred to NS&Q. Mr. Pierce testified that he thought any small issue would cause his termination. USEC did not terminate other employees for arguments during meetings.

R. D. & O. at 23. The ALJ’s decision is supported by Pierce’s testimony and that of Butch Alderson. Pierce testified that Larry Jackson, the Operations Functional Area Manager, attended the 3:45 p.m. meeting and at times would become emotional, threaten to fire people, and use foul language. Tr. 1706. Pierce and Alderson testified that other managers had yelled, screamed, used profanity, and intimidation. Tr. 1706-1708, 2028-2029. Pierce also stated that employees Billy Vaughan, John Massey, Doug Harrall, Mike Cash, and Jim Wittman had become upset and used foul language in meetings. Tr. 1706-1709. Alderson testified that employees Mark McClure, Bo Weir, and Jimmy Walker had engaged in this type of behavior as well. Tr. 1033-1036. Labarraque himself was guilty of storming out of meetings. Tr. 374; CX-39. As noted by the ALJ, USEC did not terminate any of these employees for outbursts during meetings. R. D. & O. at 23. The harshness of Pierce’s termination for emotional behavior is illustrated by an e-mail that Labarraque sent to another manager concerning a prior incident when Pierce became emotional in August 2002, stating, “If I see further indications of aberrant behavior, I will offer [Pierce] the help that USEC has available.” CX-46. Instead of offering counseling, USEC fired Pierce. We agree with the ALJ that the likely reason for Pierce’s termination was not unprofessional behavior, but Pierce’s protected activity.

Given the close temporal proximity between Pierce’s protected activities (the filing of the ATR alleging safety issues with the South Crane, Pierce’s meetings with the NRC inspector, and his DOL and NRC complaints), and the adverse actions taken (DML and termination), coupled with the ALJ’s findings of pretext, which are supported by the record evidence, we conclude that Pierce’s protected activity was a contributing factor in the decision to place him on DML and terminate his employment.

Clear and Convincing Evidence

Since Pierce has demonstrated that his protected activity was a contributing factor in USEC's adverse employment action, we next consider whether USEC has established by clear and convincing evidence that it would have taken adverse action in the absence of Pierce's protected activity. USEC argued before the ALJ and this Board that Pierce had many performance deficiencies, which were legitimate management concerns.³⁰ And it appears to us from our review of the record that at a minimum there were conflicts between Pierce and Labarraque almost from the moment Labarraque became Pierce's supervisor. These performance deficiencies and conflicts with management might well have led to Pierce's termination, without regard to his protected activity. But USEC "bears the risk that 'the influence of legal and illegal motives cannot be separated,'"³¹ and can escape liability only by presenting clear and convincing evidence that the adverse action would have been taken in the absence of the protected activity.³²

USEC has not demonstrated on this record that it would have placed Pierce on DML and terminated his employment when it did even if he had not engaged in protected activity. The strongest evidence of a retaliatory motive on USEC's part is the swiftness of its moving from PIPC to administrative leave to DML and ultimately to termination and the temporal proximity of the protected activity and the adverse action. And, the record contains no evidence that USEC acted similarly toward other employees, or that its progressive disciplinary procedures dictated termination of a 26-year employee without any intervening disciplinary steps. We conclude, like the ALJ, that USEC failed to demonstrate that it would have taken adverse action against Pierce, absent his protected activity.

³⁰ In this regard, USEC introduced into evidence 13 "Memos to File" written by Labarraque between July 10, 2000, and December 13, 2002, detailing Labarraque's complaints about Pierce's performance deficiencies. Pierce avers that he never saw these memos until USEC produced them during discovery. Complainant's Reply Brief at 26. We do not find these memos probative because they directly conflict with Employee Concerns Representative Bill Reep's "Memo to File" dated October 9, 2002, responding to Pierce's request that USEC remove from its files negative statements and personnel actions made against him since 2000. Reep responded, "A review of [Pierce's] personnel file, field files and his discipline yielded little, if any information of a negative nature. . . .The last file reviewed was the discipline file in the possession of Human Resources. The only content in the file was the memo from Jorge Labarraque regarding the discipline for sleeping issued in July, 2002." RX-156.

³¹ *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1164 (9th Cir. 1984), quoting *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983)

³² 42 U.S.C.A. 5831(b)(3)(D).

We therefore affirm the ALJ's determination that USEC violated the ERA's whistleblower provisions by terminating Pierce.³³

Compensatory Damages

Pierce also contends that the ALJ erred in denying his claim for compensatory damages. An employer who violates the ERA may be held liable to the employee for compensatory damages for mental or emotional distress.³⁴ Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress.³⁵

Emotional distress is not presumed; it must be proven.³⁶ "Awards generally require that a plaintiff demonstrate both (1) objective manifestation of distress, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress."³⁷ To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm.³⁸

The ALJ did not award Pierce compensatory damages because he found that Pierce was adequately compensated by an award of reinstatement, back pay, and interest. R. D. & O. at 25. We affirm this finding because the record supports it. Although Pierce testified that he felt a "tremendous sense of loss," "guilt," and "loss of self esteem," he acknowledged that he had not sought or received professional medical help for his

³³ See *Timmons v. Franklin Elec. Coop.*, ARB No. 97-141, ALJ No. 1997-SWD-002, slip op. at 6 (ARB Dec. 1, 1998) (temporal proximity between protected activity and termination plus employer's failure to provide plausible explanation for firing sufficient to establish retaliatory discharge).

³⁴ 42 U.S.C.A. § 5851(b)(2)(B).

³⁵ *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 33 (ARB Feb. 9, 2001) (citations omitted).

³⁶ *Moder v. Vill. of Jackson, Wis.*, ARB Nos. 01-095, 02-039, ALJ No. 2000-WPC-005, slip op. at 10 (ARB June 30, 2003).

³⁷ *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993-SWD-001, slip op. at 17 (ARB July 30, 1999).

³⁸ *Gutierrez v. Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 9 (ARB Nov. 13, 2002).

symptoms. Tr. 1466. Moreover, he offered no documentary evidence or witness testimony to support his testimony that he had suffered mental or emotional anguish as a result of the unfavorable personnel action taken against him.

Attorney's fees and costs

We turn next to the ALJ's Attorney Fee Order (Order). The ERA provides that, in a case in which the Secretary issues an order in favor of a Complainant, the Secretary may order the Respondent to pay all costs and expenses, including attorney's fees, "reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued."³⁹ Generally, the lodestar method of calculation is used, which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.⁴⁰

Before the ALJ, Pierce's counsel filed a fee petition, and USEC filed an opposition. Pierce's attorney requested \$421,205.34 in attorney's fees and costs. This amount represented 1407.55 hours of work performed by counsel at rates varying between \$175.00 and \$250.00 an hour, 434.7 hours of law clerk and paralegal work at rates varying between \$100.00 and \$250.00 per hour, and \$35,060.34 in costs.

In his Attorney Fee Order, issued on June 7, 2006, the ALJ discussed each of USEC's objections to Pierce's fee petition and awarded a total of \$381,194.68, after reducing the hourly rate for Complainant's Attorney Hoffman to \$202.50 for the 198.75 hours of work he performed as an associate on the case, reducing the hourly rates of counsel who assisted Pierce's attorneys on the case, reducing the hours requested for travel time by 50%, and reducing costs by \$797.44. Order at 5-9.

The ALJ concluded that in this case it was appropriate to determine hourly rates based on the rates in the Louisville market.⁴¹ The ALJ considered the affidavits USEC and Pierce submitted concerning the availability of local counsel and concluded that "competent, willing local counsel were unavailable to Complainant and that it was reasonable for him to seek legal counsel elsewhere."⁴²

³⁹ 42 U.S.C.A. 5851(2)(B).

⁴⁰ *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

⁴¹ Order at 3, citing *Louisville Black Police Officers Org. Inc. v. Louisville*, 700 F.2d 268, 278 (6th Cir. 1983) (district courts are "free to look to the national market, an area of specialization market or any other market they believe is appropriate to fairly compensate particular attorneys in individual cases.").

⁴² Order at 4.

On appeal, USEC has reiterated its argument before the ALJ that the hourly rates for Stewart and Hoffman and the rates for others in their firm who assisted on the case should be based on rates applicable to Paducah, Kentucky, the hearing location, rather than those applicable to Louisville, Kentucky, the location of the Complainant's counsels' office. In this regard, USEC contends that this case was not complex and that any local attorney with some employment law experience could have handled the matter. USEC, however, did not use local counsel, but instead chose a national law firm located in Washington, D.C.

USEC asserts that this case was "relatively straightforward" and "rudimentary" and did not require representation by specialized counsel, although USEC itself chose specialized counsel outside of Paducah.⁴³ Our review of the evidence and arguments presented in this case convinces us that the case is of such complexity that it was reasonable for Pierce to retain counsel with expertise in federal whistleblower litigation. Therefore, we agree with the ALJ that it was reasonable for Pierce "to seek legal counsel elsewhere."⁴⁴

The ALJ awarded Stewart his requested rate of \$250 and awarded law clerks and paralegals the requested rate of \$125. He also awarded Hoffman his requested rate of \$225 for the hours he worked on the case as a partner in the law firm, but he reduced Hoffman's rate to \$202.50 for the hours he worked as an associate. Because the ALJ found that Pierce had not demonstrated the reasonableness of the rates requested for other attorneys who assisted on the case and attested only generally to their qualifications, he reduced all their rates by 10%. We conclude that the all the rates the ALJ determined, based on the Louisville market, are reasonable.⁴⁵

⁴³ Presumably the firm could have retained a local attorney, Mark Whitlow, who had represented USEC in the past. USEC's Initial Brief, ARB Case No. 06-119 (Attorney's fee case) at 14-15.

⁴⁴ Order at 4.

⁴⁵ In support of its argument that Louisville hourly rates are unreasonable, USEC has not introduced evidence of the hourly rate charged or the hours billed by its own counsel. Such evidence would be probative as evidence of the appropriate rate for this type of case. *See Isabel v. City of Memphis*, 404 F.3d 404, 416 (6th Cir. 2005)(court refuses to adjust civil rights plaintiffs attorney's rate downward because, among other reasons, City's lead counsel's rate (\$270) was higher in comparison to plaintiffs' attorneys rate (\$250); *Walker v. U.S. Dep't of Housing & Urban Dev.*, 99 F.3d 761, 770 (5th Cir. 1996)(published rates of outside opposing counsel retained by city of Dallas are probative of the customary rate in the relevant legal community. "In fact, the published rates are highly probative, as they are direct evidence of what the going rate is for the kind of complex federal litigation that occurred in the instant case.").

USEC also objects to the ALJ's award for hours related to contacts with the Nuclear Regulatory Commission. The ALJ awarded 20.285 hours for Attorney Stewart, 1.25 hours for Attorney Hoffman, and 8.583 hours for a paralegal. Pierce asserted before the ALJ that the connection between his DOL complaints and hours of work relating to the NRC was evident from the record, and the ALJ concluded that Pierce met his burden of demonstrating that connection. We disagree. To be compensable under the fee shifting provision of the Act, complainant's attorney must show the connection between the hours expended and the whistleblower litigation.⁴⁶ In this case, the connection between the hours expended and the whistleblower litigation is not self-evident, and Pierce's vague descriptions of the work (e.g., "Conference with NRC staff; dictate extensive report" or "Conference with Gary Pierce re: NRC") do not reveal the connection. Motion and Memorandum for Approval of Attorney Fees before Office of Administrative Law Judges, Invoice Submitted to Gary Pierce, pp. 17, 21. Therefore, we reverse the ALJ's fee award for hours related to the NRC.

USEC also contends that all travel time should be excluded from the Attorney Fee Award. The decision to award travel time is within the discretion of the ALJ.⁴⁷ As permitted under *Clay v. Castle Coal & Oil Co., Inc.*,⁴⁸ the ALJ appropriately reduced the travel time requested by Pierce's attorney by 50%. We find the discounted travel time reasonable and affirm his decision.⁴⁹

USEC also raises several issues with respect to the fee request for time expended on December 9, 2004, and June 1, 2005. USEC contends that Pierce accounted for only 10 hours worth of time on December 9, but requested compensation for 12 hours, and that the ALJ failed to reduce travel time for Pierce's attorneys on December 9, 2004, and June 1, 2005, by 50% in accordance with his prior findings in the Order. In addition, the ALJ failed to reduce Hoffman's hourly rate for the time worked on December 9 to his lower associate rate in accordance with his prior findings in the Attorney Fee Order. We have examined these entries and therefore reduce the travel time on December 9, 2004, and June 1, 2005, by 50%, and we reduce Attorney Hoffman's hourly rate to \$202.50 for his work on December 9.

⁴⁶ *Pittman v. Goggin Truck Line, Inc.*, ARB No. 99-062, ALJ No. 1996-STA-025, slip op. at 1 (ARB July 30, 1999).

⁴⁷ *Perotti v. Seiter*, 935 F.2d 761, 764 (6th Cir. 1991).

⁴⁸ 1990-STA-037 (Sec'y June 3, 1994).

⁴⁹ *In re Babcock & Wilcox Co.*, 526 F.3d 824 (5th Cir. 2008) (bankruptcy court did not abuse discretion by discounting fee for non-working travel time).

In conclusion, we reverse the ALJ's award for attorney's fees and costs for work before the NRC, reduce his award for fees billed for December 9, 2004, and approve the remainder of his Order.

CONCLUSION AND ORDER

The ALJ analyzed all the evidence and correctly applied relevant law. We have examined the record and conclude that it fully supports the ALJ's finding that USEC violated the whistleblower protection provisions of the ERA when it placed Pierce on DML and terminated his employment. Therefore, we affirm the ALJ's finding and grant the complaint.

Pierce's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition for costs and services before the ARB, with simultaneous service on opposing counsel. Thereafter, USEC shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge