

U.S. Department of Labor

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



In the Matter of:

**KIRTLEY CLEM and
MATTHEW SPENCER,**

COMPLAINANTS,

v.

**COMPUTER SCIENCES
CORPORATION,**

RESPONDENT.

ARB CASE NO. 2020-0025

**ALJ CASE NO. 2015-ERA-00003
2015-ERA-00004**

DATE: March 10, 2021

Appearances:

For the Complainants:

**Stephani L. Ayers, Esq.; *Law Offices of S.L. Ayers*, Medford Oregon;
Nikolas F. Peterson, Esq.; *Hanford Challenge*, Seattle, Washington**

For the Respondent:

**Rachel Linzy, Esq., Joseph R. Ward, III, Esq., Stephen L. Scott, Esq.,
The Kullman Firm, Birmingham, Alabama**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas
H. Burrell and Randel K. Johnson, *Administrative Appeals Judges***

DECISION AND ORDER

PER CURIAM. This case arises under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (2005), as implemented by regulations codified at 29 C.F.R. Part 24 (2020). Kirtley Clem and Matthew Spencer (Complainants) filed complaints alleging that their former employer, Computer Sciences Corporation (CSC), violated the whistleblower protection provisions of the ERA.

Consolidating the appeals, the Administrative Law Judge (ALJ) found for Clem and Spencer and awarded damages. CSC appealed the ALJ's decision, and the Board vacated and remanded with instructions for the ALJ. On remand, the ALJ again found for Complainants and awarded damages. We affirm.

BACKGROUND

We fully incorporate the background facts from the ALJ's initial Decision and Order,¹ the Board's Decision and Remand Order,² and the ALJ's Decision and Order on Remand.³ We will give an overview of the parties and actions at issue that are necessary for discussion, with an emphasis on the facts relied on by the parties for their arguments.

CSC hired Complainants as Senior Programmer Analysts in the summer of 2011.⁴ At the time, CSC was a prime contractor for the Department of Energy (DOE) to provide occupational medical services at DOE's Hanford Site and National Laboratory (Hanford) in eastern Washington.⁵ It subcontracted some of its obligations to HPM Corporation (HPM).⁶ CSC's main duty was to provide IT services for the medical clinic at Hanford.⁷ The IT team, which was led by Eric Elsethagen, consisted of Complainants, Michael Johnston, Polly Riley, and Ray Matthews.⁸ Kim Conley directed the clinic and reported to George Baxter, the principal manager of the clinic.⁹ Both reported to Lisa Poulter, CSC's Public Health Sciences Manager.¹⁰

In 2011, CSC began producing an electronic records management program called Occupational Health Management (OHM), which integrated clearances and

¹ *Clem v. Comput. Scis. Corp.*, ALJ Nos. 2015-ERA-00003, -00004 (ALJ Sept. 12, 2016) (D. & O.).

² *Clem v. Comput. Scis. Corp.*, ARB No. 2016-0096, ALJ Nos. 2015-ERA-00003, -00004 (ARB Sept. 17, 2019) (ARB D. & O.).

³ *Clem v. Comput. Scis. Corp.*, ALJ Nos. 2015-ERA-00003, -00004 (ALJ Jan. 9, 2020) (D. & O. on Remand).

⁴ CX 9-10.

⁵ CX 2.

⁶ D. & O. on Remand at 3.

⁷ ARB D. & O. at 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

medical records to manage worker assignments.¹¹ Clem was responsible for converting applications to operate with OHM.¹² CSC's IT employees worked with HPM employees to implement the program, which was scheduled to go live on August 20, 2012.¹³

In 2012, CSC's contract with DOE expired, and HPM won the new prime contract.¹⁴ The companies agreed for CSC to serve as subcontractor on the new contract.¹⁵ In July 2012, Cleve Mooers, HPM's transition manager, announced that CSC needed to lay off three programmers by October 1.¹⁶ On August 7, Conley offered the positions to Elsethagen, Johnston, and Spencer.¹⁷ Elsethagen and Spencer, however, resigned from their positions before the new contract began.¹⁸ On September 18, Conley offered the open spots to Riley, an off-site worker, and Matthews, a junior developer.¹⁹

During the time leading up to the new contract, CSC and HPM employees worked cooperatively on a daily basis. Spencer stated that employees from both companies were indistinguishable unless they were asked who employed them.²⁰ Joe Vela, the head of Performance Assurance for HPM, met with Complainants about the transition.²¹

Complainants made ongoing complaints about the functionality of OHM and were concerned that it would not perform reliably by the go-live date. In July 2012, Complainants expressed their concerns to Elsethagen, who responded, "it's our jobs to fix issues like this . . . so, to me, it's go out and do your job."²² At some point, Lisa Zaccaria, a Business Process Analyst for CSC, told Spencer to stop raising his concerns at IT staff meetings.²³

¹¹ D. & O. on Remand at 3.

¹² D. & O. at 4.

¹³ D. & O on Remand at 3.

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ D. & O on Remand at 3.

¹⁷ ARB D. & O. at 3.

¹⁸ *Id.*

¹⁹ D. & O. 24-25; Hearing Transcript (Tr.) 193.

²⁰ D. & O. 5; Tr. 496-97.

²¹ D. & O. 5.

²² Tr. 986-87.

²³ ARB D. & O. at 4.

Clem asked Vela for his opinion on the issue, who encouraged Complainants to bring their complaints to DOE.²⁴ On August 10, 2012, Complainants anonymously emailed a complaint to the DOE employee-concerns program.²⁵ The DOE met with Complainants that day and later performed an inquiry at the site on August 15.²⁶

Clem also sent an anonymous email to Riley on August 10, informing her of the complaint and asking if she would discuss the issue with DOE.²⁷ Riley forwarded Clem's email to Elsethagen soon after.²⁸ Clem subsequently identified to Riley that he and Spencer were the employees who complained to DOE.²⁹ Riley replied that she was "shocked, saddened and disappointed" about the email and lamented their "secretive enrollment of co-conspirators to derail the project."³⁰

Riley subsequently forwarded Clem's message and her response to Elsethagen, noting her disdain for Complainants' "corporate backstabbing."³¹ On the same day, CSC sent out an email stating that CSC staff should not be supporting HPM-identified transition work unless directed by Baxter or Conley, and if an employee had a question as to whether work was CSC transition or HPM transition, to talk to Conley or Baxter.³²

Johnston had expressed concern to Conley about Spencer discussing OHM with HPM and Lockheed Martin Services, Inc. (LM), the IT contractor for Hanford's operations outside of the clinic.³³ On September 6, Spencer met with Conley about Johnston's concerns. Conley advised Spencer not to speak with Vela about OHM.³⁴ On September 14, Johnston emailed Conley to express concerns about Complainants spending a lot of time "behind closed doors."³⁵

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; D. & O. on Remand at 4.

²⁷ ARB D. & O. at 4.

²⁸ CX 31.

²⁹ D. & O. at 10.

³⁰ CX 37.

³¹ *Id.*

³² CX 29; ARB D. & O. at 5.

³³ ARB D. & O. at 2-3, 5-6.

³⁴ D. & O. on Remand at 5.

³⁵ *Id.*

Because OHM was not ready by August 20, CSC delayed its go-live date until September 17.³⁶ After OHM went live, Spencer notified Elsethagen that he received 213,000 error messages from the new system, which had crashed three times in the first two days.³⁷

On September 18, at HPM's request, Complainants met with Mooers and Vela at an off-site restaurant.³⁸ Mooers and Vela requested IT information, and Complainants discussed their concerns with OHM, including issues that HPM might need to be aware of during the transition, such as the crashes and the staffing issues.³⁹ Mooers offered to pay Clem for a transition write-up on staffing and risk assessment.⁴⁰ Clem also inquired about a rumor that LM was bidding on the IT scope for the clinic, which Mooers confirmed.⁴¹ All attendees of the meeting denied that they discussed any CSC proprietary information.⁴²

On September 19, Baxter, Poulter, and Conley received an email chain between HPM and DOE revealing HPM's effort to switch from a fixed-price to cost-reimbursable contract.⁴³ Mooers testified that the switch would replace CSC with LM for the clinic's IT work.⁴⁴

On September 20, Complainants initiated a meeting with Conley to discuss their ongoing concerns with OHM.⁴⁵ Conley described the meeting in a statement to CSC's Employee Relations office (ER).⁴⁶ The meeting began with Complainants voicing their concerns with OHM.⁴⁷ They also informed Conley that they had met with Mooers and Vela and discussed CSC's IT systems and staffing, that LM was bidding on the IT component, and that HPM had requested Clem to provide

³⁶ *Id.*

³⁷ Tr. 546-47; D. & O. at 15.

³⁸ ARB D. & O. at 7.

³⁹ D. & O. on Remand at 5.

⁴⁰ ARB D. & O. at 7.

⁴¹ D. & O. at 17.

⁴² D. & O. on Remand at 12.

⁴³ ARB D. & O. at 7.

⁴⁴ Mooers Dep. 19-20.

⁴⁵ D. & O. on Remand at 6; CX 66.

⁴⁶ *Id.*

⁴⁷ *Id.*

consulting on OHM and staffing for HPM's transition.⁴⁸ Conley then asked how long and how often they met with HPM, the information they shared, why HPM met with them instead of management, and why they thought the meeting was acceptable.⁴⁹ Conley also asked Clem whether LM had offered him a job, which he denied.⁵⁰ Spencer admitted that "he had talked with a number of LM employees at all levels."⁵¹

Conley stated that Complainants believed that OHM would suffer catastrophic failures in the upcoming weeks because no "key staff" would be retained after the transition.⁵² Complainants believed the meeting was acceptable because HPM would become the new prime contractor in October.⁵³

In his statement to ER, Clem said that the purpose of the meeting with Conley was to make sure she knew the risks from the IT staff being cut.⁵⁴ He explained that Elsethagen had told the IT group in July 2012 that they could assist an HPM employee that had questions regarding the IT systems for transition purposes "unless it was going to take more than an hour or so."⁵⁵

After the meeting, Conley informed Baxter of the meeting and called Poulter to discuss.⁵⁶ Conley reported the meeting and that Complainants had provided information to aid LM in their bidding, knowing that the risk assessment HPM requested was for LM to take over the subcontract.⁵⁷

Later in the day, Conley suspended Complainants without pay.⁵⁸ Conley later claimed that Poulter had directed her to suspend Complainants to prevent them from sabotaging the system, but Poulter stated that ER decided to suspend them.⁵⁹

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Tr. 430-32.

⁵¹ CX 66.

⁵² ARB D. & O. at 7. Most of CSC's staff, including Conley, believed the reduction in staff was an unwise decision. Tr. 322-23, 1146.

⁵³ CX 66.

⁵⁴ D. & O. on Remand at 6.

⁵⁵ CX 66.

⁵⁶ ARB D. & O. at 8.

⁵⁷ *Id.*

⁵⁸ D. & O. on Remand at 6.

⁵⁹ *Id.*

Baxter did not recall the details of the suspension and only remembers that he had not made the decision.⁶⁰ In her summary of the incident, Kobra Martinez, the ER employee assigned to the case, detailed that “Conley stated that she will not terminate the employees because they were already schedule[d] for termination but wanted them immediately removed from the work site.”⁶¹ Clem recalls that Conley told them they were suspended for “for aiding the competition and supplying confidential business sensitive information to a competitor.”⁶²

On the same day, Poulter informed Mooers in an email that HPM should contact Conley to coordinate if HPM needed assistance from a CSC worker.⁶³ Mooers replied asking if CSC had fired IT professions for “aiding the competition,” to which Poulter responded “no.”⁶⁴ Later that day, Mooers responded that he was “told that [Poulter] prohibited any of [her] IT professionals from talking with HPMC,” and asked her that “if discussing IT with the current IT folks is troublesome to [her, to] please let [him] know.”⁶⁵

In a call between Martinez, her supervisor, and CSC’s legal counsel regarding the incident, counsel said that “only but so much information could have been shared with HPM” and because “HPM already has access to the meetings, CSC employees and the client, it’s not unusual for employees to talk among themselves about work related subjects.”⁶⁶ ER never reached a conclusion as to wrongdoing.⁶⁷

After the suspension decision, CSC did not retain Clem for employment in the follow-on contract, and CSC did not pay Clem and Spencer special pay promised

⁶⁰ D. & O. at 20; Tr. 139-41.

⁶¹ CX 66.

⁶² Tr. 137.

⁶³ D. & O. on Remand at 7; CX 60.

⁶⁴ CX 60. Poulter, however, testified that she believed Complainants had improperly shared information with HPM. When asked if she believed that they aided the competition, Poulter responded that Complainants “certainly undermined CSC’s competitive position in the course of negotiating the subcontract with the prime.” Poulter Dep. 81. Poulter stated that HPM was not honoring its agreement for the follow-on contract because it was trying to remove CSC from the follow-on contract: “CSC’s business interests were at risk based on HPM’s performance or behavior, and certainly that was not helped by Mr. Clem and Mr. Spencer going and talking to HPM clandestinely, if that’s the word.” Dep. 49-50, 53-54. Poulter testified that Clem and Spencer should not have been “colluding” with HPM and sharing proprietary information “outside of the normal management chain.” Dep. 58.

⁶⁵ CX 60.

⁶⁶ CX 66. Martinez documented the call in her summary of the incident. D. & O. at 7.

⁶⁷ Martinez Dep. 42.

to CSC staff for additional or overtime hours worked during OHM's implementation.⁶⁸ Clem applied for a job with CSC in December 2012 and October 2013 but was not selected for employment.⁶⁹ Spencer, who was offered a position on the next contract on August 7 but resigned from the position, took a job at another company.⁷⁰

Complainants filed complaints with the Occupational Safety and Health Administration (OSHA), alleging that CSC unlawfully retaliated against them under the ERA.⁷¹ On November 18, 2014, OSHA found for Complainants.⁷² CSC filed objections with the Office of Administrative Law Judges. The ALJ held a hearing for six days and thereafter ruled for Complainants.⁷³

In his D. & O., the ALJ found that Complainants engaged in protected activity, that CSC was aware of that protected activity, and that Complainants suffered adverse actions.⁷⁴ The ALJ further found that a totality of factors supported a reasonable inference that the protected activity contributed to their suspension, CSC's failure to pay them special pay for overtime work, and CSC's decision not to retain or rehire Clem for employment.⁷⁵ For each of the adverse actions, the ALJ found that CSC could not prove by clear and convincing evidence that it was justified in taking its actions.⁷⁶

The ALJ awarded damages to Complainants. Both were awarded their salaries for the period of suspension, compensatory damages for their suffering, and 40 hours of "special pay" CSC did not provide.⁷⁷ The ALJ further awarded Clem for his lost wages and employer contributions to his 401(k).⁷⁸

CSC petitioned for review of the ALJ's decision. The Board affirmed the ALJ's findings that Complainants engaged in protected activity, that CSC was aware of the protected activity, and that CSC took adverse employment actions

⁶⁸ ARB D. & O. at 9.

⁶⁹ *Id.*

⁷⁰ Tr. 487-88.

⁷¹ D. & O. at 21.

⁷² ARB D. & O. at 10.

⁷³ *Id.*

⁷⁴ D. & O. at 22-23.

⁷⁵ *Id.* at 23-25.

⁷⁶ *Id.* at 26-28.

⁷⁷ *Id.* at 35.

⁷⁸ *Id.*

against them.⁷⁹ The Board, however, held that the ALJ erred in describing the contributing-factor casual standard and same-action defense standard and by failing to adequately engage the parties' arguments and evidentiary record.⁸⁰ The Board therefore vacated the decision and damages award and remanded for the ALJ to apply the correct standards on remand.⁸¹ The Board also provided the ALJ with several instructions to fully analyze the record, weigh evidence, and make findings of fact by a preponderance of the evidence on the issues.⁸²

In his D. & O. on Remand, the ALJ discussed the Board's instructions on remand and re-analyzed the contributing-factor causal and same-action defense issues.

The ALJ first discussed the contributing factor element of the whistleblower claim using the correct standard: whether Complainants demonstrated by a preponderance of the evidence that their protected activity was a contributing factor to the adverse actions against them.⁸³ For this factor, the ALJ first considered whether the protected activity contributed to the suspension.

The ALJ found temporal proximity between the protected activity and the suspension and determined that Complainants' disclosure of the restaurant meeting was not an intervening event that would negate the circumstantial value of the temporal proximity.⁸⁴ The ALJ concluded that it was implausible that a meeting with HPM employees would suddenly result in suspension, noting CSC's and HPM's history of working cooperatively, especially during transition, Elsethagen's

⁷⁹ ARB D. & O. at 11-14.

⁸⁰ ARB D. & O. at 15-16.

⁸¹ *Id.* at 22-23.

⁸² Specifically, the Board ordered the ALJ to (1) analyze the record and address CSC's argument and evidence that CSC was concerned with HPM attempting to substitute LM for CSC and suspended Complainants under the belief that they were colluding with HPM, (2) evaluate CSC's arguments and supporting evidence that CSC warned employees not to work with HPM on transition-related activities without permission, (3) assess the testimony of Conley, Baxter, and Poulter concerning the meetings and decision-making that took place on September 20 and explain why or why not he disbelieves their testimony, (4) explain how the ALJ's findings that CSC's stated reasons are pretextual support his ultimate findings of contribution and the CSC's inability to prove its same-action defense, (5) analyze the evidence concerning the role that ER played in the investigation and disciplinary process, and (6) weigh Poulter's denial to Mooers that Complainants were suspended for aiding the competition with the remainder of the email conversation and the record in general. ARB D. & O. at 21-22.

⁸³ D. & O. on Remand at 8-9.

⁸⁴ *Id.* at 9-11.

permission for CSC employees to provide IT information to HPM, and the fact that Complainants were not in a position to provide proprietary information.⁸⁵

The ALJ also found CSC's stated reasons for the suspension were pretextual, concluding that CSC did not have a good-faith belief that Complainants had shared proprietary business information with HPM.⁸⁶ The ALJ found that testimony from Mooers and Conley established that Complainants had no access to proprietary information and that CSC had no reason to think otherwise.⁸⁷ ER documented that "only but so much information could have been shared with HPM." The high level of cooperation between the two companies further made it unlikely that CSC believed the meeting violated company policy, and Complainants' persistent complaints about OHM distinguished them from the rest of the staff.⁸⁸ The ALJ also highlighted that none of CSC's personnel took responsibility for the suspension, concluding that an employer would presumably be willing to admit to such a decision if it had a legitimate basis.⁸⁹ The ALJ, therefore, concluded that Complainants' protected activity contributed to their suspension.

Next, the ALJ considered whether the protected activity led to the decision not to provide special pay to Complainants. The ALJ noted that CSC promised special pay to staff for overtime work but then alleged that the pay was withheld because Complainants were not "giving 100%."⁹⁰ The pay however was for extra hours, not effort, and no other employees were denied it for lack of effort.⁹¹ The ALJ thus found contribution.

The ALJ then considered whether the protected activity contributed to the decision not to retain Clem for the next contract. The ALJ found choosing a less-experienced person for a short-staffed team counterintuitive.⁹² Further, the decision not to retain Clem was made after Clem made ongoing complaints about OHM and before the Conley meeting.⁹³ The ALJ therefore found the protected activity contributed to the decision.

⁸⁵ *Id.* at 10-11.

⁸⁶ D. & O. on Remand at 11.

⁸⁷ Tr. 1109; Mooers' Dep. 15.

⁸⁸ D. & O on Remand at 13.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 14.

⁹³ *Id.*

Lastly, the ALJ found that the protected activity contributed to the failure to rehire Clem. The ALJ found CSC's proffered reason for not rehiring him, that they received stronger resumes, not credible and unsupported.⁹⁴ The ALJ also found contribution supported by temporal proximity because Clem was not rehired in December 2012 or October 2013, both within approximately one year of the protected activity and the suspension.⁹⁵

Because Complainants had proven that their protected activities contributed to the adverse employment actions, the ALJ then analyzed CSC's same-action defense to determine whether CSC demonstrated by clear and convincing evidence that CSC would have taken the same adverse actions if there were no protected activity. The ALJ noted that the question in this case was whether CSC would have taken the same adverse action against Complainants if it had only learned about the off-site meeting with HPM, without any connection to complaints about OHM.⁹⁶

For the suspension, CSC argued that Complainants' disavowed knowledge of the proper protocol for speaking with HPM was not credible because Complainants knew LM was a direct competitor and that they knew that CSC was deliberately withholding information from HPM.⁹⁷ The ALJ found that the assertion was on shaky evidential ground when considering the whole record, citing the evidence of close collaboration between the companies during transition and Elsethagen permitting IT staff to provide information to HPM on transition matters.⁹⁸ Further, Mooers had asked Poulter to inform him if discussing IT staff with CSC was troublesome to her after she suspended Complainants, which suggested there was no well-known policy that CSC employees could not exchange information with HPM.⁹⁹

The ALJ further opined that the discrepancies in testimony regarding the decision-making process undermined CSC's defense, highlighting that no CSC employee would admit to or identify who made the decision to suspend.¹⁰⁰ Poulter's denial to Mooers that she suspended the employees for aiding the competition also weakened CSC's defense, and Mooers' surprise by the suspension of Complainants

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 15.

⁹⁷ *Id.* at 17.

⁹⁸ *Id.*

⁹⁹ *Id.* at 18.

¹⁰⁰ *Id.*

suggests that Complainants' concerns with OHM played a role in the adverse actions against them.¹⁰¹

The ALJ then addressed the meeting between Conley and Spencer on September 6, in which she advised Spencer not to speak with Vela about OHM.¹⁰² The ALJ opined that the meeting was the strongest evidence supporting CSC's argument that Spencer knew not to speak to HPM about OHM and that providing information to HPM was suspension-worthy.¹⁰³ The ALJ's issue with the evidence, however, was that the command was directed at restricting Spencer's protected activity, expressing concern about OHM, not protecting proprietary business information.¹⁰⁴ The ALJ found the evidence supported a conclusion that CSC's main concern regarding Complainants' discussions with HPM was their complaints about OHM.¹⁰⁵ The ALJ therefore found that CSC failed to prove their same-action defense for the suspensions.

The ALJ next found that CSC failed to demonstrate with clear and convincing evidence that it would not have given Complainants special pay absent their protected activity. Even if such pay were discretionary, as argued by CSC, the ALJ determined that CSC would have provided Complainants special pay if they had not made the complaints, as their colleague Johnston received special pay after working the same hours and not engaging in protected activity.¹⁰⁶

The ALJ then found that CSC failed to prove that it would not have retained Clem absent the protected activity, concluding that it was counterintuitive to select a more junior developer and remote worker for an IT team with low staffing and highlighting that the initial three selections were all senior programmers like Clem.¹⁰⁷ The ALJ noted that CSC was likely aware of Complainants' protected activity when the selections were made because DOE had already investigated their complaints and Conley had already told Spencer not to discuss OHM with HPM.¹⁰⁸

Last, the ALJ found that CSC failed to prove its defense regarding rehiring Clem. Conley claimed that she did not hire Clem because of reliability and trust issues from his conversations with HPM, despite finding him eligible. The ALJ

¹⁰¹ *Id.* at 19.

¹⁰² *Id.* at 19-20.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 20.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 21.

¹⁰⁸ *Id.*

found that her explanations failed to show it was highly probable she would not have hired him despite his protected activity.¹⁰⁹

Because CSC failed to prove its affirmative defense, the ALJ then discussed damages. Observing that the Board vacated the award in the initial decision but did not suggest any error, the ALJ fully incorporated his analysis and findings in his initial damage award.¹¹⁰

CSC filed a timely petition for review of the ALJ's findings thereafter.

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the ERA.¹¹¹ The Secretary has delegated that authority to the Administrative Review Board.¹¹² The ARB will affirm an ALJ's findings of fact when supported by substantial evidence.¹¹³ "Substantial evidence is 'more than a mere scintilla.' It means . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹¹⁴ The threshold for this "evidentiary sufficiency is not high."¹¹⁵ This test "limits the reviewing court from 'deciding the facts anew, making credibility determinations, or re-weighing the evidence.'"¹¹⁶

DISCUSSION

The ERA's whistleblower statute provides that, "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"

¹⁰⁹ *Id.*

¹¹⁰ D. & O. on Remand at 22.

¹¹¹ 42 U.S.C. § 5851.

¹¹² Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020); *see* 29 C.F.R. § 24.110 (2020).

¹¹³ 29 C.F.R. § 24.110(b) (2020) ("The ARB will review the factual findings of the ALJ under the substantial evidence standard.").

¹¹⁴ *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. § 197, 229 (1938)).

¹¹⁵ *Id.*

¹¹⁶ *Stone v. Webster Const., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1133 (11th Cir. 2012) (quoting *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005)).

engaged in protected activity,¹¹⁷ including any “action [designed] to carry out the purposes of [the nuclear safety statutes].”¹¹⁸ Courts interpret the statute broadly to implement its “broad, remedial purpose.”¹¹⁹

On remand, the Board tasked the ALJ with re-evaluating two of the required findings in an ERA whistleblower claim.¹²⁰ First, whether Complainants demonstrated by a preponderance of the evidence¹²¹ that their protected activity was a contributing factor to the adverse actions against them. Second, whether CSC demonstrated by clear and convincing evidence¹²² that it would have taken the same unfavorable personnel action in the absence of protected activity. In his initial decision, the ALJ also made findings regarding damages awards after finding Complainants prevailed on their claim, which he incorporated into his decision on remand as the ARB did not address those findings in its remand order. On appeal, CSC challenges the ALJ’s findings in favor of the Complainants for each adverse action on remand and the damages awards provided to Clem and Spencer. We address each issue in turn.

1. Contributing Factor

CSC argues that the record does not support the ALJ’s finding that Complainants’ protected activity contributed to the adverse actions against them. Under this element of an ERA whistleblower claim, a complainant can meet this “rather light burden” by demonstrating that their protected activities “tended to

¹¹⁷ 42 U.S.C. § 5851(a)(1).

¹¹⁸ *Am. Nuclear Res., Inc. v. U.S. Dep’t of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998).

¹¹⁹ *Id.* (quoting *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984)).

¹²⁰ To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, suffered an unfavorable or adverse personnel action, and that his protected activity was a contributing factor in the unfavorable personnel action taken against him. If the complainant’s protected activity was a contributing factor in the adverse action, the employer may avoid liability and damages only if it demonstrates “by clear and convincing evidence that it would have taken the same unfavorable personnel action” in the absence of the protected activity. *See Clem v. Comput. Scis. Corp.*, ARB No. 2016-0096, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 11 (ARB Sept. 17, 2019); 42 U.S.C. § 5851(b); 29 C.F.R. § 24.109(b).

¹²¹ Preponderance of the evidence requires the ALJ to determine whether the party with the burden has proven that the fact is more likely than not. *Clem*, ARB No. 2016-0096, slip op. at 19.

¹²² An employer satisfies the clear and convincing burden when it shows that it is “highly probable” that it would have taken the same action in the absence of protected activity. *Id.*

affect [the adverse action] in at least some way.”¹²³ A contributing factor may be “any factor, small or big, that actually influenced the employer’s actions, regardless of how many other influences there were,” so “once an ALJ decides that protected activity contributed, no number of legitimate reasons can undo that finding.”¹²⁴

CSC challenged the ALJ’s finding that Complainants’ protected activity contributed to the suspension, arguing that the ALJ disregarded or mischaracterized evidence supporting CSC’s position. For instance, though CSC and HPM workers routinely worked on matters together at Hanford, Complainants’ September 18 restaurant meeting was not with front-line clinic employees but with higher level managers at HPM. CSC had learned that HPM managers had been working to replace CSC with LM and was aware of Complainants’ interaction with HPM and LM staff at the clinic in early September. Mooers was HPM’s owner’s husband and a transition manager and admitted that he did not routinely speak with CSC IT staff.¹²⁵ Vela was the quality insurance manager for HPM. While there was a high level of interaction between employees of both companies, the ALJ conflated the interactivity with clinic workers and with managerial level employees in concluding that the restaurant meeting was typical and to be expected.

CSC also argues that the July 2012 email from Elsethagen permitting CSC employees to assist HPM employees was incorrectly cited to support a finding that the restaurant meeting was an authorized part of transition. First, the email limited assistance to “an hour or so” and does not logically permit an after-hours meeting at an off-site location. Further, the approval was in response to a specific request regarding inquiries from HPM regarding a certain IT system and did not translate into a general rule allowing CSC staff to discuss IT information with anyone at HPM at any time.¹²⁶

Any notion of a general rule permitting meetings between HPM and CSC staff is rebutted by other actions by CSC, including Baxter’s email to HPM in July 2012 to confirm that “all requests for contract transition support (meeting requests, data requests, etc.) be sent to CSC management” and Riley’s demand that HPM and LM elevate their request for access to a patient database to her management in September 2012.¹²⁷ Most notably, the email sent by CSC on August 10, 2012, which informed staff that they should not be working to support HPM-identified transition

¹²³ *Deltek v. Dep’t of Labor*, 649 Fed. Appx. 320, 329 (4th Cir. 2016) (quoting *Feldman v. Law Enft Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014)).

¹²⁴ *Palmer v. Canadian Nat’l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 64 (Jan. 4, 2017) (Corchado, J., concurring).

¹²⁵ CSC Brief (Br.) at 13.

¹²⁶ CSC Br. at 11-12.

¹²⁷ CSC Br. at 12.

work unless directed by Baxter or Conley, set boundaries for CSC staff that logically did not authorize a meeting such as the one at the restaurant. These actions, as CSC points out, were not discussed by the ALJ.

CSC further argues that the record demonstrates that Complainants were aware of the boundaries for interacting with HPM staff. After Johnston had notified Conley of suspicious closed-door meetings with HPM and LM personnel in the clinic, Conley spoke with Spencer. Spencer noted in his daily journal that Conley had advised him not to speak with HPM about OHM and informed Clem about the counseling. In his statement to HR, Clem wrote that “[w]e were told you don’t discuss CSC scope (IT) with HPM.”¹²⁸

CSC’s arguments are persuasive and present support for reaching a finding that differs with the ALJ’s. Under the pertinent standard of review, however, “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.”¹²⁹ In our review, we are unable to determine the facts anew, make credibility judgments, or re-weigh the evidence in the record.¹³⁰ Even if a reviewing court disagrees with the ALJ’s factual findings, the court will still uphold the findings if substantial evidence supports the conclusion.¹³¹

Here, several pieces of evidence in the record support the ALJ’s finding. First, the temporal proximity between the protected activity, namely voicing concerns to Conley about OHM, and the suspension provided circumstantial evidence towards

¹²⁸ CX 71.

¹²⁹ *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966) (citing *NLRB v. Nevada Consol. Copper Corp.*, 316 U.S. 105, 106 (1942)).

¹³⁰ *Stone & Webster Const., Inc.*, 684 F.3d at 1133 (quoting *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005)).

¹³¹ See *Sharpe v. Supreme Auto Transp.*, ARB No. 2017-0077, ALJ No. 2016-STA-00073, slip op. at 5 (ARB Dec. 23, 2019) (“We must uphold an ALJ’s factual finding that is supported by substantial evidence, even if there is also substantial evidence for the other party, and even if we ‘would justifiably have made a different choice had the matter been before us de novo.’”); see also *Bonet ex rel. T.B. v. Colvin*, 523 F. App’x 58, 59 (2d Cir. 2013) (“It may well be that reasonable minds would disagree as to [the finding], but it is clear from the record that the ALJ . . . simply reached a conclusion, supported by substantial evidence.”); *Yi Teng Zheng v. Bd. of Immigr. Appeals*, 235 F. App’x 757, 758-59 (2d Cir. 2007) (“Although we do not agree with” the finding, “we need not remand on that basis because we can confidently predict that the agency would adhere to its adverse credibility finding on remand.”); *Dema v. Gonzales*, 193 F. App’x 109, 110 (2d Cir. 2006) (“Although we do not agree with all of the [factual findings], remand is not required because we can confidently predict that the decision-maker would reach the same conclusion on remand.”).

finding contribution.¹³² Second, Conley admitted in her testimony that Poulter informed her to immediately suspend Complainants because CSC management was worried that Complainants could cause the failure of OHM that they had warned management about, suggesting that Complainants' protected activity had some effect on their suspension.¹³³ Further, Mooers' reaction to Complainants' suspension and Elsethagen's email permitting CSC staff to assist HPM staff on transition demonstrate that there was no clear or well-known policy against discussing IT matters with HPM staff. These facts all indicate that Complainants' OHM complaints at least played a part in their suspension.

While evidence in the record supports Complainants' position, it is entirely possible that a reasonable mind could have come to a different finding than the ALJ's, given the strong evidence favoring CSC's position. However, at this point, the egg in this case has been scrambled, as we are unable to substitute our judgment with the ALJ's under the applicable standard of review. We therefore hold that substantial evidence supports the ALJ's finding that Complainants' protected activity contributed to their suspension.

CSC also objects to the ALJ's finding that the protected activity contributed to the failure to retain or rehire Clem.¹³⁴ CSC argues that the ALJ was improperly acting as a "super-personnel department" when opining that CSC's reasons for not retaining or rehiring Clem were insufficient. CSC notes that Spencer was offered a job on the new contract prior to the suspension and that the ALJ failed to consider all of CSC's reasons why it did not rehire Clem.

Given that substantial evidence supports the ALJ's finding regarding the suspension, however, CSC's arguments do not persuade us that Clem's protected activity did not also contribute to the decision not to retain or rehire him. Along with the evidence supporting the suspension finding, the ALJ cited evidence that Clem had made complaints about OHM prior to the decision not to retain him, that the decision to hire a less experienced IT worker for a short-staffed team was counterintuitive, and that the decisions not to hire Clem occurred within a year of the suspension. Though CSC proffered several reasons why they did not retain or

¹³² Temporal proximity between an adverse action and protected activity may constitute circumstantial evidence of retaliation, though the causal connection may be severed "where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action." *Robinson v. Nw. Airlines, Inc.*, ARB No. 2004-0041, ALJ No. 2003-AIR-00022, slip op. at 9 (ARB Nov. 30, 2005).

¹³³ Tr. 1147-49.

¹³⁴ CSC does not present an argument against the ALJ's finding that the OHM complaints contributed to the failure to provide Complainants special pay.

rehire Clem,¹³⁵ they do not negate a finding that the protected activity also contributed to the decision not to employ Clem. Further, the ALJ is not “required to discuss every piece of evidence submitted” in its decision, and his “failure to cite specific evidence does not indicate that such evidence was not considered.”¹³⁶ Accordingly, we shall not disturb the ALJ’s findings.

2. Same-Action Defense

CSC argues that it had proven that it would have suspended and withheld special pay from Complainants and declined to retain or rehire Clem absent their protected activity. If an ALJ determines a complainant’s protected activity contributed to an adverse employment action, an employer may avoid liability by proving by clear and convincing evidence that it would have committed the adverse action in the absence of the protected activity.¹³⁷ Clear and convincing evidence demonstrates “that a fact is ‘highly probable’ and ‘immediately tilts’ the evidentiary scales in one direction.”¹³⁸ This “is a tough standard [for employers], and not by accident,” as “Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves.”¹³⁹

As directed by the Board, the ALJ discussed on remand CSC’s argument that it had a good-faith belief that Complainants violated company policy by meeting and sharing proprietary information with HPM, which CSC contends would have warranted the adverse actions against Complainants.¹⁴⁰ The ALJ found that CSC did not have such a belief, noting that Complainants were not in a position to share proprietary information and that testimony indicated that no proprietary information was discussed at the restaurant meeting.

CSC argues that the ALJ improperly focused on what *actually* happened, as opposed to what CSC *believed* to have happened, and failed to address the evidence regarding the attempt to replace CSC with LM on the IT subcontract. CSC cites to Conley’s documentation of the September 20 meeting, in which she noted that

¹³⁵ CSC did not list these reasons, however, in the section of its brief discussing contribution for failure to retain and rehire Clem.

¹³⁶ *Brault v. Soc. Sec. Admin., Comm’r*, 683 F.3d 443, 448 (2d Cir. 2012) (citations omitted).

¹³⁷ *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 2013-0074, ALJ No. 2005-ERA-00006, slip op. at 9 (ARB Apr. 25, 2014).

¹³⁸ *Id.* at 11 (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)).

¹³⁹ *Id.* at 9 (quoting *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)).

¹⁴⁰ Martinez, the ER employee, testified that sharing information with a competitor would be considered a serious offense under CSC policy. ARB D. & O. at 9.

Spencer had provided information to LM for a pricing proposal and that Complainants had provided information about the IT systems to HPM, which demonstrated her understanding of the conversation with Complainants.¹⁴¹ A day before the suspension, an email informed CSC that HPM was attempting to change the contract with the DOE from fixed-firm costs to cost-reimbursable, which would replace CSC with LM. HPM had also been delaying the execution of the subcontract with CSC.¹⁴² CSC staff knew that Complainants had met with HPM and LM, and HPM's proposal to switch the contract noted that it included "more technical information."¹⁴³ Spencer also informed Conley that he had met with all levels of LM in their meeting. CSC contends that this evidence proves that it believed at the time that Complainants had shared proprietary information with a "direct competitor."

CSC is correct that this evidence is sufficient for the ALJ to have found it had a good-faith belief that Complainants gave away proprietary information and that the ALJ's decision lacked discussion of LM's role in the events. As discussed *supra*, however, our main concern on review is whether substantial evidence supports the ALJ's finding that CSC did not have a good-faith belief. CSC conceded indirectly that Complainants' complaints about OHM were a factor in the suspension decision. CSC believed that they might sabotage the program. Evidence in the record demonstrated that Complainants did not have access to pricing data, which was stored on a separate server, and that CSC knew so, as counsel for CSC stated that "only but so much information" Complainants could have shared. Indeed, Conley could not say what proprietary information Complainants could have used or how they undermined CSC's competitive position. Further, Poulter denied to Mooers that CSC suspended Complainants for "aiding the competition." This evidence supports the ALJ's finding.

Evidence that there was not a well-established policy for speaking with HPM employees further undermines CSC's defense. Employees from both companies interacted with each other frequently before and during transition. Elsethagen gave permission to staff to assist HPM employees with transition matters. After the suspension, Mooers sent an email asking Poulter to let him know if she had an issue with HPM staff discussing IT with CSC staff. On the other hand, CSC points to its email to HPM asking that "all requests for contract transition support be sent through CSC management" and the notice sent on the day of the suspension reminding CSC employees to coordinate transition through CSC management.

CSC further cites Spencer's September 6 meeting with Conley, in which she warned him not to discuss OHM with HPM, as evidence that CSC warned staff not

¹⁴¹ CSC Br. 22-23; CX 66.

¹⁴² Tr. 1516-17.

¹⁴³ CSC Br. 22.

to meet with HPM regarding transition and that Complainants were aware of this policy. The ALJ acknowledged that this was CSC's "strongest evidence" of their contention. Complainants argue that this meeting attempted to limit their protected activity, discussing OHM, rather than protect CSC's proprietary business information. The ALJ found this to demonstrate that CSC was more concerned with Complainants' complaints about OHM than them meeting with HPM staff.

While this evidence may adequately support a finding in favor of either party, our review is limited to whether the ALJ's finding that CSC failed to prove its defense by clear and convincing evidence is supported by substantial evidence. We hold that it is and, therefore, shall affirm this finding.

The ALJ was unpersuaded by CSC's arguments that the remaining adverse actions would have occurred in the absence of Complainants' protected activity. For the special pay, the ALJ noted that CSC's explanation that Complainants were not paid for failing to "give 100%" was unconvincing, given that other CSC workers who did not engage in protected activity but worked similar hours were provided the pay. For failure to retain Clem, the ALJ was unpersuaded by CSC's argument that it hired Matthews over Clem to have an "available mix of skills," considering the original three selections were all senior programmers. Last, the ALJ found CSC's explanation that Clem was not rehired because of reliability and trust issues, despite Conley finding him eligible, to be ambiguous. Because substantial evidence supports the ALJ's finding for the suspension, it is hardly possible to conclude that substantial evidence does not support the ALJ's findings for the subsequent adverse actions.

3. Damages Award

CSC contests several aspects of the ALJ's damages award, arguing that it was not supported by substantial evidence.¹⁴⁴ Incorporating the damages award from the initial D. & O., the ALJ awarded Clem \$172,889.21 in back pay¹⁴⁵ and \$30,000 in compensatory damages and awarded Spencer \$3,191.12 in back pay¹⁴⁶

¹⁴⁴ Complainants also contest the damages award, arguing that the ALJ should have awarded higher compensatory damages to Complainants and more special pay to Spencer. We shall not consider Complainants' arguments, however, as they did not file a petition for review of the damages award. See *Talukdar v. U.S. Dep't of Veteran Affs.*, ARB No. 2004-0100, ALJ No. 2002-LCA-00025, slip op. at 8 (ARB Jan. 31, 2007); *Adm'r, Wage and Hour Div., USDOL v. Doctor's Help, Inc.*, ARB No. 2018-0038, ALJ No. 2017-LCA-00024, slip op. at 5 (ARB Dec. 9, 2020).

¹⁴⁵ Clem's back pay included: \$2,716.95 in pay lost because of his suspension; \$1,728.80 in special pay withheld; \$7,884.24 in employer contributions to his 401(k); and \$160,559.22 in lost wages. D. & O. on Remand at 22.

and \$10,000 in compensatory damages. Damages awards are factual findings and must be supported by substantial evidence.¹⁴⁷

CSC first contests the ALJ's award of loss of contribution from CSC to Clem's 401(k) retirement account. CSC argues that the only evidence of the contribution, pay stubs from 2012, was insufficient and that the award should be totally reversed.¹⁴⁸ That year, however, was the year Clem was suspended, meaning it was the most recent evidence of what CSC was contributing for him, and testimony established that CSC employees were still receiving "full benefits" at the time of the hearing.¹⁴⁹ This award is supported by substantial evidence.

CSC next argues that Clem's special pay award should be reduced because evidence demonstrates that Clem had already received 36 of 61 overtime hours he submitted for special pay.¹⁵⁰ Complainants respond that Clem asserted that he did not receive a portion of the special pay for hours he did work, rather than no special pay at all.¹⁵¹ Because the record lacked documentary evidence for the precise number of hours, the ALJ awarded the lowest of Clem's estimate from his testimony. We decline to disturb the ALJ's award.

Last, CSC argues that Complainants are not entitled to any compensatory damages. During the hearing, two psychologists who had treated Clem testified about the suspension's emotional impact. Dr. Dan Lowe, who Clem saw for treatment four times, testified that Clem's history of psychological issues contributed to the reason he sought treatment in 2014. Dr. Lowe did not believe that Clem suffered any mental health conditions directly related to the suspension.¹⁵² Dr. Naughne Boyd, who Clem saw at least 28 times, connected emotional trauma experienced by Clem to the retaliation.¹⁵³

¹⁴⁶ Spencer's back pay included: \$1,701.92 in pay lost because of his suspension; and \$1,489.20 in special pay withheld. D. & O. on Remand at 23.

¹⁴⁷ See *Rudolph v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB Nos. 2014-0053, -0056, ALJ No. 2009-FRS-00015, slip op. at 14 (ARB Apr. 5, 2016); *Youngerman v. United Parcel Serv., Inc.*, ARB No. 2011-0056, ALJ No. 2010-STA-00047, slip op. at 10 (ARB Feb. 27, 2013).

¹⁴⁸ CSC Initial Br. 27.

¹⁴⁹ Tr. 1284.

¹⁵⁰ CSC cites to a 158 page exhibit (CX 117) in support of this contention but fails to include the precise page number in the exhibit where such documentation can be found. CSC Initial Br. 27.

¹⁵¹ Tr. 189-90.

¹⁵² Tr. 199; Lowe Dep. 86, 92-93.

¹⁵³ Tr. 298-99, 304.

CSC contends that Complainants did not prove causation between Clem's emotional distress and the adverse employment actions. CSC cites Dr. Lowe's testimony that Clem already had a history of mental health conditions and that the suspension did not lead to any further conditions. CSC also cites *Rodriguez v. Bowen*,¹⁵⁴ which it claims states that the ALJ must accept Dr. Lowe's testimony because the opinion of a treating physician is subject to special weight.

Under the ERA, however, a complainant needs only to prove that the adverse action caused emotional pain and suffering or mental anguish, not a diagnosed mental health condition.¹⁵⁵ Further, while *Rodriguez* does give a treating health professional's opinion special weight, the expert opinion is not necessarily conclusive and may be disregarded for specific, legitimate reasons.¹⁵⁶ Here, Dr. Boyd, who had treated Clem many more times than Dr. Lowe, opined that the suspension caused Clem emotional distress, including sleep issues, lack of confidence, anxiety, and depression.¹⁵⁷ Dr. Lowe did not deny that the retaliation caused Clem emotional distress, so his testimony did not negate Dr. Boyd's. Clem's compensatory damages award, therefore, is supported by substantial evidence.

For Spencer's compensatory damages award, CSC argues for reversing the award because Spencer had already resigned and found a new job, did not seek mental health treatment, and any stress he experienced came from the job's long hours.¹⁵⁸ The ALJ cited to Spencer's testimony that he had sleeping issues after the suspension and his worries that his suspension will prevent him from getting a job in the future.¹⁵⁹ The ALJ also cited Spencer's wife's testimony that Spencer became withdrawn, lacked energy, and had difficulty sleeping.¹⁶⁰ Because Spencer did not experience the same effects as Clem, the ALJ awarded Spencer a smaller award. This evidence is adequate to support the award.

CONCLUSION

¹⁵⁴ *Rodriguez v. Bowen*, 876 F.2d 759 (9th Cir. 1989).

¹⁵⁵ *Gutierrez v. Regents of the Univ. of California*, ARB No. 1999-0116, ALJ No. 1998-ERA-00019, slip op. at 10 (ARB Nov. 13, 2002) (citing *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992)) ("To recover compensatory damages under the [ERA], a complainant must show by a preponderance of the evidence that he or she experienced mental suffering or emotional anguish and that the unfavorable personnel action caused the harm.").

¹⁵⁶ *Rodriguez*, 876 F.2d at 761-62.

¹⁵⁷ Tr. 291-92, 298-99.

¹⁵⁸ CSC Initial Br. 30.

¹⁵⁹ Tr. 577-82.

¹⁶⁰ Tr. 766-67.

Because substantial evidence supports the ALJ's findings, we **AFFIRM** the ALJ's Decision and Order on Remand.

SO ORDERED.