



**In the Matter of:**

**FELIPE FRANCHINI,**

**ARB CASE NO. 13-081**

**COMPLAINANT,**

**ALJ CASE NO. 2009-ERA-014**

**v.**

**DATE: September 28, 2015**

**ARGONNE NATIONAL LABORATORY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Stephen B. Horwitz, Esq., *Sugarman & Horwitz*, Chicago, Illinois**

***For the Respondent:***

**Jon E. Klinghoffer, Esq.; Kristen A. Jones, Esq., *Goldberg Kohn LTD*, Chicago, Illinois**

**Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*.  
Judge Corchado concurring and dissenting.**

### **DECISION AND ORDER OF REMAND**

This case arises under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C.A. § 5851 (2013), as implemented by regulations codified at 29 C.F.R. Part 24 (Thomson Reuters 2013). Felipe Franchini filed a complaint with the Occupational Safety and Health Administration (OSHA) claiming that Argonne National Laboratory (ANL), operated by

UChicago Argonne, L.L.C. (Argonne),<sup>1</sup> terminated his employment in violation of the ERA whistleblower provisions. OSHA dismissed his case, whereupon Franchini filed objections and requested a hearing with the Office of Administrative Law Judges (OALJ). Before the assigned Administrative Law Judge (ALJ), Argonne filed a motion for summary decision seeking dismissal of Franchini's complaint, which the ALJ granted by Order issued October 13, 2010. On appeal, the Administrative Review Board (ARB or Board) reversed the ALJ's ruling and remanded the case having found genuine issues of material fact and errors of law on the issue of causation. On remand, the case was assigned to a new ALJ, who granted summary decision in favor of Argonne and dismissed Franchini's complaint. Franchini has again appealed to the ARB. For the reasons that follow, the Board again remands the case with an order for the ALJ to proceed to an evidentiary hearing on the merits.

## BACKGROUND

### *General Background and Franchini's Initial Safety Complaints*

Argonne hired Franchini in 2000 and terminated his employment on October 10, 2008. The Department of Energy (DOE) owns Argonne National Laboratory (ANL), which is operated by Argonne. At ANL, Franchini worked in the High Energy Physics (HEP) Division and in 2008 reported to Manoel Conde, his immediate supervisor, who in turn reported to Hendrick (Harry) Weerts, the HEP Division Director. Darryl Howe served as Argonne's Employee Relations Manager. Franchini asserts, without objection from Argonne, that he was promoted in or about 2005. Franchini spent a substantial amount of time working in Building 366, the focus of this case. Ken Woods was the Manager of Building 366.

Relevant to the instant action, Franchini made several safety complaints to both Argonne management and to the DOE in 2007 and 2008. In the summer of 2007, Franchini brought several non-radiological safety issues to the attention of DOE.<sup>2</sup> In August of 2007, Franchini raised concern with Harry Weerts about potential radiation contamination in Building 366.<sup>3</sup> It is undisputed that Franchini filed an internal complaint with Argonne in September 2007 concerning the work environment of Building 366. The September complaint reiterated earlier complaints and raised complaints about tool usage, frayed electrical cords, proper disposal of hazardous material, and eating in designated areas. On September 12, 2007, DOE's on-site manager at Argonne, Ronald Lutha, provided written notice to Argonne's President (Robert Rosner) of the various safety complaints raised in Franchini's complaint. Argonne responded by

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<sup>1</sup> Argonne National Laboratory is a scientific research facility owned by U.S. Department of Energy but operated by UChicago Argonne, L.L.C. We understand the Respondent to be UChicago Argonne, L.L.C.

<sup>2</sup> Claimant's Exhibit (CX) 33 (Declaration of Franchini, par. 6). *See also* CX 17 (Franchini email to DOE recounting August 2007 complaint).

<sup>3</sup> CX 33 (Declaration of Franchini, par. 5).

investigating the working conditions at Building 366 in September and October 2007, and DOE Site Manager Lutha reported several corrective actions taken by Argonne. Franchini claims that shortly after Weerts learned of Franchini's reports to the DOE, he was disciplined for the first time in his career at Argonne.<sup>4</sup>

The parties do not dispute that Franchini also raised safety complaints in 2008. In early 2008, Franchini again reported safety concerns regarding working conditions in Building 366. In an email dated March 27, 2008, Franchini reiterated to DOE non-radiological safety concerns that he had raised in 2007. On April 16, 2008, DOE received a formal complaint filed by Franchini reiterating his September 2007 complaints alleging unsafe job-site operational practices and issues related to hazardous chemical exposure.<sup>5</sup> On April 23, 2008, Franchini telephoned DOE (Craig Schumann) expressing concern about levels of radiation that had been detected that same day by an Argonne Health Physics employee both inside Building 366 where a Zeus Module had been stored and immediately outside the building around a shipping container.<sup>6</sup> On May 1st, Weerts notified Franchini that he would be meeting with DOE Argonne site officers Craig Schumann and Eric Turnquest.<sup>7</sup> On May 12, Franchini met with the DOE officers, at which time he discussed his radiation concerns arising from the April 23 discovery.<sup>8</sup> Franchini subsequently emailed Weerts requesting information about radiation exposures in Building 366,<sup>9</sup> and on or about May 19, 2008, Franchini complained in an email to Weerts and other officials at Argonne, with copy to Schuman at DOE (which Schuman in turn forwarded to Lutha), about potential radiation coming from the Zeus container in Building 366.<sup>10</sup> Franchini described in his email to Weerts the circumstances leading to detection of the radiation discovered on April 23. He also claimed he was exposed to depleted uranium. The same day (May 19), Franchini met for a second time with Schumann, at DOE's office located at ANL. At the time, Franchini was on sick leave.<sup>11</sup> Subsequently, on May 23, Gary Zeman, ANL's Radiological Safety Officer, received from DOE (Paul Neeson) a copy of Franchini's May 19

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<sup>4</sup> *Id.* (Declaration of Franchini, par. 6, 7).

<sup>5</sup> *See* Record before ALJ resulting in ALJ Order Granting Respondent's Motion for Summary Decision issued October 13, 2010, Complainant's Exhibit 5 (Franchini OSHA Ex. O-BB).

<sup>6</sup> CX 33, par. 8.

<sup>7</sup> *Id.*, par. 9.

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

<sup>9</sup> *Id.*, par. 10. *See also* CX 19.

<sup>10</sup> *Id.*, par. 10. *See* CX 20 and Respondent's Exhibit (RX) E (email to Weerts). *See also* RX C (Declaration of Weerts, par. 21).

<sup>11</sup> CX 33 (Declaration of Franchini, par. 11).

email to Weerts. Zeman, in turn, advised others at Argonne (including Darryl Howe) of Franchini's email and his concerns.<sup>12</sup> According to Argonne, it subsequently investigated Franchini's report about the container and found "no unacceptable levels of radiation."<sup>13</sup>

Throughout the period of his employment, Franchini recorded conversations with co-workers and management personnel at Argonne, often without their knowledge or consent, which in some instances involved work-place safety concerns.<sup>14</sup> For example, Franchini testified that he recorded a meeting in his office in early 2008 with his supervisor, Manoel Conde, and another member of Argonne management, where they discussed safety concerns.<sup>15</sup> Franchini indicated that as early as 2004 he informed Argonne management, including Howe and the HEP Division Director at the time (Larry Price), that he had made tape recordings at work of Argonne personnel, and that he provided Price with a transcript he had made of his recording of his then-supervisor.<sup>16</sup> At a meeting with Argonne management on June 6, 2008 (*see* discussion, *infra*), Franchini also indicated that he had taken "numerous pictures of equipment and other items [he] felt related to safety concerns at the Laboratory."<sup>17</sup> The purpose of the recordings, according to Franchini, was because he anticipated seeking resolution of problems he had identified "outside the Lab."<sup>18</sup>

*Insubordination for Violation of Sick Leave Return Protocol; Request for Audio Tapes*

On May 19, 2008, Franchini, who at the time was on sick leave, again met with Craig Schumann at DOE's office located at ANL in connection with his complaint about radiation contamination.<sup>19</sup> On May 23rd, Weerts wrote Franchini advising him that he was not to return to the ANL job site unless he had obtained a medical release to return to work from this treating

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<sup>12</sup> CX 21 (copy of Zeman's email to self).

<sup>13</sup> Mot. for S.J. on Rem., Ex. D (declaration of radiological safety officer).

<sup>14</sup> RX B (Deposition of Franchini at pp. 30-36).

<sup>15</sup> *Id.*, at 73.

<sup>16</sup> CX 33, par. 15.

<sup>17</sup> RX I (Memo from Weerts to Franchini dated June 13, 2008). Franchini reiterated the safety-related purpose of his picture-taking in a letter of June 18, 2008 to Weerts, in which he noted Argonne President Robert Rosner's authorizing of "the use of cameras for safety related pictures." RX U.

<sup>18</sup> *Id.*, at 47-48.

<sup>19</sup> CX 33, par. 11.

physician and had scheduled an appointment in advance with ANL's Medical Department to meet for clearance to return to work.<sup>20</sup>

On June 2nd, Franchini attempted to return to work. He brought with him a medical release from his doctor and presented it to the ANL Medical Department, which informed him that the medical release was not acceptable. Franchini left, and returned on June 4th to the ANL Medical Department with a new medical release. The Medical Department approved his return, and Franchini returned to work that same day.<sup>21</sup>

Two days later, on Friday, June 6th, Franchini was summoned to a meeting with Argonne managers Weerts and Darryl Howe.<sup>22</sup> According to Howe, the purpose of the meeting was "to issue Franchini an insubordination discipline for his refusal to follow Argonne policies with regard to his use of sick leave."<sup>23</sup> Franchini was advised that he had disobeyed Weerts's instructions of May 23 regarding return to the ANL job site by entering Argonne on June 2 without a release from his physician and again on June 4 for entering Argonne without scheduling an appointment in advance with ANL's Medical Department. Franchini received a written reprimand for insubordination, signed by Weerts, for having returned to the ANL job site in disregard of Weerts's May 23 directive.<sup>24</sup>

At the June 6th meeting, Franchini was also asked if he had been recording co-workers without their consent.<sup>25</sup> Franchini responded that he had made approximately fifty recordings since 2004, and forty-seven were obtained without the consent of the other parties.<sup>26</sup> Franchini was either directed or asked to produce the tapes and other recordings (including any videos and pictures) that he had made, and to deliver them to Howe's office the following Monday, June 9th, which Franchini agreed to do.<sup>27</sup> After the meeting on June 6th, Franchini discovered that his

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<sup>20</sup> *Id.* See CX 22 (Weerts's letter of May 23 to Franchini). See also CX 24 (December 18, 2008 Argonne Division memo articulating ANL policy regarding returning to work from sick leave).

<sup>21</sup> CX 33 (Franchini Declaration, par. 12-13).

<sup>22</sup> *Id.*, par. 13. See also Mot. for S.J. on Rem., RX C (Declaration of Weerts), par. 6

<sup>23</sup> RX A (Declaration of Darryl Howe, par. 6). See also RX C, par. 6.

<sup>24</sup> CX 33 (Franchini's Declaration, par. 14). See also CX 23 (Weerts's June 6, 2008 letter of reprimand).

<sup>25</sup> Mot. for S.J. on Rem., RX A, par. 8; RX C, par. 8.

<sup>26</sup> RX A, par. 9, 10.

<sup>27</sup> There exists an issue of material fact as to whether Franchini was *directed* to return the tapes, or merely *requested* to do so. Howe and Weerts testified that Franchini was directed to return the tapes and that Franchini was informed at the June 6 meeting that failure to produce the tapes to Howe

office had been searched and that the lock on his office door had been changed preventing him from returning to his office.<sup>28</sup>

On or about June 6th, the DOE Argonne Site Office sent Argonne a document captioned “Review of Status of Corrective Actions from September 2007 Complaint,” which addressed Franchini’s complaints regarding working conditions in Building 366.<sup>29</sup>

Over the weekend of June 7-8, 2008, Franchini reviewed his collection of recordings and duplicated some, but not all, on to eight cassettes.<sup>30</sup> According to Franchini, on Monday, June 9th, upon returning to work, he placed the cassettes, along with a cover letter stating that he needed additional time to copy the balance of the audio tapes in his possession, in an interoffice envelope addressed to Howe.<sup>31</sup> Franchini went on extended sick leave on June 9 after placing

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by June 9 would be considered insubordination. RX A (Declaration of Howe, at 11), RX C (Declaration of Weerts, at 9). Franchini disputes this, contending that Howe and Weerts merely requested that he return the tapes. CX 33 (Declaration of Franchini, par. 15); RX B (Deposition of Franchini, at pp. 45-47).

<sup>28</sup> CX 33, par. 16. *See also* RX B (Deposition of Franchini, at pp. 56-57).

<sup>29</sup> *See* Claimant’s Exhibit 5 (Franchini OSHA Ex. O-BB), record before ALJ with respect to Order Granting Respondent’s Motion for Summary Decision issued October 13, 2010. In response to Argonne’s first motion for summary judgment in this case, Franchini submitted OSHA Ex. O-BB, CX 5, which identified a number of problems at Argonne National Laboratory, including the following: (1) “HEP [Argonne] did not inform all employees in Building 366 of the materials and chemicals used in work activities and potential hazards as required by hazard communication requirements (29 C.F.R. 1910.1200 and 29 C.F.R. 1910.1450)”; (2) the NOVA Project Adhesive Testing confirmed that exposures did not surpass occupational exposure standards for a “small scale” project but should not be used predict conditions for a “full size” NOVA neutrino detector construction; and (3) employees on some projects (e.g., Argonne Wakefield Accelerator) “were not informed of the specific chemicals used, material safety data sheets (MSDS), or provided hazard information related to the NOVA project activities” and therefore all employees were not “appropriately informed.” The DOE letter also expressly reminded HEP of its obligations to provide MSDS and information to individuals about chemicals such individuals have used on particular projects. The DOE Letter (Attachment #1) then reviewed eight “Complaints” and corresponding findings, as well as DOE’s criticisms of Argonne pertaining to each complaint. In Attachment #2 to the DOE Letter, DOE listed approximately 30 additional criticisms following employee interviews and a walkthrough of Building 366.

<sup>30</sup> CX 33, par. 15.

<sup>31</sup> *Id.*, par. 16. *See* CX 27 (Franchini’s memo to Howe that accompanied the tapes).

the tapes in interoffice mail. He remained on sick leave up until the time he was notified in October that his employment with Argonne was terminated.<sup>32</sup>

*Post-June 6, 2008 Safety Complaints; Termination of Employment*

Howe and Weerts testified that they never received any of Franchini's tapes or recordings on June 9th.<sup>33</sup> On June 13, Weerts sent a written memorandum to Franchini via Federal Express, which Franchini received, informing him that Argonne had not received the tapes, and directing him to bring all recordings to Darryl Howe "when you return to work" from sick leave.<sup>34</sup> "Failure to comply with this directive," the memorandum stated, "will be cause for additional corrective action up to and including release from Laboratory employment."<sup>35</sup> Weerts further directed, "Because you have been absent on sick leave in excess of three days [June 10-13], you are required to provide your doctor's release and medical certification before you return to work. You are not to return to work or come on-site at Argonne without this certification. Please provide this certification and the recordings requested above when you return to work."<sup>36</sup>

According to Franchini, the June 13, 2008 directive from Weerts was the last written communication he received from Argonne prior to receipt of his employment termination letter on October 10, 2008.<sup>37</sup>

By correspondence dated June 18, 2008, Franchini responded to Weerts's June 13 directive by challenging the accuracy of certain statements made by Weerts. Franchini mentioned that the use of cameras for safety-related pictures had been authorized by Argonne's president, Robert Rosner, and asserted that Weerts had "failed to implement corrective action to the safety issues I have addressed to you" and that Weerts had "allowed the safety conditions to worsen and additional safety issues [to] have taken place."<sup>38</sup>

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<sup>32</sup> CX 33, par. 17.

<sup>33</sup> RX A (Declaration of Howe, par. 12, 15); RX C (Declaration of Weerts, par. 10).

<sup>34</sup> RX I (Weerts's directive to Franchini dated June 13, 2008).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> CX 33 (Declaration of Franchini, par. 17).

<sup>38</sup> RX U (Franchini's June 18, 2008 correspondence). Weerts received the correspondence on June 23rd. RX C (Declaration of Weerts, par. 12).

On or about June 20, 2008, Franchini filed a supplemental letter complaint of safety concerns with DOE's Argonne Site Office, to the attention of Ron Lutha, DOE's Site Director.<sup>39</sup> The June 20 letter identified several radiation-related safety issues Franchini contended had been overlooked in DOE's June 6th letter to Argonne. Franchini also claimed retaliation and harassment for having raised these and similar issues with Argonne management. Lutha, in turn, forwarded Franchini's correspondence to his colleagues at DOE with the recommendation that DOE request Argonne to investigate the concerns raised in Franchini's letter.<sup>40</sup>

On or about July 15, 2008, Lutha wrote to Rosner, Argonne's President, "in regard to safety concerns raised by Felipe Franchini regarding his employment at Building 366." Lutha noted that Franchini "has initiated several requests for information regarding his workplace conditions and whether they may have contributed to any medical effects" and that while "[t]he Laboratory and this office have reviewed these concerns and have provided him with requested information," DOE "would like to ensure that [Franchini's] questions have been answered and that all appropriate information has been provided."<sup>41</sup> Lutha further noted that DOE had found "that radiological safety conditions at [Franchini's] workplace have not been thoroughly evaluated," and requested "that this area be reviewed to determine whether (a) he received any undue radiation exposure (external or internal) or (b) there were any shortcomings in the Laboratory's response to radiological safety deficiencies (if any)."<sup>42</sup>

On October 3, 2008, Weerts sent Franchini a written directive by way of Federal Express instructing Franchini to immediately return his tape recordings, video recordings and pictures in a pre-paid FedEx box that was enclosed. Weerts warned that failure to provide Argonne with the requested materials by October 8th "will be cause for corrective action, including release from Laboratory employment."<sup>43</sup> Weerts's letter was delivered via Federal Express to Franchini's home on October 6th, but not signed for by Franchini as having been received. The FedEx tracking record indicates that the FedEx package was sent with signature receipt waived.<sup>44</sup>

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<sup>39</sup> CX 26 (Franchini's letter complaint, received by DOE on June 23, 2008). Franchini's supplemental complaint was in response to Lutha's June 11th correspondence to Franchini in which Lutha forwarded a copy of DOE's June 6th letter to Argonne regarding Franchini's complaint about working conditions in Building 366. See CX 25, and Claimant's Exhibit 5 (Franchini OSHA Ex. O-BB).

<sup>40</sup> CX 26 (Lutha's transmittal email, dated June 24, 2008).

<sup>41</sup> CX 30 (Lutha letter to Rosner, July 15, 2008). This memo, among others was copied to Gary Zemen, Argonne Radiation Safety Officer.

<sup>42</sup> *Id.*

<sup>43</sup> RX J (Memo from Weerts to Franchini, Oct. 3, 2008).

<sup>44</sup> RX J (FedEx tracking certification).

On October 10, 2008, Weerts terminated Franchini's employment for "violating Laboratory policies, including Employee Conduct § 7400.1 (insubordination)."<sup>45</sup> Upon inquiring as to the reason for Argonne's action, Franchini was informed that he was terminated for not returning the tapes as he had been instructed in the October 3, 2008 letter. Franchini attests that he never received Weerts's October 3rd letter; that the last written communication he had from Argonne regarding the tapes was Weerts's June 13, 2008 correspondence which had directed him to return the tapes and other recordings to Howe "when you return to work" from sick leave, and that he had been on sick leave since June 9th.<sup>46</sup> Franchini further declared that the first time he saw the October 3rd letter was on December 22, 2008, at a grievance hearing in connection with his employment termination.<sup>47</sup>

#### *Administrative and prior OALJ and ARB Proceedings*

On April 1, 2009, Franchini filed a complaint with OSHA. On June 29, 2009, OSHA found that Franchini engaged in protected activity under the ERA but that a series of intervening events occurred between his protected activity and the employment termination, and therefore rejected Franchini's claim for failing to show that protected activity was a contributing factor in the termination of his employment. Franchini filed objections to OSHA's determination and requested a hearing with the OALJ.

Before the ALJ initially assigned to Franchini's case, Argonne filed a motion for summary decision on the grounds that Franchini did not engage in ERA protected activity or if he did, that such activity did not contribute to the termination of his employment. Argonne also argued that it would have fired Franchini even if he had not engaged in protected activity. Following submission of Franchini's response, the ALJ granted Argonne's motion for summary decision and dismissed Franchini's complaint.<sup>48</sup>

Franchini appealed the ALJ's decision to the ARB. On September 26, 2012, the ARB reversed the ALJ's ruling granting summary decision and remanded the case for further proceedings.<sup>49</sup> On remand, the case was assigned to a different ALJ, the initial ALJ having

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<sup>45</sup> RX C (Declaration of Weerts, par. 19). See RX L (October 10, 2008 termination letter). See RX K (Section 7400.1 Employee Conduct – Policy). Employee Conduct Policy 7400.1 generally refers to "insubordination" without defining the term or expressly discussing audio recording. D. & O. on Rem., slip op. at 4 (citing OSHA Ex. O-KK; Mot. for S.D., Exs. K, M).

<sup>46</sup> CX 33 (Declaration of Franchini, par. 17).

<sup>47</sup> *Id.*, par. 18).

<sup>48</sup> *Franchini v. Argonne Nat'l Lab.*, ALJ No. 2009-ERA-014 (Oct. 13, 2010).

<sup>49</sup> *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014 (ARB Sept. 26, 2012) (ARB D. & O.).

retired. Argonne again moved for summary decision. The ALJ granted summary decision in favor of Argonne.<sup>50</sup> Franchini appeals.

### 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. 42 U.S.C.A. § 5851. The Secretary has delegated that authority to the Administrative Review Board. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). *See* 29 C.F.R. Part 24.

The ARB reviews an ALJ's grant of summary decision de novo,<sup>51</sup> applying the same standard that ALJs must employ under 29 C.F.R. § 18.40.<sup>52</sup> Pursuant to 29 C.F.R. § 18.40(d), an ALJ may "enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."<sup>53</sup> In ruling on a motion for summary decision, the evidence is not weighed to determine the truth of the matters asserted. Rather, the question is whether, upon viewing the evidence in the light most favorable to the nonmoving party,<sup>54</sup> "the pleadings, affidavits, material obtained by discovery or otherwise, or matters

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<sup>50</sup> *Franchini v. Argonne Nat'l Lab.*, ALJ No. 2009-ERA-014 (July 15, 2013) (ALJ D. & O. on Rem.).

<sup>51</sup> *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999-STA-021, slip op. at 2 (ARB Nov. 30, 1999).

<sup>52</sup> *Siemaszko v. First Energy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012); *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027, slip op. at 6 (ARB May 29, 2009).

<sup>53</sup> *Siemaszko, supra*. *See Trammell v. New Prime, Inc.*, ARB No. 07-109, ALJ No. 2007-STA-018, slip op. at 4-5 (ARB Mar. 27, 2009) (noting that 29 C.F.R. § 18.40 generally incorporates into the administrative proceedings the summary judgment procedure described in Rule 56 of the Federal Rules of Civil Procedure).

<sup>54</sup> "[O]nly where the record is devoid of evidence that could reasonably be construed to support the [complainant's] claim" should a motion for summary decision preclude an evidentiary hearing. *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

officially noticed show that there is no genuine issue as to any material fact” and if not, whether the moving party is thus entitled to summary decision as a matter of law.<sup>55</sup>

## DISCUSSION

In reversing the ALJ’s ruling and remanding this case to the ALJ, the Board in its September 26, 2012 Decision and Order of Remand identified three errors committed by the ALJ in the original order granting summary decision: (1) failure to properly evaluate the temporal proximity evidence presented by Franchini within its overall context, “including the nature of the protected activity and the evolution of the unfavorable personnel action;” (2) failure to take into consideration evidence of safety concerns (and thus protected activity) that Franchini raised in June of 2008, occurring more closely in time to the adverse personnel action than the five month period the ALJ found had elapsed since the occurrence of any protected activity; and (3) finding as a matter of summary decision that Franchini’s refusal to turn over the tape recordings of co-workers constituted insubordination and thus an intervening event severing any causal link between Franchini’s protected activity and the termination of his employment.<sup>56</sup> With respect to this last point, the ARB noted that the record on appeal did not contain undisputed evidence that Franchini violated any workplace policy substantiating Argonne’s general claim of insubordination, nor did the record support Argonne’s claim that Franchini’s recording of his co-workers violated Illinois state law. The evidence of record did not establish that Argonne had an undisputed right to demand that Franchini turn over his tape recordings or the reason that Franchini had to comply with Argonne’s directive. Ultimately, the Board pointed out, even if Franchini’s refusal to turn over his tapes was a valid reason for Argonne’s action, “this conclusion does not rule out protected activity as a contributing factor in the termination of his employment.”<sup>57</sup>

On remand, the case was assigned to a new ALJ. Argonne again moved for summary decision. The ALJ reviewed the arguments and, in apparent disregard of the errors of law identified by the ARB in its Decision and Order of Remand as contained in the prior ALJ’s decision, granted summary decision in favor of Argonne. To begin with (and contrary to the Board’s instruction in its prior remand), the ALJ focused only on Franchini’s protected activity prior to his meeting with Argonne officials on June 6, 2008, from which he concluded that

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<sup>55</sup> *Lee v. Schneider Nat’l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

<sup>56</sup> ARB D. & O., slip op. at 10-12.

<sup>57</sup> *Id.* at 12. As the ARB stated, “In a motion for summary decision, an employer cannot nullify the complainant’s evidence of contributory factor by simply presenting a different independent and lawful reason for the unfavorable employment action.” *Id.* at 10.

Franchini failed to create a genuine issue of material fact that the pre-June 6th protected activity contributed to the termination of his employment:

Complainant's protected activity (reporting safety concerns) and the adverse employment action (his termination) were separated by the intervening events of the June 6, 2008 meeting and those that followed thereafter regarding Respondent's directive to Complainant to return the tape recordings. . . . All of the evidence points to the uncontested, simple facts that Mr. Franchini was terminated because after he surreptitiously recorded some of his co-workers, he agreed to turn over to his employer the tapes he made. While in fact he did turn over a small portion of the tapes, he did not turn over all of the tapes as he had agreed to. . . . He was in fact terminated because he did not do what he had agreed to do . . . after having been put on notice that if he did not return all of the tapes (as he agreed that he would) he could be terminated.<sup>58</sup>

Based upon the foregoing, the ALJ held that "there is simply no evidence of any nexus between Mr. Franchini's previously reporting of safety violations and his termination for insubordination." The ALJ acknowledged that Argonne "could have done a better job about having written policies prohibiting surreptitious recordings in the work place," but treated the Respondent's failure as "irrelevant because Mr. Franchini agreed to return all of the tapes and did not do so after being put on notice that the failure to do so could result in his termination." "For the same exact reason," the ALJ considered it "irrelevant whether Mr. Franchini's surreptitious workplace recordings violated any state or federal laws; he agreed to return all of the tapes and did not do so. All that really matters is that it was Mr. Franchini's choice, after having been put on notice, not to do what he had agreed to do that led to him being terminated. He made a choice, and that choice had consequences." The ALJ accordingly held in conclusion:

[T]he uncontroverted evidence overwhelmingly demonstrates, even when viewed in the light most favorable to Complainant, that Complainant was terminated solely because of his insubordination in not returning the tapes as he had agreed that he would . . . and that his protected activity of reporting safety concerns was not in any way a contributing factor in his termination.<sup>59</sup>

Aside from ignoring the ARB's Decision and Order on Remand and the law applicable to determining whether a claimant has met his or her burden of proving "contributing factor" causation (matters which we turn to momentarily), we find the ALJ's rationale for ruling against Franchini untenable in and of itself. The ALJ treated both ANL's policy regarding workplace recording and whether Franchini violated state or federal law as "irrelevant" *because he agreed to turn over the tapes but failed to do so*. "All that really matters is that it was Mr. Franchini's

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<sup>58</sup> ALJ D. & O. on Rem., slip op. at 9.

<sup>59</sup> ALJ D. & O. on Rem., slip op. at 9-11.

choice, after having been put on notice, not to do what he had agreed to do that led to him being terminated. He made a choice, and that choice had consequences.” Aside from the ALJ engaging in fact finding at the summary decision stage,<sup>60</sup> the ALJ is in effect saying: “*If an employee agrees to take action at the request of his or her employer under threat of termination, but fails to do so, his or her employment may be terminated regardless of whether the employee’s failure violated company policy or applicable law.*” We know of no body of law that countenances such a novel interpretation of a whistleblower’s rights, and in fact consider the ALJ’s rationale in and of itself unsustainable as a matter of law. We thus squarely reject the ALJ’s most unusual rationale for finding no “contributing factor” causation.

Turning to the merits of dismissing Franchini’s claim as a matter of summary decision, we first recount the law governing whistleblower rights under the employee protection provisions of the Energy Reorganization Act of 1974, 42 U.S.C.A. § 5851, to the extent here applicable. Section 5851(a)(1) provides, in pertinent part: “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 . . . (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.); . . . (D) commenced . . . a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended; (E) testified or is about to testify in any such proceeding; or (F) assisted or participated . . . in such a proceeding. . . .”

To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, suffered an unfavorable personnel action, and that his/her protected activity was a contributing factor in the unfavorable personnel action. If the complainant establishes that protected activity was a contributing factor in the adverse personnel action, the respondent may nevertheless avoid liability 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.<sup>61</sup>

There is no dispute but that Franchini was subjected to an unfavorable personnel action within the meaning of the ERA. Turning, then, to the question of protected activity and viewing, as we must, the evidence in the light most favorable to Franchini (the nonmoving party), the evidence of record establishes that Franchini engaged in ERA-protected activity both before *and after* his June 6, 2008 meeting with Argonne officials.

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<sup>60</sup> ARB D. & O., slip op. at 7; *In re Dana Corp.*, 574 F.3d 129, 151 (2d Cir. 2009) (role of the district court in considering a motion for summary judgment “is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists”).

<sup>61</sup> 42 U.S.C.A. § 5851(b)(3)(C) and (D); 29 C.F.R. § 24.109(b)(1); *Hoffman v. NextEra Energy, Inc.*, ARB No. 12-062, ALJ No. 2010-ERA-011 (ARB Dec. 17, 2013).

As previously discussed, *supra* p. 2, in the summer of 2007 Franchini brought several non-radiological safety issues regarding working conditions in Building 366 to the attention of the Department of Energy, that in turn resulted, in September, in DOE's on-site manager at Argonne notifying Argonne's President of the concerns Franchini had raised (which, in turn, resulted in Argonne investigating Building 366's working conditions in September and October 2007). In August of 2007, Franchini also raised safety concerns with Argonne's HEP Division Director about potential radiation contamination in Building 366, and it is undisputed that Franchini filed an internal complaint with Argonne in September 2007, which reiterated earlier complaints and raised additional workplace safety concerns.

In early 2008, Franchini again raised safety complaints, including concerns about possible radiation leakage at the job site, both internally and with DOE. Also, to the extent that some of Franchini's recordings taken during his employment involved work place safety concerns and were taken, as he testified, because he anticipated using the recordings in seeking resolution of problems he had identified "outside the Lab," *see* discussion *supra*, pp. 3-4, such recordings would constitute ERA-protected activity.<sup>62</sup>

Evidence of record also establishes that Franchini engaged in ERA-protected activity after his June 6, 2008 meeting with Argonne officials. As the ARB noted in its remand decision (ARB D. & O., pp. 4, 11, 12), and as previously discussed herein, there is sufficient evidence of record establishing (again viewing the evidence in a light most favorable to the nonmoving party) that Franchini engaged in protected activity on or about June 18, 2008, in a letter addressed to the HEP Division Director raising concerns about additional radiation-related issues. The June 18th letter, which responded to correspondence received from the HEP Division Director, asserted, among other things, that the Director had failed to implement corrective action to address safety issues Franchini had previously raised, and charged the Director with having allowed safety conditions to worsen and additional safety issues to have occurred.

Also as previously noted (*supra*, pp. 7-8), by correspondence dated June 20, 2008, Franchini filed a supplemental complaint of safety concerns with DOE's Argonne Site Office. The June 20th letter identified several radiation-related safety issues Franchini contended were

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<sup>62</sup> *See Melendez v. Exxon Chem. Am.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 18 (ARB July 14, 2000) ("the gathering of evidence in support of a whistleblower complaint, including the gathering of evidence by means of tape recording, is a type of activity that has been held to be covered by the employee protection provisions [of the ERA]"); *Mosbaugh v. Georgia Power Co.*, 1991-ERA-001 (Sec'y Nov. 20, 1995) (tape recording to gather evidence in support of a nuclear safety complaint to the Nuclear Regulatory Commission protected under the ERA). *Cf.*, *Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-007 (ARB Mar. 24, 2001) (distinguishing cases such as *Mosbaugh*, where the complainant engages in "selective recordings" designed to gather evidence of safety violations or other violations under the whistleblower statutes, from cases in which a complainant engages in indiscriminate and excessive recording of unrelated topics, such as a company's business strategy and finances, which the ARB held would create an independent legal basis for disciplinary action).

overlooked by DOE in an investigation it had conducted at the ANL jobsite in response to Franchini's prior complaint. Following a recommendation by the DOE site manager that DOE request an investigation by Argonne into the concerns Franchini raised, on or about July 15, 2008 the DOE Argonne site manager wrote to Argonne's President regarding the safety concerns he had raised. The DOE site manager noted in the letter that Franchini "has initiated several requests for information regarding his workplace conditions and whether they may have contributed to any medical effects" and that while "[t]he Laboratory and this office have reviewed these concerns and have provided him with requested information," DOE "would like to ensure that [Franchini's] questions have been answered and that all appropriate information has been provided." The site manager further noted that DOE had found "that radiological safety conditions at [Franchini's] workplace have not been thoroughly evaluated," and requested "that this area be reviewed to determine whether (a) he received any undue radiation exposure (external or internal) or (b) there were any shortcomings in the Laboratory's response to radiological safety deficiencies (if any)."<sup>63</sup>

The fact that Franchini engaged in protected activity in June of 2008 that was brought to the attention of Argonne's president in July,<sup>64</sup> considerably strengthens Franchini's proof by circumstantial evidence that his protected activity was a contributing factor in his employment termination three months later, given the temporal proximity.<sup>65</sup> A fact-finder could reasonably infer causation from this close temporal proximity. This and the other evidence<sup>66</sup> present

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<sup>63</sup> CX 30 (Lutha letter to Rosner, July 15, 2008, copied to, among others, Argonne's Radiological Safety Officer).

<sup>64</sup> "[P]roof that an employee's protected activity contributed to the adverse action does not necessarily rest on the decision-maker's knowledge alone. It may be established through a wide range of circumstantial evidence, including the acts or knowledge of a combination of individuals involved in the decision-making process. Proof of a contributing factor may be established by evidence demonstrating 'that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity.'" *Rudolph v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 16-17 (ARB Mar. 29, 2013) (quoting *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 14 (ARB June 24, 2011)). See *Bartlik v. T.V.A.*, 1988-ERA-015, at n.1 (Sec'y Apr. 7, 1993) ("[W]here managerial or supervisory authority is delegated, the official with ultimate responsibility who merely ratifies his subordinates' decisions cannot insulate a respondent from liability by claiming 'bureaucratic ignorance'.").

<sup>65</sup> See, e.g., *Goldstein v. EBASCO Contractors, Inc.*, No. 1986-ERA-036, slip op. at 11-12 (Sec'y Apr. 7, 1992) (temporal proximity of seven to eight months established nexus); *Barker v. UBS AG*, 888 F. Supp. 2d 291, 300 (D. Conn. 2012) (suggesting that a range up to five months could be a sufficiently close temporal gap to support an inference of unlawful discrimination in a SOX whistleblower case).

<sup>66</sup> Franchini also presented evidence which suggests that Argonne's demand to return the tape recordings was pretextual. As early as 2004, Franchini had notified Weerts, Howe and others that he

sufficient disagreement over material facts to preclude summary decision on the issue of causation. There nevertheless remains the question of whether the undisputed evidence of record supports the ALJ's finding that Franchini's failure to turn over his tape recordings in early October constituted an intervening event of "insubordination" justifying Argonne's decision to terminate Franchini's employment. The ALJ's finding raises two issues, both of which warrant rejection of the ALJ's summary decision, as hereafter discussed.

To begin with, the ALJ's summary decision finding no "contributing factor" causation was based on the ALJ's determination that "the uncontroverted evidence overwhelmingly demonstrates . . . that Complainant was terminated solely because of his insubordination in not returning the tapes as he agreed that he would."<sup>67</sup> In reaching his conclusion of no "contributing factor" causation, the ALJ ignored or discounted Franchini's circumstantial evidence of causation in favor of evidence submitted by Argonne in support of its affirmative defense as to why it terminated Franchini's employment. In doing so, the ALJ ran afoul of the Board's decision in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014), as reaffirmed and clarified *en banc* in *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015).<sup>68</sup> As explained in detail in these two

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was taping conversations in order to gain evidence demonstrating harassment against him. He also testified that his supervisor, Dr. Conde, informed Argonne management about Franchini's recordings in February 2008. See discussion, *supra* pp. 3-4. But Franchini was never directed either to stop taping or to turn over copies of the audio tapes until after he contacted DOE about radiation contamination. Nor did Argonne have a written policy prohibiting the taping of conversations. All this evidence begs the question of why Argonne waited until June 2008 to demand the tapes from Franchini. A reasonable fact-finder could infer pretext from this evidence.

<sup>67</sup> ALJ D. & O. on Rem., slip op. at 10-11.

<sup>68</sup> We fail to understand the purpose in our colleague's concurrence, particularly since the holding in *Fordham*, as reaffirmed and clarified by *Powers*, is not significantly different from that which the ARB stated in our first decision in this case (authored by Judge Corchado), *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, slip op. at 10 (ARB Sept. 26, 2012) ("In a motion for summary decision, an employer cannot nullify the complainant's evidence of contributory factor by simply presenting a different independent and lawful reason for the unfavorable employment action."). Certainly there has been no confusion on the part of ALJs who have taken *Fordham* and *Powers* into consideration since the ARB's rulings. See *Occhione v. PSA Airlines*, ALJ No. 2011-AIR-012, slip op. at 30 (ALJ Aug. 26, 2015) ("based on the holding in *Powers v. Union Pacific Railroad*, . . . the Employer's evidence supporting a defense of its actions cannot be considered when determining whether Complainant has met his burden of proving his prima facie case by a preponderance of the evidence"). See also *Hoffman v. NOCO Energy Corp.*, ALJ No. 2014-STA-055 (ALJ June 22, 2015); *Mascarenas v. Interstate Hotels & Resorts*, ALJ No. 2014-STA-047 (ALJ May 12, 2015); *Smith v. BNSF Railway*, ALJ No. 2013-FRS-071 (ALJ Apr. 27, 2014). Moreover, the members of the Senate Whistleblower Protection Caucus (led by the Chairman of the Senate Judiciary Committee) obviously understood the ARB's ruling in *Fordham* and *Powers*, and its significance. See <http://www.grassley.senate.gov/news/news-releases/senators-laud-labor->

decisions, a respondent's affirmative defense evidence (supporting a legitimate, non-retaliatory reason for the adverse action at issue in the absence of any protected activity) is, with rare exception, not to be taken into consideration at the initial causation stage, where the complainant is required to prove by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse personnel action at issue. The respondent's affirmative defense evidence is, instead, reserved for proof by clear and convincing evidence should the complainant prevail in establishing "contributing factor" causation.<sup>69</sup> The exceptions identified in *Powers* are not in the present case applicable. Consistent with *Fordham* and *Powers*, the Board noted in our

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department%E2%80%99s-%E2%80%98burden-proof%E2%80%99-interpretation-whistleblowers. We can only conclude that our colleague has decided to embark upon a crusade of perpetual dissent with respect to the evidentiary burden of proof required of whistleblower claimants in order to meet the "contributing factor" causation standard. See Allison Orr Larsen, *Perpetual Dissents*, William & Mary Law School, Faculty Publications, Paper 46 (2008), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1054&context=facpubs>.

<sup>69</sup> We also do not understand our colleague's dismissiveness of *Fordham* and *Powers* by reference to *Bobreski v. J. Givoo Consultants*, ARB No. 13-001, ALJ No. 2008-ERA-003 (ARB Aug. 29, 2014), as "contrary" and "long established" "binding precedent" that the ARB "has never explicitly overruled." This ignores the fact that *Bobreski* was a two-one split decision, where the concurring opinion expressly took issue with the majority's weighing of the respondent's non-retaliatory reasons for its action against the complainant's evidence of causation at the "contributing factor" causation stage, citing ARB precedent holding that a complainant may prevail in establishing causation notwithstanding a respondent's legitimate reasons for its action. *Bobreski, supra* at 32-33 (citing *White v. Action Expediting*, ARB No. 13-015, ALJ No. 2011-STA-011, slip op. at 5 (ARB June 6, 2014); *Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ Nos. 2008-STA-020, 21, slip op. at 8 (ARB May 13, 2014); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 10 (ARB June 29, 2006); *Klopfenstein v. PCC Flow Techs Holdings*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18-19 (ARB May 31, 2006)). "Assuming the complainant's evidence is sufficient to sustain proof of 'contributing factor' causation," the *Bobreski* concurrence stated, "the respondent's non-retaliatory reason for its action may not be weighed against the complainant's evidence of causation but instead must be weighed at the second affirmative defense stage under the higher clear and convincing evidence standard." *Id.* at 33. Our colleague also ignores the fact that in *Fordham* the Board did address *Bobreski*, comparing it with the Board's decision in *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-020 (ARB May 31, 2013), in pointing out that the Board's previous attempts to address the question of whether a respondent's evidence supporting its affirmative defense is to be weighed against the complainant's evidence in determining whether the complainant has met his burden of proving "contributing factor" causation has proven inconclusive if not confusing. The Board noted that in *Hutton* the panel majority reversed the ALJ's "contributing factor" determination in part because the ALJ rejected the complainant's circumstantial evidence of causation in favor of the employer's evidence of a legitimate business reason for the adverse personnel action, while in *Bobreski* a different panel majority affirmed the weighing of the respondent's asserted legitimate business reasons for its action against the complainant's causation evidence at the "contributing factor" stage. *Fordham*, slip op. at 33.

prior decision in this case that “[i]n a motion for summary decision, an employer cannot nullify the complainant’s evidence of contributory factor by simply presenting a different independent and lawful reason for the unfavorable employment action,”<sup>70</sup> and accordingly that “even if Franchini’s refusal to turn over his tapes was a true reason, this conclusion does not rule out protected activity as a contributing factor in the termination of his employment.”<sup>71</sup>

Moreover, contrary to the ALJ’s understanding that an intervening event relied upon by a respondent to independently justify its action compromises a claimant’s proof of causation,<sup>72</sup> “an ‘intervening event’ does not necessarily break a causal connection between protected activity and adverse action simply because the intervening event occurred after the protected activity.”<sup>73</sup> The complainant’s burden of proving contributory causation may be met notwithstanding the existence of evidence demonstrating that the employer also had a legitimate reason for the unfavorable employment action taken against the employee. Because under the “contributing factor” burden of proof standard a complainant is not required to prove that his protected activity was the only or the most significant reason for any adverse action taken against him, it is enough that the complainant establish that the protected activity affected *in any way* the adverse action at issue notwithstanding other factors cited by an employer in defense of its action.<sup>74</sup> Here, the ALJ short-circuited the “contributing factor” causation analysis by focusing on the intervening event of Franchini’s alleged insubordination upon which Argonne relies to justify Franchini’s employment termination, which should, instead, have been considered as part of Argonne’s affirmative defense subject to proof by clear and convincing evidence. As a matter of summary decision, the ALJ’s taking of the Respondent’s evidence supporting its statutory affirmative defense as to why it decided to terminate Franchini’s employment into consideration in finding that Franchini’s protected activity was not a contributing factor in Respondent’s decision, constitutes reversible error.

The second basis for reversing the ALJ’s summary decision involves the ALJ’s finding that Franchini was terminated because his failure to return the tapes constituted insubordination. While it is true that Argonne cited Franchini’s failure to turn over the tape recordings as “insubordination” justifying its termination of his employment, a careful examination of the

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<sup>70</sup> ARB D. & O., slip op. at 10.

<sup>71</sup> *Id.* at 12.

<sup>72</sup> In reaching this conclusion, ALJ D. & O. on Rem., at 9, the ALJ relies upon *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-001 (ARB July 31, 2001), a decision interpreting the burden of proof requirements under the environmental whistleblower acts, and thus of no relevance to the instant case.

<sup>73</sup> *Rudolph*, ARB No. 11-037, slip op. at 20; *Benninger v. Flight Safety Int’l*, ARB No. 11-064, ALJ No. 2009-AIR-022, slip op. at 2, n.2 (ARB Feb. 27, 2013).

<sup>74</sup> *Rudolph*, ARB No. 11-037, slip op. at 20-21.

evidence of record, when viewed in the light most favorable to Franchini, does not support a finding that Franchini's failure to produce the tapes constituted insubordination as Argonne charged and as the ALJ found.

Aside from the question of whether Franchini was *directed* to return the tapes, or merely *requested* to do so, *see supra*, at n.27, which in and of itself raises an issue of material fact with regard to the charge of insubordination, the evidence of record (again when viewed in the light most favorable to Franchini) indicates that Franchini did not fail to comply with Argonne's request to turn over the tape recordings as that request was communicated to him. At his meeting on June 6th with Argonne officials, Franchini agreed to produce the tapes and other recordings (including any videos and pictures) that he had made, and to deliver them to Argonne the following Monday, June 9th. As the ALJ noted, "in fact he did turn over a small portion of the tapes" on June 9th, although he did not at that time turn over all of the tapes as he had agreed. D. & O. on Rem., at 9. Subsequently, Franchini received correspondence from Argonne, dated June 13, 2008, in which the HEP Director directed Franchini to bring all recordings to Darryl Howe, Argonne's Employee Relations Manager, "when you return to work."<sup>75</sup> The June 13th correspondence further directed: "Because you have been absent on sick leave in excess of three days [June 10-13], you are required to provide your doctor's release and medical certification before you return to work. You are not to return to work or come on-site at Argonne without this certification. Please provide this certification and the recordings requested above when you return to work."<sup>76</sup> According to Franchini, the June 13, 2008 directive was the last written communication he received from Argonne prior to receipt of his employment termination letter on October 10, 2008.<sup>77</sup> Although Argonne sent Franchini (per Weerts) a written directive on October 3rd by way of Federal Express instructing Franchini to immediately return his tape recordings, video recordings and pictures in a pre-paid FedEx box that was enclosed, containing the warning that failure to provide Argonne with the requested materials by October 8th "will be cause for corrective action, including release from Laboratory employment," the evidence of record (viewed, again, in the light most favorable to the nonmoving party) indicates that the correspondence was not signed for upon delivery to Franchini's home, signature evidencing receipt having been waived, and that Franchini did not see the October 3rd letter until December 22, 2008, at a grievance hearing in connection with his employment termination.<sup>78</sup>

In assessing whether Franchini was insubordinate by failing to produce the tapes and other recordings as requested, it is not only significant that the last communication on the subject

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<sup>75</sup> RX I (Weerts's directive to Franchini dated June 13, 2008).

<sup>76</sup> *Id.*

<sup>77</sup> CX 33 (Declaration of Franchini, par. 17).

<sup>78</sup> *Id.*, at par. 18.

received from Argonne directed him to return the tapes when he returned to work from sick leave, the reminder in the June 13 correspondence to follow proper procedures in returning to work is perhaps even more significant. The very purpose of the June 6 meeting to which Franchini was summoned by Argonne officials was “to issue Franchini discipline for insubordination resulting from his failure to follow management’s directive and Argonne policies with regard to his use of sick leave.”<sup>79</sup> As previously discussed, Franchini was advised at the meeting that he had disobeyed prior instructions regarding returning to the ANL job site from sick leave when he returned to Argonne on June 2nd without a release from his physician, and again on June 4 for returning without scheduling an appointment in advance with ANL’s Medical Department. For having returned to the ANL job site in disregard of the prior directive, Franchini received a written reprimand for insubordination, signed by the same Argonne official who signed the June 13th directive.<sup>80</sup> Thus there can be little doubt but that Franchini would strictly adhere to the June 13th directive that he provide the recordings to Argonne “when you return to work” and, because he was at that time again on sick leave, that he not return to work without the required doctor’s release and medical certification -- lest he again be subjected to discipline for insubordination. In other words, and in conclusion on this point, far from being insubordinate for not returning the requested recordings, the evidence of record indicates that, based on the last communication he received from Argonne on the subject, Franchini was being scrupulous in avoiding any action that would constitute grounds for again charging him with insubordination. When viewed in the light most favorable to Franchini, there thus exists, at a minimum, an issue of material fact as to whether Franchini’s conduct constituted insubordination justifying the termination of his employment.

## CONCLUSION

Given the issues of material fact that have been identified precluding summary decision, coupled with the noted errors of law committed by the ALJ in assessing the requirements imposed upon a clamant under the ERA for establishing “contributing factor” causation, the ALJs’ Order Granting Respondent’s Motion for Summary Decision, herein appealed, is **REVERSED**. With the understanding that the Board’s rejection of the ALJ’s grant of summary decision in the Respondent’s favor is not a final ruling that causation exists or any indication of

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<sup>79</sup> RX A (Declaration of Darryl Howe, par. 6). *See also* RX C (Declaration of Weerts, par. 5).

<sup>80</sup> CX 33 (Franchini’s Declaration, par. 14). *See also* CX 23 (Weerts’s June 6, 2008 letter of reprimand).

our view of the merits of Franchini’s claim of unlawful retaliation, this case is **REMANDED** for an evidentiary hearing and such additional proceedings as warranted, consistent with this Decision and Order of Remand.

**SO ORDERED.**

**E. COOPER BROWN**  
**Deputy Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

*Judge Corchado, concurring and dissenting.*

As I elaborate below, the majority’s remand mandate on the issue of contributing factor (causation) directly contradicts the binding holding in *Addis v. U.S. Dept. of Labor*<sup>81</sup>; therefore, I can only partially concur with the remand mandate. I cannot ignore a relevant opinion from the Seventh Circuit Court of Appeals but must follow *Addis* absent sufficient and explicit justification for contradicting it.<sup>82</sup>

In addition, contrary and binding precedent also exists in the ARB’s *Bobreski* ERA decision that the ARB has not explicitly overturned in any ARB case.<sup>83</sup> The Secretary’s delegation of authority requires the Board to follow precedent unless it “explicitly overturns it.”<sup>84</sup> I agree with *Bobreski*’s long-established precedent. Most likely, the circuit courts will

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<sup>81</sup> 575 F.3d 688 (7th Cir. 2009).

<sup>82</sup> Consider the United States Supreme Court’s statement in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), “If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”). Note the cautious discussion of federal court precedent in *Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 28 n.23, 42 (ARB May 25, 2011) (three concurring judges expressly recognized the existence of federal appellate court decisions applying a previous standard for protected activity).

<sup>83</sup> *Bobreski v. J. Givoo Consultants*, ARB No. 13-001, ALJ No. 2008-ERA-003 (ARB Aug. 29, 2014).

<sup>84</sup> For the delegation of authority, *see supra* at p.9. For an extensive discussion about the Board’s duty to address inconsistencies and departure from precedent *see, Hutchins v. TNT Logistics*,

view as “arbitrary” the two-judge majority here that ignores long-established precedent dating back to the 1992 ERA amendment, given the lack of sufficient and explicit justification.<sup>85</sup>

Instead of addressing the long-established precedent continued by *Addis* and *Bobreski*, the majority in this case cites to a two-judge majority decision in a SOX whistleblower case (*Fordham*) that cannot overturn a previous panel decision, and an *en banc* decision that did not explicitly overturn the ERA precedent. Upon remand, the ALJ should follow *Addis*, *Bobreski*, and the long-established ERA precedent. These cases represented the law when the ALJ decided this case in 2013, and he did not run “afoul” of the Board’s decisions in *Fordham* and *Powers*, which neither changed ERA precedent nor did these decisions exist in 2013.

### *Federal Court Precedent*

In *Addis*, both the ARB and the Seventh Circuit Court of Appeals unequivocally dismissed the complainant’s case solely on the issue of contributing factor and they did so by considering the “entire record,” especially the employer’s reasons for not permitting *Addis* to withdraw her resignation. The Seventh Circuit noted that “contributing factor” was a lower causation standard but never said that such a lower standard means that the employer’s explanations were irrelevant to that question and, in fact, affirmed that they were relevant.<sup>86</sup> In *Addis*, “[the ALJ] concluded that the decision to accept her resignation was based on her ‘substandard performance as a unit supervisor and not on her protected activity.’”<sup>87</sup> The ARB affirmed solely on the issue of contributing factor in holding that “[w]e agree with the ALJ that *Addis* failed to demonstrate by a preponderance of the evidence that the concerns she raised with the ECP contributed to Exelon’s decision to terminate her employment.”<sup>88</sup> The appellate court

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ARB No. 05-065, ALJ No. 2004-STA-009, slip op. at 8-11 (ARB Jan. 31, 2008) (J. Oliver concurring opinion).

<sup>85</sup> See *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 329 (D.C. Cir. 2006) (vacating FERC orders because, “instead of openly acknowledging its intention to reverse course to bring order to its case law, FERC attempted to gloss over its prior holding” (internal quotation marks and alteration omitted)); *Ramaprakash v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003) (agency action is arbitrary and capricious if it departs from agency precedent without explanation and failure to come to grips with conflicting precedent is “inexcusable”) (citations omitted). See also *Columbia Broad. Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971) (“Faced with two facially conflicting decisions, the Commission was duty bound to justify their coexistence.”).

<sup>86</sup> *Addis*, 575 F.3d at 692 (*Addis*’s evidence of contributing factor was “outweighed” by the “entire record” and particularly performance difficulties).

<sup>87</sup> *Addis v. Exelon Nuclear Generation Co., LLC*, ARB No. 05-118, ALJ No. 2004-ERA-023, slip op. at 5 (ARB Oct. 31, 2007).

<sup>88</sup> *Id.*

expressly noted the limited basis of the ARB’s affirmance. The Circuit Court even went so far as to note all the evidence in Addis’s favor but affirmed the ALJ’s ruling that the “entire record” “outweighed” Addis’s causation evidence. No amount of reinterpreting the *Addis* decision can change the fact that (1) the employer’s reasons were weighed together with all the evidence in deciding the question of “contributing factor” and (2) “clear and convincing” was never discussed by the ARB or the Seventh Circuit Court of Appeals.

Aside from the ultimate holding in *Addis*, also relevant to this case, the Seventh Circuit Court of Appeals highlights that a ruling on a motion for summary decision fundamentally differs from a decision made after a full evidentiary hearing on the merits.<sup>89</sup> In *Addis*, the court states:

If we were reviewing a grant of summary judgment in Exelon’s favor, we would be faced with a situation where there are numerous contested facts that are sufficiently important to warrant consideration by a trier of fact. But *Addis* has already had the benefit of a fact-finder (and one round of review), and our task is only to ensure that substantial evidence supports the decision below.<sup>[90]</sup>

In ruling on a motion for summary decision, the evidentiary question is whether the parties have *presented* opposing evidence on a material issue of fact. The court does not weigh any evidence and consequently cannot decide whether an employer’s evidence “nullifies” (or rebuts) the complainant’s evidence.<sup>91</sup> That is why we stated in our first remand order that “*in ruling on a motion for summary decision, the employer cannot nullify the complainant’s evidence of contributing factor.*”<sup>92</sup> In contrast, after a full evidentiary trial, an employer’s reasons can convince an ALJ that protected activity was not a reason for the challenged unfavorable employment action.

The Board’s decision in *Bobreski* is consistent with *Addis*. It carefully lays out how the question of contributing factor must be decided by considering all the evidence as a whole. It points out how the ALJ’s fragmentation of the evidence resulted in an obviously distorted view of the case. Yet, fragmenting the evidence is exactly what the majority would have the ALJ do.

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<sup>89</sup> A fundamental point apparently misunderstood by the majority when it tries to equate our review of a summary decision in this case to an appeal following evidentiary hearings on the merits. *See supra*, p. 15-16, n.68.

<sup>90</sup> *Addis*, 575 F.3d at 691-92.

<sup>91</sup> *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 7 (ARB Sept. 26, 2012) (ARB D. & O.).

<sup>92</sup> *Id.* at 10. (Emphasis added.)

Fragmenting evidence would result in the right decision only by chance or sheer determination by the factfinder to find the truth in the scattered evidentiary pieces of the whole picture. Regardless, the ARB has never explicitly overruled *Bobreski*.

### *Powers*

The majority attempts to rely on *Powers* to order the ALJ to disregard precedent and disregard the employer's explanations on the question of causation, but looking *solely* at the majority holding in *Powers* reveals that it speaks against the remand mandate in this case. Nowhere does the compromise decision in the *Powers* majority hold that, for FRSA whistleblower cases, the employer's reasons for its actions are irrelevant in deciding the question of contributory factor. In fact, the *Powers* majority says the opposite more than once. It tells the parties that *Fordham* only "seems to foreclose" considering the employee's evidence and not to read *Fordham* so "narrowly."<sup>93</sup> It says there is "no inherent limitation" on any evidence, a rule unanimously endorsed by all five Board members.<sup>94</sup> The majority in *Powers* cites at least two cases approvingly where the complainant failed to prove contributing factor in light of the employer's convincing non-retaliatory reasons.<sup>95</sup> In one of those two cases, contrary to the rule announced in *Fordham*, the ARB relied on the employer's decisions in affirming summary decision on the question of contributing factor.<sup>96</sup> There is no actual holding in *Powers* (pp. 30-36) that says the employer's evidence was irrelevant in that case, much less irrelevant as a matter of law, but only that it was of "highly questionable relevance" and "prejudicial" in that case.<sup>97</sup> The majority in this case also says that none of the "exceptions" in *Powers* apply here, to allow consideration of the employer's reasons on the causation question, but the word "exceptions" does not even appear in the entire *Powers* opinion, much less any clearly articulated rule with attendant "exceptions."<sup>98</sup> Instead of clarifying how ALJs should treat the employer's reasons in

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<sup>93</sup> *Powers*, ARB No. 13-034, slip op. at 14.

<sup>94</sup> *Powers*, ARB No. 13-034, slip op. at 22.

<sup>95</sup> *Powers*, ARB No. 13-034, slip op. at 23 and 26, n.15, citing *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012); *Zurcher v. Southern Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012).

<sup>96</sup> *Abbs*, ARB No. 12-016.

<sup>97</sup> *Powers*, ARB No. 13-034, slip op. at 28.

<sup>98</sup> Rather than accept that *Powers* is patently self-contradictory, the majority seeks refuge in a letter signed by six U.S. Senators sent directly from the office of a Senator to my Department of Labor e-mail box and to other ARB members (April 14, 2015) praising the partially completed *Powers* decision, while I was still finalizing my dissent. The purpose for this letter is a mystery. But it seems somebody failed to tell the Honorable Senators that the *Powers* decision erased the cornerstone of whistleblower protection, *i.e.*, that any reliance on protected activity in deciding employment discipline is a violation of the law. See *Powers*, ARB No. 13-034, slip op. at 16, n.8

deciding contributing factor, the *Powers* self-contradictory decision has already led to apparent errors by ALJs.<sup>99</sup>

Even in this case, similar to *Powers*, the majority provides unclear guidance upon remand. While telling the ALJ to not “weigh” the employer’s reasons against Franchini’s causation evidence, it also says that evidence of pretext in the employer’s reasons can support a finding of contributing factor. But how does an ALJ analyze whether the employer’s reasons are pretext and then somehow disregard the employer’s reasons in deciding contributing factor?<sup>100</sup> The majority leaves unclear whether an employer’s motives and animus against the complaint can support a finding of contributing factor. If so, how does the ALJ consider the employer’s animus and motive without weighing or considering the employer’s stated reasons for its actions? In the end, none of this confusion will matter if the ALJ follows the clearer and long-established ERA precedent as described in *Addis* and *Bobreski*.

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

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(majority explaining that establishing a causal link between protected activity and unfavorable employment action is not necessarily illegal).

<sup>99</sup> See, e.g., *Mascarenas v. Interstate Hotels & Resorts, Inc.*, ALJ No. 2014-STA-047, slip op. at 23 (ALJ May 12, 2015) (ALJ incorrectly placed the burden on the employer to prove that it “did not discipline” the complainant in violation of the whistleblower act); *Hoffman v. NOCO Energy Corp.*, ALJ No. 2014-STA-055, slip op. at 20 (ALJ June 22, 2015) (aside from the obvious error of mixing the “motivating factor” causation standard from environmental cases with the “contributing factor” standard, the ALJ ultimately required the employer to prove that protected activity “played no part in the ending of his employment relationship”); *Occhione v. PSA Airlines*, ALJ No. 2011-AIR-012, slip op. at 30-31 (ALJ Aug. 26, 2015) (ALJ felt compelled to find contributory factor because the complainant’s evidence “supported” a “prima facie” case of contributing factor and he felt prohibited from considering the employer’s reasons, which then led to a seemingly contradictory causation finding that termination was an “automatic” result).

<sup>100</sup> On the issue of pretext, I note that the previous remand never questioned whether the failure to turn the tapes over was a valid basis for termination, only that there was no undisputed evidence of insubordination. Without such undisputed evidence, we cannot rule by summary decision that “insubordination” was a true reason. This is a fact that must be resolved by an evidentiary hearing. See *ARB D. & O.*, slip op. at 11-12.