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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 DAVID W. SANDERS,

8 Plaintiff,

9 v.

10 ENERGY NORTHWEST, a
Washington municipal corporation,

11 Defendant.

NO: 12-CV-0580-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

12
13 BEFORE THE COURT is Defendant's Motion for Summary Judgment
14 (ECF No. 47). This matter was heard with oral argument on February 20, 2014.
15 John P. Sheridan appeared on behalf of the Plaintiff. William G. Miossi and Angel
16 Rains appeared on behalf of the Defendant. The Court has reviewed the completed
17 briefing and the record and files herein, and is fully informed.

18 **BACKGROUND**

19 This case concerns Plaintiff's discharge from his position with Defendant,
20 which Plaintiff claims is a violation of the whistleblower retaliation provisions of

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 1

1 42 U.S.C. § 5851 of the Energy Reorganization Act (“ERA”). For the reasons
2 discussed below, the Court finds that Plaintiff’s termination did not violate the
3 ERA.

4 **FACTS**

5 Defendant Energy Northwest (“EN”) is a Washington municipal corporation
6 that owns and operates the Columbia Generating Station (“CGS”), a nuclear power
7 plant in Richland, Washington. ECF No. 56 at 24. EN terminated its at-will
8 employee Plaintiff David Sanders (“Sanders”) from his position as a maintenance
9 supervisor on April 20, 2011, after nineteen years of employment. *Id.* at 2.
10 Sanders oversaw contractors and administered work for EN’s contracts with
11 companies that provided it with temporary staffing needs. *Id.*

12 Sanders claims he was terminated for two activities—opposing a condition
13 report designation and advocating a change in badging procedure—which are
14 protected under whistleblower retaliation protections in 42 U.S.C. § 5851 of the
15 Energy Reorganization Act (“ERA”). ECF No. 56 at 25. Defendant characterizes
16 these as four instances of allegedly protected activity: Plaintiffs’ dispute over a 30-
17 day access policy, ownership of a condition report, a condition report designation,
18 and a change in badging procedure. ECF No. 47 at 2-4. The parties also cite
19 another incident involving employee Ricky Hayes, which EN claims prompted
20 Plaintiff’s termination.

1 **1. Condition Reports**

2 Two allegedly protected activities concerned ownership and designation of
3 Condition Reports (“CRs”). CRs are internal reports generated by EN employees
4 when, *inter alia*, EN procedures may have been violated. CRs are designated in
5 decreasing order of severity as “Alpha,” “Bravo,” “Charlie,” or “Delta.” ECF No.
6 47 at 3.

7 Sanders and EN’s then-Security Compliance Supervisor, Bruce Pease
8 (“Pease”), disagreed over a CR concerning maintenance contractors who violated
9 the 30-day access rule. ECF No. 56 at 25, 27. The 30-day access policy governs
10 procedures by which an individual can maintain Unescorted Access Authorization
11 (“UAA”). UAA is a security clearance status required for personnel working at
12 nuclear power plants in the United States to gain access to certain areas of a plant
13 without an escort, which is addressed by Nuclear Regulatory Commission
14 regulations at 10 C.F.R. Parts 26 and 73. *Id.* at 25. The disagreement between
15 Sanders and Pease began when one CR was designated “Bravo” for an instance
16 when a company employee left employment without terminating his UAA badge
17 within three days, as was required by company policy. *Id.* at 27. Sanders and
18 Pease argued over who should “own” the CR because both wanted to control how
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1 to fix it.¹ After a CR review meeting and management advising Sanders and Pease
2 to discuss their differences outside the meeting, Sanders' department ultimately
3 took responsibility for remedying the Bravo designated CR. *Id.* at 27, 28.

4 Approximately two weeks later, a second CR was issued for Pease's security
5 department and designated "Charlie" for an alleged incident where an employee's
6 UAA badge was not terminated in accordance with certain EN procedures. *Id.* at
7 28. Sanders disputed the Charlie designation with Pease and management in a CR
8 review meeting because the incident was similar to the CR Bravo designation his
9 department was remedying. *Id.* at 29, 30. Again, Sanders and Pease were advised
10 to discuss the issue outside the meeting and told to resolve it. At the CR review
11 meeting the next morning, Sanders stated he would no longer dispute the
12 designation and would "let it go as a Charlie." *Id.* at 29; ECF No. 48-2 Sanders'
13 Depo. at 26.

14 **2. Badging Procedure**

15 Two more allegedly protected activities concerned badging procedures. The
16 first concerned Plaintiff's dispute with Pease regarding the 30-day access policy
17 where an individual who has been granted UAA can maintain his or her clearance.

18 ¹ At oral argument, the parties clarified that "own" means whose department would
19 be responsible for *remedying* the issue identified in the CR, as opposed to owning
20 it for purpose of punishment or demerit, which is not the issue here.

1 ECF No. 56 at 25. This policy is a security clearance status required by nuclear
2 power plant personnel to gain unescorted access to certain areas of the plant, and it
3 is covered by Nuclear Regulatory Commission (“NRC”) regulations. *Id.*
4 Individuals with UAA status must “badge in” at an access point once every 30
5 days and be observed by a member of EN management in order to maintain their
6 clearance. *Id.* at 25-26. After an employee violated the 30-day badge-in procedure
7 due to an injury, Sanders suggested moving the badge-in point. ECF No. 48-2,
8 Sanders’ Depo. at 13. Sanders explained that the change would be “less
9 burdensome for everybody on-site from an administrative standpoint,” and that it
10 would be “more accommodating and just as effective.” *Id.* at 18-19. Sanders
11 testified that “[t]he NRC information did not require you to come through the
12 turnstile.” *Id.* at 15.

13 Then, in February or March 2011, Sanders suggested changing EN’s UAA
14 processing procedure for temporary workers scheduled to perform maintenance
15 work at CGS. ECF No. 56 at 30. The existing procedure provided that if a
16 contract worker was on EN’s site for more than five days, the security department
17 must start the badging process for them, including a background check and other
18 functions to determine if the employee or contractor meets NRC criteria for
19 obtaining UAA clearance. *Id.* Plaintiff proposed allowing contractors to come to
20 the site for training without having to begin the process because it would “save

1 money.” ECF No. 56 at 11; ECF No. 48-2, Sanders’ Depo. at 29 (“I said we need
2 something so we can do this without costing the company money.”).

3 **3. The Hayes Incident**

4 On January 28, 2011, Dale Atkinson, a vice president of EN, began
5 investigating per diem payments made to contract worker, Ricky Hayes (“Hayes”)
6 in 2009. ECF No. 48 at 13; ECF No. 56 at 10-11.

7 In 2009, Hayes was hired by one of the contract companies EN worked with,
8 Nelson Nuclear, Inc. (“NNC”), which provided personnel to commercial nuclear
9 facilities and DOE sites. ECF No. 56 at 3. NNC is owned and operated by Richard
10 Nelson (“Nelson”), a friend and former colleague of Sanders. *Id.* at 2. Nelson
11 received Hayes’ name from Sanders after EN was short a contract worker for the
12 semi-annual maintenance process. *Id.* at 3, 35 (Sanders testified he advised Nelson
13 to hire Hayes). At the time of his hire, Hayes had been living with Sanders’
14 daughter in the Tri-Cities area for eight months and working at Target in
15 Kennewick, Washington. *Id.* at 34-35.² On the application Hayes completed for
16 NNC, he listed South Carolina as his permanent address because, even though he
17 had been working at Target for several months, he had not decided whether he
18 would remain in Washington. *Id.* at 4. Additionally, at the time of his hiring,
19 Hayes was registered to vote in South Carolina, had a South Carolina driver’s

20 ² Hayes and Sanders’ daughter had a child together. ECF No. 48 at 11.

1 license, and indicated in his paperwork that taxes should be taken out for South
2 Carolina. *Id.* As the technical representative on the NNC contract, Sanders
3 approved the paperwork that enabled Hayes to receive per diem because Hayes
4 was working away from his permanent residence. *Id.* During the five week
5 contract work Hayes did for EN, Hayes completed a Personal History
6 Questionnaire (“PHQ”) which is required by the NRC to collect data to determine
7 whether an individual is trustworthy, reliable, and fit for duty prior to granting and
8 while maintaining an UAA. *Id.* at 5. In the PHQ, Hayes listed South Carolina as
9 his permanent address. After the form was completed, an outside vendor, Pinnacle,
10 did a background check, and the security department, either Pease or a designee,
11 reviewed the information both independently and with Hayes, and also verified
12 Hayes’ employment at Target. *Id.* at 6. In August 2009, after Hayes made the
13 decision to move his residence to Washington, Hayes was temporarily hired by EN
14 and completed another PHQ, this time listing Washington as his permanent
15 address. *Id.* at 7. EN hired Hayes permanently in February of 2010, had Hayes fill
16 out another PHQ, and again Hayes listed Washington as his permanent residence.
17 *Id.* at 8.

18 In an email dated January 28, 2011 between Atkinson and Pam Bradley
19 (“Bradley”), EN’s acting general counsel, Atkinson asked Bradley to investigate a
20 2009 per diem issue pertaining to Hayes raised by Bill Penwell (“Penwell”). *Id.* at

1 10-11. In 2009 or 2010³, Penwell, then an EN manager, notified Atkinson that his
2 wife “mentioned that this gentleman that was working for [Sanders] that actually
3 lived in the Tri-Cities⁴ area and had actually lived there for a couple of years and
4 was getting per diem.” *Id.* at 7-8. After EN began its investigation of Hayes’ per
5 diem payments in January 2011, it learned Hayes received a total of \$7,177.30 for
6 expenses related to travel to and from Washington and per diem payments in May
7 and June of 2009. ECF No. 48 at 10-11.

8 On March 16, 2011, two weeks after the second dispute over badging
9 procedure, EN gathered information about Hayes, Sanders, and Hayes PHQs and
10 per diem in 2009. ECF No. 56 at 13. That same day Hayes was interviewed by
11 Kurt Gosney (“Gosney”), the then security compliance supervisor Pease and Jerry
12 Ainsworth, EN’s Technical Specialist. *Id.* Hayes was told he had filled out his
13 PHQs incorrectly by not listing a Washington address. *Id.* at 13, 14. Hayes
14 admitted to living continuously in Washington since the summer of 2008 and
15 agreed that he was not entitled to per diem during the time in question but received

16 ³ Penwell claims the conversation was in 2009. Atkinson claims it was November
17 or December of 2010.

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19 ⁴ The Tri-Cities area encompasses the Washington cities of Pasco, Kennewick, and
20 Richland, where the CGS is located.

1 it anyway. ECF No. 48 at 15. Following the interview, Hayes signed a written
2 statement and was consequently fired for the per diem payments he received. *Id.*

3 Pease, Gosney, and Ainsworth also interviewed Sanders on March 16, 2011,
4 about Hayes' per diem payments. ECF No. 56 at 42; ECF 48 at 15-16. Sanders
5 confirmed he was aware Hayes was living in Kennewick when Hayes contracted to
6 work with NNC, and admitted Hayes should not have received payment for travel
7 to and from South Carolina from Washington. ECF No. 56 at 42-43; ECF 48 at 16.
8 Sanders was placed on administrative leave and a pre-termination hearing
9 followed. ECF 48 at 17.

10 On April 7, 2011, Sanders attended a pre-termination hearing and supplied
11 information about other contractors receiving per diem and travel expenses he
12 believed were similar to his situation. ECF No. 56 at 44. At that meeting, Sanders
13 explained that "the travel approval was an error." ECF No. 48-2, Sanders' Depo.
14 at 60-61 ("I explained to them it was done from home along with approving
15 probably three to 400 other things through the Triple A screen and I just didn't see
16 it. It was wrong."). In a letter dated April 20, 2011, Sanders was notified of his
17 termination. ECF No. 48 at 18.

18 After his termination, Sanders' filed an ERA complaint, and subsequently
19 testified in Nelson's Department of Labor hearing after his UAA clearance was
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1 revoked. Plaintiff brought suit in this Court under the ERA’s whistleblower
2 protection “kick out” provision, 42 U.S.C. § 5851. ECF No. 1.

3 **DISCUSSION**

4 **A. Legal Standard**

5 Summary judgment may be granted to a moving party who demonstrates
6 “that there is no genuine dispute as to any material fact and that the movant is
7 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party
8 bears the initial burden of demonstrating the absence of any genuine issues of
9 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then
10 shifts to the non-moving party to identify specific genuine issues of material fact
11 which must be decided by a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.
12 242, 256 (1986). “The mere existence of a scintilla of evidence in support of the
13 plaintiff’s position will be insufficient; there must be evidence on which the jury
14 could reasonably find for the plaintiff.” *Id.* at 252.

15 For purposes of summary judgment, a fact is “material” if it might affect the
16 outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any
17 such fact is “genuine” only where the evidence is such that a reasonable jury could
18 find in favor of the non-moving party. *Id.* In ruling upon a summary judgment
19 motion, a court must construe the facts, as well as all rational inferences therefrom,
20 in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372,

1 378 (2007). Only evidence which would be admissible at trial may be considered.
2 *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002).

3 **B. Whistleblower retaliation provisions of 42 U.S.C. § 5851 of the Energy**
4 **Reorganization Act (“ERA”)**

5 The whistleblower retaliation provisions of 42 U.S.C. § 5851 of the Energy
6 Reorganization Act (“ERA”) are intended to protect energy workers from
7 retaliation based on their concerns for safety and quality. *See Mackowiak v. Univ.*
8 *Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984). The provisions provide an
9 administrative procedure through which an employee can seek redress for
10 violations of this prohibition. Under the relevant section of the act, “[N]o employer
11 may discharge any employee or otherwise discriminate against any employee with
12 respect to his compensation, terms, conditions, or privileges of employment
13 because the employee (or any person acting pursuant to a request of the
14 employee)” engaged in certain protected acts. 42 U.S.C. § 5851(a)(1).⁵

15 ⁵ An aggrieved employee may file a complaint with the Secretary of Labor
16 (“Secretary”). 42 U.S.C. § 5851(b)(1). If the Secretary has not issued a final
17 decision within one year after the filing of an administrative complaint, the
18 employee may file an action in federal district court. *Id.* § 5851(b)(4). Sanders
19 alleges in his complaint that he has filed a whistleblower complaint under Section
20 211 of the ERA with the Department of Labor; the DOL did not issue a final

1 The statute provides for a burden-shifting scheme, under which the
2 complainant must make a “prima facie showing that any behavior described in
3 subparagraphs (A) through (F) of subsection (a)(1) of this section was a
4 contributing factor in the unfavorable personnel action alleged in the complaint.”
5 42 U.S.C. § 5851(b)(3)(A). But “[r]elief may not be ordered under paragraph (2) if
6 the employer demonstrates by clear and convincing evidence that it would have
7 taken the same unfavorable personnel action in the absence of such behavior.” 42
8 U.S.C. § 5851(b)(3)(D).⁶

9 **a. Whether Sanders’ Engaged In Protected Activity**

10 The ERA whistleblower protection provisions apply only to certain
11 activities. The ERA provides that employers may not discharge or discriminate

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13 decision within a year. ECF No. 1 at 2. Thus, this Court has jurisdiction pursuant to
14 42 U.S.C. § 5851(b)(4).

15 ⁶ “The Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, effective
16 October 24, 1992, amended section 210 to incorporate a burden shifting paradigm
17 whereby the burden of persuasion falls first upon the complainant to demonstrate
18 that retaliation for his protected activity was a ‘contributing factor’ in the
19 unfavorable personnel decision.” *Doyle v. United States Secretary of Labor*, 285
20 F.3d 243, 249 (3d Cir. 2002).

1 against an employee because the employee:

- 2 (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.);
- 3 (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged
- 4 illegality to the employer;
- 5 (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
- 6 (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic
- 7 Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic
- 8 Energy Act of 1954, as amended;
- 9 (E) testified or is about to testify in any such proceeding or;
- 10 (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

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12 42 U.S.C. § 5851(a)(1).

13 Generally “an employer may fire an employee for any reason at all, so long
14 as the reason does not violate a Congressional statute.” *Kahn v. United States Secretary of Labor*, 64 F.3d 271, 280 (7th Cir. 1995).⁷ The first question, then, is
15 whether Sanders’ activities were protected under the whistleblowing statute. As
16 listed above, in addition to enumerated protections, the statute also includes a
17 catch-all provision protecting employees “in any other action to carry out the
18 purposes of [the safety statutes].” 42 U.S.C. § 5851(a)(1)(F). Courts interpret the

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20 ⁷ The parties agree Plaintiff was an at-will employee.

1 statute broadly to implement its “broad, remedial purpose.” *Mackowiak v.*
2 *University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984). The policy
3 behind a broad interpretation “encourages safety concerns to be raised and resolved
4 promptly and at the lowest possible level of bureaucracy, facilitating voluntary
5 compliance with the ERA and avoiding the unnecessary expense and delay of
6 formal investigations and litigation.” *Bechtel Const. Co. v. Sec’y of Labor*, 50 F.3d
7 926, 933 (11th Cir. 1995).

8 Certain acts are squarely within the statute’s protections. In *Mackowiak*, a
9 quality control inspector talked to inspectors from the NRC in connection with
10 their ongoing investigation into his employer, UNSI. *Mackowiak*, 735 F.3d at
11 1161. Participation in a NRC proceeding was explicitly protected under § 5851. *Id.*
12 at 1162. The court stated, “In a real sense, every action by quality control
13 inspectors occurs “in a NRC proceeding” because of their duty to enforce NRC
14 regulations.” *Id.* at 1163. In *Stone & Webster Eng’g Corp.*, the court stated, “if an
15 employee talks about safety to a plant fire official, an employer and an industry
16 regulator, he or she acts squarely within the zone of conduct that Congress marked
17 out under 42 U.S.C. § 5851(a)(1).” *Stone & Webster Eng’g Corp. v. Herman*, 115
18 F.3d 1568, 1573 (11th Cir. 1997).

19 Despite this broad construction, “[t]o constitute a protected safety report, an
20 employee's acts must implicate safety definitively and specifically.” *Am. Nuclear*

1 *Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998) (citing
2 *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 931 (11th Cir. 1995)
3 (holding that a carpenter's acts were protected where he "raised particular, repeated
4 concerns about safety procedures," which were "tantamount to a complaint.")).
5 "[G]eneral inquiries regarding safety do not constitute protected activity." *Bechtel*,
6 50 F.3d at 931. "The ERA does not protect every incidental inquiry or superficial
7 suggestion that somehow, in some way may possibly implicate a safety concern."
8 *Am. Nuclear*, 134 F.3d at 1295. "[A]n employer may terminate an employee who
9 behaves inappropriately, even if that behavior relates to a legitimate safety
10 concern." *Id.* (citing *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986)).

11 Courts have also held that the ERA protects acts that implicate safety. In
12 *Bechtel Const. Co.*, the Eleventh Circuit found that, while general inquiries
13 regarding safety are not protected, an employee's voicing of his "particular,
14 repeated concerns about safety procedures for handling contaminated tools" was a
15 protected activity. *Bechtel Const. Co.*, 50 F.3d at 931. When working in
16 radioactive areas with radioactive tools, crew members would have a health
17 physics (HP) staff person on duty measure the amount of contamination and write
18 the rate of contamination on a tag attached to the bag containing the tools. *Bechtel*
19 *Const. Co.*, 50 F.3d at 929. The procedure was known as "taking a dose rate and
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1 tagging” the tools. *Id.* Nichols, a crew member, disagreed with Wright, the
2 foreman, over the procedure.

3 Based on his training, Nichols understood that contaminated tools
4 were to be put in two double polyurethane bags and carried to the
5 “frisking station” where the HP technician on duty could take a dose
6 rate and tag them. Wright told Nichols that the tools could be placed
7 in a single bag, and if the HP technician was not at the frisking station,
8 the tools could be taken to the HP technician in the dry storage
9 warehouse for dosing and tagging. Nichols disagreed and stated that
10 he believed safety procedures required that the tools be surveyed at
11 the tool box.

12 *Id.* Nichols made an anonymous complaint to the senior HP supervisor, told his
13 foreman’s supervisor, and also approached HP technicians and the HP supervisor
14 to discuss the issue. *Id.*

15 However, the ERA does not protect “every incidental inquiry or superficial
16 suggestion that somehow, in some way may possibly implicate a safety concern.”
17 *American Nuclear*, 134 F.3d at 1295. In *American Nuclear*, the Sixth Circuit found
18 that the employee’s acts lacked a sufficient nexus to safety concerns where the
19 employee “never alleged that [his employer] was violating nuclear laws or
20 regulations,” “never alleged that [his employer] was ignoring safety procedures or
assuming unacceptable risks,” and where the employee’s “conduct never led
anyone to change, probe, or even question [the employer’s] safety procedures.” *Id.*
at 1296. In *American Nuclear*, an employee was contaminated because the
Radiation Protection personnel (“RP”s) failed to spray him down quickly, after

1 which the employee complained that the RPs did not know what they were doing,
2 grew angry while the RPs administered his full body count test, and asked for a
3 copy of the body count after the test. *Id.* The court found this too tenuous a link to
4 protected activity, stating that “to constitute a protected safety report, an
5 employee’s acts must implicate safety definitively and specifically.” *Id.* at 1295.

6 Here, Sanders’ conduct unequivocally falls outside the scope of ERA
7 protection because it lacks a sufficient nexus to safety concerns. Sanders alleges he
8 engaged in two types of protected activities giving rise to his termination in
9 violation of the whistleblowing statute: the CRs and the badging procedures. The
10 Court considers each in turn.

11 **i. The CR Designations**

12 The CR designation disputes do not implicate safety. The first dispute
13 concerned which department “owned” the condition report for the purposes of
14 remediation. The dispute centered around which party would be responsible for
15 resolving the issue, not whether there was a safety violation or whether it would be
16 reported. The second CR dispute likewise only concerned the labeling of the
17 severity of the reported incident. Sanders argues the specific designation
18 implicated a safety issue because the Bravo designation warrants a root cause
19 analysis to the violation, whereas the Charlie designation process is not as
20 complicated. But this dispute did not concern whether the incident was reported or

1 whether it would be addressed, but rather the priority and depth of its resolution.
2 As in *American Nuclear*, Sanders' acts lack a sufficient nexus to safety concerns
3 because he "never alleged that [his employer] was violating nuclear laws or
4 regulations," "never alleged that [his employer] was ignoring safety procedures or
5 assuming unacceptable risks," and where the employee's "conduct never led
6 anyone to change, probe, or even question [the employer's] safety procedures."
7 *American Nuclear*, 134 F.3d at 1296. EN and its management were fully aware of
8 the violations before and after Sanders' dispute about who should own the
9 condition report or what label to assign the second one. Sanders' disagreement
10 with Pease about who would remedy the first or what label applied to the second,
11 do not "implicate safety definitively and specifically."

12 **ii. The Badging Procedure**

13 Sanders also argues that the badging procedure "implicates safety because it
14 concerns when individuals are and are not allowed on a nuclear facility and the
15 level of security clearance needed to be on the facility at that time." ECF No. 55 at
16 21. EN counters that it was not protected because Sanders advocated the changes
17 to save time and money, and the current policy was not governed by NRC
18 regulations. The Court agrees with EN; neither badging activity can be described
19 as protected under the whistleblower statute.

1 With respect to the badge-in location, Sanders testified that he wanted to
2 change the location of the badge-in because it was “more accommodating and just
3 as effective.” Sanders Depo., ECF No. 48-2 at 18. As a result, Sanders testified, he
4 “got rid of....approximately 100 to 200 CRs written on people not entering the
5 turnstile gates, which was time-consuming for the people that have to resolve the
6 CRs and it wasn’t providing a product that was worthwhile.” *Id.* The procedure,
7 Sanders explained, was “less burdensome for everybody on-site from an
8 administrative standpoint,” including him. *Id.* at 19. Thus, Sanders seems to imply
9 that because it was “less burdensome” administratively, it freed up administration
10 to deal with more pressing problems.

11 With respect to Sanders’ desire to change the timing for contractor badging
12 during training, Plaintiff testified that “[w]e need to change it so we can save the
13 company money.” ECF No. 56-2, Exhibit 1 at 39; ECF No. 56 at 11. Pease may
14 have written the policy, but EN’s policy contained in the GIH required the
15 contractors to badge for the training. ECF No. 56-2, Exhibit 1 at 38-39. Pease
16 objected to changing the GIH. *Id.* Sanders, however, obtained permission through
17 his own chain of command. *Id.* When Pease learned that Sanders had succeeded in
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1 having the badging procedure changed, he allegedly said to Sanders “that’s twice
2 and [he] owed [him] one.” *Id.* at 40.⁸

3 Sanders’ advocacy of badging procedure change—for location and timing—
4 cannot be construed as “acting in furtherance of safety compliance” because it does
5 not appear that the changes improved safety, or even that Sanders suggested the
6 changes for that purpose. Sanders himself admits that the changes were made to
7 save money and for administrative ease. ECF No. 48-2, Sanders’ Depo. at 18-19,
8 33. Critically, it is also undisputed that the changes were not required to comply
9 with the NRC. *Id.* at 15. When asked if he believed there was a safety issue with
10 the badging procedure, Sanders said “no.” *Id.* Furthermore, the Court cannot see
11 how *delaying* the time for badging *improves* safety, since contractors would be on
12 site for training without any badging procedure started. Likewise, changing the
13 badging location to make it more accessible does not appear to be a safety concern,
14 particularly because the change made it easier for employees to maintain their
15 UAA status. Procedures that Plaintiff admits do not involve safety, which do not
16 appear to improve safety, and which Plaintiff himself states were made to save
17 money or administrative time do not “implicate safety definitively and

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⁸ However, this comment is hearsay and the Court does not rely upon it in its
20 decision.

1 specifically” as required under the relevant case law. Such changes fall into the
2 category of “incidental inquiry or superficial suggestion” to which the Sixth Circuit
3 declined to extend protection in *American Nuclear*. See *American Nuclear*, 134
4 F.3d at 1295. Indeed, under Plaintiff’s theory, *any* company cost cutting
5 suggestion could implicate safety because it would free up personnel and money
6 for safety programs. That, however, is not the test.

7 Thus, because none of Sanders’ alleged activities rise to the level of
8 protected activity under the ERA or the associated case law, the Court finds that
9 Plaintiff has failed to meet his burden in establishing a prima facie case of
10 retaliation under the whistleblower statute.

11 **C. Other Matters**

12 Plaintiff asks the Court to delay ruling until additional comparator
13 information is received in discovery, should the Court find that issues in this case
14 “turn on whether Sanders improperly awarded Hayes per diem.” ECF No. 55 at 25-
15 26. However, since the Court’s decision rests on other facts, this request is denied.

16 Having found that Plaintiff has failed to show that he engaged in protected
17 activity, as required under the statute, the Court need not consider whether
18 Defendant would have taken the same adverse action regardless of the employee’s
19 activity. Here, EN has come forward with compelling evidence that it discharged
20 Sanders solely because he approved travel and per diem payments to Hayes with

1 knowledge that Hayes had been living in the Tri-Cities with Sanders' daughter for
2 at least eight months and the two had a child together. Sanders' speculation that
3 Pease's participation in the per diem investigation was somehow nefarious does
4 not advance his cause; Pease was Sanders' equal, not his supervisor. Pease did not
5 terminate Sanders. Sanders has contrived a retaliation claim out of what appears to
6 be a personality conflict with Pease, not based on protected conduct that implicates
7 "safety definitively and specifically."

8 **CONCLUSION**

9 The Court finds that Plaintiff has not shown that he engaged in protected
10 activity, thus Plaintiff has not met his burden as required under 42 U.S.C. § 5851.

11 **ACCORDINGLY, IT IS HEREBY ORDERED:**

12 1. Defendant's Motion for Summary Judgment (ECF No. 47) is

13 **GRANTED.**

14 2. All pending hearings and trial are vacated as **MOOT**.

15 The District Court Executive is hereby directed to enter this Order, enter
16 Judgment for Defendant, provide copies to counsel, and **CLOSE** the file.

17 **DATED** April 4, 2014.



Thomas O. Rice
THOMAS O. RICE
United States District Judge