

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 June 2005

CASE NO.: 2004-CAA-00012

In the Matter of:

BETHEL BURNS,
Complainant,

v.

LARSTAN INDUSTRIES, INC.,
Respondent.

APPEARANCES:

Warren Kaplan, Attorney
Steven A. Skalet, Attorney
Anna M. Pohl, Attorney
For Complainant

Jonathan Meyers, Attorney
Ivan R. Novich, Attorney
For Respondent

BEFORE:

Stephen L. Purcell
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER
DENYING COMPLAINT**

This case arises under the whistleblower provisions of the Clean Air Act ("CAA"), 42 U.S.C. § 7622, the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971, the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622 (collectively "the Acts"), and the regulatory provisions in 29 C.F.R. Parts 18 and 24 related thereto. These statutes prohibit employers from discriminating against any employee with respect to his or her compensation, terms, conditions, or privileges of employment because that employee engaged in activity which is protected by the Acts.

Procedural Background

Bethel Burns, Complainant, filed an appeal with the Office of Administrative Law Judges on May 13, 2004, from an April 26, 2004 denial of her complaint by the Occupational Safety and Health Administration, U.S. Department of Labor.

On February 28, 2005, I issued an order granting in part and denying in part Respondent's motion for summary judgment. *Burns v. Larstan Industries, Inc.*, 2004-CAA-12 (Feb. 28, 2005). Partial summary judgment for Respondent was granted pursuant to the doctrine of defensive collateral estoppel based on my finding that certain facts at issue in this case had also been fully litigated and decided in an unemployment compensation proceeding involving these same parties before the Maryland Department of Labor ("MDOL"). *Id.* at 10-12. I found that MDOL's decision to deny benefits was final and valid, and that the following facts were critical and necessary to that decision:

1. Complainant walked off the job on January 28, 2004.
2. Complainant reasonably but erroneously believed that she could not return to work thereafter until she signed the safety form presented to her by Charles Reese.
3. Complainant was not going to sign the safety form until she had the form reviewed by her attorney.
4. Complainant wrongfully abandoned her position on January 28, 2004 and failed to return to work on January 29, 2004.
5. The "call-in form" maintained by Respondent for January 26 through 29, 2004 was validly prepared by Respondent.
6. Complainant did not call out on January 29, 2004 to report that she was not coming to work.
7. Complainant was "culpable for the separation from employment" because she walked off the job on January 28, 2004 and did not call out on January 29, 2004.
8. Claimant was "discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003."

Id. at 12, 14.

In granting partial summary judgment for Larstan with respect to the issue of collateral estoppel, I inadvertently declared that this matter was a "dual motives" case. *Id.* at 13. However, before any such determination can be made, it is first necessary for the whistleblower complainant to make a *prima facie* case, *i.e.*, to show that he or she engaged in protected activity, was subjected to an adverse personnel action, and the respondent was aware of the protected

activity when it took the adverse action. *See, e.g., Sawyers v. Baldwin Union Free School Dist.*, 85-TSC-00001 (Sec’y Oct. 24, 1994), slip op. at 12, 14. Since there remained disputed material issues of fact with respect to *each* of the necessary elements of Burns’ case, my characterization of this matter as a “dual motives” case was incorrect.

A formal hearing was held in Washington, D.C. from March 7 through 10, 2004. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence, submit oral arguments, and file post-hearing briefs. Complainant’s Exhibits (“CX”) 1-26 and Respondent’s Exhibits (“RX”) 1-44 were admitted into evidence. Post-hearing briefs were received from both parties, including a reply brief filed by Complainant’s counsel, and the findings of fact and conclusions of law contained herein are based upon my analysis of the entire record, the arguments of the parties, the applicable regulations, statutes, and case law, and my observation of the demeanor of the witnesses who testified at the hearing.

I. ISSUES

1. Whether Complainant engaged in activities which are protected by the Acts?
2. Whether Respondent, actually or constructively, knew of, or suspected, such activity?
3. Whether Complainant suffered an unfavorable personnel action?
4. Whether Complainant’s activity was a contributing factor in the unfavorable personnel action taken against him?
5. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action irrespective of Complainant’s having engaged in protected activity?

II. SUMMARY OF THE EVIDENCE

Witness Testimony

Bethel Burns

Ms. Burns graduated from high school in 1976 and subsequently attended Hagerstown Community College where she obtained an Associate of Arts degree in Human Resource Management in 1992 just prior to beginning her employment with Larstan. Tr. 67. She began working for Larstan on or about June 19, 1993 earning \$4.50 per hour as a trimmer. Tr. 68-69. She continued at that position until around 1995 or 1996 when she was transferred to shipping. Tr. 69. After that, she worked in the office as a receptionist sometime in 1996 or 1997 and her salary went from \$6.50 to \$8.50 or \$9.10 per hour. Tr. 70. She also began to assist Brenda Poole in Human Resources with filing, showing safety tapes, assisting job applicants with filling out paperwork when they were hired, and serving refreshments to visitors. Tr. 71.

Around November 2002, Burns was transferred to Larstan's Oak Ridge plant after she got into a confrontation with Bob Lemons, a co-worker, and complained about it. Tr. 72-73. She believed the transfer was, in part, due to her knowledge of dumping of chemicals at the plant. Tr. 73. According to Complainant:

In 2001 up there when Ms. Poole came down, mad about Emily taking her job, I – she told me something about the dumping, the dumping and burying and I agreed to her – with her because Raymond Barthelow, Sr. told me also that Russ had him do the dumping and burying in the yard. From then on, my life became a living H E L L. From then on. I lost my keys to my – to the room in back where I hosted, you know, people when they came in. . . .

.
Russ Darnell came down. Russ Darnell came down and took the keys from the office. He threatened me. He said I would lose everything if I tell anything about anything. He said that Larry Banks (ph.) and them would see me in Court and said that I would lose even my home, and they would keep me in Court long enough to break me, and I would lose my home, you know, and I knew then that Brenda went up there, even though she said it, even though she said it, that I would lose, you know, about the chemical dumping, she was covering up. She was scared I would go back and tell Russ what she said down there, and instead of him asking or saying anything, he just came down, you know, 15 minutes later and, you know, threatened me, for me to lose everything I've got. It wasn't my fault she talks too much. I mean I'm off by myself. They don't allow me around people, you know, and he just, you know, just went crazy like, you know, and took my keys later on. He even took the copy machine. I mean I need to work. You know, there was nothing left for me. You know, I already knew that, and then they stick that Bob Lemons on me and he really got intense. I mean he got intense. He set up a plan with these keys. Them keys have been in Mr. Lemons' office for almost a year when I went to work for the Harper's Ferry Job Corps. They were in there a year, them keys. This day, Russ comes up to the office, he wants the keys to the building. I said, Russ, you know Bob has them keys for a long time. Do not, do not, you know, go down there and tell Bob, you know, take his keys. He said I'm the plant manager. I want these keys back up in your office. I knew it was a staged play. This is what they do to me when they want to harass me and try to make me leave my job.

Tr. 73-75. Burns also testified that Brenda Pool, who was Larstan's Human Resource Manager, told her she knew that people had been dumping and burying chemicals at Larstan and said "[t]hey do not want to mess with me . . . because I will turn them in and they will lose everything they've got." Tr. 76.

On February 11, 2003, Complainant was no longer a phone operator and was assigned to work at the Oak Ridge plant on the floor. Tr. 78. The Early Drive and Oak Ridge plants are about four miles apart. *Ibid.*

According to Burns, when she worked as a receptionist she had prior knowledge of when inspections by the Occupational Safety and Health Administration (“OSHA”) or Maryland Occupational Safety and Health (“MOSH”) inspectors were to occur. Tr. 79. She testified that Russ Darnell, the plant manager at Early Drive, would tell her that he was expecting an inspection within the next week and that he would tell Brenda Poole and Brenda would call Burns who was to “hold them at bay until we get together.” *Ibid.* Burns further testified that chemicals were “stashed” in the Rebond shop at the Early Drive plant during OSHA inspections. Tr. 80-81.

When asked about various conversations that she had had with Larstan employees concerning dumping, spilling, or burying chemicals at the Early Drive facility, Burns testified that she talked to Raymond Barthelow, Sr. and his son Gary beginning in about 2000. Tr. 82. Raymond Barthelow told her between 2000 and 2002 that Russ had him bury chemicals in the yard, and he also dumped chemicals in the yard. Tr. 83-84. She reiterated that she also talked to Brenda Poole in 2001 and had told her then about what Raymond Barthelow had told her. Tr. 85. Burns also told Poole “if they keep messing with me, I’m going to do the same thing. I’m getting me a lawyer and I’m going to turn them in.” Tr. 85-86. After that conversation, Pool spoke with Russ Darnell and he told Burns “that they would keep me in Court forever, and I would wind up losing my house and everything else.” Tr. 86. In 2002, Burns also had a conversation with Brandy Naugle about possible EPA violations. Tr. 88. According to Burns, Naugle told her Gary Rowe, her ex-boyfriend, had been told by Russ Darnell to dump and bury chemicals in the yard. Tr. 88, 92. Naugle also told her that she and a co-worker were “fudging paperwork” regarding “calibrations” relating to chemicals. Tr. 88-89. Around February 2003 when Burns got transferred to Oak Ridge, Gary Barthelow told her that he knew about dumping and burying chemicals at Larstan even though he had not been involved in it. Tr. 93-94.

Burns also testified that several women who worked for Larstan had health problems. Tr. 94. For example, Kathy Grim had an operation on her ovaries and Gerri Repp had a hysterectomy. Tr. 94-95. Wendy Zimmerman also had an ovary removed or a hysterectomy, and Peggy Anderson told Burns that Gloria Armstrong “suffered some type of woman disease.” Tr. 95. Burns believed that these health problems were associated with their work at Larstan because “[t]here was just too many illnesses, and all us girls, not just me, we thought that maybe whatever they were using and whatever they were talking about, the chemicals was dumping and all, we actually thought something was going on there.” Tr. 95-96. She had no other basis for her belief, and, despite having been treated for one of the problems she described, did not ask her doctor about whether her exposure to any chemicals at Larstan may have caused her condition. Tr. 97.

According to Complainant, she thought about making a report to EPA about possible environmental violations in 2001 and was convinced by Brandy Naugle sometime in 2002 that she had to do something about it. Tr. 98. On December 18, 2003, she and her attorney participated in a conference call with officials at EPA, and she told them about hiding chemicals in the Rebond shop, Russ Darnell’s and Brenda Poole’s instructions to hold OSHA at bay, medical problems affecting Larstan’s female employees, and what Raymond Barthelow had told her about dumping and burying chemicals. Tr. 99. Burns subsequently told her daughter and

Brandy Naugle about having spoken to EPA officials. Tr. 100. Her daughter was angry with her because she thought Brandy would tell others about what she had done. Tr. 101.

Shortly before Christmas, Burns received a call from Brandy who told her that Burns' attorney had called Emily Westberry, Brenda Poole's assistant, who in turn called Bill Watkins, the plant manager at Oak Ridge, and told him about the EPA. Tr. 102. Burns again spoke with Brandy Naugle at her New Year's Eve party and was told that "Russ Darnell and them were on to me and everything, and that I should be careful, be very careful." Tr. 102-03. After Complainant made her disclosures to EPA, she noticed that people at work were "less friendly. Tr. 104. A co-worker, Herbie Younker, told her that Charles Rees had told him not to talk to her, and "they increased their intimidation with me, teased me with the mouse and everything." *Ibid.* They allowed her to work on the Lyle machine without gloves and she burned her hands. Tr. 105. She was transferred to the Lyle machine on December 8, 2003, filed a Workers' Compensation claim when she burned her hands, and subsequently purchased and began wearing gloves when she worked on the machine. Tr. 105-06. Burns never refused to wear gloves at Larstan and was in fact advocating that employees working on the Lyle machine wear them. Tr. 108-09.

On January 28, 2004, while she was working on the Lyle machine after lunch, Charles Reese, her supervisor, brought a safety memorandum around for the workers to sign. Tr. 109-12. According to Burns:

I read the paper, I seen the paper, I look at him and I said, Charles, I can't sign this until my lawyer sees it. I can't sign it. He didn't say a word. He said fine. Well, I kept the paper. He got all the stuff from everybody else. Everybody signed it, and he took it back into the office, and I don't know what happened in the office, but he came back and he told me to get my things and Bill Watkins wanted to see me in the office. So I did just that. I went into the office and everything, and as soon as I got to the office, Monique Broadus said, if you don't sign this paper, you have to clock out. I said am I fired? And she said, if you don't sign the paper, you have to clock out. And I asked again, am I fired? And that's when Bill Watkins was sitting at the table messing with a part, and he said, I don't – he didn't understand the big deal. Did you see anything wrong with that? I said I don't see anything wrong with the paper, but I said I'm not going to sign anything until I talk to my lawyer. He said, well, who are you going to listen to, your lawyer or Larstan Industries? I said, well, I'm 45 years old and you don't have to tell me what to do. You know, I'm 45. I know who I'm supposed to listen to, and that's when Gabby laughed. He came around us, he came in and he laughed, you know, and I think that pissed him off, excuse my language, but that's what I think, and he said, well, he says, look – I said am I fired. He said, well, you have to sign this paper or you have to clock out. I said well, am I fired? He said, no, you're not fired, you know what I mean but don't come back here until this paper is signed. I don't see what the big deal is, and I said fine. So, you know, I clocked out, I waited on a cab until 3:00. You know, that was about – I clocked out about – I guess it was 2:00. I heard the buzzer go off, and everything.

That was 2:00 break. So a little bit after 2:00 I clocked out. He told me to clock out. I clocked out. . . .

Tr. 112-13.

Burns attempted to contact her attorney that afternoon but he was out of the office due to illness. Tr. 113. She was also unable to contact him on January 29th because he was still ill. Tr. 118. On January 30th, she went to work at her regular time and her timecard was not in its slot. *Ibid.* A co-worker told her that she was to report to Brenda Poole at the Early Drive plant. *Ibid.* She got there at about 8:00 a.m. and Brenda asked her what she was doing there. Tr. 120. After talking to Bill Watkins, Brenda gave her a fax dated January 29th which said she had abandoned her job and Larstan considered that she had quit. *Ibid.*

Since leaving Larstan, Complainant has suffered a loss of self-esteem, become depressed, cannot sleep, has frequent bouts of crying, and has thought of suicide. Tr. 123-24. She has actively pursued other employment and has had a few jobs. Tr. 126, CX 6-8, 10. She estimates that she has lost wages of \$20,778.40, including a Christmas bonus, since she left Larstan, and has earned a total of \$2,695 since then. Tr. 127-28.

On cross-examination, Complainant acknowledged that, in addition to the January 29, 2004 safety memo, she had refused to sign two employee warning notices dated October 30 and November 20, 2003. Tr. 138. She also testified that when she was transferred onto the floor to work as an inspection trainee, she told Russ Darnell that she had “no talent for that” and asked why he didn’t just lay her off. Tr. 138-39. A handwritten note by Burns dated February 11, 2003 states, in relevant part: “Forced to take position of inspector trainee. Requested to be laid off. Request denied.” Tr. 140; RX 40. Complainant also acknowledged that she had never seen any chemicals dumped or buried at Larstan. Tr. 148.

In support of her rebuttal case, Complainant testified as follows with respect to the events of January 28, 2004:

Sir, we just came back from lunch not too long before that and Mitch was showing me how to do the parts with the gloves, and we were punching out holes, and Charles Reese came back with a stack of papers and was handing them out to everybody. He came to me, he said, you have to sign this safety paper. I said what safety paper. The safety paper, I read it, sir, and everything, and I said, well, I can’t sign anything until I speak to my attorney, like that. He says, well, just read it over. I did. I can’t sign it until I speak to my attorney, you know what I mean. He said fine. He went around, he was not working the machine at that time. He was getting everybody to sign this paper, the safety paper. He collected all the papers and went back into Bill’s office. That’s where I assumed he went. I went on back to working. He said, Bethel, get your things. Bill wants to see you in the office. He brought in Irene [to replace me]. Her name is Irene. She’s from the Dominican, and he brought Irene with him and told me to get my things and follow him right into the office. So I did, and he said, come on, get your things. Bill wants you in the office. I followed him into the office. . . .

Tr. 776-77.

Mary Giess

Mary Giess has worked at Larstan for approximately eight years and is presently working as a shrink wrapper. Tr. 155. When she started there, she was a “cleaning person” and then worked gluing parts together. *Ibid.* As a shrink wrapper, she worked in the vicinity of the Desma machine which is used to manufacture arm rests for automobiles. Tr. 157. When asked if the Desma machine “uses very strong chemicals,” Giess testified that she never smelled any chemicals and denied that she had ever told counsel that she had smelled chemicals near the machine. Tr. 157-58. She similarly denied that she had ever said she or anyone else got sick when working near the machine. Tr. 158-59. Giess testified that she had never seen chemicals dumped on the ground at the plant, although she did recall seeing chemicals dumped into a large square plastic container on one occasion four or five years earlier. Tr. 159-60. She also testified that she never said anyone dumped chemicals from the Desma machine in the back of the plant, nor did she have any information regarding whether Larstan ever received advance notice of OSHA inspections. Tr. 161. Giess previously had a hysterectomy but it had nothing to do with her employment at Larstan. Tr. 164-65.

Mitchell Mason

Mitchell Mason is presently unemployed but worked for Larstan at the Oak Ridge plant from December 2002 to March 2004. Tr. 180-82. He worked as a machine operator, wrapped parts with tape for a couple of months, and subsequently worked on the Lyle machine. Tr. 181-82. The Lyle machine forms interior door panels for automobiles and is operated by two people, with another six or eight people gathering the pieces after they come through the machine. Tr. 182-83. When Mason began working at Larstan, Burns was working in the office. Tr. 184. He recalled having conversations with her about people not wanting to work at the Early Drive plant “because they dump stuff out back . . .” *Ibid.* Gary Barthelow and Charles Reese participated in the conversations. Tr. 185. Gary Barthelow seemed to know about dumping chemicals at Early Drive but never said he participated in it. Tr. 186-87. Neither Barthelow nor Reese knew what kinds of chemicals were being dumped. Tr. 188. Mason testified that he recalled a conversation about two or three months before he left Larstan in March 2004 involving Joyce Miller, her daughter Judy Miller, and Charles Reese in which “[t]hey were saying that the company, that they kind of knew that [Burns] was going to get a lawyer, that they caught wind of her going to get a lawyer about the dumping stuff, and that’s pretty much what I heard.” Tr. 188-89. Bethel Burns was employed at Larstan at the time of the conversation. Tr. 192.

Mason testified that he had a “periodic absentee problem.” Tr. 194. He received warnings for absenteeism on April 22, 2003, July 12, 2004, and March 17, 2004. Tr. 195; RX 35. Despite the fact that the written notice dated July 12, 2004 indicated that he would be terminated if his tardiness and absenteeism did not improve, he was not fired in March after being absent. *Ibid.* The March 17th notice states:

A warning was given on April 22, 2003, a first notice was given on January 12, 2004, and today is the last notice for absenteeism, tardiness and leaving early, 30-day probation. Any time missed without excuse will be terminated.

Ibid. March 17, 2004 was his last day of work. Tr. 196. He did not feel well that day and wanted to leave. Tr. 197. When he asked Joyce Miller whether he would be fired if he left, she said “yes.” *Ibid.* He left work at about 10:00 a.m. and subsequently filed for unemployment benefits which Larstan opposed. *Ibid.*

On cross-examination, Mason acknowledged that he never worked at the Early Drive plant and never saw any chemicals being dumped or buried there. Tr. 200. He also acknowledged that he plead guilty to unlawful possession of a handgun and theft on August 17, 1998, was sentenced to 18 months incarceration with all but 6 months suspended, and then violated his parole on September 2, 1999. Tr. 202-03.

William Watkins

William Watkins worked for Larstan from January 1990 to the end of 1991 or beginning of 1992, left for a while to sell real estate, and returned to Larstan in January 1994. Tr. 209. During his initial employment, he worked as a machinist at the Early Drive plant. Tr. 210. When he returned to Larstan in 1994 he was asked to manage the start up of the thermal forming business at the Early Drive plant. Tr. 210-11. In the fall of 1995, he moved to the Oak Ridge plant and became plant manager there. Tr. 211. There are approximately 65 to 70 people at that plant. *Ibid.* Watkins reports to Russ Darnell who is Vice President of manufacturing and plant manager of the Early Drive plant. Tr. 212.

Watkins has known Bethel Burns for approximately 10 years. Tr. 212. He has never had reason to doubt her integrity or truthfulness. Tr. 213.

Watkins knows Brandy Naugle and was one of two Larstan employees who attended her wedding after she left Larstan. Tr. 216-17. Naugle handled HR matters, took care of shipping, and answered phones in Watkins’s office before she left in August 2003. Tr. 218. As late as last summer, Watkins and Naugle were in contact with each other at least once a month. Tr. 219.

Emily Westberry held the same job as Naugle before Naugle filled the position. Tr. 220-21. Sometime shortly before Christmas, Watkins received a call from Westberry and “she just said a lawyer had contacted her asking her questions” Tr. 221. She did not say the questions related to environmental violations but simply said she could not talk about it. *Ibid.* Watkins may have told Russ Darnell about the call from Westberry. Tr. 222-23. He received a call from Naugle about the same time. Tr. 223. Naugle mentioned Gary Rowe, her ex-boyfriend, but did not say anything about dumping chemicals. Tr. 225. In another telephone conversation sometime after the first, Naugle said she had been visited by investigators but did not say who they were. Tr. 226. He probably told Russ Darnell about that conversation as well. Tr. 227.

According to Watkins, around this time he also heard from plant employees and supervisors that Bethel Burns was trying to record conversations at work. Tr. 229. Watkins confronted Burns about this and told her it was illegal to record conversations in the plant. *Ibid.* Burns denied that she was doing it. *Ibid.* Watkins believed it had something to do with her Workers' Compensation claim. Tr. 230.

On January 28, 2004, Burns told Watkins that she did not want to sign the safety memo until she had a chance to have her attorney look at it. Tr. 236-37. Watkins told her that if she did not sign the paper, she could not go back to work on the Lyle machine. Tr. 237. He did not tell her to "clock out." Tr. 243. He did not give her a deadline for getting the memorandum reviewed by her lawyer, but neither did he give her permission to leave work to get it done. Tr. 246. Watkins believed she would be back at work the next day. Tr. 247. If she had shown up the following morning with the memorandum signed "she would have been right back to work without any problem . . ." *Ibid.*

Around 2:00 p.m. on January 29, 2004, Watkins spoke with Russ Darnell and told him he had not heard from Burns that day. Tr. 248-49. Based on her failure to come to work, he "treated it as a walkout, she quit." Tr. 249. Watkins expected her to show up at work on January 29th but not on January 30th. Tr. 253. Late in the day on January 29th, Watkins pulled Burns' time card and told Joyce Miller that if she showed up on January 30th to send her to Brenda Poole at Early Drive. Tr. 253-54. Because Burns had worked for Larstan for 10 years, he gave her the benefit of the doubt on January 28th when she left work. Tr. 257.

When he heard that Burns had contacted a lawyer in December 2003 he thought it was related to her Workers' Compensation claim. Tr. 260-61. It would be important to him that an employee had contacted EPA or any other governmental agency about environmental violations and had he heard that that had happened he would have reported it to Russ Darnell. Tr. 261-62. That did not happen in December 2003. Tr. 262. The first time Watkins recalls knowing that Burns had contacted EPA or any other government agency accusing Larstan of environmental wrongdoing was after she left Larstan and filed the complaint in this case. Tr. 264.

When Watkins spoke with Burns on January 28th, she was upset, combative, and aggravated. Tr. 265. He did not give her permission to leave the plant when she walked out of his office. Tr. 266. Watkins assumed she was going back to her job, and Monique subsequently told him that she had gone outside and was standing alongside the road. *Ibid.* Although he did not know if there was a written policy governing it, Watkins testified that since he had worked at Larstan "if somebody walks out, they're treated as quit." Tr. 267. Normally, if someone walked off the job he would pull their time card but, since Burns had been with Larstan 10 years, and because Watkins believed she would cool down and come to work the next day, he did not do so when Burns left on January 28th. Tr. 267-68. He did not know of any other 10 year employee who had ever walked off the job.¹ Tr. 268. Watkins is aware that the company has "a three-day no call, no show policy" which provides that if an employee does not come in to work or call for three consecutive days they are considered to have quit. Tr. 269. That policy did not apply in this case since Burns had walked off the job. Tr. 270. The decision to treat Burns' departure as

¹ Watkins subsequently testified that he was unaware of *any* employee, regardless of the length of their employment, who had walked off the job and had subsequently been allowed to return to work. Tr. 300.

a “quite” had nothing to do with disclosures to EPA because Watkins did not know of the disclosures. *Ibid.*

In 2002, Larstan moved the entire second shift, as well as Burns, Naugle, and Poole, from the Early Drive facility to the Oak Ridge plant. Tr. 271. Burns, Naugle, and Poole worked in the office at Early Drive before the move, and they continued to work in the office at Oak Ridge. Tr. 272. The move was a result of a new contract with Continental Plastics involving a very substantial project. Tr. 273. Burns’ pay, benefits, and seniority remained the same. *Ibid.*

In February 2003, Burns was moved from the office to the floor as a quality inspector. Tr. 274; RX 23. Her pay, benefits, and seniority remained the same. *Ibid.* In October 2003 Larstan received a complaint from its Georgia customer regarding the quality of parts inspected by Burns. Tr. 277-78; RX 27. In December 2003, Continental Plastics received parts that were not properly glued or taped and which had been inspected by Burns. Tr. 280; RX 28. She was then taken off quality control and made a production worker on the Lyle machine. *Ibid.* There was no change in her salary, benefits, or seniority. Tr. 283.

Watkins testified that he instructed Monique Broadus to draft the January 2003 safety memorandum regarding the requirement that Lyle workers wear gloves. Tr. 286. The memo was generated because there was an increase in the number of employees who had sustained hand injuries. *Ibid.*; *see also* RX 19. The memorandum was directed to all employees who worked on the Lyle machine. Tr. 288; RX 29. Every employee other than Burns signed the memo. *Ibid.* None of the employees other than Burns voiced any objection to signing it. *Ibid.* According to Watkins:

The first thing when she came in she was waving the paper and said I’m not signing this thing. My attorney advised me not to sign anything until he read it. At that point I had said something to her, and I think Monique had joined in the conversation at the same time and said, you know, it’s just a form saying that you read and understand what we expect, that’s it. It’s nothing saying you did anything wrong or anything like that. She didn’t want to hear that. She said, well, I’m not signing anything until my attorney sees it, and at that point I think I said, you know, do you work for the company or do you work for your lawyer, and then she was waving her hands and she went out the door.

Tr. 292-93.

Brenda Poole

Brenda Poole began working for Larstan in October 1990 and is presently its Human Resource Manager. Tr. 323-24. She has held that position since approximately 1992 or 1993. Tr. 324. Her duties include dealing with employment issues and maintaining employment records. *Ibid.*

According to Poole, she never had a conversation with Burns in 2001 in which she stated she knew things about the company that could get it shut down. Tr. 324. Nor did she ever tell

Burns she knew chemicals were being buried, dumped, or concealed or tell her about any environmental concerns or violations. Tr. 325. Poole also testified that Burns never told her that she knew things that would get the company shut down, or knew of chemicals being buried, dumped, or concealed. *Ibid.* Poole further denied that she told Burns she or anyone else at Larstan had advance notice of OSHA inspections, or that there was any special relationship between Larstan and OSHA. Tr. 326-27. To her knowledge, Larstan never received advance notice of an OSHA inspection, nor did any of its employees ever dump, bury, or conceal chemicals in its Rebond shop. Tr. 328. At least four times since Poole has been with Larstan, it has been cited by MOSH for environmental violations following inspections. Tr. 329. Based on her knowledge of Larstan's personnel files, Poole does not know of any Larstan employee who contracted ovarian cancer or any other illness due to exposure to chemicals. Tr. 330.

Poole testified that she did not learn that there was an issue regarding Burns' employment status at Larstan until January 29, 2003. Tr. 330. Bill Watkins called her that day and said that Burns had walked out the day before because she was angry over a safety memo and since she did not come to work or call on January 29th it would be "handled as job abandonment." Tr. 331. No other Larstan employees had, according to Poole, walked out and been allowed to come back without reapplying for a job. Tr. 331. Quite a few employees have walked out before a shift ended and they were all treated as though they had quit as shown by the exit interview documents maintained by Larstan. Tr. 332-35; RX 38. When someone walks out before the end of a shift, that person would have to be replaced by pulling an employee from another area of the plant. Tr. 336.

It was not company policy to try to contact employees after they had walked off the job or if they failed to show up for work, and there was no reason for anyone at Larstan to have called Bethel Burns on January 29, 2003 after she had walked out on January 28th. Tr. 337-38. The only reason that Bill Watkins gave for terminating Burns' employment was because she had walked out on January 28th and never came to work or called on January 29th. Tr. 339. Neither Watkins nor Darnell ever said anything to Poole to suggest that the decision to terminate Burns was motivated by knowledge that she had contacted the EPA. Tr. 339-40. Poole did not know at that time that Burns had contacted the EPA, and at no time prior to her termination of employment did Burns express any concerns about potential environmental violations by Larstan. Tr. 340-41. The first time Watkins learned of Burns' allegations was when she signed the receipt for the certified complaint in this case in March or May 2004. Tr. 341.

According to Watkins, Burns never complained about, or expressed any dissatisfaction with, her transfer from the Early Drive plant to Oak Ridge. Tr. 341-42. Similarly, she never expressed any dissatisfaction with the change in her job duties from receptionist to quality training inspector, or from quality training inspector to Lyle machine operator. Tr. 342-43.

Burns filed a Workers' Compensation claim on December 8, 2003 in which she alleged that she had sustained first degree burns on her fingertips at work. Tr. 343-44. That was the first day she was working on the Lyle machine. Tr. 344. The claim was denied. Tr. 344; RX 1.

Poole testified that there are a number of employers in Hagerstown, Maryland that employ unskilled workers, and Larstan has a high turnover rate. Tr. 355. It is not unusual for an employee to leave Larstan and be rehired at a later time. *Ibid.*

Larstan maintains a log of employee injuries, referred to as the “OSHA 300 log.” Tr. 356. It lists all injuries that are reported to Workers’ Compensation and Larstan’s insurance carrier. Tr. 357. As Human Resource Manager, Brenda Poole files Workers’ Compensation claims and follows up with court appearances if necessary. Tr. 416. Between 1994, when she became Human Resource Manager, and the time of the hearing, Pool was unaware of any Workers’ Compensation claims filed by any Larstan employee that related to health problems due to exposure to hazardous chemicals or noxious fumes or any other fumes or chemicals. *Ibid.* Poole also worked as personnel assistant from 1991 or 1992 until becoming Human Resource Manager, and was similarly unaware of any such claims having been filed during that period as well. Tr. 417.

Vivian Monger

Vivian Monger suffers from emphysema and problems with her feet and legs which would have made it difficult for her to physically attend a hearing in Washington, D.C.. She therefore agreed to testify in this proceeding via telephone Tr. 439-40. Monger worked for Larstan for seventeen years between 1987 and 2004. Tr. 441.

According to Monger, she had a telephone conversation with Complainant’s counsel during which she acknowledged that she had signed a written declaration for Larstan in which she lied about whether she had knowledge of chemical dumping and injuries at Larstan. Tr. 442. When asked if she remembered telling counsel that she actually knew about dumping of chemicals at Larstan, Monger testified: “I had heard of it years ago.” Tr. 443. She further testified that the glue used on rubber gaskets at the plant had a strong odor, that some of the workers complained about headaches after working with the glue, and that she saw Bob Lemon, a production manager, collapse in the plant. Tr. 443. When asked what else she knew about the conditions at Larstan, Monger testified: “Yeah, but other than that, I don’t know of anything that, you know. It’s – just as far as I’m concerned, it’s a typical workplace.” Tr. 444. She also said she heard reports about dumping chemicals, but that was “years ago.” Tr. 445. According to Monger, she lied on the declaration for Larstan because she “care[ed] about the people in there, . . .” and was concerned about “the possibility of the plant having to close down and people being without jobs.” *Ibid.*

Monger also related a conversation she had with Brenda Poole after signing the Larstan declaration. Tr. 446. She told Poole that she had a conversation with Bethel Burns during which Burns said that “anybody that goes down and testifies will gain profit the same as she.” *Ibid.* She understood Burns’ statement to mean that they would receive money. *Ibid.* Monger believes she contacted Poole with respect to this conversation. Tr. 447.

On cross-examination, Monger testified with respect to having heard stories about people burying or dumping chemicals that they were just “rumors” and “[i]n a factory, you don’t know

what to believe.” Tr. 457-58. She further testified that she had never had any illness or surgery related to her reproductive organs that she believed was caused by Larstan. Tr. 458.

James Pons

James Pons has worked for Larstan for a nine-month period preceding the hearing but has been employed there on several different occasions. Tr. 473. He originally started with Larstan in the 1980’s working on the Desma machine. *Ibid.* The Desma is a molding ejection machine in which two chemicals, a resin and a hardener, are mixed in a mold to make a part. Tr. 474. Pons operated the Desma machine on and off for approximately five or six years, coming and going from Larstan on four or five occasions. Tr. 474-75. The chemicals are mixed in the machine with an auger, and there is an exhaust system adjacent to it. Tr. 477. The mold is sprayed with a liquid wax-like substance so the parts will release from the mold. *Ibid.* At some point during the day, the machine was cleaned and the auger was removed and put into a container which contained some type of chemical. Tr. 478. The chemicals were kept in plastic “totes” which are approximately five feet high. *Ibid.* The totes hold 50 or 60 gallons and are moved from one place to another with a forklift. Tr. 479.

Pons testified that he never participated in dumping chemicals in the yard in back of Larstan other than one time he disposed of “a little bit of spray left in a container, there was a little bit on the bottom, it was just wax, and I did that myself but that was – I never done nothing, no.”. Tr. 479. He never disposed of any resin or hardener at the Early Drive plant, which is the only facility at which he worked. Tr. 480. He never received any orders or directions from Russ Darnell to dump leftover chemicals in the yard behind the plant. *Ibid.*

When asked if he had ever told any EPA investigators that he had been told to dump chemicals at the plant, Pons invoked his Fifth Amendment privilege against self incrimination on the advice of counsel. Tr. 480-81. According to Larstan’s counsel, Pons met with EPA on two occasions – once approximately a year before the hearing, and a second time approximately one month before the hearing – and his instruction to Pons that he invoke his Fifth Amendment privilege applied only to the first meeting. Tr. 483.

Pons acknowledged that when he met with EPA investigators in February 2004 they asked him questions on the subject of dumping chemicals. Tr. 485-86. Pons denied that he ever told the investigators that he worked in the Rebond shop. Tr. 488. He testified that “I drank a lot and I did a lot of drugs and stuff like that” around that time, but he was not intoxicated when he spoke to the EPA investigators in 2004, Tr. 501, and he denied that: resin and liquid hardener were dumped in the yard twice a month, Tr. 502; a bucket or less of mold release spray was dumped in the back of the plant “hundreds of times,” Tr. 503; he ever dumped any plastic totes containing resin or liquid hardener in the yard, Tr. 505; he ever worked in the Rebond shop or mixed leftover rubber with a chemical in the Rebond shop which was then baked to produce a “bun,” Tr. 507; and breathing protective devices were unavailable to employees, Tr. 508.

When asked if Bethel Burns ever asked him to lie about environmental violations at Larstan, Pons replied:

She said if anything ever come up about it any wrongdoings or anything happening there or if I knew anything, that we could get paid. That's what she said.

Tr. 510. During his deposition, however, he testified that the conversation with Burns related to possible compensation employees might receive if they contracted an illness which was related to their jobs. Tr. 511-12. When asked if he would have lied about something he had done if asked to do so by Russ Darnell when he previously worked for Larstan, Pons responded he would have done so. Tr. 514.

On cross-examination, Pons testified that he never told Complainant at any time before she left Larstan on January 28, 2004 about any environmental violations there, nor did he tell her that he had been involved in, or knew about, dumping or burying chemicals at Larstan. Tr. 519. Although he had testified that he would have lied if Russ Darnell asked him to, he further testified that Darnell had never asked him to lie or to dump or buy any chemicals. Tr. 520.

Herbert Younker

Herbert Younker has been employed by Larstan for seven years and works as a forklift operator. Tr. 541. He knew Bethel Burns both before, and during, the time she was employed at Larstan. Tr. 542. On several occasions, he heard her say that she wished she could be laid off or fired during the period she was working at Larstan. Tr. 543-44. She made such a statement around the time she was moved from the office to the Lyle machine. Tr. 546. She was "frustrated" when she made the statement. Tr. 546-47.

Younker testified that he was convicted of a drug charge in 1998 for which he could have been sentenced up to three years incarceration. Tr. 547-48.

Tiffany Linton

Tiffany Linton has worked for Larstan for five years as of May 3, 2005. Tr. 552. She is shipping manager and warehouse supervisor. *Ibid.* Her maiden name is Burns and the Complainant in this case is her aunt. Tr. 553. She has never told her aunt that she had an ovary removed, that she had ovarian cancer, that she has had any medical problems with her reproductive organs, or that she experienced any medical condition which she believes was related to her employment with Larstan. *Ibid.*

Geraldine Repp

Geraldine Repp has worked for Larstan for twenty-six years and is an office assistant. Tr. 558. She testified that she heard Complainant say on January 30, 2004 that "all she wanted was to be laid off or fired so that she could draw unemployment while she looked for another job." Tr. 559-60.

Repp underwent a hysterectomy in 1993 or 1994 because of fibroid tumors. Tr. 560-61. It was a hereditary condition and had nothing to do with her employment at Larstan. Tr. 561.

She had mentioned to Burns that she had a hysterectomy and “told her that my mother had a hysterectomy in her thirties, my aunt and then a year later, I told her that my sister had a hysterectomy for the very same reason [fibroid tumors].” Tr. 563.

Donna Moore

Donna Moore has worked for Larstan for five years and is a Gantry machine operator and parts builder. Tr. 565. She works at the Early Drive plant. Tr. 566. She has never had any illnesses or medical conditions that she believes were caused by working at Larstan. Tr. 566.

Emily Westberry

Emily Westberry worked for Larstan from September 1997 to August 2001. Tr. 568. She held several positions, including Human Resources, purchasing, shipping, and document control. *Ibid.* She knows both Bethel Burns and Bill Watkins through her employment at Larstan. Tr. 568-69. Westberry never told Bill Watkins that Burns had contacted the EPA, nor did she have any conversations with Watkins during which they discussed Burns, the EPA, or any types of environmental violations at Larstan. Tr. 569-71. The first time she learned that Burns had contacted the EPA was in September 2004 when she spoke with Respondent’s attorney. Tr. 571.

On cross-examination, Westberry acknowledged that she recalled receiving a telephone call from a woman representing Bethel Burns but does not recall when that was. Tr. 572-73. She did not report to anyone at Larstan that she had been contacted. Tr. 574. The first time she mentioned the conversation was when she spoke to Respondent’s attorney in September 2004. *Ibid.* She communicated with Bill Watkins maybe two or three times a year after she left Larstan in 2001, usually by telephone, and never disclosed to him during any of those conversations that she had received a telephone call from an attorney representing Burns. Tr. 575.

Keith Essex

Keith Essex has worked for Larstan for 19 years and is a “machine helper.” Tr. 576-77. He works at the Early Drive plant. Tr. 577. He worked for about five years in the Rebond shop where they make “big [rubber] blocks.” *Ibid.* He does not recall any time during the five years he worked in the Rebond shop that any chemicals were hidden there or that the Rebond shop was locked at an unusual time. Tr. 578. He never knew that an OSHA inspection was about to occur before inspectors got to the plant. *Ibid.* Employees who worked in the Rebond shop always wore protective masks. Tr. 582. The Rebond shop is approximately 10 feet from the plant building at Larstan and there are four or five employees who work there. Tr. 584.

Gloria Armstrong

Gloria Armstrong has worked for Larstan since 1989 as a laminator. Tr. 587. She had a hysterectomy in 1992 because she had a fibroid tumor. Tr. 588. Her doctor told her he did not know what caused the tumor. *Ibid.* She has never told anyone that her hysterectomy was associated with her work at Larstan. Tr. 589.

Barbara Vaughn

Barbara Vaughn has worked for Larstan for approximately 22 years and is a schon operator. Tr. 590-91. A schon is a press machine. Tr. 591. Vaughn had a hysterectomy in 1973, five years before she began working at Larstan. *Ibid.* No doctor or other healthcare provider has ever told her that she had any type of illness or sickness caused by working at Larstan, nor does she believe that she has ever gotten sick from working there. Tr. 592. She never told Burns that she believed a medical condition she had was caused by her work at Larstan. *Ibid.* On January 30, 2004, Burns told her “they’d either have to fire her or lay her off, that way she could draw unemployment.” Tr. 592-93.

Ronda Flook

Ronda Flook worked for Larstan from 1986 to 1989, 1994 to 1999, and 2002 to 2003. Tr. 596. She worked as a picker and packer, a roller die operator, and a Gantry machine operator. *Ibid.* She has never had any surgeries or illnesses relating to her reproductive organs, nor has she had, or told anyone she had, any illnesses which she believes were caused by working at Larstan. Tr. 597.

Wendy Zimmerman

Wendy Zimmerman worked for Larstan from 1998 to 2005. Tr. 600. She had a cyst removed from her ovary at the time of her second pregnancy in 1994. *Ibid.* That was before she started working at Larstan. Tr. 601. She has never had, nor told anyone she had, any sickness or surgery that she believes was caused by working at Larstan. *Ibid.* She acknowledged that a declaration she signed in support of a motion filed by Larstan’s attorney reflects that she had a cyst on one of her ovaries and a fallopian tube surgically removed in or about May 2002. Tr. 603. She began experiencing pain related to the cyst around 1993 or 1994 when she was pregnant before she worked at Larstan. Tr. 605.

Falicia Stewart

Falicia Stewart has worked for Larstan for approximately one and one-half years beginning October 2003. Tr. 606. She works as a Gantry operator. *Ibid.* Bethel Burns was there when she first started working at Larstan. Tr. 607. She recalls Burns saying at some point before she was terminated that she wished they would fire her. Tr. 607-08. It was probably a few weeks before she left, and she heard the statement while she and Burns were at the time clock. Tr. 608.

Sonia Broadus

Sonia Broadus began working for Larstan on May 30, 2002 and works as a stacker. Tr. 610. She has known Burns all her life. *Ibid.* About a month or two before Burns left Larstan, Broadus recalls hearing her say she wished she could get laid off. Tr. 610-11.

Ann Marie Barthelow

Ann Barthelow has worked for Larstan approximately seven years and works as a laborer. Tr. 612-13. She worked on the Lyle machine at the Oak Ridge plant while Burns was working there. Tr. 613. She gave Burns a new pair of gloves to wear. Tr. 613-14. She recalls Burns stating while they were near the Lyle machine that she did not know why the didn't just fire her or lay her off. Tr. 615. Barthelow has seven family members who are also employed at Larstan. Tr. 616.

Monique Broadus

Monique Broadus has worked for Larstan since February 2000 as a personnel assistant. Tr. 620. She prepares exit interview forms for employees who no longer work for the company. Tr. 621. Bethel Burns walked out on January 28, 2004 without clocking her time card out, and Broadus had to do it for her. Tr. 621-22. Bill Watkins instructed her to do so after lunch that day. *Ibid.* Broadus prepared an exit interview form for Burns on the instructions of Bill Watkins. Tr. 623; RX 12. Under the heading "Employer/supervisor's comments," it notes Burns "[r]efused to sign new procedure implemented for all employees, clocked out and walked out." *Ibid.* The form is dated January 29, 2004. Tr. 624. Broadus also prepared a memo dated January 20, 2004 relating to an incident involving a complaint by Burns that Jason Rhodes, a co-worker, had scared her with a toy mouse. Tr. 626. Broadus directed Rhodes to apologize to Burns, which he did. *Ibid.*

On cross-examination, Broadus acknowledged that no "exit interview" actually occurred with Burns because she walked out. Tr. 627. The form was filled out on Bill Watkins' orders. *Ibid.* He told Broadus that Burns refused to sign the safety memo and instructed her to write on the form that "she clocked out and walked out." *Ibid.* When she wrote "clocked out and walked out" she did not mean that Burns had clocked herself out. Tr. 629.

Gary Barthelow

Gary Barthelow has worked for Larstan since 1997 and works there as a Lyle supervisor. Tr. 641. He has never participated in dumping or burying of chemicals at Larstan and is unaware of anyone having participated in such activity. Tr. 642. He knows both Bethel Burns and Mitchell Mason from his employment at Larstan. Tr. 643. He never told either individual that he had participated in dumping or burying chemicals or was aware of any such activities. Tr. 644. Charles Reese was Barthelow's supervisor on the Lyle machine until sometime in 2004 when he took a job closer to his home. *Ibid.* He never heard Reese say that he participated in dumping or burying chemicals. Tr. 645. Barthelow has worked in the yard at the Early Drive plant. *Ibid.* The yard is about the size of one or two football fields and is covered in gravel about a foot deep. *Ibid.*; RX 6. It would be "really hard" to dig a hole in the yard at the Early Drive plant. Tr. 647. Bethel Burns never gave him "a ball of glue," nor did he ever give one to her. Tr. 647-48. When Burns was put on the Lyle machine, she told Barthelow that "if I would help her, assist her in suing Larstan, she would make it worth my while." Tr. 649. He understood her to mean that he would receive monetary compensation if he helped her. *Ibid.*

She did not tell him the nature of the lawsuit. *Ibid.* He told her “no thank you, and that’s it.” *Ibid.*

On cross-examination, Barthelow testified that the yard surrounding the plant is covered in gravel so the forklifts do not sink into the mud. Tr. 650. When asked if someone dumped liquid onto a foot of gravel whether it would be permeable, he responded “I guess.” *Ibid.* He was told by one of Larstan’s supervisors that the gravel in the yard was a foot deep, but he does not know that for a fact. Tr. 651. He acknowledged that someone could dump chemicals onto the gravel in the back of the yard and he would have no way of knowing about it. Tr. 652. He denied that he had not reported his conversation with Burns concerning receiving compensation if he helped her sue Larstan before the day of his deposition in this case. Tr. 654. He also disputed that she simply meant that everyone would benefit “if people would come forward and raise these issues” *Ibid.* The conversation occurred approximately a month or two before Burns left Larstan. Tr. 655.

Joyce Miller

Joyce Miller has worked for Larstan for about nine years and works as a Gantry supervisor at the Oak Ridge plant. Tr. 659. She knows Bethel Burns from her employment there. Tr. 660. During the time they were working together at the Oak Ridge plant, Burns told her that she would not mind being laid off. Tr. 663. Miller did not recall ever having a conversation with anyone before Burns’ departure from Larstan where they discussed Burns contacting a lawyer, suing the company, or contacting the EPA. Tr. 664. Nor did she ever hear Burns express before she left any concern that: chemicals were being dumped or buried at Larstan; employees were getting sick from exposure to chemicals; or Larstan was getting advance notice of OSHA inspections. Tr. 664-65.

On cross-examination, Miller reiterated that Burns told her she would not mind getting laid off so she could collect unemployment. Tr. 668.

Charles Reese

Charles Reese started working for Larstan in August 1999 and quit July 24, 2004. Tr. 674. He worked there as a Lyle operator and supervisor. *Ibid.* He knows Mitchell Mason because Mason worked for him on the “table” at the Lyle machine for a couple of months. Tr. 674-75. They worked together at the Oak Ridge plant. Tr. 675. Reese never told Mason that he participated in dumping chemical waste at the Early Drive plant, nor did Reese ever work at the Early Drive plant. *Ibid.* No one ever asked Reese to go to Early Drive or to bury chemicals, and he never told Mason that he believed dumping or burying chemicals had occurred at Early Drive. Tr. 676. Reese also never heard Gary Barthelow tell Mason that he dumped or buried chemicals, nor did Reese tell Mason that Gary Barthelow participated in dumping or burying chemicals at Early Drive. *Ibid.*

Reese further testified that he never had a conversation with anyone, including Joyce Miller, before Burns left Larstan in which they discussed Burns seeking a lawyer or filing a lawsuit against Larstan or Burns saying that she believed chemicals were being dumped or

buried at Larstan. Tr. 676-77. The first time he knew Burns had a lawyer was when they handed out the safety memo on January 28, 2004 because “[s]he said I’m not signing this until I talk to my lawyer.” Tr. 677-78.

As Mason’s supervisor, Reese was aware that Mason “was missing a lot of time.” Tr. 678. He had been written up for absenteeism and was informed that he could be terminated if he missed any more time. *Ibid.* On the day he walked off the job, he asked Reese to lie for him. *Ibid.* Reese testified: “He asked me to go and tell them that he was out back puking which he wasn’t the day he got the layoff. He just walked off.” Tr. 679. Reese declined Mason’s request. *Ibid.* Mason also told him “to clock him out, and I told him I wasn’t clocking him out because I don’t have the authority to do that” Tr. 680.

On cross-examination, Reese testified that he never heard people talking about chemicals having been dumped over at the Early Drive plant. Tr. 681. He did not recall ever going to Bill Watkins in December 2003 or January 2004 to tell him he thought Burns might be tape recording people’s conversations. Tr. 681-82. He also did not recall ever asking Burns to step away from the Lyle machine and then asking her “what’s going on?” Tr. 682.

Raymond Barthelow, Sr.

Raymond Barthelow has worked for Larstan for about ten years and is a truck driver and maintenance worker. Tr. 696. His job entails removing “[l]eftover materials and stuff like that. . . .” *Ibid.* None of the waste products generated by Larstan are hazardous waste or chemical waste. Tr. 697. Barthelow takes waste materials to the county landfill for disposal where it is weighed and inspected. Tr. 697-98. He has never been instructed to bury or dump chemical waste at Larstan, he has never done so, nor has he ever told Bethel Burns that he or anyone else has done so. Tr. 698. Similarly, he has never hidden or concealed chemicals in Larstan’s Rebond shop, been instructed to do so, or told Bethel Burns that he had engaged in, or was aware of, such activity. Tr. 698-99. To his knowledge, Larstan never got advance notice of OSHA inspections, and he never told anyone that he knew OSHA was going to inspect the plant before inspectors arrived. Tr. 699.

On cross-examination, Barthelow testified that he no longer takes refuse to the landfill because Larstan now uses dumpsters. Tr. 700. The waste that he transported to the landfill was placed in clear plastic bags. Tr. 700-01. Chemicals used to produce the products manufactured by Larstan arrive at the plant in large totes which hold around 50 to 60 gallons. Tr. 701. He never transported totes to the landfill. *Ibid.* Plastic totes containing chemicals were delivered to the plant about once a month. Tr. 702. The totes would arrive in a big truck, would be unloaded in front of the plant with a forklift, and then taken inside the plant. Tr. 702-03. Once the chemicals in the tote had been used up, they would be set outside and stacked up between the plant and the warehouse. Tr. 703.

Barthelow worked at the Early Drive plant for the entire 10 years of his employment with Larstan and knows that Bethel Burns worked at the Early Drive plant until around 2002. Tr. 704. Most of the time that Burns was there, she worked in the office. Tr. 705. Barthelow denied that he would, from time to time, go up to the office and have conversations with her when he was

upset. *Ibid.* He similarly denied that he ever complained about “some injustice that [he] felt had been done, that [he] threatened that if the injustice was – in the presence of Ms. Burns, if the injustice was not straightened out to [his] satisfaction, [he was] going to disclose what [he] knew about chemicals being dumped in the yard.” Tr. 707.

Russell Darnell

Russell Darnell has worked for Larstan for eighteen years and is Vice President of Manufacturing and plant manager. Tr. 710. He manages the Early Drive plant, the Oak Ridge plant, and Larstan’s Woodstock, Virginia plant. *Ibid.* His office is at Early Drive. *Ibid.* He has known Bethel Burns since she was initially hired at Larstan. Tr. 711. He assigned her to work trimming foam rubber parts which she did for about two years. *Ibid.* He then promoted her to receptionist where she answered phones and assisted with various personnel functions. *Ibid.* He increased her pay three or four times during her employment, and at no time was her compensation, benefits, or seniority ever reduced. Tr. 712. Darnell had her transferred to the Oak Ridge facility in November 2002 with approximately 25 other employees because Larstan was starting a new operation over there. Tr. 712-13. Burns never complained about the move or said she wanted to return to Early Drive. Tr. 713.

Darnell speaks with Bill Watkins, the manager of the Oak Ridge plant, frequently. Tr. 714. Watkins called him on January 28, 2004 about Burns and told him that she had walked out and abandoned her job. *Ibid.* They spoke again the following day around 1:00 or 1:30 p.m. and

he proceeded to say that she walked out and abandoned her job. She didn’t call in. He waited until then, and then it was probably around 2:00, 1:30, 2:00, sometime like that, and he wanted to know how to handle it, and Brenda looked at me, and I said, well, handle it in the normal procedure, the same way we do anything else.

.....
[I]f somebody walks out, abandons their job, we assumed they quit, you know, because they left. If it’s an older employee and we think there’s a problem, we’ll wait until the next day to see, well, what’s the rest of the story, and, of course, if they make no contact or nothing, you assume they walked off, they abandoned their job and they’re not coming back. So we followed the standard procedures that they voluntarily quit.

Tr. 715.

Darnell has personally hired many people at Larstan and they are told when hired that if they walk off the job at anytime during their employment they are considered to have abandoned their jobs. Tr. 716. Burns was “totally aware” of that policy based on her having worked in the HR department at Early Drive. Tr. 717. Darnell knows of no similar instance where an employee with seniority similar to Burns has ever been allowed to return to work after they walked out and failed to show up or call the next day. Tr. 718.

Darnell's decision with respect to Burns was in no way motivated by Burns contacting the EPA, and Darnell had no knowledge that she had done so at that time. Tr. 719. Neither Burns nor anyone else had ever told Darnell that Burns suspected there had been environmental violations such as chemical dumping at Larstan, and she had no reason to suspect that such activity had occurred. *Ibid.* The first time Darnell knew that Burns had made such allegations was when Brenda Poole received a copy of the complaint in this case in March 2004. Tr. 720. He did not know that Burns had contacted any government agency or a lawyer regarding environmental concerns before that time. *Ibid.* At no time before Burns left Larstan did Darnell ever tell her that if she went to the EPA or filed a lawsuit the company would ruin her or take her house. *Ibid.*

As Vice President and Manager of the Early Drive facility, Darnell oversees the company's compliance with OSHA and EPA laws and regulations. Tr. 722. Neither OSHA nor EPA ever cited or fined Larstan during the period of Burns' employment for burying or dumping chemicals. Tr. 722-23.

Darnell is also responsible for overseeing the purchasing of chemicals used at Larstan's plant in the manufacture of products. Tr. 727. The principle product that it uses in the manufacturing process is foam rubber, but Larstan also purchases liquid chemicals which form a bonding adhesive which bonds the foam rubber together. Tr. 727-28. They also use a bonding material in a recycling operation which bonds together particles that are chopped up. Tr. 728. There would be no reason to dump these chemicals because they are very expensive. *Ibid.* Furthermore, there are no waste products left over from the raw materials after the production process is complete. Tr. 729. With respect to Larstan's "reclaiming operation," Darnell testified:

[W]e take all of our excess foam and we run it through a chopping operation, chop it up into small particles, about 3/8 of an inch in diameter, or that configuration. Once that's chopped up, it goes into a big blender that's got blending wheels and stuff, blades I guess on the inside. This matter that we're using, the isocyanate, it comes in a tote. There's a hose hooked to it, and it injects it into – it's a closed system – into this tumbler which we call a blender. Well, it's blended together so that that material which is a glue, gets on all of those particles. Once it's on all of those particles, when it's going through its mixing cycle, then it is dropped down into a steel mold and a lid comes down and presses it down, and depending on the amount in the mold, that gives us the density of the solid form that we want after the curing which is about a 30, 35 pound density, a solid rubber block. Well, once that comes down and the lid is on there and there's pins going through it, then that mold is removed and taken to an oven and it's – that mold is 40 inches wide, 60 inches long, and 8 to 10 inches thick, and that would make a 35 pound density solid block weight approximately 350 pounds or a little over, depending on the foam material that we used for that process. It goes into the oven and it sets in the oven for approximately 10 to 12 hours, and the heat activates that liquid adhesive that's on those particles and that's what causes it to bond together and make a solid. And then after that, it is taken out, taken out of the building, behind the main plant. It sits there until it completely cools down

which is probably 16 hours anyhow. Once that is completely cooled down, then that block of rubber is removed from that mold, and that's our recycling and waste management process on the Rebond bonding blocks as we call them, the rubber blocks. Then after that, they're put in the splitter and they're sliced into whatever thickness you want, and then there's parts die cut out of that, floor mats, different parts like that and, of course, we sell a lot of the sheets to the construction industry that they pour concrete on and things like that.

Tr. 729-31. With respect to waste that Larstan does not use, Darnell testified:

The only waste we have would be the – our general scrap or our foam rubber pieces that we cannot use with a different density or color that we would not want to put into those blocks, and we throw those in our compactor or take them to the landfill.

Tr. 731. No liquid chemical waste products are generated at Larstan. Tr. 732.

No one at Larstan has ever received advance notice of an OSHA inspection, Darnell has never instructed employees to hide chemicals in Larstan's Rebond shop, and no employees have ever done so since "there's really nothing to conceal or hide." Tr. 732-33. None of the citations issued to Larstan by MOSH involved dumping or burying chemical waste, concealing chemical waste in the Rebond shop, employee illnesses related to exposure to chemicals, or the company getting advance notice of inspections. Tr. 738; RX 39. EPA fined Larstan in 1994 because:

[w]e failed to fill out R forms and send it to them. We made a mistake and filled out A forms and sent them, and it didn't work because they were the wrong forms.

.....

We filled out I think it was an A form and you have to fill out an R form with all the data on it. We, we sent the wrong paperwork, and they got us for not filling out an R form, and we were using chemicals, trichloroethylene, isotolene (ph.) and you have to declare those. You have to put those on the R form, how many pounds a year you're using so they know what the threshold limits are that you're exhausting into the atmosphere or into an area.

Tr. 739. Although EPA originally imposed a fine of \$115,000, it subsequently reduced the amount to \$5,000 as part of a five-year "supplemental program." Tr. 741. Part of the supplemental program also involved Larstan converting from a solvent-based to a water-based product beginning around 1996. Tr. 741-42.

During the period 1994 to the present, OSHA has conducted air quality inspections with negative results. Tr. 743-44 Findings on reports of air quality inspections "were well below the threshold limits." Tr. 744; RX 39. No citations were ever issued for air quality violations. Tr. 745.

On cross-examination, Darnell testified that he had no problems with respect to Bethel Burns' honesty and truthfulness during the 10 years she worked for Larstan. Tr. 746. He also testified that his knowledge of the events on January 28 and 29, 2004 was derived from conversations with Bill Watkins and Brenda Poole. Tr. 746-47. The decision with respect to Burns' employment status was made by Darnell. Tr. 747.

Bethel Burns has not, to Darnell's knowledge, reapplied for any job at Larstan since she left in January 2004. Tr. 772. Nor was she ever told after she left that she could never return to Larstan. *Ibid.*

Documentary Evidence

Complainant's Exhibits

CX 1 – Banks Bros. Corporation Employee Absenteeism/Tardiness Guidelines.

CX 2 – Material Safety Data Sheets from: (1) BASF Corporation for Polymethylene Polyphenylisocyanate; (2) OleTex Inc. for Polyethylene Foam; (3) Chem-Trend Inc. for RCTW-6107 (water based emulsion); Lubriplate for Petroleum Lubricating Grease; (4) Rohm and Hass Co. for Robond PS-35 and Robond 9202 Emulsion (containing non-hazardous polymers, monomers, and organic resin, as well as ammonia and water); (5) Clifton Adhesive, Inc. for PS-5523 W, PS 6020 W, and PS 6034 W (vinyl acetate monomer); (6) Silaprene for Polychloroprene Adhesive; (7) Spartan Chemical Co., Inc. for Hydrochloric acid; and Chem-Trend Inc. for organic solvent blend.

CX 3 – State of Maryland Dept. of Labor, Licensing and Regulation Office of Unemployment Insurance Fact Finding Report with respect to Bethel L. Burns dated February 15, 2004.

CX 4 – Lyle: Safety & Protective Gear memorandum from Bill Watkins to all employees dated January 28, 2004.

CX 5 – Separation Notice/Exit Interview form for Bethel Burns dated January 29, 2004.

CX 6 – Earnings Statement from Larstan Industries, Inc. for Bethel Louise Burns for pay period ending January 23, 2004.

CX 7 – Earnings statement from Aerotek for Bethel L. Burns for pay period ending June 12, 2004.

CX 8 – Pay stubs for Bethel Burns from Holiday Inn.

CX 9 – Maryland Dept. of Labor, Licensing and Regulation Occupational Safety and Health inspection records encompassing period May 15, 1996 to May 12, 2004; EPA Complaint, Docket No. EPCRA-III-148, dated July 20, 1994 with Consent Agreement and Order dated February 13, 1996.

CX 10 – Payroll records for Bethel Burns from Charles Town Races.

CX 11 – Affidavit of Bill Watkins dated March 24, 2004.

CX 12 – Letter from Deputy Associate General Counsel Robert A. Friedrich, EPA, to Warren K. Kaplan, Esq. dated March 4, 2005 stating that agency will voluntarily provide assistance in this matter in the form of declarations by Ms. Helbert and Mr. Horvath concerning conversations with Bethel Burns and James Pons.

CX 13 – Letter from Phyllis Ann LeTart, VP – Legal & Business Affairs, Charles Town Races & Slots to Warren Kaplan, Esq. enclosing memorandum from Director – Housekeeping which states that a document referencing an incident involving Bethel Burns on May 27, 2004 is a training document and that she was not being disciplined with respect to standing on a chair.

CX 14 – Washington County Hospital Association treatment record of Bethel Burns reflecting examination on December 8, 2003 for “[s]wollen hands, cracked fingers.” Diagnosis was “[p]ossible burn fingertips versus chemical reaction.”

CX 15 – Document entitled “Information for New Hires” for Larstan’s new employees.

CX 16 – OALJ Subpoena for Vivian Monger dated January 14, 2005.

CX 17 – Declaration of EPA Assistant Special Agent in Charge Susan S. Helbert stating that she participated in a conference call on December 18, 2003 with Warren K. Kaplan and Bethel Burns during which Burns stated she was an employee of Larstan and that Larstan engaged in potential environmental violations which included: dumping and burying chemicals behind its manufacturing plant; having advance notice of OSHA inspections; and closing the Rebond Shop during OSHA inspections and reassigning workers to other parts of the manufacturing plant. Burns further reported that there was a significant number of employees who suffered from a variety of maladies including ovarian cancer, hair loss, and nose bleeds.

CX 18 - Declaration of EPA Special Agent Gregory I. Horvath stating that he and Special Agent Brendt Johnson interviewed Jimmy Pons on February 25, 2004 regarding his knowledge of illegal activity at Larstan and that Pons stated, *inter alia*, that: at the direction of Russ Darnell, he and other individuals dumped totes containing resin and liquid hardener in the yard behind the Larstan plant twice a month; a bucket or less of mold release spray was dumped in the back of the Larstan facility “hundreds of times;” and there was no breathing protection provided to employees who worked in the Rebond Shop. Horvath further stated that Pons was interviewed again on February 15, 2005, that he declined to be further interviewed until he could consult an attorney, and that he stated Bethel Burns had previously told him to advise EPA investigators that he had dumped chemicals at the Larstan facility and that he would “get some money.”

CX 19 – Transcript of deposition of James Pons dated August 24, 2004 taken at law offices of Miller, Oliver, Baker, Moylan & Stone in Hagerstown, Maryland.

CX 20 – Declaration of Keith Essex dated September 3, 2004. (Marked for identification purposes only.)

CX 21 – Declaration of Wendy Zimmerman dated September 2, 2004.

CX 22 – Transcript of deposition of Gary Barthelow dated August 24, 2004 taken at law offices of Miller, Oliver, Baker, Moylan & Stone in Hagerstown, Maryland.

CX 23 – Affidavit of Joyce Miller dated March 25, 2004.

CX 24 – Declaration of Vivian Monger dated February 24, 2005.

CX 25 – Declaration of Vivian Monger dated February 3, 2005.

CX 26 – Declaration of Vivian Monger dated October 11, 2004.

Respondent's Exhibits

RX 1 – Undated letter from Relinda M. Sexton, Claim Representative, Injured Worker's Insurance Fund, to Bethel Burns denying claim for Workers' Compensation with respect to December 8, 2003 injury.

RX 2 – Memorandum dated December 8, 2003 from Monique Broadus to Bill Watkins and Brenda Poole noting, *inter alia*, that Bethel Burns was going to the Emergency Room for her hands "because she has sugar diabetes and she could be allergic to either the material or the gloves she was wearing to perform her job."

RX 3 – Letter dated December 9, 2003 from "Monique" to "Human Resources, Management, Etc." stating: "I worked beside Bethel on 12/8/03 in the Lyle poking holes on the 370 part. Bethel worked beside me on the production table, she started out without wearing gloves. The parts are a little warm so I went to get her a new pair of cotton gloves. She worked with the gloves on for about 10-15 minutes, then said she couldn't work with the gloves on. She took the gloves off and worked without them."

RX 4 – Copy of RX 3 signed by Charles Reese.

RX 5 – "Pre-Employment Training" form signed by Bethel Burns June 1, 1993.

RX 6 – Photocopies of photographs depicting yard area at Early Drive plant.

RX 7 – Job description for Quality Manager.

RX 8 – Job description for Human Resource Manager.

RX 9 – Job description for Receptionist.

RX 10 – Job requirements for various positions including VP of Manufacturing, Production Manager, Human Resource Manager, and Quality Assurance Manager.

RX 11 – Memorandum dated January 20, 2004 from Monique Broadus to Bill Watkins, Bethel Burns, and Jason Rhodes re “toy mouse” incident.

RX 12 – Separation Notice/Exit Interview form for Bethel Burns dated January 29, 2004.

RX 13 – Memorandum dated January 29, 2004 from Bill Watkins to “Personnel File” regarding Bethel Burns’ refusal to sign safety memo on January 28, 2004 and abandonment of job.

RX 14 – Letter dated March 3, 2004 from Brenda Poole, Human Resource Manager/Purchasing Coordinator, to “Ms. Warner” stating that she is “faxing the Safety & Protective Gear memo Bethel refused to sign.” The letter further notes that Bethel Burns came to her office on January 30, 2004 and stated “All I wanted them to do was to fire me or lay me off so I could draw a check until I could find another job.”

RX 15 – Unsigned copy of Lyle Safety & Protective Gear memorandum from Bill Watkins to all employees dated January 28, 2004.

RX 16 – Earnings Statement from Larstan Industries, Inc. for Bethel Louise Burns for pay period ending January 16, 2004.

RX 17 – W-2 Forms for 2000-2003 for Bethel Burns from Larstan Industries, Inc.

RX 18 – W-2 Form for 2002 for Bethel Burns from Larstan Industries, Inc.

RX 19 – OSHA Form 300 – Log of Work-Related Injuries and Illnesses for years 2003-2004 for Larstan.

RX 20 – Employee Warning Notice dated December 5, 2003 re Bethel Burns told that customer (Continental Plastics) received parts with no glue or tape on them.

RX 21 - Employee Warning Notice dated November 21, 2003 re Beth Burns told to increase her quality of work.

RX 22 – Continental Plastics Co., Inc. Incoming Quality Report re defective parts received November 19, 2003.

RX 23 – Memorandum dated February 11, 2003 from Bill Watkins to Bethel Burns re change in job to Quality Inspector in Training on production floor.

RX 24 – Employee Calendar for year 2000 for Valencia Burnett hired 7/31/00.

RX 25 – Separation Notice/Exit Interview form for Valencia Burnet dated August 29, 2000.

RX 26 - Washington County Hospital Association treatment record of Bethel Burns reflecting examination on December 8, 2003 for “[s]wollen hands, cracked fingers.” Diagnosis was “[p]ossible burn fingertips versus chemical reaction.”

RX 27 – Employee Warning Notice dated November 21, 2003 to Bethel Burns that she was to increase her quality of work.

RX 28 - Employee Warning Notice dated December 5, 2003 re Bethel Burns told that customer (Continental Plastics) received parts with no glue or tape on them.

RX 29 – Copies of signed Lyle Safety & Protective Gear memoranda from Bill Watkins to all employees dated January 28, 2004.

RX 30 – Time card for pay period ending 1/2/04 reflecting funeral pay to Bethel Burns on December 29, 2003.

RX 31 – Christmas bonus check to Bethel Burns for 2003 in amount of \$323.22.

RX 32 – Larstan payroll records for Bethel Burns for pay period ending October 6, 2004.

RX 33 – Photocopies of photographs of Material Safety Data Sheets.

RX 34 – Photocopies of photographs of safety posters.

RX 35 – Employee Warning Notices, Employee Calendars, Office of Unemployment Insurance document, and Separation Notice/Exit Interview form relating to Mitchell Mason.

RX 36 – Employment Application of Valencia Burnett dated July 26, 2000.

RX 37 – Larstan Employee Earnings Records for Bethel Burns.

RX 38 – Separation Notice/Exit Interview forms dated 1998 – 2004 for various employees reflecting that they “walked out, quit.”

RX 39 – MOSH and OSHA inspection records relating Larstan’s Early Drive plant.

RX 40 – Handwritten note by Bethel Burns dated February 11, 2003 which states: Force to take position of Quality Inspector in training, requested to be laid off, request denied, desk moved out on production floor facing the wall, back facing the employees (no notice, nothing). Assign to be my Supervisor was Mrs. Joyce Miller who also had little or no knowledge of the job she was training me for, and she appeared not to be able to read or write to well, and plus she had her own assign job to do, so basically I learned my position on my own with her help when she had the time. didn’t walk out.”

RX 41 – Personnel and payroll records of Bethel Burns from Charles Town Races.

RX 42 – Complainant’s Answers to Respondent Larstan Industries, Inc.’s First Set of Interrogatories in this case.

RX 43 - Complainant’s Supplemental Answers to Respondent Larstan Industries, Inc.’s First Set of Interrogatories in this case.

RX 44 – Employment records of Bethel Burns from Aerotek Commercial Staffing.

III. SUMMARY OF THE PARTIES’ ARGUMENTS

According to Complainant’s post-hearing brief:

On January 29, 2004, after a decade of faithful service, during which she compiled an impressive reputation among her supervisors for honesty and integrity, Bethel Burns . . . , a 45 year old African-American factory worker, was discharged from her position at Larstan Industries Six weeks earlier, Burns had gone to the EPA and provided evidence of unlawful dumping of chemicals and other environmental violations.

Complainant’s Post-Hearing Brief (“Comp. Br.”) at 1. Burns argues that her reporting of environmental violations to the EPA was “protected activity,” that Larstan knew she had gone to the EPA, and that it terminated her because she had done so. *Id.* at 2.

Larstan states that Complainant “is no whistle-blower,” and argues that:

she is a disgruntled and bitter individual, who: (1) had no knowledge of any wrong-doing by Larstan, but nevertheless made Disclosures about the Company with the EPA, (2) schemed to get herself fired in order to collect unemployment benefits, (3) abandoned her job in opposition to a Larstan safety policy, but claimed she was fired because of her Disclosures (false), and (4) improperly attempted to enlist others to join in her false allegations (without success).

Respondent’s Post-Hearing Brief (“Resp. Br.”) at 1. It thus goes on to argue, *inter alia*, that the evidence adduced at trial establishes that: no environmental violations occurred; Burns had no reasonable basis for believing that such violations had occurred; and Larstan could not have “retaliated” against her for reporting such violations because it did not know before her separation from employment that she had gone to the EPA. *Id.* at 2.

In her reply brief, Complainant takes exception to Larstan’s characterization of her as “a disgruntled and bitter individual with an axe to grind against her former employer, . . . [and] an unusually gullible or credulous person who cannot distinguish reality from tall tales.” Complainant’s Reply to Respondent’s Post-Hearing Brief (“Comp. Rep. Br.”) at 1. She asserts that Respondent has misstated the applicable law relating to environmental whistleblower cases and argues Larstan’s claim that it treated Burns no differently than any other employee is “less than credible.” Rep. Br. at 2-9. She also argues that Larstan’s attacks on her credibility are disingenuous and that Respondent has misstated the law on damages. Rep. Br. at 9-20.

IV. DISCUSSION

A. Clean Air Act.

The whistleblower provision of the CAA, states, in part:

(a) Discharge or discrimination prohibited

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

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,

42 U.S.C. § 7622; *see also* 29 C.F.R. § 24.2. As the Secretary previously noted in one case:

The CAA seeks to prevent and control air pollution by regulating emissions into the atmosphere at particular sources. Generally, a complaint about contamination of workplace air, contained within a building, structure, facility, or installation which is not emitted into the external atmosphere, would not be covered under the CAA.

Johnson v. Old Dominion Security, 86-CAA-3 (Sec’y May 21, 1991), slip op. at 8, n. 8.

Just as in *Johnson*, Complainant here has neither alleged, nor presented evidence, that contaminants were emitted into the atmosphere or into the workplace. *Id.* at 8. She has thus not met her burden of making a *prima facie* showing with respect to any violation by Respondent under the CAA.

B. Toxic Substances Control Act and Solid Waste Disposal Act.

The TSCA and SWDA contain anti-discrimination provisions similar to those found in the CAA. The TSCA seeks to prevent an unreasonable risk of injury to health and the environment. 15 U.S.C. § 2601. A complaint about an unsafe or unhealthful condition communicated to an outside regulatory agency, such as EPA, is protected under this type of statutory language. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 1510-1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). Similarly, reporting of safety or quality concerns to an employer or governmental agency is protected activity under the SWDA. *See, e.g., Dodd v. Polysar Latex*, 1988-SWD-4 (Sec’y Sept. 22, 1994); *Conaway v. Instant Oil Change, Inc.*, 1991-SWD-4 (Sec’y Jan. 5, 1993).

When a whistleblower case proceeds to a formal hearing before an ALJ, a complainant must demonstrate by a preponderance of the evidence that his or her protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint. *See Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999); see also *Dysart v. Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). Once a complainant meets this burden, he or she is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. *Trimmer*, 174 F.3d at 1102.

Accordingly, Complainant must establish by a preponderance of the evidence that: (1) she engaged in protected activity as defined by the TSCA or SWDA; (2) her employer was aware of the protected activity; (3) she suffered an adverse employment action, such as discharge; and (4) circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. *See Mactal v. U. S. Dep't of Labor*, 171 F.3d 323, 327 (5th Cir. 1999); *Zinn v. Univ. of Missouri*, Case No. 1993-ERA-34 (Sec'y Jan. 18, 1996); *Overall v. Tennessee Valley Auth.*, Case No. 1997-ERA-53 at 12 (ARB Apr. 30, 2001).

If Complainant fulfills this burden of proof, Respondent may avoid liability by producing sufficient evidence to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action. *See Yule v. Burns Int'l Security Serv.*, Case No. 1993-ERA-12 (Sec'y May 24, 1995). Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than a preponderance of the evidence and less than beyond a reasonable doubt. *See id.* at 4.

1. Whether Complainant engaged in activities protected by the TSCA or SWDA?

"Protected activity," as defined under the relevant regulations, includes, *inter alia*: commencing or causing to be commenced a proceeding for the administration or enforcement of any requirement imposed under the Acts; testifying in any such proceeding; or assisting or participating in any manner in such proceeding. 29 C.F.R. § 24.2(b)(1)-(3). To be considered protected activity, a complaint must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Jones v. EG & G Defense Materials, Inc.*, 1995-CAA-3 (ARB Sept. 29, 1998) (citations omitted), slip op. at 10. In *Minard v. Nerco Delamar Co.*, 1992-SWD-1 (Sec'y Jan. 25, 1994), the Secretary of Labor established the "reasonable belief" test which states, *inter alia*, that it is not enough for an employee to believe the environment may be negatively impacted by the employer's conduct, but rather, the employee's complaints must be grounded in conditions reasonably perceived to be violations of the environmental acts. *Id.*, slip op at 5, *citing Crosby v. Hughes Aircraft Co.*, Case No. 85-TSC-2 (Sec'y Aug. 17, 1993), slip op. at 26; *see also Johnson v. Oak Ridge Operations Office*, 1995-CAA-20/21/22 (ARB Sept. 30, 1999), slip op. at 6-7 (protected activities limited to those grounded in conditions constituting reasonably perceived violations); *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12 (ARB Apr. 8, 1997), slip op. at 3 (whistleblower acts do not protect employees simply because they subjectively think conduct might affect environment). A

complainant's training and experience in the field may be relevant to whether he or she reasonably believes a violation has occurred. *Minard v. Nerco Delamar Co.*, *supra* at 5, n. 5.

On December 18, 2003, Complainant and her attorney engaged in a telephone conference with officials of the EPA. During this telephone conference, Complainant and her counsel alleged, *inter alia*, that: Burns believed certain Larstan employees had engaged in burying chemicals and hazardous waste materials in the yard at Respondent's Early Drive plant; Larstan's plant manager, among others, had received advance notice of inspections to be conducted by OSHA and MOSH and took various steps to conceal chemical waste-related operations at the Early Drive plant; and many employees working for Larstan contracted serious ailments while employed by Respondent due to their exposure to hazardous chemicals and pollutants. I find, for the reasons set forth below, that Complainant did not have a good faith reasonable belief that these allegations were true, and her reporting of them to EPA therefore did not constitute "protected activity."²

(1) Dumping, Burying, and Concealing Chemicals and Waste.

As noted in the *Crosby* case, "[t]he Secretary's decisions finding protected activity often illustrate an experiential basis for the employee's belief that an employer is violating an environmental act." *Crosby v. Hughes Aircraft Co.*, Case No. 85-TSC-2 (Sec'y Aug. 17, 1993), slip op. at 14. This is not such a case.

Complainant is a high-school graduate with an AA degree in Human Resource Management. She has no particular experience or expertise with regard to hazardous chemicals or waste disposal, and her allegations regarding Larstan's alleged involvement in dumping, burying, or concealing hazardous chemicals and waste in this case are, by her own admission, based solely on what others have purportedly told her. She has alleged that she had conversations with Brenda Poole, Tr. 76, Raymond and Gary Barthelow, Tr. 82-83, and Brandy Naugle, Tr. 88, 92, about chemicals being dumped or buried at Larstan. As noted below, Brenda Poole and the Barthelows have expressly denied that any such conversations occurred. Furthermore, neither Brandy Naugle, nor her ex-boyfriend Gary Rowe (the alleged source of Naugle's information concerning alleged EPA violations) were ever identified as witnesses in this case by Burns, or called by her to testify at the formal hearing.

With respect to the witnesses who actually testified on her behalf at the formal hearing, they, like Burns, stated that they had never personally observed, or been involved in, any such activity. More importantly, those witnesses either denied that they had ever told Burns the knew of such activity, or they information that "knew" was insufficient to lead a reasonable person to conclude that any such violations had occurred. For example, Mary Giess testified that she had

² While Complainant correctly asserts in her reply brief that, in order to prevail, she need not have actual first-hand knowledge of Larstan's violations, or prove an actual violation of the applicable acts has occurred, Comp. Rep. Br. at 4, she must demonstrate a *good faith reasonable belief* that a violation has occurred. Indeed, Burns cites *Keene v. Houston Lighting & Power Co.*, 1995-ERA-4 (ARB Feb. 19, 1997), slip op. at 7, in recognition of this principle. Comp. Rep. Br. at 5 (erroneously cited as "*Keene v. Ebasco Constructors, Inc.*"). For the reasons stated herein, I do not find Burns' allegations credible when weighed against the contrary evidence of record, and I therefore find that she had no reasonable basis for believing that any of the alleged violations by Larstan occurred.

never seen, and had never said she had seen, chemicals dumped on the ground at the plant. Tr. 159-61. Similarly, Mitchell Mason testified that he never worked at the Early Drive plant, and he never saw any chemicals being dumped or buried there, although he did say he participated in conversations involving Gary Barthelow and Charles Reese about people not wanting to work at the Early Drive plant “because they dump stuff out back” Tr. 184, 200. Vivian Monger testified that she lied in an affidavit prepared for Larstan about whether she had knowledge of chemical dumping at Larstan, but then testified that the only knowledge she had on the subject was based on reports she heard “years ago” about dumping. Tr. 442-43, 445. James Pons, a convicted felon and an admitted liar, testified that he never participated in dumping chemicals in the yard in back of Larstan, nor was he ever told by anyone to do so. Tr. 479-80. Pons further testified that he never told Burns at any time before she left Larstan on January 28, 2003 about any environmental violations there, nor did he tell her that he had been involved in, or knew about, dumping or burying chemicals at Larstan. Tr. 519. According to Pons, he “drank a lot and . . . did a lot of drugs and stuff like that” around that time. Tr. 501.

In contrast to Complainant’s witnesses, *all* of the witnesses called by Respondent, many of whom were identified by Burns as individuals who allegedly told her they had been involved in, or knew of, such activities, testified that no chemicals or hazardous wastes were ever dumped, buried, or concealed by employees at Larstan’s Early Drive plant. Brenda Poole denied that she had ever had any conversation with Burns concerning dumping, burying, or concealing chemicals at Larstan. Tr. 324-25. Likewise, Gary Barthelow testified that: he worked at the Early Drive plant; he never participated in, or told anyone he participated in, dumping or buying chemicals at Larstan; he was unaware of anyone ever having participated in such activity; and he never heard Charles Reese tell Mitchell Mason he had done so. Tr. 642-45. Charles Reese similarly testified that no one ever asked him to go to Early Drive or to bury chemicals, and he never told Mitchell Mason that he believed dumping or burying chemicals had occurred at Early Drive. Tr. 676. Reese also said he never heard Gary Barthelow tell Mason that he dumped or buried chemicals, nor did Reese tell Mason that Gary Barthelow participated in dumping or burying chemicals at Early Drive. *Ibid.* Raymond Barthelow similarly testified that: he was never instructed to bury or dump chemical waste at Larstan; he has never done so; nor did he ever told Bethel Burns that he or anyone else had done so. Tr. 698. Finally, Russ Darnell, Vice President of Manufacturing and the on-site manager of the Early Drive plant, testified that neither OSHA nor EPA have ever cited Larstan during the period of Burns’ employment for burying or dumping chemicals. Tr. 722-23. He also testified that, although Larstan purchases and uses some liquid chemicals to form a bonding adhesive used to join pieces of foam rubber together, there would be no reason to dump these chemicals anywhere because they are very expensive. Tr. 727-28. Darnell further testified that no liquid chemical waste products are generated at Larstan, he has never instructed anyone at Larstan to dump or bury chemicals, and he has never told anyone that he ever instructed an employee to do that. Tr. 732.

Based on all the foregoing, I find that Complainant had no reasonable basis for believing that Larstan was engaged in any activities associated with dumping, burying, or concealing chemical waste products at its plant. Respondent’s witnesses in this case were at least as credible as Complainant on this issue, and Burns has thus failed to prove by a preponderance of the evidence that she had a good faith reasonable basis for making these allegations.

(2) Advance Notice of OSHA and MOSH Inspections.

Complainant's allegations that Larstan had advance notice of OSHA and MOSH inspections also fail for the reasons set forth above. Burns testified that when she worked as a receptionist at Larstan, Russ Darnell and Brenda Poole knew in advance that inspectors would be coming and instructed her to "hold them at bay." Tr. 79-81. Not a single witness called by Complainant corroborated her testimony, and both Darnell and Poole have expressly denied this. Tr. 326-27, 732-33. With respect to Respondent's other witnesses, Mary Giess worked at Larstan for eight years and testified that she never knew in advance of an OSHA inspection. Tr. 161. Keith Essex worked for Larstan for 19 years, five of which were in the Rebond shop, and he testified that no chemicals were ever "hidden" there, the shop was not locked at "unusual times," and he had no advance notice of OSHA inspections. Tr. 577-78. Raymond Barthelow, a 10 year employee, similarly testified that Larstan never received advance notice of inspections. Tr. 699.

Documentary evidence produced by Respondent also refutes Burns' allegations. OSHA and MOSH records reveal inspections of the Early Drive plant and citations for a variety of violations, many of which are noted as "serious." RX 39. Indeed, a 1997 inspection report expressly notes, with respect to the Rebond shop:

While conducting the inspection, we encountered some plain-view hazards which we decided to address. In the Rebond Area, where rubber and foam products are ground up and remolded into various products, there was a damaged step which is used to gain access to the grinder/mixer machine; an unguarded hole in the floor which was a passageway to the rear of the grinder/mixer machine. . . .

Noise monitoring was conducted in the plant on 7-11-97 in three areas of the plant: the Slitter area, the Desma area and the Rebond area. . . . Three employees work in the Rebond area and monitoring was done on one of them. . . .

RX 39 at 85; *see also* RX 39 at 148-53.

After having had the opportunity to listen to and observe the testimony of the witnesses presented by both parties, and based on the entire evidence of record, I find that Burns' testimony in this regard is not credible. I further find that Larstan had no advance notice of OSHA or MOSH inspections and that Burns had no reasonable basis for believing otherwise.

(3) Employee Illnesses Related to Their Employment at Larstan.

The last of the "protected" disclosures identified by Complainant relates to medical conditions experienced by Larstan employees which Burns attributes to some unspecified exposure to chemicals during their employment. In her post-hearing brief, Burns' counsel states:

Burns was told by many of her female co-workers that they were undergoing or had undergone surgery on their reproductive systems (ovary removal, hysterectomy, etc.) while at Larstan. Burns named 14 such women, whom she could recall. Although Burns has no direct evidence that these surgeries were

necessitated by toxic chemicals within the plant, she testified that she (and others) believed this to be true because of the sheer number of cases.

Comp. Br. at 5-6. In her reply brief, she also states that she “has never claimed that these illnesses or surgeries were caused by Larstan; she simply expressed her suspicions that they might have been because of what seemed to be an unusually high number of illnesses at one location.” Comp. Rep. Br. at 5-6.

Larstan argues that Burns has presented absolutely no evidence to corroborate these allegations and is simply a “disgruntled employee” who is willing to say or do just about anything to get money from the company. Based on the evidence before me, I am persuaded that Larstan is correct.

The evidence of record confirms that Burns was a disgruntled employee who wanted to leave Larstan and draw unemployment while she looked for another job. For example, Herbert Younker, who has known Burns since before she worked for Larstan, testified that he heard her say on several occasions she wanted to be fired or laid off. Tr. 543-44. Similarly, Sonia Broadus also heard Burns make such a statement a month or two before she left Larstan, and Joyce Miller heard Burns say she wouldn’t mind getting laid off so she could get unemployment. Tr. 610-11, 663, 668. Even Burns herself admits that she said she wanted to be fired or laid off when she was transferred to her job as an inspection trainee. Tr. 138-39.

The evidence also suggests that Complainant sought to induce others to help her by claiming that they themselves would benefit. When Mary Giess was asked if she had any conversations with Burns which led her to believe she might receive a financial benefit if she testified in Burns’ favor, she stated that Burns said “she takes care of her friends . . .” Tr. 168. Vivian Monger, one of Complainant’s own witnesses, also testified that Burns told her “anybody that goes down and testifies will gain profit the same as she.” Tr. 446. Similarly, James Pons, another of Complainant’s witnesses, told EPA Special Agent Horvath that Burns had previously told him to advise EPA investigators that he had dumped chemicals at the Larstan facility and that he would “get some money.” CX 18. Gary Barthelow likewise testified that while he and Burns were working on the Lyle machine, she told him “she would make it worth [his] while [if he would assist her in suing Larstan].” Tr. 647.

However, even without regard to the evidence relating to her job dissatisfaction and suggestions to others of profit if they helped her, I believe the evidence which most supports Respondent’s allegation that Burns is willing to say almost anything to get money from Larstan is her willingness to assert, without any factual basis whatsoever, that Respondent’s female employees became ill simply because they worked at Larstan. Having seen and listened to all the Larstan employees who testified at the formal hearing in response to these allegations, I note that it was patently embarrassing for them to do so, and I find, for the reasons discussed below, that Burns has presented absolutely no evidence to support this aspect of her complaint.

Burns admittedly has no particular expertise or training with respect to illnesses associated with exposures to chemicals or hazardous materials. She testified at the hearing that Kathy Grim had an operation on her ovaries and Gerri Repp had a hysterectomy. Tr. 94-95.

According to Burns, Wendy Zimmerman also had an ovary removed or a hysterectomy, and Peggy Anderson told Burns that Gloria Armstrong “suffered some type of woman disease.” Tr. 95. She named a total of 14 co-workers who allegedly had an illness or surgery which she “suspected” might have been caused by Larstan. Comp. Br. at 6; Comp. Rep. Br. at 5. However, she had no reasonable basis for her professed belief.

Despite having had her own ovaries removed, Complainant was never told by her treating physician that there was any relationship between the need for her surgery and her work at Larstan, nor did she question her doctor about any such relationship. Tr. 97. The *only* basis she gave for her allegation that Larstan was guilty of some unspecified environmental violation in this regard was that “[t]here was just too many illnesses, and *all us girls, not just me*, we thought that maybe whatever they were using and whatever they were talking about, the chemicals was dumping and all, we actually thought something was going on there.” Tr. 95-96 (italics added).

Even though Burns claimed that “all us girls” thought their illnesses were associated with working at Larstan, not a single Larstan employee identified by Burns at any time in this case has ever attributed any past medical condition or illness they have suffered to their employment there. For example, Mary Giess testified that she had a hysterectomy but it had nothing to do with her employment at Larstan. Tr. 164-65. Vivian Monger similarly testified that she never had any illness or surgery related to her reproductive organs that she believed was caused by Larstan. Tr. 458. Tiffany Linton, Burns’ niece, likewise testified that she never told her aunt she had an ovary removed or had ovarian cancer, nor did she ever have any medical problems with her reproductive organs or experience any medical condition which she believed was related to her employment with Larstan. Tr. 553. Geraldine Repp testified she underwent a hysterectomy in 1993 or 1994 because of fibroid tumors, a hereditary condition which had nothing to do with her employment. Tr. 560-61. Donna Moore likewise testified that she never had any illnesses or medical conditions that she believed were caused by working at Larstan. Tr. 566. Gloria Armstrong testified that she never told anyone that her hysterectomy was associated with her work at Larstan. Tr. 589. Barbara Vaughn testified that she never told Burns she believed a medical condition she had was caused by her work at Larstan, and that she had a hysterectomy in 1973, five years before going to work at Larstan. Tr. 592. Ronda Flock has never had any surgeries or illnesses relating to her reproductive organs, nor has she had, or told anyone she had, any illnesses which she believes were caused by working at Larstan. Tr. 597. Wendy Zimmerman has never had, nor told anyone she had, any sickness or surgery that she believes was caused by working at Larstan. Tr. 601. Finally, Brenda Pool, Larstan’s Human Resource Manager, was unaware of any Workers’ Compensation claims filed by any Larstan employee from 1991 to the present that related to health problems associated with exposure to hazardous chemicals or noxious fumes. Tr. 357, 417.

I find that Complainant’s assertions in this regard are not credible and are directly contradicted by other more credible evidence of record. I therefore find that Complainant had no reasonable basis to believe that Larstan’s employees had experienced any illness associated with a violation of any environmental statute or regulation at issue here.

V. CONCLUSION

Burns has alleged in this case that her disclosures to EPA investigators on December 18, 2003 were “protected” and that it was these disclosures which ultimately led to her discharge by Larstan on January 29, 2004. *See, e.g.*, Comp. Br. at 13. However, it is Complainant’s burden to prove by a preponderance of the evidence that she had a good faith basis for believing that the disclosures made by her to EPA were true. The evidence in this case demonstrates both that Complainant’s allegations were not true and that she could not have reasonably believed them to be true when they were made. Since Complainant has failed to show, by a preponderance of the evidence, that she had a good faith basis for believing that Larstan committed any environmental violation associated with burying, dumping, or concealing chemicals, obtaining advance notice of OSHA and MOSH inspections, or causing any illnesses or surgeries of female employees, she has failed to prove that she engaged in any protected activity when she disclosed information regarding these alleged violations to the EPA. I therefore recommend that her complaint be denied.

RECOMMENDED ORDER

It is recommended that the complaint of Bethel Burns against Larstan Industries, Incorporated be denied.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.

NOTICE OF REVIEW

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.