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Issue Date: 31 March 2009

Case No. 2005-CAA-00016

In the Matter of

MAX SIMS,
Complainant,

vs.

CHS, INC.
Respondent.

Appearances:

Anthony P. X. Bothwell, Esq.
Jordan S. Kushner, Esq.
Shane P. McGovern, Esq.
For the Complainant Max Sims

Kathryn Mrkonich Wilson, Esq.
Susan K. Fitzke, Esq.
For CHS, Inc.

Before: William Dorsey,
Administrative Law Judge

Decision and Order

This is a complaint alleging employment discrimination filed under the Clean Air Act (42 U.S.C. § 7622), and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9610). Many of the events the Complainant, Max Sims, relied on as discriminatory actions happened well before the 30-day limitations period those statutes set to bring complaints to the Department of Labor, so they do not qualify for relief in themselves. The primary type of discrimination he complained about was continuing harassment that created a hostile work environment, which he says ultimately drove him to leave his job as an engineer at the Respondent's Laurel, Montana petroleum refinery. He found another employer, but far from Montana, where he wished to remain. In the context of a harassment claim, events that took place more than 30 days before his complaint may serve as potential proof of forbidden harassment and ultimately of constructive termination. I find he was not harassed, however, and his resignation to take a job in California is not remediable as a constructive discharge.

This decision will introduce the parties, and briefly look at processes at the petroleum refinery that bear on this complaint. It then will recount the examination federal environmental regulators began in 2000 into specific questionable practices at petroleum refineries throughout the country. Sims looked into questions EPA regulators had posed before they visited Cenex's Laurel refinery, and reported internally that he had uncovered permit violations of the type the EPA was targeting. The refinery put the best face on things when it told the EPA about what Sims found, and after Sims complained internally that the EPA hadn't been told clearly enough what had happened, management arranged for him to participate in a conference call to discuss the violations with the EPA. Management negotiated remedial actions and related civil money penalties with the government that culminated in a consent decree filed in U.S. District Court.

The decision will consider in more depth the internal and external disclosures Sims made about permit violations, his persistent efforts to persuade the federal government to prosecute them as crimes (an invitation the government declined), and events at work thereafter that he contends were retaliation management exacted for bringing the refinery's violations to light. Sims became disillusioned with both Cenex and the government. He interpreted events at work in the worst possible light, and eventually became so unhappy that he quit, after he found another job.

Findings of Fact

A. The Complainant

Sims is a chemical engineer who began working for Cenex (now CHS, Inc.) on March 30, 1994 as one of the three or four environmental health and safety engineers (the number varied over time) at its Laurel, Montana petroleum refinery. Those engineers see that the refinery abides by permits and regulations, as well as safety standards. Tr. 224, 291.¹ He managed the refinery's Leak Detection and Repair (LDAR) program, wrote a number of reports that were filed on regular schedules, and managed aspects of the refinery's hazardous waste disposal. Tr. 556.

Sims felt burned out with his job as an air quality engineer at Cenex by 2001. Seven years of repetitive report writing made his job monotonous, while duties related to the disposal of the refinery's hazardous wastes burdened him. Tr. 191, 211-212, 515-516. In 1998 he had applied for a job as a refinery economist at the Laurel refinery, and February 2001 for an accounting manager job there, but wasn't selected for either job. Tr. 187-188, 199, RX 49. His applications to manage the refinery's Environmental Health and Safety unit in the spring of 2001² (when

¹ The trial transcript will be referred to as Tr. __, the Complainant's exhibits as CX __, and the Respondent's exhibits as EX __.

² Sims' application in 2001 to become manager of the Environmental Health and Safety unit surprised Pat Kimmet, who was moving up from that job to become the refinery's

Marty Perga was chosen) and spring of 2003 (when Greg Brown was chosen) also weren't successful. Tr. 191, 199. During a physical on October 24, 2001 he told his family doctor he thought he was being "stalled for advancement," and "thinks he is going to have to find another job." CX 47 at D633.

He resigned on April 25, 2005. He seeks employment protection based on disclosures he made within Cenex and to government officials about permit violations related to sulfur emissions and recovery at the refinery from 1994 through 2001. He made his claim to the Secretary of Labor on May 10, 2005.

B. The Cenex Laurel Petroleum Refinery Generally

Cenex Harvest States Cooperatives, Inc.³ (now renamed CHS, Inc., but referred to as Cenex throughout this decision) operated a petroleum refinery in Laurel, Montana that was built in 1960, old enough to pre-date much of what is now a pervasive régime of federal and state environmental regulation. Part of the refining process recovers sulfur out of the crude petroleum in sulfur recovery units so that it isn't emitted into the air as sulfur dioxide. Tr. 328-330.⁴ The sulfur those units capture then is sold as elemental sulfur, delivered by rail cars that carry 88 tons per car out of the refinery. Tr. 332, 335. Sulfur dioxide is a smokestack air pollutant that can be emitted into the ambient air only in the quantities permitted by the U.S. Environmental Protection Agency (EPA). Cenex had been permitted to emit into the ambient air 13,000 tons of sulfur dioxide per year, although it emitted less.⁵ Tr. 559-560.

1. Sulfur Recovery

In the petroleum refining process, a mixture predominantly made up of hydrogen sulfide gas (an acid gas), plus varying levels of water vapor and hydrocarbons, was fed into both Cenex sulfur recovery units. Tr. 414-416. The original sulfur recovery unit at Laurel (SRU #1) had a design capacity of 28 long tons of sulfur a day (LT/D). Tr. at 330. A limit on the sulfur recovery of a refinery effectively limits its production of end-products (*e.g.*, fuel oil, diesel fuel and gasoline), but as a grandfathered unit, emissions from SRU #1 were for the most

manager, for Sims had just recently told Kimmel he was getting burned out in his job. Tr. 191. Sims though being promoted would cure that. *Id.*

³ CHS is a co-operative whose members are 60,000 farmers and 1,200 local co-operatives that represent farmers. What it earns from dealings with members and its other operation is distributed back to members as cash and as equity certificates that are retired over time. Tr. 246-247.

⁴ CX 2 is a flow chart that describes visually the processes at the Laurel refinery. The SRU #2 there is labeled as the refinery's "Zone A."

⁵ Although the two sulfur recovery units are separate, they emit sulfur dioxide from a single stack, and the limit applies to that stack, with no allocation between the two units. Tr. 559-560.

part unregulated. It could operate at its design capacity unencumbered by permit regulations. *Id.*

The second unit to recover elemental sulfur at the Laurel refinery went into service in 1977, when EPA permits (and state permits) were required. Its design was similar to the original unit and had a similar capacity. Documents submitted in connection with its permit described SRU #2 as a “spare,” a back-up unit that could be an alternate mechanism to remove sulfur if SRU # 1 went out of service for some reason.⁶ The EPA permit for the “spare” SRU #2 authorized its capacity as 19.9 LT/D of sulfur, much less than its nearly 30 LT/D design capacity. Tr. 331.

No sulfur recovery unit comes on-line at the flip of a switch. The chemistry of petroleum refining requires high heat to keep the sulfur liquid; 48 hours are needed to bring a dormant SRU into service at its operating temperature of 230 to 250 degrees Fahrenheit. Tr. 328, 551. As a practical matter SRU # 2 had to run continuously to be available for use, and did.

2. The Orifice Meter

Cenex installed an orifice meter in SRU #2 because the EPA required it. An orifice meter is a device that both monitors and restricts the hydrogen sulfide gas flow (sometimes referred to as a “charge”) into SRU #2; its proper use effectively constrained SRU #2’s capacity to its EPA-permitted sulfur level. An orifice meter’s readings are affected by the purity of the acid gas fed to it, the temperature of that gas (which affects the sulfur’s density) and the pressure of the gas feed. Tr. 415-416. The sulfur content of the crude oil being processed varies too. Tr. 474.

The restriction the orifice meter provided mattered—a lot. If the SRU #2 actually operated at the slightly higher capacity of 20 LT/D of sulfur (well within its design capacity of 30), Cenex would have been required to install an expensive tail gas treatment unit on SRU #2, because the EPA’s New Source Performance Standards (NSPS) required tail gas clean-up on a SRU with a capacity of 20 LT/D,⁷ a substantial cost Cenex wanted to avoid. Tr. 322-25. Whether the limit was on the amount of sulfur fed to SRU #2 (*i.e.*, the acid hydrogen sulfide gas that charged the unit) or the unit’s daily output of elemental sulfur wasn’t entirely clear. Tr. 323.

⁶ Montana regulators referred to SRU #2 as a “stand-by unit” in letters exchanged during the permitting process (CX 39, letter of Oct. 12, 1977 to Lou Day). The permitting lawyer for Cenex referred to the state permit for SRU #2 as a “Spare Sulfur Plant Construction Permit” (CX 39, letter of Oct. 14, 1977 to Fred Gray from David Veeder, Esq.). Veeder also described SRU #2 as a “spare unit constructed to increase the reliability of the existing plant facilities,” and as a unit that would “decrease plant down time from upsets and increase overall efficiency in the production of elemental sulfur from a given acid gas charge stream.” *Id.*

⁷ The EPA requirements then were described in regulations published at 40 C.F.R. § 60.14(a).

Given that the orifice meter the EPA required regulated the charge, the regulatory limit obviously was being applied to the charge. Tr. 325. This makes sense, because otherwise the excess sulfur in the charge could go out into the air through refinery's smokestack as the pollutant hydrogen sulfide gas, rather than being turned into elemental sulfur. Tr. 44. The discharge of sulfur dioxide isn't monitored by the Laurel refinery itself, but by a third party, the Billings-Laurel Air Quality Technical Committee (BLAQ TECH), so the refinery wouldn't be tempted to alter the ambient air quality monitoring results. Tr. 369.

Emitting or creating no more sulfur than the EPA permitted, and operating a sulfur recovery unit as its EPA permit prescribed (*i.e.*, operating SRU #2 at Laurel as a "spare") is a refiner's legal obligation. Cenex acknowledged its obligations with respect to SRU #2 in a letter to state regulators dated April 26, 1978 that also emphasized that "with a physical limitation" [*i.e.*, the orifice meter] in place the operations cannot be changed to produce over the 19.9 LT/D" limit on the "spare sulfur reaction section." CX 4. The EPA repeated the limitation in a letter to Cenex on March 6, 1979 memorializing the "understanding" that the "Cenex spare sulfur reaction system" was part of a plant with a capacity of 20 long tons per day or less, and that Cenex was "aware that future modification of the spare sulfur reactor system to increase its capacity to over 20 LT/D would subject the facility to NSPS." CX 39. Cenex agrees that 19.9 LT/D of sulfur was the enforceable, permitted sulfur level for Laurel's SRU #2. Tr. at 245, 308-09, 461, 550-551.

Violating the orifice meter obligation can trigger an EPA enforcement proceeding, and can require expensive remedial action, because the Cenex refinery would then have to comply with the NSPS regulations. Willful violation of EPA permits also can lead to criminal prosecution, which happened to a Wisconsin refiner, Murphy Oil. Tr. 373; CX 38.

There was conflicting proof about whether the SRU #2 was a spare. To the extent witnesses for Cenex testified that the SRU #2 wasn't a spare, that testimony seems to contradict the written evidence that bears on Laurel's EPA and state permits. The idea that Cenex could run both SRU #1 at full design capacity of 28 LT/D of sulfur, and the SRU #2 could also be used at its full permitted capacity of 19.9 LT/D of sulfur, for a total of 47.9 LT/D of sulfur, appears inconsistent with the letters pertaining to the SRU #2 permit.

The EPA apparently didn't regard the SRU #2 as a spare, to be operated only at low levels, to rapidly kick in if the original SRU unit went off-line for some reason. SRU #2 hadn't been operated as a spare for many years, and both the EPA and its Montana counterpart knew it. Tr. 552, *see also* CX 2. There is no evidence that as the result of the program audit the EPA began in December 2000 (discussed below) that culminated in a consent decree in U.S. District Court in Montana, Cenex was restricted to use SRU #2 as a spare (*i.e.*, to use it in petroleum production only when the older unit did not operate). Consequently, I find that

despite what the exhibits from the late 1970's appear to say, the SRU #2 was not restricted to be a spare.

This isn't a particularly significant finding, however, because Sims doesn't rely on the status of SRU #2 as the primary basis for his employment protection claim. That comes from his disclosures within and outside Cenex about purposeful alterations to the orifice meter's settings. Before reaching those disclosures, the program the EPA began in 2000 to audit specific practices at petroleum refineries must be explained. The next section discusses the EPA's campaign.

C. The EPA Industry –Wide Enforcement Efforts

The EPA believed in 2000 that petroleum refiners throughout the nation frequently were out of compliance with identifiable parts of their operating permits and EPA regulations. The amount of crude oil refineries processed nationally had gone up over 20 years. The increase necessarily implied refinery expansions and permit modifications EPA administrators knew refiners hadn't applied for or been granted. Tr. 305-306, 525; CX 16 at 2. The EPA embarked on a campaign of visiting refineries throughout the nation, auditing their operations for likely violations, and negotiating consent decrees under § 114 of the Clean Air Act to remedy them. Tr. 297-298. Refineries representing 80% of the refining capacity in the United States ultimately became subject to EPA supervision under consent decrees the EPA negotiated. Tr. 478.

In December 2000 the EPA requested documents and answers to about 35 questions that covered the Cenex Laurel refinery's operations over a 20-year period, as the first step of its program audit. Tr. 147, 227-228, 297. Patrick Foley of Washington, D.C. led the EPA's audit program team, which included Betsy Wahl of the EPA Region VIII Helena, Montana office, and a representative of EPA's counterpart agency in Montana, the Dept. of Environmental Quality (DEQ). The EPA-DEQ team met at the Laurel refinery on October 11, 2001 with the environmental health and safety engineers who worked at Laurel: Marty Perga (then the refinery's supervising environmental health and safety engineer, who like Sims also was trained as a chemical engineer), the Complainant Max Sims, Ron Nissen (a chemist with the same status as an engineer), Greg Brown (an environmental engineer) and the refinery's manager, Pat Kimmet. Tr. 300, 372-374, 428, 457.

D. EPA Compliance Inquiries at Laurel

At that initial meeting Foley explained that EPA was focusing on several areas of spotty industry compliance (things he called "marquee issues"), one of which was whether flow restricting devices like the orifice meter on Laurel's SRU #2 had been reset or "re-ranged"⁸ to let the refinery produce more sulfur (and

⁸ Re-ranging is similar to altering the speedometer in an automobile that reads from 0 to 120 so that when the auto travels at 50 miles per hour the speedometer nonetheless reads

therefore more product) than permitted.⁹ Tr. 302, 307-308, 522-524. As EPA investigated that and four other likely areas of non-compliance, its goal was to negotiate a voluntary consent decree under § 114 of the Clean Air Act to correct Cenex's shortcomings. Foley assumed violations would be found in four of the five marquee areas. Tr. 429. Refiners as large as Exxon and Conoco-Phillips also negotiated, and a small Montana refinery, Montana Refining, had already signed an agreement with the EPA. Tr. 300, 557. If Cenex wouldn't voluntarily comply, the EPA would switch to onerous, traditional enforcement proceedings. Tr. 301.

Cenex cooperated. As a small refinery, it wanted no battles with the EPA. Tr. 516-517. Perga assigned Sims to look into the settings on the SRU #2 orifice meter, where Sims saw proof of re-setting or re-ranging, just as EPA's team leader Foley had anticipated. Tr. 37-38, 158-159, 308, 316-317, 429, 683. The changes fed more acid gas into SRU #2, created more elemental sulfur than SRU #2 was permitted for, allowed the refinery to produce more gasoline and other products, and evaded the capital cost of a tail gas treatment unit. The re-ranging required calculations by an engineer; it had to be intentional. Sims later recalled that as the engineers in Laurel's environmental health and safety unit were discussing the data the EPA asked Cenex to gather at the beginning of the § 114 process (well before EPA officials visited Laurel) Perga (who then was the plant's maintenance manager) had said, "We'll be all right if they don't find out what . . . we did down there in Zone A," a reference to SRU #2. Tr. 146-148.

It took a week, but after what Sims discovered, the orifice meter was reset to restrict SRU #2's operation to 19.9 LT/D of sulfur (Tr. 701-02), and Cenex took steps to discourage any other change to the meter's setting, for example by requiring a supervisor to sign off on any changes, and later by tagging meters that had restrictions associated with their settings. Tr. 240, 270, 346-47, 580. Cenex reported the violations the re-ranging of the SRU #2 meter represented to the EPA on November 2, 2001, and asked to negotiate a consent decree. Tr. 345, 524-525; RX 22. Sims' findings presented the occasion for Cenex to enter the negotiation process that it already knew it had to participate in. Tr. 557.

The orifice meter re-ranging represented something other than a brash attempt to evade the EPA permit limits, at least initially. Their recording in an accessible log book freely available on a bookshelf (later moved to an equally

zero. A reading of 2 mph then represents a speed of 52 mph. The speedometer isn't useless, it still measures increments of speed accurately within its new range. *See generally* CX 35 at 17.

⁹ The marquee areas were: the orifice meter settings for refinery expansion that SRU #2 represented (Tr. 522), the refinery's benzene wastes; leak detection and repair; the flaring of gasses; the hydrofluoric alkylation unit where a propane/butane material was manufactured into gasoline (Tr. 304, 429) also sometimes referred to as the cat (catalyst) cracker; and the refinery's heaters and boilers. Tr. 428.

accessible library), shows that while intentional, they weren't surreptitious. Tr. 342; CX 5. The first adjustment (done in August, 1994) was downward, apparently to get better operational control of SRU #2, as the persons involved tried to match the meter setting to the level of hydrogen sulfide gas being fed to the unit. Tr. 241, 247, 338-342, 542-543. The orifice meter only gives results within a range, and if set too low, the reading just tops out.¹⁰ Later adjustments moved the settings up, however, in ways that impaired the orifice meter's usefulness as a constraint on sulfur production, effectively increasing Laurel's output of gasoline and other products.

Perga knew of a standing order by the refinery manager from years ago, Ron Pletcher,¹¹ that the orifice meter wasn't to be re-ranged, although not all employees knew that (Tr. 413); the current refinery manager, Kimmet, similarly knew that meter wasn't to be re-ranged. Tr. 577-578.

The administration¹² of the EPA was disposed to interpret meter re-rangings charitably, not only at Laurel but throughout the nation. Managers and employees knowledgeable about orifice meter setting limitations at refineries could move to new positions, causing institutional memory about permit limits to be lost. Tr. 302, 307-308, 522-524. This meant that changes often could result from ignorance of the restriction.

Whether or not the Laurel refinery's orifice meter settings had been altered, the EPA was considering whether to apply the New Source Performance Standards to SRU #2 because its design capacity (not its permitted limit) was over 19.9 LT/D Tr. 314, 326. The permit violation that re-ranging the orifice meter represented wouldn't necessarily preclude reaching a global settlement with the EPA through a consent decree. Tr. 314; RX 16. Cenex and the EPA eventually did agree by September 1, 2003 to the terms of a consent decree. Tr. 59. It was entered in the Billings Division of the U.S. District Court for the District of Montana in February, 2004. Cenex paid civil monetary penalties (Tr. 237), made the capital improvement (among others) of adding a tail gas treatment unit, and undertook many other changes in its operations. The total cost of the consent decree to the Cenex Laurel refinery was in the range of \$10 to \$15 million. Tr. 229, 237-238, 558.

The disclosures Sims made about the orifice meter re-ranging within Cenex, to the EPA and elsewhere, are more detailed than already has been explained. The next sections describe his disclosures.

¹⁰ If an automobile speedometer goes from 0 to 100, once the driver exceeds 100 mph, it offers a driver no data how much above the speedometer's upper limit the car is moving.

¹¹ At times the transcript gave his name as Fletcher.

¹² In early 2001 a newly elected Administration had taken office.

E. Sims' Internal Disclosures

1. Within the Laurel Plant

Perga instructed Sims on October 16, 2001 to investigate the questions the EPA had raised about the SRU #2 orifice meter. Tr. 37-38, 157-158, 316-317, 429, 523; RX 17. Perga wanted to “insure there were no surprises in there as we prepared to go into negotiations on a consent decree with the EPA.” Tr. 38. Records did show the meter had been re-ranged, beginning in the mid-1990's. CX 5. Sims reported this finding to Perga on October 25, 2001,¹³ when he met with Perga and Greg Brown, another environmental health and safety engineer. Tr. 159-160, 317, 429, 524. Perga then had Sims look into whether the changes resulted in feeds to the SRU #2 that exceeded permissible limits; Sims believed that they did (Tr. 642; RX 18), but Perga wasn't sure.¹⁴ The finding was reported to the refinery manager, Kimmet. As stated above, on November 2, 2001 Perga, Brown and Kimmet told the EPA about the orifice meter re-ranging and asked to negotiate a consent decree. Tr. 417, 525.¹⁵

I reject Sims' argument that Perga never intended that Sims find and report the orifice meter re-ranging. Tr. 148. Perga knew of (or may even have participated in) the re-ranging when it occurred as a way for Cenex to “pull the wool over the eyes”¹⁶ of the EPA. Tr. 395-397; CX 33 at 7, 8, 10. The re-ranging would have been done by Laurel's maintenance department, the department Perga headed from 1988

¹³ Sims told his family doctor the day before that he was “being stalled for advancement and he thinks he is going to have to find another job” (CX 47 at D633). This shows he was contemplating leaving Cenex before he reported his findings about the re-ranging of the orifice meter on SRU #2 to anyone at Cenex, *i.e.*, before he could have suffered retaliation of any sort.

¹⁴ A definitive calculation of how much more hydrogen sulfide gas the meter re-rangings charged the SRU #2 can't be done, for the log sheets on the feed rates for the gas were discarded in the ordinary course of Cenex's business. Tr. 318-320, 414. These are different records than the evidence in CX 5 and CX 39. Given the pattern of changes to settings of these kinds in refineries throughout the country, which is why it became one of EPA's marquee issues, I infer the re-ranging was meant to evade permit limits at Laurel as it was at other refineries.

¹⁵ Sims' contention that what he learned about the orifice meter re-ranging triggered the EPA investigation (Complainant's Post-trial Brief at 5) isn't correct. The EPA was looking for precisely this type of problem before it arrived at the Laurel refinery; during the opening meeting, before Sims was assigned to look onto the topic as one of EPA's “marquee concerns,” Foley made it clear that EPA expected to negotiate a consent decree with Cenex, as with other refiners. The investigation under § 114 of the Clean Air Act was already under way before Sims discovered the altered orifice meter settings.

¹⁶ Despite Perga's denial, I find he did brag at Cenex about pulling the wool over the EPA's eyes. Tr. 64-65; CX 33. I do not, however, find all his testimony false, although I would be entitled to. I find much else in his testimony credible.

to 2001. Tr. 411. Perga had to expect that Sims would find any re-ranging when Perga (then manager of Laurel's Environmental Health and Safety unit) assigned Sims to investigate the EPA's suspicion about one of its marquee issues. I accept Perga's testimony that he wasn't angry at Sims for discovering what had been done to the orifice meter, a discovery any competent engineer would have made. Tr. 418.

Sims saw the re-rangings as misconduct at Cenex not only serious enough to force it to install an expensive tail gas treatment unit (Tr. 643), but also told Perga it could be a crime. Tr. 373, 381; CX 38. When Sims raised the matter again on November 14, 2001, Perga told Sims to "blow it off" (Tr. 48), which incensed Sims, who took Perga's dismissiveness "as the worst kind of professional rejection someone can receive." Tr. 148. Whether the comment was Perga's own, or Perga's repetition of a comment Cenex's outside lawyer, David Veeder, made isn't entirely clear. Tr. 211, 463, 609; CX 34 (entry for 12/6/01, fourth bullet point).

A few days later, Sims saw a report of a criminal prosecution of Murphy Oil, for failures to disclose internal analyses of excess sulfur dioxide emissions from the sulfur unit at Murphy's Superior, Wisconsin refinery. Tr. 48-50; CX 38. He brought this to Perga's attention, whose response when Sims raised the possibility of criminal liability for the re-ranging was: "We're not going to goddamn go there." Tr. 416-417. Those were matters for lawyers, in Perga's view, not for two chemical engineers. Tr. 376. Sims also brought the Murphy Oil situation to the attention of the refinery manager, Kimmet, and to the most senior Cenex executive at Laurel, Dan Knepper, the refinery's corporate Vice President for Energy Operations. In a conversation about the case, Knepper told Sims the refinery hadn't done anything criminal. Tr. 51.

Sims felt no one at the refinery took the intentional change to the orifice meter settings seriously enough. Kimmet told Sims on December 4, 2001 that he had informed Betsy Wahl of the EPA's Helena office that Cenex "may have exceeded the limit on the #2 sulfur unit." Tr. 162, *see also*, Tr. 52. This struck Sims as an effort to cover up intentional wrongdoing that dodged the intentional aspect of the violations—to him the re-rangings weren't mistakes, things done by inadvertence or honest misinterpretations of a regulation. Tr. 52. Sims saw them as "willful and knowing type behavior." Tr. 165.

2. Investigation by Cenex Carried Out Above the Level of the Laurel Refinery

Sims took his concerns that the EPA permit for Laurel's SRU #2 had been violated intentionally above the level of the Laurel refinery, to corporate headquarters in St. Paul, Minnesota. He called the Cenex environmental hotline on December 5, 2001, to raise legal and ethical issues that had surfaced during the EPA's audit of the Laurel refinery. CX 6; RX 27.

Shortly thereafter Todd King, Cenex's Director of Environmental Affairs, telephoned Sims. Tr. 279; RX 28. Sims told King of his concern about the intentional violations of the permit for SRU #2 at Laurel, the excess sulfur dioxide emissions it implied, that the EPA might not grasp the import of the relevant data given the way Cenex presented it, and his fear that he might bear personal responsibility to ensure the EPA clearly understood the violations he had uncovered. Tr. 51, 271-276. I take this to mean Sims feared he could incur personal criminal liability for not making the violations known to the EPA. Tr. 276. He also told King that he feared retaliation because of his disclosures about the irregularities he found in the sulfur unit, and didn't want his name to be released to co-workers as the source of these concerns. Tr. 272, 279. King investigated Sims' report. RX 28, 29.

The General Counsel of Cenex, David Kastelic, telephoned Sims on December 13, 2001 about his call to the corporate hotline. Kastelic told Sims that investigating his complaints about what had happened at Laurel, even if his name weren't mentioned, could lead local managers to realize who raised the issue; his anonymity could be lost. Sims understood and agreed the investigation nonetheless should proceed. Tr. 248; RX 34.

King discussed Sims' call to the hotline on a conference call with Cenex's General Counsel, Kastelic; the corporate Vice President for Energy Operations at the Laurel refinery, Knepper; the refinery's manager, Kimmet and the manager of Laurel's Environmental Health and Safety unit, Perga. Tr. 280; RX 31. The people from the Laurel refinery told the executives from headquarters that the EPA had been informed of the re-ranging of the orifice meter on SRU #2. Someone (most likely Perga) suggested that Cenex arrange a phone call to the EPA in which Sims could make any and all disclosures to the EPA Sims thought appropriate. Tr. 280-281, 348, 526. The call was arranged for December 18, 2001. The night before, King called Sims to tell him the call would take place. Tr. 281.

F. Sims' External Disclosures

1. Disclosures to the Local EPA

Sims participated with other Cenex employees, including his supervisor Perga, fellow environmental engineers Nissen and Brown, the refinery manager Kimmet, on a call to Betsy Wahl of the EPA's Helena office on December 18, 2001. Tr. 53, 134, 430. Before the call began, Perga told those present they were to speak freely, the call's purpose was to allow all of them to be comfortable with the disclosures to the EPA. Tr. 432, 527. Sims stated his concerns, but was surprised when Wahl immediately deflected concerns about criminal misconduct when Perga first and then Sims raised the issue, stating that EPA was uninterested in criminal prosecutions. Tr. 53, 134, 166-167, 350, 423. As far as Cenex knew, this call to the EPA was the last contact about the re-ranging Sims made to the government. He spoke with Wahl by telephone again before the end of the business day (his work

day ended at 4:00 p.m.) from his home. Tr. 167. She told him the potential willful violations Sims was raising required her to turn the matter over for criminal investigation, which she did. Tr. 54.

2. Disclosures to other Government Entities

Three times after Wahl's referral in December 2001, someone from the EPA's Criminal Investigation Division met Sims, once at his home, to accept information that included a copy of the orifice meter re-ranging sheet. Tr. 55, 167. Sims was assured that the matter was moving forward; according to Sims the EPA did not want to broach the subject of criminal charges until the consent decree had been finalized. *Id.* Sims understood that what he gave the EPA would eventually lead to "an appropriate audience in EPA at the proper time before the various people that . . . would understand this matter, so that I could lay my case out to them." Tr. 55-56. No Cenex managers knew of those three meetings.¹⁷

In early January 2002, Todd King from the St. Paul headquarters called to check on whether the call Cenex arranged with the EPA had met Sims' expectations. Tr. 134, 281. Sims expressed satisfaction with the detail he was able to give to the EPA (Tr. 167, 281; RX 38) and that he had been able to raise the subject of possible criminal violations at Laurel (Tr. 209), but thought managers took too much comfort in the EPA's lack of interest in criminal prosecution and its focus on a consent decree. He thought it opened him to retribution. Tr. 134-135; RX 38.

3. The EPA Uses Sims' Information

The EPA used information Sims provided to its advantage in negotiating the Cenex consent decree that required the Laurel refinery to undertake supplemental environmental projects, install control equipment, and change specific management practices. Tr. 68, 472. In mid-October 2003, when the consent decree negotiations were done, Sims contacted officials at the EPA Inspector General's Office, first in Denver, then in Washington, D.C., because he heard nothing about criminal prosecution, which he regarded as a betrayal of EPA's commitment to him. Tr. 56-59; CX 10.¹⁸ He pursued this again in 2004, believing by that time he had been "sold down the river" by the EPA (Tr. 67), that wouldn't "follow through on their commitment to me to allow me this audience before them" (*id.*), or carry out a criminal investigation. Tr. 66-68; CX 13. Convinced he was getting nowhere with the EPA, ultimately Sims contacted the U.S. Attorney's office in October 2004,

¹⁷ Only after Sims resigned did Brown learn that the EPA's criminal investigation unit had looked into Sims' allegations about the SRU #2 at the Laurel refinery, and that the EPA's Inspector General had investigated Betsy Wahl of the EPA's Helena office. Tr. 476-477, 505.

¹⁸ This may have led the Inspector General of the EPA to investigate Betsy Wahl. Tr. 476-477, 505.

seeking criminal prosecution, with no results. Tr. 58, 76; CX 16. If re-ranging types of violations were common enough at American refineries to become one of the EPA's five marquee issues, any decision about criminal prosecution would have implications for managers and employees at many refineries, not just at Laurel.

G. Sims' Perception and Complaints about Retaliation within Cenex

Sims testified he was tormented by the ethical implications of the irregularities he'd found out about SRU #2. Tr. 132. He was frustrated on two counts: (a) he couldn't convince the EPA to treat the matter as criminal; when he would call the EPA, he didn't believe he was being taken seriously, but was being stonewalled (Tr. 133), and (b) he believed that managers at Laurel felt secure that the slate had been wiped clean when they heard EPA's Betsy Wahl rebuff his suggestion of possible criminal charges when Perga and Sims broached it during the December 18, 2001 call Cenex had arranged. Tr. 134-135. He judged that Cenex was getting away with a tap on the wrist. Tr. 133. It caused him to become moody and to lose sleep at night. Tr. 127-132.

He also became convinced Cenex targeted him for reprisal. His concerns can be analyzed over three periods: an initial one from November 2001 until August 2002 when he expressed his fears to the refinery manager, Kimmet; a second that began when he wrote to Cenex headquarters on September 23, 2002 to assert he was suffering retaliation, a charge Cenex Human Resources officials investigated but did not sustain; and a third period from the completion of that investigation until he left Cenex in April 2005. The evidence doesn't sustain the charge that Sims was harassed or constructively terminated.

1. The initial period from November 2001 to August 2002

After his disclosures to the EPA and within Cenex, Sims believed the demeanor toward him of individuals at the refinery changed. He perceived, for example, that Vice President of Energy Operations in charge of the refinery, Knepper, didn't return his hellos in the morning. Tr. 63-64, 149. The refinery's chief process engineer, Tom Davis, by contrast, returned greetings in a way that Sims regarded as demeaning, drawing out the "a" in his name Max. *Id.* I am more disposed to accept that Knepper became cooler to Sims than to believe that Davis regularly taunted him—but the proof for both is too impressionistic and thin. He never mentioned this sort of demeaning behavior in his conversations with Kimmet, when he raised other things he thought were retaliatory (of which more will be said later). Tr. 581. Sims' feelings don't persuade me that Sims he was systematically shunned or harassed at the Laurel refinery for bringing the re-ranging of the orifice meter to the attention of local management, to the corporate office in St. Paul, or for ensuring the EPA understood what had happened at Laurel during the December 18, 2001 telephone call to the EPA.

Sims believed that Perga, who would retire in April 2003 (Tr. 68), groomed Brown rather than Sims to become the Environmental Health and Safety unit's

manager. Perga consulted Brown on issues that arose in the office, took Brown along to meetings in Helena with the EPA, and sent Brown to a meeting of the National Petroleum Refining Association that spring, a meeting Cenex managers previously attended, not line engineers. Tr. 62-63. But Sims wasn't the only other engineer in the Environmental Health and Safety group at Laurel; those actions or changes don't represent retribution directed at Sims. Nissen, the other engineer in the group then, had been Sims' friend, but things Perga did that added to Brown's status didn't denigrate Nissen and Sims. The further inference, that Perga preferred Brown as a way to retaliate against Sims, is one the evidence doesn't justify, for the reasons explained next.

Brown was well thought of at the refinery. In Spring 2001 when Perga had been selected as the new manager for the Environmental Health and Safety unit, Brown had been the runner-up candidate for the position. Tr. 520; RX 11. Nissen was rated third, Sims fourth.

Sims believed that Perga had retaliated by assigning him a smaller raise for 2002 than the average raise he "had been accustomed to before." Tr. 173. Sims attributes the retaliation to a time even earlier than the December 5, 2001 call he made to the Cenex environmental hotline (*e.g.*, to Perga's November 14, 2001 comment telling Sims to "blow it off" when he raised the issue of intentional tampering with the orifice meter, and Perga's rejection of his fears about potential criminal liability for the re-ranging). I reject the contention that his report of what he found when Perga assigned him to investigate the SRU #2 orifice meter settings adversely affected Sims' 2002 pay. Tr. 352, 418, 528-529, 585.

Sims believed he was slighted when Nissen was designated to attend a professional conference in New Orleans in the Fall of 2002. Tr. 62-63; RX 52. This wasn't a slight, because (a) Perga thought the conference topics were most closely related to Nissen's duties so Nissen was designated to go, but when Perga realized it was Sims' turn in rotation to go, and Perga himself couldn't attend, Sims was sent too (Tr. 355-356, 633-635). He wasn't kept from any conference it was his turn in rotation to attend. Tr. 635.

Perga assigned Sims two tasks Sims thought were harassing make-work: creating summaries of environmental regulations the Laurel refinery had to follow, and developing a list of wastes the refinery generated and the containers needed to hold them when they were removed during the refinery's annual maintenance shut-down. Neither claim is convincing.

The corporate headquarters required every Cenex facility to assemble binders that contained matrices of all environmental regulations each facility had to follow, so headquarters understood what regulations staff at each location had to keep up with. Tr. 79, 364. When Perga assigned the project to Sims in June or July of 2002, it took Sims three weeks to compile that data into 3-ring binders. Tr. 78-79, 141; CX

42. The credit Perga gave to Brown for participating in the creation of the binders also galled Sims, for Brown hadn't been involved. Tr. 79. Sims maintained that the intensive typing the project required led to neck and upper spine pain that he had to use a home traction device to relieve. Tr. 141-143; CX 37.

Sims believed he created "a good document," but "bet that this thing is gathering dust on the shelves at Cenex right now." Tr. 79. Cenex headquarters used the binders, and they also were used at staff meetings at the Laurel refinery. Tr. 364. The binders would have included the limits that applied to the SRU #2 orifice meter, so there would have been a central place refinery staff could consult for regulatory requirements, that would help insure re-rangings didn't occur again. Tr. 386-387. The testimony of Perga and Kimmet that the data compiled in the binders were useful to plant personnel is the more persuasive evidence. Tr. 364, 564. The idea that the assignment was retaliatory because it was useless (Tr. 79) doesn't make sense. The task was required of all facilities Cenex owned. Even if the task were useless in a larger sense, it was an obligation the Environmental Health and Safety unit had to meet.

The other task required Sims to develop a waste-handling guideline that detailed the wastes that would come out of each of the refinery's four vessels during the refinery's annual maintenance and overhaul shut-down, and the containers the wastes should go into. Tr. 80. Perga realized the value of having that sort of guide available, given his recent role as manager of refinery maintenance. Maintenance foremen could refer to Sims' guide without making rush calls to the Environmental Health and Safety engineers about where wastes were to go or what containers they should go into. Tr. 365-367. Sims doesn't believe that analysis has been re-created since he did it. Tr. 80. That isn't persuasive proof that what he created needed to be replicated annually, rather than re-used. Tr. 366.

Probably the most serious of the allegations is Sims' belief that he was systematically excluded from conference call negotiations with the EPA under the § 114 process from early 2002 to September 2003 that culminated in the consent decree. Tr. 86, 89. The refinery's manager (Kimmet), the manager of the refinery's Environmental Health and Safety group (Perga), and one of the group's engineers (Brown), negotiated the program terms of the consent decree for Cenex. Tr. 86.

There were valid reasons to engage Brown extensively in those negotiations: his areas of responsibility included the catalyst cracker,¹⁹ necessary carbon dioxide monitoring, the retrofitting of the refinery's heaters and boilers to low nitrogen oxide burners, and the flaring of gasses. These were among the marquee issues the

¹⁹ One of the refining steps is to use a fine dust as a catalyst to break or crack heavy oil into gasoline and diesel fuel. The Laurel refinery did this in a unit that was very old and comparatively inefficient. One of the marquee issues of the EPA was to modernize that process at Laurel. Tr. 302-305.

EPA emphasized in its review of Laurel's operations; they took up 90% or more of the negotiations. Tr. 433, 533. The benzene NESHAPS process (a wastewater regulation for benzene emissions) that Nissen concentrated on wasn't a significant issue in negotiating the consent decree. Tr. 87. The Leak Detection and Repair program that was one of Sims primary responsibilities also wasn't a major subject of negotiations, although it came up. Tr. 87. The consent decree broadened the definition of what constituted a leak of volatile hydrocarbon vapors that had to be corrected, which implied more work for Sims. Tr. 81.²⁰ Cenex accepted the EPA's leak detection and repair proposals with little alteration. Tr. 478, 533. Input by Nissen and Sims came through e-mail back and forth with the Cenex negotiation team. Tr. 87-88. Cenex's use of Brown on the negotiation team throughout the § 114 process isn't evidence of harassment, retaliation or discrimination against Sims.

2. The Retaliation Sims Recounted to Kimmet

Sims met with Kimmet on March 8, 2002 to express his concerns that Perga was retaliating against him, offering four examples. RX 52. He added another example a short time later. Those concerns, and Kimmet's responses and suggestions, are explained below.

Sims first objected on March 8th that Perga went to Brown "on everything." *Id.* Kimmet pointed out that not just Perga, but people throughout the refinery sought Brown's assistance with their problems. Brown spent time out in the production areas of the refinery learning the issues that concerned those in production, not just in the Environmental Health and Safety unit office. Tr. 530-531.

The second example Sims raised of retaliation was that Perga had sent Brown to the National Petroleum Refiner's Association meeting, but after discussion Sims agreed that the rotation sending engineers to out of town meetings had been done correctly. Tr. 352.

Third, Sims objected to the depth of Brown's involvement in the consent decree negotiations. Kimmet explained that the negotiations primarily focused on Brown's areas of responsibility; duties or programs Sims and Nissen handled were touched upon, but hadn't been their focus. If the primary purpose of an individual

²⁰ The consent decree changed the definition of a leak from 10,000 parts per million to 500 parts per million for valves, and to 2,000 parts per million for pumps and flanges, which was similar to what the EPA negotiated with other refiners, including Conoco-Phillips. Tr. 81-82, 478. Sims became the coordinator for the leak detection and repair program that the consent decree required. Tr. 85-86. An off-site contractor had to come in to test the equipment by sniffing with instruments to detect leaking volatile organic compound vapors; Sims then had to type work orders to the maintenance department to repair any leaks that contractor found. Perga wouldn't let the contractor, an outsider, direct the work of the Cenex maintenance department. Tr. 80-81.

conference call or meeting were the Leak Detection and Repair program, Sims would be involved.²¹ Tr. 357, 534.

Sims ended by confiding his worry that Perga was grooming Brown to become the Environmental Health and Safety manager. Sims told Kimmet that if he promoted Brown to the job, Sims would have a problem with that. Tr. 534. Kimmet made clear that the promotion (which was Kimmet's decision as refinery manager) would go to someone who spent time in the production part of the refinery, who process and maintenance engineers and staff sought out for help on health and safety matters, thereby demonstrating leadership. Tr. 534-535.

Kimmet suggested three ways Sims could enhance his chances of promotion. He recommended that Sims attend the 15 to 20 minute operations meeting the refinery conducted each morning, a meeting that Brown made a point to attend.²² Tr. 512, 531. The operations group discussed what had been accomplished the day before and what was planned for the current day. *Id.* Sims believed he couldn't take the time from his other duties, which surprised Kimmet, who knew Sims arrive and left on time but "never put in any extra time at all." Tr. 531, *see also*, Tr. 293. Kimmet's statement generally was accurate,²³ for Sims habitually worked from 7:30 a.m. to 4:00 p.m., although in rare crises Sims had worked long hours, as he once did in 1998 when a computer problem wiped out a report and he worked all night to recreate it, and in April 20003 when he returned on a Friday evening after he learned there was a fire in a hazardous waste bin. Tr. 95-101. Kimmet proposed that Sims consider applying for a process engineer position, to learn more about refinery operations, an idea Sims also rejected because it required more time at work when problems and plant upsets occurred, and during the maintenance turnarounds. Tr. 531-532. A third way to expand his knowledge base would be to swap duties with one of the other engineers in the Environmental Health and Safety unit, which Sims also didn't want to do. Tr. 531.

Kimmet relayed the concerns Sims had raised about what he thought was preferential treatment of Brown to Cenex' General Counsel on March 14, 2002; Kastelic believed Kimmet had handled those concerns appropriately Tr. 250, RX 52.

At another meeting shortly after the one on March 8, 2002, Sims told Kimmet he believed Perga had retaliated against him by reducing his raise for 2002.

²¹ That never happened, because Cenex accepted the EPA position on the Leak Detection and Repair program. Tr. 478-480.

²² Perga had made the same suggestion to Sims, because Perga too was concerned about Sims' level of knowledge of the refinery's production processes. Tr. 292-293.

²³ Sims had been in the habit of eating his lunch at his desk so he could work. Tr. 640. Toward the end of his employment at Cenex (in 2004 to 2005) Sims would meet his wife to eat at a park across from Cenex rather than work through lunch. Tr. 100, 640-641.

Kimmet explained that wasn't true, the raises for the Environmental Health and Safety group had been set on November 26, 2001, before Perga took medical leave for surgery, which was also before Sims had contacted the Cenex hotline on December 5, 2001. Tr. 173, 351-353, 527-528, 536; RX 24. The 4% raise Sims received was in line with raises others in the unit got (his colleague Nissen received the same percentage raise, and non-engineers in the unit received lesser percentages), and 4% was the average given throughout the refinery that year. Tr. 352, 582-585.

Kimmet sat down with Sims again on August 2, 2002 specifically to inquire how things were going (the meeting was relatively formal as they sat to talk; it wasn't fleeting hallway banter). Sims had no complaints then, and gave Kimmet the impression everything was fine. Tr. 536-538, RX 54. At neither meeting did Sims say he felt Knepper was shunning him, or that Davis was taunting him by greeting him in a sarcastic or demeaning manner; Kimmet didn't observe those things either. Tr. at 581.

3. Sims' September 2002 Letter to Cenex Headquarters about Retaliation

Despite what he had told Kimmet early in August, Sims wrote to Cenex's General Counsel, Kastelic, on September 23, 2002 to complain that he was suffering retaliation because of his disclosures about the criminal tampering with the orifice meter on SRU #2, and the call to the EPA on December 8, 2001; he asked that his retaliation claim be investigated.²⁴ Tr. 56-57, 169-170, 282; CX 8; RX 57. Cenex took Sims' new allegations seriously, and promptly conducted two investigations (one of the meter re-ranging, another looking into retaliation). Kastelic responded to Sims's complaint in a little over a month, by telephone and with a letter dated October 30, 2002. Tr. 170, RX 70.

The investigation began when Kastelic and King telephoned Sims on September 30, 2002. Tr. 170, 253, 282, RX 60, RX 62. They asked whether there were any new irregularities with the orifice meter. Sims made clear there weren't. But he thought the company responded inadequately to his 2001 hotline complaint—no one had been fired. *See*, RX 60 (Sims "would expect to be fired" if he had done the re-ranging). They asked Sims who he thought had been involved in the re-ranging. Sims named Knepper, Kimmet, Perga, and engineers Tom Davis,²⁵ John Traeger, and Doug Keane. RX 60.

²⁴ Sims didn't raised as misconduct the use of the SRU #2 as more than a "spare" or allege that more elemental sulfur was being created than permits allowed.

²⁵ Around that time Sims spoke to Davis, Laurel's chief process engineer, about the re-ranging, and gave Davis the impression criminal liability was involved. Tr. 65-66. When Davis went to Kimmet, worried that someone was going to jail, Kimmet rebuked Sims for

Cenex General Counsel Kastelic and Executive Vice President Debortim investigated the allegations of criminal wrongdoing (the second such investigation by Cenex). Tr. 226, 231, 252. Another pair of officials, the Vice President for Human Resources, Dick Baldwin, and the Director of Human Resources for Energy, Theresa Bachmeier, investigated Sims' retaliation allegations. Tr. 171-173, 253. They reported their conclusions in a draft report and orally to Kastelic and Debortim. RX 70, 200. Kastelic wrote a letter to Sims that reviewed the investigation the Centex headquarters staff had done in 2001 after Sims' December 5, 2001 call to the environmental hotline, and what it found from the further investigation after receiving his September 23, 2002 letter.

a) The Second Investigation of the Orifice Meter Re-ranging

Kastelic and Debortim investigated the allegation of intentional (and therefore potentially criminal) meter tampering with the SRU #2 orifice meter at Laurel. They interviewed individually (by telephone conference) those Sims had named: the former refinery manager, Ron Pletcher (RX 66); the refinery process engineer in 2001 when the change was discovered, Tom Davis (RX 65); the former refinery process engineers, Doug Keane (RX 67); and John Traeger of (RX 64); the refinery's head maintenance engineer at the time, Perga (RX 63) and Kimmet (RX 59). They also interviewed Knepper, Traeger and Keane as a group by telephone. RX 68. Kastelic's handwritten summary supplements the typed results of these inquiries. RX 61. Kastelic and Debortim determined, and told Sims orally by telephone and then by letter that:

“no one with knowledge of the permit restrictions was involved in re-ranging the [SRU #2 orifice] meter or knew that the meter had been re-ranged. Accordingly we concluded that there was no evidence of the willful knowing conduct necessary for a criminal violation.

RX 70 at 2 of 3.

Their conclusion comports with the charitable view of re-rangings the EPA held.

b) The Investigation Into Retaliation Against Sims

Sims was deeply disappointed that Baldwin and Bachmeier weren't investigating criminality when they came to Billings to delve into his retaliation allegations. Tr. 172. They met with him at the Billings Holiday Inn, where they discussed Sims' 2002 pay raise, and his charges about the preferences accorded to Brown. They also interviewed Knepper, Perga and Kimmet. Tr. 354-360, 538.

what he had told Davis; going to Davis undercut the efforts Kimmet was making to maintain confidentiality for Sims. Tr. 65.

These weren't entirely new matters. Kimmet already had dealt with the allegation about Sims' 2002 pay raise in response to the complaint Sims presented directly to him in March 2002. Kimmet told Baldwin and Bachmeier the same thing he had told Sims then. Tr. 536, 528-529, RX 24. Perga's version of events was consistent with Kimmet's. Tr. 351-353. Sims' reports about the re-ranging of SRU #2 never affected his 2002 raise. Tr. 352.

Baldwin and Bachmeier also learned that Sims had not been prevented from attending professional meetings due to the discovery of the SRU #2 orifice meter re-ranging or due to placing the hot line call to Cenex headquarters in St. Paul. Tr. 354-358. Nor had Sims been given onerous work assignments as punishment. Perga believed Sims was assigned less work than Brown, although more than Nissen. Tr. 362. In meetings with the EPA as the consent decree was negotiated, the major issues centered around Brown's areas of responsibility, so he was the appropriate engineer to participate. Tr. 357-358.

Baldwin and Bachmeier reported orally to Kastelic and Debortim in St. Paul. Their investigation did not bear out Sims' retaliation claim that his 2002 pay raise was retaliatory, that Brown received preferential treatment, or the other workplace issues Sims had raised. Tr. 254. Their findings were summarized briefly in Kastelic's letter to Sims too. RX 70.

H. Events after the 2002 Cenex investigation

1. The Fire in the Disposal Bin

In early April 2003 a fire broke out on a Friday evening in a disposal bin that contained non-hazardous waste, in the Laurel refinery's storage tank area. Tr. 95-99. Fires of that sort occurred from time to time; any fire at a refinery is a dangerous event. Tr. 588. Sims learned of it and returned to the refinery, where he saw Kimmet and one of the refinery's Human Resources managers, Bill Strauch, in the Incident Command Center. Tr. 97-98, 588. Employees were trying unsuccessfully to put out the fire with water.

Sims realized it was a hazardous waste bin (even though the contents weren't hazardous) that had a lid, so he suggested the lid be rolled closed to smother the flames. Strauch objected that the bin's paint would blister and have to be repainted. Tr. 99. Later Brown returned to the refinery, and made the same suggestion. This time Strauch praised Brown for making "an executive decision." Sims took the comment as an effort to demean and belittle him. Tr. 99. Strauch hadn't been involved in the investigation of the meter re-ranging or any of the other investigations involving Sims (Tr. 547), so his statement didn't represent retaliation directed at Sims.

2. Brown Becomes Environmental Health and Safety Manager

The following Monday Brown's promotion to manage the Environmental Health and Safety unit was announced, a decision made well before Friday's burning bin incident. Kimmet chose Brown to replace Perga after he interviewed Brown, Nissen and Sims, rating them in that order. Tr. 517-521. Brown had managed an environmental department for another employer. Tr. 545. He had developed greater familiarity with the refinery's operations, after regularly going out into the refinery and learning Laurel's processes well, and had become the environmental health and safety engineer others sought out to assist with problems. Tr. 546. Sims, on the other hand, hadn't taken to heart the suggestions Kimmet had offered in March 2002 to enhance Sims' chance to be selected for the job.

a) Attitudes Clash

As Sims warned back in March 2002, he had problems with (*i.e.*, resented) working for Brown. Tr. 535, RX 52 (final bullet point). Their styles clashed. Sims believed raises were basically cost of living adjustments; Brown regarded them as merit increases to be earned. Tr. 175-176. Sims completed his reports shortly before their deadlines (what Brown called "just in time reporting"), Brown wanted to review reports before they were due in the regulator's hands. Tr. 177-178, 440-441, RX 81.

This wasn't the first time Sims chafed under supervision. He complained when Kimmet managed the Environmental Health and Safety unit that he was being micro-managed, and suggested the unit be re-structured in a way that would give him "more say." Tr. 513-514; RX 8.

b) Performance Ratings

Perga never evaluated Sims' performance in a formal way, nor apparently the performance of any of his employees in the Environmental Health and Safety unit. Tr. 76, 350. Brown rated Sims performance for 2003 in a January 2004 evaluation, which found Sims' performance satisfactory, but included items that Sims disagreed with. Tr. 69-70, 440; RX 78. For example, Brown suggested that Sims get out into the refinery weekly and interact with the operations and maintenance staff who were hourly workers (a comment included for all the engineers in the unit) and perform at least three incident investigations, which required time-consuming root cause analyses. Tr. 71, 484.

Sims regarded these suggestions as too onerous, especially when he retained responsibility for the refinery's hazardous waste disposal he'd had since he was hired in 1994. He kept manifests of the various wastes, arrange for their transport from the refinery within set periods after they had been collected (usually 90 days), and trained refinery personnel annually about restrictions on hazardous waste disposal. Tr. 71. He believed he was being overworked, and told Brown so. Tr. 468, 500. Under the régime the consent decree brought in, everyone's workload

increased, in the Environmental Health and Safety unit and throughout the refinery. Tr. 362, 446, 500, 563. Sims' duties had increased more than Nissen's but less than Brown's. Tr. 362. The hazardous waste duties weren't re-assigned to the new engineer in the Environmental Health and Safety unit, Karen Molinar, as Sims requested (Tr. 72), because Brown believed she had enough responsibilities under the consent decree herself. Tr. 446-447.

Sims maintained his habit of leaving work after eight hours, by 4:00 each day, a sign that he wasn't being overloaded with work. Tr. 426. Others on staff in Laurel's Environmental Health and Safety unit did work later hours to remain current, including Molinar and Brown. Tr. 563-564.

Brown believed that Sims hadn't learned and planned for all the things Cenex had committed to do in the consent decree pertaining to Leak Detection and Repair. Tr. 440. For example, Brown documented in a memo of August 27, 2004 (RX 80) three shortcomings in Sims' performance during the summer of 2004 related to implementing Leak Detection and Repair portions of the consent decree:

(a) A report due June 28, 2004 under ¶ 144 of the consent decree that Sims had to prepare wasn't done until June 27 and 28, so Brown had little time to review it, and it contained an inaccuracy.

(b) A certification due on August 25, 2004 under ¶ 144 of the consent decree was done only on the due date, although Brown has asked for it to be completed in advance so it could be reviewed; the refinery manager, Kimmet, wasn't available to sign it on August 25, so it was submitted late. The certification sought an extension of the time the consent decree set for Cenex's annual monitoring of its compliance with the decree, but Sims hadn't developed a schedule to ensure the monitoring program would be completed within the additional time.

(c) A representation made in the June 28 letter to have a quality assurance /quality control procedure in place by July 31, 2004 (through a contractor) under ¶ 160 of the consent decree hadn't been honored because necessary software had not been installed until August 25, 2004, and had not yet been run.

Brown required specific corrective actions of Sims, one of which was to have necessary reports done in advance to allow time for Brown's review. He didn't give the memo about Sims' shortcomings to Sims, Brown meant to incorporate the information into Sims' 2004 evaluation that was prepared shortly thereafter, for the period ending September 30, 2004, which he did. *See*, EX 81. As a result in the performance evaluation for 2004, Brown rated Sims' performance as less than fully satisfactory—the category at Cenex is “needs improvement.” Sims had never received anything less than a satisfactory evaluation before.

The performance deficiencies Brown relied upon were valid criticisms of Sims' work. Brown believed Sims needed to improve his performance, and made that clear

in the 2004 evaluation. Of the goals on the evaluation form, Sims received a rating that he “met requirements” in three areas that represented 45% of his goals, his performance was rated “outstanding” in one area that represented 20% of his goals, and rated as “needs improvement” in two areas that represented 35% of his goals. Additional ratings on the evaluation’s second page for other competencies weren’t associated with numerical factors. Needing improvement in 35% of an employee’s annual goals appropriately can be characterized as performance that needs improvement.

The time interval from the December 5, 2001 Cenex internal hotline call and the December 18, 2001 conference call with the EPA to the September 30, 2004 performance evaluation make it difficult to believe that Brown’s criticisms were delayed retaliation for disclosures Sims had made so long ago. I am not persuaded that those disclosures caused, or even contributed to his less than fully satisfactory 2004 performance evaluation.

3. Minor Problems and Sims’ Ongoing Suspicions of Retribution

Kimmet criticized Brown when a Montana state environmental inspection noted that a burned out fluorescent light bulb had been disposed of in a bin for “universal waste” (a term for mildly hazardous waste due to mercury in the light bulb) that ought to have been covered by a lid, but wasn’t. Brown passed the criticism on to Sims, who saw it as an undeserved oral reprimand from Brown. Tr. 91. That seems to place more emphasis on the event that it actually represented. Kimmet wanted clean inspection reports, told Brown so, and Brown passed the information along, because Sims trained refinery employees on the proper disposal of universal waste. Tr. 90. For Kimmet to tell Brown he expected the Environmental Health and Safety unit to keep the refinery from being criticized by state regulators (even with relatively minor criticisms) was appropriate. Passing that expectation along wasn’t harassment, but management, even if it was uncomfortable for Sims.

On another occasion in 2004 shortly before an inspection of the benzene NESHAPS program that Nissen handled, Sims noticed on a storage pad near the front of the refinery a barrel with a yellow hazardous waste tag in his handwriting. He routinely distributed those sorts of tags in the refinery, asking to be notified when a drum was filled, so it could be properly logged on the hazardous waste manifest and removed from the refinery within the 90 days regulations demanded. Its label showed the removal date was two days away, so Sims had to make special efforts to have the transport company remove it before the inspection. Tr. 91-93. Sims was never criticized over the incident. Tr. 446. The proof doesn’t support the inference that a plan was afoot to concoct a violation of the hazardous waste regulations to retaliate against Sims. It isn’t an example of harassment.

In January 2005 Brown failed to have a timely inspection of floating seals on four of the refinery’s gasoline tanks (covers on the tanks were designed to float on

the product to eliminate the build up or leakage of volatile vapors). Tr. 94. Molinar, the engineer most adept at using Excel spreadsheets (Tr. 79), had sent out an e-mail (its date isn't clear) with a table to designate which engineer handled which projects. The floating seals, known as the MACT project, had Sims initials on the grid, though it had always been Brown's responsibility, never Sims.' Brown told Kimmet the error in not getting the necessary inspections was his and no one else's. Kimmet made his displeasure with Brown for missing the inspection deadline quite clear. Tr. 498, 586. Sims never was blamed in any way for the missed inspections. Tr. at 447-450, 586-587. Molinar's mistaken entry on the Excel spreadsheet wasn't retaliation either.

4. The Final Straw

The handling of hazardous waste disposal changed in March 2005, in ways that saved Cenex some money (Tr. 453, 601), but that Sims disliked. Some wastes at Laurel were centrifuged, to reduce their volume by wringing out water, to prevent shipping water as if it were waste. Tr. 452. Cenex decided to go with a unitary or turnkey system, where one contractor, PSC, would be responsible to come to the refinery twice a year, centrifuge the waste, package it, write the necessary shipping manifest, and ship the waste to an approved disposal site. Some of the sub-contractors PSC used were the same ones Sims already used (the sub-contractors for the centrifuging and the transportation didn't change) Tr. 104. The disposal site to receive the waste became one farther from Laurel. The sub-contractor used to prepare the shipping manifests was Baretooth Environmental, which Brown had no role in selecting; PSC chose it. Tr. 102-104, 181, 452; CX 18 at 3.

The first shipping manifest Baretooth prepared wasn't correct, so when Sims reviewed it on April 18, 2005 he wouldn't sign it; Brown did. Tr. 108, 454; CX 18 at 3. Brown told Sims to do whatever he had to do to become comfortable with signing Baretooth's manifests, including using the old contractor, Bill Davis of Montana Environmental Solutions (Tr. 103) to review Baretooth's work if he had to. Tr. 181-184, 454 CX 18 at 3. Sims objected to the waste he perceived in bringing back Davis, the contractor he had historically worked with, to review the work of the new sub-contractor, Baretooth. Apparently Baretooth's work has proven adequate, Cenex uses it to this day. Tr. 454-455, 601.

To Sims, the problem he saw as inadequate work by Baretooth was the "final straw." Tr. 106. "I knew that that stuff like this was just going to, to continue and I could no longer tolerate it." *Id.* But Cenex hired PSC as the turnkey contractor on its hazardous waste removal to save money, not to goad Sims to resign. That change was a financially driven decision, it wasn't harassment, even though Sims perceived it that way.

Sims decided he would find another job. He already had applied to Flying J, a refinery in Bakersfield, California, in mid-March, 2005. It hired him at a higher annual salary, although when all aspects of the compensation package are

considered, it may not have been as favorable. The job required him to move from Montana, which he was loath to do. He resigned from Cenex on April 25, 2005. CX 19. He sought employment protection as a whistleblower with OSHA on May 10, 2005. RX 104.

I. Harassment and Constructive Termination

Conditions at Cenex didn't inflict indignities on Sims that altered the conditions of his employment, created an abusive working environment, nor would they have detrimentally affected a reasonable person, although they affected him enough to cause him to resign. In October 2001 he was seriously thinking that he needed to find another job, before he reported any of his findings about the re-ranging of the orifice meter on SRU #2 to Perga. Tr. 159-160; CX 47 at D633.

Besides being burned out with his work, Sims ultimately became deeply disillusioned:

- disillusioned with local management at the Laurel refinery, where employees and managers intentionally evaded the operational limits the orifice meter was meant to impose on SRU #2, and initially put the best face on what he had turned up as they reported the misdeeds to the EPA, rather than admit guilt unequivocally;
- disillusioned with Cenex headquarters staff that failed to fire anyone once he brought the intentional re-ranging to their attention;
- disillusioned with the EPA at the local level, and its Criminal Investigation Unit, that reneged on what Sims believed were commitments to allow him to make the case for criminal prosecutions, if not file them without additional urging from Sims; he took a personal interest in bringing Cenex to criminal account. *See*, Tr. 55-56, 66-68. Government indifference to his efforts left him smoldering;
- disillusioned with the EPA Inspector General and even the Montana U.S. Attorney, who wouldn't bring criminal charges against Cenex and its officers or employees; and
- disillusioned that he wasn't made the manager of the Environmental Health and Safety unit at Laurel in 2001 or especially in 2003, when he had to work for Brown, who he didn't want as a manager.

Disillusionment may explain his change in mood that led Sims' primary care physician to prescribe an anti-depressant for him in mid-2004. Tr. 135-138; CX 17. He had felt moody and depressed back in October 2001, before he reported the changes made to the SRU #2 orifice meter, which is the event Sims says initiated his whistle blowing. Tr. 645; CX 47 at D633. He told his doctor in May 2004 (about a year before he quit) that he had discovered improprieties at Cenex about two and a

half years earlier, but that “the people he brought the information to turned out to be the culprits and they are still there,” and that the “EPA is putting [him] off and not following through so that he is in this pretty stressful situation every day.” He also mentioned that “[t]wo of the EPA people he thinks are screwing him over will be meeting with him in seven days and he wonders if he should just call in sick to work.” CX 47 at D629-630. The anti-depressant (Paxil) and anti-anxiety medication (Xanax) he was prescribed in May helped him sleep and made him “more mellow at work” by June, 2004. CX 47 at D627.

The lens of disillusionment predisposed him to interpret actions of Cenex managers, officers and employees as retribution for his disclosure about the orifice meter tampering to the Cenex corporate office on December 5, 2001, or to the EPA on December 18, 2001. (Cenex never knew of his contacts with the EPA after it had arranged the December 18, 2002 telephone conference call). But it just wasn't so.

The evidence proves neither harassment or constructive discharge.

The findings on the liability aspect of the case make it unnecessary to consider the evidence Sims offered on damages.

Conclusions of Law

The main legal issues are which of the claims Sims raised are timely, and whether he proved retaliatory harassment or a constructive termination.

I. Timeliness of the Harassment and Constructive Termination Complaints

Many things that Sims relies as proof of retaliation were discrete acts, and therefore discrete claims under *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 114-15 (2002), that the Secretary could remedy only if a complaint were filed about them within 30 days after they happened. The time to complain under the Clean Air Act is brief—30 days—as it is under the Comprehensive Environmental Response, Compensation and Liability Act. 42 U.S.C. §§ 7622(b)(1); 9610(b); 24 C.F.R. §24.3(b); *School District of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981)(Congress balanced the protection to employees with a short time to complain to the Secretary of Labor).

The ARB carefully enforces the "discrete acts" principle the U.S. Supreme Court laid down in *Morgan*. See, *Lewis v. U.S. Environmental Protection Agency*, ARB No. 04-117, ALJ Nos. 2003-CAA-5 and 6 (ARB Mar. 30, 2007), *amended on reconsideration* (ARB June 30, 2008). An adverse employment action such as a termination, failure to promote, denial of transfer, or refusal to hire happens on an identifiable day. *Morgan*, 536 U.S. at 114. The time to challenge a discrete retaliatory act is counted from the day it happened. *Morgan* at 110. Sims' constructive termination allegation identifies a discrete act for which he filed a timely complaint. The less than fully acceptable performance evaluation Sims

received from Brown in 2004, the failure to promote him to manage the Environmental Health and Safety unit after Perga retired in 2003, and the 4% annual increase Sims received in 2002 each took place more than 30 days before he complained to the Department on May 10, 2005. None are things the Secretary could undo or grant relief for.

A harassment claim by its “very nature involves repeated conduct,” and “cannot be said to occur on any particular day.” *Morgan* at 115. All Sims’ grievances properly may come into evidence to show harassment, but the relief could go only to harassment as a general matter, he could not use that claim to receive relief for old discrete events (again, the 2002 pay raise Sims believed inadequate due to retaliation by Perga, the failure to promote him to management after Perga retired, or the less than satisfactory performance evaluation Brown gave him for 2004).

II. Hostile Work Environment

The concept of a hostile work environment, which was first developed in cases that alleging race-based and sex-based employment discrimination, applies to allegations of whistleblower discrimination. *Varnadore v. Oak Ridge Nat'l Lab.* (*Varnadore II*), Nos. 1992-CAA-002, *et al.*, slip op. at 71 (ARB June 14, 1996), *aff'd*, *Varnadore v. Sec'y of Labor*, 141 F.3d at 625 (6th Cir. 1998). Those claims involve conditions or repeated conduct that occur "over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Morgan*, 536 U.S. at 114-115. But a hostile work environment claim requires a complainant to prove the workplace is “permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.” *Morgan*, 536 U.S. at 116 (internal quotations omitted).

To succeed on a hostile work environment claim, a Complainant must prove by a preponderance of the evidence that 1) he engaged in protected activity, 2) he suffered intentional harassment related to that activity, 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and to create an abusive working environment, and 4) the harassment would have detrimentally affected a reasonable person and detrimentally affected him. *See Lewis supra*, amended slip op. at 5; *Erickson v. U.S. Emtl. Prot. Agency*, ARB Nos. 03-002 -004, 03-064; ALJ Nos. 1999-CAA-002, 2001-CAA-008, -013, 2002-CAA-003, -018, slip op. at 19 (ARB May 31, 2006).

Whether the work environment is hostile is determined by looking at the totality of the circumstances: the frequency of the harassing conduct, its severity, whether the conduct was genuinely humiliating or merely an offensive utterance, and whether harassing conduct unreasonably interfered with an employee’s work performance. *See, Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (involving a Title VII claim where a manager repeatedly denigrated a female employee and

made inappropriate sexual comments), quoted in *Morgan* at 116. Careful analysis is required "to ensure that Title VII [or any employment discrimination statute] does not become a 'general civility code.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, (1998). Proper application of the standard distinguishes complaints based on invidious discrimination from those rooted in the ordinary trials and tribulations of the workplace. *Id.*

1. Protected Activity

Whether Cenex actually exceeded the permitted sulfur production level of 19.9 LT/D by re-ranging the orifice meter on the SRU #2 is not an issue to be resolved here. An actual violation of the Clean Air Act or of the Comprehensive Environmental Response, Compensation and Liability Act isn't an element of the claim for employment protection. The EPA, the agency with regulatory jurisdiction, was fully informed and took whatever action it thought appropriate in the consent decree. These actions by Sims qualify as protected activities:

- his reports about the SRU #2 orifice meter re-ranging made both within Cenex to his immediate supervisor, Perga, in November 2001 and to others (Kimmert and Knepper) at the refinery;
- his call to the Cenex environmental hotline on December 5, 2001 and his discussions with King and Kastelic who investigated his allegations about the re-ranging;
- the statements he made to Betsy Wahl of the Montana EPA office during the December 18, 2001 conference call Cenex arranged because of Sims' call to the Cenex environmental hotline;
- his complaints about retaliation expressed to Kimmert in their meeting on March 8, 2002 and their later meeting in March about Sims' 2002 salary increase;
- his complaints to Kastelic about criminal conduct in re-ranging the meter and about retaliatory harassment in his letter of September 23, 2002.

All were directly and quite specifically related to a potential violation of the predicate environmental statutes or their employee protection provisions. They constitute, individually and in the aggregate, protected disclosures.

The discovery of the meter re-ranging when Perga assigned him to look onto it as one of the EPA's marquee issues doesn't lose its protected status because Sims was reporting something he found in the course of doing his job. *Willy v. Admin. Review Board, U.S. Dep't of Labor*, 423 F.3d 483, 489 & n. 11 (5th Cir. 2005) (claim under the Clean Air Act, among others); *Stone & Webster Eng'g Corp. v. Herman*,

115 F.3d 1568, 1576 (11th Cir.1997) (claim under the Energy Reorganization Act); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir.1985) (claim under the Energy Reorganization Act); *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y Apr. 27, 1987) (order of remand).

Internal disclosures and complaints qualify for protection. *Passaic Valley Sewerage Commissioners v. United States Dept. of Labor*, 992 F.2d 474 (3rd Cir. 1993). That the EPA or the government agencies may have known of the potential violations from other sources (the commonality of meter re-rangings nationally that had made it a marquee issue for the EPA) doesn't matter. The disclosures need not be unique, or the first notice the employer or the regulator has of a potential violation, to be protected. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983).

Aside from the internal disclosures, Cenex knew of only one external protected disclosure—the December 18, 2001 conference call Cenex arranged with the EPA. Sims' later contacts with the Betsy Wahl on the evening of December 18, 2001, the three meetings with employees of Criminal Investigation Division of EPA, his contacts with the Inspector General of the EPA in Denver and Washington, D.C., and with the U.S. Attorney in Montana aren't useful to Sims as protected activities; he successfully kept them all from Cenex. Managers and co-employees can't retaliate for things they didn't know about. *Hasan v. J.A. Jones, Inc.*, ARB No. 02-123, ALJ No. 2002-ERA-5 (ARB June 25, 2003).

2. No Intentional or Retaliatory Harassment

After proving he engaged in protected activities, Sims' claim founders, for he didn't suffer intentional harassment for them. Whether a retaliatory motive led to harassment or to another specific adverse employment action (here the claimed constructive termination) is a legal conclusion the adjudicator infers from the facts proven at trial. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). For the reasons already explained, I don't find Sims suffered intentional harassment or a hostile working environment, and certainly not severe and pervasive harassment that altered working conditions and create an abusive working environment the U.S. Supreme Court described in *Morgan*, 536 U.S. at 116.

To succeed with a hostile work environment claim the second element the Complainant must prove by a preponderance of the evidence is objectionable conduct so severe or pervasive that it altered the conditions of employment, and created an abusive working environment. This formulation has been refined somewhat over time, the employer's retaliatory conduct at one time had to be "extremely serious or serious and pervasive." See, the commentary in *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 10 & n. 23 (ARB Jan. 31, 2006) relying on *Belt v. United States Dep't of Labor*, 163 Fed.Appx. 382, 389 (6th Cir. 2006) (Jan. 25, 2006), *aff'g sub nom. Belt v. United*

States Enrichment Corp., ARB No. 02-117, ALJ No. 01-ERA-19 (ARB Feb. 26, 2004). The appropriate formulation was the essential point of the U.S. Supreme Court's opinion in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

If a hostile work environment exists, the employer is liable for harassment not only by managers, but by co-workers when the employer knew or should have known about the harassment, and failed to take prompt remedial action. *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-014, slip op. at 47-48 (ARB Nov. 13, 2002). Cenex knew what adverse actions Sims was complaining about—he made them clear to Kimmet in their March 2002 meetings and to Kastelic in his September 2002 letter. But Cenex had no duty to stop things that weren't harassment.

As explained in the Findings of Fact, Sims wasn't shunned by Knepper, or repeatedly taunted by sarcastic greetings from Davis in retaliation for his protected activities. Sims never complained of those things to Kimmet in any of the meetings they had where Sims brought up retaliation (nor did Kimmet observe them), nor did Sims complain of those behaviors in his letter to Kastelic. Neither do I believe that Strauch dismissed his suggestion for how to extinguish the fire in the hazardous waste bin in a calculated attempt to demean Sims. Strauch didn't know of any protected activities by Sims, so what he said had no retaliatory motive.

Sims' 2002 raise wasn't reduced for uncovering the re-ranging, or bringing it first to the attention of his supervisor Perga, and then up the chain of authority to Kimmet and Knepper, or letting them know criminal culpability could be involved. After those disclosures, and the ones he later made to the Cenex environmental hotline on December 5, 2001 and in the conference call to the EPA on December 18, 2001, he suffered no retaliation for his internal or external disclosures. He wasn't assigned make-work by Perga, kept from attending a professional conference in New Orleans; passed over for the promotion that went to Brown; singled out for false criticism in his 2003 or 2004 performance evaluation or for the lack of a lid on a universal waste bin; overloaded with work after the consent decree came into effect, or in his daily activities throughout those years. Neither managers nor workers at the Laurel refinery plotted against Sims by dropping off a hazardous waste drum on a storage pad shortly before an inspection; listed him purposefully in an e-mail attachment as the engineer responsible for MACT inspections, when he wasn't; or sought to distress him by moving to a turnkey system for removing hazardous wastes from the refinery.

Courts have cautioned that the fact-finder should not “carve up the incidents of harassment and then separately analyze each incident, by itself, to see if each rises to the level of being severe or pervasive.” *Mason v. Southern Illinois University at Carbondale*, 233 F.3d 1036, 1044-1045 (7th Cir. 2000). The very concept of “pervasiveness” implies the need to look at the totality of the circumstances.

But such warnings often are offered to trial judges as they consider pretrial dispositive motions, such as motions for summary judgment. A judge can lose sight of the overall impression evidence may build for a jury, by focusing too intently on whether individual instances the plaintiff points to as indicia of harassment show the necessary offensiveness, severity, frequency, and ultimately prove pervasive hostility at the workplace. *See, e.g., Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999) (finding that where the plaintiff's claim was based on the behavior of supervisors and coworkers, conduct of both types of harassers was relevant). There the Sixth Circuit found that:

Under the facts as alleged in this case, viewed in their entirety and in their proper context, we believe a rational trier of fact could conclude that Williams was subjected to a hostile work environment. Certainly, at minimum, the allegations raise a question of fact for the jury and were not properly summarily dismissed.

Williams, 187 F.3d at 563

Here the entire trial has been held. Analysis of the instances Sims relies on as proof of intentional retaliation, the fulcrum on which all whistleblower discrimination claims turn, is appropriate.

Pausing to look at all the evidence he offered as a whole, rather than as a series of independent events, doesn't alter the outcome. The mosaic of proof reveals a picture of burn-out and disillusionment, little about retribution. Sims failed to make out a hostile work environment claim. *Cf., Vasquez v. County of Los Angeles*, 349 F.3d 634, 642-643 (9th Cir. 2003) (finding no hostile environment existed where the plaintiff was told that he should consider transferring to work in the field because "Hispanics do good in the field," was told that he had "a typical Hispanic macho attitude," a co-worker made continual, false complaints about the plaintiff to his supervisor, and plaintiff was yelled at in front of others).

Objective hostility is determined by examining the totality of the circumstances and whether a reasonable person with the same characteristics as Sims would perceive the workplace as hostile. *Harris v. Forklift Sys., Inc.*, 510 U.S. at 20-21. Taken as a whole, the conditions for Sims at Laurel weren't "permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive [*i.e.*, a hostile] working environment." *Morgan*, 536 U.S. at 116.

III. Constructive Discharge

The failure of the harassment claim dooms the constructive discharge claim. *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000); *West v. Marion Merrell Dow, Inc.*, 54 F. 3d. 493, 497 (8th Cir. 1995).

Constructive discharge has much in common with hostile work environment claims, but requires more. An employee with a viable discrimination claim doesn't necessarily have a valid constructive discharge claim. Courts distinguish between circumstances where a resignation may be a reasonable response to discrimination, and those where "the abusive working environment became so intolerable that [the employee's] resignation qualified as a fitting response." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 133 (2004). Only in the second situation is the employer liable for damages that arise when the employee quits the job. The jury instruction for constructive discharge distills the essence of that claim: a constructive discharge occurs when the working conditions are so intolerable that a reasonable person in the plaintiff's position would feel compelled to resign. *See*, 9th Cir. Civil Jury Instr. 10.4C, which is based on *Suders*, 542 U.S. at 147.

Intolerable working conditions themselves aren't enough. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002) (requiring the plaintiff to show a nexus between the discriminatory remarks and subsequent employment decisions); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 659 (7th Cir. 1991) (en banc) (emphasizing there must be a causal relationship between the protected characteristic and the adverse conditions for actionable discrimination). Sims must show conditions became intolerable due to retaliation for his protected disclosures. 1 LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 20 (IV)(B) (4th ed. BNA Books 2007) (The employee "must establish a causal link between the alleged intolerable conditions and some illegal discrimination").

That isn't what happened here. Sims found the working conditions at Cenex subjectively intolerable because he was burnt out and so thoroughly disillusioned with his job at Cenex that he quit. The things he found intolerable didn't happen because Cenex managers and employees were retaliating against him for protected disclosures.

No relief is due for constructive discharge.

IV. The Ledbetter Act Does Not Alter the Legal Analysis

The various sections of the Lilly Ledbetter Fair Pay Act, Pub. L. 111-2, makes no change in these principles, as it modifies neither the Clean Air Act or CERCLA. The Ledbetter Act amends:

- Sections 706(e) and 717 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-5(e) and 2000e-16)) (Ledbetter Sec. 3 and 5(c)(2));
- Section 7(d) and 15(f) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 626(d) and 633a(f)) (Ledbetter Sec. 4 and 5(c)(3));
- Sections 503 and 107(a) of the Americans With Disabilities Act of 1990 (42 U.S.C. §§ 12111, 12203, and 12117(a)) (Ledbetter Sec. 5(a)),

- Sections 501(g) and 504(d) and 505(a) of the Rehabilitation Act of 1973 (29 U.S.C. §§ 791(g), 794(d), 794a(a)) (Ledbetter Sec. 5(b),(c)(1)).

Order

The complaint Max Sims filed seeking employment protection is dismissed.

So Ordered.

A

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).