

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 March 2011

Case No.: 2010-CAA-00008

In the Matter of:

DOMINICK VALENTI,
Complainant,

v.

SHINTECH, INC.,
Respondent.

APPEARANCES:

Michael Howell, Attorney
For Complainant

Jay C. Counts, Attorney
Steven L. Rahhal, Attorney
Edward Berbarie, Attorney
For Respondent

BEFORE:

Stephen L. Purcell
Chief Administrative Law Judge

**DECISION AND ORDER
DISMISSING COMPLAINT**

This matter arises under the employee protection provisions of the Clean Air Act, 42 U.S.C. § 7622 (“CAA”), the Toxic Substances Control Act, 15 U.S.C. § 2622 (“TSCA”), as implemented by 29 C.F.R. Part 24, and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 41 U.S.C. § 9610 and applicable regulations found at 29 C.F.R. Part 24. These statutes prohibit employers from discriminating against any employee with respect to his or her compensation, terms, conditions, or privileges of employment because that employee engaged in activity which is protected by the Acts.

Procedural Background

Dominick Valenti, Complainant, filed an appeal with the Office of Administrative Law Judges on August 31, 2010, from an August 5, 2010 denial of his complaint by the Occupational Safety and Health Administration, U.S. Department of Labor.

A formal hearing was held on the merits in Houston, TX on November 15-17, 2010. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence, submit oral arguments, and file post-hearing briefs. Respondent's Exhibits ("RX") 1-46 were admitted into evidence and it was decided that Complainant's Exhibits ("CX") would be admitted on a case-by-case basis throughout the hearing. Post-hearing briefs were received from both parties.

On December 2, 2010, I issued an Order granting Complainant's motion to amend his complaint to include a claim under CERCLA and to take judicial notice of the facts set forth in CX-125 obtained from the Agency for Toxic Substances and Disease Registry regarding the physical properties of vinyl chloride.

On February 1, 2011, I issued an Order granting Respondent's motion to strike Complainant's motion to reopen the record to include news reports concerning an investigation being conducted by the Environmental Protection Agency and the State of Texas involving Shintech.

The findings of fact and conclusions of law contained herein are based upon my analysis of the entire record, the arguments of the parties, the applicable regulations, statutes, and case law, and my observation of the demeanor of the witnesses who testified at the hearing. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

I. ISSUES

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

II. SUMMARY OF THE EVIDENCE

Witness Testimony

Dominick Valenti

Dominick Valenti testified that he started working for Shintech in Plant-II as an operator on January 12, 1981. Tr. 370. In 2002, he was moved to Plant-I to help with their new computer system because he had experience with the system from working on it in Plant-II. Tr. 373-374. He was at Plant-I for approximately six and one-half years before he was fired, and he worked on three different shifts while assigned there. Tr. 463. Sometime in September or October 2008 Complainant was transferred to a shift on which Michael Irvin worked. Tr. 440. Valenti, Irvin and the other operators typically worked 12-hour rotating shifts where they would work four consecutive nights, have three days off, work the next three days, have the weekend off, and then work three midnight shifts. Tr. 441. During normal operations, there were five operators assigned to a shift: one worked the control board; one worked in the reactor area;¹ one covered the dryers and strippers;² one worked “utilities” where all the incoming and outgoing water was treated; and one was assigned to the continuous operation unit which handled the vinyl and gas. Tr. 442.

Complainant testified that he thought he was fired in retaliation for the various environmental complaints he had made over the years. Tr. 381. He asserted that five or six days before his termination he had complained to Mitch Hamilton, his supervisor at Plant-I, about the dryers in Plant-I “blowing out” and about a 401 tank incident where the tank was dropped to the ground. *Ibid.* Complainant said that when he came back to work after being off for seven days, he complained to Hamilton that the dryers looked terrible and that he was getting hit with pellets of PVC floating around in the air. Tr. 381-383. Valenti said he told Hamilton they should let upper management know about the dryers but Hamilton never wrote up a report. Tr. 382.

Complainant also testified about purported releases of vinyl chloride during 2001 and 2002, which he heard about but did not personally witness, Tr. 394-398, and said that in either 2003 or 2004, he called an EPA criminal investigator to report these incidents anonymously but never identified Shintech as the responsible company. Tr. 398-400. In September 2008,

¹ According to Mitch Hamilton, a supervisor at Shintech, Plant-I contains six reactors, labeled “A” through “F” which are large vessels containing agitator blades used in the process of converting vinyl chloride into PVC. Tr. 55-56. The reactors mix water and vinyl chloride causing a reaction which creates a PVC “slurry” that looks like “a real fine sand in water mixture.” Tr. 58-59; Tr. 298. The PVC slurry from reactors C and D is pumped under pressure into the “401 B tank” which contains a screen at the bottom to filter out large particles. Tr. 59. The mixture is then pumped from the 401 B tank into a “400 tank,” which is used as a holding tank to regulate the flow of the mixture before it goes into a steam “stripper.” Tr. 59-63. The “stripper” removes any excess vinyl chloride gas from the PVC slurry. Tr. 62. Vinyl chloride gas is vented into a contained system at various points during the process. Tr. 61-63.

² “Dryers” are downstream from the stripper and, according to Complainant, consist of stacks which are approximately 24 inches in diameter, “a couple hundred feet high” and have a “choke” on top designed to catch light particles of PVC floating around during the drying process. Tr. 376-77. Complainant further testified that: “If they plug up real bad, then they’ll blow out the stack.” Tr. 377.

according to Valenti, he called EPA again and reported that the company was using a transformer that had a hole in it, this time giving both his name and Shintech's name. Tr. 400-401. Complainant stated he arranged to meet with an investigator, Agent Rainey, on December 23, 2008, where he told the investigator that during a plant shutdown at Shintech in 2005, someone dropped a whole reactor on the ground because they could not discharge the 401B tank. Tr. 402-403.

According to Valenti, he mentioned his environmental concerns regarding what happened during the 2005 shutdown³ to Michelle Hickner in Human Resources. Tr. 421. He said that sometime in 2006 he also showed reports about a Plant-II release to Ted Martin, a supervisor at Plant-I. Tr. 427. Additionally, Complainant testified that he made environmental complaints to Andrew Floyd, the Assistant Plant-I Superintendent, Tr. 435, 437, and complained to Randy Stanford, Floyd's supervisor, about how badly the 2005 shutdown was going in Plant-I. Tr. 430. Valenti further testified that he spoke to Stanford in 2008 about UN-301, an orange colored oily byproduct with strong vapors, draining into the ground. Tr. 431.

According to Complainant, he attended "harassment" training at Shintech in 2004. Tr. 451, 455. Based on that training, it was his understanding that he had to personally address any harassment issues involving co-workers with that person before he reported the problem to his superiors. *Ibid.* He explained that was what he was attempting to do when he confronted Michael Irvin in July 2009 in the dryer lab in Plant-I which ultimately led to his discharge. Tr. 454, 456. Valenti described the room in which the confrontation occurred as approximately 8 feet wide and 16 to 18 feet long, and he testified that Irvin was running tests on samples and seated with his back to Valenti when he entered the room. Tr. 457. Complainant further testified that he was not mad at Irvin "except for the way he had been treating me," and he wanted Irvin to "quit talking to me and doing some of the things he was doing to me." *Ibid.*

According to Valenti, the reason he confronted Irvin in the dryer lab was because Irvin had been rude to him the day before. Tr. 473. What Complainant perceived to be rude was Irvin's statement to him that "I don't care, you need to get it now." *Ibid.* Complainant was sure that Irvin said "a couple other things in there" but he could not remember what they were. Tr. 474. Valenti never reported the incident to his supervisor, anyone in management, or anyone in Human Resources. *Ibid.* Instead, he decided to handle the situation himself, and approached Irvin in the lab the following day on Saturday, July 18, 2009. *Ibid.* Valenti initiated the contact with Irvin and secretly recorded their conversation. Tr. 475. During the conversation Valenti threatened to sue him, said he was "going to take care of things outside of here," and told Irvin "you're going to talk to me right." Tr. 476. He also told Irvin that it was going to cost him and even though Valenti might not win any money in court, Irvin would have to pay for lawyers to defend himself. *Ibid.* Valenti further told Irvin that he could outspend him. Tr. 477.

Complainant testified that after his confrontation with Irvin, Michele Hickner, the head of HR, came to the plant and told Valenti he was being sent home pending an investigation. Tr. 477. Hickner further told Valenti that she would contact him on Monday, and in fact did so. *Ibid.* Complainant returned to the plant on Monday, met with Hickner, and revealed to her for

³ Valenti testified that Shintech routinely shut down the plant to clean and inspect tanks, replace valves and perform other maintenance. Tr. 391. The 2005 plant shutdown was part of that process. *Ibid.*

the first time that he had recorded his conversation with Irvin on July 18th. Tr. 478. Both before and after they listened to the tape, Valenti maintained that he had not threatened Irvin. *Ibid.* Complainant testified:

I did not threaten Michael Irvin with bodily harm like I was accused of when they walked in the control room and he said I threatened his wife, his family and himself. No, I didn't do that.

Tr. 478-79. He never apologized for his confrontation with Irvin because he did not believe he had done anything wrong. Tr. 479.

Complainant also testified that he had previously talked to both Stanford and Hickner about getting transferred from the shift on which he worked with Irvin because they did not get along. According to Valenti, despite his requests, he was never transferred. Tr. 460. Complainant also testified he believed he was put with Irvin because of an EEOC complaint Valenti had filed. Tr. 461. Valenti stated that Stanford was harassing him

because I complained about being transferred over to that shift in the first place. He could have moved other people around. I think because of the EEOC complaint he was staying out of it. And Mike might have been his tool to get me.

Ibid. Complainant felt that his union-organizing activity may have also had something to do with why Stanford was harassing him. *Ibid.* However, he acknowledged that Stanford told him the reason he was ultimately terminated was because he had “numerous warnings about getting along with people.” *Ibid.*

Claimant described several documents in evidence showing he complained that he was discriminated against because of his age and a possible disability, including formal charges of age discrimination he filed with the EEOC both before and after he was fired by Shintech. Tr. 489-499, *See* RX-8, RX-9, RX-10, RX-11, RX-13, RX-17. Complainant explained that Respondent's Exhibit 4 includes documents he submitted to the EEOC just after he was terminated from Shintech, which allege that he was discriminated against by Shintech because of his age and his disability. Tr. 483-487, RX-4. Complainant identified Respondent's Exhibit 7 as a letter that he prepared on April 28, 2008, in which he complained that a younger employee received the instructor position at a fire school instead of him. Tr. 488, RX-7.

Michael Irvin

Michael Irvin has been a process technician at Shintech in Plant-I since January of 2002. Tr. 577-578. He recalled that when he was a fairly new employee, he was disciplined for not following proper procedures when dealing with a plugged line, and testified that he received a cut in pay because of that incident. Tr. 578. He further testified with respect to that incident that he left the area before the flange on the pipe was removed by the maintenance crew but learned later that there was still pressure in the pipe when the knockout pot was opened and some material was expelled from the line. Tr. 580-82.

Irvin next testified about an incident which occurred in November of 2008 involving some discussions between him and Complainant about who should be the “step-up” supervisor⁴ on their shift. According to Irvin, Valenti had told management he did not want the position and Irvin was subsequently assigned as the step-up supervisor for the shift. Irvin testified that he later told Valenti during a shift that Valenti should be the step-up supervisor because he had a bad knee and should work inside. Tr. 584. According to Irvin, “We had a project going on outside the next day, and I told him I'd rather him be inside and do it and I'd go outside and do all the running around.” Tr. 584-85.

Subsequently, Irvin and Complainant were summoned to a meeting with Mitch Hamilton and Michelle Hickner about the incident, during which Hickner told Irvin and Valenti they needed to get along and work together. Tr. 586-87. According to Irvin, Hickner further instructed them that if there were any further problems they were to come directly to her to discuss them. *Ibid.* Irvin testified that he used to joke around with Complainant before the November 2008 meeting, but thereafter he only spoke to Complainant when absolutely necessary for work. Tr. 585, 589.

Irvin next described the incident which occurred on Saturday, July 18, 2009, which preceded Valenti's firing. He testified:

I was in [the lab] running samples, and Mr. Valenti approached me and told me that he didn't like the way I had spoke to him about a issue that we had had the day before, and he got very upset, telling me that he could – that if Michelle [Hickner] and Mitch [Hamilton] would not help him with me that he would take it into his own hands.

He said that he would spend more money than I could spend. He said that he would make sure that – you know, that – the first thing he said was that [he] would take care of me outside of the plant. That point, that was – I felt very threatened at that point.

And then when he said that he could out-spend me, same thing. You know, I'm not quite at a point like he is in my career where I got a lot of money to be spending, and I felt very threatened, physically and financially, after that.

Tr. 590. When asked if Valenti threatened his family, Irvin replied:

I felt like he did when he said he would take care of me outside of the plant. I didn't know if that meant me at home, me at work, out in the parking lot, or when I was with my family. Yes, I felt my family was very threatened.

Ibid. Irvin continued:

⁴ When the regularly-assigned supervisor is unavailable for a particular shift, a senior member of the shift who has been previously designated by the supervisor “steps up” to the supervisor's position for that shift.

The whole time, he was walking closer to me and raising his voice and started yelling at one point. Yes, I did feel very threatened.

Tr. 591-92. Irvin testified further that he felt very threatened by Complainant since he had a reputation for stirring things up and that he was always threatening to sue people. Tr. 599-600.

Immediately following the July 18, 2009 incident, Irvin went to Mitch Hamilton, his supervisor, and told him what had happened. He then wrote up a summary of the incident at his supervisor's direction that same day. Tr. 592, RX-3.

Michelle Hickner

Michelle Hickner has worked at Shintech for almost six years and is presently Shintech's Human Resources Manager. Tr. 166. She testified that she has held that position for a month, and that she was Shintech's Human Resources Supervisor before being promoted to HR Manager. *Ibid.* With respect to the reason for Complainant's termination, Hickner testified that it was "for making threats towards another employee after he had been asked on another occasion if there were any other issues to come to HR or to come to a supervisor." Tr. 169.

Hickner testified that Complainant never discussed environmental issues with her, although she did recall that he mentioned a 2005 plant shutdown on one occasion. Tr. 170. She testified that she does not remember the details of this conversation, but told Complainant that any concerns he had regarding that matter should be discussed with the safety department. *Ibid.*

Hickner stated that she received a letter from Complainant complaining about Michael Irvin and the way he treated him and subsequently arranged a meeting with the two of them in November 2008. Tr. 711, RX-10. During the meeting, she told them that, "they didn't have to like each other but they had to get along, they needed to respect each other, and if there were any other issues that they needed to come to me with it." *Ibid.* Hickner testified that her receipt of the letter from Valenti was the first time she became aware of any problems between him and Irvin. Tr. 712. She felt that the problems were the result of a personality conflict and wanted to get the two of them together so they could get along. *Ibid.* Hickner learned a few weeks before the hearing in this case that Mitch Hamilton, who was Valenti's and Irvin's supervisor and had attended the meeting, recorded most of the meeting.⁵ Tr. 714. Hickner's introductory comments were not recorded at the start of the meeting, and a portion of the conversation at the end of the meeting was not recorded. *Ibid.* Between the meeting in November 2008 and July 2009, Valenti never again came to her with any complaints regarding disagreements involving him and Irvin. Tr. 714.

According to Hickner, Mitch Hamilton called her at home on Saturday, July 18, 2009 and said that Michael Irvin had come to him and told him that Complainant had threatened him and his family. Tr. 716. Hickner testified that she subsequently contacted Jim Hodges, the Site

⁵ Jim Hodges, Shintech's Site Manager, only learned the day before the formal hearing of the fact that Mitch Hamilton had secretly recorded the November 2008 meeting. Tr. 835. He was contemplating disciplinary action against Hamilton but had not yet decided on what that might be. Tr. 836. Hodges believed Hamilton's actions were inappropriate and should not have happened. *Ibid.*

Manager, to inform him of her conversation with Hamilton, and stated that Hodges ordered her to go to the plant and talk to Irvin to get his version of what happened. Tr. 716-717. When she got to her office, Hickner met with Michael Irvin, and he provided her with a written complaint he had drafted at Mitch Hamilton's request describing his confrontation with Valenti. Tr. 718. According to Hickner, Irvin appeared to be very upset. She testified:

Mr. Irvin at the time was visibly shaken. His voice was shaky, his hands were shaky, and he explained to me that he felt very threatened, that Don had threatened to take care of him outside the gates, and that he had threatened him with a lawsuit.

Ibid. Hickner subsequently called Hodges at home again, described her conversation with Irvin and the contents of his written complaint, and was told to defuse the situation by sending Complainant home with pay pending an investigation. Tr. 719. She thereafter informed Valenti that he was to go home and told him that they would discuss the incident again on Monday. Tr. 179, 182-189. According to Hickner, when she told Complainant he was being sent home, he got upset and complained that she did not care what he had to say. Tr. 721. Hickner responded that she did care what he had to say and informed Complainant that he should write down his account of what happened so they could discuss it on Monday. *Ibid.*

Hickner called Complainant into her office the following Monday to meet with her and Andrew Floyd, the Assistant Plant-I Superintendent, so they could hear his side of the story. Tr. 191, 724. According to Hickner, Complainant arrived at her office with a co-worker, Walter Burns, as a witness. Valenti thereafter told her that he had approached Michael Irvin the preceding Saturday and told him he did not like the way he talked to him and that Irvin was going to have to respect him. Tr. 192, 724. Hickner asked Complainant if he had threatened Irvin, to which he replied that he had done nothing wrong. Tr. 724. Valenti further told Hickner that he had made a tape recording of his conversation with Irvin which he would play for her. Tr. 192. He explained that once she listened to the tape, she would see that he had done nothing wrong. Tr. 724-725.

According to Hickner, after listening to the tape, she believed without a doubt that Complainant had threatened Irvin. Tr. 725. Hickner testified:

I absolutely could not believe that he was playing this tape for me that I had specifically asked him not two minutes before if he had threatened Michael Irvin in any way and he told me no. And, as we're listening to it and he's saying I'll take care of you outside the gate, I will take you to court, I will spend more money than you, I will – I don't know what else to say. I was floored.

.....

I took it as he was threatening him physically and financially. That was my understanding.

Ibid.

Hickner took the tape to Jim Hodges and recommended Complainant's termination, but it was solely Jim Hodges' decision to terminate him. Tr. 171, 726-728. Hickner testified that she did not believe Randy Stanford, Mitch Hamilton, Ted Martin, Erv Schroeder, or Andrew Floyd had any input in the decision to terminate Complainant. Tr. 733-735.

When questioned about another Shintech employee who was previously accused of making racial comments and threats against a co-worker, and harassing a contractor,⁶ Hickner explained that at the time of the incident, she and Hodges discovered that this employee was experiencing marital issues and had been off his anti-depressant medication, so they determined it was more appropriate, under the circumstances, to give the employee a "last chance agreement" rather than terminate him. Tr. 738, 741-742. She further testified that this employee had been very apologetic and explained that all of the incidents in which he was involved happened at once. In contrast, she testified, Complainant's interactions with Michael Irvin had occurred over a longer period of time, and Complainant had been expressly warned not to confront Irvin if there were further problems. Instead, Complainant was told to contact Human Resources about any such problems. Tr. 742-743.

At no time before Valenti was fired by Shintech did Michelle Hickner know of any issues Valenti had with Mitch Hamilton the week before his termination. Tr. 730. Hickner was similarly unaware of any issues Valenti had with PVC being expelled from the dryers in Plant-I, any issues raised to Ted Martin, any issues involving the release of vinyl chloride or chloride gas, any issues involving the UN-301 tank draining on the ground, or any other environmental or safety issues that Valenti may have raised with Shintech, the Environmental Protection Agency, the Texas Commission on Environmental Quality, or any criminal investigative agencies. Tr. 730-732. She also did not know that Valenti had contacted an attorney to discuss environmental or safety issues or that he had contacted any agencies besides the EEOC. Tr. 732. She had been told by Valenti in November 2008 that he was not happy about the way the Shintech plant shutdown was handled in 2005. Tr. 733. However, at the time Complainant was fired, she had no knowledge that Valenti had claimed Shintech was misreporting information to governmental agencies, and environmental issues did not play any part in her recommendation to Hodges that Valenti be terminated. *Ibid.*

Jim Hodges

Jim Hodges has worked at Shintech for twenty-one years and has been the company's site manager for the last three and a half years. Tr. 814-815. Hodges testified that he terminated Complainant because of an incident involving Valenti's threats against another employee at Shintech. Tr. 818. He said the conversation between Valenti and Irvin was recorded and Complainant's threats to Irvin sounded to him like they were premeditated. *Ibid.* Hodges explained that Complainant was fired because of the severity of the event, because he surreptitiously recorded the confrontation, because Valenti had been told by HR after November

⁶ The parties agreed at the hearing to designate any testimony regarding the above referenced individual as confidential. Accordingly, any references to the incident involving this individual will not use his name or other identifying information.

2008 to go to them if there were any further issues involving him and Irvin, because Valenti did not believe he did anything wrong, and because he showed no remorse. Tr. 818-820. Hodges testified that he was unaware of any complaints relating to environmental issues made by Valenti before he was terminated. Tr. 823-827.

With regard to Shintech's discipline of the employee who was accused of making racial comments and threats against a co-worker, Hodges testified that the company decided to give the employee a "last chance letter" instead of firing him because the incidents were spontaneous, not premeditated like the confrontation involving Complainant, and the employee was very remorseful, unlike Complainant. Tr. 829-832.

Mitch Hamilton

Mitch Hamilton began working in Plant-II at Shintech in 1982. Tr. 53. About six years prior to the hearing, he was transferred to Plant-I, and shortly thereafter he was promoted from an operator position to a supervisor position. Tr. 53-54.

Hamilton testified that he attended a meeting in November of 2008 involving himself, Michael Irvin, Complainant, and Michelle Hickner, during which they worked to resolve an ongoing conflict between Valenti and Irvin. Tr. 131-132. He stated the meeting was held in an office across the street from the control room, and he recorded the conversation. Tr. 131. Hamilton said the meeting came about because Complainant had filed an EEOC complaint against Irvin for picking on him. Tr. 153-154. According to Hamilton, Michelle Hickner told Complainant and Irvin during the meeting that "they did not have to like each other but that they did have to get along, they had to work together, if they had other issues they needed to come see myself or her or somebody else and not to be butting heads out in the plant." Tr. 154. Hamilton said the meeting did not accomplish anything because the two continued to pick at each other afterwards. Tr. 136.

Hamilton testified that Complainant and Irvin got into an argument in July 2009, after which Irvin came to him and told him that Complainant was threatening him and his family. Tr. 156-157. Hamilton stated he had not contacted HR again to report the ongoing issues between Valenti and Irvin until "[o]n a Saturday morning when Mr. Irvin came to me and told me he's had all he could, he needed to be moved from the shift or he would have to quit, or something." After Irvin told him that Valenti had threatened him, Hamilton told Irvin to write down his recollection of the conversation and said he would inform Michelle Hickner in HR of the incident. Tr. 157. Hamilton testified that Irvin was visibly upset. *Ibid.* He further testified that he was not involved in the decision to terminate Complainant's employment. *Ibid.*

With respect to Valenti's statements concerning an incident on April 2, 2009 involving a problem with the 401B tank in Plant I, Hamilton testified that some "slurry" had solidified in the tank and could not be pumped.. Tr. 64-65; RX 1. Hamilton said that Hamaguchi, the engineer working in Plant-I that night, instructed them to open the tank. Tr. 68-69. Hamaguchi had to call in water blasters to break up the solidified slurry so that they could get it out of the tank. Tr. 71-75. Once they broke up the mixture, it was removed from the tank with rakes and taken to Plant-II. Tr. 75-77. Hamilton testified that Walter Burns, one of Valenti's co-workers, got

caustic on his hand and arm when he was pulling some scale out of the tank. Tr. 86; RX 23. After the incident, he called Hamaguchi and Randy Stanford, the Plant-I superintendent, to report the injury. Tr. 89.

Regarding the PVC blowout incident referenced by Complainant, Hamilton testified that Valenti had asked him for a "PVC blowout report" form, but he explained to Complainant that there were no such forms, only incident reports. Tr. 147. When asked how Valenti responded, Hamilton testified he raised his voice. *Ibid.* He said the following night Valenti again approached him about wanting a form, that Complainant had gotten upset with him, and that he just walked away from Valenti and went into his office. Tr. 148-149. Hamilton said he called Tom Penny, the Plant-II supervisor, to tell him about this exchange, and Penny confirmed that there was no such report. Tr. 148-49. Hamilton further testified that he never discussed the incident with Michelle Hickner, Jim Hodges, or anyone else. Tr. 148-149. In fact, he explained, he never went to Michelle Hickner or Jim Hodges about any environmental issues that were raised by Valenti, or any other operator, because it was not their department. Tr. 150.

Randy Stanford

Randy Stanford testified that he is presently employed by Shintech as Superintendent of Plant-I, a position he has held since September 2004. Tr. 216. He holds Bachelor of Science degrees in safety and industrial hygiene and environmental science from the University of Houston, and an MBA from LeTourneau University in Houston. Tr. 221-222. Stanford testified that he considered Valenti to be a very good operator, and he gave him positive performance reviews. Tr. 223. Since he was Superintendent at Plant-I, he testified, he was the one who told Complainant he was fired, but he had no involvement in making that decision. Tr. 224-225. Stanford testified that he was unaware that Complainant was complaining about environmental quality issues at Shintech. Tr. 225.

Upon reviewing Complainant's personnel evaluation for 2007, in which he noted that Complainant should focus his leadership in a more positive manner, Stanford testified that "[Complainant] has a tendency to get people excited about things that they take action on that's not always the most positive action that I would have expected from an employee." Tr. 269-271, RX-26. He explained that Complainant incited other employees and would get them excited about things, such as convincing them they were not being listened to by their supervisors. Tr. 272.

Stanford examined a letter he wrote on December 15, 2008, which discussed ongoing problems between Complainant and Michael Irvin. Tr. 317-318, RX-28. He testified that Irvin came into his office around that time and complained that Valenti was becoming a real problem since their discussion with Hickner.⁷ Tr. 319. Stanford said he forwarded the letter to HR since they were handling the situation. Tr. 319-320.

⁷ The incident to which Stanford was referring occurred the prior month in November when Michelle Hickner met with Valenti, Irvin and their supervisor Mitch Hamilton about the EEOC complaint Valenti had filed against Michael Irvin.

Stanford testified that he moved Complainant around to various shifts within Plant-I as the need arose to balance shifts with experienced and inexperienced workers. Tr. 298-299, 334-335. He stated that the last time Complainant was moved to a different shift was because Mitch Hamilton, the shift supervisor, had come to him and said he needed more experienced operators on that shift. Tr. 335.

Stanford testified that Complainant attended quality safety meetings as a representative for his shift, but that he missed two of the meetings. Tr. 340-343.⁸ According to Stanford, Complainant was in a “step-up” position for a while during 2006, which means that he would step-in for a shift supervisor who was unavailable. Tr. 345-348, RX-30. Stanford stated that when Complainant was first put in this position, he complained that he did not want to be in it, so he had been looking for another worker to fill the step-up position. Tr. 347-348. Because of this, he was “totally shocked” when Complainant later complained to him about not being put in the step-up role in 2008. Tr. 348.

Walter Burns

Walter Burns testified that he has worked at Shintech for thirty-one years. Tr. 621. He stated that he has worked in both Plant-I and Plant-II, and has worked in Plant-I continuously since 1989. *Ibid.* Burns stated that he is an emergency medical technician and has received training in emergency medical techniques. Tr. 651.

Burns recalled an incident from 2008 where he opened up a 401B tank and got some caustic on his arm. Tr. 623-24. The flow of water into the 401 tank was stopped, which indicated it was plugged with too much PVC, and Burns called his supervisor, Mitch Hamilton. Tr. 624. Burns testified that Hamilton made the decision to open the tank, at which time they detected a “pretty strong odor of vinyl gas” and the tank was full of solidified PVC. Tr. 624-25. Hamilton, Jim Gandy and Burns attempted unsuccessfully to clear the PVC from the tank using a fire hose. Tr. 625. By that time, Hamaguchi had arrived, and he told Hamilton to call the water blasters. *Ibid.* Valenti and Burns removed the flange from the top of the tank, and also unbolted the flange on the side. Tr. 628-29. It took about an hour from the time the water blasters started until the tank was cleared. Tr. 632. They used highly-pressurized water to break up the solidified PVC, which ranged in size from “beach ball size” to “small chunks,” into pieces the size of golf-balls or smaller. Tr. 633-34. Burns cleaned the caustic off his arm and felt there was no need to seek medical treatment. Tr. 653. The PVC materials extracted from the tank were washed into the mechanical ditches which feed into a sump. Tr. 653-54. Trucks subsequently evacuate material from the sump and dump it into the “403 pit.” Tr. 654. Shintech has a contract with another company to remove and dispose of the PVC material from the 403 pit. *Ibid.*

Burns also testified that PVC is, on occasion, emitted from dryer stacks at Shintech’s plant. Tr. 637-38. According to Burns:

⁸ See also RX-6 (minutes from quality safety meetings attended by Complainant), RX-43 (quality safety meeting sign-in sheets for 2007-2009), and RX-30 (notes by Randy Stanford).

Well, the double dampers, which are located on the bottom of the cyclones,⁹ if they're left open, if the cams are left open, the PVC will go out the exhaust stack.

Tr. 639. He further testified that PVC being blown from the stacks does not occur very often, and that he only recalls it happening twice in the last three years. Tr. 639-40. According to Burns, whenever an incident like this occurs, the operators have a checklist of procedures to follow, and the supervisor usually fills out an incident report. Tr. 640.

Andy Polk

Andy Polk has worked at Shintech for thirty years, of which about 21-22 years has been in Plant-I. Tr. 674. Polk testified that he got into an argument with Irvin in late 2008 over whether or not he should open up a tank while a dryer was running. Tr. 675-676. He said that Irvin was insistent that he was doing it right and got angry with Polk and told him to get out of his unit. Tr. 676. They both subsequently went to a supervisor concerning the matter, and he has not had any disagreements with Irvin since then. Tr. 677. Polk testified that he has seen Irvin act extremely short and rude to Valenti and that Irvin seemed to go out of his way to be condescending to him. Tr. 677. Polk and Valenti have been friends for many years and they see each other socially. Tr. 678 -79. Polk testified he used to be friends with Irvin but the tension between Valenti and Irvin has affected that relationship. Tr. 679.

Mark Garza

Mark Garza testified that he has worked at Shintech in the position of Environmental Manager since July of 2007. Tr. 769. He holds Bachelor of Science degrees in chemistry and chemical engineering, the first from the University of Texas-Pan American in Edinburg, Texas and the second from the University of Texas in Austin. Tr. 770-71. Prior to working at Shintech, Garza said he worked at the Texas Commission on Environmental Quality, first as a permit engineer, then as a regional inspector. Tr. 771. As a regional inspector, he investigated whether or not companies were in compliance with federal and state environmental laws. Tr. 772. He also worked at Merisol as an environmental engineer and environmental manager, and then at Invista as a senior environmental engineer before coming to Shintech. Tr. 772-73.

Garza testified that Shintech is a manufacturing facility and its final product is PVC. Tr. 774. Garza explained that one of the raw materials used in the manufacturing process is vinyl chloride, and Shintech carefully monitors its concentrations on a 24-hour basis to make sure that they conform to all applicable air quality standards. Tr. 774. He testified that Shintech has an "intricate network of [air quality] monitors that monitor the concentrations of vinyl chloride on a 24-hour basis," and that the system has certain redundancies built in so that if one monitor fails other monitors will continue to monitor the site for hazardous emissions. Tr. 774, 777. Shintech similarly monitors water quality, both inside and outside the plant. Tr. 779-80. Any solid waste materials that are generated at the plant are sent to a third party, analyzed, and reports are generated in conformity with EPA requirements which identify the classification of any

⁹ Apparently, the "cyclones" Burns referred to are fans, of which there are six in each dryer. Tr. 639. The fans are employed to create a vacuum at the top of the dryer causing the floating light PVC particles to be returned to the dryer. Tr. 638.

hazardous materials and the manner of their disposal. Tr. 780. Garza also stated that Shintech has an internal reporting system in place so that any employee can notify management or fill out an incident report themselves whenever they wish to raise an environmental issue. Tr. 781-782. In addition, he asserted, every month Shintech has to submit a discharge monitoring record to the EPA. Tr. 784.

III. SUMMARY OF THE PARTIES' ARGUMENTS

A. *Complainant's Arguments*

According to Complainant's post-hearing brief:

Mr. Valenti was fired from Shintech, Inc. because he reported environmental law violations to various government bodies, supervisors, superiors, co-workers, and notably...the people that fired him.... The record indisputably established that Mr. Valenti told a supervisor, Ted Martin, and a superintendent, Andrew Floyd, about his interactions with the regulatory agencies regarding illegal spills and emissions.

Complainant's Post-Hearing Brief ("Comp. Br.") at 1. Complainant argues that each of the incidents that he alleged against Mitch Hamilton, a supervisor at the plant, were truly reportable environmental incidents and that the 401B tank incident was also likely a violation of CERCLA. Comp. Br. at 10-11. Complainant asserts that his reporting of these events to his supervisors and to governmental agencies constitutes protected activity.¹⁰ Comp. Br. at 12, 15.

Regarding causation, Complainant argues "[t]he fact that Mr. Hodges and Mr. Stanford would not be candid while under oath about their impressions of Mr. Valenti can only suggest that they are hiding their true motivations in firing Mr. Valenti." Comp. Br. at 14. Complainant further asserts that Shintech's reasons for terminating him were not credible. Comp. Br. at 16. He states that when he initiated the conversation with Irvin, he was "following human resources training and directives to discuss issues." Comp. Br. at 17. Regarding his alleged threat against Irvin, Complainant argues that, "[o]ther than the tone of Mr. Valenti's voice after he is antagonized by Mr. Irvin, there is nothing that should have put fear into Mr. Irvin." Comp. Br. at 18.

Complainant also argues that, "Shintech does not fire other operators for undisputed physical threats even when made against a direct supervisor, or sexual harassment, or derogatory comments." Comp. Br. at 19. Specifically, he asserted that another employee was accused of sexual harassment, and physically threatening and making racial comments to a supervisor, but remains employed by Shintech. *Ibid.*

¹⁰ Complainant refers to these activities as mode 1 and mode 2 protected activities. Earlier in his brief he defines mode 1 activity as when an employee reports a violation of environmental statutes to an outside government agency and causes an investigation, and mode 2 as when Complainant engages in purely internal reporting of statutory violations during his employment. Comp. Br. at 6.

B. Respondent's Arguments

In Respondent's Post-Hearing Brief, Employer argues that:

Valenti has presented no evidence that the decisionmaker who made the decision to terminate his employment was aware of any protected activity that he may have engaged in, much less that any such protected activity played a part in the termination decision. Instead, Valenti has embarked on a misguided attempt to show that Shintech engaged in environmental violations unrelated to the termination decision.

Respondent's Post-Hearing Brief ("Resp. Br.") at 1. Respondent asserts that it had legitimate, nondiscriminatory reasons for terminating Complainant's employment, which include: Complainant threatened Irvin; Valenti ignored two directives regarding how to interact with Irvin; Complainant's actions were premeditated; and Complainant was not remorseful and believed he had done nothing wrong. Resp. Br. at 23. Respondent contended that it is uncontroverted that Hodges, the Site Manager, was the sole decisionmaker in the decision to terminate Complainant, that Michelle Hickner, the Human Resources Supervisor, was the only other person to provide input in this decision, and that there was no evidence or testimony that Hodges or Hickner were aware of any protected activity engaged in by Complainant. Resp. Br. at 23. Respondent further argues that even if Complainant could prove either Hodges or Hickner was aware of any protected activity, he has not established a nexus between the protected activity and the decision to terminate his employment. Resp. Br. at 29. Moreover, Respondent argues that Complainant is not credible because he has offered multiple, conflicting, and ever-changing theories as to why he believes he was terminated. Resp. Br. at 32-33. Specifically, all of his previous complaints allege that he was terminated because of age discrimination, union-organizing, or because of a disability, not as a result of raising environmental concerns. Resp. Br. at 32-34.

Concerning similarly situated employees, Respondent asserts that:

It is inconceivable that Shintech would not be bothered by the complaints raised by [several other employees], but yet terminate Valenti's employment for raising similar concerns. Likewise, it makes no sense that Shintech would have so many mechanisms in place to encourage and receive reports of environmental concerns – mechanisms which are utilized by other employees – but then for some reason terminate Valenti for raising an environmental concern.

Resp. Br. at 38. Regarding the employee who was accused of sexual harassment, and physically threatening and making racial comments to his supervisor, Respondent contended that this employee's situation is distinguishable from Valenti's due to all the mitigating factors in that case. These include the fact that Shintech learned of all of the incidents involving this employee at the same time, the acts were uncharacteristic of that particular employee, the employee was off his anti-depressant medication, and he apologized to those he threatened. Resp. Br. at 38-39. Moreover, Respondent asserted, there was no evidence to support the contention that Complainant was treated differently because of any protected activity. Resp. Br. at 38.

IV. DISCUSSION

The environmental whistleblower protection statutes prohibit employers from discharging or otherwise discriminating against any employee because he engaged in protected activities such as initiating, reporting, or testifying in any proceeding regarding environmental safety or health concerns. *Morriss v. LG&E Power Services, Inc.*, ARB No. 05-047, ALJ No. 2004-CAA-14, slip op. at 31 (ARB Feb. 28, 2007). Once a whistleblower case has been tried on the merits, it is irrelevant whether the complainant has established a *prima facie* case of retaliation. *Id.* at 32. Rather, the question is whether the complainant has proved by a preponderance of the evidence that: (1) he engaged in protected activity; (2) his employer was aware of the protected activity; (3) he suffered adverse employment action; and (4) the employer took the adverse action because of his protected activity. *Id.* at 31-31. A complainant's failure to establish any of these elements defeats his whistleblower complaint. *Id.*, see also *Mactal v. U. S. Dep't of Labor*, 171 F.3d 323, 327 (5th Cir. 1999); *Zinn v. Univ. of Missouri*, Case No. 1993-ERA-34 (Sec'y Jan. 18, 1996); *Overall v. Tennessee Valley Auth.*, Case No. 1997-ERA-53 at 12 (ARB Apr. 30, 2001).

In this case, the issue of whether the Complainant suffered an adverse employment action is not contested inasmuch as Valenti was clearly discharged from his employment with Shintech. The remaining issues – whether Complainant engaged in protected activity, whether the employer was aware of the protected activity and whether there is a nexus between the protected activity and the unfavorable action – are discussed below.

1. Whether Complainant engaged in protected activity as defined by the applicable statutes

A. Applicable Statutes

Clean Air Act.

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

(a) Discharge or discrimination prohibited

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

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

42 U.S.C. § 7622; see also 29 C.F.R. § 24.2.

Toxic Substances Control Act and Comprehensive Environmental Response, Compensation, and Liability Act.

The TSCA¹¹ and CERCLA contain anti-discrimination provisions similar to those found in the CAA. The TSCA seeks to prevent an unreasonable risk of injury to health and the environment. 15 U.S.C. § 2601. A complaint about an unsafe or unhealthful condition communicated to an outside regulatory agency, such as EPA, is protected under this type of statutory language. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 1510-1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984).

Similarly, reporting of safety or quality concerns to an employer or governmental agency is protected activity under CERCLA. CERCLA is a broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threaten the environment and human health. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197 (2nd Cir. 1992). Reporting is generally required under CERCLA of releases, other than a federally permitted release, of a “hazardous substance” from a “facility,” as those terms are defined under CERCLA. 42 U.S.C. § 9603. CERCLA defines “hazardous substance” as any substance so designated by the EPA pursuant to § 9602 of CERCLA or any substance designated as hazardous in referenced sections of the Clean Air Act, Clean Water Act, RCRA, and Toxic Substances Control Act. *See* 42 U.S.C. §§ 9601 and 9602; *B.F. Goodrich*, 958 F.2d at 1199-1200.

B. Protected Activity

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

¹¹ In its post-hearing brief, Respondent alleges that Complainant has dropped the TSCA claim and added the CERCLA claim. Resp. Brief at 20 citing to Tr. 8:1-4. However, Complainant’s post-hearing brief specifically references its TSCA claim, thus I will therefore presume this claim has not been dropped.

workplace, but not endangering the public are not protected. *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec’y Jan. 25, 1994), *Denvers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 01-SWD-3, slip op. at 10 (Mar. 31, 2005). Thus, an employee’s complaints about purely occupational hazards are not protected under the CAA, or similar environmental statutes. *Stephenson v. NASA*, ARB Case No. 98-025, ALJ No. 94-TSC-5, slip op. at 15 (ARB July 18, 2000).

Complainant asserts that he made numerous complaints to his supervisors, the EPA and various other environmental agencies beginning in 2002 and continuing until he was fired by Shintech in July 2009. For example, he claims his move from Plant-II to Plant-I in 2002 was precipitated by an anonymous letter he wrote concerning a large vinyl release where an employee was injured. Tr. 371.¹² In addition, he testified that he expressed concerns about various events during the 2005 plant shut down to EPA investigators. Tr. 402-403. According to Complainant, however, the primary events that led to his termination involve his reports relating to two specific incidents. Tr. 381; Comp. Br. 8.

Complainant asserts that the April 2, 2009 TK-401B tank incident, which he claims Mitch Hamilton never reported, led to his termination. Tr. 381; Comp. Br. at 10. Complainant testified that the 401B tank, which held 1,500 gallons of un-stripped PVC, was “dropped . . . to the ground and the ditch,” and stated that people were “exposed to high concentrations of vinyl chloride and caustic material.” RX-1.1, Comp. Br. at 10-11. According to Valenti, “as soon as TK-401B was opened that night the operators could smell vinyl chloride.” Comp. Br. at 10. He further testified that the smell of vinyl chloride lasted for approximately an hour, that the odor threshold of vinyl chloride is about 3,000 parts per million, and that the initial concentration of vinyl chloride in the area of the tank was 300-times the legal limit. *Id.* at 10-11.

Valenti also testified that he had complained on July 10, 2009 to Mitch Hamilton about the dryers in Plant-I blowing out. Tr. 381. According to Complainant, he had come back to work after being off for seven days and told Hamilton that the dryers looked terrible and he was getting hit with pellets of PVC floating around in the atmosphere. Tr. 381-383. He testified he spent the whole day cleaning up material that had blown out of the stack and that it was knee deep on the top deck of the dryer. Tr. 383-84. With respect to how management purportedly knew about the blowout problems, he claimed “the whole ground is full of white. It looks like snow.” Tr. 387. He also said that he told Hamilton they should let upper management know about the dryers but Hamilton never wrote up a report. Tr. 382.

Valenti’s testimony regarding complaints about the April 2009 401B tank incident, and the July 2009 dryer blowout event, is inconsistent with, and outweighed by, more credible evidence of record.

According to Mitch Hamilton, during the processing of the PVC through the system, any vinyl chloride gases are contained within the system. Tr. 62-63. He further testified that it was the plant engineer, Hamaguchi, who made the decision to open the 401B tank on April 2, 2009. Tr. 68. Hamilton, Hamaguchi and several operators were there when the tank was opened. Tr.

¹² According to Valenti, he wrote the letter because there were rumors that an operator was being blamed for the incident when it was actually the supervisor who was at fault. Tr. 371. When called into Shintech’s front office and asked about the letter, he denied he wrote it. Tr. 372.

69. According to Hamilton, Walter Burns brushed his arm against some caustic material when he was attempting to extract the solidified PVC from the tank. Tr. 70. Once the solidified material was broken up by the water blasters, it was removed from the tank and taken to a small stripper in Plant-II to remove any excess vinyl.¹³ Tr. 75. The water used to break up the solidified material drained into the concrete mechanical ditches which surrounded the tank and from there it was drained off into a sump. Tr. 81, 82. Hamilton further testified that “[a]ll of this water is still kept within the plant in our wastewater system.” Tr. 81. According to Hamilton, the wastewater in the system is treated and rendered safe before it leaves the plant. Tr. 82. Furthermore, Hamilton testified that there are “dikes or berms” surrounding the tank to contain the water and they cause it to flow into the mechanical ditches near the tank. *Ibid.* Hamilton noted that an incident report relating to the April 2nd event was generated. Tr. 85; RX 23.3 The report reflects that Walter Burns got some caustic on his hand and arm, he flushed his hand and arm with water, and he refused medical treatment. *Id.*; Tr. 86. Hamilton further stated that, as a result of his injury, Burns was subsequently instructed on proper safety procedures, told he should not have been reaching into the tank and told he should have been wearing rubber gloves at the time of the incident. Tr. 87-88. Hamilton also followed up the incident, both at the time of the event and in the ensuing weeks, by discussing what happened with the people on his shift and reviewing proper safety procedures with them to avoid the recurrence of similar incidents in the future. Tr. 102. Finally, Hamilton testified that, at the time the 401B tank was opened, an MSA meter, which is a photo-ionization “sniffing device,” was employed by one of the workers to determine how many parts per million of vinyl chloride gas would be released when the tank was opened. Tr. 106-07. He stated that the meters are calibrated and give an accurate reading of how much gas is present. Tr. 107-08. According to Hamilton, the probe on the meter is inserted into a sampling port on the tank, and the meter used at the time of the April 2nd incident read 25 parts per million. Tr. 109, 110-11; CX 21.

Mark Garza, Shintech’s Environmental Manager and the person who is responsible for all environmental matters relating to air, water and waste at the facility, testified that Shintech maintains an intricate network of monitors throughout the facility to continuously monitor the concentrations of vinyl chloride gases at the plant. Tr. 770, 774. The threshold setting on the monitors, according to Garza, is 5 parts per million and any readings in excess of that threshold will generate a printout. Tr. 775. He further testified that the monitoring system is configured in such a way that if one monitor fails, others in close proximity to the malfunctioning monitor will detect emissions. Tr. 776-77. He noted that any printout that is generated by the monitors is logged and tracked plant-wide. Tr. 779. He further stated that any water discharged outside the plant is monitored on a daily basis, and water samples are sent to an outside, accredited lab for testing. *Ibid.* According to Garza, solid waste materials which are collected at the plant are similarly sent offsite to a third party for analysis and disposal. Tr. 780. Garza testified that activities within Shintech’s boundaries, such as draining any type of equipment, follow prescribed procedures and do not constitute reportable environmental events. Tr. 780-81. He also testified that if, for any reason, hazardous materials are not contained within the plant, and they are instead released outside the area of the facility, there are checks and balances in place which will detect those releases. Tr. 781. Garza stated that Shintech submits a monthly

¹³ Hamilton testified that the end product produced by Shintech is a powdery white PVC resin, ranging in size from almost dust size to a granular-like sand size. Tr. 77. The PVC resin is sold to other companies which melt it down to make everything from road base materials to umbrellas, vinyl bottles and PVC pipe for plumbing. *Ibid.*

discharge monitoring record to the Environmental Protection Agency which identifies any releases which exceed established standards. Tr. 784. With respect to Valenti's description of the dryer blowout event, he testified that any type of blowout activity from a dryer would impact an area greater than Shintech's property. Tr. 786. Garza testified that a dryer blowout event involving 8,000 to 10,000 pounds of PVC, which he was uncertain could even happen, would unquestionably impact property outside Shintech's facility. Tr. 787. He explained that PVC is a very light material which would not simply fall down from the dryer stack during a blowout event but would instead be carried by wind and dispersed like a snow fall over a wide area. Tr. 787-88. Garza also testified that he has never seen such an event since he has been at Shintech. Tr. 788. He further stated that if the odor of vinyl chloride gas could be detected by an employee, the monitors throughout the plant would detect it since they are set to detect 5 parts per million whereas the odor threshold for vinyl chloride gas is approximately 3,000 parts per million. Tr. 788-89. According to Garza, Shintech has had only one reportable event as far as he knows which occurred in September 2008 right after Hurricane Ike. Tr. 793-94.

As noted above, an employee's complaints about purely occupational hazards are not protected under the environmental whistleblower statutes. *Stephenson v. NASA*, *supra*, ARB Case No. 98-025, ALJ No. 94-TSC-5, slip op. at 15. Reports of hazards limited to the workplace which do not endanger the public, are not protected. *Minard v. Nerco Delamar Co.*, *supra*, *Denvers v. Kaiser-Hill Co.*, *supra*, slip op. at 10. While Valenti testified that he complained to Mitch Hamilton about a dryer blowout event in early July 2009 which left an accumulation of PVC on the ground that was "knee deep," Mark Garza credibly disputed that such an event did or could occur. Garza also testified that an incident of that magnitude would disperse PVC well beyond Shintech's boundaries, and stated that he had neither observed such an event nor had he been informed by anyone, inside or outside of Shintech's facility, that such an event had occurred. Likewise, with respect to the 401B tank incident in April 2009, Mitch Hamilton credibly testified that the level of vinyl chloride gas in the tank was checked and documented prior to when it was opened and it was determined to be 25 parts per million, well under the 3,000 parts per million odor threshold for vinyl chloride. He further testified that the solidified PVC material removed from the tank, and the waste water created during the removal process, were properly and safely disposed of according to established protocols, and that testimony was corroborated by Mark Garza. It is clear from their testimony that these two events, at best, constituted potential occupational hazards, *Stephenson v. NASA*, *supra*, and not "conditions constituting reasonably perceived violations of the environmental acts." *Jones v. EG & G Defense Materials, Inc.*, *supra*, 1995-CAA-3, slip op. at 10. As such, Valenti's reporting of these events does not amount to protected activity within the meaning of the environmental statutes involved here.

Since engaging in protected activity is an essential element in any whistleblower cause of action, Valenti's failure to prove this element means that his complaint must be dismissed. However, even if I were to find that he engaged in protected activity, his complaint would still fail for the reasons discussed below.

2. Whether the Employer was aware of the protected activity

To prevail on a complaint of unlawful discrimination under the referenced environmental retaliation statutes, a complainant must show that his employer was aware of the protected activity. It is insufficient to meet this requirement by showing that any co-worker, or even a supervisor, knew of the protected activity. As the Board has previously stated: “Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint.” *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) citing *Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec’y Apr. 7, 1993), *aff’d*, 73 F.3d 100 (6th Cir. 1996).

In this case, Complainant testified that he talked “once or twice” with Michelle Hickner and Randy Stanford about environmental concerns regarding what happened during the 2005 shutdown. Tr. 421, 430-431. According to Valenti, sometime in 2006 he also showed reports about a Plant-II release to Ted Martin, a supervisor at Plant-I, Tr. 427, made environmental complaints to Andrew Floyd, the Assistant Plant-I Superintendent, Tr. 435, 437, complained to Randy Stanford, Floyd’s supervisor, about how badly the 2005 shutdown was going in Plant-I, Tr. 430, and spoke to Stanford in 2008 about UN-301, an orange colored oily byproduct with strong vapors, draining into the ground. Tr. 431.

Conversely, Michelle Hickner testified that Complainant never discussed environmental issues with her. Tr. 170. She stated that she remembers Complainant mentioning something about the 2005 plant shutdown to her, but she told him then that he needed to take his concerns up with the safety department, not her. *Ibid.* Hickner further testified that she was not aware of any environmental or safety complaints Complainant made to Hamilton the week before he was fired, or any other issues he had raised, including issues about PVC blowouts, vinyl chloride or chloride gas releases, a UN-301 tank being drained to the ground, the 401-B tank being drained to the pad in April 2009, or similar concerns that he may have raised with other Shintech personnel. Tr. 730-732.

Similarly, while Mitch Hamilton was Valenti’s supervisor in Plant I, he was not involved in the decision to terminate Complainant’s employment and any knowledge he had about Valenti’s alleged environmental complaints is therefore irrelevant. Tr. 158. Hamilton testified that he never went to Michelle Hickner or Jim Hodges about any of the environmental issues raised by Complainant, or any other operator, because it was not their department. Tr. 150. According to Hamilton, whenever an operator raised environmental issues with him, he would, if the need arose, talk to Hamaguchi, Andrew Floyd, or Randy Stanford, not to Hickner or Hodges.

In addition, Stanford testified that, because he was Complainant’s second-level supervisor, he was told by Hodges to fire him, but he was not involved in the termination decision in any way. Tr. 224. He testified he was called into the office to meet with Michele Hickner and Jim Hodges and

[t]hey told me that the decision had been made to terminate Don Valenti, and, because of my role, I had to ask them what were the grounds. And they said,

well, essentially this tape. And I asked them to listen to it. I listened to it and I said okay. That's all.

Tr. 225.

With regard to Jim Hodges, the individual who actually made the decision to fire Valenti, other than occasional greetings in the control room, he had very little interaction with Complainant, both before and after he became site manager at Shintech. Tr. 816. Hodges testified that he decided to fire Valenti solely because of the incident with Michael Irvin, and he did not receive any input in making that decision from Randy Stanford, Andrew Floyd, Mitch Hamilton, Ted Martin, or Erv Schroeder. Tr. 817-818. He further testified that he was not aware of any environmental issues Valenti had raised with Mitch Hamilton the week before he was fired, nor was he aware of any issues Complainant had raised regarding the 2005 plant shutdown, PVC blowouts, vinyl chloride or chloride gas releases, the UN-301 tank or a lab sink being drained to the ground, the 401-B tank being drained to the pad in April 2009, or any environmental or safety issues, reports, complaints or concerns that Valenti had raised with any Shintech employee, supervisor or manager. Tr. 823-25.

It is clear from the above-referenced testimony that it was Jim Hodges' decision alone to terminate Complainant, and that Michelle Hickner recommended termination but had no influence on the decision. Furthermore, Hickner credibly denied any knowledge of environmental complaints by Valenti. Since knowledge of protected activity cannot be imputed to Hodges, it is irrelevant that Complainant made reports concerning environmental issues to Mitch Hamilton, Randy Stanford, Andrew Floyd or anyone else, since he has offered no evidence that any of these individuals communicated those reports to Hodges. As noted above, Hodges credibly testified that he was not aware of any of Complainant's environmental complaints before he terminated him. Tr. 823-827. As the Board has made clear, evidence must show that an employee of the respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge. Aside from Complainant's self-serving testimony that he mentioned his environmental concerns to Hickner, which she disputes, Complainant has provided no evidence that the decision to terminate him was made or influenced by anyone at Shintech who had knowledge of his purported protected activity. I find Michelle Hickner to be credible in her testimony that she had no knowledge of Complainant's protected activity. In addition, I find that Jim Hodges, the actual decisionmaker had no knowledge of the protected activity. Accordingly, I find that Complainant has not met his burden of showing that his employer was aware of his protected activity.

3. Whether circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action

The final element of a whistleblower complaint is that there must be a nexus between the protected activity and the adverse action. The ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981) (Title VII case).

Even if I were to assume that Shintech had knowledge of Valenti's allegedly protected activity at the time his employment was terminated, I find that Complainant has failed to establish any nexus between such activity and his discharge. Having listened to and observed the demeanor of the witnesses at the hearing in this matter, I find the testimony of Hodges, Hickner and Irvin regarding the events surrounding the termination of Valenti's employment at Shintech credible.

First, Jim Hodges, the site manager at Shintech, testified unequivocally that he terminated Complainant because of the incident that occurred involving Valenti and Irvin on July 18, 2009. Tr. 818. When asked to explain why Complainant was fired, Hodges gave several interrelated reasons. He testified that it was because of the severity of the event, because of the fact that Valenti surreptitiously recorded his conversation with Irvin, because Valenti had been told by HR, after the November 2008 meeting, to go to HR first if there were any further issues involving him and Irvin, because Valenti did not believe he did anything wrong, and because he showed no remorse over the incident. Tr. 818-820. Like me, Hodges was disturbed by the fact that any employee would secretly record a conversation in the workplace with a co-worker.¹⁴ In fact, Hodges testified that he was shocked that Valenti had taped his conversation with Irvin, and thought Valenti was attempting to goad Irvin into an altercation. Tr. 821-22. Hodges testified that, after he received the telephone call from Michelle Hickner on Saturday alerting him to Valenti's confrontation with Irvin, he instructed Hickner to go to the plant and talk to Michael Irvin and his supervisor to determine what happened. Tr. 827-28. Based on Hickner's emotional state after talking to Hamilton and Irvin, Hodges concluded that the situation was more serious than he originally thought, and he told Hickner to send Valenti home so they could defuse the situation and conduct a thorough investigation before deciding what to do on Monday. Tr. 828. Monday morning, after consulting with legal counsel concerning the incident, Hodges made the decision to fire Valenti. Tr. 829.

On cross-examination, Hodges reiterated the reasons supporting his decision to fire Valenti. He testified that he was concerned about Valenti's threats that he would "get Mike, he has more money than Mike, I will take this outside and we'll take care of it then." Tr. 836-37. He confirmed that he had listened to the tape recording of the incident before he fired Complainant, and testified that Valenti's statements to Irvin on the tape led him to believe this was a serious matter. Tr. 837.

With respect to Hodges' testimony, I saw no evidence of animus towards, or bias against, Valenti. As Hodges himself made clear, his interactions with Complainant were limited to seeing him occasionally on the plant floor and exchanging greetings. I found Hodges' testimony to be direct, corroborated by other evidence of record and credible.

Second, Michelle Hickner corroborated Hodges' explanation surrounding the July 2009 incident, testifying that Complainant was terminated for making threats to Michael Irvin after he had been told following the November 2008 incident involving Irvin to come to HR or talk to a

¹⁴ As noted previously, Hodges was similarly concerned about the fact that Mitch Hamilton, one of Shintech's supervisors, surreptitiously recorded the November 2008 meeting involving Hickner, Irvin and Valenti, which he had only learned about the day before the formal hearing, and he had not yet decided on what disciplinary measures would be taken against Hamilton.

supervisor if there were any further problems between the two. Tr. 169. She confirmed that she recommended Valenti be fired after the incident in July but testified that Jim Hodges makes those kinds of decisions and made the decision in this case. Tr. 171, 172-73. She likewise confirmed the substance of her conversations with Jim Hodges about Valenti's confrontation with Irvin, Tr. 189, and described her conversations with Irvin that Saturday morning. Tr. 188. She testified that Irvin had written out a statement describing what Complainant had said by the time they met that morning, and he described to her how he felt threatened by Valenti, both for his own well-being and that of his family. *Ibid.* Based on what she related to Hodges about her conversation with Irvin, and the information provided in Irvin's written statement, Hodges told her to send Valenti home with pay pending an investigation. Tr. 189-90, 191. On Monday morning, Hickner and Andrew Floyd met with Valenti and Walter Burns, who Valenti wanted as a witness. Tr. 191-92. She learned then that Valenti had secretly recorded his conversation with Irvin and listened to the tape. Tr. 192. She subsequently informed Hodges of the existence of the tape, and he told her he wanted to wait until he could hear it before deciding what to do. Tr. 193-94. A copy of the tape was also provided to Shintech's counsel, since it was common practice for the company to notify its attorneys of these types of incidents and seek recommendations. Tr. 195-96. After hearing the tape, Hodges made the decision to fire Valenti. Tr. 196.

As with Hodges, I detected no hint of bias or animus from Hickner towards Complainant and found her testimony credible. While Hickner clearly had more frequent interactions with Valenti than did Hodges, nothing in her testimony suggested to me that she did not personally like Valenti or wished to see him fired.

Third, Michael Irvin's account of his confrontation and its aftermath is consistent with the testimony of Hickner and Hodges. Equally important, the substance of the conversation between him and Valenti on July 18, 2008 is verified by the taped conversation itself. Irvin testified that he was in the lab that Saturday morning running samples when Valenti approached him and told him he did not like the way Irvin had spoken to him the day before. Tr. 590. Irvin further testified that Valenti got very upset and told him that if Michelle and Mitch would not help him that he would take matters into his own hands. *Ibid.* According to Irvin, Valenti also told him that he could spend more money than Irvin and would take care of him outside the plant. *Ibid.* Irvin testified that he did not have a lot of money, and he felt very threatened, both physically and financially during the confrontation. Tr. 591. When asked whether Valenti threatened his family, Irvin testified:

I felt like he did when he said he would take care of me outside of the plant. I didn't know if that meant me at home, me at work, out in the parking lot, or when I was with my family. Yes, I felt my family was very threatened.

Ibid. Irvin testified that he left the lab and told his supervisor, Mitch Hamilton, what happened, Tr. 591-92, and Hamilton told him to write it down. Tr. 592; RX 3.1.

As noted above, Irvin's account of the incident is corroborated by other testimony. Unlike Hickner and Hodges, though, Irvin and Valenti clearly did not like each other and had problems getting along at work. Despite this animosity between the two, however, I found

Irvin's testimony credible, especially with regard to the incident which led to Valenti's termination.

The recording made by Complainant on July 18, 2009 includes statements made by Valenti to Irvin such as:

"You're gonna talk to me right, I'm telling you that;"

"Don't push me Mike, I'm telling ya, don't push me, because, you know what? If I don't get no help from Michelle or somebody else, I'll take care of things outside here;"

"It's gonna cost you Mike, I'm telling ya. You better just wise up;" and

"You don't wanna talk to me? You wanna play your little games? That's fine. I don't care, but you're gonna talk to me right. You got that? 'Cause I'm telling ya, it's gonna cost you. If I've gotta turn it over to my lawyer and go after ya, I'll go after ya. I mean it, and it's gonna cost ya. I might not win a damn penny in court, but I'll tell ya what, you're gonna have to pay for lawyers to get . . . but if I can't get no satisfaction from these people the way you talk to me, I'm not gonna put up with it no more. Mitch don't wanna do nothin' about it? Fine. We'll see what Michelle says, and if Michelle won't do nothin' about it, then I'll do it on my own. And whatever it costs me Mike, because, you know what? I think I can outspend you Mike."

Listening to the tape, there is no doubt that Valenti's tone is threatening. Furthermore, having observed both individuals during the hearing, it is clear that Valenti is larger and more physically intimidating than Irvin. In addition, during Irvin's testimony I observed that, even long after the incident in July 2009, Irvin remained emotional and concerned about his and his family's safety and well being in the event Valenti ever followed through on his threats.

Based on the foregoing, I find that Valenti was fired by Shintech because of his confrontation with Michael Irvin on July 18, 2009, not because of any environmental complaints he made concerning the facility at which he worked. I thus find that Complainant has failed to meet his burden of showing that his protected activity was likely a contributing factor in the decision to terminate his employment.

V. CONCLUSION

Complainant has alleged in this case that his numerous disclosures of environmental concerns to his supervisors, the EPA and various other environmental agencies from 2002 until 2009 were "protected" and that it was these disclosures which ultimately led to his discharge by Shintech on July 20, 2009. However, Complainant has failed to establish that his complaints fall within the definition of "protected activity," or that Jim Hodges, the person at Shintech who made the decision to fire him, had any knowledge of Complainant's environmental concerns.

Similarly, Valenti has failed to show that his employment with Shintech was terminated for any reason other than his confrontation with Michael Irvin on July 18, 2009. Therefore, in light of Complainant's failure to prove these three essential elements of his case, his complaint must be dismissed.

Order

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, the whistleblower complaint filed by Dominick Valenti against Shintech, Inc. under the Clean Air Act, the Toxic Substances Control Act and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is hereby DISMISSED.

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STEPHEN L. PURCELL
Chief Administrative Law Judge

Washington, D.C.

NOTICE OF REVIEW

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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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.