

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

**Issue Date: 31 May 2017**

CASE NO.: 2015-CAA-00002

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*In the Matter of:*

THOMAS J. CREAN,  
*Complainant,*

v.

125 W. 76<sup>th</sup> REALTY CORPORATION,  
*Respondent.*

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Before: Timothy J. McGrath, Administrative Law Judge

*Appearances:*

Thomas Crean, *pro se*

Barry Margolis, Esq., Abrams, Garfinkel, Margolis & Bergson, LLP, New York, NY, for Respondent

**DECISION AND ORDER DISMISSING COMPLAINT**

**I. STATEMENT OF THE CASE**

This proceeding arises from a complaint of discrimination filed by Thomas Crean (“Complainant”) against his employer, 125 W. 76<sup>th</sup> Realty Corporation (“Respondent”), under the whistleblower protection provision of the Clean Air Act, 42 U.S.C. § 7622 (“CAA” or the “Act”), which prohibits any employer from discharging any employee or discriminating against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee engaged in protected activity under the Act. On November 7, 2014, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA)

alleging his employment with Respondent was terminated due to his protected activity.<sup>1</sup> OSHA dismissed the claim on May 29, 2015, and Complainant appealed that dismissal to the Office of Administrative Law Judges and, on June 29, 2015, his case was assigned to my docket.

A hearing was held on December 13, 2016 in Waterbury, Connecticut where the parties had a full and fair opportunity to present testimony and offer evidence.<sup>2</sup>

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<sup>1</sup> Complainant additionally filed an overlapping complaint of discrimination with OSHA under the whistleblower provision of Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. § 660(c), which was also dismissed by OSHA. As discussed during the July 31, 2015 and August 3, 2015 teleconferences with the parties, this Court does not have jurisdiction over the whistleblower provision of Section 11(c). Accordingly, this Court proceeded to adjudicate this case solely under the whistleblower protection provision of the Clean Air Act, 42 U.S.C. § 7622.

<sup>2</sup> I advised Complainant of his opportunity to present evidence in support of his case at the outset of his appeal and throughout the litigation process. I gave the parties an opportunity to present pre-hearing statements and objections to the other party's proposed exhibits prior to trial. TR 5-6. Before the hearing, Complainant submitted voluminous records to the Court, most of which consisted of mere argument. *See* TR 6.

As noted in the *Order Denying Complainant's Motion to Exclude Witnesses and Evidence and Denying Respondent's Objections to Complainant's Motion and Exhibits* dated December 6, 2016 ("Order"), I denied Respondent's objections to Complainant's proposed exhibits. Order at 3. Respondent first objected to the entirety of Complainant's evidence submitted prior to trial and argued Complainant's "10 volume treatise" was neither competent evidence nor relevant to the issues in this proceeding, but I denied this objection because it was overly broad. *Id.* The Order explained, "The Court does not engage in the practice of combing through every page of every exhibit to determine its admissibility because a party presents an overarching objection with no specificity." *Id.*

Respondent also objected to thirteen of Complainant's proposed exhibits identified in his pre-hearing statement, arguing that they were not relevant to the issues in this matter. *Id.* Although Respondent's second objection was more detailed than its first, I noted:

[T]he objection questions whether Respondent received a number of Complainant's exhibits and their overall relevance. In light of the enigmatic compilation of Complainant's exhibits, I believe the most efficient manner to determine the admissibility of [the] exhibits . . . will be at hearing when Complainant attempts to enter each exhibit into evidence over the course of the hearing.

*Id.* I gave both parties an opportunity to offer their proposed exhibits at hearing and present objections to each exhibit offered by the opposing party, which I ruled on during the hearing.

At the start of trial, I pointed out to Complainant that many of his proposed exhibits previously presented to the Court were mere argument and I explained to him that argument is not evidence. TR 6. I also noted that some of Complainant's proffered exhibits related to issues not applicable to the present case, such as the history of asbestos and scientific issues relating to asbestos. TR 5, 6. I reiterated to Complainant that he has the burden of proof and I emphasized the pertinent and relevant issues in this case. TR 6-7. I then explained to Complainant at length the procedure by which he may offer proposed exhibits into evidence during the course of the hearing. TR 7-8.

Complainant subsequently offered documentary evidence, of which exhibits CX-1 through CX-3 and CX-5 through CX-10 were admitted into evidence. TR 31, 64, 66, 67, 68, 71, 74, 155. During the presentation of his case, I reminded Complainant of his opportunity to submit evidence and asked him whether he had any additional proposed exhibits or witness testimony to offer. TR 62, 155-56. At the close of his case, I again explained to

Formal papers were admitted into evidence as Administrative Law Judge Exhibits (“ALJX”) 1-70, and the parties’ documentary evidence was admitted as Complainant’s Exhibits (“CX”) 1-3 & 5-10, and Respondent’s Exhibits (“RX”) 1-10, 12-16, 18-21, 25 and 27. The Hearing Transcript is referred to herein as “TR.” At trial, Complainant appeared *pro se* and testified on his own behalf. Also testifying was: Amy Rowland, a resident and current Board President at 125 W. 76<sup>th</sup> Realty Corporation; Peter Finn, Esq., a former attorney at the Realty Advisory Board on Labor Relations; and Pam Elgar, of the Plymouth Management Group, who is Respondent's property manager. The parties submitted post-hearing briefs (“Compl. Br.” and “Resp. Br.,” respectively) and the record is now closed.

## **II. STIPULATIONS AND ISSUES PRESENTED**

The parties did not submit any formal stipulations. TR 13. At trial, however, Respondent indicated it does not dispute that Complainant called the NYC Department of Environmental Protection (“DEP”), that DEP made certain findings, or that DEP temporarily shut down the boiler room project at Respondent’s facility. TR 23; Resp. Br. at 3. Respondent also stipulated that Complainant’s wife, Susan Crean, typed emails for Complainant throughout the course of his employment at 125 W. 76<sup>th</sup> Realty Corporation. TR 152-53; Resp. Br. at 3.

The remaining issue to be adjudicated is whether Complainant demonstrated by a preponderance of the evidence that his alleged protected activity motivated Respondent’s decision to terminate his employment. If I find Complainant meets his burden, I must then analyze whether Respondent established by a preponderance of the evidence that it would have taken the same adverse action notwithstanding Complainant’s purported protected activity.

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Complainant that many of the exhibits submitted prior to trial were argument, not evidence, and therefore could only be included in a post-trial brief. TR 153-55. I then clarified with Complainant that his documents entered into evidence consisted solely of exhibits CX-1 through CX-3 and CX-5 through CX-10. TR 155.

Based on the record as a whole, I find that Complainant failed to show by a preponderance of the evidence that his alleged protected activity was a motivating factor in Respondent's decision to terminate him.<sup>3</sup>

### **III. FINDINGS OF FACT**

#### **A. Background**

Respondent, 125 W. 76<sup>th</sup> Realty Corporation, is a nine-floor and penthouse level, twenty-eight unit cooperative residential building in New York, New York. Resp. Br. at 3; TR 159-60. Respondent has a Board of Directors (the "Board") comprised of seven resident volunteers who are elected by other occupants. TR 159-60. The Board normally meets once a month unless there is a need for a special meeting. TR 159. The cooperative has a managing agent, from the Plymouth Management Group, who ensures compliance with agency regulations, maintains the condition of the building, hires employees, and procures outside services, such as contractors to perform work or repairs. TR 160, 216. The cooperative also has a full-time superintendent who lives in the building as well as a part-time porter on the weekends. TR 160-61, 216. On August 15, 2001, Complainant began working for Respondent as the live in building superintendent. TR 25; CX-9; RX-25.

#### **B. Complainant's Behavior and Work Performance – 2014**

In early 2013, Pam Elgar, of Plymouth Management Group, assumed the duties as the new property manager for Respondent. TR 215. At the time of trial, Elgar had ten and a half

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<sup>3</sup> In its brief, Respondent argued Complainant's complaint is barred by res judicata and collateral estoppel in light of the union arbitration and the Arbitrator's March 4, 2015 decision. See Resp. Br. at 22-24; RX-25. I previously denied those arguments in my March 11, 2016 *Order Denying Respondent's Motion for Summary Decision*. ALJX-42; ALJX-44. Accordingly, I will not address the arguments about res judicata or collateral estoppel presented in Respondent's brief.

years' experience as a property manager. *Id.* Elgar's husband, Steve Miller, had been the property manager at Respondent, but when he died, Elgar was invited to fill his role. *Id.* She testified that Complainant had a good working relationship with her husband and that when she first took over managing Respondent's building, Complainant was "supportive," "welcoming" and "helpful." *Id.* However around late 2013 into early 2014, Complainant's behavior drastically changed and he became "combative." TR 162; *see also* TR 216-17.

Amy Rowland, a current resident of the building and a Board member in 2014, testified, "[I]t was very clear to me from the get-go that he [Complainant] ran the building . . . [H]e definitely viewed himself as running the building." TR 162. In her opinion, Complainant "always had to be the expert" in a number of different building projects. TR 177. In one particular instance, in 2013, Complainant criticized management and the Board because he disagreed with the roof renovation work completed by Respondent's hired professionals. TR 177, 220-21. During cross-examination, Complainant pointed out perceived errors with the building roof renovation and noted the hired architect was a "youngster." TR 78-83. Complainant believed the Board shut him out of the building roof project and failed to consult him for his opinion. TR 60-61, 78-79. Elgar described Complainant's manner as "aggressive" when he opposed certain repairs in the building done by outside professionals. TR 220-21.

In 2014, as Elgar worked with and became more acquainted with Complainant, she noticed he had "uneasy" and "irregular relationships with . . . people on the [Respondent's] Board [of Directors] or in the building." TR 217. Complainant often refused to take telephone calls from certain occupants or perform some of his work duties, such as picking up residents' trash. *See* TR 174, 218, 225. In fact, "[Complainant] made the rules about how much garbage he should pick up, and . . . what floors deserve more garbage pickup than others." TR 225.

Elgar stated, “people who pay for their building to be clean don’t want to be told how much garbage they’re supposed to have.” *Id.*

Although Complainant was friendly with some residents, Elgar said Complainant no longer had any goodwill toward certain occupants and he resented having to do work for them. TR 218. Around May of 2014, Complainant’s insubordinate behavior escalated to where he was venting, shouting, and threatening to reduce service levels to certain residents and Board members. *See* TR 164-65; RX-3. Rowland felt “very nervous” and “uneasy” about Complainant’s behavior. TR 166.

The cleanliness of the building noticeably declined around 2014. TR 168-69, 217. During this time, the Board received complaints from residents about the condition of the lobby and a decline in other services. TR 169. Elgar testified:

I didn’t think that the building was up to what the standard it should be, and I found [Complainant] less and less willing . . . to discuss his obligation, why he wasn’t fulfilling his obligation, [and he became] edgier with me when I challenged him on the condition of the building.

TR 217. In Elgar’s opinion, Complainant refused to do certain work because he felt “he was being asked to do too much, [and] considering his position there should be other people doing that job.” *Id.*

C. Special Board Meeting – May 27, 2014

On May 27, 2014, Elgar met with the Board at a special meeting to discuss Complainant’s unacceptable work performance and behavior. TR 164-65, 224-26; RX-2. The Board meeting was documented through the minutes:

At a specially-called meeting to discuss the behavior of the building’s superintendent, those present<sup>4</sup> agreed that the superintendent is not performing

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<sup>4</sup> Board members: Arenson, Madnick, Friedman, Rowland, Turkisher and Pam Elgar of Plymouth Management.

satisfactorily: His working relationship with the building's residents, its Board members and its managing agent has deteriorated significantly. He is threatening and/or not responding to shareholders and to the managing agent and he needs to be told to improve.

RX-2; *see also* TR 164-65. In order to rectify the ongoing problems with Complainant and his insubordination, it was agreed that three Board members and Elgar would meet with Complainant to discuss his conduct. RX-2; *see also* TR 165. In a May 28, 2014 email to fellow Board member Michael Madnick, Karen Arenson noted: "[A]t our coop Board meeting yesterday morning, called specially to discuss the behavior of the building's superintendent, hearing pieces about pieces of [Complainant's] increasingly bad behavior from so many different people painted an even more dire picture." RX-3. She then outlined the specific behaviors to be addressed with Complainant at the meeting:

Venting to residents, sometimes shouting at them.

Holding forth in long tirades, to the point where some residents are now fearful about dealing with him and others worry that he may take his frustrations out on them by leaving them in dangerous situations.

Ignoring phone calls from residents or not responding in a timely fashion, especially in emergency calls during his work hours.

Ignoring phone calls and emails from the managing agent.

Shouting at the managing agent.

Scolding building shareholders and treating them like bad children.

Threatening to reduce service levels.

Refusing to carry out tasks that the building requests, like polishing the brass.

Refusing to deal with a vendor who needs to service a shareholder apartment. (Ex: Time-Warner)

Making mistaken statements about building finances to residents.

RX-3. Of particular concern to the members of the Board was an email complaint from Complainant addressed to Elgar, accusing the Board of changing Complainant's health insurance without his approval and demanding the Board fix the issue.<sup>5</sup> See TR 169-70; RX-1. In an email dated March 11, 2014, with the subject line of "Sneaky Underhandedness!," Complainant's wife threatened Elgar she would "sue the pants off of everyone!" and that "there would be grave consequences!" for changing his health insurance without his consent.<sup>6</sup> RX-1.

D. Realty Advisory Board Involvement with Complainant's Behavior – 2014

In an effort to address Complainant's progressing disobedience, Elgar and the Board contacted Peter Finn, then a staff attorney for the Realty Advisory Board on Labor Relations ("RAB"), to discuss Complainant's lack of cooperation, his failure to perform work duties and the health insurance issue. TR 199-202. Finn testified he had discussions with Elgar several times by phone and then in personal meetings in 2014. TR 199-200.

Respondent is part of the Realty Advisory Board on Labor Relations,<sup>7</sup> an organization that negotiates collective bargaining and other contracts on behalf of its members. TR 196; *see also* RX-27. The collective bargaining agreement governs the obligations of union employees,<sup>8</sup>

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<sup>5</sup> Elgar routinely forwarded Complainant's emails addressed to her to the Board. TR 169, 223.

<sup>6</sup> Complainant only admitted to seeing some of the emails sent from his email account to Elgar in 2014, and stated his wife wrote many of them on his behalf. See TR 86-90, 93, 107-11, 113-14, 116-20, 125-26, 143-44. He testified he could not recall when he learned his wife was communicating with Respondent in this type of manner. See TR 91.

<sup>7</sup> As Finn testified:

The RAB was an organization that was started 80 years ago in reaction to the ordinance of Local 32B and 32J, which is the Building Service Employers Union. It is a recognition that especially an organization representing the employer as the union represents the employees, and to both negotiate contracts and to provide advice and counsel and information to the members of the Realty Advisory Board, which represents about 5,000 commercial and residential buildings, one of which is currently, as far as I know, 125 West 76<sup>th</sup> Street.

TR 195.

<sup>8</sup> Complainant was a member of the Service Employees International Union, Local 32BJ. RX-27.

such as superintendents and outlines obligations of employees, including wages, hours, terms and conditions of employment. RX-27; TR 196-97.

At hearing, Finn clarified that Respondent was not responsible for choosing Complainant's new health insurance plan. TR 198-99. That decision is determined by the union. TR 199. An employer's obligation under contract is to simply "provide certain monies with respect to the health fund . . . which provides medical coverage for all members who are covered under the contract." TR 198. Finn explained:

The employer makes the contribution [to the health fund] on a monthly basis . . . and it's sent to the various funds, and there's a separate fund created with employer trustees and union trustees who make decisions solely and exclusively within the requirement of a fiduciary responsibility for the benefit of members . . . *The employer specifically or individually has nothing to do with those decisions.*

TR 198 (emphasis added). Several Board members attempted to convince Complainant many times that his union, not the Board, changed his health insurance. *See* TR 84, 163, 221-22.

E. Special Board Meeting with Complainant – June 16, 2014

On June 12, 2014, Alyson Reim Friedman, then Board President, sent an email to Complainant requesting he meet with them at a nearby café for a breakfast meeting, to discuss concerns about his work performance and the health insurance issue. TR 91, 164, 166-67, 223-25; RX-4. Complainant rejected that meeting invitation,<sup>9</sup> but later he agreed to attend a meeting on June 16, 2014 in one of the Board member's apartments. TR 91, 167, 223-27; RX-5.

During that June 16<sup>th</sup> meeting, Elgar recalled it "was not an easy friendly meeting" as Complainant "sort of turned away from the table, and we expressed the concern that he wouldn't let go of this issue about the health insurance." TR 227. The Board explained to Complainant

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<sup>9</sup> At hearing, Complainant maintained that the Board's request to meet with him at the café was a "subterfuge" and a "deception." *See* TR 94-95, 97-98.

that it was his union that made the choice of health insurance plans for its members, and the Board had no say in that matter. *Id.* Complainant refused to believe the Board was not responsible for changing his health insurance. TR 162-64, 167, 221-22, 227. Rowland recalled Complainant screaming at the Board members during this meeting. TR 166; *see also* TR 218-19.

At the conclusion of that meeting, the Board informed Complainant that he needed to stop expressing his anger about the health insurance to residents in the building and needed to improve both his behavior and work performance. TR 167, 168, 174.

Later that same day, the Board sent a letter to Complainant outlining the understanding that was reached between them during the morning meeting. RX-5; TR 100-02, 168, 228. The letter indicated that Complainant had agreed to no longer express his anger about the change in his health insurance to Board members, management or residents. RX-5. At that time, Elgar was hopeful that Complainant's behavior would get better. *See* TR 229.

Within hours of the meeting's conclusion, Complainant and his wife sent an angry, accusatory email to Elgar, directed to Respondent's Board members, stating:

You all came to a wrong conclusion with UNacceptable resolution (at your unscheduled Board meeting with management today – compelling my husband to attend). It was wholly unfair of all of you to try and hoodwink my husband, who you did NOT even let consult me in the matter – to either agree or disagree with what you have concluded . . . .

I have rights and I will NOT be overlooked or subjected to any further of your one-sided determinations, that have greatly negatively impacted on us, and on our lives. We previously emailed Pam [Elgar] the only acceptable resolution in this matter, which you should all seriously consider.

. . . .

So, the only solution to this problem is for YOU to privately pay for BOTH our prior level of medical coverage with CIGNA (and, with a true CIGNA product; NOT an Obama Care inferior exchange product! . . . .<sup>10</sup>

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<sup>10</sup> At hearing, Complainant said his wife wrote this email, but he “didn’t know” she sent it. *See* TR 107-10. He testified, however, that the information in the email is true. *See* TR 111.

RX-6 (emphasis in original); *see also* RX-20. The Board found this email completely “inappropriate.” TR 170.

F. Issues Leading to the Decision to Terminate Complainant’s Employment – October 8, 2014

After the June 16, 2014 meeting, Complainant’s harassing behavior escalated and his work performance further declined. *See* TR 174, 229. He became “increasingly paranoid” of management and the Board. *See* TR 172. On July 2, 2014, Complainant sent a two and a half page email accusing the Board President, of “willful defamation and slander” against him.<sup>11</sup> TR 170-71, 229-31; RX-7. On September 17, 2014, Complainant sent Elgar an email stating, “Someone is playing games!” because the batteries for the clock in the building lobby were apparently missing. *See* RX-8; TR 231-32.

On September 24, 2014, Complainant emailed Elgar, with a copy to contract attorney, Steven Peluso, asserting it was a “CRIMINALLY fraudulent misrepresentation” to put the laundry room’s washer and dryer warranties in his name and he demanded the machine contracts be changed immediately. RX-9 (emphasis in original); *see also* TR 172-73, 233-34. Elgar felt “uncomfortable” that Complainant copied Attorney Peluso on this email, especially because she had already changed the warranties. RX-9; TR 233-34. Elgar testified, “I didn’t understand why the whole situation was so uncomfortable [with Complainant], but I did want it to go away.” TR 234. At that time, it was clear to Elgar that Complainant had a “distrustful attitude toward the

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<sup>11</sup> Although immaterial to the present case, except for Complainant’s suspicious views of the Board, I note Complainant’s accusation stemmed from Ms. Friedman’s son’s school project where he interviewed Complainant about his life. *See* TR 170-71, 229-31; RX-4; RX-7; Resp. Br. at 8. The interview was published in a fictional *New Yorker* article as part of the boy’s school project. *See* RX-4. According to Complainant, the interview as detailed in the school article was distorted and denigrating to his life. *See* RX-7; TR 95-100, 114. At hearing, Elgar noted, “I thought it was a bizarre and unusual reaction [by Complainant] to an article from a child, and what could be seen by it other than be sort of charmed by a child writing about you so what – it was not normal I thought.” TR 231.

people in the building where they lived and not a feeling of goodwill which makes it a[n] [un]comfortable work environment for me and the people who live in the building.” See TR 232-33.

Although it was a difficult decision, Elgar recognized they had to find a new superintendent for the building because residents were unhappy. TR 234-36. At trial, she explained, “the super was unhappy and many of the people living in the building were unhappy.” TR 234. At that point, residents could not “ask the [Complainant] to do things . . . and they couldn’t easily ask him for help, and he had rules that made it even more difficult. It was not easy to contact him, find him at home, [or] reach him on the phone.” TR 234-35. In early October 2014, Elgar requested a meeting with Attorney Finn because:

The atmosphere in the building was deteriorating and there was more and more unhappiness, and there were more complaints, more discomfort from people who lived there, the issue with the health insurance – and the goodwill of this seemed completely finished, the goodwill of Mr. Crean toward the people in the building, and I needed to move on.

. . . .

I needed to get another superintendent for this building. This was a very unhappy situation for this building as I perceived it, people who were living together who felt bad toward each other.

TR 234.

On October 8, 2014, Board members Rowland and Friedman, along with Elgar, met with Attorney Finn to discuss possible options and procedures for firing Complainant because of continued poor work performance and unacceptable conduct. TR 173-75, 202-03, 234-36. Pursuant to the rules of the applicable Collective Bargaining Agreement (“CBA”), Finn advised the Board that terminating Complainant was an appropriate course of action. TR 175. More specifically, Finn advised that an arbitrator would not find such a termination to violate the CBA

given Complainant's lack of cooperation, threats, and defiant behavior. TR 175, 200-03, 236; RX-27 at 67-68. Article XVI, Paragraph 3 of the CBA sets forth the standard between the superintendent and employer: "The Arbitrator shall give due consideration to the Superintendent's fiduciary and management responsibilities and to *the need for cooperation* between the Superintendent and the Employer." RX-27 at 67-68 (emphasis added).

During the meeting with Attorney Finn, Rowland and Friedman were presented with "two options and one was to fire [Complainant] outright and one was to try and offer [Complainant] some sort of buyout package." TR 175. Although it was clear to Rowland, Friedman and Elgar that Complainant could no longer work for the building, there were a couple of Board members who felt "sentimental" about Complainant and who wanted to "try to offer [him] some sort of settlement." TR 235-36; *see also* TR 179. Complainant was not fired that day because Elgar, Rowland and Friedman, "out of respect for the other people on the [B]oard," wanted to "take a full and formal vote and record it" at a specially called meeting. TR 236. After this meeting, the Board decided "it was at least worth a shot to try to offer some sort of settlement" to Complainant. TR 179.

G. The Boiler Room Project Incident – October 21, 2014

Prior to the project, Complainant, on August 7, 2014, sent an email to Elgar detailing his concerns about the boiler room renovations:

I have valid concerns about this renovation job work. Particularly, because, not only is it directly below my apartment, but, there are questionable friable materials that are going to be disturbed. I do not know, if this material is 'Asbestos,' or not. However, it is original old composition insulation from 1922.

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Testing now is paramount to determine what this material is before any renovation work can be done. Especially, considering all the time I have spent (and are spending) in the Boiler Room; I do not want to further inhale this airborne dust! And, especially now, since my medical insurance level of care has been significantly reduced (without prior notification), and I would be put at further risk!

CX-1. Before starting repairs on the mechanical flu-duct system in the basement, the Board hired Ace Development Group, Inc. (“Ace”), a company specializing in asbestos investigation, to inspect the building’s boiler room. RX-10; TR 178, 236-37. The inspection, to look for the presence of asbestos, took place on September 10 and September 24, 2014. *Id.*

Following the two inspections in September 2014, Ace concluded the boiler room project could proceed. TR 178-79, 238; RX-10. Ace’s inspection report noted, “There is no asbestos-containing material (ACM) present on the mechanical flu-duct and the boiler affected by proposed repair work. However, the sealant around chimney-wall penetration contains asbestos traces. In addition, if any ACM-suspect is found during demolition exercise, the work must stop for further asbestos investigation.” RX-10 at 2; *see also* TR 179, 238; CX-6.

After Ace gave clearance to proceed, Elgar arranged to move forward with the boiler room repairs. TR 238-39. On October 16, 2014, Elgar notified the building residents via email about a service interruption—the heat and hot water were going to be shut off on October 21, 2014 because of the boiler work. CX-2; RX-12; TR 176, 239. Elgar informed residents to keep their windows shut as the work in the boiler room could get “dusty.” CX-2; RX-12. The next day, on October 17, 2014, Complainant responded to Elgar’s email demanding management take specific precautions because, in his opinion, the dust from the work is asbestos and fiberglass.<sup>12</sup> RX-13. Rowland testified Complainant’s email did not surprise her because he “had inserted himself into a number of different projects where he always had to be the expert.” TR 177.

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<sup>12</sup> Complainant had a list of things he said needed to be done, including instructions for Ace’s workers telling them how to do their job, and techniques and procedures he thought they should employ. RX-13.

On the morning of October 21, 2014, while Elgar was at the cooperative waiting for the workmen to arrive to begin the boiler room work, she and Complainant conversed in the lobby. *See* TR 34-35, 240. Along with a conversation about many things, Elgar asked Complainant about his plans for retirement because “if [he] would leave the building, we wouldn’t have to fire him and . . . we could make a smoother transition.” TR 240. She told him that “if he decides he’s leaving . . . the building will recognize his long service for the building.” TR 240-41. Although Complainant testified he told Elgar he would retire in three or four years, Elgar testified Complainant did not respond to her question. TR 35, 240-41. Elgar left the building soon after this conversation and returned to her office at Plymouth Management. TR 240.

While in her office, Elgar was notified that Complainant told the workmen to stop working and leave the boiler room job site. *Id.* Complainant did so without authority from the Board. *Id.* Complainant testified he called Elgar on the phone to tell her that the workmen did not have the proper filters to complete the job in the boiler room. *See* TR 36, 127-28. Elgar subsequently told the workmen to go back to the job and she returned to the building to confirm the workmen began the repairs. TR 241.

That same day, Complainant confronted the workers in the boiler room because he was “flustered” and “stunned” that the work had started in the boiler room. TR 37. Complainant then notified Attorney Peluso, wherein they made several phone calls to the city and commissioner’s office about asbestos in the boiler room and Respondent’s renovations. *See* TR 37-39; CX-3.

In response to Complainant’s phone calls, Nazim Hodzic, an investigator for the New York City DEP, came to the building at about 7:30 PM, to investigate the complaints about the boiler room. *See* TR 38-40. Complainant said Mr. Hodzic stopped the workmen in the boiler

room, inspected, and took samples.<sup>13</sup> TR 38, 40. After Mr. Hodzic took samples, he put “red danger asbestos tape” around approximately 400 square feet of space in the basement “outside of the boiler room . . . past the motor room and laundry room.” TR 41; CX-5.

That same night, DEP issued a Stop Work Order (“SWO”) and shut the boiler room project down. TR 43, 180, 242; CX-5; RX-14. Elgar was notified that night about Complainant’s call to DEP and the stop work order. TR 241-42. Since this was an emergency situation where residents were without heat and hot water, Elgar immediately called Ace for guidance about remediating the SWO. TR 180, 242. The next day, on October 22, 2014, Ace submitted its proposed asbestos abatement work plan for DEP’s approval. CX-5 at 2; TR 242. DEP then approved Ace’s work plan. TR 242.

On or around October 21, 2014, Complainant posted his own “Notice to Residents” in the building about the boiler room inspection because the management’s notice “didn’t address asbestos . . . [or] fiberglass.” TR 46, 130-33, 181; RX-15. That notice stated in pertinent part:

THIS WORK WAS NOT SANCTIONED BY THE SUPERINTENDENT, AND HE WAS OVER-RIDED WHEN HE PROTESTED TO THIS WORK BEING DONE, BY ALYSON AND PAM. THE WORK IS STILL CONTINUING AS OF THE TYPING OF THIS NOTICE, AND THE WORKMEN ARE EXPECTED TO FINISH UP AROUND 8 P.M.

HAVE NO DOUBT; THIS WORK WAS NOT PROPERLY CONTAINED, NOR REMOVED IN ACCORDANCE WITH FEDERAL EPA OR FEMA REGULATIONS AND PROTOCOLS ON THE REMOVAL OF HAZARDOUS SUBSTANCES; THAT WERE LAB TESTED AND PROVED TO BE SUCH.

\*\*\*\*AND, AS A CONSEQUENCE, THE BUILDING IS NOW IN A CONTAMINATED STATE, OF WHICH INSPECTORS WILL INVESTIGATE SOON!

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<sup>13</sup> At trial, Complainant described the type of samples Mr. Hodzic took from the boiler room:

He was taking tailings off the debris that was hauled out of the boiler room. There was a lot of debris there, but there was a lot of different stuff, and he took a number of them and put them into bags to isolate them and put them in his pouch.

TR 40.

ALSO, SINCE THE WORK ENVIRONMENT IS TOXIC AND HAZARDOUS TO THE SUPERINTENDENT – HE IS NOT ALLOWED TO WORK IN THIS CONTAMINATED AREA, THROUGH NO FAULT OF HIS DOING.

RX-15 (emphasis and punctuation in original). The Board did not authorize Complainant to post this notice and Board members received various concerns from residents about the safety of the building. TR 181, 243. Elgar found this notice to be “upsetting.” TR 243.

After October 21, 2014, Complainant remained in his apartment, but stopped performing his work duties. TR 183-86, 243-44. He refused to go into the basement so the Board had to hire the part-time porter to do the work. *Id.* On October 22, 2014, Complainant sent an email to Elgar, with a copy to Attorney Peluso, indicating that he could not work in “unsafe conditions” created by the boiler room work until the area is cleared of contaminants. *See* RX-16; TR 137-38, 183, 244.

On October 23, 2014, as part of the Respondent’s asbestos abatement work plan, a remediation team conducted air monitoring in the building’s basement. *See* TR 183, 242-43; RX-18; CX-5 at 2. Complainant testified at hearing that he saw the abatement team in the basement, but thought “they didn’t look competent in what they were doing.” TR 45-46, 138. On October 24, 2014, Mr. Hodzic notified Elgar that the boiler room work could resume assuming the asbestos contractor properly followed all approved procedures. TR 245; RX-18; CX-5 at 2. That same day, DEP vacated the Stop Work Order because the remediation team’s air monitoring results were below the clearance criteria. TR 183, RX-18; CX-5 at 2.

In Complainant’s opinion, Ace’s initial inspection and the subsequent remediation work was not done properly. *See* RX-13; RX-15; RX-16; RX-19; TR 35-36, 45, 127-29, 139-42, 183. On October 24, 2014, Complainant sent a lengthy email to Elgar asserting the clean-up in the boiler room was not completed “with . . . the ‘[m]inimum’ safety [a]sbestos removal standards,

protocols and procedures (in accordance with FEMA and EPA laws).” *See* RX-19. He further stated, “I cannot work in these terrible conditions until they are properly cleaned up and properly filtered of all contaminants!” *Id.* Elgar described the relationship with Complainant at this point as “hostile” and contacted Attorney Finn immediately. TR 244. On November 1, 2014, Complainant notified Elgar via email that he was sick from the “toxic exposure” in the basement and that he would be taking his remaining ten-day sick leave. TR 49-50, 145, 184-85, 246; RX-20. Complainant did not discuss nor ask for approval of his sick time with management. *See* TR 246; RX-20.

#### H. Complainant’s Termination – November 5, 2014

On November 4, 2014, the Board met with Attorney Finn to draft Complainant’s termination letter. TR 187, 204. With Finn’s advice, the Board sent the letter to Complainant notifying him he was terminated effective immediately. TR 187, 204; RX-21. Pursuant to the terms of the discharge outlined in the letter, Complainant was required to vacate his apartment in the building within thirty days. RX-21; TR 187. At that point, the Board hired a security guard to sit in the lobby so that residents felt calm during the transition and that “nothing irregular would happen.” TR 185, 247.

Complainant received his termination letter on November 5, 2014. *See* TR 25, 51; RX-21. That day, Complainant filed his complaint against Respondent with OSHA. *See* TR 32, 51-52. He also filed an unsafe working conditions complaint with the union. TR 52; *see also* RX-25.

## IV. DISCUSSION

Under the CAA whistleblower provision, no employer may discriminate against an employee “with respect to his compensation, terms, conditions, or privileges of employment” because he or she has “commenced,” “testified,” or “assisted or participated” in any proceeding under the respective statutes “or in any other action to carry out the purposes of [the statute].” 42 U.S.C. § 7622. In order to establish a whistleblower claim under the Act, a complainant must establish by a preponderance of the evidence that the employer took an adverse action against the complainant because he or she engaged in protected activity. *Jenkins v. U.S. EPA*, ARB No. 98-146, ALJ No. 1988-SWD-2, HTML at 15 (ARB Feb. 28, 2003). In reaching a decision, administrative law judges may apply the framework of burdens developed for discrimination cases under Title VII of the Civil Rights Act of 1964 and other employment discrimination laws. *Id.*

A complainant must first establish a *prima facie* case, raising an inference of unlawful discrimination, by demonstrating that: (1) he engaged in protected activity; (2) the respondent was aware of the protected activity; (3) he suffered unfavorable personnel action; and (4) the protected activity was the reason for the unfavorable personnel action. *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, PDF at 5 (ARB Apr. 30, 2010); *Jenkins*, ARB No. 98-146, HTML at 15. Once the complainant has established these elements, the burden then shifts to the respondent “to simply produce evidence or articulate that it took adverse action for a legitimate, nondiscriminatory reason (a burden of production, as opposed to a burden of proof).” *Morriss v. LG&E Power Servs., LLC*, ARB No. 05-047, ALJ No. 2004-CAA-14, PDF at 32 (ARB Feb. 28, 2007).

If the employer meets its burden of production, “the inference of discrimination disappears” and the complainant must prove by a preponderance of the evidence the employer intentionally discriminated against the complainant. *Jenkins*, ARB No. 98-146, HTML at 15 (citations omitted). To meet this burden, “a complainant may prove that the legitimate reasons proffered by the employer were not the true reasons for its action, but rather were a pretext for discrimination.” *Id.* If the complainant establishes that a retaliatory motive was a factor in the employer’s decision to take an adverse action, “only then does the burden of proof shift to the respondent employer to prove by a preponderance of the evidence that the complainant employee would have been fired even if the employee had not engaged in protected activity.” *Morriss*, ARB No. 05-047, PDF at 33. However, “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Williams v. U.S. DOL*, No. 03-1749, PDF at 13 (4th Cir. 2005) (per curiam) (unpublished) (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

The Board has established that once a case arising under the environmental whistleblower statutes has been litigated fully on the merits, an administrative law judge no longer determines whether a *prima facie* case has been met, but instead determines only whether the complainant has proven by a preponderance of the evidence that the respondent intentionally discriminated against the complainant because of his or her protected activity. *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1, HTML at 7 n.1 (ARB Apr. 30, 2004) (citing *Williams v. Baltimore City Pub. Schs. Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, HTML at 2 n.7 (ARB May 30, 2003)); see also *Morriss*, ARB No. 05-047 at 32-33. Since Complainant’s claim was fully tried on the merits, I will directly proceed to whether Complainant has proven by a

preponderance of the evidence that Respondent discriminated against him because of his alleged protected activity.<sup>14</sup>

A. Complainant's Burden of Proof

The burden is on Complainant to prove by a preponderance of the evidence “that retaliation for protected behavior was a motivating factor for the adverse employment action.” *Miller v. Lower Makefield Pub. Works Dept.*, 2009-CAA-00010 (Apr. 27, 2010); *see also* 29 C.F.R. § 24.109(b)(2). Complainant has not established by a preponderance of the evidence that his report to DEP was a motivating factor for his termination. At hearing, Complainant presented no evidence establishing his alleged protected activity was a motivating factor in Respondent's decision to discharge him.<sup>15</sup> Instead, Complainant's entire case is largely founded on the wholly unsubstantiated contention that Respondent's evidence is fraudulent. *See, e.g.*, Compl. Br. at 6-7. In his brief, Complainant spends significant time personally attacking each witness and accusing Respondent of “staging” testimony, but offered no evidence at trial suggesting Respondent fabricated any documentation or that witnesses falsified their stories.<sup>16</sup> *See id.* at 12-22.

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<sup>14</sup> It is clear that Complainant suffered an adverse employment action when Respondent terminated his employment, and Respondent does not dispute that termination is an adverse employment action.

<sup>15</sup> At trial, Complainant offered into evidence five letters of goodwill, from residents and former residents, and a May 13, 2014 letter from management, stating, “[w]e are looking forward to [Complainant's] continued employment.” CX-9; CX-10. I accord no weight to these letters; neither exhibit aids Complainant in trying to establish that Respondent's adverse action was motivated by Complainant's call to DEP on October 21, 2014.

<sup>16</sup> Complainant's brief is replete with accusations against Respondent. *See* Compl. Br. at 1-7. Complainant purports the following: The Board knew Ace used “wrong and obsolete” testing/inspection techniques in the boiler room in September 2014; The Board knew Ace's report was incorrect and false prior to commencing the boiler room work on October 21, 2014; Respondent knew toxic contaminants were present in the basement for years, but continued to make repairs over the course of his fourteen-year employment without proper procedures; and Respondent failed to notify Complainant and his family about the exposure to toxic contaminants. *Id.* None of those alleged claims against Respondent are substantiated by any evidence in the record.

I am compelled to note that Complainant, a self-represented litigant, was afforded every opportunity to perfect his case and present evidence. However, rather than address the relevant matters at hand, Complainant and his wife, throughout the course of this case, focused their attention and energy in attacking, accusing, or threatening almost everyone involved in this matter. Their vitriol was not limited solely to members of Respondent's Board of Directors, but was also directed at some of their family members, and to Respondent's counsel. Their accusations and maligning were also directed to this Court and members of the Court's staff.

Contrary to Complainant's unsupported position, I found Rowland, Finn and Elgar to be credible and forthright and their testimony established a consistent narrative documenting the events leading up to and after the October 21, 2014 boiler room incident. As an experienced property manager, Elgar was uniquely situated to observe and interact with Complainant and the Board on a daily basis. When she noticed the ever increasing hostility and aggression by Complainant, and his unwillingness to perform his duties, she enlisted the services of Attorney Finn at the RAB. I found Elgar's believable testimony to be most useful in understanding the problems that Complainant caused in the building and how his attitude and disregard for the Board and other occupants of the building directly led to his termination.

Attorney Finn is an experienced labor relations attorney and his credible testimony was very instructive in explaining how the RAB worked and its interaction with the union. His explanation of the union's health insurance process clearly showed that Respondent had no role in choosing or changing Complainant's health insurance. I found him to be forthright and believable.

Rowland's testimony was likewise credible. As a Board member and resident of the building, she was able to clearly articulate, from personal observation, the issues surrounding Complainant's behavior and attitude. I found her testimony to be believable.

I note that Complainant's objection to the boiler room renovation was not the first time he adamantly opposed a building project or Board decision. *See* TR 59, 177, 219-21. In these instances, Elgar found Complainant's behavior "aggressive," noting he often accused the building's hired professionals of "being wrong, not knowing the rules [and] just doing [the work] inappropriately." *See* TR 219-21. During cross-examination, Complainant recalled a time in 2008 when work on the building was performed while he was away, testifying, "[y]ou don't do something pertinent to the building if the superintendent is on vacation. He's the one person that knows the building." TR 59. In 2013, Complainant, although he had no formal training or experience, disagreed with the licensed architect who renovated the building roof and identified several perceived mistakes with these repairs. TR 78-82, 220-21. Complainant's past disagreements with management and the Board evinces his skepticism of Respondent's judgment and of its hired professionals' qualifications.

Complainant's October 21, 2014 call to DEP and actions thereafter further illustrate his attitude that only he knew what was best for the building, and that Respondent's hired professionals were not qualified or competent to perform repairs. *See* TR 78-83, 162, 177, 220-21; CX-1; RX-16; RX-19. There is no evidence in the record indicating Complainant had any relevant training in asbestos investigation. During cross-examination, Respondent asked Complainant if he had any specific license or training in asbestos protocols, and Complainant replied that he took a course about "EPA mandates," although "it wasn't about asbestos, but the same practices pertain[ing] to it . . . [and] [y]ou can't do anything without these filters." TR 128.

Nevertheless, Complainant insisted Ace and the remediation air specialists did not use asbestos investigation or removal procedures in accordance with “FEMA and EPA laws,” but provided no evidence supporting this assertion at trial.<sup>17</sup> RX-19; *see also* TR 142.

Based upon the record before me, it appears Complainant’s opposition to the boiler room project and his report to DEP on October 21, 2014 resulted from his evident distrust towards Respondent and its hired professionals, rather than a reasonable belief that Respondent was violating any environmental laws. Complainant’s inability to establish that the report to DEP on October 21, 2014 constituted protected activity under the Act is another hurdle he cannot overcome.<sup>18</sup>

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<sup>17</sup> On cross-examination, Complainant claimed that Ace and the air specialists used “improper” and “obsolete techniques in testing” for asbestos in the boiler room:

Q: Is that [your opinion] based upon some independent expert that you hired to examine the testing that was done in the basement?

A: I didn’t hire any expert nothing. As a matter of fact, it’s noted, I have it submitted in the documentation, that the procedures were changed in 1989 and now we have – this applies to Quadri [sic] [Lawal from Ace] as well as the air specialist people – they were just using polarized light microscopy and that’s outdated. They have to use that procedure in conjunction with the new testing. So you have to get two procedures.

TR 141-42.

<sup>18</sup> Protected activity cannot be based on “assumptions and speculation.” *McKoy v. N. Fork Servs. Joint Venture*, ARB No. 04-176, ALJ No. 2004-CAA-002, slip op. at 6 (ARB Apr. 30, 2007). An employee’s protected activity must be “grounded in conditions constituting reasonably perceived violations of the environmental acts.” *Evans*, ARB No. 08-059, PDF at 6. In other words, the complainant must demonstrate that the complaints were based on a reasonable belief that the respondent violated the applicable environmental laws. *See Evans v. Baby-Tenda*, ARB No. 03-001, ALJ No. 2001-CAA-4, PDF at 4 (ARB July 30, 2004). Reasonable belief must be scrutinized under both a subjective and objective standard; namely “[the complainant] must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the complainant’s] circumstances having his training and experience.” *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-6, PDF at 28 (ARB July 14, 2000)

The reasonableness of Complainant’s belief that Respondent was violating environmental laws is undercut by the ample evidence demonstrating Respondent took all measures required by law to ensure it properly inspected the boiler room for asbestos prior to starting the renovations. *See* RX-10; RX-18; TR 178-79, 236-39, 242. The reasonableness of Complainant’s belief is also completely undermined by DEP’s findings on October 24, 2014. *See* RX-18. Although DEP confirmed that the remediation team’s air monitoring results were below the clearance criteria and allowed Respondent to move forward with renovations on October 24, 2014, Complainant maintained that Respondent did not properly clean-up and filter the boiler room or follow regulatory protocols. *See* RX-18; RX-19; TR 183. In his October 24, 2014 email to Elgar, Complainant asserted Respondent failed to follow specific clean-up guidelines: “Both sub-contracted companies were NOT even knowledgeable of proper contaminant

Although my determination that Complainant has not met his burden is dispositive, I will proceed to the final stage in the analysis for completeness of the record and any possible appellate review.

B. Respondent's Burden of Proof

If a complainant establishes by a preponderance of the evidence that a retaliatory motive played at least some role in the decision to take an adverse action, only then does the burden of proof shift to respondent to prove by a preponderance of the evidence that the complainant would have been fired even if he had not engaged in protected activity. *See* 29 C.F.R. § 24.109(b)(2); *Kuehu v. United Airlines*, ARB No.12-074, ALJ No. 2010-CAA-007, slip op. at 4 (ARB Feb. 10, 2014); *Morriss*, ARB No. 05-047 at 33. Assuming, *arguendo*, that Complainant met his burden, Respondent has proven by a preponderance of the evidence that Complainant would have been terminated notwithstanding his purported protected activity. Respondent's evidence overwhelmingly shows Complainant's behavior in 2014 towards management and Board members escalated beyond mere lack of cooperation to outright hostility, and thus I find Respondent has met its burden of proof.

After Respondent's remediation work in the boiler room, Complainant continued to challenge management and the Board, triggering a total break-down of the employer-employee relationship. *See* RX-15; RX-16; RX-19; RX-20; TR 181-86, 243-44, 246. In fact, Complainant's actions created a "hostile" environment for management, Board members and residents. TR 244; *see also* TR 181-82. Complainant refused to enter the basement and wholly

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procedures and proper eradication of these contaminants." RX-19 (emphasis in original). It is important to note that Respondent was not cited or fined by DEP or OSHA for the boiler room renovation. *See* TR 247-48.

stopped performing work duties as of October 21, 2014. TR 183-86, 243-44; RX-15; RX-16; RX-19; RX-20.

Despite DEP's permission to resume the basement renovations, Complainant disputed the legitimacy of the boiler room clean-up. TR 183, 242-44; RX-19. In his October 24, 2014 email to Elgar, Complainant told both the Board and management, "You are NOT going to use my throat (nor any other residents' throats here) as Asbestos filters to cover your tracks!" RX-19 at 2 (emphasis in original). He further asserted, "YOU, and the Board[] . . . have consciously and willfully put ALL residents in IMMINENT DANGER by exposing all (continuously now), to FRIABLE Asbestos WITH other contaminants . . . that have been FURTHER SPREAD by the 2 NON-LAW-COMPLIANT subcontractors you hired!" *Id.* (emphasis in original). Based upon the testimony elicited at hearing and the documents entered into evidence, it is abundantly clear that Complainant's unrelenting insubordination, hostility and disappearance after October 21, 2014 sparked the Board's decision to terminate his employment on November 5, 2014, not his purported protected activity.

Most pertinent to this determination is that the Board decided to terminate Complainant well before the telephone calls to DEP on October 21, 2014. TR 173-75, 202-03, 234-36. In early 2014, Complainant became resentful of the Board causing the relationship to deteriorate. TR 162-65, 217-18, 225, 220-21; RX-3; RX-5. It appears the issue over Complainant's health insurance was the catalyst to his combative behavior towards Respondent in 2014. *See* TR 91, 162-63, 164, 166-67, 170, 199-200, 221-22, 234; RX-1; RX-3; RX-5; RX-6. As a result of his hostility, Complainant continually defied Respondent by refusing to perform required work (such as taking out the trash or polishing the brass in the building's lobby) for some residents and Board members. *See* TR 174, 202-04, 218, 225; RX-3. Even more disconcerting to the Board,

was that Complainant shouted at and threatened a Board member, and vented to other residents about the health insurance issue. TR 164-66; RX-3.

In an attempt to mend the declining relationship with Complainant, Respondent contacted Attorney Finn several times in 2014 for guidance about how to remediate Complainant's combative behavior and unsatisfactory work performance. TR 201-02. Notwithstanding Respondent's efforts to encourage Complainant to improve his behavior, his conduct only worsened. *See* TR 174, 229. Complainant became so uncooperative to the point where some residents no longer felt comfortable in their own building. *See* TR 166, 168-69, 174, 183-86, 199-200, 217-18, 220-21, 225, 229, 231-36, 243-44; RX-3.

Ultimately, the working relationship between Complainant and Respondent completely lacked "goodwill" and became outright dysfunctional long before the boiler room incident. TR 173-75, 202-03, 234. It was during the October 8, 2014 meeting with Attorney Finn that Rowland, Friedman and Elgar agreed to end Complainant's employment, either through a buyout/settlement offer or absolute termination. TR 173-75, 179, 202-03, 234-36. In fact, on the morning of October 21, 2014, prior to Complainant's call to DEP, Elgar asked him about his retirement plans in hopes the building could make a "smoother transition" without an absolute discharge. TR 240-41. Thus, I find that Complainant's employment would have been terminated despite his report to DEP on October 21, 2014.

## **V. CONCLUSION AND ORDER**

Based on the foregoing, I find that Complainant has not met his burden of establishing by a preponderance of the evidence that Respondent took an adverse action against him because he engaged in protected activity under the Clean Air Act.

Accordingly, **IT IS HEREBY ORDERED** that Complainant's claim under the Clean Air Act is **DENIED** and his complaint is **DISMISSED**.

**SO ORDERED.**

**TIMOTHY J. McGRATH**  
Administrative Law Judge

Boston, Massachusetts

**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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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 filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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.