

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 October 2017

CASE NO.: 2016-CAA-2

IN THE MATTER OF:

VAN JASON ROZNER

Complainant

v.

FORMOSA PLASTIC CORPORATION, TEXAS¹

Respondent

APPEARANCES:

ROBERT E. MCKNIGHT, JR., ESQ.

For The Complainant

CHRISTINE REINHARD, ESQ.,
STEPHEN BACHRAN, ESQ.

For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the employee protective provisions of the Clean Air Act of 1977, (herein CAA), 42 U.S.C. § 7622, et seq., and Toxic Substances Control Act, (herein TSCA), 15 U.S.C. § 2622, and regulations thereunder at 29 C.F.R. Part 24, brought by Van Jason Rozner (Complainant) against Formosa Plastic Corporation, Texas (Respondent).

¹The name of the Respondent appears as amended at the formal hearing.

I. PROCEDURAL BACKGROUND

Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") on or about April 27, 2016, alleging that Respondent discharged him because Complainant reported various environmental and safety concerns regarding unpermitted air emissions, unauthorized disposal of contaminated waste, and alleged violations of the operating Title V Air Permit at Respondent's Port Comfort, Texas facility. Specifically, Complainant argues that because he made these complaints with Respondent he was presented a written disciplinary action on March 31, 2016, for failing to follow certain procedures. On April 1, 2016, Respondent terminated Complainant for "conduct unbecoming" of a Respondent employee, but without any specificity.

The OSHA Regional Supervisory Investigator dismissed Complainant's complaint on May 19, 2016, after "calling" counsel for Complainant on May 12, 2016, to request information relative to the complaint. Apparently, by May 19, 2016, one week later, without a return call from counsel or any information supplied relative to the complaint, the complaint was dismissed. Consequently, the Secretary's Findings indicated that "there is insufficient evidence to sustain the violation" and the complaint was dismissed.² (ALJX-1).

Based upon Complainant's Request for Hearing dated June 3, 2016, this matter was referred to the Office of Administrative Law Judges for a formal hearing. (ALJX-2). Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a formal hearing, which commenced on January 31, 2017, in Houston, Texas. (ALJX-3; ALJX-6). This matter was heard over a period of three days. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs.

The following exhibits were received into evidence at the formal hearing: Administrative Law Judge Exhibit Numbers 1-6;³

² References to the transcript and exhibits are as follows: Transcript: Tr.____; Complainant's Exhibits: CX-____; Respondent's Exhibits: RX-____; and Administrative Law Judge Exhibits: ALJX-____.

³ The Administrative Law Judge Exhibits consist of an OSHA letter of referral dated May 19, 2016 (ALJX-1); Complainant's objections to the Secretary's findings (without photos) and request for hearing dated June 3, 2016 (ALJX-2); the Notice of Hearing and Pre-Hearing Order dated July 5, 2016 (ALJX-3); Complainant's Complaint filed August 1, 2016 (ALJX-4); Respondent's Answer and Defenses to Complainant's Complaint filed August 25, 2016 (ALJX-5); and an Order Rescheduling Hearing and Revised Pre-Hearing Order dated September 23, 2016 (ALJX-6).

Complainant Exhibit Numbers 1, 4, 7, 12, 17, 20-22, 23 (pp. 4-6), 26, 27, 28 (pp. 1-9), 29 and 30; and Respondent Exhibit Numbers 1-4, 12, 22, 24-26, 28, 31, 33, 41 and 42. Post-hearing briefs were timely received from Complainant and Respondent by the final briefing date of May 1, 2017. No reply briefs were received from the parties.

Based on the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Order.

II. STIPULATIONS

At the commencement of the hearing, the parties stipulated, and I find:

1. At all times material, Complainant was an employee within the meaning of 42 U.S.C. § 7622. (Tr. 27).
2. At all times material, Respondent was an employer within the meaning of 42 U.S.C § 7622. (Tr. 27).

III. ISSUES

1. Whether Complainant engaged in protected activity within the meaning of the Clean Air Act and the Toxic Substances Control Act?
2. Assuming Complainant engaged in protected activity, whether his alleged activity was a motivating factor⁴ in Respondent's alleged discrimination against Complainant?
3. Whether Respondent demonstrated a legitimate, non-discriminatory business reason for its actions towards Complainant?
4. Whether Respondent has demonstrated by a preponderance of evidence that it would have taken the same unfavorable personnel actions against Complainant irrespective of his having engaged in alleged protected activity?

⁴ In contrast to the statutory language of "motivating factor," the Board in Kelly-Lusk v. Delta Airlines, Inc., ARB No. 16-041, ALJ No. 2014-TSC-003, slip op. at 8 (ARB Sept. 18, 2017), referred to complainant's burden as demonstrating the protected activity is a "contributing factor" in the unfavorable personnel action. See 29 C.F.R. 24.104(e)(2)(i)-(iv).

IV. SUMMARY OF THE EVIDENCE

Background

Respondent operates its Specialty PVC unit ("SPVC unit") at the Port Comfort facility under the purview of the Texas Commission on Environmental Quality's Air Quality Permit ("Air Permit") which was issued to Respondent on May 28, 2013. (Tr. 369; RX-33). The Air Permit provides special conditions set forth by government agencies to ensure Respondent's air emissions derive from permitted emission sources and do not exceed the maximum allowable emission rates. (RX-33, p. 3). Respondent employs an Environmental Senior Manager, Stephanie Schmidt, whose job is to ensure all units that fall under the Air Permit comply with its conditions and function within the confines of environmental regulations. (Tr. 367-68). Respondent also maintains internal procedures such as "Procedure 28" that may be utilized when an emission event or maintenance situation creates emissions that will exceed the reportable quantity release amount set forth by the Air Permit. (Tr. 375; CX-1).

As discussed below, Complainant began working for Formosa Plastic Corporation, Texas, at its facility in Port Comfort, Texas, on May 15, 2000. Initially, he worked as a laboratory technician in the PVC/VCM (polyvinyl chloride/vinyl chloride monomer) lab. Thereafter, in March 2008, Complainant received a promotion and became a day shift supervisor in the SPVC unit, where he remained until he was terminated on April 1, 2016. (ALJX-4).

In his June 16, 2016 request for hearing, Complainant avers Respondent violated multiple regulations regarding the Clean Air Act and the Toxic Substances Control Act, as well as requirements set forth by its Air Permit, the Environmental Protection Agency ("EPA") and the Occupational Safety and Health Administration ("OSHA"). Consequently, Complainant made numerous (anonymous) reports about environmental non-compliance to "Report It," a third party vendor who receives reports from Respondent's employees which are then transmitted to Respondent's corporate New Jersey office. (Tr. 533-34). However, on March 31, 2016, after Complainant filed an "employee exposure incident" report, Jim Hersey and Star Lee became angry and pulled his badge on the same day. Thereafter, Complainant was terminated on April 1, 2016, for "false reasons" after he refused to sign a disciplinary notice that Complainant states is completely false and is refuted by documentary evidence. (ALJX-2).

The Testimonial Evidence

Wilburn D. Laas, Jr.

Laas testified he is acquainted with Complainant who was a shift supervisor in the "SPVC unit" from 2009 until April 1, 2016, when Complainant was terminated. (Tr. 30-31). Laas confirmed it is against Respondent's policy for employees to sleep on the job, even during a work break. In the event there is evidence an employee is sleeping on the job, an investigation is conducted before the employee is terminated. Laas testified Complainant was terminated from employment with Respondent because it was determined Complainant was "in fact sleeping on the job." He confirmed the sole reason for Complainant's termination was sleeping on the job. Prior to Complainant's termination, Jim Hersey contacted Laas to inform Laas that he possessed evidence that Complainant had fallen asleep during his work shift. (Tr. 31).

Laas testified Hersey is the Production Manager in Respondent's SPVC unit, and was Complainant's direct supervisor. Laas is Respondent's Human Resources ("HR") Manager. Laas along with human resources generalist, Alan Revis, conduct Respondent's employee investigations. Laas's supervisor is Ben Hall, the Director of Administration, as well as General Manager Rick Crabtree. (Tr. 32).

Laas testified Hersey called him on the phone about Complainant sleeping on the job. Hersey obtained two employee statements from Francisco Rodriguez and Jonathan Garcia, along with one statement from a supervisor regarding Complainant's sleeping on the job. (Tr. 33). Laas confirmed Hersey was instructed to obtain the employee statements, but Laas had no personal involvement with obtaining the statements. (Tr. 33-34).

Laas testified he met with Complainant to question him about sleeping on the job, but he did not record the investigative meeting rather he only took notes. He also did not ask Complainant to provide a written account of what occurred during the meeting. (Tr. 34). Laas identified CX-26, which is an exhibit that contains six witness reports related to Complainant's April 1, 2016 termination for "unbecoming behavior," along with Laas's investigation notes. (Tr. 35-36).

On cross-examination, Laas testified he has been employed by Respondent since 1992. Initially, he began working at Respondent's Engineering Center as a pipe inspector. (Tr. 37-

38). In December 1999, Laas transferred to Human Resources and became manager of HR two years ago. He also serves as an "Ombudsman," and in doing so, he educates employees about Respondent's policies and procedures. (Tr. 38). For the past 10 to 12 years, Laas also has conducted training for new supervisors. The training is an eight hour course entitled "Civil Treatment for Leaders." (Tr. 39).

Laas testified Alan Revis is Respondent's "HR generalist." (Tr. 39). Before transferring to HR, Revis was an Environmental Health and Safety Specialist operating in Respondent's Environmental Health and Safety ("EHS") Department. Prior to working in the EHS Department, Revis worked as an Operator in the "PVC unit." Neither Laas nor Revis report to Jim Hersey or Star Lee. (Tr. 40). Randy Smith, the former General Manager, had an open door policy for reporting any issues, which Laas stated began in 1998. (Tr. 41). In April 2016, Smith retired, but his successor, Rick Crabtree, continued the open door policy. (Tr. 42).

Laas testified the Civil Treatment for Leaders training is a two-day course that includes training about sexual harassment issues, along with environmental, health, and safety policies. (Tr. 42-43). Attendees are required to sign-in and are tested on the course. Laas stated he aims to teach the course every year, but it was not conducted in 2015. However, in 2016, Laas completed the course with all new employees. (Tr. 44). Laas identified RX-26 as test scores from 2012; Complainant scored "100" on September 13, 2012.⁵ Ms. Stephanie Schmidt, Respondent's Environmental Manager, and Mr. Josh Jasek, a SPVC supervisor, also completed the course on September 13, 2012. (Tr. 46). As part of the training, sleeping on the job is discussed and Respondent's policy prohibiting sleeping on the job is found in the personnel manual. (Tr. 47).

Laas testified Randy Smith made sleeping on the job a terminable offense in 2001 or 2002. (Tr. 47). The termination policy for sleeping on the job applies to supervisors, as well as all other employees. The only time sleeping is permissible is when an employee is on **unpaid** lunch time, but if an employee is being paid the employee may not sleep. (Tr. 48). Laas emphasized that it is important employees do not sleep on the job due to the serious nature of Respondent's business, and as such, employees must be alert and attentive. During employee training courses, Laas made clear Respondent's policy about

⁵ Respondent's Exhibit 26 was offered and received into evidence without objection. (Tr. 45).

sleeping on the job pertained to all employees, including supervisors. (Tr. 49).

Laas confirmed Respondent's disciplinary actions are reflected in RX-24 which is a chart that was revised on August 6, 2002, and in effect to present.⁶ (Tr. 50). Page three of RX-24 details the "behavioral section" and addresses "sleeping during working hours." The resulting discipline for sleeping on the job is termed "SPIT," suspension pending investigation to terminate. (Tr. 51). Laas further confirmed the HR Department becomes involved only when employees receive written warnings, last warning notices, suspension, or termination. Typically, the HR Department does not perform oral warnings or coaching, or complete communication counseling forms, which is usually done by supervisors. (Tr. 52). If a supervisor completes a communication counseling form, the HR department does not keep record of it. (Tr. 53).

Prior to Complainant's termination, Laas was involved in disciplinary matters involving Complainant.⁷ (Tr. 53). Specifically, on September 9, 2015, Laas issued a last written warning notice to Complainant for "inappropriate behavior at a supervisor's meeting." (Tr. 55-56; RX-10). Laas did not attend the supervisor's meeting, rather Hersey informed Laas that Complainant became disruptive, acted inappropriately and in an insubordinate manner towards Star Lee. (Tr. 56). Consequently, Lee expressed that he wanted Complainant terminated. Thereafter, Laas requested that Hersey collect statements from witnesses who attended the supervisor's meeting. (Tr. 57). Hersey communicated to Laas what transpired at the supervisor's meeting and Laas recalled that Complainant was questioning Lee's recommendation that there be a change from two supervisors to one supervisor overseeing the "train's reaction and drying." (Tr. 57-58). Witnesses' statements were gathered and Laas reviewed the statements. The statements are set forth in RX-11.⁸ (Tr. 58). Three supervisors who attended the supervisor's meeting did not provide statements; Greg Chapa who worked with Complainant, and two other supervisors who left immediately after the meeting. (Tr. 59). Ultimately, it was decided by

⁶ Respondent's Exhibit 24 was offered and received into evidence without objection. (Tr. 50).

⁷ An offer of proof by question and answer was made at the hearing regarding Complainant's last written warning notice he received in September 2015. (Tr. 53-64). The undersigned allowed the offer of proof for the sole purpose of demonstrating that Hersey and Lee had an opportunity to terminate Complainant, but did not do so because they believed Complainant was a good supervisor and they could work with Complainant. (Tr. 53-55, 68).

⁸ Respondent's exhibits 10 and 11 were rejected on the basis of relevancy, and as a result, were not admitted into evidence. (Tr. 68-69, 110).

Hersey and Lee that Complainant was a good supervisor and they could work with Complainant. As a result, Complainant was not terminated. (Tr. 60-61).

Laas later spoke with Complainant about the events that transpired at the September 2015 supervisor's meeting, and he tried to advise Complainant on how to conduct business in a professional manner. (Tr. 61). Laas did not recall Complainant stating he believed the last written warning notice was requested by Lee and Hersey based on a retaliatory motive. (Tr. 62). However, Laas recalled Complainant's concern related to a safety issue regarding "writing hot work permits," but Complainant did not raise concern about a change leading to greater air emissions. (Tr. 62-63). Nor did Laas recall Complainant expressing concern over a possible violation of the Air Permit that applied to the SPVC unit. (Tr. 63). Laas stated the sole reason for Complainant receiving the last written warning notice was because of Complainant's outburst and behavior at the supervisor's meeting. (Tr. 63-64).

On March 31, 2016, Laas was notified about Complainant sleeping on the job. (Tr. 69). Statements were collected from witnesses (i.e., THM crew members)⁹ who saw Complainant sleeping, but Laas did not collect the statements or speak directly with the witnesses. (Tr. 70). Complainant's "confession" that he slept in the backhoe was similar to the account provided by witnesses. (Tr. 71-72). Laas confirmed RX-21 and CX-26 are the same documents, which reflect notes made by Laas while speaking with Complainant about the sleeping on the job incident. (Tr. 72-73). Hersey and Revis were present in the room while Laas questioned Complainant about sleeping on the job. (Tr. 73). Laas identified RX-22 as a photo of the room where he questioned Complainant and which shows where he, along with Complainant, Hersey, and Revis were all seated.¹⁰ (Tr. 74-75).

Laas testified he did not share the collected witness statements with Complainant. According to Laas, during the questioning, Complainant initially stated "no, I was not sleeping," he then stated "I do not remember sleeping," and "I did not intend to go to sleep." (Tr. 76). Lastly, Complainant stated "well, I might have drifted off or dozed off," but Complainant stated he could not remember. (Tr. 76-77). Complainant further reported to Laas that he climbed into the cab of the backhoe to "warm up," and that after the THM crew left, Complainant got out to close the windows. However, Laas

⁹ "THM" stands for "total housekeeping management." (Tr. 473).

¹⁰ Respondent's Exhibit 22 was offered and received into evidence without objection. (Tr. 75).

stated there was a window missing on one side of the backhoe. Furthermore, Complainant only reported to Laas that he saw the THM crew drive up with a forklift, but Complainant did not know the THM crew had walked up earlier and saw him sleeping in the backhoe prior to their arriving with the forklift. Laas noted that Complainant made many inconsistent statements regarding the sleeping on the job incident. (Tr. 77). At the end of questioning, Laas informed Complainant that his badge was being pulled, and he was suspended pending an investigation due to allegedly sleeping on the job. (Tr. 78).

During the questioning, Complainant did not raise any issues about other employees not being terminated for sleeping on the job. (Tr. 78). If Complainant had done so, Laas would have made a note of it and investigated the allegations. Complainant also never alleged that someone falsely accused him of sleeping on the job. (Tr. 79). After Complainant left the room, Laas had no more contact with him that day. However, after the meeting, Complainant stated he scheduled a meeting with Rick Crabtree that afternoon. (Tr. 80). Laas informed Complainant the meeting would have to be cancelled because his badge was being pulled and he could not return to the administration building. (Tr. 80-81). Laas and Revis escorted Complainant from Respondent's premises, during which Complainant did not raise his discipline as retaliation for his alleged complaints, or state that he communicated to Hersey he was going to the Texas Commission of Environmental Quality ("TCEQ") or the Environmental Protection Agency ("EPA") to report environmental violations. (Tr. 81-82).

Laas testified that, days or weeks later, he had a phone conversation with Complainant, but Complainant never stated he believed his termination was related to environmental concerns he expressed to Hersey and Lee. (Tr. 82). At the time Complainant was suspended from work prior to his termination, Laas did not investigate the matter any further because he had Complainant's statement, along with the statements from the THM crew which confirmed Complainant was sleeping in the backhoe. (Tr. 82-83). After considering whether to terminate Complainant, Hersey and Lee concluded Complainant should be terminated for sleeping on the job. (Tr. 83). As Respondent's Human Resource Manager, Laas recommended Complainant be terminated because the application of Respondent's policy against sleeping on the job must be applied consistently. (Tr. 84). Laas recalled Hersey did not enjoy seeing Complainant lose his job, and losing a shift supervisor increased the work load for the employees who worked in the SPVC unit where Complainant worked. (Tr. 84-85). Hersey never mentioned to Laas that

Complainant complained about environmental compliance issues or reported that Complainant was going to outside government agencies. (Tr. 85).

Laas confirmed Rick Crabtree was the last person to sign off on Complainant's termination. However, before doing so, Crabtree asked a lot of questions, but he did not ask for the THM crew or employee statements. (Tr. 86). Complainant's termination notice states the nature of the infraction as "unbecoming behavior FPC-TEX employee." Laas testified the aforementioned phrase was used, rather than "sleeping on the job" because it was unbecoming for Complainant to be asleep in the backhoe. Laas stated it was inappropriate for Complainant to be in the backhoe because it did not run, and it was not part of the equipment Complainant's unit used, so there was no need for Complainant to be in the backhoe. (Tr. 88). Moreover, on the day Complainant entered the backhoe, he was only 30 minutes into his shift and as the shift supervisor he had to relieve his counterpart and get the crew ready to go for the shift. Therefore, for Complainant to leave the control room to go sleep in the backhoe was completely inappropriate. (Tr. 88-89). It did not make sense to Laas that Complainant went into the backhoe to "warm up" because Complainant worked out of a control room that was air conditioned and heated. Laas also stated Complainant had no need to get into the backhoe to allegedly "watch the THM crew" because the crew reported to the "day supervisor," and not a shift supervisor. (Tr. 89).

In the last couple of years, Respondent terminated two to four employees for sleeping on the job. (Tr. 90). Laas confirmed RX-25 contains documentation of those employees who have been terminated for sleeping on the job since 2014.¹¹ (Tr. 91). Nathan Merck, who worked in the SPVC unit as an operator, was terminated, in part, by Hersey for sleeping on the job in June 2014. (Tr. 94). However, Complainant was Merck's supervisor at the time of Merck's termination. (Tr. 95). Similarly, Todd Savoy was terminated for sleeping on the job in December 2016. (Tr. 95-96). Neither Marek nor Savoy made complaints or voiced concerns relating to the CAA, TSCA, or potential Air Permit violations. (Tr. 96).

Laas testified he met with Complainant on various occasions, some of which occurred while Complainant worked with supervisor Hersey. However, Complainant never reported to Laas that he was going to contact the TCEQ or the EPA. (Tr. 98). Nor did Complainant report to Laas that Lee was not complying

¹¹ Respondent's Exhibit 25 was offered and received into evidence. (Tr. 91-93).

with Respondent's Air Permit, or that he was being treated differently by Hersey and Lee. (Tr. 98-99). Eventually, it became apparent to Laas that Complainant had problems with the management style of Hersey and Lee. Although Laas had knowledge that Complainant was also going to be issued a last written warning for improper sampling, Laas did not know the warning was issued on the same day he spoke with Complainant about sleeping on the job. (Tr. 100). The last warning notice was in relation to not properly following the standard operating procedures for taking samples in the SPVC unit. (Tr. 101-02).

Laas testified that on the day Complainant was suspended, Complainant took photos and confidential schematic drawings from Respondent's facility without permission to do so. (Tr. 102-03). All employees sign a confidentiality agreement (i.e., an employee secrecy agreement) not to take information for personal gain. Complainant would have needed a "camera pass" to take photos, but he never obtained a pass. (Tr. 103-04). Laas confirmed RX-24 states an employee will be terminated for violating an employee secrecy agreement. (Tr. 104-05). Laas identified RX-2 and RX-3 as two employee secrecy agreements signed by Complainant while he was employed by Respondent. (Tr. 105-06).¹²

Laas testified Marcus Casillas never informed him that he witnessed other employees sleeping on the job, which Casillas could have brought to Laas's attention. (Tr. 108-09). Nor did Casillas communicate to Laas that he believed Complainant had been treated poorly or was being retaliated against by Hersey or Lee. Laas took no pleasure in terminating Complainant and he stated Complainant's termination was not due to a retaliatory motive. (Tr. 109).

On re-direct examination, Laas confirmed RX-25 does not contain the paperwork demonstrating Todd Savoy was terminated in December 2016, for sleeping on the job. (Tr. 111). Laas testified he knew of only one employee, Curtis Rosenbrock, who was not terminated for sleeping on the job. (Tr. 113-14). However, Rosenbrock was not terminated because he tendered his letter of resignation before all signatures were obtained for the termination notice. (Tr. 114).

Marcus Casillas

Casillas testified he worked for Respondent from July 14, 2010 to March 7, 2016. (Tr. 116). He began working for

¹² Respondent's Exhibits 2 and 3 were offered and received into evidence without objection. (Tr. 106-07).

Respondent as a process operator at an hourly wage. Shortly thereafter, he became a shift supervisor in the SPVC unit which is a salaried position. (Tr. 116-17). For a short time, his supervisor was Mike Toler. He also worked for S.C. Chang, Joey Chen, Star Lee, and Jim Hersey beginning in 2014. (Tr. 117). Hersey was Casillas's direct supervisor, and Hersey's direct supervisor is Star Lee. (Tr. 118).

Casillas testified he informed Hersey that he observed Brian Hover, a shift supervisor, and Derek Chavana, an operator, sleeping on the job at the shift change. (Tr. 118). Casillas observed Chavana lying on top of a desk, and Hover was asleep, propped up in a chair. (Tr. 118-19). Casillas observed Hover and Chavana sleeping at the end of their night shift when he was coming into work for the day shift. (Tr. 119-20). In the summer of 2014, when Hersey became production manager over the SPVC unit, Casillas informed Hersey that Hover and Chavana were sleeping on the job. (Tr. 120). Hersey stated he would handle the matter, but he did not ask Casillas for a statement or whether he had any evidence (i.e., a photograph) of the employees sleeping on the job. (Tr. 120-21). In addition, Casillas was not contacted by the HR Department to obtain a statement as to who he observed sleeping on the job. (Tr. 121). Casillas does not know if his reports of sleeping on the job were investigated. He reported to Hersey at least two or three times, that employees were sleeping on the job. (Tr. 122). Casillas also witnessed Greg Chapa and Darrell Taylor nodding off at their desks and told them to "go walk around. Do not let these guys see you like that. It is not a good example." (Tr. 122-23).

Casillas identified CX-1 as Respondent's "Procedure 28" which became effective on February 15, 2012, and its purpose is to provide instruction on how to report and document emissions on the ENV-2 forms.¹³ (Tr. 124). Casillas explained the purpose of Procedure 28 is to report and document the quantity of controlled substances that are emitted into the environment. This is a requirement for Respondent's Air Permit. (Tr. 125). Casillas further explained the ENV-2 form is utilized when regular maintenance is performed, as well as for unplanned maintenance incidents. (Tr. 126).

Casillas testified there were several times that he and Hersey debated when to use the ENV-2 forms, and whether proper safety precautions were taken. (Tr. 127). For example, Casillas and Hersey had a disagreement regarding the ST-532

¹³ Complainant's Exhibit 1 was admitted and received into evidence with no objection. (Tr. 124).

tank. Hersey opened the tank and approximately six to eight thousand pounds of powder with VCM fell to the ground and went into the air as well.¹⁴ (Tr. 128-29). To Casillas's knowledge, no ENV-2 form was completed and Hersey was "not interested" in properly containing the powder with a "vac truck" or "super sacks" to prevent further emission into the environment. (Tr. 129-30).

Casillas described another incident in 2015, that involved a problem with the "wet side" and caused the "mass spec alarm" to sound.¹⁵ (Tr. 131-33). The mass spec alarm signals when "fugitive emissions" are present. He instructed an employee to take a "mini-ray" reading, which monitors ambient air and will signal when there is a high concentration of chemicals in the air. (Tr. 133). He could smell the "VCM" and the "VAM."¹⁶ (Tr. 134). The emission of chemicals was due to equipment that was "plugged up" with waste water from the recovery and stripping process. Casillas could see the vapors coming off of the water. Donnie Schumacher, Josh Jasek, Hersey, and Lee were present to help resolve the problem. Casillas stated piping sections were being dismantled and the employees, including Hersey and Lee, were standing in waste with a hose "to push it [waste water] to the trench." (Tr. 135). Casillas testified that no steps were taken to measure the release of chemicals, nor was an ENV-2 form filled out. (Tr. 136).

Casillas also testified about preparing ENV-2 forms for residual VCM when changing "EF-506 dual filters" used in the drying process. (Tr. 137). Casillas stated an ENV-2 form had to be completed each time the EF-506 filters were changed. (Tr. 138). Casillas completed an ENV-2 form each time he changed the EF-506 filters, which were placed into either the planned maintenance binder or the process upset folder. However, when he looked in the binders it became evident that other people were not completing the ENV-2 forms when changing, inspecting, or opening the EF-506 filters. (Tr. 139). He reported to Hersey and Eddie Houseton, the process safety manager, that the ENV-2 forms were not being completed as required. (Tr. 140). Casillas stated his opinion varied from Hersey and Houseton, who stated the "MSS equipment opening spreadsheet" did not require ENV-2 forms, but Casillas disagreed.¹⁷ (Tr. 140). Casillas got

¹⁴ Casillas did not provide a specific date on which the ST-532 tank incident occurred. (Tr. 128-29).

¹⁵ Casillas testified he was responsible for the "dry side" at the time issues arose with the "wet side." (Tr. 131).

¹⁶ Casillas explained that "VAM" is vinyl acetate monomer. (Tr. 134).

¹⁷ Notably, Stephanie Schmidt, Respondent's Senior Environmental Manager, testified that the equipment listed on the MSS worksheet does not require ENV-2 forms to be completed, stating "an ENV-2 form does not have to be

the impression that Hersey was "irritated or indifferent" when he disagreed with Hersey about the ENV-2 forms. (Tr. 141).

On cross-examination, Casillas testified he is no longer employed with Respondent.¹⁸ However, Casillas has remained friends with Complainant and has visited with Complainant outside of work. He never heard Hersey say anything negative about Complainant. (Tr. 142). He raised issues of employees sleeping on the job with Chen and Hersey, but he did not prepare written statements. (Tr. 143-44). His observations about employees sleeping on the job may have been documented in software on his Outlook calendar. (Tr. 144). However, he did not give any such documentation to Hersey, Lee, or anyone in the HR Department. (Tr. 145).

Casillas agreed Respondent's Air Permit was issued in March 2013, and Procedure 28 originated in 2012. (Tr. 146-47). He was never informed by Hersey or Houseton that the Air Permit eliminated the need to abide under Procedure 28. (Tr. 149). He stated Procedure 28 was simply alternatives to providing the proper information regarding the "equipment openings." (Tr. 149-50). When Casillas realized he was the only person utilizing the spreadsheet, which was created by Houseton to report equipment openings, he reverted back to using only the ENV-2 forms. (Tr. 150).

Casillas confirmed Hersey and Houseton disagreed that the ENV-2 forms were required when changing out the EF-506 filters, or when completing maintenance work. (Tr. 150). When the mass spec alarm went off, Casillas ordered John Cantu to take mini-ray readings because it was a serious incident and it needed to be mitigated as soon as possible. (Tr. 153). He does not know if an ENV-2 form was completed following the mass spec alarm incident. (Tr. 154-55).

Casillas stated Greg Chapa, who he observed nodding off in front of his computer, is a supervisor. He also observed Darrell Taylor nodding off, but did not report Chapa or Taylor to Hersey. Casillas described his relationships with Chapa and Taylor as "co-workers, acquaintances." (Tr. 155). Casillas confirmed he took over Brian Hover's shift. After Hover left, Casillas never caught Chavana sleeping on the job again because

completed for any of the equipment." She also provided Complainant with the MSS worksheet and informed him of the same. (Tr. 379).

¹⁸ In brief, Employer avers Casillas was "involuntarily terminated." However, Employer did not provide any factual information as to why or when he was terminated, nor is there any evidence in the record demonstrating whether Casillas was indeed "involuntarily terminated." See Employer's Brief, p. 7.

"he did not tolerate it" due to potential safety hazards. (Tr. 156).

Van Jason Rozner (Complainant)

Complainant testified he began working for Respondent in May 2000, in the PVC/VCM utility plant. (Tr. 157-58). He was a lab technician in four different labs until 2008, when he was promoted to a supervisor position. While working in the lab, he was the lead technician on "D shift" and received training for "PVC, VCM and utility." After being promoted to supervisor, in March 2008, he worked as the day supervisor in the SPVC unit. (Tr. 158).

Complainant also worked at Respondent's Delaware facility for three years, traveling back and forth to Texas. During that time, he worked as a shift supervisor at the Delaware facility and conducted research for permits, learned the requirements for SPVC production and maintenance, along with safety and environmental standards for the SPVC unit. (Tr. 158). He also received training on procedures, equipment, the evacuation of equipment, and how to put equipment back into service. (Tr. 158-59). In Delaware, he worked with Tammy Lassiter, the Environmental PIC, and Kim Bennett, the Environmental Health and Safety Supervisor. (Tr. 159).

Complainant testified Jim Hersey arrived at Respondent's Texas facility in March 2014, and Star Lee is Hersey's supervisor. Before Hersey became his supervisor, Complainant reported on numerous occasions that people were sleeping on the job. (Tr. 159). Similarly, Complainant reported to Hersey on "a number of occasions" that Greg Chapa was sleeping in the Dryer Morgan Building which is called the dryer shack. He also observed Greg Chapa sleeping in a truck in the parking lot outside of the control room. He reported to Hersey that Nathan Merck was sleeping in the dryer shack as well. Finally, he reported to Hersey that (unidentified) operators and supervisors were sleeping in the permit room where they turned security cameras to the side so they could not be observed sleeping. Employees sleeping in the dryer shack turned off the lights, locked the doors, and placed cardboard in the windows. He observed Supervisor Greg Chapa sleeping on four occasions. (Tr. 161).

When Complainant reported his observations, Hersey stated that he would look into the matter and take care of it. (Tr. 162). Complainant offered to write a statement, but Hersey told him it was not necessary. Rather than Hersey following up with

the employees who were sleeping on the job, Complainant stated Hersey had the "ISE Department" remove the camera by the permit room. (Tr. 163). Complainant also told Hersey there were security cameras recording Greg Chapa was sleeping in his truck. However, Complainant asked Hersey if he should get the tapes from the camera, to which Hersey told him "no, he would take care of it." (Tr. 164). Complainant stated Bobby Dunagan also observed Greg Chapa sleeping in the dryer shack. (Tr. 164). He asked Dunagan about the door being locked to the dryer shack, which was Dunagan's area of responsibility. Dunagan stated he had no idea why the door was locked because it was usually unlocked. (Tr. 165). Subsequently, Complainant observed Dunagan trying to open the door to the dryer shack and looking into the windows. Dunagan used an unknown object to get into the dryer shack and was in the room for two to three minutes before exiting. When Dunagan left, Greg Chapa emerged and left the area. (Tr. 167). Complainant told Hersey that Dunagan had also witnessed Chapa sleeping on the job, to which Hersey replied that it was a bad situation because Chapa was Dunagan's supervisor. Complainant stated the incidents of the doors being locked and cardboard boxes being placed over the windows of the dryer shack occurred before and after he observed Greg Chapa sleeping on the job. (Tr. 168). To Complainant's knowledge, Greg Chapa is still employed by Respondent and he was not suspended. (Tr. 169).

At his March 2016 investigative interview, Complainant confirmed the discussion focused on why he was in the backhoe. He explained he was in the backhoe watching the THM crew because they were not following policy and procedure, and were not following through with assignments. (Tr. 169). During his interview, Complainant "adamantly denied" that he was sleeping in the backhoe. Complainant believes his termination is a retaliatory action because he threatened to report non-conformance and false calculations to outside government agencies. (Tr. 170).

Complainant identified CX-1 as Respondent's "Procedure 28" which is "SPVC's equipment startup and shutdown notifications." (Tr. 170-71). Procedure 28 contains a spreadsheet for all equipment that is required for calculations.¹⁹ Complainant further explained that Procedure 28, section 7.3, requires the completion of the ENV-2 form, and states "the ENV-2 must be completely filled out to ensure that all information is reported as required under the regulations." Section 7.3 also provides instructions about all the information required to file a report under governing regulations. He testified Procedure 28 does not

¹⁹ See supra, note 17.

distinguish between emissions that have to be reported to any outside agency and emissions that are below the level of reporting to an outside agency. (Tr. 171). Rather, Procedure 28 states "records of activity that do not result or do not have the potential to result in emissions or which exceed an RQ (reportable quantity release) are required to be maintained by the operating unit using the ENV-2 form. Maintenance shutdowns, startup activities that result or have the potential to result in emissions which equal or exceed and RQ are required to be reported using the ENV-2 form."²⁰ (Tr. 172).

Complainant's complaints about environmental non-compliance at Respondent's Port Comfort facility in the SPVC unit resulted from a failure to have calculations and measurements required to complete the ENV-2 forms. (Tr. 173-74). According to Complainant, "no one" was following Procedure 28 in regard to calculations, taking measurements, reporting incidents and releases, or reporting process upsets. Complainant testified the problems with non-compliance began when Star Lee came to the facility in December 2013. (Tr. 174). Lee issued written instructions that deviated from the policy on maintenance, VCM opening equipment for service, and taking equipment out of service.²¹ (Tr. 174-75). Complainant identified CX-22 as instruction from Lee for opening procedures for the EF-442 filter which varied from policy; employees no longer heated equipment and materials in order to vaporize the VCM that was in product and trapped inside the vessel.²² (Tr. 175-77). Complainant stated Lee's instructions for the EF-442 filters were also adopted for all other filters utilized in the SPVC unit. (Tr. 177-78). Consequently, none of the filters were being evacuated properly. (Tr. 178).

Complainant made his first complaint about Lee's instructions in June 2014. However, in September 2014, he began to document his concerns in writing and the discussions he had with Lee and Hersey about his concerns of alleged violations.

²⁰ As will be discussed below, beginning in **fall 2015**, not only did Senior Environmental Manager Stephanie Schmidt provide Complainant with the MSS worksheet, which lists all the equipment that does not require ENV-2 forms to be completed, she had several conversations with him about Respondent's Air Permit, Procedure 28, and ENV-2 forms, among other things, and explained to Complainant that the SPVC unit was in full compliance with the Air Permit. (Tr. 370-379).

²¹ Significantly, the record evidence is completely devoid of any testimony from Senior Environmental Manager Stephanie Schmidt, or any other employee working in the SPVC unit, that comports with Complainant's assertion that Star Lee provided instructions which deviated from proper procedures and policy.

²² Complainant's Exhibit 22 was admitted and received into evidence. (Tr. 176).

(Tr. 178). At a September 2014 supervisor's meeting, he discussed his apprehension over the fact that procedures were no longer being followed for evacuating equipment, leaving high concentrations of VCM in the equipment that went beyond the allowable limits. (Tr. 179). Hersey negated what Complainant was reporting and became "irritated." (Tr. 180). Eddie Houseton, who was also at the meeting, agreed with Complainant and confirmed the need to follow procedure for equipment opening for VCM service. (Tr. 181). Complainant stated Hersey became very upset and irate, so he "just let it go." (Tr. 181-82).

Following the September 2014 supervisor's meeting, Complainant stated "we continued to drop high concentration of VCM to the pad and open equipment without taking measurements because the opening procedures were not properly followed and the ENV-2 forms were still not being completed. (Tr. 186-87). On September 26, 2014, Complainant dropped an EF-442 filter to the pad using the instructions provided by Lee. However, operator Matt Paige expressed concern that proper procedure was not being followed and the filter was releasing high concentration of VCM into the atmosphere and contaminating waste water to the pad. (Tr. 187). As a result, Paige sampled the contaminated waste water which was analyzed at a lab and is set forth in CX-7. (Tr. 187-88). The lab results showed 1,264.2 PPM of liquid product²³ which Complainant stated exceeds the 10 PPM of liquid product allowed to drop to the ground.²⁴ (Tr. 188). Complainant notified Hersey about the lab results and Paige's concern, but Hersey stated it was a "non-issue" and that Lee said it would be "okay." (Tr. 190-91).

In February 2015, Complainant had a discussion with Hersey and Houseton about completing the ENV-2 forms. Hersey stated that until a conclusion was reached, all of the supervisors should go back to completing the ENV-2 forms on all of the equipment. (Tr. 192).

²³ As discussed below, Senior Environmental Manager Stephanie Schmidt testified that:

The Air Permit requires the air sample reading to be less than "10,000 PPM." There is a difference between air samples and liquid samples, explaining that when a liquid sample is taken it is dropped to the pad, washed into the sump for containment, and treated with a stripper prior to going to the waste water plant. As long as this process is followed when taking liquid samples, there is no issue if a **liquid sample is over 1,000 PPM**, nor is there a violation of the Air Permit requirements.

(Tr. 377-78).

²⁴ Complainant's Exhibit 7 was admitted and received into evidence without objection. (Tr. 189).

Complainant recalled the "MV-410 incident" as described by Casillas. (Tr. 192). Hersey, Lee, and Donnie Schumacher took equipment apart and drained it such that large quantities of "VAM, contaminated BBs" were on the ground. At the shift change the maintenance crew bolted all the parts back together. Complainant could see vapors coming off of product stuck to the filters and piping. Complainant and operator Shane Stoves began cleaning up the area the evening of the incident. Shortly thereafter, Complainant developed a rash on his legs, nose, and on the side of his cheek. (Tr. 193). Complainant confirmed CX-17 contains photos taken by his wife of rashes on his body after the incident which occurred during his October 24, 2015 shift.²⁵ (Tr. 194, 196). Due to health concerns about his skin rash, Complainant spoke with Hersey about going to the medical department, but Hersey stated it was not necessary as it was likely just a reaction to wearing latex gloves. (Tr. 197). Hersey's response upset Complainant. Consequently, he became "more vocal and assertive" about following policies and procedures. (Tr. 198).

In January 2016, Complainant went to Scott Maresh, Respondent's in-house SPVC "environmental health and safety specialist," and reported that EF-442 filters were dropped to the pad using the written instructions provided by Lee. He explained to Maresh the instructions deviated from proper policy and procedure, which caused high concentrations of VCM that contaminated waste water to the pad, and equipment was being opened without proper calculations, measurements, and paperwork completed. (Tr. 199).

On January 6, 2016, Complainant and Shane Stoves, an operator, prepared an EF-442 filter according to Lee's instructions and dropped it on the pad. Maresh was present and conducted readings which showed chemical levels above the allowable exposure limit. Hersey asked Complainant what he was doing taking samples with Maresh. Complainant informed Hersey they were testing samples which were above the allowable exposure limit. (Tr. 200). Hersey became "upset and defensive," and stated Armando Escobar, a day supervisor, would oversee the situation as Hersey did not want Complainant or Stoves taking samples. (Tr. 201). Due to the high readings, Maresh told Hersey to cease dropping filters on the pad during the day shift and to only do so at night with barricades surrounding the affected area. (Tr. 201).

²⁵ Complainant's Exhibit 17 was admitted and received into evidence. (Tr. 197-98).

After the high readings, Maresh later decided the filters could no longer be dropped on the pad, but must go into containers. (Tr. 202). Complainant confirmed CX-20 is an email dated January 8, 2016, received by Complainant from Maresh addressing how EF-442 filters should be dumped at night to avoid exposure to maintenance personnel, along with barricading the affected area.²⁶ (Tr. 204). Similarly, CX-21 is an email from Maresh dated February 12, 2016, stating the filters must be dropped in "totes."²⁷ (Tr. 205-06). Complainant testified that using the totes when dropping filters "slowed down production" from seven to eight "batches" per day to two or three batches per day. (Tr. 206-07).

On March 30, 2016, Complainant provided Hersey with a list of equipment that was related to the "EF-422" filters, as well as other equipment such as "EF-506, MF-321, MV-401, EF401, SF401, and SF232," all of which were not being properly opened or evacuated, and other employees were not calculating emissions or taking measurements.²⁸ (Tr. 208).

On March 29, 2016, manager Star Lee, who was working on the night shift, instructed supervisor Joelle Rodriguez to emit VCM vapors into the atmosphere from the "ST501A and B." Complainant learned of the incident after reading his supervisor's notes.²⁹ (Tr. 209; CX-23, pp. 4-6). He immediately knew the emitting of vapors from the "ST501's" were against policy because Hersey sent out an email in reference to "ET501s and ST501s," stating they contained higher VCM concentrations and had to remain closed up at all times. He notified Greg Chapa and used the mini-ray to obtain readings in the area, all of which were above the allowable exposure limit.³⁰ (Tr. 210). The allowable exposure limit is 0.5 ppm. However, Complainant's mini-ray readings showed levels as high as 205 ppm and as low as 3.4 ppm. (Tr. 214). Thereafter, Complainant gave Hersey a copy of the mini-ray readings and discussed the problems regarding Lee's instructions to Rodriguez to open the vent line which in turn

²⁶ Complainant's Exhibit 20 was admitted and received into evidence. (Tr. 204-05).

²⁷ Complainant's Exhibit 21 was admitted and received into evidence without objection. (Tr. 206).

²⁸ Of significance, the record is devoid of any **credible** testimonial evidence to support Complainant's contention that proper procedure was not being followed by any other employee in the SPVC unit concerning the aforementioned equipment.

²⁹ Complainant's Exhibit 23, pages 4 through 6, was admitted and received into evidence without objection. (Tr. 211-12).

³⁰ Complainant tested the drying area including D1, D1A, and D1B, along with taking readings of the ground level, and the fourth, fifth, sixth and seventh levels. He also tested exposure levels around equipment including the blower. (Tr. 213).

emitted vapors. Complainant stated Hersey became "agitated and irritated, and his voice trembled." Hersey told Complainant that Lee had made the decision to open the vent line, and he supported Lee's decision irrespective of whether it was correct. Given Hersey's response, Complainant concluded he was not making any progress with assuring the SPVC unit followed proper policy and procedure. (Tr. 215).

On March 31, 2016, Complainant presented to Hersey a report he made with "Report It,"³¹ along with calculations Complainant determined were false that related to calculations obtained when equipment was opened. He communicated to Hersey he was going to contact the TCEQ, the EPA, and OSHA. (Tr. 215).

In addition, "a few weeks" before March 31, 2016, Complainant informed Lee and Hersey that if the SPVC unit remained non-compliant with environmental policies and procedures, and continued not to mitigate the release of vapors into the atmosphere, he was going to notify Respondent's Environmental Health and Safety Department, the TCEQ, the EPA, and OSHA. (Tr. 215-16). According to Complainant, Lee became "very upset" with him and walked away. On the other hand, Hersey followed Complainant into the control room "trying to talk him out of it." Further, Hersey told Complainant he had to report to him (Hersey) prior to reporting anything to the Environmental Health and Safety Department or the HR Department. Finally, Hersey told Complainant he was "forbidden" to contact any outside agencies, to which Complainant sternly replied he would contact the EPA, the TCEQ, and OSHA if the SPVC unit did not immediately begin to follow proper policy and procedure. (Tr. 217). Hersey's face became "red" and Hersey "threw his arms up." (Tr. 217-18).

Complainant confirmed CX-28 contains his pay stubs from his employment with Respondent.³² (Tr. 219). Regarding his damages as a result of his termination, Complainant testified his base pay was \$96,334.00 per year and he received quarterly incentive pay which amounted to \$4,436.55, as well as overtime in the amount of \$4,452.03. Complainant confirmed CX-28 includes his final pay stub dated April 7, 2016. (Tr. 220-21). He also received a shift differential of \$264.00, and had a 401K plan to which Respondent contributed 7 percent. (Tr. 222-23). His benefits included health insurance for his family at a rate of

³¹ "Report It" is a system which is supplied by a third party vendor that can receive **anonymous** reports from employees which are then transmitted to Respondent's corporate New Jersey office. (Tr. 533-34).

³² Complainant's Exhibit 28, pages 1 through 9, was admitted and received into evidence without objection. (Tr. 218-19).

\$80.00 per month, along with dental and vision insurance. (Tr. 225-26). Complainant confirmed CX-27, p. 4, is his COBRA notice after his termination, which shows his monthly premium for family coverage is \$1,173.00. (Tr. 226). In addition, Complainant received an annual safety boot allowance in the amount of \$90.00. (Tr. 228).

After his termination, Complainant worked for the City of Palacios as a patrol officer earning \$16.86 per hour. His bi-weekly gross pay as a patrol officer is \$1,403.00. (Tr. 229). He completed the police academy in 1993, and was a full-time police officer from 1993 to 2000. However, he worked as a police officer part-time for the City of Palacios while working full-time for Respondent. (Tr. 230).

Complainant acknowledged he is working as a police officer because "any job is better than no job." (Tr. 231). Nevertheless, he has looked for work comparable to his job he had with Respondent, but there is not a lot of comparable employment opportunities where he resides. (Tr. 231-32). He applied for employment at the nuclear plant for South Texas Electric, which was closest to him, at 42 miles from his residence. In contrast, Respondent's facility is located 28 miles from his residence. He went to South Texas Electric's website and entered all of his information. (Tr. 232). He applied for the South Texas Electric's security force, but he has not been offered employment. (Tr. 232-33). The next closest plants to his residence are "Celanese and Oxycam," both of which are on the other side of Bay City and are approximately 60 miles from his home.³³ (Tr. 233-34). Complainant also interviewed with the police department for a lieutenant's position, but he was not selected for the position. (Tr. 235).

Complainant testified that his termination has also had a non-financial impact on his life. He has been extremely emotional with mental anxiety, panic attacks, and loss of sleep. He takes three forms of narcotics for panic attacks and depression. Additionally, he lost 42 pounds since his termination. His focus and attention span is limited. He also takes medications for sleep and idiopathic muscle jerks. He acknowledged that he suffered from anxiety before his termination, but his medications have increased since his

³³ Complainant's Exhibit 27 was admitted and received into evidence without objection, and consists of Complainant's Payroll Summary Report dated December 31, 2015 (documenting Complainant's wages), a Personnel Action Form dated March 3, 2016, a Merrill Lynch Enrollment/Change Request dated August 17, 2000, and a letter dated October 12, 2015, from Respondent to Complainant regarding the costs for 2016 Medical Cobra Premiums. (Tr. 234; CX-27, pp. 1-4).

termination. (Tr. 236). He now suffers from sexual dysfunction for which he takes medication. There is stress, tension and ill-will in his marriage which, in turn, has caused heartache and anxiety with his kids. His 20-year old daughter dropped her college classes at Texas State because of the cost. Complainant's 18-year old son was part of an advanced program at high school which offered college courses, but he can only take one class per semester because Complainant cannot afford to pay the costs of the courses. (Tr. 237). His wife has been on medication maintenance for depression and weight control, which she has cut back taking so Complainant can afford to take his medications. (Tr. 238-39).

Complainant admitted that after he was suspended and his badge was pulled, he took photos and items from Respondent's facility. However, he avers he did so as a "protective measure" because he could be held "criminally" responsible for certain actions or inactions regarding polluting the environment and intentional release of chemicals into the atmosphere. (Tr. 239-40). The specific documents removed from Respondent's property, he considered relevant to issues that could incite criminal liability. Nonetheless, Complainant only shared the documents with his attorney, and has not divulged any process information or diagrams to anyone.³⁴ (Tr. 240).

On cross-examination, Complainant affirmed he took photographs and schematics because he was fearful of going to jail. (Tr. 242-43). He knew he was taking the photos and schematics without permission. (Tr. 244). Complainant acknowledged he did not provide any information to the EPA or the TCEQ, nor did he use the documents in his complaint with OSHA. (Tr. 244-45).

Complainant confirmed he has taken several medications for years, such as Hydrocodone since 1999, and Zoloft and Xanax for panic attacks and anxiety since 2014. (Tr. 245). He has taken medication for high blood pressure for eight years. (Tr. 246). Complainant identified CX-29 as his medical records which show that in January 2016, he weighed 201 pounds and in August 2016, following his termination, he weighed 198 pounds.³⁵ (Tr. 246-47).

Complainant testified he did not apply for employment at the "Celanese or Oxycam" plants. (Tr. 249). He applied for the

³⁴ Complainant's Exhibit 29, identified as "business medical records," was admitted and received into evidence without objection. (Tr. 241-42).

³⁵ This contradicts Complainant's earlier testimony that he lost 42 pounds since he was terminated by Respondent. (Tr. 236).

police Lieutenant Position with the police force and as a security officer with the nuclear plant. However, he has not applied for any other positions with the police force. (Tr. 250). Complainant was not aware that the Texas Process Operators Facebook Page existed for his industry. (Tr. 251).

Complainant testified the City of Palacios provides health insurance and he pays for vision and dental insurance. (Tr. 251-52). His most recent paycheck showed a \$40.00 deduction for dental insurance. (Tr. 252; CX-28, p. 8). He began working full-time with the police force within three days of his termination. (Tr. 253). He acknowledged a full-time officer can also work private events for compensation. (Tr. 155). In September 2016, he inquired about two vacancies at the Bay City Police Department. (Tr. 256). He continues to work full-time with the City of Palacios. (Tr. 257).

Complainant was not aware of a citizen's complaint dated January 2017, regarding a citizen seeing him sleeping in his patrol car. (Tr. 257). He holds a license with the Texas Commission on Law Enforcement. (Tr. 259). He affirmed that under the Texas Administrative Code any arrests greater than a Class B misdemeanor must be reported. (Tr. 259-60). He acknowledged that on January 10, 2017, he was arrested for shoplifting from a Dollar General store. (Tr. 260-61). He stated he only had to report the final disposition of the charge to the Texas Commission on Law Enforcement. (Tr. 261). He notified his department and they filed the proper "paperwork." (Tr. 262).

Complainant confirmed he began working for Respondent as a lab technician and he remained in the position for eight years. (Tr. 268). Thereafter, he was promoted to a day shift supervisor in Respondent's SPVC unit, where he worked for two years. Before 2013, he was a "PVC, ISO, and THM coordinator." When Lee became Director in 2013, Complainant was already working as a shift supervisor. (Tr. 269). He identified RX-1 as Respondent's "new hire orientation checklist" that he signed in 2000.³⁶ (Tr. 270). Complainant also identified RX-4 as Respondent's "employee acknowledgement for employee complaint procedure" that he signed in May 2000.³⁷ (Tr. 271). He agreed RX-5 is an acknowledgement form that he signed in May 2000, acknowledging he received Respondent's employee handbook. (Tr.

³⁶ Respondent's Exhibit 1 was admitted and received into evidence without objection. (Tr. 270-71).

³⁷ Respondent's Exhibit 4 was admitted and received into evidence without objection. (Tr. 272-73).

273). Paragraph two of the employee handbook reveals Complainant's employment with Respondent was "at will," and he knew he could be terminated by Respondent at any time. (Tr. 274).

During the time he was a shift supervisor, Complainant was involved in the termination of one employee, Nathan Merck, in June 2014. He was familiar with the process required to terminate an employee, but he did not know that three people had to sign off on a termination. (Tr. 275-76). He confirmed that RX-25 is Merck's termination notice dated June 18, 2014. (Tr. 276). Complainant acknowledged that when he became a supervisor, he received two days of supervisor training in a program that covered general responsibilities for supervisors. (Tr. 277). The two-day supervisor's program also covered safety responsibilities such as when and how to report to the Environmental Health and Safety Department. (Tr. 277-78).

Complainant testified he did not go to any government agency "before or after" his termination to report any of his environmental concerns regarding the SPVC unit. Nonetheless, he avers that he spoke to Randy Smith, the former general manager, about his concerns in 2014 or 2015. (Tr. 279). He acknowledged that during his deposition, when asked whether he talked to Smith about Hersey or Lee, he responded "not in particular." (Tr. 280-81). Complainant explained that he let Smith know there was an issue, but he did not go into any particulars. (Tr. 281).

On a prior occasion, Complainant also attempted to contact Rick Crabtree, who became general manager when Randy Smith retired, but he was unable to reach him until March 31, 2016, when Complainant asked Crabtree if he intended to follow Smith's open door policy for reporting "employee safety and business ethics" concerns. (Tr. 281-82). Crabtree communicated to Complainant that he would discuss the issue when Complainant arrived at Crabtree's office. (Tr. 282). Complainant also filed reports with Respondent's New Jersey corporate office, during which he was asked for personal information and was given a case number for each report he filed. (Tr. 283). In his deposition, Complainant confirmed that he "anonymously" reported concerns and he did not provide his name even though the report asked for a name. (Tr. 284).

Complainant recalled he attended a supervisor's meeting in September 2014, where he confronted Hersey about filling out the ENV-2 forms and following policy. (Tr. 284-85). According to Complainant, Hersey advised Complainant to complete the ENV-2

forms. Complainant identified RX-36, which was not offered into evidence but used for impeachment purposes, as an ENV-2 form dated September 26, 2014, that was prepared by Complainant in regard to an EF-442C filter. (Tr. 285). Also contained within RX-36 is the Supervisor's Log dated September 26, 2014, which has mini-ray readings from September 25, 2014. (Tr. 286-88). Complainant identified CX-22 as the instructions from Star Lee regarding how to open the EF-442 filter before taking air samples. (Tr. 289). Claimant identified CX-7 as liquid samples taken by Matt Paige on September 26, 2014. (Tr. 290-91). After Paige had taken the liquid samples, Complainant had a conversation with Hersey, during which Hersey instructed Complainant to tell Paige to speak with Hersey prior to taking any samples. (Tr. 291-92). Complainant confirmed Paige still works for Respondent. (Tr. 292).

In March 2015, after Hersey allegedly became upset when Complainant raised concerns about the completion of the ENV-2 forms, Hersey prepared Complainant's performance rating evaluation which is set forth in RX-31.³⁸ (Tr. 293-94). Hersey gave Complainant a rating of "90" and stated "Jason [Complainant] worked at keeping SPVC in compliance with safety and environmental concerns. Jason has been aggressive in cross training operators on his shift." (Tr. 296).

Complainant admitted that after the "MV-410 incident" when he allegedly developed a rash on his skin after being exposed to chemical vapors from the waste water, he did not seek medical treatment or fill out an incident report. Complainant averred he "was instructed not to" fill out an incident report. (Tr. 297). He explained Hersey instructed him to notify Hersey and Lee prior to filling out an incident report. Consequently, he did not go to medical or complete the incident report because that would be "breaking the chain of command." Complainant testified Hersey told him not to go to the Medical Department or to call the EHS Department, and eventually his rash went away. (Tr. 298).

Complainant averred in January 2016, he along with Scott Maresh obtained samples, but Complainant stated it was not part of "exposure task evaluations." (Tr. 299). Complainant identified CX-20 as an email from Maresh to "all supervisors" regarding "IMs for the leak of January 4 through 8, 2016." (Tr. 300). Complainant confirmed on January 4, 2016, Maresh made no mention of the EF-442 filters. However, on January 5, 2016, Maresh made note of "monitoring, sampling and dumping the EF-

³⁸ Respondent's Exhibit 31, pages 2 and 3, was admitted and received into evidence without objection. (Tr. 295).

442B filter," but Maresh noted there was not enough liquid to test the samples. (Tr. 301). On January 6, 2016, Maresh again made no mention of the EF-442 filters, but on January 7, 2016, Maresh indicated he was working with the filters. Finally, on January 8, 2016, Maresh noted he spoke with Hersey about the EF-442 filters, but noted no further action relating the filters. (Tr. 302). Complainant also averred Hersey stated that he wanted Armando Escobar to be involved in assessing the EF-442 filters. Complainant identified CX-21, as an email from Maresh dated February 12, 2016, that discusses a change in the process of draining the EF-442 filters. (Tr. 303).

On three different occasions, Complainant told Hersey he would contact Respondent's EHS Department and outside government agencies about not following proper procedure; the last time occurring on March 31, 2016. (Tr. 306-07). The other two occasions, on which Complainant told Hersey he was going to contact outside agencies, occurred three weeks before Complainant was terminated. (Tr. 308). The first incident occurred in the DCS control room where Complainant told Lee and Hersey that if proper procedure was not implemented he was going to contact the Respondent's EHS Department, as well as the TCEQ, the EPA, and OSHA. (Tr. 309-10). Thereafter, Complainant walked away and entered the shift supervisor's office, but Hersey followed Complainant into the office. (Tr. 311-12). Complainant avers Bobby Dunagan was present, and Hersey attempted to persuade Complainant to not contact any outside agencies, rather Hersey requested Complainant first report directly to him or Lee. However, Complainant again stated he would report Respondent's failure to follow proper procedure to outside government agencies. (Tr. 312). Hersey "shook his head and walked out." (Tr. 314).

On March 30, 2016, Complainant provided Hersey with handwritten mini-ray readings. Hersey told Complainant that Lee made the "decision to line the vent gas up" and Hersey was supporting Lee's decision. (Tr. 315-16). Complainant identified CX-25, p. 1, as a copy of his handwritten mini-ray readings that he delivered to Hersey on March 30, 2016.³⁹ (Tr. 318). Upon receiving the readings, Hersey told Complainant he would "look into it." (Tr. 319). Complainant also gave Hersey a list of equipment from which incorrect calculations were reported on ENV-2 forms. (Tr. 319-20).

³⁹ Complainant's Exhibit 25 which allegedly contained a copy of his handwritten mini-ray readings that Complainant provided to Hersey on March 30, 2016, was not offered or admitted into the record evidence. (Tr. 315).

On the morning of March 31, 2016, Complainant informed Hersey that because nothing was being done to "correct the problem" he was going to the TCEQ. Hersey did not say anything to Complainant, but his "body language spoke a thousand words." (Tr. 320).

During his March 31, 2016 meeting with Hersey, Complainant was given a last written warning notice for failing to follow procedure, which was dated March 1, 2016, and is designated as RX-12.⁴⁰ (Tr. 321-22). Nonetheless, Complainant refused to sign the notice when he received it on March 31, 2016. (Tr. 322). In their meeting, the majority of the discussion was about Complainant's last written warning notice for failing to follow procedure for sampling the stripping tanks, and they did not discuss the list of concerns presented by Complainant. (Tr. 324). Hersey informed Complainant that other employees were being disciplined "across the board" for the same stripping tank incident. (Tr. 324-25).

Also on the morning of March 31, 2016, Complainant went into a backhoe to "watch the THM crew." (Tr. 325). It was cold and raining which led Complainant to get into the backhoe, despite the backhoe having one window busted out and one window open. (Tr. 325-26). He was in the backhoe for ten minutes. (Tr. 326). He denied that he slept, dozed off or nodded off. He did not close his eyes for any length of time. He affirmed the backhoe did not work. He was watching the THM crew, who was 25 to 30 feet away from the backhoe, work with "super sacks and roll off boxes." (Tr. 327). He began watching the THM crew at 6:30 a.m. Despite the THM crew wearing dark colored coveralls, Complainant saw one of the crew in a forklift, 30 feet away, who was not wearing a seatbelt. Complainant acknowledged that Tommy Yaws or Armando Escobar, the day supervisors, were in charge of overseeing the THM crew. (Tr. 328). However, Complainant did not report any issues to Yaws or Escobar because he "never had the time to," even though he attended a supervisor's meeting on that same morning with Yaws and Escobar. (Tr. 328-29).

He met with Laas who had written statements in his hand; Complainant saw the name Frankie Rodriguez. (Tr. 329). Rodriguez was the THM crew member that Complainant saw operating the forklift without a seatbelt. Complainant admitted he did not dispute any allegations against him set forth in the meeting with Laas, nor did he report to Laas that he told Hersey he was going to notify outside agencies about Respondent's failure to follow policy because he "never had an opportunity to" tell

⁴⁰ Respondent's Exhibit 12 was admitted and received into evidence without objection. (Tr. 323).

Laas. (Tr. 330). Furthermore, he was instructed by Hersey not to report anything before he communicated any issues to Hersey and/or Lee. (Tr. 331).

Initially at the investigative interview, Complainant did not know why Laas was pulling his badge. (Tr. 331-32). Towards the end of the meeting, Laas asked Complainant whether he fell asleep in a backhoe to which Complainant responded "no." (Tr. 332). At the time, he did not mention Greg Chapa sleeping on the job because he did not realize his badge was being pulled for sleeping on the job. (Tr. 332-33). However, he also did not mention Chapa sleeping on the job because of Hersey's instructions to report to Hersey prior to going to the HR Department. (Tr. 333). The day after Complainant's badge was pulled, he spoke with Revis who informed him that his employment with Respondent was terminated, but Complainant did not ask why Chapa was not also terminated for sleeping on the job. He also did not tell Revis that he informed Hersey he was going to outside government agencies to report environmental violations. (Tr. 334).

Complainant testified he witnessed Chapa sleeping in a chair in the dryer shack and reported the incident to Hersey, but he does not know what Hersey did about his report. (Tr. 335-36). Hersey did not ask him for a statement or evidence of Chapa sleeping on the job. In his deposition, Complainant deposed it was a few days after he saw Chapa sleeping on the job that he informed Hersey about the incident. (Tr. 336). However, Complainant also called Hersey on the phone the night he witnessed Chapa sleeping in the truck, as well as the dryer shack, and he documented all of this in his Outlook email. (Tr. 337).

Complainant did not make a calendar entry in his email about his meeting with Lee and Hersey concerning his threats to go to outside agencies because he did not have the opportunity to do so. (Tr. 338). On the day his badge was pulled, Complainant printed out calendar entries from his Outlook email, but none of the printed entries contain any mention of Greg Chapa concerning any alleged sleeping incident. (Tr. 339).

Complainant testified he spoke with Chapa about sleeping on the job and Chapa admitted he was sleeping in the dryer shack. (Tr. 340). However, Complainant deposed that he asked Chapa if had been sleeping on the job to which Chapa responded "no." (Tr. 341). He did not see the employees sleeping in the permit room because they did not do this during his shift, and the permit room camera was manipulated in such a way that he could

not see the room. (Tr. 344). Complainant identified RX-28 as an email exchange between him and Hersey dated March 30, 2015, and August 14, 2015, that is in regard to the camera in the permit room.⁴¹ (Tr. 344, 346). In the email to Hersey, Complainant only mentioned that on "January 4, 2012," the camera was being manipulated because operators were sleeping in the room, but Complainant made no mention of any employee sleeping in the permit room in August 2015. (Tr. 347). That notwithstanding, Hersey informed Complainant that the permit room camera was fake. (Tr. 348).

Complainant avers during the Civil Treatment for Managers training in 2012, Laas told him that, as a supervisor it was "okay" for him to sleep on the job. (Tr. 348). Despite Laas allegedly telling him it was okay to sleep on the job, Complainant did not bring it up when Laas questioned him about sleeping in the backhoe. (Tr. 349). Despite Complainant averring supervisors could sleep on the job, he reported that Chapa was sleeping on the job because although Chapa was a "supervisor," Complainant had to run the "entire" plant by himself when Chapa slept during his shift. (Tr. 349-50).

On re-direct examination, Complainant stated there had been no adjudication, conviction, or acquittal regarding his arrest for shoplifting. (Tr. 350). Complainant confirmed the January 2016 emails from Maresh contained in CX-20 are all related to Complainant's request that Maresh look into each matter discussed in the emails. (Tr. 351-52).

Complainant also explained that, while Chapa did not say "yes" I was sleeping on the job, Chapa implicitly admitted he was sleeping on the job when he told Complainant that Bobby Dunagan was put in a bad position as a subordinate because he would have to report he saw Chapa sleeping. (Tr. 353-54). He confirmed CX-30 is a calendar entry dated April 2, 2015, that he alleges he spoke with Hersey about people turning the camera in the permit office and sleeping with the door locked in the dryer shack with cardboard boxes over the windows.⁴² (Tr. 354-59).

On re-cross examination, Complainant identified a memo, CX-30, concerning a discussion with Hersey wherein Complainant reported that people were sleeping in the permit office. (Tr. 359-60). However, Complainant's memo did not state who was sleeping on the job. (Tr. 361). Complainant stated he told

⁴¹ Respondent's Exhibit 28 was admitted and received into evidence. (Tr. 345).

⁴² Complainant's Exhibit 30 was admitted and received into evidence. (Tr. 358).

Hersey that Chapa was sleeping on the job. Complainant testified he took down the cardboard boxes placed over the permit room windows, and they were put back up. (Tr. 362-63). Complainant confirmed Chapa's "sleeping on the job" doubled Complainant's workload, but he did not wake Chapa from sleeping because he "did not want to get involved in any issues he [Chapa] was having." (Tr. 364-65).

Stephanie Schmidt

Schmidt testified she has been the Environmental Senior Manager for Respondent for the last one and one-half years. (Tr. 366-67). Prior to holding her current position, she was the Environmental Manager of the "air programs" for four years. She has worked for Respondent for nine years. (Tr. 367). Her responsibilities are to assure everything is reported correctly, that all units function within the confines of the Air Permit and other regulations, to conduct training, and to interface with the TCEQ. (Tr. 367-68). She obtained an Environmental Science degree from Texas A&M. She oversees two managers who each have a staff of six employees. (Tr. 368).

Schmidt identified RX-33 as the Air Permit issued by the TCEQ which applies to Respondent's SPVC unit.⁴³ She keeps a copy of the Air Permit in her office and the SPVC unit maintains several copies of the Air Permit, along with an air compliance manual which provides instruction regarding compliance with special conditions set forth by government agencies. (Tr. 369).

Schmidt had conversations with Complainant concerning the Air Permit. Complainant came to her office to verify the SPVC unit was operating within the confines of the Air Permit. (Tr. 370). They also discussed filter cleanings and records keeping. Schmidt testified she has an open door policy for anyone who wishes to discuss concerns. Upon Complainant expressing concern about the SPVC unit's method for cleaning filters, Schmidt went over the section (beginning with Special Condition 33) of the Air Permit with Complainant that addresses filter cleanings. Schmidt stated it was clear the SPVC unit was doing what was required. (Tr. 371). Schmidt testified Complainant was particularly concerned about how the SPVC unit was cleaning the filters and whether "dropping the contents of the filters to the pad" would satisfy the requirements of the Air Permit. She confirmed this conversation with Complainant took place in fall 2015, because it was "fairly soon" after she had been promoted to her current position in June 2015. (Tr. 372-73).

⁴³ Respondent's Exhibit 33 was admitted and received into evidence without objection. (Tr. 369-70).

According to Schmidt's understanding of the filter process, the filter would be drained to the pad and the liquid from the filter would be washed into a trench and flow into a "closed sump." She confirmed the SPVC unit was draining the filters in accordance with Special Condition 34 of the Air Permit. She further confirmed the Air Permit does not require an ENV-2 form to be completed when draining liquid from a filter. (Tr. 374). She explained the ENV-2 form is not discussed anywhere in the Air Permit, rather it was a form created by Respondent prior to the Air Permit being issued. (Tr. 374).

Schmidt testified she is familiar with "Procedure 28" as well. She explained Procedure 28 is an "internal procedure" that is used when an emission event or maintenance situation creates emissions that will exceed the allowable emission limits set forth by the Air Permit "by more than an RQ amount." (Tr. 375). She stated the ENV-2 forms may not be required if an employee has prepared the filter and has verified there will not be emissions above the amount allowed by the Air Permit. (Tr. 375-76).

Schmidt acknowledged CX-22 discusses the EF-442 filter and preparation for opening the equipment, which includes using nitrogen pressure to purge the system. (Tr. 376). This process is repeated several times before an air sample is taken to ensure it is safe to open the equipment. (Tr. 376-77). Schmidt confirmed the Air Permit requires the air sample reading to be less than "10,000 PPM." (Tr. 377). Schmidt stated there is a difference between air samples and liquid samples, explaining that when a liquid sample is taken it is dropped to the pad, washed into the sump for containment, and treated with a stripper prior to going to the waste water plant. (Tr. 377-78). She confirmed as long as this process is followed when taking liquid samples, there is no issue if a liquid sample is over 1,000 PPM, nor is there a violation of the Air Permit requirements. (Tr. 378).

Schmidt also spoke with Complainant over the phone about "MSS and documentation." She explained Respondent has an "MSS worksheet" that is used as a tracking tool within the SPVC unit. (Tr. 378). She provided the MSS worksheet to Complainant, which lists various pieces of equipment. She confirmed that none of the equipment listed on the MSS worksheet requires an ENV-2 form to be completed, stating "an ENV-2 does not have to be completed for any of the equipment." In her conversations with Complainant, she made it clear the ENV-2 forms were not required. (Tr. 379).

Schmidt testified she knows Scott Maresh, who works in the EHS Department and oversees the SPVC unit. (Tr. 379-80). However, she explained Maresh has no connection to the Environmental Department except that he reports to the Health And Safety Department that is grouped with the Environmental Department. Maresh has no training for environmental compliance within the SPVC unit. (Tr. 380). She had a conversation with Maresh concerning the EF-442 filters and whether the Air Permit requirements were being followed. Maresh asked Schmidt whether any issues arose under the Air Permit when equipment was drained to the pad. (Tr. 380-81). She explained the permit requirements to Maresh and informed him that the permit was being followed. She is aware of Maresh's involvement with "changing the process" of dropping contents onto the pad to dropping them into a "super sack" due to "safety" concerns. (Tr. 381). She was not involved with the "safety change" other than verifying that dropping the contents of the filter into a super sack is within the confines of the Air Permit. (Tr. 382).

Schmidt stated Complainant never reported to her that Hersey had instructed Complainant not to speak with her. Nor did Complainant communicate to her that he believed the SPVC unit was not in compliance, or that the TCEQ should be notified of non-compliance. As an Environmental Senior Manager, Schmidt interacted with Hersey frequently. (Tr. 382). She also had multiple conversations with Hersey about whether Respondent's operations were compliant with the Air Permit. Hersey never gave her the impression he was hiding or disregarding environmental concerns. Hersey appeared to Schmidt as though he wanted "to do the right thing" and make sure sampling was performed in a proper manner. (Tr. 383).

Schmidt is familiar with the "mini-ray," which is used to take readings of an air sample to determine the amount of hydrocarbons in the air. (Tr. 384-85). The readings are based on "parts per million." (Tr. 385). The mini-ray is often used to determine whether there is a "leak" in the area. When the mini-ray beeps at a high level, employees should move away from the area and don extra personal protective equipment. (Tr. 387).

She explained no Air Permit violations occur if powder resin escapes from a particular piece of equipment. However, if there is "visible particulate matter" in the air, that would need to be reported. She confirmed that unlike liquid product, the final product does not have to be sampled because it has gone through the drying process and the VOCs are contained within the final product. (Tr. 388).

Schmidt testified the TCEQ conducts audits, and in March 2016, the TCEQ audited Respondent's SPVC unit for the period of January 2015 through January 2016, to ensure the records and reporting were in accordance with the Air Permit. (Tr. 389). The TCEQ sent Respondent a letter with the results of the March 2016 audit, noting there were "no findings," which Schmidt characterized as a "good thing." (Tr. 390).

Schmidt attended the September 13, 2012 Civil Training for Managers course that was conducted by Laas. (Tr. 390-91; RX-26, p. 3). During the course, Schmidt recalled Laas stating that sleeping on the job is not acceptable, unless on an unpaid lunch break. She explained that the 12-hour shift salaried employees did not have an unpaid lunch and therefore, it was not an acceptable practice to sleep on the job. She confirmed Laas never stated it was an acceptable practice for supervisors to sleep on the job either. (Tr. 391). During the course, Laas also communicated that he would pull an employee's badge for sleeping on the job. (Tr. 392).

On cross-examination, Schmidt acknowledged Procedure 28 was still in effect in April 2016. (Tr. 392). Schmidt confirmed that Procedure 28 stated only those maintenance shutdowns and/or startup activities that result or have the potential to result in emissions which equal or exceed a RQ which is required to be reported using an ENV-2 form. (Tr. 392-93). She stated unplanned maintenance cannot be authorized per Procedure 28. She explained that "VOC" is a general term for hydro carbon and "VCM" is a specific chemical used in the SPVC unit. (Tr. 394).

Josh Jasek

Jasek testified he has worked for Respondent for 14 years and he currently is the Maintenance Coordinator in the SPVC unit. He has worked in the SPVC unit for seven years. Until May 2014, Jasek worked as a shift supervisor in the SPVC unit. (Tr. 397). His fellow SPVC shift supervisor was Brian Hover. (Tr. 397-98). As of April 2016, Hover no longer worked for Respondent. During his time as shift supervisor, Jasek reported to Hersey, and Hersey reported to Star Lee. (Tr. 398).

Jasek testified he knows and worked with Complainant. (Tr. 398-99). They had a "good" working relationship and he has no ill-will against Complainant. Jasek still reports to Hersey even though he is a Maintenance Coordinator. Jasek stated Hersey is the "best manager" he has worked for in the SPVC unit. He described Hersey as a "very calm" individual. Hersey treated

Jasek in a "fair" manner. (Tr. 399). He never raised issues with Hersey regarding environmental or safety procedures. (Tr. 401). However, Jasek made recommendations to Hersey, and found Hersey was open to hearing the recommendations and was "a good listener." Hersey did not appear resistant to any changes suggested by Jasek. (Tr. 402).

At one of the first meetings held by Hersey, Jasek recalled Complainant raised a question over whether the ENV-2 form should be used for equipment openings for non-VOC equipment because Complainant alleged no one was completing the forms. Jasek stated Hersey instructed them to fill out an ENV-2 form for every equipment opening until he received clarification on the matter. (Tr. 402). Hersey did not appear angry or irritated toward Complainant. Jasek had not witnessed Hersey ever becoming angry with Complainant. (Tr. 403).

Jasek recalled in October 2015, there was an issue with MV-410 equipment, and he along with Hersey, Lee, Donnie Schumacher, and Marcus Casillas were present. Schumacher and Casillas were running the shift, during which the piping became plugged at the MV-410s. Schumacher called maintenance to restore the pipe. Jasek was still at work around 7:30 a.m., but he left a few hours before lunchtime. (Tr. 404). During the time Jasek was at work, Complainant was not present. He confirmed that a shift supervisor would complete the ENV-2 form if necessary, but that issue did not come up with respect to the MV-410 incident. (Tr. 405).

Jasek also recalled there being a procedure change regarding the EF-402 filters. He explained the new procedure involved putting the liquid from the filters into "totes" to contain the liquid, and thereafter, placing the liquid in the waste water system. The general area where the process took place also had to be barricaded. (Tr. 406). Nevertheless, he stated the use of the totes "did not slow down production." (Tr. 407).

Complainant never told Jasek he reported or was going to report concerns to the EHS Department. He confirmed Complainant would periodically speak to Eddie Houseton, but Jasek was not involved in the conversations. (Tr. 407). Complainant never told Jasek he was going to report any issues to the TCEQ or the EPA. Jasek never heard Hersey complain about Complainant, rather he heard Hersey praise Complainant's work. (Tr. 408).

Jasek worked with Brian Hover as a "co-B shift supervisor." (Tr. 409). Jasek explained that supervisors work a 12-hour

shift and will "make relief" (in the supervisor's office) with the supervisor coming on to the next shift, which usually includes going over the previous shift supervisor's typed notes about the activities in the unit. (Tr. 409-10). Jasek testified he never witnessed Brian Hover or Derek Chavana sleeping on the job, both of whom he worked with on his shift. (Tr. 410-11). Jasek also never heard Complainant or Marcus Casillas report that they witnessed other employees sleeping on the job. Jasek never witnessed any employee sleeping on the job. (Tr. 411).

Jasek attended the Civil Treatment for Managers Training on September 13, 2012. (Tr. 411-12; RX-26, p. 1). He confirmed that the training course covered the issue of sleeping on the job. (Tr. 412-13). It is Jasek's understanding that if an employee is on an uncompensated break, the employee can sleep. Jasek did not recall supervisors ever being exempt from Respondent's sleeping on the job policy. Indeed, Jasek worked in a unit where one employee was fired for sleeping on the job. Jasek did not recall any time where Hersey did not terminate an employee in the SPVC unit for sleeping on the job. (Tr. 413).

On cross-examination, Jasek confirmed he never witnessed anyone sleeping on the job. (Tr. 414). Jasek also confirmed that an ENV-2 form was not completed during the MV-410 incident. (Tr. 416).

On re-direct examination, Jasek identified a supervisor's comment log dated October 24, 2015, which listed Schumacher and Casillas as shift supervisors, and notes that an ENV-2 form was completed for the filters going to the MV-410 tank, but it does not specify that an ENV-2 form was completed for the "piping" below the MV-410 tank. (Tr. 417-18). However, Jasek confirmed Process Safety Manager Houseton would have determined whether it was necessary to complete an ENV-2 form for the piping. (Tr. 418).

James Hersey

Hersey testified he has been employed by Respondent since 1988. (Tr. 420). Currently, he is the Production Manager in the SPVC unit. On April 1, 2014, he transferred to the SPVC unit from the PVC unit, where he was the day supervisor and maintenance coordinator for approximately four years. He also worked as a shift supervisor before becoming a day supervisor. (Tr. 421). Hersey's current supervisor is Star Lee. (Tr. 421-22).

As Production Manager of the SPVC unit, Hersey oversees the overall running of the unit including production, safety, environmental issues, budget, and quality assurance. He has eight shift supervisors who report to him, as well as five day supervisors. (Tr. 422). He confirmed Eddie Houseton held the position of Environmental Coordinator, but has since been transferred to a Process Safety Management position in the SPVC unit. (Tr. 422-23).

Hersey knows Complainant and confirmed Complainant worked as a shift supervisor in the SPVC unit. (Tr. 423-24). He recalled knowing that Complainant also worked in Respondent's PVC lab. Hersey confirmed Brian Hover was also a supervisor. Nevertheless, Hover worked under Hersey's supervision for less than one month. Hersey recalled knowing Marcus Casillas, another shift supervisor. (Tr. 424). Casillas never informed Hersey that he witnessed Brian Hover or Derek Chavana sleeping on the job. (Tr. 424-25). Further, no one ever reported to Hersey that Hover or Chavana was sleeping on the job. (Tr. 425).

Hersey testified Complainant worked the "C" shift as a shift supervisor. (Tr. 425). In September 2014, Hersey conducted a supervisor's meeting that Complainant attended. (Tr. 425-26). Hersey explained supervisor's meetings are held on an "as-needed" basis to discuss issues and problems. During the supervisor's meeting, Complainant raised questions about procedure on filter cleaning. In particular, Complainant asked whether ENV-2 forms should be completed for cleaning EF-506 filters. (Tr. 426). Consequently, Hersey asked Eddie Houseton about the filters. Houseton stated the filter cleaning needed to be logged, but an ENV-2 form was not required. However, Complainant did not agree with Houseton's opinion. Due to the discrepancy, Hersey asked Houseton to verify the proper procedure with the Environmental Department. In the meantime, Hersey instructed all the supervisors to complete the ENV-2 forms until the issue was resolved. Nevertheless, Hersey does not recall there being any arguments about the issue. (Tr. 427).

In February 2015, another supervisor's meeting was held during which Complainant was present. However, at no point in time did Hersey get upset with Complainant. (Tr. 428). Complainant's March 2015 evaluation shows Hersey gave Complainant a high evaluation score of 90. (Tr. 428-29). At that time, Hersey had a good impression of Complainant, but it deteriorated after July 2015. (Tr. 429).

During a September 2015 supervisor's meeting, Hersey did not recall any discussion about the ENV-2 forms or that proper measurements were not being taken during openings. Rather, Hersey recalled the meeting was held to discuss re-arrangement of supervisors. Complainant's behavior was out of control and he talked over Hersey and Star Lee. Hersey asked Complainant to calm down. (Tr. 431). Hersey gave Complainant a last warning notice, but he could have terminated Complainant. Hersey sought advice from the HR Department, who advised Hersey that Complainant could be terminated or issued a warning. He discussed the discipline with Lee and they decided to issue Complainant a warning rather than terminating Complainant.⁴⁴ (Tr. 432).

Hersey also recalled the October 2015 incident involving the MV-410 tank. (Tr. 432). However, Hersey stated Complainant was not working the day of the incident. In addition, Hersey does not recall Complainant reporting to him that he had a skin irritation and needed to go to the medical department. Further, Complainant never came to work and reported to Hersey that he suffered from a skin irritation or rash. If Complainant suffered a skin irritation, Hersey stated Complainant should have filed an incident report and sought medical attention. (Tr. 433). Supervisors do not have to obtain Hersey's permission before filling out an incident report. He had no phone conversations with Complainant on or around the date of October 24, 2015, when Complainant allegedly reported a skin irritation and, if he had, Hersey would have asked for an incident report. (Tr. 434).

Hersey identified Scott Maresh as the Health and Safety Professional in the SPVC unit, where he has served in that position since April 2014. (Tr. 434-35). Maresh's job is to identify "safety" issues within the SPVC unit, perform "audits on lockouts, tagouts," and conduct investigations of safety incidents. Hersey stated Maresh does not perform "exposure task evaluations," as the evaluations are conducted by the Industrial Hygienist Department. However, Maresh served as the coordinator with the industrial hygienist. (Tr. 435). Hersey confirmed that on one occasion, around December 2015, he requested the shift supervisors' input about what "exposure task evaluations" should be conducted because the Industrial Hygienist Department

⁴⁴ An offer of proof by question and answer was made at the hearing regarding the September 2015 supervisor's meeting. (Tr. 53-64). The undersigned allowed the offer of proof for the sole purpose of demonstrating that Hersey and Lee had an opportunity to terminate Complainant, but did not do so because they believed Complainant was a good supervisor and they could work with Complainant. (Tr. 431-32).

wanted to perform a site-wide review of the evaluations, and in doing so, requested the units provide a list of all tasks that may require such evaluations. (Tr. 436).

Prior to March 2016, Complainant informed Hersey that he wanted to talk to the Environmental Health and Safety Department about an issue relating to the draining of water. Hersey had no problem with Complainant speaking with Stephanie Schmidt in the EHS Department because Hersey had already spoken with Schmidt about the very same drainage issue. (Tr. 436). In general, Hersey knew Complainant would contact Schmidt or the corporate EHS Department to obtain information about concerns. (Tr. 436-37). Hersey had no issues with Complainant contacting other departments because he wanted to know if the SPVC unit was doing something wrong, rather than not addressing problems. Hersey never instructed Complainant not to go to the EHS Department with any concerns. Hersey was aware that Complainant spoke with Schmidt about the "flushing after stopping on our stripping column and beating water and then draining the water." (Tr. 437). Hersey stated Schmidt confirmed that the process conducted by the SPVC unit was acceptable under the Air Permit. (Tr. 438).

Hersey testified he is familiar with the Air Permit, and he is also aware of Procedure 28 which requires completion of the ENV-2 forms. It is Hersey's understanding that the Air Permit provides exceptions as to when the ENV-2 forms must be completed for certain types of maintenance activities. When he had questions relating to issues of compliance under the Air Permit, he spoke with Eddie Houseton, who would in turn consult with Stephanie Schmidt. (Tr. 438).

Hersey testified he had no other discussions with Complainant, during which Complainant indicated he was going to speak with the EHS Department, or the TCEQ, OSHA or the EPA. (Tr. 438-39). If Complainant had brought up additional environmental concerns, Hersey would have contacted Schmidt to determine whether they were following proper procedure. (Tr. 439-40). He also never told Complainant he could not report to the TCEQ, and had to follow the "chain of command." Hersey confirmed that a discussion took place in the control room between him, Star Lee, and Complainant regarding the issue of the "stripping column." However, Complainant only stated he was going to talk with the EHS Department, to which Hersey replied "okay." During this conversation, Complainant never communicated to Hersey that he was contacting any outside government agency. (Tr. 440). Further, he did not discourage

Complainant from speaking to someone in the EHS Department. (Tr. 441).

Hersey confirmed March 31, 2016, was Complainant's last day in the SPVC unit. Hersey does not recall that on March 30, 2016, Complainant brought Hersey mini-ray readings taken around the "blower" that were written on post-it notes. Hersey did not recall any details or mini-ray readings regarding the "blower." (Tr. 441). In addition, Hersey did not recall having any conversation with Complainant on March 30, 2016, about the unit not following proper policy or procedure. (Tr. 441-42). Likewise, Hersey did not remember Complainant informing him about a March 29, 2016 incident involving Star Lee opening a "vent line." (Tr. 442).

Hersey testified he had a one-on-one meeting with Complainant on the morning of March 31, 2016, during which Hersey issued a last written warning notice to Complainant for "sampling of our water stripping," which is set forth in RX-12. (Tr. 442-43). Hersey explained that Complainant's warning was dated March 1, 2016, because the incident involving the improper sampling of waste water tanks was discovered at an earlier period of time, but it took time to conduct the investigation into why the proper procedure was not being followed. (Tr. 443). Hersey stated the investigation also involved seven SPVC unit operators, all of whom were issued last written warning notices. (Tr. 443-44). All of the operators accepted responsibility and signed their warnings. However, after the operators were issued their warnings, operator Greg Gaskin informed Hersey that Complainant also improperly sampled the water stripping. (Tr. 444).

Consequently, Hersey informed Alan Revis, who works in the HR Department, about Complainant's involvement in the sampling incident. Revis requested that Gaskin provide a written statement about Complainant's involvement, which Gaskin provided in an email set forth in RX-13. Thereafter, Hersey spoke with Complainant about the sampling incident because Hersey had no idea Complainant had failed to follow proper procedure. In doing so, Hersey requested Complainant provide a written explanation to clear him of the allegations. (Tr. 445). Nevertheless, two other operators on Complainant's shift also confirmed Complainant had improperly sampled the water stripping. To confirm the allegations against Complainant, Hersey looked at the samples taken during the alleged period of time, which demonstrate there were duplicative samples taken at the same time that produced the same results. The last written warning notice issued to Complainant is consistent with the

warning given to the operators. (Tr. 446). Complainant denied improperly sampling the water stripping and stated he was working on documentation to prove he followed proper procedure. As a result, Complainant did not sign the warning. Hersey agreed to give Complainant time to provide documentation showing he did not take improper samples. (Tr. 447). Complainant did not say anything about reporting to outside government agencies when presented with the warning. (Tr. 447-48).

When Hersey issued the last written warning notice to Complainant for improper sampling, he was not aware that Complainant had been seen sleeping in a backhoe. Hersey became aware of the issue when day supervisor Armando Escobar handed him a yellow post-it note stating other employees witnessed Complainant sleeping in a backhoe. (Tr. 448). Hersey identified CX-26 as Complainant's termination notice that he signed. (Tr. 449). Also contained in CX-26 is a written statement from Escobar and a copy of the post-it note Escobar provided to Hersey about Complainant sleeping in the backhoe. (Tr. 449-50). After reading Escobar's note, Hersey contacted Alan Revis in the HR Department. Hersey was not sure whether he could obtain statements from the THM crew, who witnessed Complainant sleeping, because they were contractors and not Respondent's employees. (Tr. 450). Revis advised Hersey to obtain witness statements, and thereafter, Hersey requested that Escobar obtain the witness statements from the THM crew. (Tr. 451).

In 2014, Complainant called Hersey and reported to Hersey that he witnessed Nathan Merck sleeping on the job. (Tr. 451). Hersey instructed Complainant to prepare a written statement. Upon receiving Complainant's statement, Hersey forwarded it to the HR Department. (Tr. 451-52). Hersey pulled Merck's badge for sleeping on the job. Since 2004, Hersey has known about Respondent's policy prohibiting sleeping on the job when he received supervisor training from Bill Laas. He never heard it was "ok" for supervisors to sleep on the job. (Tr. 452). Complainant never reported to Hersey that Greg Chapa was sleeping on the job in the dryer shack. (Tr. 452-53). If Complainant had reported such an incident, Hersey would have requested Complainant provide a witness statement just as he did with Merck. Since April 2016, Hersey confirmed two other employees were terminated for sleeping on the job. Hersey also confirmed Complainant never reported that he witnessed Greg Chapa sleeping in a truck outside of the control room. (Tr. 453).

Similarly, Hersey testified Complainant never reported anyone sleeping in the permit room. Hersey explained the camera in the permit room was a fake camera. Hersey removed the camera from the permit room after some of the operators found out the camera was not real. (Tr. 454). Complainant never reported anyone sleeping in the dryer shack, employees locking doors or putting cardboard on windows while sleeping, or seeing other employees sleeping on the job. (Tr. 455). Hersey stated that, if Complainant had witnessed someone sleeping on the job, Complainant would have likely reported it to Hersey just as he did with Merck. Hersey confirmed that as a shift supervisor, Complainant had the right to immediately pull an employee's badge for sleeping on the job and thereafter, notify Hersey. (Tr. 456).

Upon obtaining witness statements from the THM crew, Hersey, Laas, and Revis held a meeting with Complainant in the SPVC unit's conference room. (Tr. 456-57). Hersey recalled that Laas questioned Complainant about sleeping in the backhoe. Hersey confirmed the backhoe was non-functioning at the time of Complainant's sleeping on the job incident. When the THM crew witnessed Complainant sleeping in the backhoe, the crew was working in the "W" area which is the waste water area. (Tr. 457). Hersey stated he had no interaction with Complainant on the morning of March 31, 2016, nor did Complainant mention to Hersey that he was going to surveil the THM crew's activities.⁴⁵ (Tr. 458).

When Laas began to question Complainant as to why he was in the backhoe, Complainant stated he went to the backhoe to "warm up," but Complainant did not mention he was watching the THM crew. (Tr. 458). Hersey confirmed Complainant admitted to sleeping in the backhoe. Hersey recalled that Complainant stated his intention was not to "go crash out, but I might have dozed off." Complainant reported he became "damp" when he was working on the filter press in the "W" area, so he went into the backhoe to "warm up." Complainant's story did not make sense to Hersey because one of the windows was broken in the backhoe. Hersey spoke with one of the THM crew who witnessed Complainant sleeping and provided a written statement. (Tr. 459). He also read all of the statements pertaining to Complainant's sleeping

⁴⁵ Although Hersey testified he met with Complainant on March 31, 2016, to issue Complainant his last written warning regarding the "improper sampling" incident, Hersey also testified he was not aware that Complainant had been seen sleeping in a backhoe at the time he issued Complainant's last written warning for improper sampling. (Tr. 448). Nevertheless, it is unclear from the record evidence at what time Hersey issued the last written warning, as well as when Hersey first learned that Complainant had allegedly fallen asleep in a backhoe.

on the job, and the THM crew statements were consistent with the others. During this meeting, Complainant did not state to Laas that other employees had slept on the job, but never had their badges pulled. At the end of the meeting, Laas pulled Complainant's badge. (Tr. 460).

After leaving the conference room, Hersey spoke with Complainant in the supervisor's office and asked Complainant if he had an explanation as to why he may have fallen asleep (i.e., taking medication that made him drowsy). (Tr. 460-61). Complainant simply stated to Hersey that he was not "going to lie" and he was going to tell the truth. Complainant never raised the issue of other employees sleeping on the job, nor did he mention any issue relating to environmental or safety reports to outside government agencies. (Tr. 461). While Complainant was in the supervisor's office he gathered his personal items. Thereafter, Complainant was escorted out of Respondent's facility. (Tr. 462).

The next day, the HR Department notified Hersey that Complainant would be terminated. (Tr. 462). Hersey was not happy with Complainant's termination because Complainant worked hard, he consistently made sure his shift completed their jobs, and he had legitimate concerns which should be considered. (Tr. 462-63). Hersey never had problems with Complainant voicing potential concerns. Hersey did not believe Complainant's voicing concerns played a part in his termination. Complainant was terminated for sleeping on the job. Hersey agreed that Respondent's policy clearly states an employee will be terminated for sleeping on the job. (Tr. 463).

Complainant spoke with Hersey about the EF-442 filter cleanings. (Tr. 463-64). He recalled that an "exposure test evaluation" had been conducted on the EF-442 filter which resulted in some changes regarding how the filter was drained. Hersey explained the Air Permit required that the filter be drained into a closed system within one hour, but it was not guaranteed the filter could be drained into a "sump" within one hour. (Tr. 464). Consequently, the SPVC unit began using plastic totes which did not affect production. He explained the night shift would clean the filters at night because there was a chance of having emissions above a 1 PPM to the atmosphere, which was a "safety" concern, not environmental. The area was barricaded during the cleaning process. (Tr. 465).

Hersey confirmed completion of the ENV-2 form is the responsibility of the shift supervisor. (Tr. 465). Hersey recalled the MV-410 incident relating to the piping being

plugged, during which Donnie Schumacher was the supervisor. When Hersey arrived the drain on the piping was opened. (Tr. 466). He understood Marcus Casillas would complete the ENV-2 form in order to show Schumacher how to complete the form. Complainant never complained to Hersey about an ENV-2 form not being completed for the MV-410 incident. (Tr. 467). Hersey testified he did not retaliate against Complainant for communicating any concerns, which is against Respondent's policy. (Tr. 468).

On cross-examination, Hersey confirmed Complainant was terminated for sleeping on the job. (Tr. 468-69). He further confirmed that Complainant's last written notice in regard to the water stripping issue had no bearing on Respondent's decision to terminate Complainant. If Complainant had presented evidence to show he did not conduct improper sampling, Hersey would have investigated the evidence. On the day Complainant was terminated, he provided Hersey with a "stack of papers."⁴⁶ Hersey acknowledged that Complainant brought up more concerns than other employees within the SPVC unit. (Tr. 469). However, Hersey believed Complainant's concerns were reasonable and legitimate. (Tr. 470).

Thomas Yaws

Yaws testified he works for Respondent at its Point Comfort, Texas facility where he has been the day Production Supervisor in SPVC unit for the past four years. (Tr. 471-72). However, he has worked for Respondent for 25 years. Currently, he reports to Jim Hersey. (Tr. 472). While working in the SPVC unit, Yaws also worked with Complainant when he was a shift supervisor. (Tr. 472-73).

As the day Production Supervisor, Yaws has three areas assigned to him including the incinerator, water waste, and utilities areas. He also oversees the THM and hydro blasting crews. Yaws explained that "THM" stands for "total housekeeping management." The THM crew is employed by a contract company, Taurus, but Yaws assigns work to the crew and oversees their schedules and timesheets. The THM crew is tasked with clean-up and picking up trash. (Tr. 473). He confirmed that Francisco Rodriguez and Jonathan Garcia worked as part of the THM crew. (Tr. 473-74). Yaws's shift begins at 7:45 a.m., but he arrives

⁴⁶ Hersey did not testify about the contents of the "stack of papers." Therefore, it is unclear whether Complainant's "stack of papers" related to culpability regarding the waste water stripping issue, for which he received a last written warning, or whether the papers related to Complainant's alleged environmental concerns. (Tr. 469).

to work between 7:15 a.m. and 7:30 a.m. The THM crew works from 6:00 a.m. to 4:00 p.m. (Tr. 474). Prior to March 31, 2016, Yaws was not aware that Complainant intended to observe the THM crew's activities. (Tr. 474-75).

On March 31, 2016, Armando Escobar informed Yaws that the THM crew saw Complainant sleeping in a backhoe. (Tr. 475). Eventually, one of the THM crew members, Francisco Rodriguez, came to him and completed a statement about seeing Complainant sleeping in the backhoe. Jonathan Garcia also provided a statement regarding the incident. Yaws read Rodriguez and Garcia's statements, but he did not request that they provide the statements. (Tr. 476). Yaws also provided a written statement regarding Complainant's sleeping on the job, which is set forth in CX-26, and was requested by Jim Hersey. (Tr. 476-77). Yaws reported that a couple of days before Complainant was seen sleeping in the backhoe, he walked into the supervisor's office where Complainant was seated in a chair with his back to Yaws. When Yaws began to talk to Complainant, Complainant did not turn around for about one minute, and it appeared to Yaws that he was asleep. However, Yaws never saw Complainant's eyes closed. (Tr. 478). He thought Complainant looked tired. Yaws confirmed that Respondent's policy for sleeping on the job has always been termination. Yaws never witnessed anyone sleeping on the job. He was not aware of Greg Chapa, Brian Hover, or Derek Chavana ever sleeping on the job. (Tr. 479). He could not recall anyone who had slept on the job, but was not fired. (Tr. 479-80). Yaws stated supervisors are not allowed to sleep on the job and there has never been an exception for supervisors. (Tr. 480).

Yaws has worked with Hersey, since Hersey was transferred to the SPVC unit. He testified he has a good working relationship with Hersey. Yaws attended the supervisor's meeting that addressed switching supervisors's areas of responsibility. (Tr. 480). Hersey was not upset with Complainant or disrespectful towards Complainant, but likely frustrated. (Tr. 480-81). Yaws did not witness any negative interaction between Hersey and Complainant, nor did he hear Hersey ever state anything negative about Complainant. (Tr. 481). Complainant never communicated to Yaws that he had concerns about which he was going to report to outside government agencies. (Tr. 481-82). He did not recall Complainant communicating to Hersey concerns about the ENV-2 forms in regard to the EF-442 filter process. (Tr. 482). Yaws further testified he never witnessed Complainant voice environmental concerns to Hersey. (Tr. 482-83).

Armando Escobar

Escobar testified he works for Respondent at its Point Comfort, Texas facility and has been employed by Respondent for six years. (Tr. 489). For the past two years, he has worked as a day supervisor in the SPVC unit. (Tr. 489-90). Prior to becoming a day supervisor, Escobar was a process operator in the SPVC unit. Currently, he reports to Hersey. He is responsible for four day shift employees, completing employee timesheets and training, and he works with the engineers when there are projects within the area he oversees. He also fills-in for Maintenance Coordinator, Josh Jasek. (Tr. 490). Escobar oversees the "E process from the reactionary to the dryer." (Tr. 490-91).

Escobar knew Complainant and had worked with him over the course of three to four years. He reported to Complainant, who was the shift supervisor, when he worked as the process supervisor on the "C" shift. (Tr. 491). Escobar had a good working relationship with Complainant and described Complainant as "his mentor" and was "all business." (Tr. 491-92). Escobar believes Complainant would support his being promoted to a supervisory level. Likewise, Escobar has no issues with Hersey, stating Hersey is a "fair" manager. Regarding interaction between Hersey and Complainant, Escobar did not ever witness Hersey treating Complainant in a negative manner. (Tr. 492). Escobar never received the impression from Hersey that he disliked Complainant, nor did Hersey express any frustration with Complainant. (Tr. 493).

In regard to the process changes for the EF-442 filters, Hersey asked Escobar to work with safety professional Scott Maresh and industrial hygienist Jacob Dominney to determine if there was a way to improve the process. The EF-442 filters come within the purview of the "E" process area that Escobar oversees. Hersey never expressed to Escobar that he did not want Complainant involved in the process change for the EF-442 filters. (Tr. 493). Ultimately, the process change resulted in the draining of the EF-442 filters to "super sacks" and pumping the remaining liquid into totes. (Tr. 493-94). The change in the draining process "did not slow down production." (Tr. 494).

Escobar learned Complainant had been seen sleeping on the job when day operator, Jim Orta, told him about the incident. While in the break room, Orta learned that Complainant was sleeping on the job from people who witnessed the incident. (Tr. 494). Thereafter, Escobar reported the incident to Hersey and handed him a sticky note stating the THM crew witnessed

Complainant sleeping in the backhoe. (Tr. 494-95). Escobar gave Hersey the sticky note right before a "9:00 meeting" because there were several people around and he wanted to be discrete. Escobar recalled that, upon reading the sticky note, Hersey responded "you are kidding me," and Hersey appeared "disappointed." Consequently, Hersey asked Escobar to speak with Yaws about obtaining written statements from the THM crew. Escobar confirmed CX-26 contains the post-it note he delivered to Hersey with his statement about Complainant's sleeping on the job.⁴⁷ (Tr. 495). He further confirmed CX-26 also contains a written statement he provided following his discussion with Hersey. (Tr. 496). The written statement notes Escobar observed Complainant during the production meeting "struggling to stay awake." (Tr. 496-97). Escobar stated Complainant's drowsy appearance was unusual because he was normally "alert and attentive." He provided his written statement to Yaws. Escobar reported Complainant's sleeping incident to Hersey because as a supervisor he "had a duty to act." Nevertheless, it "hurt" Escobar because he knew sleeping on the job results in termination. (Tr. 497). Escobar stated sleeping on the job is against Respondent's policies and it always results in suspension pending an investigation to terminate ("SPIT"). (Tr. 497-98).

Escobar has not witnessed anyone else sleeping on the job. However, recently two of Respondent's operators within the SPVC unit were terminated for sleeping on the job. The day Escobar reported Complainant's sleeping on the job, he had no other conversations with Hersey, nor did Hersey ever tell Escobar to have an ear out for anything involving Complainant. (Tr. 498).

After being promoted to day supervisor in the SPVC unit, Escobar still worked and interacted with Complainant. Complainant never communicated to Escobar that he believed Hersey was "out to get him," nor did he make any comments in general about Hersey. (Tr. 499). Nonetheless, Escobar felt there was tension between Complainant and Hersey, but Escobar stated he only witnessed tension between them during one supervisor's meeting. (Tr. 499-500). Complainant never told Escobar he was going to report environmental concerns to outside government agencies. Complainant also never reported to Escobar that he observed Greg Chapa sleeping on the job. However, if

⁴⁷ It is unclear exactly when Hersey requested Escobar obtain witness statements from the THM crew, but Hersey testified that after reading Escobar's note he contacted Alan Revis in the HR Department to determine proper procedure for obtaining such statements. Thereafter, Revis advised Hersey it was okay to obtain witness statements from the THM crew, and as a result, Hersey requested that Escobar obtain the witness statements from the THM crew.

Complainant had reported Chapa sleeping on the job, Escobar would have reported it because he may lose his job for not doing so. (Tr. 500). Escobar never heard Star Lee and Hersey state that they wanted to get rid of Complainant. (Tr. 500-01).

On cross-examination, Escobar testified he was not sure what caused the tension between Hersey and Complainant. He attended a supervisor's meeting where Complainant asked Hersey several questions about "cross training" and Complainant became "a little bit loud," which "was very uncomfortable" for Escobar. (Tr. 501).

On re-direct examination, Escobar testified Complainant would say "I am going to give them hell," or "I am coming in hot," in reference to Hersey. Escobar knew that meant when Complainant arrived to work he was headed straight to Hersey's office. (Tr. 502). Escobar stated "knowing Jason [Complainant] when I started working with him, he is going to stir the pot or he has something that he is going to agitate Jim [Hersey] about." (Tr. 502-03). Escobar confirmed the issues Complainant had expressed were work-related. However, Complainant never reported to Escobar there were issues that needed correction, nor did he report job-related issues. Escobar felt Complainant had concerns, but he never expressed them to Escobar. (Tr. 503).

Escobar did not witness Complainant sleeping in the backhoe. Likewise, Mr. Orta, who reported the incident to Escobar, did not witness Complainant sleeping in the backhoe. Rather, Mr. Orta heard other people discussing the incident in the break room. (Tr. 504).

Alan Revis

Revis testified he has worked for Respondent for five years, and for the last year he has worked as Respondent's HR Generalist. (Tr. 505-06). Before becoming a HR Generalist, in 2012, he worked as a chemical process operator in the PVC unit and in 2015, he transferred into the EHS Department where he worked as a Health And Safety Professional in the "OFS-2" unit for nine to ten months. (Tr. 506-07). He reported to Hersey from May 2012 to April 2014. (Tr. 507). Revis testified that as a manager, Hersey was "fair" and a "great supervisor." Revis stated Hersey encouraged him to get certified, and in doing so, he became a better operator and a better employee. (Tr. 507). He did not bring any environmental or safety concerns to Hersey's attention, but Revis characterized Hersey as being

"very receptive" to any concerns expressed by other employees. (Tr. 507-08).

As a HR Generalist, Revis's responsibilities include investigating personnel issues, drug testing, thefts and work altercations. He also recommends corrective actions after completing investigations. In addition, he makes recommendations for procedural revisions, and assists with recruiting and payroll. (Tr. 508). He confirmed personnel files are kept in the HR Department, which include notice of absence sheets, personalized action forms, warning notices, and performance evaluations. (Tr. 509). Revis identified RX-31 as part of the Complainant's personnel file.⁴⁸ (Tr. 509-10).

Revis was involved with issuing Complainant's last written warning notice for the improper sampling incident. (Tr. 511-12). In March 2016, Hersey brought the matter to Revis's attention. (Tr. 512). Hersey did not communicate to Revis that he wanted Complainant terminated due to improper sampling. However, Hersey was not hesitant about issuing Complainant the last written warning notice because other SPVC operators had received the same warning for improper sampling. Revis stated that operators and supervisors are treated the same in regard to discipline. Prior to issuing Complainant the warning, Hersey investigated the sampling issue, which included speaking to several operators, and as a result, Hersey determined Complainant also improperly sampled. Hersey never communicated to Revis that Complainant had raised issues about not following proper procedure and policy in the SPVC unit. (Tr. 513).

On March 31, 2016, Hersey contacted Revis stating he received a post-it note from Armando Escobar that two members of the THM crew witnessed Complainant sleeping on the job. Hersey asked Revis what he should do and Revis directed Hersey to gather witness statements and to call Revis after gathering all of the information. Immediately following his conversation with Hersey, Revis reported to Wilburn Laas, his supervisor in the HR Department, what had transpired. (Tr. 514). Hersey brought written witness statements to Revis. Revis identified CX-26 as the statements he received from the two THM crew members, Francisco Rodriguez and Jonathan Garcia, as well as from Armando Escobar, and Tommy Yaws. (Tr. 515). Revis did not speak directly with the THM crew members because typically the managers in the department will obtain statements from

⁴⁸ Respondent's exhibit 31 was admitted and received into evidence without objection. However, only pages 2, 3, 8, 21, 24, 25, 31-33, 35, 39, 42, 43, 52, 58, 59, 70, 75, and 76 (out of 286 pages) were received into evidence. (Tr. 510-11).

individuals. (Tr. 516). After Revis obtained the witness statements, he provided the statements to Laas, and they informed Rick Crabtree about the incident due to the serious nature of the matter. (Tr. 517).

Revis testified he has been involved with situations in which other employees were caught sleeping on the job, all of whom were also terminated. (Tr. 517).

After Crabtree received all the information about Complainant's sleeping on the job, he advised Revis, Laas, and Hersey to meet with Complainant to discuss the issue. Initially, a meeting was held in the SPVC conference room with only Hersey, Laas, and Revis in order to discuss all the facts and ensure the details were correct. Revis stated Hersey was nervous and did not appear eager to proceed with Complainant's discipline. (Tr. 518). Hersey mentioned meeting with Complainant about his last written warning notice for improper sampling, but Hersey did not mention anything unusual about the meeting with regard to the notice. (Tr. 519).

Laas conducted the meeting and requested that Complainant meet them in the conference room. When Complainant arrived he had a handful of papers. Laas asked Complainant if he knew why he was asked to come to the meeting, to which Complainant replied "no." Laas informed Complainant that he was accused of sleeping on the job, and Laas asked Complainant if he had been in the backhoe. (Tr. 520). Complainant stated "yes" he was in the backhoe because it was cold and wet outside and he wanted to "warm up." (Tr. 521). Thereafter, Laas asked Complainant whether at any point in the backhoe did he fall asleep, and whether it was Complainant's intention to climb into the backhoe to go to sleep. Complainant responded that he did not intend to sleep, but he may have "dozed off," and he did not deny it was a possibility. Consequently, Laas requested Complainant surrender his badge and Complainant complied. Revis did not recall Complainant offering a defense as to why he dozed off, nor did Complainant state the allegations against him were not true. Complainant also did not raise issues regarding any other employees sleeping on the job who were not terminated. (Tr. 522).

Laas was the only person to take notes during the meeting with Complainant. Revis confirmed that CX-26 contains Laas's notes from the meeting. Revis found it odd that Complainant stated he went into the backhoe to "warm up" because Complainant had a heated office where he could have warmed up. (Tr. 523).

Revis confirmed Hersey did not ask any questions during the meeting with Complainant. (Tr. 524).

After the meeting, Complainant gathered his personal belongings and Revis escorted him off the premises. Complainant also had company issued tools and a radio which Revis retrieved. (Tr. 524). Complainant asked Revis if he was fired to which Revis replied that he was suspended pending investigation. Revis stated that he attended high school with Complainant's son and he, like Complainant, had also been in law enforcement. (Tr. 525).

When leaving the control room, Complainant mentioned that he had a meeting scheduled with Rick Crabtree at 3:30 p.m. (Tr. 525-26). Laas told Complainant "I will inform Mr. Crabtree that you will not be attending that meeting." Complainant did not respond to Laas. Revis never told Complainant he could not contact Crabtree. Complainant never alleged that the allegation regarding his sleeping on the job was false, nor did he say he thought it was okay for supervisors to sleep on the job, or that other employees were not terminated for sleeping on the job. (Tr. 526). Complainant made no mention that he believed his suspension was related to his work relationship with Hersey, or that he told Hersey he was going to report environmental issues to the TCEQ, the EPA, or any other government agency. (Tr. 526-27).

On April 1, 2016, Revis contacted Complainant to inform him that he was terminated. The conversation was casual and lasted ten to 15 minutes. Revis followed a "termination script." (Tr. 527). Complainant expressed to Revis that he was glad to have his law enforcement job with the City of Palacios. Complainant did not ask Revis why he was terminated, and he was not upset or hostile. (Tr. 528). Complainant did not express to Revis that he was wrongfully terminated, that he was terminated because he threatened to report concerns to outside agencies, or that his discharge was of a disparate nature. (Tr. 528-29).

One week later, Revis called Complainant about retrieving his personal belongings that were gathered at Respondent's facility. Revis stated most of Complainant's personal belongings were heavy tools so he could not ship them to Complainant. Revis asked Complainant if he wanted to come get them, to which Complainant replied "no, we can meet somewhere if you would like." (Tr. 529). Revis met Complainant in Palacios at the "RV Park" on Highway 35 and gave Complainant his personal belongings. They spoke for about five minutes. (Tr. 529-30). Complainant was dressed in his law enforcement uniform.

Complainant commented that he liked Revis's truck and Revis asked Complainant how everything was going with law enforcement. Complainant stated his job was going good and that he was making "some good money," at a rate of \$23.00 per hour, but it was not the salary he received while working for Respondent. (Tr. 530). Complainant did not mention he was upset about his termination, that he was wrongfully terminated, that his termination was retaliation, or that Hersey was "out to get him." (Tr. 530-31).

Revis testified Respondent's employees may submit complaints or concerns to the HR Department using an "open line form" which are placed in generalized areas where they can be easily accessed by employees. (Tr. 531). The open line complaints can be anonymous, and may be submitted by interoffice mail or by U.S. mail. (Tr. 531-32). On the other hand, employees may submit a formal complaint to the HR Department, but the complaint must list the employee's name, the supervisor's name, and the person about whom the employee is complaining. (Tr. 532). Revis is the "open line" administrator and he investigates all of the open line complaints to determine whether they are valid. (Tr. 532-33).

Revis became the HR Generalist on December 1, 2015. From December 2015 through April 1, 2016, Revis has not received any complaints from the SPVC unit, nor has he received any complaints against Lee or Hersey. (Tr. 533). Revis is familiar with the "Report It" system which is a third party vendor who receives anonymous reports from employees which are then transmitted to Respondent's corporate New Jersey office. (Tr. 533-34). Thereafter, the New Jersey office will transmit the anonymous complaint to the local office that is involved in the complaint. The "Report It" complaints provide the date the complaint was submitted and when the corporate office received the complaint. Complainant never reported to Revis that he filed any complaint within the "Report It" system. (Tr. 534). Until the current matter arose, Revis had no knowledge that Complainant submitted a complaint with "Report It." Revis never had the impression that Hersey was trying to get rid of Complainant. (Tr. 535).

On cross-examination, Revis did not ever witness Complainant report to Hersey that he had concerns about environmental issues. (Tr. 536). To his knowledge, no other SPVC unit supervisor has been terminated for sleeping on the job. However, SPVC unit operators have been terminated for sleeping on the job, in December 2016, and in August or September 2016. (Tr. 537). Revis confirmed that he did not personally interview the THM crew members who witnessed

Complainant sleeping on the job because the SPVC unit managers and supervisors had already interviewed them and obtained their written statements. (Tr. 538).

On re-direct examination, Revis confirmed there was no variation between the statements gathered from witnesses and Complainant's admission about sleeping on the job. (Tr. 539-40). Therefore, Revis did not interview the THM crew because it was unnecessary.⁴⁹ (Tr. 540).

V. CONTENTIONS OF THE PARTIES

In brief, Complainant contends he engaged in protected activity pursuant to the Clean Air Act and Toxic Substances Control Act. 42 U.S.C. § 7622(a); 15 U.S.C. § 2622(a). In particular, Complainant asserts his protected activities were "definitive and specific" internal complaints about air pollution and toxic substances which began in September 2014, when Complainant voiced his concerns about Respondent not following Procedure 28. See Carpenter v. Bishop Well Servs. Corp., ARB No. 07-060, ALJ No. 2006-ERA-035 (ARB Sept. 16, 2009). Thereafter, Complainant avers he continued to voice concerns to his supervisor, Jim Hersey, about compliance with Respondent's Air Permit, following proper procedures, and accurately reporting calculations and emissions. However, in October 2015, Complainant became more aggressive, assertive, and vocal about his concern regarding Respondent's alleged environmental violations when he was exposed to vapors that caused a rash on his face and legs. As a result, Complainant avers that on several occasions he communicated to Jim Hersey and Star Lee he was going to report Respondent's environmental violations to various outside government agencies.

Further, Complainant asserts he suffered an adverse employment action when he was later terminated from his employment with Respondent on April 1, 2016, for "unbecoming behavior," that is, sleeping on the job. Nonetheless, Complainant adamantly denies that he ever fell asleep during his shift on March 31, 2016. On the other hand, Complainant contends his protected activity was a **motivating factor** in Respondent's decision to terminate his employment as evidenced by temporal proximity, disparate treatment, and Respondent's

⁴⁹ Respondent's Exhibits 41 and 42, consisting of Respondent's December 19, 2016 Motion for Summary Decision and the Order Denying Motion for Summary Decision that was issued by the undersigned on January 13, 2017, were admitted and received into evidence. In addition, Complainant's Exhibit 4, consisting of Complainant's Opposition to Respondent's Motion for Summary Decision dated December 23, 2016, was also admitted and received into evidence. (Tr. 541-42).

malice. Moreover, Complainant argues Respondent has failed to prove by a preponderance of the evidence that his termination would have occurred even if he had not engaged in protected activity. See Kuehu v. United Airlines, ARB No. 12-074, ALJ No. 2010-CAA-007, slip op. at 4 (ARB Feb. 10, 2014).

Additionally, Complainant contends he is entitled to \$111,884.00 for 1.08 years of back pay, as well as front pay in lieu of reinstatement to his previous job with Respondent, and compensatory and exemplary damages. On this basis, Complainant contends that any failure to mitigate damages by pursuing substantially similar employment should not result in a denial of his back pay, nor should his removing of confidential information from Respondent's property, or his arrest for shoplifting.

In brief, Respondent contends Complainant failed to provide any evidence that he engaged in protected activity pursuant to the Clean Air Act and the Toxic Substances Control Act. Specifically, Respondent avers Complainant admitted in his Response to Formosa's Motion for Summary Judgment that the "resin chunk incident" did not invoke 40 C.F.R. § 261.32(a),⁵⁰ and in doing so, Complainant has provided no further evidence of protected activity under the TSCA. Similarly, Respondent asserts that Complainant's **internal** complaints about procedures relating to the reporting and handling of air emissions are not properly considered protected activity under the CAA. Respondent further argues that Complainant relies solely upon his **incredible** testimony in alleging he engaged in protected activity under the TSCA and CAA, and therefore Complainant has failed to present any evidence of protected activity. In the same way, Respondent asserts Complainant cannot demonstrate he **reasonably** believed any environmental violations were occurring due to Environmental Senior Manager Schmidt's explaining to him the mechanics of Respondent's Air Permit and that all applicable regulations were followed by Respondent's SPVC unit. See Allen v. Admin. Rev. Bd., 514 F.3d 468, 477 (5th Cir. 2008). Thus,

⁵⁰ In his July 25, 2016 Complaint, Complainant addressed an incident involving a resin chunk and referenced a TSCA regulation relating to "heavy ends from the distillation of vinyl chloride in vinyl chloride monomer production." 40 C.F.R. § 261.32(a). On December 19, 2016, Respondent filed its Motion for Summary Judgment asserting, among other things, that Complainant's claim pursuant to the TSCA was invalid because Complainant expressed concern about a resin chunk found in his supervisor's office that was not a threat to public health or safety. Respondent's Motion for Summary Judgment, pp. 7-8. Nevertheless, in his Response to Respondent's Motion, Complainant conceded that his TSCA claim regarding the "resin chunk incident" involved an issue of workplace safety, and thus did not invoke the TSCA. Complainant's Response, p. 5.

Respondent argues Complainant's "willful ignorance or unwarranted speculation" is not properly characterized as a **reasonable belief** that Respondent violated environmental regulations pertaining to its Air Permit. See Abernathy v. Walgreen Co., 836 F. Supp. 817, 822 (M.D. Fla. 1992).

Nonetheless, assuming **arguendo** Complainant demonstrated he engaged in protected activity, Respondent asserts Complainant has failed to show by a preponderance of the evidence that his protected activity was a **motivating** factor in his termination. Respondent argues Complainant's alleged protected activity, which he stated began in September 2014, is too remote to rely on temporal proximity to demonstrate a causal link between such activity and his April 1, 2016 termination, as the temporal proximity clock begins to run on the **first** date Respondent became aware of protected activity. Mitchell v. Snow, 326 F. App'x 852, 856 n. 6 (5th Cir. 2009). Likewise, Respondent contends Complainant has not shown by a preponderance of the evidence that his termination was retaliation, in part, due to SPVC Production Manager Hersey's alleged malice towards Complainant.

In the alternative, Respondent argues it proved by a preponderance of the evidence that it would have discharged Complainant even in the absence of his alleged protected activity. In particular, Respondent avers Complainant's sleeping on the job violated its clear and rigid policy against such behavior and had absolutely no relationship to Complainant's alleged protected activity. On this basis, Respondent contends it has uniformly applied its no sleeping on the job policy with other employees, namely, Nathan Merck and Todd Savoy. Moreover, Complainant's assertion that, supervisor Gregory Chapa, as well as employees Brian Hover and Derek Chavana, were not fired for sleeping on the job lacks evidentiary support and is simply untrue.

Finally, Respondent asserts Complainant failed to mitigate damages because he did not exercise reasonable diligence in pursuit of similar job opportunities. In addition, Respondent argues Complainant is not entitled to any damages (back pay) after August 24, 2016, the date on which Respondent learned Complainant absconded with its confidential information in violation of written agreements he signed when he became employed by Respondent. Respondent also asserts Complainant is not entitled to an award for emotional distress because he failed to provide proof of objective manifestation of distress that was caused by his termination. Further, Respondent contends punitive damages are also not warranted in the instant

case because it has not acted with "reckless or callous disregard" of Complainant's rights nor has Respondent intentionally violated federal law.

VI. FINDINGS OF FACT, CONCLUSIONS OF LAW, ANALYSIS AND DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tenn. Valley Auth., Case No. 1992-ERA-019, slip op. at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." Ind. Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so **natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe** . . . Credible testimony is that which meets the test of plausibility.

Id. at 52 (emphasis added).

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Constr. Co. v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due

regard for the logic of probability and plausibility and the demeanor of witnesses.

In the present matter, Complainant's burden of persuasion rests principally upon his testimony. In general, I found Complainant's testimony to be overwhelmingly inconsistent, contradictory, evasive, and unpersuasive regarding the most significant factual issues in this case. Specifically, there are inconsistencies and contradictions in his testimony when correlated internally with statements he allegedly made to other witnesses, as well as an absence of corroborating evidence that detracts from Complainant's overall credibility and call into question the probability that Complainant engaged in protected activity, that there was disparate treatment, and any animus on the part of Respondent. Furthermore, the preponderance of testimonial evidence from co-workers and supervisors, most of whom I found to be credible, contradicts Complainant's version of events leading up to his termination. A brief discussion of the most significant discrepancies follows.

1. Protected Activity Discrepancies

At the formal hearing, Complainant stated his protected activity began in September 2014, at a supervisor's meeting where he voiced concerns to Hersey that procedures were no longer being followed for evacuating equipment, leaving high concentrations of VCM in the equipment that went beyond the allowable limits. Complainant averred Eddie Houseton was also at the meeting and agreed with him, confirming the need to follow procedure for equipment opening for VCM service. Complainant stated Hersey became "very upset and irate" due to his voicing concerns and asking questions, so he "just let it go."

Nevertheless, Jasek, who also attended the supervisor's meeting, recalled Complainant raised a question over whether the ENV-2 form should be used for equipment openings for non-VOC equipment, stating no one was completing the forms. Jasek stated Hersey instructed them to fill out an ENV-2 form for every equipment opening until he received clarification on the matter. However, Jasek testified Hersey did not appear angry or irritated toward Complainant.

Similarly, in contrast to Complainant's characterization of the September 2014 supervisor's meeting, Hersey testified Complainant raised questions about filter cleaning procedure, asking whether ENV-2 forms should be completed for cleaning EF-

506 filters. Consequently, Hersey asked Eddie Houseton⁵¹ about the filters. Converse to Complainant's assertion, Hersey stated that Complainant disagreed with Houseton, who stated the filter cleaning needed to be logged, but an ENV-2 form was not required. Due to the discrepancy, Hersey asked Houseton to verify proper procedure with the Environmental Department. In the meantime, Hersey instructed all the supervisors to complete the ENV-2 forms until the issue was clarified. Like Jasek, Hersey did not recall there being any arguments about the issue, nor did he become irate with Complainant.

Following the September 2014 supervisor's meeting, Complainant testified that other supervisors continued not following proper procedure for the EF-442 filters and "we continued to drop high concentration VCM to the pad," insinuating that Respondent continued to violate environmental laws. He further testified that Matt Paige took a sample of contaminated waste water that was dropped to the pad, which showed a reading of "1,264.2 PPM" of liquid product which is 110 times over the allowable limit of 10 PPM. (CX-7). Complainant verified this was an "air emissions" issue. He claims he reported the reading to Hersey, who stated it was a "non-issue."

In contrast to Complainant's characterization of the reading, Schmidt, Respondent's Environmental Senior Manager, testified about the EF-442 filters and preparation for opening the equipment which includes using nitrogen pressure to purge the system. She explained this process is repeated several times before an air sample is taken to ensure it is safe to open the equipment. Schmidt confirmed the **Air Permit** requires the air sample reading to be **less than "10,000 PPM."** Schmidt stated there is a **difference between air samples and liquid samples**, explaining that when a liquid sample is taken it is dropped to the pad, washed into the sump for containment, and treated with a stripper prior to going to the waste water plant. She confirmed that as long as this process is followed when taking liquid samples, there is no issue if a **liquid sample is over 1,000 PPM**, nor is there a violation of the Air Permit requirements.

Complainant also avers that in **October 2015**, there was an incident involving the "MV-410" tank where there were large quantities of "VAM" such that he could see vapors coming off of product stuck to filters and piping. On the evening of the MV-410 incident, Complainant avers he began cleaning up the area

⁵¹ Hersey testified Eddie Houseton held the position of Environmental Coordinator, but has since been transferred to a Process Safety Management position in the SPVC unit. (Tr. 422-23).

where parts containing the VAM had been disassembled. He further alleges that he developed a rash on his legs and face due to being exposed to chemical vapors. (CX-17). However, Complainant stated he did not complete an incident report or seek medical treatment because Hersey instructed him not to do so. On the other hand, Jasek, who was present on the morning of the incident, testified Hersey, Lee, Schumacher, and Casillas were present during the incident. Jasek testified he left "a couple hours before lunchtime," and that Complainant was not present. Likewise, Hersey testified Complainant did not work the day of the MV-410 incident, nor did Complainant ever report to Hersey he suffered a skin irritation and was in need of medical treatment. Notably, the record is devoid of any evidence that Hersey, Jasek, Lee, Schumacher, or Casillas, all of whom were present when the piping was initially clogged and disassembled, ever saw chemical vapors coming from the filters and/or piping, or experienced any kind of reaction to such vapors.

Complainant further avers that on **January 6, 2016**,⁵² he contacted Scott Maresh, who he characterized is the "in-house environmental health and safety specialist," to report EF-442 filters were dropped to the pad using the written instructions provided by Lee, which deviated from proper policy and procedure. Consequently, high concentrations of VCM were contaminating waste water to the pad, and equipment was opened without proper calculations, measurements, and paperwork completed. In particular, Complainant stated Maresh was present and conducted readings that showed chemical levels above the allowable exposure limit. According to Complainant, Hersey asked him what he was doing with Maresh taking samples. Complainant informed Hersey they were testing samples which were above the allowable exposure limit and Hersey became "upset and defensive." Thereafter, Hersey requested Armando Escobar to oversee the situation. Due to the high readings, Maresh told Hersey to cease dropping filters on the pad during the day shift and to only do so at night with barricades surrounding the affected area. After the high readings, Maresh later decided the filters could no longer be dropped on the pad, but must go into containers. Finally, Complainant averred the change in

⁵² Maresh's emails demonstrate that on **January 5, 2016**, Maresh made note of "monitoring, sampling and dumping the EF-442B filter," but Maresh noted there was not enough liquid to test the samples. On **January 6, 2016**, Maresh made no mention of EF-442 filters, but on January 7, 2016, Maresh indicated he was working with the filters. Finally, on **January 8, 2016**, Maresh noted he spoke with Hersey about the EF-442 filter, but noted no further action relating to the filters. (CX-20, pp. 1-3).

procedure "slowed production" from seven to eight batches per day, down to two to three batches per day.

In contrast to Complainant's characterization of the events involving the EF-442 filters, Hersey confirmed that around **December 2015, he requested** the shift supervisors' input about what "**exposure task evaluations**" should be conducted because the Industrial Hygienist Department wanted to perform a site-wide review of the evaluations, and in doing so, requested the units provide a list of all tasks that may require such evaluations. He recalled that an exposure test evaluation had been conducted on the EF-442 filter which resulted in some changes regarding how the filter was drained. Hersey explained the Air Permit required that the filter be drained into a closed system within one hour, but it was not guaranteed the filter could be drained into a "sump" within one hour. As a result, the SPVC unit began using plastic totes which did not affect production. He explained the night shift would clean the filters at night because there was a chance of having emissions above a 1 PPM to the atmosphere which was a **safety concern**, not environmental. The area was barricaded during the cleaning process. Hersey further testified that Scott Maresh is the "health and safety professional" and Maresh's job is to identify **safety issues** within the SPVC unit, but Maresh does not perform "exposure task evaluations," as the evaluations are conducted by the Industrial Hygienist Department. Notably, Hersey stated **production did not slow down** due to the change in procedure.

Likewise, in regard to the EF-442 filters, Escobar testified Hersey asked him to work with safety professional Scott Maresh and industrial hygienist Jacob Dominney to determine if there was a way to **improve the process**. Escobar explained the EF-442 filters are within the purview of the "E" process area that Escobar oversees. Ultimately, the process change resulted in the draining of the EF-442 filters to "super sacks" and pumping the remaining liquid into totes. The change in the draining process **did not slow down production**. Hersey never expressed to Escobar that he did not want Complainant involved in the process change for the EF-442 filters.

Also significant, Schmidt testified she knows Scott Maresh, who is the health and safety personnel in the SPVC unit. She explained Maresh has no connection to the Environmental Department except that he reports to the Health and Safety Department that is grouped with the Environmental Department. She further testified Maresh has no training for environmental compliance within the SPVC unit. However, she had a conversation with Maresh concerning the EF-442 filter and

whether the Air Permit requirements were being followed. Maresh asked Schmidt whether any issues arose under the Air Permit when equipment was drained to the pad. She explained the permit requirements and told Maresh the permit was being followed. She was aware of Maresh's involvement with changing the process of dropping contents onto the pad to dropping them into a "super sack" with respect to any safety concerns.

Most notable, Schmidt testified Complainant was particularly concerned about how the SPVC unit was cleaning the filters and whether "dropping the contents of the filters to the pad" would satisfy the requirements of the Air Permit. She confirmed she spoke with Complainant about this issue in **fall 2015**. She further confirmed the SPVC unit was draining the filters in accordance with Special Condition 34 of the Air Permit and she made clear to Complainant the SPVC unit was in compliance.

According to Schmidt's understanding of the filter process, the filter would be drained to the pad and the liquid from the filter would be washed into a trench and flow into a "closed sump." She confirmed the SPVC unit was draining the filters in accordance with Special Condition 34 of the Air Permit. She further confirmed the Air Permit does not require an ENV-2 form to be completed when draining liquid from a filter. (Tr. 374). She explained the ENV-2 form is not discussed anywhere in the Air Permit, rather it was a form created by Respondent prior to the Air Permit being issued. (Tr. 374).

I also find Complainant's vacillating testimony concerning his aggressiveness in reporting concerns about Respondent's alleged environmental violations to be evasive, contradictory, and unpersuasive. Complainant claimed that following the October 2015 MV-410 incident, during which he was exposed to vapors and developed a rash, he became more vocal and aggressive about air emissions and Respondent's alleged violations of environmental regulations. He further asserts that by March 2016, he threatened to report certain violations to outside government agencies. However, in complete contradiction, Complainant also testified he did not file incident reports, notify personnel in Respondent's EHS Department, or contact outside agencies about any environmental violations because he was following the "chain of command," as he was forbidden by Hersey to do so. Significantly, Laas, Revis, Hersey, Schmidt, Yaws, Escobar, and Jasek all testified that Complainant never stated he had environmental concerns about which he was going to report or did report to the EHS Department, nor did Complainant

state he was going to report environmental violations to the TCEQ, the EPA, or OSHA.

Contrary to Complainant's assertion, Environmental Senior Manager Schmidt testified that she had multiple conversations with Complainant about concerns of compliance with Respondent's Air Permit. She further testified that she also spoke with Complainant about filter cleanings, dropping the contents of the filter onto the pad, and record keeping as it pertained to the Air Permit. On this basis, Schmidt testified Complainant never told her Hersey instructed him not to contact her. Likewise, Hersey testified he never discouraged Complainant from speaking to anyone in the EHS Department, including Schmidt, because he wanted to know if the SPVC unit was doing something wrong. Hersey was aware that Complainant spoke with Schmidt on various occasions which was a non-issue for Hersey as he had often spoke with Schmidt about the same issues. Assuming **arguendo**, Complainant was forbidden by Hersey to report environmental violations internally, or to outside government agencies, his testimony is still unpersuasive as he failed to make any reports to outside agencies following his termination. Similarly, when Complainant met Revis at an RV park following his termination, he did not mention to Revis any concerns about environmental violations or that Hersey forbid him to discuss or report his concerns.

2. Sleeping On The Job Discrepancies

Complainant also testified that during his March 31, 2016 investigative interview with Laas, Revis, and Hersey he adamantly denied ever falling asleep in the backhoe, but instead he entered the backhoe to watch the THM crew because they were not following proper procedure or completing their duties. In contrast to Complainant's testimony, Laas, Revis, and Hersey similarly testified that Complainant stated he was working on a filter press, became wet/damp, and climbed into the backhoe to "warm up."⁵³ Likewise, Laas, Revis, and Hersey testified that initially Complainant stated he was not sleeping in the backhoe, but then he stated he did not intend to fall asleep, but he might have "dozed off" and did not remember. Laas, Revis, and Hersey all testified that it struck them as strange that Complainant entered the backhoe to "warm up" because the backhoe

⁵³ Laas also stated in his notes from the investigative meeting, that at first Complainant stated he climbed into the backhoe because he was cold and he was watching the THM crew. However, Complainant's story changed, stating he became wet when he was washing a filter press. He entered the backhoe to warm up, and after the THM crew left he got out to close the windows in the backhoe. (CX-26, p. 8).

was missing a window. Revis also testified he found it strange Complainant would climb into the backhoe to "warm up" given he had access to a heated supervisor's office. Moreover, they all testified that Complainant never offered a defense as to why he fell asleep, nor did he state the allegations that he slept in the backhoe were untrue, or that other employees had slept on the job, but were not terminated. Also troubling, Complainant admitted that he did not supervise the THM crew, rather day supervisors Armando Escobar and Tommy Yaws oversee the crew and ensure they complete their tasks, which comports with Laas's testimony that Complainant would not need to get into the backhoe to watch the THM crew because the crew reported to the "day supervisor," and not a shift supervisor.

Complainant also averred that Laas stated supervisors were exempt from Respondent's no sleeping on the job policy during his September 2012 Civil Treatment for Leaders training. However, Schmidt and Jasek, both of whom attended the September 2012 training course with Complainant, testified Laas never informed the class that it was permissible for supervisors to sleep on the job. Conversely, they testified Respondent had a rigid policy against anyone sleeping on the job, and if violated it resulted in termination. Likewise, Laas testified that in 2001 or 2002, sleeping on the job became a terminable offense, and as a result, he always made it clear that supervisors and other employees were not allowed to sleep on the job. Notably, during the formal hearing, no other employee testified that supervisors were exempt from Respondent's policy prohibiting sleeping on the job, but instead confirmed sleeping on the job is prohibited. Finally, what I find most injurious to Complainant's testimony regarding this matter is Complainant's failure to question Laas, when Laas pulled Complainant's badge, as to why he was being investigated for sleeping on the job, if, in fact, Laas communicated it was permissible for supervisors to sleep on the job.

3. Disparate Treatment Discrepancies

Further, I find Complainant's testimony that Hersey failed to investigate and discipline other supervisors and employees who were sleeping on the job is contradictory and lacks evidentiary support. Complainant alleges that he reported to Hersey on several occasions seeing supervisor Greg Chapa, as well as other **unidentified** operators and supervisors sleeping in the dryer shack and permit room. Specifically, Complainant testified he told Hersey **four times** that Greg Chapa was sleeping on the job and even called Hersey on the telephone, but Hersey never investigated the matter or requested Complainant's

statement regarding the same. Moreover, Complainant stated Chapa's sleeping on the job **doubled his workload** because Chapa was a supervisor, and as such, Complainant had to run the "entire" plant by himself when Chapa was sleeping. Nevertheless, despite Chapa's sleeping on the job doubling Complainant's workload, Complainant testified that he did not wake Chapa because he "did not want to get involved in any issues he [Chapa] was having."

In stark contrast to Complainant's testimony, Hersey testified Complainant had never reported to him that Greg Chapa or anyone else was sleeping in the dryer shack or permit room, and if Complainant had reported such incidents Hersey would have acted just as he did with Merck. Indeed, in June 2014, Complainant informed Hersey (**on just one occasion**) that Nathan Merck, an operator who worked under Complainant's supervision, was sleeping on the job and Merck was terminated. Hersey testified that Complainant reported he witnessed Nathan Merck sleeping on the job. Consequently, Hersey instructed Complainant to prepare a statement, and upon receiving Complainant's statement, Hersey forwarded it to the HR Department. Thereafter, Hersey pulled Merck's badge and he was terminated for sleeping on the job. As will be discussed below, I find Hersey's testimony very credible and I find no reason why Hersey would not have taken similar action with any other employee if he had been notified. Furthermore, Complainant admitted that he never provided Hersey with the names of the employees sleeping in the permit office.⁵⁴ In addition, Complainant never communicated to Laas or Revis that Hersey failed to discipline employees sleeping on the job. Therefore, in light of Hersey's prompt response to reports of Merck sleeping on the job, as well as the absence of evidence as to why Hersey would take such quick action with Merck, but not with other employees, I find Complainant's testimony not believable. I also find Complainant's explanation that, he would not wake Chapa from sleeping because he did not want to get involved in Chapa's personal life, to be completely illogical, when as a result Complainant alleged he had to run the "entire" plant.

Based on the foregoing, I find that statements made by Complainant, on the whole, were contradicted by credible testimony (as will be discussed below), and lacked evidentiary support. Moreover, I find Complainant mischaracterized the events surrounding his alleged protected activity. Therefore, I

⁵⁴ Complainant identified a memo, CX-30, concerning a discussion with Hersey wherein Complainant reported that people were sleeping in the permit office. However, Complainant's memo did not state the names of the individuals who were sleeping on the job. (Tr. 359-61).

find Complainant's testimony incredulous and unpersuasive, which significantly calls into question the veracity of much of his testimony surrounding the most crucial factual issues. Further, many of Complainant's claims as it relates to statements made by his supervisors are uncorroborated and at times contradicted. Thus, I accord little probative value to Complainant's testimony.

Conversely, I found Wilburn Laas's testimony to be unbiased, sincere, and credible. I found Laas had a good understanding of Respondent's human resources policies and procedures, and there is no evidence that Laas inconsistently administered such policies. Laas was particularly persuasive in his testimony about Complainant sleeping in the backhoe, the investigative interview that followed, and pulling Complainant's badge for sleeping on the job.

On the other hand, I was not entirely impressed with the testimony of Marcus Casillas. In general, I question whether Casillas is an unbiased witness because he testified he has remained friends with Complainant and they have visited with each other outside of work, despite both Casillas no longer being employed by Respondent⁵⁵ and Complainant being terminated from employment with Respondent. Irrespective of a potential bias, I also question the veracity of Casillas's testimony that he reported to Hersey witnessing supervisor Brian Hover and operator Dereck Chavana sleeping on the job, but Hersey failed to take action. Casillas stated he found Hover and Chavana sleeping at the end of their night shift, when he was coming into work for the day shift. However, Jasek, who was Hover's fellow SPVC shift supervisor, testified he never witnessed Hover sleeping on the job. Likewise, he never witnessed Chavana sleeping. Furthermore, Jasek confirmed he never heard Casillas report that he witnessed Hover and Chavana, or any other employee sleeping on the job. Like Jasek, Yaws and Escobar, both of whom work in the SPVC unit, did not witness Hover or Chavana sleeping on the job. Finally, Laas testified that Marcus Casillas never informed him that he had seen employees sleeping on the job, which Casillas could have brought to Laas's attention. Given the foregoing, I am not convinced by Casillas's testimony as I find it highly unlikely that he would be the only person to witness Hover and Chavana sleeping on the job.

In regard to the remainder of Casillas's testimony, overall I find his testimony to be unpersuasive and incredible. He averred Procedure 28 had to be followed because it was required

⁵⁵ See supra note 18.

by Respondent's Air Permit. He further averred that he had various disagreements with Hersey and Houseton about the appropriate use of the ENV-2 forms, stating he disagreed with Hersey and Houseton that the forms were not needed when changing out the EF-506 filters. However, later in his testimony he professed that he was never told Respondent's Air Permit eliminated the need to follow Respondent's internal procedures found in Procedure 28. I find it unbelievable that Casillas possessed no knowledge about Respondent's Air Permit, or that he was not informed about how and to what extent the Air Permit superseded Respondent's internal procedures (i.e. Procedure 28) when he was a shift supervisor in the SPVC unit and presumably attended the supervisor's meetings that addressed such issues.

I also find Casillas's testimony about the MV-410 incident to be incredible and unpersuasive. Casillas, who was one of the shift supervisors during the MV-410 incident, claimed "fugitive emissions" were present, but that no steps were taken to measure the release of chemicals, nor was an ENV-2 form completed. In stark contrast to Casillas's testimony, Jasek identified a supervisor's comment log dated October 24, 2015, that lists Schumacher and Casillas, and notes that an ENV-2 form was completed for the filters going to the MV-410 tank. In addition, Hersey confirmed completion of the ENV-2 form is the responsibility of the shift supervisors. Hersey recalled the MV-410 issue relating to there being a plug in the piping, during which Donnie Schumacher and Marcus Casillas were shift supervisors. It was Hersey's understanding that Casillas completed the ENV-2 form in order to show Schumacher how to complete the forms.

Lastly, Casillas testified about an incident involving the ST-532 tank where six to eight thousand pounds of powder with VCM fell to the ground, during which Hersey did not seem "interested" in containing the powder with a "vac truck" or "super sack." Nevertheless, Schmidt explained that there would be no issues concerning Respondent's Air Permit if powder resin escaped from a piece of equipment, unless there was visible particulate matter in the air. Given the foregoing, I find it unbelievable that Casillas possessed no knowledge of Respondent's Air Permit after working as a shift supervisor for over five years in the SPVC unit. Rather, it appears that Casillas is attempting to portray Hersey as not following proper procedure, by claiming this powder resin incident was in violation of environmental regulations.

In contrast, I found Stephanie Schmidt to be a very credible, unbiased witness who possessed the best knowledge of

Respondent's Air Permit, Procedure 28, and whether Respondent's operation in the SPVC unit was compliant with all regulations. I also found her testimony about her interaction with Complainant to be honest and sincere, particularly her candid statements that she explained to Complainant the Air Permit requirements and reassured Complainant the SPVC unit was in compliance. In addition, I credit her testimony that Hersey wanted "to do the right thing" and make sure sampling was performed in a proper manner in the SPVC unit.

I also found Josh Jasek to be a very credible witness. In particular, I found his testimony to be honest and sincere as it relates to Hersey, who he stated was the "best manager he ever had," a "calm individual," "good listener," and "open to hearing recommendations." I also credit Jasek's testimony that Hersey never became angry with Complainant when he raised the issue of completing the ENV-2 forms during a supervisor's meeting. In addition, Jasek credibly testified he never witnessed Hover or Chavana sleeping on the job, and that Laas never instructed employees that supervisors were permitted to sleep on the job. I also found Jasek's testimony to be credible concerning the MV-410 incident, and that Complainant was not present during the morning of the incident.

Jim Hersey was also very credible and consistent in his testimony regarding whether employees were sleeping on the job, his interaction with Complainant, and the events leading up to Complainant's termination. Hersey was very believable when he testified that no one had informed him that Greg Chapa, Brian Hover or Derek Chavana were sleeping on the job. I also credit his testimony that in September 2014, at the supervisor's meeting, Complainant disagreed with Eddie Houseton about when the ENV-2 forms were to be used, and as a result, Hersey asked Houseton to verify proper procedure with the EHS Department, but there were no arguments about the situation. In the same way, Hersey credibly testified Complainant did not work the day of the MV-410 incident, nor did he report a rash, fill out an incident report, or request medical treatment. Similarly, I found Hersey's testimony persuasive and credible regarding his discussion with Lee and Complainant in the "control room" about the "stripping column," when he testified Complainant only stated he was going to talk to the EHS Department, but there was no arguing, nor did Complainant threaten to contact outside government agencies about alleged environmental violations. Lastly, Hersey's testimony regarding Complainant's statements during the investigative interview comports with the testimony of Laas and Revis, and as such, I found it credible as well.

I also credit the testimony of Tommy Yaws in regard to his statement that he never witnessed Greg Chapa, Brian Hover, or Derek Chavana sleeping on the job. In addition, I found Yaws to be sincere in his testimony that Hersey was not upset with Complainant nor did Hersey act disrespectful towards Complainant, or say anything negative about Complainant. I also credit Yaws's testimony that he never witnessed Complainant voice environmental concerns to Hersey, nor did he hear Complainant talk about reporting environmental violations to outside government agencies.

Armando Escobar was an equally credible witness. I found Escobar's testimony regarding Complainant to be sincere and persuasive. In particular, I found Escobar sincerely expressed that Complainant was his "mentor," and that it pained him to report to Hersey that the THM crew witnessed Complainant sleeping in the backhoe because he knew it would result in Complainant's termination. Also noteworthy is Escobar's testimony that Complainant became so loud at a supervisor's meeting it made Escobar "uncomfortable," and that Complainant would come into work stating "I am going to give them hell" which meant to Escobar that Complainant was going to "stir the pot" and attempt to agitate Hersey. Further, I also found Escobar's testimony equally probative regarding Hersey's being a "fair" manager and Hersey never treated Complainant in a negative manner. Finally, I credit Escobar's testimony about his involvement and recollection of the events surrounding Complainant's sleeping on the job incident.

I found Alan Revis to be a very credible witness as well. He credibly testified about his recollection of the events leading up to Complainant's termination, which comports with Laas's testimony. Similarly, his recollection of the investigation interview with Complainant corresponded with Laas and Hersey's testimony. I also found his testimony to be sincere and candid in regard to his meeting with Complainant at the RV Park, during which Complainant never voiced concerns about disparate treatment, environmental violations, or that he threatened to report violations to outside government agencies.

B. The Purpose of Environmental Whistleblower Provisions

The employee protective provisions of the CAA and other Environmental Acts prohibit discharge or discrimination of an employee because the employee has engaged in protected activity under these Acts. See Morriss v. LG&E Power Servs., LLC, ARB No. 05-047, ALJ No. 2004-CAA-014, slip op. at 29-30 (ARB Feb. 28, 2007); Jenkins v. United States Env'tl. Prot. Agency, ARB No.

98-146, ALJ No. 1988-SWD-002, slip op. at 14 (ARB Feb. 28, 2003). Nevertheless, while the purpose of the Environmental Acts is to protect employees from adverse personnel actions who have reported violations of environmental laws, "[whistleblower provisions] are not intended to be used by employees to **shield themselves from the consequences of their own misconduct or failures.**" Trimmer v. U.S. Dept. of Labor, 174 F.3d 1098, 1104 (10th Cir. 1999) (emphasis added) (citing Kahn v. U.S. Secretary of Labor, 64 F.3d 271, 279 (7th Cir. 1995) (rejecting plaintiff's attempt to hide behind his protected activity as a means to evade termination for non-discriminatory reasons); see NLRB v. Knuth Bros, Inc., 537 F.2d 950, 954 (7th Cir. 1976) (an employer may terminate an employee for any reason, good or bad, or for no reason at all, as long as the employer's reason is not proscribed by a Congressional statute).

The CAA is a comprehensive scheme for reducing atmospheric air pollution. Its purpose is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare" as well as "to encourage and assist the development and operation of regional air pollution prevention and control programs." 42 U.S.C. § 7401(b)(1). Under the CAA, an "**air pollutant**" is defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters ambient air." 42 U.S.C. § 7602(g); Smith v. W. Sales & Testing, ARB No. 02-080, Case No. 2001-CAA-17 (ARB Mar. 31, 2004).

Regulations implementing the CAA define "**ambient air**" as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(3). See, e.g., Kemp v. Volunteers of America of Pa., Inc., ARB No. 00-069, Case No. 2000-CAA-6 (ARB Dec. 18, 2000).

Similarly, in enacting the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 (2006), et seq., Congress found that human beings and the environment are exposed to a large number of chemical substances and mixtures "whose manufacture, processing, distribution in commerce, use, or disposal may present an **unreasonable risk or injury** to health or the environment." Ctr. for Biological Diversity v. Jackson, 815 F. Supp. 2d 85, 87-88 (D.D.C. 2011); Williams v. Dall. Indep. Sch. Dist., ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 7 (ARB Dec. 28, 2012). The purpose of the TSCA is to regulate chemical substances and mixtures that present such risks and to take action with respect to chemical substances and mixtures which

are imminent hazards. Williams, supra, slip op. at 7; Culligan v. Am. Heavy Lifting Shipping Co., ARB No. 03-046, Case Nos. 2000-CAA-020, 2001-CAA-009-011, slip op. at 9 (ARB June 30, 2004).

C. The Burden of Proof

Pursuant to 29 C.F.R. § 24.102(a), environmental whistleblower protection provisions prohibit employers from discharging or otherwise discriminating against any employee "with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activities such as commencing, testifying, or assisting in any proceeding regarding environmental safety and health concerns. 29 C.F.R. § 24.102(a), (b).

Accordingly, to prevail in this adjudication, Complainant must demonstrate or prove his **prima facie** case by presenting evidence "sufficient to raise an inference, a rebuttable presumption, of discrimination." Morriss, supra, slip op. at 32; Schlagel v. Dow Corning Corp., ARB No. 02-092, ALJ No. 01-CER-001, slip op. at 6 (ARB Apr. 30, 2004); see Tomlinson v. EG&G Def. Materials, Inc., ARB Nos. 11-024, 11-027, ALJ No. 2009-CAA-008, slip op. at 8 (ARB Jan. 31, 2013). The Complainant can satisfy this burden by showing: **(1)** the Respondent is subject to the CAA and environmental statutory provisions; **(2)** the Complainant engaged in protected activity; **(3)** that the Respondent was aware of his protected activity; **(4)** the Complainant suffered an adverse employment action; and **(5)** the protected activity was a motivating (substantial) factor to the adverse employment action. 29 C.F.R. § 24.104(e)(2)(i)-(iv); Kelly-Lusk v. Delta Airlines, Inc., ARB No. 16-041, ALJ No. 2014-TSC-003, slip op. at 8 (ARB Sept. 18, 2017);⁵⁶ see Kuehu v. United Airlines, ARB No. 12-074, ALJ No. 2010-CAA-007, slip op. at 4 (ARB Feb. 10, 2014); see also Morriss, supra, slip op. at 32; Mugleston-Utley v. EG&G Def. Materials, Inc., ARB No. 12-025, ALJ No. 2009-CAA-009, slip op. at 2 (ARB May 8, 2013); Tomlinson, supra, slip op. at 8; Jenkins, supra, slip op. at 17.

Furthermore, under the Environmental Acts, the complainant must have an **actual, reasonable belief** the environmental acts are being violated. The complainant's belief "must be scrutinized under both **subjective and objective standards**, i.e., [he] must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable for an individual in [complainant's] circumstances." Melendez v. Exxon Chemicals Americas, ARB No.

⁵⁶ See supra note 4.

96-051, Case No. 1993-ERA-006, slip op. at 28 (ARB July 14, 2000) (emphasis added); see Tomlinson, supra, slip op. at 13; Williams, supra, slip op. at 9-10. Under the **objective standard**, reasonableness of the complainant's belief regarding illegality of a respondent's conduct is to be determined on the basis of "the knowledge available to a reasonable person in the **same factual circumstances** with the **same training and experience** as [the] complainant." Tomlinson, supra, slip op. at 14 (emphasis added); Melendez, supra, slip op. at 27. Nevertheless, for a whistleblower claim to survive, the complainant need not demonstrate that he communicated his reasonable belief to the employer, rather the Environmental Acts only require that a complaint "**touch on**" the concerns for the environment and public health and safety.⁵⁷ Tomlinson, supra, slip op. at 16 (quoting Melendez, supra, slip op. at 18). In the same way, an employee need not prove the hazards he perceived actually violated the Environmental Acts. Williams, supra, slip op. at 10; Dixon v. U.S. Dep't of Interior, ARB Nos. 06-147, 06-160, ALJ No. 2005-SDW-008, slip op. at 9 (ARB Aug. 28, 2009). That notwithstanding, "a complaint that expresses only a **vague notion** that the employer's conduct might negatively affect the environment, or that is based on numerous **assumptions and speculation**, is not protected." Carpenter v. Bishop Well Servs. Corp., ARB No. 07-060, ALJ No. 2006-ERA-035, slip op. at 6-7 (ARB Sept. 16, 2009) (quoting Dixon, supra, slip op. at 9) (internal citations omitted) (emphasis added).

After the complainant has established his **prima facie** case, the respondent is then required 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, supra, slip op. at 32 (emphasis added); Schlagel, supra, slip op. at 6. The respondent must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse employment action. The explanation provided must be legally sufficient to justify a judgment for respondent. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981); see Machinchick v. PB Power, Inc., 398 F.3d 345, 354 (5th Cir. 2005) (finding that employer sustained its burden by alleging that employee was terminated due to inadequate job performance and his refusal to adapt and modify his business plan). However, the respondent does not bear the burden of persuading the fact-finder that it

⁵⁷ Notably, when attempting to prove a violation occurred under the CAA, an employee may "depending on the circumstances . . . reasonably believe his employer was violating the CAA, even if no release into the ambient air occurred." Tomlinson, supra, slip op. at 18 (quoting Knox v. U.S. Dep't of Labor, 434 F.3d 721, 724 n. 3 (4th Cir. 2006)).

had convincing, objective reasons for the adverse employment action. Burdine, supra.

If the respondent successfully produces evidence of a legitimate, nondiscriminatory reason for the complainant's adverse employment action, the rebuttable presumption created by the complainant's **prima facie** showing "drops from the case" and the complainant is then required to prove **intentional discrimination** by a **preponderance of the evidence**. Morriss, supra, slip op. at 32 (quoting Burdine, 450 U.S. at 255, n. 10). Thus, once the respondent has produced evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a **prima facie** case. See Morriss, supra, slip op. at 32. Instead, the relevant inquiry is whether the complainant prevailed by a **preponderance of the evidence** on the ultimate question of whether he was intentionally discriminated against because of his protected activity. Id.; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-511, 113 S.Ct. 2742 (1993); See Williams v. Baltimore City Pub. Schools Sys., ARB No. 01-021, Case No. 2000-CAA-015, slip op. at 2, n. 7 (ARB May 30, 2003); Schlagel, supra, slip op. at 6; Carroll v. Bechtel Power Corp., ARB No. 1991-ERA-046, slip op. at 11, n. 9 (Sec'y Feb. 15, 1995), aff'd sub nom., Bechtel Power Corp. v. U.S. Dep't of Labor, 78 F.3d 352 (8th Cir. 1996); James v. Ketchikan Pulp Co., Case No. 1994-WPC-004 (Sec'y Mar. 15, 1996); Adjiri v. Emory Univ., Case No. 1997-ERA-036, slip op. at 6 (ARB July 14, 1998); Schwartz v. Young's Commercial Transfer, Inc., ARB No. 02-122, Case No. 2001-STA-033, slip op. at 9, n. 9 (ARB Oct. 31, 2003); Kester v. Carolina Power & Light Co., ARB No. 02-007, Case No. 2000-ERA-031, slip op. at 6, n. 12 (ARB Sept. 30, 2003); Simpkins v. Rondy Co., Inc., ARB No. 02-097, Case No. 2001-STA-059, slip op. at 3 (ARB Sept. 24, 2003); Johnson v. Roadway Express, Inc., ARB No. 99-111, Case No. 1999-STA-005 (ARB Mar. 29, 2000).

Preponderance of the evidence is the greater weight of evidence or superior evidence, weight that though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. Brune v. Horizon Air Indus., Inc., ARB No. 04-037, Case No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006).

A mixed or dual motive analysis is appropriate if the complainant is successful in proving his case by a **preponderance of the evidence** that his protected activity played some part in

or was a motivating factor in the adverse action. Melendez, supra, slip op. at 12. In other words, the complainant must prove by a preponderance of the evidence that a "retaliatory or discriminatory motive played **at least some role** in the respondent's decision to take an adverse action." Schlagel, supra, slip op. at 6 (emphasis added); see Melendez, supra, slip op. at 36. If so, the burden of proof then shifts to the respondent who may avoid liability by demonstrating by a **preponderance of the evidence** that the adverse action would have occurred even if complainant had not engaged in protected activity. 29 C.F.R. § 24.104(d)(4); Morriss, supra, slip op. at 33; Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); Schlagel, supra, slip op. at 6 (noting that the "clear and convincing" burden of proof does not apply to respondent's in matters falling under the TSCA or CAA).

1. Protected Activity

With respect to protected activity, the Clean Air Act states an employee is protected when 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,
- (2) testified or is about to testify in any such proceeding, or
- (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C. § 7622(a) (emphasis added).

Likewise, the TSCA states an employee is protected if the employee:

- (1) Commenced, caused to be commenced, or **is about to commence or cause to be commenced a proceeding** under this chapter;
- (2) Testified or is about to testify in any such proceeding; or

(3) Assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

15 U.S.C. § 2622(a) (emphasis added).

Moreover, the Secretary of Labor ("Secretary") and the Administrative Review Board ("the Board") have consistently held that "the raising of **internal concerns** to an employer" constitutes protected activity under employee protection provisions of the CAA and TSCA, and in doing so, have directed administrative law judges to apply similar reasoning to internal protected activities. Melendez v. Exxon Chemicals Americas, ARB No. 95-051, ALJ No. 1993-ERA-6, slip op. at 16, n. 23 (ARB July 14, 2000) (emphasis added); see, e.g., Willy v. The Coastal Corp., 1985-CAA-1, slip op. at 2-6 (Sec'y June 4, 1987) (holding that **complainant raising questions to his employer** about violations of environmental laws was protected activity); Tomlinson v. EG&G Def. Materials, Inc., ARB Nos. 11-024, 11-027, ALJ No. 2009-CAA-8, slip op. at 19, n. 7 (ARB Jan. 31, 2013) (noting that ARB precedent regarding the TSCA makes clear that "internal reporting of safety concerns and procedures" falls within the scope of protected activity); Williams v. Dall. Indep. Sch. Dist., ARB No. 12-024, ALJ No. 2008-TSC-1, slip op. at 10 (ARB Dec. 28, 2012) (quoting Erickson v. U.S. Env'tl. Prot. Agency, ARB Nos. 04-024, 04-025, ALJ No. 2004-CAA-1, slip op. at 7-8 (ARB Oct. 31, 2006) (internal quotations omitted) (explaining that "[a]n employee who makes a complaint to the employer that is grounded in conditions constituting reasonably perceived violations of the environmental acts, engages in protected activity."); Lewis v. Synagro Tech., Inc., ARB No. 02-072, ALJ Nos. 2002-CAA-12, 2002-CAA-14, slip op. at 14, n. 22 (ARB Feb. 27, 2004) (noting the Secretary's comments that were provided with the revised regulations at 29 C.F.R. Part 24 (implementing the environmental whistleblower statutes), where the Secretary observed the Department's consistent interpretation of such statutes had been "that employees who file complaints **internally with an employer are protected from employer reprisals . . .** against the employee") (emphasis added); see 63 Fed. Reg. 6614-6615 (Feb. 9, 1998); Smith v. W. Sales & Testing, ARB No. 02-080, ALJ No. 2001-CAA-17, slip op. at 10 (ARB Mar. 31, 2004) (the Board noted that, under the CAA, complaints about unsafe or unhealthful conditions **communicated to management** or to outside agencies are protected); Sasse v. U.S. Dep't of Justice, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-7, slip op. at 11 (ARB Jan. 30, 2004) (the Board noted they had construed the term "proceeding" in Section 7622(a)(1) to encompass all phases of a

proceeding that relate to public health or environment, including the initial (internal) statement of the employee that points out a violation, whether or not it generates a formal or informal proceeding); Caldwell v. EG&G Def. Materials, Inc., ARB No. 05-101, ALJ No. 2003-SDW-001, slip op. at 12 (ARB Oct. 31, 2008) (under the CAA and other environmental statutes, the ALJ found protected activity when complainant participated in an internal investigation of the migration of a toxic substance into the atmosphere because his participation furthered the statutory purpose).

Prefatory to addressing Complainant's alleged protected activity, the undersigned notes that on December 19, 2016, Respondent filed a Motion for Summary Judgment in the present matter, asserting among other things, that Complainant's alleged complaints to **internal** Formosa personnel did not qualify as protected activity pursuant to the CAA and TSCA. The issue was fully considered by the undersigned and I found, that as a matter of law internal complaints regarding violations of environmental laws made by an employee to his employer constitutes protected activity with respect to the CAA and TSCA. See Order Denying Motion for Summary Decision dated January 13, 2017, pp. 1-2, 9. However, in brief, Respondent continues to assert **internal complaints** do not qualify as protected activity. That notwithstanding, for purposes of judicial efficiency, the undersigned is not going to address this issue again as it was fully considered and decided upon on January 13, 2017. Therefore, the undersigned will proceed in the instant case, with the understanding that **internal complaints** constitute protected activity under the CAA and TSCA.

Complainant's Alleged Protected Activity

Complainant alleges that he engaged in protected activity pursuant to the Clean Air Act, 42 U.S.C. § 7622, and the Toxic Substances Control Act, 15 U.S.C. § 2622(a), some of which he avers began in September 2014, but increased in intensity until "a few weeks before" his April 1, 2016 termination. See Complainant's Brief, p. 16. His alleged protected activity is as follows:

ENV-2 Forms

Complainant testified that in **September 2014**, at a supervisor's meeting, he began making complaints about environmental non-compliance in Respondent's SPVC unit due to a failure to have calculations and measurements required to complete the ENV-2 forms. However, according to Jasek and

Hersey, Complainant only raised a question about filter cleaning procedure, asking whether ENV-2 forms should be completed for cleaning EF-506 filters to which Eddie Houseton, the Process Safety Manager and at one time, the Environmental Coordinator, replied the filter cleaning needed to be logged, but an ENV-2 form was not required. Due to the discrepancy, Hersey asked Houseton to verify proper procedure with the Environmental Department. In the meantime, Hersey instructed all the supervisors to complete the ENV-2 forms until the issue was clarified.

Schmidt testified she had conversations with Complainant concerning the Air Permit, during which they discussed filter cleanings and records keeping. Upon Complainant expressing concern about the SPVC unit's method for cleaning filters, Schmidt discussed with Complainant the section (beginning with Special Condition 33) of Respondent's Air Permit that addresses filter cleanings. Schmidt stated it was clear the SPCV unit was doing what was required. However, Schmidt confirmed this conversation with Complainant took place in the **fall 2015**, soon after she was promoted to Senior Environmental Manager.

Based on the foregoing, I find it plausible that Complainant raised an issue about whether ENV-2 forms were required for cleaning filters, which **touches on** an environmental concern and constitutes protected activity under the CAA.⁵⁸ Indeed, taking all precautions, Hersey requested that the supervisors use the forms until Houseton confirmed his belief with the Environmental Department, that the ENV-2 forms were unnecessary. I further find that at the time, Complainant's belief was **reasonable** given that Complainant disagreed with Houseton's opinion, and Hersey, who was also unsure, requested that supervisors complete the forms until Houseton confirmed proper procedure with the Environmental Department. Although Schmidt informed Complainant that the SPVC unit was in compliance with Respondent's Air Permit regarding filter cleanings, she did not do so until the fall 2015. Thus, I find any alleged concerns Complainant voiced following his discussion with Schmidt would not be reasonable as Schmidt explained the SPVC unit was in compliance with the Air Permit. See Melendez, supra, slip op. at 28.

Nonetheless, Complainant's employment termination occurred on **April 1, 2016**, and as such, I find his **September 2014** concern

⁵⁸ In his testimony, Complainant was asked whether the failure to follow proper procedure concerning the completion of the ENV-2 forms was an "air emissions" issue to which he replied "yes." (Tr. 187-88). Accordingly, I do not find the TSCA to be applicable to this issue.

about the ENV-2 forms is too remote to his termination to constitute protected activity upon which retaliation may be based.

October 2015 MV-410 Incident

In **October 2015**, Complainant stated there was an incident involving the "MV-410" where there were large quantities of "VAM" released such that he could see chemical vapors coming off of product stuck to filters and piping. On the evening of the MV-410 incident, Complainant stated he began cleaning up the area where parts containing the VAM had been disassembled. He further alleges that he developed a rash on his legs and face due to being exposed to chemical vapors. However, Complainant stated he did not complete an incident report or seek medical treatment because Hersey instructed him not to do so. Complainant alleges that after this incident he "became more aggressive, more assertive and more vocal on the issue that we needed to get back to the basics of following the requirements of our [Respondent's] Air permit, our procedures, our reporting, our calculations, our emissions, our incidents." (Tr. 198).

In view of the foregoing, I find the preponderance of the record evidence does not support a finding that Complainant engaged in protected activity pursuant to the CAA or TSCA. Arguably, Complainant does not allege he engaged in protected activity when he purportedly was exposed to chemical vapors, rather he states that **following this incident** he became more aggressive in his reporting of environmental non-compliance. That notwithstanding, given Complainant's **incredible** testimony, I question whether he was even present the day of the MV-410 incident as Jasek, who was there when the equipment was initially taken apart, testified he did not see Complainant. In the same way, Hersey, who was also involved with the MV-410 incident, testified Complainant did not work that day. Moreover, Hersey credibly testified Complainant never called him to report he was exposed to chemical vapors, or that he wanted to complete an incident report and seek medical treatment.

January 2016 EF-442 Filter Incident

Likewise, I do not find Complainant engaged in protected activity on January 6, 2016, with respect to the EF-442 filters. As discussed above, I found Complainant mischaracterized events that he alleged was protected activity under the CAA and TSCA, and the EF-442 Filter incident is no exception to my finding. Complainant testified that he went to Scott Maresh, Respondent's in-house SPVC "environmental health and safety specialist," and

reported that EF-442 filters were dropped to the pad, the written instructions provided by Lee deviated from proper policy and procedure, high concentrations of VCM were contaminating waste water to the pad, and equipment was opened without proper calculations, measurements, and paperwork completed. Further, he averred Maresh conducted readings which showed chemical levels above the allowable exposure limit and due to the readings, Maresh told Hersey to cease dropping filters on the pad during the day shift and that the filters could no longer be dropped on the pad, but must go into containers.

Hersey's testimony, which is further supported by Escobar's testimony, clearly demonstrates that the **process change** with respect to the EF-442 filters had nothing to do with deviating from proper policy and procedure, high concentrations of VCM were contaminating waste water to the pad, or equipment being opened without proper calculations, measurements, and paperwork completed. Rather, Hersey credibly testified that around **December 2015**, he requested the shift supervisors' input about what "exposure task evaluations" should be conducted because the Industrial Hygienist Department wanted to perform a site-wide review of the evaluations, and in doing so, requested the units provide a list of all tasks that may require such evaluations. He recalled that an exposure test evaluation had been conducted on the EF-442 filter which resulted in some changes regarding how the filter was drained. Hersey explained the Air Permit required that the filter be drained into a closed system within one hour, but it was not guaranteed the filter could be drained into a "sump" within one hour. As a result, the SPVC unit began using plastic totes which did not affect production. He explained the night shift would clean the filters at night because there was a chance of having emissions above a 1 PPM to the atmosphere which was a **safety concern**, not environmental. The area was barricaded during the cleaning process. Hersey further testified that Scott Maresh is the health and safety professional and Maresh's job is to identify **safety issues** within the SPVC unit, but Maresh does not perform "exposure task evaluations," as the evaluations are conducted by the Industrial Hygienist Department.

Schmidt's testimony also comports with Hersey's testimony. She explained Maresh has no connection to the Environmental Department except that he reports to the Health and Safety Department that is grouped with the Environmental Department. She further testified Maresh has no training for environmental compliance within the SPVC unit. She also confirmed she had a conversation with Maresh concerning the EF-442 filter and whether the Air Permit requirements were being followed. Maresh

asked Schmidt whether any issues arose under the Air Permit when equipment was drained to the pad. She explained the permit requirements and told Maresh the permit was being followed. She was aware of Maresh's involvement with **changing the process** of dropping contents onto the pad to dropping them into a "super sack" with respect to any safety concerns. Lastly, Schmidt previously had conversations with Complainant about dropping filters to the pad and explained to him that the SPVC unit was fully compliant with Respondent's Air Permit.

Based on the foregoing, there is no credible evidence that Complainant was involved with the process change concerning the EF-442 filters, let alone that the process change came about due to Complainant's alleged reporting of high concentrations of VCM were contaminating waste water to the pad, and equipment was opened without proper calculations, measurements, and paperwork completed. Complainant attempts to note Maresh's emails contained in CX-20, as evidence that environmental violations were occurring and were brought to light due to his alleged actions. However, while Maresh's emails mention the EF-442 filter, there is nothing within the emails that demonstrates Complainant engaged in any protected activity. Thus, I find he completely mischaracterized the events surrounding the EF-442 filter process change, and as such I do not find he engaged in protected activity pursuant to the CAA or TSCA.

Reporting to Outside Government Agencies

Complainant testified that "a few weeks before March 31, 2016" he informed Lee and Hersey that the SPVC unit remained non-compliant with environmental procedure and policy, and continued to emit vapors into the atmosphere. According to Complainant, he told Hersey and Lee that he was going to notify the EHS Department, the TCEQ, the EPA, and OSHA.

Since I found much of Complainant's testimony unsupported and lacking all credibility, I do not find this alleged incident constitutes protected activity. The record is devoid of any corroborative documentary or testimonial evidence that demonstrates Complainant did indeed tell Hersey and Lee he was going to report alleged environmental violations to the EHS Department or other government agencies. Furthermore, there is no evidence demonstrating Complainant possessed a **reasonable belief** that violations were occurring, in light of Schmidt's testimony that she had several conversations (beginning in fall 2015) reassuring Complainant that the SPVC unit was fully compliant with Respondent's Air Permit.

Accordingly, I do not find the preponderance of the evidence demonstrates Complainant engaged in protected activity under the CAA or TSCA.

Vent Gas Vapors From ST501A and ST501B

On March 29, 2016, Complainant also alleges Star Lee instructed supervisor Joelle Rodriguez to emit VCM vapors into the atmosphere from the "ST501A and B," according to his supervisor notes. Complainant stated he immediately knew the emitting of vapors from the ST501's were against policy because Hersey sent out an email in reference to "ET501s and ST501s" stating they contained higher VCM concentrations and had to remain closed up at all times. He further avers he obtained mini-ray readings, all of which were above the allowable exposure limit. The allowable exposure limit is 0.5 ppm. However, Complainant's mini-ray readings showed levels as high as 205 ppm and as low as 3.4 ppm. Thereafter, Complainant alleges he gave Hersey a copy of the mini-ray readings and discussed the problems regarding Lee's instructions to Rodriguez to open the vent line which in turn emitted vapors. However, Hersey **credibly** testified he did not recall Complainant informing him about a March 29, 2016 incident involving Star Lee opening a "vent line," nor did he recall ever receiving mini-ray readings.

In light of Complainant's largely **incredulous** testimony, I do not find this constituted protected activity. In support of his allegations concerning the vent gas vapors, Complainant provided copies of his supervisor notes (CX-23) which provided the purported levels. Nevertheless, the record evidence is devoid of any testimony to confirm the veracity of Complainant's allegations and whether the readings were indeed over allowable limits. Furthermore, there is no testimonial evidence that confirms Complainant ever reported high VCM concentrations from the vent line. Accordingly, I do not find Complainant engaged in protected activity pursuant to the CAA or TSCA.

List of Equipment

On March 30, 2016, Complainant testified that he provided Hersey with a list of equipment that was related to "EF-422" as well as "EF-506, MF-321, MV-401, EF401, SF401, and SF232" for which employees were not following proper procedure for opening, evacuating, calculating emissions, and taking measurements. In particular, Complainant told Hersey that "just like the [EF]-442 filters" proper procedure was not being followed for the aforementioned equipment. Complainant further averred he

provided Hersey with handwritten mini-ray readings that allegedly demonstrated air emissions in excess of the permissible levels. Complainant identified CX-25, p. 1, as a copy of his handwritten mini-ray readings that he delivered to Hersey on March 30, 2016, but Complainant did not offer CX-25 as evidence to support his claim.

Not unlike Complainant's other alleged protected activity, I find his allegations are unsupported and incredulous. There is no record evidence that demonstrates Complainant provided Hersey with a list of equipment and reported environmental violations. Furthermore, Hersey **credibly** testified he did not recall having any conversation with Complainant on March 30, 2016, about the unit not following proper policy or procedure. In addition, Hersey testified he did not recall that on March 30, 2016, Complainant provided to him any mini-ray readings taken around the "blower" that were written on post-it notes. More importantly, even assuming Complainant confronted Hersey in March 2016 regarding the proper procedures for the aforementioned equipment, it could not be said that he had a **reasonable belief** that Respondent was in violation of its Air Permit as Schmidt (prior to March 2016) had several conversations with Complainant and informed him that the SPVC unit was indeed compliant. Also troubling, there is absent from the record any testimony from other employees stating that there were indeed compliance issues in the SPVC unit concerning the aforementioned equipment. I also find it highly unlikely, as asserted by Complainant, that no other employees were following proper procedure concerning this equipment. Accordingly, I do not find the preponderant weight of the evidence demonstrates Complainant engaged in protected activity on March 30, 2016, pursuant to the CAA or TSCA.

List of equipment & Falsified Calculations

Similarly, Complainant testified that on **March 31, 2016**, he presented Hersey with a list of everything he had filed **anonymously** through "Report It," including "calculations he knew were false." Specifically, Complainant stated he listed equipment such as "SR401A, SR401C, SB201A" and "a lot of other equipment" that had been opened for release including calculations that were "fudged." Complainant averred he researched all of the calculations and informed Hersey that he was going to report this to the "EPA, TCEQ and OSHA."

I also find that the preponderance of the record evidence does not support a finding that Complainant raised falsified calculations as an environmental issue pursuant to the CAA or

TSCA. First and foremost, Complainant has provided no credible evidence to demonstrate he accurately calculated any type of air emissions. Secondly, Complainant claims he filed several "Report It" claims with Respondent's corporate office, regarding environmental non-compliance, but he did so **anonymously**. On this basis, Revis testified that he receives the "Report it" claims when they are transmitted from Respondent's New Jersey office, but that he never received any reports (to his knowledge) from Complainant. Further, although Hersey testified that on March 31, 2016, Complainant handed him a stack of papers, the contents of such papers are unknown, and as such, it is unclear whether the papers related to any environmental concern, or whether Complainant presented such papers to dispute his culpability concerning his improper sampling of the waste water. Moreover, Hersey credibly testified that Complainant never informed him that he was going to any government agency about environmental violations. Like Hersey, Laas, Revis, Yaws, Escobar, Jasek, and Schmidt (and even Casillas) all testified that at no point in time before or after his termination did Complainant state he was going to contact outside government agencies or that he informed Hersey of the same. Consequently, I find there is no credible evidence demonstrating Complainant reported improper calculations or environmental violations to Hersey, or that he was going to outside government agencies. Thus, I find Complainant did not engage in protected activity.

In sum, I find it is plausible that Complainant engaged in protected activity when he raised an issue about whether ENV-2 forms were required for cleaning filters, which **touches on** an environmental concern and constitutes protected activity. However, I also find Complainant's **April 1, 2016** employment termination is too remote from his **September 2014** actions regarding the ENV-2 forms to constitute protected activity upon which retaliation may be based.

2. Respondent's Knowledge of Protected Activity

As discussed above, I found Complainant engaged in protected activity in September 2014, when he inquired about the use of the ENV-2 forms at the supervisor's meeting. Hersey, Complainant's manager, was present at the meeting and ordered the supervisors to use the forms until Houseton obtained clarification on the matter from the EHS Department. Accordingly, I find and conclude Respondent was aware of Complainant's September 2014 protected activity.

3. Adverse Employment Action

By its terms, 29 C.F.R. § 24.102(a) explicitly prohibits employers from discharging or otherwise discriminating against any employee "with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activity.

Here, the parties do not dispute that on April 1, 2016, Complainant was terminated from his employment with Respondent for "unbecoming behavior of FPC-TX employee." (CX-26, p. 1). Accordingly, I find and conclude Complainant suffered an adverse employment action when his employment was terminated on April 1, 2016.

4. Protected Activity as a Motivating Factor

Complainant also bears the burden of proving by a preponderance of the evidence that his protected activity was a motivating (substantial) factor to the adverse employment action. 29 C.F.R. § 24.104(d)(2)(iv); Morriss, supra, slip op. at 32; see Kuehu, supra, slip op. at 4; see also Mogleston-Utley, supra, slip op. at 2; Tomlinson, supra, slip op. at 8.

a. Temporal Proximity

Determining what, if any, logical inference can be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science, but requires a "fact intensive" analysis. Franchini v. Argonne Nat'l Lab., ARB No. 11-006, ALJ 2009-ERA-014, slip op. at 8-9 (ARB Sept. 26, 2012). Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. Robinson v. Northwest Airlines, Inc., ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. at 9 (ARB Nov. 30, 2005). However, where an employer has established one or more legitimate reasons for the adverse actions, the **temporal inference alone may be insufficient** to meet the employee's burden to show that the protected activity was a contributing factor. Caldwell v. EG&G Def. Materials, Inc., ARB No. 05-101, ALJ No. 2003-SDW-001, slip op. at 9-10 (ARB Oct. 31, 2008); Barber v. Planet Airways, Inc., ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

Here, as discussed above, I found Complainant engaged in protected activity in September 2014 when he voiced concerns about whether the ENV-2 forms must be completed to remain in compliance with environmental regulations. However, because

Complainant was not terminated until April 1, 2016, I found his September 2014 protected activity was not temporally close in time to his termination, and thus, there could be no logical inference of retaliation based upon such protected activity.

Accordingly, I find and conclude there is no temporal connection between Complainant's protected activity and his adverse employment action that demonstrates by a preponderance of the evidence his protected activity was a motivating factor in his termination.

b. Disparate Treatment

Complainant argues Respondent treated him disparately when Hersey, who had been informed about other employees sleeping on the job, failed to take similar action by terminating the identified employees. More specifically, Marcus Casillas testified he reported to Hersey, two or three times, that Derek Chavana (an operator) and Brian Hover (a shift supervisor) were sleeping on the job. Casillas stated he would come into work for the day shift and would see both employees sleeping before the end of their night shift. Nevertheless, Casillas stated Hersey never asked him for a written statement, and to Casillas's knowledge neither Chavana nor Hover were investigated. Likewise, Complainant testified he reported to Hersey on a number of occasions that Greg Chapa, a supervisor, was sleeping in the dryer shack. Furthermore, he reported on a number of occasions that "supervisors and operators" were sleeping in the permit room, but Hersey never took action, rather he stated he would look into the situation. Complainant acknowledged Hersey fired operator, Nathan Merck, who worked under Complainant's supervision, but Complainant argues this lends further support to his contention that he was treated disparately because Merck was an operator, not a supervisor. Whereas, Hover and Chapa were both supervisors and neither were terminated for sleeping on the job.

The United States Fifth Circuit Court of Appeals, under whose jurisdiction this case arises, states that to "establish disparate treatment a plaintiff must demonstrate that a **"similarly situated"** employee under **"nearly identical"** circumstances was treated differently. Wheeler v. BL Dev. Corp., 415 F.3d 399, 406 (5th Cir. 2005) (quoting Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995) (emphasis added)). The Court further explained that to be a proper comparator the employee must have **"held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have**

essentially similar violation histories.” Lee v. Kansas City S. Ry. Co., 574 F.3d 253, 260 (5th Cir. 2009) (emphasis added). The Court noted that of **most importance**, the employee’s conduct that elicited the adverse personnel action must be “nearly identical to that of the proffered comparator who allegedly drew a dissimilar employment decision.” Id.; see Wyvill v. United Life Cos. Life Ins. Co., 212 F.3d 296, 304-05 (5th Cir. 2000) (finding that when “striking differences” exist between the plaintiff and comparator it more than accounts for the different treatment each person received. The Court noted that the “**most important**” difference between the plaintiff and comparator was that **different decision-makers determined each employee’s fate**); see also Little v. Republic Refining Co., 924 F.2d 93, 97 (5th Cir. 1991) (finding that the plaintiff had not proffered a nearly identical comparator because the two employees did not share the same supervisor).

As discussed above, I found Complainant, as well as Casillas’s testimony regarding the alleged employees who were sleeping on the job to be incredible and unpersuasive. Complainant’s allegations of disparate treatment relies heavily upon his allegation that fellow SPVC shift supervisor Greg Chapa was sleeping on the job, which according to Complainant “doubled” his workload because he had to run the “entire” plant. However, Complainant never woke Chapa from sleeping because he “did not want to get involved” in Chapa’s personal issues. Complainant also incredibly testified he reported to Hersey other supervisors were sleeping in the permit room, but he later admitted he never provided to Hersey the identity of these individuals. In contrast to Complainant, Hersey credibly testified about the events relating to Nathan Merck’s termination, when Complainant reported to Hersey that Merck was sleeping on the job. Notably, the action Hersey took upon learning Complainant was seen sleeping on the job, is the same as that in Merck’s case. I found Hersey very believable when he testified that he was never informed of either Chapa, Hover, Chavana, or employees in the permit room sleeping on the job, and if he had been notified he would have taken similar action. Also significant, no other employee testified in the instant case that they saw any of the identified individuals sleeping on the job, or that they witnessed employees sleeping in the permit room. Finally, RX-26, demonstrates that two other employees at Respondent’s Port Comfort facility were terminated for sleeping on the job on January 4, 2016, and August 5, 2016. (RX-26, pp. 1-2).

In consideration of the foregoing, I find Complainant and Casillas’s incredible and unsupported allegations are

insufficient evidence of disparate treatment. Therefore, I find and conclude the lack of preponderant evidence demonstrating disparate treatment does not support a finding that Complainant's protected activity was a motivating factor to his termination.

c. Respondent's Animus

In the present matter, I also find there is no record evidence supporting a finding that Complainant's protected activity had a nexus to or motivated Respondent to retaliate against him or that Respondent held any hostility or animus towards Complainant.

Complainant contends that there is evidence of animus which is demonstrated by Hersey's referral of Complainant's alleged sleeping on the job incident to the HR Department "shortly after his [Complainant's] protected activities reached a new level," as well as Hersey's failure to report other similarly situated employees to the HR Department for sleeping on the job. See Complainant's Brief, p. 25.

In light of the foregoing discussions concerning temporal proximity and disparate treatment, I find Complainant's assertion that Hersey acted out of hostility or animus when he reported Complainant sleeping on the job to the HR Department to be wholly unpersuasive. Furthermore, those who had worked under Hersey's supervision, including Jasek, Yaws, Escobar, and Revis, similarly described Hersey as "a very calm individual," "fair" "open to hearing recommendations," "a good listener," and a "great manager." Schmidt also had several conversations with Hersey concerning environmental compliance with Respondent's Air Permit, during which Hersey always appeared to Schmidt that he wanted "to do the right thing." More importantly, the record testimony is completely devoid of any evidence from other employees stating Hersey made negative comments about Complainant, ever acted disrespectful towards Complainant, or requested that other employees "keep an ear out" for any actions taken by Complainant.

In addition, as noted at the formal hearing, in September 2015, Complainant received a last written warning relating to his behavior at a supervisor's meeting when he acted in an insubordinate manner towards Star Lee. Star Lee requested that Complainant be terminated for his insubordinate actions. However, rather than terminate Complainant, Lee and Hersey decided they preferred having Complainant in the SPVC unit

because he was a good supervisor and they believed they could work with Complainant. (Tr. 53-55, 68).

Finally, I found Hersey's testimony that he was not "happy" about Complainant's termination, because Complainant was a hard worker, to be very sincere. Also telling, Hersey testified that after he, Laas, Revis, and Complainant left the conference room (when Complainant's badge was pulled), Hersey asked Complainant if he had any explanation as to why he fell asleep (i.e., taking medication that made him drowsy) to which Complainant replied "he was not going to lie," but would tell the truth. Notably, Hersey testified Complainant never mentioned that other individuals had fallen asleep, but were never terminated. Nor did Complainant state to Laas, Revis, or Hersey that he was being retaliated against for his alleged protected activity.

Accordingly, I find and conclude the lack of preponderant evidence demonstrating animus does not support a finding that Complainant's protected activity was a motivating factor or a contributing factor in his termination.

Thus, looking at the totality of the evidence, Complainant has failed to demonstrate by the preponderance of the evidence that his protected activity was a motivating factor or a contributing factor in his adverse personnel action.

Notwithstanding the foregoing, for the purposes of comprehensiveness, the undersigned will further consider Complainant's termination even though Complainant has failed to prove his **prima facie** case.

D. Respondent's Legitimate Business Reason

Assuming **arguendo**, Complainant established his **prima facie** case, Respondent is only required 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, supra, slip op. at 32 (emphasis added).

Respondent terminated Complainant on April 1, 2016, after Francisco Rodriguez and Jonathan Garcia, members of the THM crew, witnessed Complainant sleeping in a backhoe at the beginning of his shift. Escobar informed Yaws, who oversees the THM crew, that Rodriguez and Garcia saw Complainant sleeping. Escobar also informed Hersey about the incident, and in doing so, Hersey requested witness statements be obtained from Rodriguez and Garcia. Escobar also provided a statement in

which he averred he saw Complainant falling asleep in a production meeting on the morning of March 31, 2016, the same day he was seen sleeping in the backhoe. Likewise, Yaws provided a statement that on March 29, 2016, he entered the supervisor's office to speak with Complainant who had his back turned to Yaws, but when Yaws started to speak to him, Complainant did not immediately turn around. Eventually, Complainant slightly turned the chair and Yaws stated he was blinking his eyes as if Yaws had woke him up from sleeping. (CX-26, pp. 1-8).

Laas, Respondent's HR Manager, who conducts the Civil Treatment for Leaders training, testified that since 2001 or 2002, Respondent has maintained a rigid policy prohibiting sleeping on the job. In the event there is evidence an employee is sleeping on the job, an investigation is conducted before the employee is terminated. On March 31, 2016, Laas conducted the investigative interview with Complainant, and his notes reflect that Complainant stated he was working on a filter press, became wet/damp, and climbed into the backhoe to "warm up." Thereafter, Complainant stated he was not sleeping in the backhoe, but then he stated he did not intend to fall asleep, but he might have "dozed off" and did not remember. Moreover, at the investigative interview Complainant never offered a defense as to why he fell asleep, nor did he state the allegations that he slept in the backhoe were untrue, or that other employees had slept on the job, but were not terminated. Consequently, in keeping with Respondent's policy regarding sleeping on the job, Laas pulled Complainant's badge and on April 1, 2016, Complainant was terminated. Laas testified Complainant was terminated from employment with Respondent because it was determined Complainant was "in fact sleeping on the job." He confirmed the sole reason for Complainant's termination was sleeping on the job.

Due to Complainant violating Respondent's rigid policy against sleeping on the job, I find Respondent has produced credible evidence that it terminated Complainant for a legitimate, non-discriminatory business reason. Morriss, supra, slip op. at 32.

E. Evidence of Intentional Discrimination

As noted above, the rebuttable presumption formed by Complainant's arguable **prima facie** presentation "drops from the case" once Respondent produces evidence that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason. Morriss, supra, slip op. at 32. The relevant inquiry

remaining is whether Complainant prevails **by a preponderance of the evidence** on the ultimate question of whether he was intentionally discriminated against because of his September 2014 protected activity. To meet this burden, Complainant may prove that the legitimate reasons proffered by Respondent were not the true reasons for its actions, but instead were only pretexts for discrimination.

In considering the issue of rebuttal of Respondent's proffered legitimate reasons for its actions, the undersigned considered the entire record, including Complainant's version of his adverse employment action and the asserted reasons why the action occurred as discussed above. I find no record evidence of any intentional discrimination by Respondent against Complainant. The undersigned also considered the environment and atmosphere in which Complainant's concerns were expressed and Respondent's attitude towards environmental and safety issues raised by its employees. After considering all of the record evidence of alleged discrimination, I find and conclude that Complainant has not demonstrated by a preponderance of the evidence that Respondent's adverse employment action was in retaliation for his protected activity.

It is within this environment and atmosphere that Complainant's protected activity must be evaluated. Complainant complained about whether it was proper to complete ENV-2 forms when cleaning the EF-442 filters.

The record is devoid of any direct evidence that Respondent harbored any animus or retaliatory intent or motive towards Complainant. My impression of the majority of witnesses in this case is that all genuinely liked Complainant. In fact, Jasek, testified that he never heard Hersey complain about Complainant, rather Hersey praised Complainant's work. In the same way, Escobar testified that it pained him to tell Hersey that Complainant had been seen sleeping on the job because Complainant was his "mentor" and he knew reporting Complainant would result in his termination. There is no record evidence of any overt hostility exhibited toward Complainant in the workplace or at the formal hearing. I found no record evidence of any animosity towards Complainant by Hersey, Laas, Revis, Yaws, or Escobar, all of whom were involved in the events leading up to his termination and/or the decision-making which ultimately led to Complainant's termination.

The sole concern of the ENV-2 forms raised by Complainant was an issue that other employees and Respondent were aware of, but had been resolved in speaking to Schmidt about the SPVC

unit's compliance with the Air Permit. Schmidt had spoken both to Complainant and Hersey on several occasions, and explained that there were no compliance issues.

In view of the foregoing, I find and conclude that Complainant has failed to establish that Respondent singled him out and intentionally discriminated against him for engaging in protected activity.

F. Respondent's Same Action Defense

Assuming **arguendo** that Complainant established his protected activity played some part in or was a motivating factor in Respondent's adverse action, thus creating a "dual motive case," which is completely belied by the instant record, Respondent may avoid liability by demonstrating that the adverse action would have occurred even if Complainant had not engaged in protected activity.

It is well settled that "[whistleblower provisions] are not intended to be used by employees to **shield themselves from the consequences of their own misconduct or failures.**" Trimmer, supra at 1104. The instant record supports a finding and conclusion that Complainant's employment would have been terminated for the following legitimate business reason, that being, he violated Respondent's rigid policy against sleeping on the job. As such, it is clear that Complainant cannot seek shelter by way of the CAA or TSCA from the consequences of his failure to comply with Respondent's employment policies. See Trimmer, supra.

Accordingly, I find and conclude that Respondent would have implemented the same adverse actions against Complainant had he not engaged in protected activity given his failure to comply with Respondent's policy prohibiting sleeping on the job.

VII. CONCLUSION

Complainant has failed to show by a preponderance of the evidence that his protected activity in reporting any of his concerns to management was a motivating factor Respondent's decision to terminate his employment on April 1, 2016.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude Respondent did not unlawfully discriminate against Van Jason Rozner because

of his alleged protected activity and, accordingly, Van Jason Rozner's complaint is **DISMISSED** in its entirety.

ORDERED this 11th day of October, 2017, at Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's 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 Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

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 no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1982.110(a) and (b).