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Office of Administrative Law Judges
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Issue Date: 09 June 2005

CASE NO.: 2004-SDW-00003

In the Matter of:

DAVID J. YARBROUGH
Complainant,
v.

U.S. DEPT. OF THE ARMY, CHEMICAL AGENT MUNITIONS DISPOSAL SYSTEM (CAMDS),
Respondent,

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISMISSAL OF DAVID J. YARBROUGH'S COMPLAINT

Introduction

David J. Yarbrough ("Complainant") filed a complaint of employment discrimination against Respondent U.S. Dept. of the Army, Chemical Agent Munitions Disposal System (the "Army" or "CAMDS" or "Respondent"**)** under Section 1450(i) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. 300j-9(i); Section 322 of the Clean Air Act ("CAA"), 42 U.S.C. 7622; Section 507(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1367; Section 7001 of the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. 6971, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), at 42 U.S.C. §§ 9601 *et seq.* He says that he internally and externally reported apparent impermissible releases of chemical warfare agent to the environment from the chemical weapons incineration complex at Respondent during the timeframe of 1999 to 2003. He claims that in retaliation for this reporting, his employment at Respondent was terminated in February 2004.

Respondent moved for a summary decision on two grounds. First, Respondent claims Complainant has not provided admissible evidence to prove that a protected activity took place, and second, even so, there is no causal connection between the alleged protected activity and the adverse act of terminating Complainant's employment at Respondent because Complainant's firing was motivated solely by Complainant's felony convictions - legitimate, non-pretextual reasons. Respondent's declarations and other proof have demonstrated that the second contention is factually uncontradicted and legally dispositive, so the complaint is dismissed.

Procedural Background

On March 22, 2004, Complainant filed his complaint at issue. RX 10.

On April 15, 2004, Respondent filed its response to the complaint denying most of Complainant's allegations of whistleblower activities.

On June 28, 2004, the Occupational Safety and Health Administration ("OSHA") issued its notice of findings dismissing the complaint and finding that Complainant's termination of employment was motivated by his criminal conviction.

On July 6, 2004, Complainant objected to OSHA's findings and appealed this matter to the Office of Administrative Law Judges ("OALJ"). This case was assigned to me on July 12, 2004. On July 13, 2004, a Notice of Hearing was issued setting trial in this case for September 2 and 3, 2004 in Salt Lake City, Utah under an accelerated discovery period.

On August 10, 2004, Respondent filed its Motion to Dismiss and Request for Stay on General Discovery primarily arguing that Complainant had not properly served his notice of appeal on Respondent. The Army's response to the complaint was attached as Exhibit 2 to its motion to dismiss and therein tabs A-K were attached thereto including tab K, a copy of an April 6, 2004 Order Denying Stay Request in connection with Complainant's appeal of the U.S. Merit Systems Protection Board's ("MSPB's") decision. That order denied Complainant's request for a stay of the MSPB whistleblower case finding that Complainant was unlikely to prevail on the merits of his whistleblower action challenging his termination due to his felony convictions for making false statements.[1]

On August 13, 2004, the trial in this case was continued to November 18-19, 2004 on request of Complainant's counsel due to Complainant's incarceration through September 2004 and pending appeal of his criminal conviction.

On September 2, 2004, I issued an order denying Respondent's motion to dismiss based on the fact that Respondent's co-counsel had been served with a timely notice of appeal. I also denied Respondent's motion for a protective order and motion to limit the scope of discovery.

On October 26, 2004, the trial was continued a third time to March 21, 2005 on request of Complainant's counsel with no objection from Respondent based on the fact that Complainant was now due to be released from incarceration on November 3, 2004 and additional time was needed to prepare for trial. Also, Claimant's counsel was hopeful that the appeal of Claimant's criminal conviction would be resolved by March 2005.

On January 14, 2005, Complainant filed his First Motion to Compel Discovery Responses from Respondent arguing that Respondent and its witnesses be compelled to answer questions propounded by Complainant in depositions regarding communications between witnesses and investigating and prosecuting attorneys and their staff. Complainant's motion also asked for an extension of the discovery deadline which was granted and extended to March 31, 2005. Complainant's Motion to Compel was limited to discovery produced through deposition testimony and did not involve any other discovery issues.

[1] Complainant did not similarly request a stay of this proceeding pending the outcome of his appeal of the felony criminal convictions or that he attempted to obtain a stay of this proceeding from the Tenth Circuit Court of Appeals pending the outcome of his appeal of his felony criminal convictions.

On January 18, 2005, Respondent filed its response to Complainant's Motion to Compel and renewed its request for a protective order to limit the scope of depositions to issues specifically pertinent to the instant case arguing that the attorney-client privilege applied to limit the response to various questions posed at deposition.

On January 20, 2005, by telephone conference with the parties' counsel to discuss various discovery issues, it was stipulated by the parties' counsel that trial should be continued a fourth time to allow the discovery dispute to get resolved and allow adequate time to complete discovery, file pre-hearing statements and conduct the trial. Complainant also requested and was granted further time to file a supplemental brief to his discovery motion and to submit deposition transcripts. The hearing was continued to June 20, 2005 in Salt Lake City, Utah.

Complainant did not file his supplemental motion to compel by January 28, 2005 as he requested and as ordered by me. No deposition transcripts were submitted as allowed in support of Complainant's waiver of the attorney-client privilege argument.

On March 3, 2005, in a telephone conference with joint counsel, Claimant's counsel withdrew his request to file a supplemental motion to compel and his crime-fraud exception argument.

By telephone conference again between the counsel for both parties on March 10, 2005, I communicated my tentative oral ruling of the then-pending discovery issues. The parties stipulated that discovery would be stayed pending the outcome of Respondent's anticipated motion for summary dismissal referenced below.

On March 11, 2005, I issued an Order: Granting Complainant's First Motion to Compel Discovery Responses, In Part; and (2) Granting Respondent's Renewed Motion for a Protective Order Limiting the Scope of Discovery which decided the discovery disputes between the parties. Also on March 11, 2005, I issued an Order: Setting Briefing Schedule for Respondent's Anticipated Motion to Dismiss Case and Related Stay of Discovery and Continuance of Trial. The hearing was once again continued to September 19, 2005 in Salt Lake, Utah.

Respondent was ordered to file its motion to dismiss on or before March 25, 2005. Complainant was ordered to file his response to the motion to dismiss on or before April 8, 2005. Finally, pursuant to the parties' stipulation, discovery was stayed pending my ruling on the motion to dismiss. These orders were served on the parties in the regular course of business and none were returned undeliverable. No objections were raised to the March 11 Orders.

On March 24, 2005, Respondent filed its Motion for Grant of Summary Judgment with memorandum of points and authorities ("MSJ") and Exhibits 1-83 in support thereof. With no objections having been filed to any of Respondent's exhibits, I admit Respondent's Exhibits ("RX") 1-11 and 13-83 into evidence and part of the record. Respondent's memorandum of points and authorities is marked as administrative law judge exhibit ("ALJX") 1 which is also admitted into evidence. RX 12 is a memorandum that contains no jurat and is rejected as an improper affidavit.

Respondent's MSJ argues that the undisputed facts in this case prevent Complainant from establishing a prima facie case of retaliation. Respondent also argues that, nonetheless, Complainant is unable to show that the reason articulated by Respondent for its removal of Complainant from employment in February 2004 was a pretext for retaliation as any pretext is barred by Complainant's felony convictions through application of the doctrine of issue preclusion.

Complainant did not file any response as ordered on or before April 8, 2005. As of the date of this recommended order, Complainant has not filed any response to the MSJ.

Issues for Determination

Whether a genuine issue of material fact exists with regard to whether Complainant has established a *prima facie* case that Respondent discriminated against him in violation of the various environmental whistleblower statutes referenced herein.

Findings of Fact and Conclusions of Law

Factual Background

Complainant was a civilian employee of the U.S. Department of the Army, Chemical Agent Munitions Disposal System ("CAMDS") at the Deseret Chemical Depot ("DCD") near Tooele, Utah for approximately 23 years from 1981 until February 26, 2004 when he was terminated from his position as Monitoring Systems Mechanic Supervisor. RX 1.

The mission of CAMDS at DCD has been to research methods for safely disposing of chemical weapons and chemical agents including mustard gas ("HD" or "HT"), sarin ("GB"), lewisite, and other nerve agents ("VX"). RX 3 at 1-2; RX 23; and MSJ[2] at 17 and 18. In conducting their research in 2002, and other times relevant, employees at Respondent came into close proximity to these chemical agents within the enclosed facility. Employees were protected from inadvertent and non-permitted exposure to chemical agents by gas masks and by air monitoring systems designed to detect any accidental release of chemical agents in enclosed work areas. An air monitoring system also protected the public by monitoring air that would be released into the atmosphere as permitted after it passed through fiber beds called the "Filter Farm." RX 3 at 2; RX 23.

In his position as supervisor over the monitoring unit from 1999-2001 and sporadically thereafter, Complainant served as a chief supervisor over the Monitoring Branch with CAMDS at Respondent with planning, work direction, administrative, and hazardous waste handling management duties. RX 80. Complainant supervised a unit comprised of a group of employees that oversaw and maintained the air monitoring machines. RX 3 at 2, RX 80.

The monitoring unit also conducted "baseline tests" to ensure that the air monitoring machines worked properly and they would send off an alarm signal to warn employees of any

[2] Respondent's motion for summary judgment (decision) is referenced throughout as "MSJ".

unexpected release of toxic air. RX 3 at 2. Sometimes alarms would go off or readings were reported due to other causes separate from the stored weapons or chemical agents such as pesticide spraying. RX 14 and 15. The log sheet records of the monitoring unit were compiled by a statistician to determine whether the baseline test had passed and whether work with chemical agents should proceed. The baseline test results were reported in a computer spreadsheet report. If the report showed too many of the air monitoring machines failing during the baseline test, the baseline test did not pass, and it had to be conducted again and passed before it was determined to be safe for employees to continue to work with chemical agents. RX 3 at 2.

On May 8 or 9, 2000, there was a non-permitted release of chemical warfare agent from the incinerator common stack at the nearby Toole Chemical Agent Disposal Facility ("TOCDF") chemical weapons disposal facility. RX 20 at 157-58. While this pre-dated Commander Peter Cooper's command at DCD, he knew of the release. *Id*.

Following the TOCDF stack alarm on May 8-9, 2000, the Department of Health and Human Services ("DHHS") found problems with the Johnson Atoll Chemical Agent Disposal System ("JACADS") chemical agent alarms and recommended changes/improvements to the sampling probes. Complainant supported a briefing and design proposal from one of his subordinates, Tom Cramer, to replace the existing TOCDF stack probe with a new proposed "CAMDS" stack probe design and sought support from DCD Commander Cooper. RX 16; RX 17; RX 18 , and RX 19.

Ultimately, the DHHS verified that maintaining the status quo and keeping the existing TOCDF stack probe monitor design was sufficient in determining the presence of chemical agent sarin (GB). RX 22. Complainant disagreed and believed that Mr. Cramer's "CAMDS" stack probe was preferable. RX 56 at 2. It is unknown whether the DHHS verified that the stack probe monitor design was sufficient for other chemical agents at DCD other than sarin.

During October-November 2001, CAMDS was merged with the DCD organization and lost its previous status as a tenant on the installation. After the merger, Complainant reported directly to Mr. Ray Cormier, who was named the Director of Operations Support at DCD. Before the merger and before reporting directly to Mr. Cormier, Complainant had received favorable and highly favorable performance evaluation reports from Respondent at least from 1996 through October 31, 1999. RX 81-83.

Complainant and Mr. Cormier did not communicate well with each other and had an apparent personality conflict. RX 24-51; RX 78 at 199. Employees who had previously reported to Complainant complained about a co-worker's qualifications and "continuous attack" of Complainant leading to his eventual loss of supervisory authority. RX 58.

Complainant went on sick leave for the early portion of 2002 as his doctor requested he be allowed to perform less stressful duties on a part-time basis. RX 27 at 2-3. Mr. Cormier considered administrative disciplinary action for a variety of misconduct and Complainant received several administrative disciplinary actions ranging from counseling to suspension between spring 2002 to winter 2002. RX 24-51. Some of Complainant's challenged conduct

involved making a Hotline complaint and then retracting the allegations saying it had no basis in fact. RX 27 at 1, 2, and 7-8. Other conduct involved a three-day suspension of Complainant for misusing a government vehicle and property while no similar suspension occurred when in May 2002, Complainant witnessed a government vehicle parked at employee Michael Coates' residence for 1.5 hours. See RX 31 at 2; RX 38 at 4. Complainant believed that Mr. Cormier was not consistent in application of penalties and rewards. RX 38 at 4.

The merger of CAMDS with DCD also led to low morale with employees at DCD according to a report in July 2002 by the Inspector General for Commander Cooper. RX 52. The report noted, among other things: (1) that General Service employees were not receiving hazardous duty pay at the time; (2) while the employees embraced the merger, directorate heads and/or command staff were territorial with no command support of the merger; and (3) the merger caused a cutback in contract technical support such as professionals calibrating equipment and providing computer support leaving untrained government employees to shoulder work that they viewed as a setup for failure on the part of DCD command. *Id*.

On June 11, 2002, Complainant was advised by his supervisor, Mr. Cormier, that Complainant was not to perform monitoring activities but, instead, would work on the property book. RX 28 at 1. It is unknown how long Complainant was instructed not to perform monitoring activities.

On July 8, 2002, Ms. Cherice Day, Sci-Tech Statistician contractor was working with Complainant and running the statistical model at the Filter Farm baseline. Throughout the time the baseline was being conducted, Complainant came over to Ms. Day and asked her to run preliminary numbers. When the baseline was finished, it had failed. Complainant brought over the final data on a sheet that Ms. Day had never seen before. The numbers on this sheet were all handwritten. Complainant told Ms. Day to re-enter all of the numbers from the beginning because some of the numbers had changed. After doing so, the baseline passed. Complainant asked Ms. Day to change the data knowing that he had changed some of the Hazard Challenge and LOQ failing test results to passing numbers. In some cases, Complainant left off the failures and only recorded the second challenge and he altered the data so that the baselines would pass. RX 34; RX 35; RX 53; RX 57.

At TOCDF on July 15, 2002, maintenance workers were inadvertently exposed to chemical agent sarin (GB) during changeover to other chemical nerve agents (VX) operation. RX 23 at 1. Corrective actions were reviewed in preparation for resumption of demilitization activities. *Id*.

On July 25, 2002, Complainant was working with Ms. Day again and brought over the data for the CTF baseline, the MDM-BIF baseline and the weekly ACAMS data. Ms. Day had already picked up a week's worth of data for the CTF and had entered it. Complainant brought over the same type of handwritten sheets as for the Filter Farm baseline referenced above on July 8, 2005. Ms. Day entered the final three days of data from the handwritten sheets and ran the numbers while Complainant waited. The data did not pass. Complainant then told Ms. Day to run the numbers as he had written on his sheets. This included taking out failures on first challenges. Ms. Day did this and ran the data again. The baseline passed. Complainant then

told Ms. Day to send this revised data in and that they had no choice. Complainant admitted and specifically recalled changing the failure data for Station 26D at the CTF. RX 34; RX 35; RX 53; RX 57.

On August 12, 2002 at JACADS, chemical nerve agents (VX) were detected in the air and residue from the metal parts furnace ("MPF") discharge airlock due to an improperly loaded waste incineration container. RX 23. Implications for MPF processing and monitoring at TOCDF were discussed between various industrial hygienists and a chemical engineer from DHHS and the Utah Dept. of Environmental Quality. *Id*.

In October 2002, Complainant was indicted for violations of 18 U.S.C. Section 1001 with respect to falsifying air monitor data on July 8 and July 25, 2002. On October 3, 2002, Complainant received a notice of proposal to remove him from his position at Respondent for making a false statement and providing false data to Sci-Tech Statistician Ms. Day concerning the Filter Farm and various baselines. RX 35.

The Superceding Indictment filed against Complainant on March 26, 2003, alleged that Complainant reported false air monitoring data in June and July of 2002, indicating that an air monitoring system used to detect the presence of deadly chemical agents was operating properly when, in fact, it was not. RX 3. Counts 1-4 and 6-8 of the indictment alleged that Complainant falsely reported individual monitoring station data on July 25, 2002 and that Complainant's false data reports caused the Army to issue false test reports on July 7 and July 25, 2002. *Id*.

On or before March 31, 2003, Complainant expressed a concern for the safety of incineration. Commander Cooper noted Complainant's concerns for the safety of incineration at TOCDF and replied to him by stating that "[t]his depot will continue its mission to demilitarize chemical agent using the highest possible standards of safety and with full regulatory oversight. RX 46 at 1.

As of July 22, 2003, Complainant was notified and ordered by DCD Commander, Commander Cooper, not to reenter or be found within the limits of DCD. RX 48.

Complainant was convicted of seven of eight counts concerning his false statements at his criminal jury trial taking place on July 28-30, 2003. RX 4-6. Complainant filed a motion for acquittal and a new trial alleging that he was a victim of conspiracy of his co-workers and Army officials. RX 7. He also contended that one of the prosecution witnesses falsely testified that the appropriate guidelines for testing the CAMDS air monitoring systems were contained in a Laboratory Quality Assurance Plan ("LQAP") other than the one that was relied on during Complainant's testing procedures in the summer of 2002. *Id*.

A letter of proposed action dated August 5, 2003 was sent to Complainant by Mr. Cormier soon after his jury convictions which proposed to remove Complainant from his position with Respondent for committing a crime for which a sentence of imprisonment may be imposed. RX 49. The indefinite suspension and removal were held in abeyance pending Complainant's sentencing in February 2004. RX 43 at 1; RX 44 at 2.

On November 21, 2003, the District Court conducted an evidentiary hearing on Complainant's motions for acquittal and a new trial. RX 8. After fully considering all testimony and evidence presented by Complainant's counsel, the district court denied his motions. *Id*. at 69-71. The district judge also ruled against Complainant on the issue of ineffective assistance of counsel. *Id.* at 70.

After denying the motions, the District Court sentenced Complainant on February 4, 2004 to a term of six months in federal prison followed by supervised release for 36 months, a fine of $10,000, and a special assessment of $700. RX 9. At the sentencing hearing, the district judge commented that the evidence against Complainant was "very compelling." *Id*. at 11.

On February 6, 2004, Complainant was convicted in the U.S. District Court for the Central Division of Utah on seven felony counts of violating 18 U.S.C. § 1001 and § 2(b), making false statements to a department or agency of government. RX 2.

Prior to Complainant's ultimate termination and removal, he specifically told Commander Cooper at Respondent of his concern that there might have been releases from TOCDF of chemical agents that had occurred prior to the May 2000 release that might have been picked up on CAMDS' air chemical agent monitoring system ("ACAMS"). RX 20 at 158. In addition, from June 25, 2001 to February 26, 2004, Complainant came and spoke to Commander Cooper on a number of occasions about his concerns over safety. RX 56 at 1 and 3. Commander Cooper stated that Complainant's safety concerns were looked into, and when the concerns were valid, they were addressed. *Id*. Commander Cooper considered these conversations to be within the bounds of Complainant's position as Chief of the Air Monitoring Division despite Mr. Cormier being Complainant's immediate first-line supervisor. *Id.*

On February 26, 2004, Complainant was terminated from his position as Monitoring Systems Mechanic Supervisor by Respondent as a result of criminal convictions for which a sentence of imprisonment may be imposed. RX 1. Commander Cooper testified that his reasons for removing Complainant in February 2004 had nothing to do with the allegations contained in his whistleblower complaint in this case. RX 56 at 3. Commander Cooper signed the Notice of Decision removing Complainant from federal service for "committing a crime for which a sentence of imprisonment may be imposed as reflected in Complainant's criminal conviction on July 30, 2003. *Id*.

Complainant surrendered to prison in May 2004 and was released in November 2004. During that time, Complainant appealed his convictions to the Tenth Circuit Court of Appeals. The parties are uncertain exactly when to expect a decision on that appeal. No stay of proceedings was sought here nor is there any evidence that Complainant attempted to obtain a stay of this proceeding from the Tenth Circuit Court of Appeals.

Discussion

Respondent argues that summary decision/dismissal should be granted in its favor on several bases. The Army first argues that the environmental protection statutes are inapplicable here because its chemical agent incineration activities are properly permitted and either there is no proof of any violation of chemical release limitations or the facts of this case do not involve substances normally listed under the environmental whistleblower statutes. Respondent also argues that Complainant has failed to establish various key elements of his *prima facie case*, and as there are no genuine issues of material fact, summary decision in its favor is proper.

Standard of Law - Summary Judgment

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. 29 C.F.R. §18.40, *see also* Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U.S. 317, 323-34 (1986).

The non-moving party benefits from any factual dispute supported by the evidence. *See Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003) ("[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.") (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 99-107, ALJ No. 99-STA-21 (ARB Nov. 30, 1999).

If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his or her pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988).

Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact and the proponent is entitled to summary decision. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). *See Webb v. Carolina Power & Light Co.,* 1993-ERA-42, slip op. at 5-6 (Sec'y July 4, 1995).

A. *Mr. Yarbrough's Claim Is Dismissed Due to His Failure to Comply with the March 11 Order and His Deemed Consent to Dismissal*

As provided under 29 C.F.R. section 18.40 (c), "[w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing."

Under 29 C.F.R. Section 24.6(e)(4)(B), the administrative law judge may, at the request of either party or on his own motion, issue a recommended decision and order dismissing a claim upon the failure of the complainant to comply with a lawful order of the administrative law judge. 29 C.F.R. Section 24.6(e)(4)(B). Furthermore, 29 C.F.R. Section 18.6(d)(2)(v) also provides me authority to strike Complainant's notice of appeal and request for hearing and render a recommended decision against him dismissing his case for failure to comply with my March 11, 2005 Order requiring a response to Respondent's motion to dismiss on or before April 8, 2005.

This authority to dismiss a case also comes from my inherent power to control my docket and prevent undue delays in the disposition of pending cases. *See Link v. Wabash Railroad Co*., 370 U.S. 626 (1962).

Complainant did not file his supplemental motion to compel by January 28, 2005 as he requested and was ordered by me. No deposition transcripts were submitted in support of Complainant's waiver of the attorney-client privilege argument. As of May 31, 2005, Complainant once again had not filed a pleading ordered by me – this time no response to Respondent's MSJ filed on March 24, 2005. Consequently, Complainant failed to comply with my March 11 Order by failing to respond to the MSJ by *April 8, 2005*.

I find that Complainant has failed to comply with my March 11, 2005 Order requiring Complainant to serve and file a response to the Respondent's motion to dismiss no later than *April 8, 2005* in the form of a filed memorandum of points and authorities, affidavits and other documentary evidence in support of his legal position as to why this matter should not be dismissed through summary judgment.

Since Complainant has not complied with my March 11 Order and has not submitted his response to Respondent's Motion for Granting of Summary Judgment in a timely manner, his complaint shall be dismissed for lack of prosecution and failure to comply with my March 11, 2005 Order.

Moreover, I further interpret local regulations 29 C.F.R. Section 24.6(e)(4)(B) and 29 C.F.R. § 18.6(d)(2)(v) as providing me with discretion to find that Complainant's failure to comply with my March 11 Order and corresponding failure to timely oppose Respondent's MSJ judgment constitutes "consent" to granting the motion. *See U.S. v. Real Property Located in Incline Village*, 47 F.3d 1511, 1519 (9th Cir. 1995)(Case dismissed pursuant to local district court rule allowing implied consent to dismissal for failing to file a pleading).

I find that despite the stipulated discovery stay, Respondent has not denied access to information by means of discovery to Complainant as information pertaining to Complainant's criminal convictions was fully provided to Complainant and he was ably represented in the defense of his criminal action.[3] RX 8 at 70. Alternatively, I find that by stipulating to the discovery stay, Complainant has waived his right to argue that he has had insufficient discovery to properly defend against Respondent's MSJ.

B. Alternatively, *Complainant Has Not Presented An Inference Of Having a Prima Facie Whistleblower Case to Prevail*

Applicability of Environmental Statutes

Assuming *arguendo* that the complaint is not dismissed due to Complainant's noncompliance with my prior orders, Complainant has alleged that the environmental statutes including the Resource Conservation and Recovery Act ("RCRA"), the Clean Water Act ("CWA"), the SDWA, the CAA and CERCLA are applicable to the whistleblower assertions of this case. See RX 10 at 2, 6-7. Some of Complainant's activities and complaints are protected under the environmental statutes because they pertain generally to the risk of an emission of toxic substances from a dangerous instrumentality, *i.e.*, an incinerator for destroying military chemical agents (including nerve gas, sarin, lewisite, and mustard gas). RX 10; RX 19; RX 23, RX 56 at 1 and 3; RX 58, RX 66, and RX 69. Like nuclear power plants, chemical agent incinerators have a great potential of harming the public in the event of a serious accident or defect, as was noted in an earlier decision involving the same Tooele Disposal Facility, *Chemical Weapons Working Group v. Dep't of the Army,* 101 F.3d 1360, 1362 (10th Cir. 1996) (denying motion for stay pending appeal of denial of preliminary injunction) (Lucero, dissenting):

> Appellants' claims appear facially substantial. They assert that since August 13, 1996, the date of the district court's denial of the preliminary injunction, nerve agent has leaked into non-agent areas at Johnson Atoll Chemical Agent Destruction System (a prototype facility upon which the Tooele Chemical Agent Disposal Facility is modeled), and has been discovered in non-airtight filter vestibules at [the Tooele Disposal Facility]; decontamination fluid has leaked through cracks in a concrete floor above an electrical wiring and equipment room

[3] It is noted in Respondent's exhibits RX 7 and RX 8 that the U.S. Attorney's Office turned over all documents to Complainant's previous attorney, therefore his stayed request for voluminous raw data in this case is viewed as a fishing expedition, especially given the amount of documents voluntarily provided to Complainant as part of RX 73 at 1-2. *See also Hasan v. Commonwealth Edison Co*., 2000-ERA-1 (ALJ Jan. 10, 2000) *affirmed* (ARB Dec. 29, 2000), where the ALJ granted summary judgment and stated that discovery requests had not sought specific information to establish a prima facie /viable claim.

> at [the Tooele Disposal Facility]; and the slag removal system in the liquid nerve agent incinerator malfunctioned at [the Tooele Disposal Facility], leading to operation shutdown. This list is non-exhaustive.

Similarly, the evidence either shows valid proof or there is an inference in favor of Complainant as the non-moving party that from the years 2000 through late 2003, there was a legitimate and reasonable safety and environmental damage risk to the air surrounding the chemical weapon incinerator facilities and the health of Complainant, his fellow employees, and the general public caused by:

> (1) each of sixteen point sampling assemblies in each of the ventilation filters were suspect and a safety concern because Complainant did not believe that sample line challenges demonstrated that successful nerve agent sampling occurred in the filter system; (2) Complainant reported that from 1999 through late 2003, there had been non-permitted, undetected, and unreported chemical warfare agent releases from the chemical weapons incineration complex to the environment including, but not limited to, releases on July 2, 2002 of the lewisite chemical agent and July 15, 2002 of the sarin (GB) chemical agent; (3) Complainant reported to Depot Commander Peter Cooper in February 2002 his safety concern that the appearance of a hectic and schedule-driven plan existed for the Lewisite Neutralization Project at CAMDS and the nerve agent (VX) Incineration Project at TOCDF; (4) Complainant and fellow workers signed a position paper in August 2002 disclosing unsafe management and serious safety concerns at CAMDS starting with the merger of CAMDS into DCD including a constant lack of supplies and repair parts needed to properly monitor the presence of non-permitted chemical agent releases and also the insufficient staffing, inconsistent management of overtime, and overwhelming assignments that forced employees to cut corners and caused the system for mustard (HD) agent monitoring to be unsafe and of serious concern to the employees; (5) Complainant reported to Commander Cooper that mustard (HD) chemical agent station monitors were not being verified as "active" despite Complainant's contention that these mustard chemical agent monitors were especially important operating in real time for protecting employees and the outlying community from potentially upset conditions; (6) Complainant reported to Commander Cooper in December 2002 that there had been 10 to 12 missed calibrations on Filter Farm stations alone with at least 4 in 38 days of live operations; (7) in December 2002, Complainant disclosed to Commander Cooper that he had been ordered by his immediate first-line supervisor, Ray Cormier, to stop pursuing every improvement to chemical agent monitoring that he had been working on; and (8) in January 2004, Complainant reported to Commander Cooper an incident in January 2004 where 72 live projectiles/rockets filled with mustard gas (HD) chemical agent were being unloaded off a pallet when they crashed to the cement floor and his safety concerns with respect to this operation and an overall lack of proper training in handling these hazardous materials. RX 10, RX 19, RX 23; RX 56 at 1 and 3; RX 58; RX 62; and RX 69.

Respondent argues that the employee protection provisions of the SWDA, also known as the RCRA, do not apply in this case because "[a]s long as emissions from [the TOCDF and the

CAMDS] are in line with permit conditions [under RCRA and the CAA], there can be no violations of the CERCLA release reporting requirements." ALJX 1 at 17.

The RCRA regulates the disposal of hazardous waste through a permit program run by the Environmental Protection Agency (EPA), but subject to displacement by an adequate state counterpart. *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 611, 112 S.Ct 1627, 1631, 118 L.Ed. 2d 255 (1992). TOCDF has an RCRA permit from the State of Utah which regulates chemical warfare agent releases, noncompliance reporting, and ACAMS functioning at a minimum. *See Mugleston v. EG&G Defense Materials, Inc*.**,**. 2002-SDW-4 (ALJ February 12, 2004), at p. 40. Similarly, I take administrative notice that the Utah Department of Environmental Quality has continuously issued both CAA and RCRA permits under its delegated authority from the Environmental Protection Agency. *See CWWG v. U.S. Dept. of the Army,* 111 F.3d 1485, 1488 (10th Cir. 1997)(Same).

One of Complainant's protected activities involves his claim that he reported non-permitted releases of chemical agent at the incinerator facilities from 1999 through late-2003 and that Respondent's adverse action terminating his employment violates the employee protection provisions of CAA, RCRA , SWDA, CWA, and CERCLA. Because there is evidence of at least three non-permitted releases of hazardous substances in May 200 and July 2002, I find that for purposes of defending a motion for summary decision, Complainant's safety and environmental concerns were reasonable and do implicate the RCRA and that his case is properly before the Court pursuant to the retaliation provisions under the RCRA. *See RX 23.*

The purpose of the CAA is to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population. 42 U.S.C.A. § 7401(b)(1). *See Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 764 (D.C. Cir. 1984) (purpose of the CAA is to protect the public health by controlling air pollution). Toward that goal, the federal government will provide financial assistance and leadership to develop cooperative federal, state, regional and local programs to prevent and control air pollution. 42 U.S.C.A. § 7401(a)(4).

I find that for purposes of withstanding attack from Respondent's motion for summary decision, Complainant has stated a cause of action under the Acts because there is at least an inference that Respondent's operations during 2000 through 2003 did pollute the air of the United States with deadly chemical agents. RX 10, RX 19, RX 23; RX 56 at 1 and 3; RX 58; RX 62; and RX 69.

I further find that the retaliation provisions of the CERCLA are also applicable here. CERCLA is a broad remedial statute designed to enhance the authority of the EPA to respond effectively to toxic pollutant spills. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197 (2nd Cir. 1992). Reporting is generally required under CERCLA of releases, other than a federally permitted release, of a "hazardous substance" from a "facility," as those terms are defined under CERCLA. 42 U.S.C. § 9603. CERCLA defines "hazardous substance" as any substance so designated by the EPA pursuant to § 9602 of CERCLA or any substance designated as hazardous in referenced sections of the CAA, the CWA, RCRA, and Toxic Substances Control Act. *See* 42 U.S.C. §§ 9601 and 9602; *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192,1199-1200 (2nd Cir.

1992). Complainant has raised concerns about the tracking of nerve gas, lewisite, mustard gas and sarin at the plant and non-permitted releases of the same into the environment. RX 10, RX 19, RX 23; RX 56 at 1 and 3; RX 58; RX 62; and RX 69. While none of these deadly chemical agents are specifically listed as a hazardous substance under CERCLA, it is absurd to think that these deadly chemical agents, some of the most lethal substances ever created, are anything but hazardous substances whose non-permitted release is covered under CERCLA through incorporation of covered hazardous substances under CAA and RCRA. See 40 C.F.R. § 302.4. Therefore, I find that Respondent is subject to the employee protection provisions of CERCLA under the facts in this case.

I further find that the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, otherwise known as the CWA, also does not apply in this case. The CWA prohibits discharge of any chemical warfare agent into navigable waters. 33 U.S.C. § 1311(f); *Chemical Weapons Working Group, Inc. v. U.S. Dept. of the Army*, 111 F.3d *supra* at 1490. Complainant alleges that the CWA applies in this case based on his disclosures about chemical agent releases into the atmosphere. Specifically, Complainant alleges that the agent releases at TOCDF into the open environment would eventually settle onto the ground, at which time rain may cause the agent contamination to run off into protected waters. See RX 10 at 7.

The path of agent releases into the open environment suggested by Complainant is not supported by any facts in the record and is purely speculative. Complainant's broad construction of the phrase "discharge…into the navigable waters" under § 1311(f) would necessarily result in regulation under § 1311(f) of any air emission that might possibly result in atmospheric deposition into navigable waters. *See Chemical Weapons*, 111 F.3d at 1490. Such a broad applicability of the CWA was not the intent of Congress. *See id.* Therefore, I find that Complainant is not protected by the retaliation provisions of the CWA.

For the same reasons, I find that the retaliation provisions of the SDWA do not apply in this case. The SDWA was enacted to ensure that public water supply systems meet minimum national standards for the protection of public health. *National Wildlife Federation v. U.S. E.P.A.*, 980 F.2d 765, 768 (D.C. Cir. 1992). Although Complainant raised concerns about chemical agent releases into the environment, there has been no evidence indicating that these releases involve the contamination of a public water system. Complainant alleges that the SDWA is implicated because agent releases at TOCDF would eventually settle onto the ground, be transported into surface and ground waters via rain runoff routes, and ultimately impact drinking water supplies. This proposition is merely conjecture and demands too broad an interpretation of the reach of the SDWA. *See Chemical Weapons,* 111 F.3d at 1490 (CWA inapplicable because alleged depositing too speculative connection from actual release into the air.) Therefore, I find that the SDWA does not apply in this case.

The jurisdiction issues presented for our consideration and their potential effect upon the public and the environment are far too important to dispose all of them by summary denial, at least at this stage of my analysis. Therefore, I proceed to analyze this case under the employee protection provisions of the RCRA, the CAA, and CERCLA (the "Acts").

Employee Protection Provisions of Environmental Statutes

The employee protection (whistleblower) provisions of the Acts prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions or privileges of employment, i.e., take adverse action, because the employee has notified the employer of an alleged violation of the Acts, has commenced any proceeding under the Acts, has testified in any such proceeding or has assisted or participated in any such proceeding.

Under the RCRA/SWDA, no person shall discriminate against any employee "by reason of the fact" that such employee has engaged in enumerated protected activity, namely

> filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any implementation plan.

42 U.S.C. § 6971(a).

The CAA's employee protection provision provides in relevant part:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .
> (1) commenced, caused to be commenced, or is about to commence a proceeding under this chapter . . .
> (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); *Tyndall v. United States Environmental Protection Agency*, 93-CAA-6 and 95-CAA-5 (ARB June 14, 1996).

Pursuant to CERCLA, an employer may not retaliate against an employee or an employee representative:

> by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

42 U.S.C. § 9610(a).

In order to establish a prima facie case of a violation of these employee protection provisions, a complainant must show that: (1) the complainant engaged in protected activity; (2) the employer was aware of the protected activity; (3) the employer took adverse action against the complainant; and (4) the complainant must raise the inference that the protected activity was the likely reason for the employer's adverse action against him. *See Shelton v. Oak Ridge*

National Laboratory, 95-CAA-19 (ALJ Mar. 3, 1998) (citing *Tyndall v. United States Environmental Protection Agency*, 93-CAA-6, 95-CAA-5 (ARB June 14, 1996); *Saporito v. Florida Power and Light*, 94-ERA-35 (1996); *Jackson v. The Comfort Inn, Downtown,* 93-CAA-7 (Sec'y, Mar. 16, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

To establish the first element of Complainant's prima facie case, he must prove that he has engaged in protected activity.

Protected Activity

The Administrative Review Board ("ARB") has construed the terms "filed, commenced, testified, assisted, or participated" broadly. *See Schlagel v. Dow Corning Corp*., 2001-CER-1 (ARB Apr. 30, 2004) at p. 9 ("We have construed the term 'proceeding' broadly to encompass all phases that relate to public health or the environment, including the initial *internal* or external statement or complaint of an employee that points out a violation, whether or not it generates a formal or informal 'proceeding.'")(Emphasis in original). Complaining internally about inadequate and inappropriate regulation are protected activities. *See, e.g., Passaic Valley Sewerage Com'rs v. U.S. Dept. of Labor,* 992 F.2d 474, 478-480 (3d Cir. 1993)("proceeding" includes intracorporate complaints that sewerage system was "inordinately expensive, inefficient, scientifically unreliable and in violation of the Clean Water Act user charge provisions"); *Pogue v. U.S. Dept. of Labor,* 940 F.2d 1287, 1288-1289 (9th Cir. 1991)(complainant employed in "hazardous waste oversight position charged with the responsibility for surveying and reporting on hazardous waste compliance[;]" undisputed protected activity included preparation of internal reports documenting noncompliance at Navy shipyard and transmittal of letter to shipyard commander detailing environmental violations). *Cf. Mackowiak v. University Nuclear Sys., Inc*., 735 F.2d 1157, 1159 (9th Cir. 1984) (Energy Reorganization Act); see also *Phillips v. Interior Board of Mine Operations Appeals,* 500 F.2d 772 (D.C. Cir. 1974) (Coal Mine Safety Act); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 959 (D.C. Cir. 1984) (Federal Mine Safety and Health Act).

The Ninth Circuit has held that "competent and aggressive inspection work" is protected activity under the Energy Reorganization Act ("ERA"). *Mackowiak v. Univ. Nuclear Sys. Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984). In *Mackowiak*, the complainant, a quality control inspector, was terminated as part of a reduction in force. *Id.* at 1160. He argued he was terminated "because he was an overly zealous inspector and because he identified safety problems to the Nuclear Regulatory Commission." *Id.* The complainant filed a whistleblower complaint under the ERA. *Id.* Noting that the employer "discouraged its inspectors from asking too many questions, and pressured those who did," the Ninth Circuit found that the complainant was terminated in part because of his protected activity. *Id.* at 1163. The court reasoned "[a]t times, the inspector may come into conflict with his employer by identifying problems that might cause added expense and delay. If the NRC's regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems." *Id.* The court concluded that employers "may not discharge quality control inspectors because they do their jobs too well." *Id.*

Self-auditing work, and the compliance and retaliation concerns it generates, and development of a methodology to be used for risk assessment are protected activities. *Jarvis v. Battelle Pac. Northwest Lab*., ARB No. 97-112, ALJ No. 97-ERA-15 (ARB Aug. 27, 1998). The reporting of statutory violations by an employee whose assigned job is to discover and report instances of noncompliance so that the employer may correct them can be protected activity within the meaning of these provisions. *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 88-SWD-2, elec. op. at 18 (ARB Feb. 28, 2003), citing *Pogue*.

Here, Respondent admits that "obviously" Complainant elevated his air monitoring concerns or issues to "management." MSJ at 25. Complainant also informed the facility Commander that his first-line supervisor ordered him to stop pursuing every improvement to chemical agent monitoring at his work. RX 62.

Respondent argues, however, that either Complainant's concerns were not reasonable with respect to dangerous releases of chemical agent or, regardless, his concerns were "unprotected" activities because they did not extend beyond his mere performance of assigned duties to report air monitoring problems to his immediate supervisor, Mr. Cormier. MSJ at 25-26. Considering that a separate oversight visit to TODCDF and other incinerator facilities at DCD by officials from the Centers for Disease Control in 2002 found four separate incidents where hazardous chemical agent was detected or workers suffered actual exposure, information reasonably related to Complainant's own concerns and disclosures from 2000-2003 of environmental violations and violations of the employee Whistleblower provisions, I find that Complainant's concerns were reasonable and based on legitimate actual non-permitted discharges of deadly chemical agent. I further find that Complainant's disclosed concerns were actions to assist in carrying out the purposes of the employee protection provisions of the Acts and therefore constitute reasonable perceived violations of the environmental laws. See RX 19, 23, 45, 46, 58-70; MSJ at 23- 5. Finally, Commander Cooper admits that when Complainant disclosed a valid concern, the concern was addressed and corrected. RX 56 at 3.

Respondent further argues that pursuant to *Huffman v. Office of Personnel Management,* 263 F.3d 1341, 1352 (Fed. Cir. 2001) and *Sasse v. U.S. Dept. of Justice*, 1998-CAA-7 (ALJ May 8, 2002), Complainant's disclosures were required within the course of his position as Chief Air Monitoring Division and, thus, were not protected activities because he made all of his concerns known to his immediate supervisor in the course of his job. MSJ at 25-26. Respondent is admonished for citing the *Sasse* case at the ALJ level while wrongly stating that the ARB adopted the ALJ's reasoning when, in fact, the ARB found error with the factfinder's narrow application of the environmental statutes' protected activity requirements. *See Sasse v. Office of the U.S. Attorney,* 1998-CAA-7 (ARB Jan. 30 2004).[4]

[4] On May 31, 2005, the Sixth Circuit Court of Appeals decided *Sasse v. U.S. Dept. of Labor; U.S. Dept. of Justice*, Case No. 04-3245, a related appeal of the 2004 ARB decision, and held that Sasse's investigation and prosecution of environmental crimes were not protected activities because he had a duty, as an Assistant United States Attorney, to perform them while affirming the ARB order dismissing Sasse's complaint. The Sixth Circuit *Sasse* case does not control my decision here as it is distinguishable. In addition, this case does not take place in the Sixth Circuit and I choose to follow the broader rationale for protected activities referenced in the *Pogue, Passaic Valley Sewerage Com'rs*, and *Jenkins* cases referenced above instead in this environmental case involving the alleged release of deadly chemical agents.

Moreover, I reject Respondent's argument characterizing Complainant's environmental concerns in 2000-2003 as unprotected activities because, as distinguished from the facts in *Huffman*, on many occasions Complainant reported his concerns outside his immediate supervisor, Mr. Cormier, to the facilities commander, Peter Cooper. See RX 19, 45, 46, 58-70. Thus, Complainant did not have a duty to report his concerns to the facilities Commander in place of his first-line supervisor. I also reject as disputed Commander Cooper's testimony that he considered Complainant's reported concerns to him as being "within the bounds of Mr. Yarbrough's [Complainant's] position as Chief of Air Monitoring Division. See RX 56 at 3. In contrast in March 2003, Commander Cooper wrote to Complainant and scolded him for not contacting his supervisor or anyone in his chain of command and Commander Cooper did not reference himself as part of this chain command but, instead, referred Complainant to Complainant's supervisor or an Army attorney. RX 46. Finally, there were lengthy periods of time starting in early 2002 when Complainant was relieved of his duties as Chief of Air Monitoring Division thereby preventing him from voicing his concerns merely in the course of his work, work that no longer involved monitoring releases of deadly chemical agent. See RX 27 at 2-3, RX 28 at 1, RX 31 at 2-3, RX 34 at 2, RX 36, RX 38 at 1, RX 41, RX 42, and RX 43 at 1.

Viewing the evidence in the light most favorable to, and drawing all inferences in favor of Complainant as the non-moving party, I find that there remains a genuine issue of material fact whether Complainant engaged in activities that the environmental whistleblower statutes at issue are designed to protect.

Respondent Had Knowledge of Complainant's Protected Activities Prior to February 2004

With regard to the second element, Complainant communicated his environmental safety concerns to Commander Cooper on a number of occasions prior to his job termination in February 2004. For example, prior to Complainant's ultimate termination and removal, he specifically told Commander Cooper at Respondent of his concern that there might have been releases from TOCDF of chemical agents that had occurred prior to the May 2000 release that might have been picked up on CAMDS' air chemical agent monitoring system ("ACAMS"). RX 20 at 158. In addition, from June 25, 2001 to February 26, 2004, Complainant came and spoke to Commander Cooper on a number of occasions about his concerns over safety. RX 46 at 1; RX 56 at 1 and 3. Commander Cooper stated that Complainant's safety concerns were looked into, and when the concerns were valid, they were addressed. *Id*. I find that Respondent was aware of Complainant's protected activities at the time they engaged in the alleged adverse action in February 2004.

Adverse Act Not an Issue as Complainant Was Terminated in February 2004

To establish the third element of Complainant's prima facie case, he must prove that the Army took adverse action against him. There is no factual dispute as the evidence clearly shows that Respondent took the adverse action of terminating Complainant's employment in February 2004. RX 1; RX 10 at 1-2. Not every action by the Army that makes an employee unhappy constitutes an adverse action. Complainant has failed to present any evidence of any other

adverse acts taken by Respondent against him as defined under the Acts. Moreover, any actionable adverse acts occurring before February 21, 2004 (30 days prior to Complainant's March 22, 2004 filing of his complaint) are beyond the thirty day limitation period under the environmental whistleblower statutes.[5] *See Jenkins v. The U.S. E.P.A.*, 1988-SWD-2 (ARB February 28, 2003, at 12-13. Complainant satisfies the third element requirement for a prima facie case based solely on the lone adverse act comprised of his February 26, 2004 termination as all other alleged adverse acts are barred as untimely claims because they occurred, if at all, beyond the thirty-day period preceding the filing of the March 22, 2004 complaint in this case.

The Complaint Must Be Dismissed Because Complainant Has Not Presented an Inference that His Protected Activities Were the Likely Reason for Termination Of His Employment

Finally, to establish the fourth element of Complainant's prima facie case, he must raise an inference of unlawful discrimination. A complainant meets this burden by showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in activity protected under the statutes of which the employer was aware, that he or she suffered adverse employment action and that a nexus existed between the protected activity and adverse action. *See Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995) (*citing Couty v. Dole*, 886 F.2d at 148 ("[p]roximity in time is sufficient to raise an inference of causation")).

Here, Complainant must raise the inference that his protected activities were the likely reason for his termination from Respondent. Complainant has not offered any credible facts or other evidence to support the inference that the Army retaliated against Complainant because of his attempt to inform Commander Cooper of environmental violations and violations of the employee Whistleblower provisions through his communications with Commander Cooper. Complainant has presented no credible evidence of any retaliatory motive on the part of Respondent or that any Respondent supervisor/manager had an improper motive in terminating Complainant's employment in February 2004. In fact, it was Complainant's admitted false statements which led to his criminal felony convictions and prison sentence that Respondent used as the sole basis for Complainant's termination. RX 56 at 3.

As a result, on February 26, 2004, Complainant was terminated from his position as Monitoring Systems Mechanic Supervisor by Respondent because of criminal convictions for which a sentence of imprisonment may be imposed. RX 1. I find that Commander Cooper's reasons for removing Complainant in February 2004 had nothing to do with the allegations contained in his whistleblower complaint in this case. RX 56 at 3. Commander Cooper signed the Notice of Decision removing Complainant from federal service for "committing a crime for which a sentence of imprisonment may be imposed as reflected in Complainant's criminal conviction on July 30, 2003. *Id*. Therefore, I find that Complainant has failed to establish the required nexus between the protected activity and the adverse action by the Army. For these

[5] "The environmental whistleblower statutes carry a limitations period of thirty days, meaning that, for the complaint to be timely, a complainant must file a complaint of unlawful discrimination within thirty days of a discrete adverse action." *Jenkins, supra* at 12.

reasons, I find that Complainant has failed to establish a prima facie case against Respondent of a violation of any applicable employee protection provisions as Complainant has not produced evidence and there is no basis to infer retaliatory discrimination.

Even If An Inference of Unlawful Discrimination Exists, Respondent Has Proven That There Was No Pretext to the Decision to Terminate Complainant's Employment As the Sole Reason for Termination Related to Complainant's Criminal Felony Convictions and Sentence to Prison

Alternatively, if Complainant put forth an inference to support a prima facie case, the burden then shifts to Respondent to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. *See Carroll v. United States Dep't. of Labor, 78 F.3d 352,356 (8th Cir. 1996)*(Setting out the general legal framework). In the event that the employer meets this burden of production, the inference of discrimination disappears, leaving the single issue of discrimination *vel non*. The complainant then must prove by a preponderance of the evidence that the employer intentionally discriminated. *E.g., Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133 (2000) (Age Discrimination in Employment Act); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Under this line of cases, the ultimate burden of persuasion rests always with the complainant. To meet this burden, a complainant may prove that the legitimate reasons proffered by the employer were not the true reasons for its action, but rather were a pretext for discrimination (*St. Mary's Honor Center*, 509 U.S. at 507-508), i.e., a complainant may prove that she suffered intentional discrimination by establishing that the employer's proffered explanation is unworthy of credence. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). An adjudicator's rejection of an employer's proffered legitimate explanation for adverse action permits rather than compels a finding of intentional discrimination. Specifically, it is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Burdine*, 450 U.S. at 258.

In this case, Respondent's declarations and other proof have demonstrated that it terminated Complainant for a legitimate, nondiscriminatory reason – Complainant's criminal felony convictions and corresponding prison sentence for making false statements in July 2002 in violation of 18 U.S.C. §§ 1001 and 1002(b). RX 1, RX 2, RX 7, RX 8, RX 9, RX 56 at 3. Consequently, I find that because of these criminal convictions, Respondent would have terminated Complainant even if he had not engaged in any protected activities.

Complainant has produced no direct evidence of discriminatory retaliation. He has failed to ground his allegations that his criminal convictions were a mere pretext for his termination in an affidavit or declaration, or to point to specific deposition testimony or discovery responses to support his claim. I find that Respondent would have terminated Complainant's employment based on his criminal convictions alone even if it had an improper motive. On summary judgment allegations unsupported by admissible evidence are insufficient, as 29 C.F.R. § 18.40(a) and (c) and Rule 56, Fed. R. Civ. P. make clear. A trial would simply be fruitless; the only possible outcome on this record is the dismissal of Complainant's complaint for protection under the Acts.

Issue Preclusion Prevents Complainant From Relitigating The Cause Of His Discharge

The remaining issue then is whether collateral estoppel precludes Complainant from relitigating the cause of his discharge in the context of these administrative proceedings. In a general sense, the doctrine of collateral estoppel is applicable in administrative proceedings under circumstances in which "a judgment on the merits in a prior suit between the same parties-- even though not the same cause of action--precludes the relitigation in a subsequent suit of any issues actually litigated and determined in a prior suit."[6] (Stein, Mitchell, and Mezines, *Administrative Law*. Matthew Bender, (1977), Section 40.01 at 40-14). As the Third Circuit Court of Appeals similarly observed:

> The same policy reasons which underlie use of collateral estoppel in judicial proceedings are equally applicable when the administrative board acts as an adjudicatory body. It is well established that the doctrine of collateral estoppel contributes to efficient judicial administration, serving the public interest in judicial economy as well as the parties' interest in finality, certainty of affairs and avoidance of unnecessary relitigation. *Chisholm v. Defense Logistics Agency*, 656 F.2d 42 (3rd Cir. 1981).

The *Chisholm* rationale was later cited with approval and adopted by the Court of Appeals in *Otherson v. Department of Justice*, 711 P.2d 267, (D.C. Cir. 1983). In *Otherson*, the court affirmed the invocation of collateral estoppel, or issue preclusion, in Merit Systems Protection Board proceedings against an INS agent previously convicted of on-duty misconduct in Federal District Court.

The Department of Labor has had an opportunity to consider the application of collateral estoppel in the context of its administrative adjudications. In *Nissi Corp*., SCA 1233, (1990), the Deputy Secretary reversed a decision by an administrative law judge, and held that it "was error for the ALJ to refuse to give preclusive effect to issues decided by the CAB decision on the ground that the decision was based on a mistake of fact. If that rule were to obtain, res judicata and collateral estoppel would never operate to bar litigation because the second tribunal could always find perceived error in the first judgment. Accordingly, the ALJ erred in refusing to give preclusive effect to the issues litigated in the CAB decision for the reasons he gave. The Deputy Secretary was persuaded that "It is well settled that an administrative decision may be given preclusive effect." Under such circumstances, there would seem little basis for failing to afford similar preclusive effect to the findings of a Federal District Court.

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[6] It makes no difference that Complainant's criminal convictions are pending appeal before the Tenth Circuit Court of Appeals as the law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's holding particularly when a case has been fully litigated on its merits. *Rice v. Department of Treasury*, 998 F.2d 997, 999 (Fed. Cir. 1993) *citing SSIH Equipment S.A. v. United States Intern'l. Trade Com'n*., 718 F.2d 365, 370 (Fed. Cir. 1983). *See also Park Lake Resources LLC. v. U.S.D.A*., 378 F.3d 1132, 1136 (10th Cir. 2004)(Issue preclusive effect for matters finally adjudicated on the merits). The same rule is applicable to the District Court convictions filed February 4, 2004. RX 2.

The test for issue preclusion was extracted from the doctrines set forth by the Supreme Court in *Montana v. U.S.*, 440 U.S. 147 (1979). Application of the issue relitigation bar involves three distinct steps (1) is the issue identical to that actually decided by the other agency, (2) was the issue necessary to the earlier judgment, and (3) did the party against whom preclusion would operate have a full and fair opportunity to litigate the issue?" *Nissi* at 9.

Applying the *Nissi* rationale as formulated by the Deputy Secretary, I find and conclude that same basic facts and circumstances which form the basis of the District Court's decision also underlie the complaint Complainant filed with the Department of Labor. I further find that the burden of proof under which Complainant was convicted in the District Court criminal matter was the stricter "beyond a reasonable doubt" standard thereby making it harder to rule against Complainant in the District Court criminal matter than here where a "preponderance of the evidence" standard, a lower burden of proof, allows the application of issue preclusion.

These circumstances include not only the cause of discharge, but encompass claims of conspiracy and inadequate legal counsel. Thus, the District Court found that the evidence against Complainant in favor of conviction for making false statements was "very compelling." RX 9 at 11. Nor did the District Court find anything in the record before it which showed a conspiracy against Complainant or that his legal counsel was anything less than effective. RX 8 at 69-71. The context in which the adverse action was taken and the alleged conspiracy surrounding Complainant provided the core of the foundation of facts supporting the District Court's convictions against Complainant.

I further find and conclude that Complainant was afforded a full and fair opportunity to litigate his claims in the prior action. The District Court specifically determined that Complainant was afforded effective counsel and noted that the evidence against Complainant was "very compelling." Thus the District Court determined that Complainant had a full and fair opportunity to defend the criminal charges before the Federal District Court.

For all of the foregoing reasons, I find and conclude that the doctrine of collateral estoppel/issue preclusion is applicable and herein bars Complainant from relitigating the cause of his discharge or the allegation of conspiracy as alleged in his administrative complaint and as decided by the District Court.

CONCLUSION

I find that, Respondent, the Army, is entitled to Summary Decision in the present claim for the following reasons: one, Complainant's total failure to comply with my March 11 Order to file a response to the Motion for Summary Judgment by April 8, 2005 constitutes "consent" to the motion's requested dismissal of this action; two, even if Complainant has not consented to the motion, certain adverse actions that Complainant alleges Respondent took because he engaged in protected activities are time-barred, and three, even if Complainant has not consented to the motion, Complainant has failed to establish that there is a genuine issue of material fact as to whether Respondent's decision to terminate Complainant was legitimately motivated solely by Complainant's felony convictions and not based on pretext.

RECOMMENDED DECISION AND ORDER

Respondent's Motion for Summary Decision, pursuant to 29 C.F.R. § 18.40, is **GRANTED** and Complainant, David J. Yarbrough's complaint is hereby **DISMISSED** with prejudice**.**

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

NOTICE OF REVIEW:

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