U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 May 2007

Case No.: 2006-SDW-00003

In the Matter of:

MICHAEL COLLINS,
Complainant

v.

VILLAGE OF LYNCHBURG, OHIO,
Respondent

APPEARANCES:

Paul H. Tobias, Esq.
David Torchia, Esq.
For the Complainant

Fred J. Berry, Esq.
For the Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises from a claim of whistleblower protection under the Safe Drinking Water Act, 42 U.S.C. § 300(j)-9(i) ("the Act"). These statutes and implementing regulations at 29 CFR Part 24, protect employees from discrimination in retaliation for engaging in protected activity such as reporting health, safety, or environmental violations. In this case, Michael A. Collins ("Complainant") alleges that he was terminated from his position with the Village of Lynchburg ("Respondent") for reporting possible violations to the Environmental Protection Agency.

STATEMENT OF THE CASE

Procedural History

Complainant filed a complaint with the Occupational Safety and Health Administration of the Department of Labor ("OSHA") on September 27, 2005. He alleged he was terminated on August 31, 2005, in violation of the above-cited whistleblower statutes. Complainant asserts that Respondent terminated his employment after learning of the allegations he made to the EPA. However, Respondent alleges that Complainant was terminated for not following the proper

chain of command and for making allegations which he knew were false in retaliation for not being allowed to go look at a truck that the Village was considering purchasing.

On January 23, 2006, the Regional Administrator for OSHA issued his findings concerning the complaint. The Administrator stated that the evidence found during the investigation supported Complainant's allegations that the Respondent discharged him in retaliation for protected activity. The Administrator further found that the Respondent failed to show that it would have terminated Complainant in absence of his protected activity. As a result, Respondent appealed the OSHA findings by means of a Notice of Appeal and Request for Hearing transmitted to the Office of Administrative Law Judges ("OALJ") on January 27, 2006.

A hearing was conducted in this matter on August 10, 2006, in Cincinnati, Ohio. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Complainant's Exhibits ("CX") and Respondent's Exhibits ("RX") were admitted into evidence without objection. The record was held open after the hearing to allow the parties to submit closing and reply briefs. All parties submitted briefs and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at the hearing, and the arguments of the parties.

Issues

1. Whether Complainant engaged in protected activity under the Act;

2. Whether Complainant thereafter was subjected to adverse action regarding his employment;

3. Whether Respondent knew of the protected activity when it took the adverse action;

4. Whether Respondent took the adverse action for a legitimate, nondiscriminatory reason; and,

5. What damages, if any, Complainant is entitled to because of the retaliatory actions taken by Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The statutes invoked in this claim prohibit employers from discriminating against employees for engaging in whistleblower activities protected by the statutes. In order to prevail on his claim, Complainant must establish by a preponderance of the evidence that Respondent took an adverse employment action against him because he engaged in protected activity. *Carroll v. U.S. Dep't of Labor,* 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. and other anti-discrimination statutes. *See Overall v. Tennessee Valley*

Authority, USDOL/OALJ Reporter (HTML), ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001), citing, *inter alia*, *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks,* 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Products, Inc.,* 120 S.Ct. 2097 (2000).

Where there is direct evidence of discrimination, the complainant prevails unless the respondent can establish an affirmative defense. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 997 (2002) (Title VII case)*; Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-122 (1985) (Age Discrimination in Employment Act ("ADEA") case). However, when direct evidence of discrimination is not available, a complainant first must create an inference of unlawful discrimination by establishing a *prima facie* case of discrimination, by showing that the respondent is subject to the Act; that the complainant engaged in protected activity; that he suffered adverse employment action; and, that a nexus exists between the protected activity and adverse action. The complainant must show that the respondent had knowledge of the protected activity to establish a *prima facie* case. *See Bartlik v. U.S. Dept. of Labor*, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); *Carroll v. U.S. Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982); 29 CFR § 24.5(a)(2). The burden then shifts to the respondent to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. Under the traditional Title VII analysis, the burden of persuasion remains at all times with the complainant, who must prove by a preponderance of the evidence that the respondent's proffered reasons were not the true reasons and constitute a pretext for discrimination. *Burdine*, 450 U.S. at 253.

Summary of the Evidence

Credibility Determinations

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence, while analyzing and assessing its cumulative impact on the record. *See, e.g., Frady v. Tennessee Valley Authority*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995) (*citing Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971). An Administrative Law Judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony. *See, Altemose Constr. Co. v. National Labor Relations Board*, 514 F.2d 8, 15 n. 5 (3d Cir. 1975).

Credibility is that quality in a witness which renders his evidence worthy of belief. For evidence to be worthy of credit,

> [it] 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 it.

Indiana Metal, 442 F.2d at 52. Moreover, based upon the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses and gathered impressions as to their demeanor. 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 the demeanor of witnesses. Probative weight is granted to the testimony of all witnesses found credible. I have thoroughly examined all the testimony in this claim, and I find all of the witnesses credible. The testimony is summarized below.

Complainant's Testimony[1]

Complainant resides in Hillsboro, Ohio, with his wife, Jackie Collins, and their son. (Tr. 44-45). He also has three stepchildren and grandchildren. (Tr. 45). Complainant's grandchildren attend school in the Village of Lynchburg. (Tr. 46). Complainant has many ties to the Village. (Tr. 46). Complainant is currently employed by the Village of Lynchburg, Respondent in this claim. (Tr. 46). He started his employment with Respondent on September 18, 1997. (Tr. 46). He worked as a laborer, which included performing water taps, sewer taps, road maintenance, snow removal, reading water meters, and other basic labor duties. (Tr. 47). Rick Berry was Complainant's supervisor in August 2005. (Tr. 47). Mr. Berry reported to Mayor Bill Priore. (Tr. 47).

Complainant stated that during his years at Respondent he has heard numerous complaints about the water supply and was even concerned himself on occasion. (Tr. 51-52, 54). The citizens would often complain that their drinking water was brown. (Tr. 52). When complaints were made, Complainant was responsible for flushing out the meters. (Tr. 52). The pipes are old that Respondent uses and, therefore, they are rusted, which at times causes the water to turn brown. (Tr. 52). Complainant agreed that Respondent has tried to fix the problem, but until they put in new lines the problem will persist. (Tr. 54). He stated that he would never drink the water. (Tr. 54).

Complainant testified that during his employment, he occasionally came into contact with Rick Ludwick, another employee who was responsible for the water distribution and testing. (Tr. 47-48). However, Complainant was able to become familiar with the basic workings of Respondent's water supply and facility. (Tr. 48). He discussed how he believed the water "well fields" worked and where the water supply came from. (Tr. 48). Complainant discussed that the fields contain three wells and that well number three is the primary well used for the water supply. (Tr. 49). Mr. Ludwick and Shawn Berry, not Complainant, were responsible for testing the water. (Tr. 49, 50). However, Complainant testified that he had observed them collecting the samples. (Tr. 50). The testing took place in order to check the water for bacteria and lead in the raw water sample. (Tr. 50). Respondent then sends the samples off to be tested. (Tr. 51). The EPA regulates the sampling and testing of the water. (Tr. 51).

In August 2005, Complainant testified that some of the test samples tested positive for bacteria. (Tr. 54). Mr. Ludwick informed Complainant that a couple of the samples had tested positive and that as a result, Test America had ordered further testing. (Tr. 55). Complainant testified that Mr. Ludwick stated that "he'd be in a world of trouble if a third one came back

[1] The record also includes Complainant's deposition. I have reviewed it and taken it into consideration.

positive for bacteria." (Tr. 55). Complainant stated that Mr. Ludwick acted worried. (Tr. 55). He then stated that Mr. Ludwick informed him that "he was going to dump chlorine bleach into the wells to kill the bacteria so that the test would test negative for bacteria." (Tr. 55). Complainant believed that this procedure was improper "[b]ecause if you dump chlorine in the well, you will kill any bacteria that's in the well and you will not get a true real sample." (Tr. 56). Complainant then spoke with Mr. Berry about the incident. (Tr. 56). Mr. Berry informed Complainant that they had put chlorine in the well on other occasions. (Tr. 56).

However, Complainant still did not feel that they were using the proper procedures, and as a result, he called the Ohio EPA. (Tr. 56). Complainant stated that he was unsure which day he called the EPA, but that he first spoke with Joshua Jackson. (Tr. 57). Complainant informed Mr. Jackson of his concerns, and Mr. Jackson stated that he would tell those concerns to Tim Schmidt, the person over the water supply division. (Tr. 57). Complainant stated that he did not tell Mr. Jackson that he actually witnessed anyone putting chlorine in the wells or the samples. (Tr. 58). He stated that Mr. Ludwick "had got [sic] two positive bacteria samples and he was going to dump chlorine bleach in the wells prior to taking those samples." (Tr. 58). The conversation only lasted around three to four minutes. (Tr. 58). Mr. Jackson compiled a memorandum as a result of his conversation with Complainant. Mr. Jackson wrote that Complainant called asserting that he witnessed Mr. Ludwick putting bleach in the actual samples; however, Complainant testified that this is not what he conveyed to Mr. Jackson.[2] (Tr. 79). Complainant continued to urge that he did not witness any incident and he only stated that Mr. Ludwick stated that he was going to put bleach in the wells prior to sampling. (Tr. 81). Complainant was only concerned with safety. (Tr. 82).

The next day, Mr. Schmidt called Complainant and asked about his concerns. (Tr. 58). Unlike with Mr. Jackson, Complainant stated that he had sufficient time to voice his concerns and to explain the situation to Mr. Schmidt. (Tr. 59). Complainant testified that he told Mr. Schmidt that Mr. Ludwick "was going to dump chlorine bleach in the wells prior to taking the samples. And Mr. Schmidt told [him] he thought [he] was mistaken, that they was [sic] disinfecting the tap and not the well." (Tr. 59). He also informed Complainant that putting chlorine in the wells was acceptable. (Tr. 60). Complainant also discussed with Mr. Schmidt another problem he had encountered. (Tr. 60). He informed Mr. Schmidt that a pipe at the water-station did not have an air gap attached. (Tr. 61). The purpose of the air gap is to prevent contamination. (Tr. 61). After the complaint about the air gap to the EPA, the Village took the water-station out of service.[3] (Tr. 90). Mr. Schmidt also informed Complainant that Mayor Priore had called and asked who filed the complaint. (Tr. 59). Complainant urged Mr. Schmidt not to give Mayor Priore his name because he would be fired. (Tr. 59). However, Mr. Schmidt had already provided Mayor Priore with Complainant's name. (Tr. 59).

After speaking with Mr. Schmidt, Complainant carried on business as usual. (Tr. 62). Around four o'clock, however, Mr. Berry informed Complainant that Mayor Priore wanted to see him. (Tr. 62). Complainant testified that he knew it was about the complaint to the EPA and that he was going to be fired. (Tr. 62-63). As a result, he had his keys ready to turn in to the Mayor. (Tr. 62). When Complainant walked into the room the Mayor immediately told him that he was fired. (Tr. 63). The Mayor neither asked Complainant questions about the situation nor

[2] *See* RX A.

[3] *See* CX 5 and 8.

did he request an explanation as to why he made the complaint. (Tr. 64). The Mayor also offered no explanation as to why Complainant was being fired; however, Complainant stated that he did not ask because he knew it was because he made the complaint to the EPA. (Tr. 64).

Prior to his termination, Respondent had only taken disciplinary action against Complainant once. (Tr. 65). Complainant stated that one day, one of the Mayor's clerk's named Michelle pulled into the Village garage and asked Complainant to look at her car. (Tr. 65). Thereafter, Bill Sulfsted, the Village Administrator, came and informed Complainant that he should not have had the woman in the garage. (Tr. 65). Complainant tried to explain the situation to Mr. Sulfsted but he would not listen. (Tr. 65). As a result, Mr. Sulfsted asked Complainant to sign a paper stating the facts of the situation; however, Complainant refused to sign. (Tr. 65). Mr. Berry had also consulted with Complainant about not wearing a uniform. (Tr. 76). Complainant had a problem with his uniforms not fitting because of his fluctuating weight. (Tr. 76). However, he was never disciplined for not wearing a proper uniform. Complainant was given no other disciplinary actions or reprimands prior to his termination. (Tr. 65-66).

Respondent argues that when Complainant made the complaints to the EPA, he knew they were false and he only made them out of retaliation for a "truck incident." (Respondent's brief). Respondent urges that Complainant was upset because Mr. Ludwick and Mr. Berry would not allow Complainant to accompany them in looking at a truck Respondent wished to purchase. (Respondent's brief). This incident occurred five to six days prior to Complainant's termination on August 31, 2005. (Tr. 66). However, Complainant testified that that he was not upset about having to stay behind and that he never told anyone that he was upset about the situation. (Tr. 66). He testified that he never would have reported the situation to the EPA if he had not heard that Mr. Ludwick was going to dump chlorine in the wells. (Tr. 67). Complainant stated that he only filed the complaint because he was concerned about the safety of the water in the Village. (Tr. 75).

Respondent also filed criminal charges against Complainant as a result of his complaint to the EPA. (Tr. 67). Chief Music conducted an investigation for the Village regarding the criminal charges. (Tr. 67). However, the charges were ultimately dismissed. (Tr. 67). Complainant stated that he was never presented with formal charges and did not have to enter a plea. (Tr. 83). Complainant had never been charged with a criminal offense prior to this incident. (Tr. 74).

After his termination, Complainant stated that he tried to find other work, but was not successful. (Tr. 67-68). He filed applications with numerous organizations. (Tr. 68). Complainant was given no offers of employment. (Tr. 68). Complainant received unemployment benefits during this time. (Tr. 68). However, Respondent eventually reinstated Complainant on July 18, 2006. (Tr. 69). He received the same rate of pay he received prior to his termination. (Tr. 70). Complainant stated that between August 31, 2005, and July 18, 2006, his lost wages amounted to $22,464.12, not including overtime he would have received or a cost of living raise. (Tr. 70-71).

Other Witnesses

Jackie Collins, Complainant's wife, also testified at the hearing. (Tr. 100-110). The couple had been married for two years at the time of the hearing. (Tr. 100). They have four

children and four grandchildren between them. (Tr. 100). Mrs. Collins works in the Customer Service Department at Huhtamaki Plastics in New Vienna, Ohio. (Tr. 101). She testified concerning Complainant's depression after his termination. (Tr. 101). She stated that "the longer period of time from the time he got fired from the job, he became more irritable, withdrawn. He had a lot of headaches. We both had trouble sleeping. His nose was bleeding occasionally." (Tr. 102). Mrs. Collins suggested that Complainant see a doctor but he would not due to financial problems. (Tr. 102). The couple also had many more arguments and they were not as intimate as they were before the termination. (Tr. 103). She further testified that Complainant did not want to go out in public after his termination. (Tr. 103). Mrs. Collins stated that Complainant had a hard time dealing with not being able to financially contribute to the family. (Tr. 104).

Mrs. Collins also discussed the incident relating to Complainant's termination. (Tr. 107). She stated that Complainant informed her that he called the EPA because Mr. Ludwick was going to put chlorine bleach in the wells prior to taking the test samples. (Tr. 107).

Rick Ludwick is responsible for operating the Village's water plant and waste water treatment plant. (Tr. 116). He is certified by the EPA. (Tr. 116). Mr. Ludwick is responsible for performing the testing required by the EPA for the Village. (Tr. 117). He has worked for the Village for over three years; however, he has been working in the water fields for over thirty-two years. (Tr. 118). Mr. Ludwick stated that he has never had any trouble with the EPA. (Tr. 118). He runs samples for the EPA quarterly. (Tr. 119). In August 2005, he recorded bad samples of water. (Tr. 119). Although he agreed that this can be a major concern, he stated that it has happened before in his career. (Tr. 120). As a result of the bad sampling, Mr. Ludwick called the EPA. (Tr. 120). He spoke with Mr. Schmidt who told him to take another sample and to chlorinate the well.[4] (Tr. 121, 122). Mr. Ludwick took a new sample and sent it to a lab called MASI via Mr. Schmidt's instructions. (Tr. 121). Mr. Ludwick had performed this process a number of times. (Tr. 123). The new sampling came back negative, meaning a good sample. (Tr. 121, 125). Mr. Ludwick communicated the results to Mr. Schmidt. (Tr. 125). Mr. Ludwick could not recall whether he conversed with Complainant regarding the sampling that day. (Tr. 124). However, he agreed that he had seen Complainant that day. (Tr. 124).

The next day Mr. Ludwick received a call from Test America, who informed him that the EPA had called wanting them to do a chlorine test on the samples. (Tr. 125). However, Mr. Ludwick was confused because he had sent the samples to MASI instead via the EPA's instructions. (Tr. 125). Mr. Ludwick then spoke with Mr. Schmidt, who asked him if he had put chlorine in the samples. (Tr. 126). He told Mr. Schmidt no and then informed the Mayor about the conversation. (Tr. 128). Mr. Ludwick stated that he was very upset and that he "[doesn't] like it when people make up stories about [him]." (Tr. 128). Mr. Ludwick agreed that Complainant was terminated on the same day they received the call from the EPA. (Tr. 127).

Mr. Ludwick urged that the Mayor did not press him to find out who made the complaint but that he, himself, wanted to know. (Tr. 144-145). However, Mr. Ludwick testified that he suspected Complainant of making the call from the beginning. (Tr. 128). First, he stated that the only other people who knew that he was taking samples were the Mayor, Mr. Schmidt,

[4] Mr. Ludwick agreed that he and Mr. Schmidt had a misunderstanding as to how he was to proceed. (Tr. 149-154). He also agreed that Complainant misunderstood the situation. (Tr. 149-154). *See* CX 4.

Complainant, and Mr. Berry. (Tr. 129). He also related the call to an incident where he and Mr. Berry were going to look at a truck. (Tr. 129). They would not let Complainant ride with them and Mr. Ludwick stated that Complainant got angry. (Tr. 129). Prior to the complaint with the EPA, Complainant and Mr. Ludwick often socialized and got along well together. (Tr. 129). Now, however, due to Mr. Ludwick's feelings, the two do not get along. (Tr. 130). Mr. Ludwick stated that he took no part in the Village's decision to terminate Complainant. (Tr. 130).

Mr. Ludwick agreed that the Village's water supply is often brown. (Tr. 130). He attributed the problem to the use of an old system. (Tr. 130). He stated that if there was a problem with bacteria in the water it would not cause him any personal problems. (Tr. 131). Prior to August 2005, Mr. Ludwick had never chlorinated a well prior to sampling at the Village. (Tr. 133).

Mr. Ludwick was also responsible for the operation of the water station. (Tr. 142-143). He agreed that under the EPA guidelines the water station should have had an air gap attached. (Tr. 143). Mr. Ludwick stated that prior to August 31, 2005, the water station did not have an air gap. (Tr. 143). Mr. Schmidt did not inform him that Complainant also informed the EPA about the missing air gap. (Tr. 144).

Joshua Jackson is employed by the Ohio EPA. (Tr. 160). He works for the surface water division. (Tr. 160). Mr. Jackson took a call from Complainant on August 30, 2005. (Tr. 160). He noted that when taking a call, he would take notes and then type up those notes into a memorandum.[5] (Tr. 162). He stated that he ordinarily writes down the time of a call, the caller, and the ultimate complaint. (Tr. 163). Mr. Jackson was unable to recall the exact specifics of his conversation with Complainant. (Tr. 162). He testified that he only spoke with Complainant for approximately 10 minutes. (Tr. 170). However, as a result of his conversation with Complainant, he created a memorandum and passed it on to the drinking water group. (Tr. 160-2). Mr. Jackson agreed that Complainant's call should have gone to another person. (Tr. 170). The memorandum was placed in the Village's file at the EPA.[6] (Tr. 162). Mr. Schmidt was in charge of the Village's file.[7] (Tr. 164). He is no longer employed with the Ohio EPA. (Tr. 164). Mr. Jackson testified that Mr. Schmidt is a truthful, honest, and accurate person. (Tr. 173, 174). Mr. Jackson was unable to remember his conversation with Complainant without his notes. (Tr. 171). He was able to remember, however, that Mr. Schmidt informed him that there had been a misunderstanding about the situation in the Village. (Tr. 174). Mr. Jackson stated that he could remember "that there was something to do with the wells." (Tr. 174).

William Priore has served as the Mayor of the Village of Lynchburg since January 2003.[8] (Tr. 178). He is also an Environmental Consultant. (Tr. 177). Mayor Priore is the Vice-

[5] The notes from the telephone conversations between the EPA and Complainant and the EPA and Mr. Ludwick are located at CX 1 through 9.

[6] The memorandum is Respondent's Exhibit A. Respondent also marked the entire file as Exhibit C; however, the Exhibit was not admitted into evidence since the entire file was not relevant. (Tr. 166-8).

[7] Mr. Jackson brought with him a copy of the file; however, the motion to admit it into evidence was denied. The evidence was duplicative and included irrelevant evidence.

[8] Mr. Priore's deposition is also included in the record. I have reviewed it and taken it into consideration.

President in charge of Ports Waterways Sediment Remediation for C.H. and Hill. (Tr. 178). Upon taking office as Mayor, he established a chain of command for the employees to follow. (Tr. 178-9). The purpose was so each employee would know to whom to report and how to make complaints. (Tr. 179).

Mayor Priore testified that in August 2005 he was aware that the Village was having problems with the samples taken from the wells. (Tr. 179). Mr. Ludwick kept him informed on the status of the samples. (Tr. 180). Mayor Priore acknowledged that Mr. Ludwick was in constant contact with the Ohio EPA. (Tr. 180). Mr. Ludwick informed the Mayor that someone had filed a complaint with the EPA "regarding sample acquisition and impropriety in sample acquisition." (Tr. 181). Mayor Priore then called the Village's Solicitor to determine whether the person filing the complaint could have committed a criminal offense by filing a false complaint. (Tr. 181). He took Mr. Ludwick's word that a false complaint was made. (Tr. 192). Thereafter, he called the Ohio EPA to find out the situation and who made the complaint. (Tr. 181). Mr. Schmidt informed the Mayor that Complainant made the allegations. (Tr. 182). Mayor Priore then called the Chief of Police and asked him to begin a criminal investigation. (Tr. 181-2). He also asked Mr. Berry to have Complainant meet him in the Village office. (Tr. 182). Mayor Priore and the Chief went to the meeting together. (Tr. 182). He then testified that "Mr. Collins walked in, had a smirk on his face like he knew what was coming off, and never volunteered anything, and I knew at that point in time that there was no sense in discussing it, so I terminated him." (Tr. 182). The Chief never gave the Mayor a report of the results of the investigation. (Tr. 184).

Mayor Priore testified that his main problem with Complainant was that he did not follow the chain of command in making his complaint. (Tr. 185). He stated that the Village has a long known problem with its water and pipes and he did not want to incite a public panic. (Tr. 185). Therefore, he believed that he had to act immediately. (Tr. 185). Mayor Priore also noted that he spoke with Mr. Ludwick prior to the termination, who informed Mayor Priore that he believed Complainant's actions were retaliatory. (Tr. 186). Mr. Ludwick believed Complainant made the allegations because he was upset about the "truck incident." (Tr. 186). Mayor Priore was upset that Complainant would retaliate for something so trivial. (Tr. 187).

Also, Mayor Priore testified to the incident involving Complainant and the woman employee at the Village barn. (Tr. 187). However, Mayor Priore had no personal knowledge of this situation. (Tr. 191). Even though he stated that he was upset with the behavior, he later agreed that he was not sure what the behavior entailed. (Tr. 192). The woman ultimately left the Mayor's office due to other circumstances. (Tr. 188). Mayor Priore further stated that he had an issue with Complainant in relation to uniforms. (Tr. 189). He requested that all employees wear uniforms so citizens would recognize the Village employees. (Tr. 189). Mayor Priore believed that Complainant wore inappropriate attire. (Tr. 190).

Prior to terminating Complainant, Mayor Priore did not speak with Complainant about the situation or ask him for his side of the story. (Tr. 196). He testified that "it was very clear, counselor, when Mr. Collins walked in that he didn't want to talk about it because he threw the keys on the desk, he had a smile on his face, and it, to me was very apparent to me that, you know, he was resigned to being terminated." (Tr. 196). However, Mayor Priore agreed that he had already made the decision to terminate Complainant prior to his entering the office. (Tr. 196). He also had not reviewed the EPA's file or paperwork. (Tr. 197). He stated that he

had to worry about panic in the Village. (Tr. 196). Yet, Mayor Priore had no knowledge that the complaint would ever be made public. (Tr. 220). Mayor Priore asserted that it appeared to him, from his conversations with Mr. Ludwick and Mr. Schmidt, that Complainant's assertions were not made in good faith; however, he agreed that since he was not present during the conversations, he cannot be sure. (Tr. 198). In Mayor Priore's deposition he stated that at the time he terminated Complainant, he was not sure whether or not Complainant was acting in good faith. (Tr. 203). The only investigation Mayor Priore ordered was a criminal one, which he took no part in and which took place after Complainant's termination. (Tr. 204). Mayor Priore informed the OSHA investigator that if Complainant had followed the chain of command he would not have been terminated. (Tr. 205).

Mayor Priore acknowledged that he did not know the Village had an employee handbook stating that employees could only be terminated for just cause until after Complainant was terminated. (Tr. 207). He urged that he believes falsifying a report is just cause. (Tr. 207). However, he took no steps prior to the termination to investigate whether falsifying a report actually occurred. (Tr. 205). Mayor Priore had no idea that the EPA determined that the whole incident involved a misunderstanding with Complainant and with Mr. Ludwick. (Tr. 208). He now understands that these misunderstandings occurred. (Tr. 209). The fact that Mayor Priore believes Mr. Ludwick is a responsible and truthful person contributed to Mayor Priore's belief that Complainant made a false report. (Tr. 212). Mayor Priore testified that he did not know anything about the air gap issue being reported. (Tr. 216). He further stated that when he terminated Complainant he knew that "employees have the right to make complaints, legitimate good faith complaints, to public agencies," and that employers are in violation of the law if they retaliate against them for those complaints. (Tr. 216).

Mayor Priore agreed that he did not know what Complainant's motive was when he made the complaint, but that he was only going by what he was told about the truck incident by Mr. Ludwick. (Tr. 217). Mr. Priore further stated that Complainant was neither fired for the incident with the woman in the garage nor for the problems with his uniforms. (Tr. 218-9).

Shaun Berry testified by deposition on August 3, 2006. Mr. Berry has worked for the Village for around five years. (p. 7). He was Complainant's supervisor at the Village. (p. 7). He never had to reprimand Complainant. (p. 8). They had a good working relationship. (pp. 7-8). Mr. Berry only had to question Complainant about the uniform issue. (p. 8). Mr. Berry also had a problem with his own uniforms not fitting. (p.8).

At times Mr. Berry would help Mr. Ludwick with testing the wells. (p. 10). He stated that in August 2005 several tests were performed. (p.12). However, since the tests came back positive they chlorinated the wells before the next tests. (p.12). Mr. Ludwick told Mr. Berry that the EPA told him to perform this process. (p.12-3).

Mr. Berry testified to the incident where he and Mr. Ludwick went to look at a truck. (p.14). This incident occurred three days prior to Complainant's termination. (p. 15). Mr. Berry agreed that Complainant was upset that he was not allowed to go with them. (p. 16). He stated that the look on Complainant's face gave it away. (p. 16). However, Complainant did not say anything to them. (p. 17). Mr. Berry could not say whether or not this incident was Complainant's motivation for making the complaint to the EPA. (p. 19).

Mr. Berry related Complainant's termination to not following the chain of command. (p. 21). His understanding was that Complainant was fired because he contacted the EPA before the Mayor. (p. 21). Mr. Berry could point to no other reason for Complainant's termination. (p. 22). The Mayor never questioned Mr. Berry about the incident. (p. 22).

DISCUSSION

Complainant must prove a *prima facia* case of discrimination. *Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146 at 16, 1988-SWD-00002 (ARB Feb. 28, 2003). He must establish that: 1) he participated in a protected activity; 2) the employer was aware of the protected activity; 3) he was subjected to an adverse employment action; and, 4) that a nexus exists between the adverse employment action and the protected activity. *Id.* If Complainant establishes his *prima facia* case, there will be an inference that discrimination occurred. *Id.* Then the burden will shift to Respondent to produce sufficient evidence to prove that it would have taken the same action despite the protected activity. *Id.* The Respondent must show that it had legitimate and nondiscriminatory reasons for terminating Complainant. *Id.* If Respondent is successful, there will no longer be an inference of discrimination and Complainant will have to prove by a preponderance of the evidence that Respondent intentionally discriminated against him. *Id.*

Protected Activity

Protected activity is defined as an "act, which the complainant reasonably believes is a violation of the subject statute. The standard for determining whether a complainant's belief is reasonable involves an objective assessment and the allegation need not be ultimately substantiated." *Johnson v. EG&B Def. Materials, Inc.*, ALJ No. 2005-SDW-00002 (ALJ Feb. 13, 2006).

On August 30, 2005, Complainant called the Ohio EPA and made allegations regarding the water supply at Respondent's facility. Complainant alleged that Mr. Ludwick was improperly conducting the testing of samples. He also made allegations regarding a missing air gap. Complainant spoke with two different EPA employees, Mr. Jackson and Mr. Schmidt. Ultimately, Complainant's allegations amounted to a misunderstanding regarding the proper procedure for chlorinating the wells. However, Complainant consistently asserts that he only had the best interests of the Village and the water supply at heart.

Respondent argues that Complainant knew his allegations were false and acted only out of retaliation for not being allowed to go look at a truck. (Respondent's Brief). I find this argument unfounded. The only evidence relating this incident to the complaint was the testimony of Mr. Ludwick. The only evidence he had to relate the incidents was Complainant's facial expressions showing that he was upset at the time of the truck incident. This is not sufficient. Furthermore, there is no evidence in the record to indicate that the situation led Complainant to make the telephone call to the Ohio EPA. However, even if Complainant acted with a retaliatory intent, his activity would still be protected. In *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), the Secretary held that, although the complainant acted solely to retaliate against one his co-workers, "the expression of a safety or health concern is not removed from categorization as a protected activity." The Secretary concluded that

"animosity toward a co-worker does not foreclose independent concerns about a safety issue, and should not diminish protection." *Id.*

Based upon all the evidence in the record, I find that Complainant was involved in a protected activity when he called the Ohio EPA and reported his safety concerns. He had a reasonable belief that there was a water safety issue at the Village. Even the Ohio EPA attributed the concern to only a misunderstanding and stated that Complainant was concerned with the safety of the water supply. The misunderstanding between Mr. Ludwick and Schmidt helps to illustrate how misleading the situation was. Mr. Ludwick testified that, although he has performed the chlorination at other jobs, he had never chlorinated the wells in such a way at the Village. Therefore, it was reasonable for Complainant to believe that this process was incorrect and was being used only to get good sample readings. There is no evidence in the record to suggest Complainant's belief was unreasonable. Complainant acted out of concern for the Village's water supply which has a history of problems.

Respondent's Knowledge of the Protected Activity and the Adverse Action Taken

Mayor Priore terminated Complainant on August 31, 2005. Complainant's termination is clearly an adverse action under the Act. *See Jenkins*, ARB No. 98-146. Prior to terminating Complainant, Mayor Priore had direct knowledge of Complainant's complaint to the Ohio EPA. Mr. Ludwick was the first to inform Mayor Priore that a complaint had been made. Thereafter, Mayor Priore called the Ohio EPA and demanded the name of the person who made the complaint. Within a couple of hours Complainant was terminated. Therefore, Complainant has also fulfilled these two elements of his *prima facia* case. *See Id.*

Nexus Between the Protected Activity and Adverse Action

Lastly, Complainant must prove that there is a nexus between his protected activity and his termination. *Id.* The Third Circuit held in *Doyle v. United States Sec'y of Labor*, that "a finding of liability requires an inquiry into the defendant's state of mind to prove that the defendant subjectively intended to discriminate against the plaintiff on account of his engagement in protected activity." 285 F.3d 243, 252 at n. 6 (2002), *cert. denied Doyle v. Hydro Nuclear Services*, 537 U.S. 1066 (2002); *quoting EEOC v. Chicago Miniature Lamp Works,* 947 F.2d 292, 297 (7th Cir.1991) (*citing Intl. Bhd. of Teamsters v. U.S.,* 431 U.S. 324, 336 n. 15 (1977). It is more likely than not that Mayor Priore viewed Complainant's allegations to the Ohio EPA with hostility. All of the circumstantial evidence, as discussed below, points directly to discriminatory intent.

A. Proximity

Retaliatory motive may be inferred when adverse action closely follows protected activity. *Couty v. Dole,* 886 F.2d 147, 148 (8th Cir. 1989); *Keys v. Lutheran Family and Children's Services of Mo.,* 668 F.2d 356, 358 (8th Cir. 1981) (less than two months). Complainant called the Ohio EPA on August 30, 2005. He was terminated on August 31, 2005. Mayor Priore made the decision to terminate Complainant around two hours after learning of the activity. Therefore, the proximity amounts to a matter of hours.

In sum, I concur with Complainant's arguments that the temporal proximity of the protected activity and Respondent's adverse action against him gives rise to an inference of discriminatory intent. I also find that Respondent failed to establish a legitimate intervening basis for the adverse employment action. Consequently, I find that Complainant's temporal proximity argument is persuasive and probative evidence of a discriminatory intent.

B. Past Performance Problems

Prior to his termination, Complainant was only reprimanded once by Respondent. He was written up for allowing a female employee of the Village into the garage/barn. The employee drove her car into the garage and asked Complainant to take a look at it. Complainant agreed and was ultimately written up for the incident. Respondent has provided no link between this activity and Complainant's termination. Although Respondent posed it as an argument in its brief, Mayor Priore agreed that the incident was not taken into consideration when he decided to terminate Complainant.

Therefore, I find that the lack of other nondiscriminatory reasons for Complainant's termination constitutes persuasive and probative evidence of a discriminatory intent.[9]

C. Investigation and Fact-Finding Results

Ordinarily in a claim of this nature the evidence obtained during the investigation and factfinding meeting is used either prove discrimination or nondiscriminatory reasons. In this case, however, Respondent took no steps to investigate the situation or the facts of the incident prior to Complainant's termination. Upon learning about the complaint, Mayor Priore immediately called the Chief of Police and asked him to start a criminal investigation. Mayor Priore took no part in the investigation, and he decided to terminate Complainant only a couple of hours after asking for the criminal investigation. Mayor Priore also took no steps to find out Complainant's side of the story. He asked Complainant no questions about the incident. Mayor Priore merely relied upon Mr. Ludwick's assertions that Complainant must have acted out of retaliation, without even performing an investigation himself.

Mayor Priore also failed to follow the protocol designed by the Village for the termination of employees. The employee handbook specifically stated that employees could only be terminated for "just cause." Mayor Priore argues that he did not even know that an employee handbook existed until this claim began. As the highest ranking representative for the Village, the Mayor's actions amounted to negligence. Furthermore, Mayor Priore argued that he believes making a false complaint is just cause; however, he took no steps to inquire whether Complainant knew his complaint was false at the time he called the Ohio EPA. Mayor Priore even testified that he failed to inquire whether or not Complainant acted in good faith.

Accordingly, I find that the actions of Mayor Priore are persuasive and probative evidence of a discriminatory intent. Therefore, I find that Complainant has proven his *prima facia* case and is entitled to an inference that discrimination took place.

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[9] The record also discusses a problem the Village had with Complainant wearing uniforms; however, Complainant was never reprimanded and the Mayor did not take the issue into consideration when deciding to terminate Complainant.

Respondent's Nondiscriminatory Reasons

As Complainant has established a *prima facia* case of discriminatory intent, Respondent must now present sufficient nondiscriminatory reasons for Complainant's termination. Respondent argues that Complainant was terminated for not following the chain of command established by the Village, not for his protected activity. Mayor Priore even testified that if Complainant had followed the proper chain of command, he would not have been terminated. Although, if Complainant had gone to Major Priore first, this misunderstanding would not have occurred, Respondent's argument is still unfounded.

The Board has consistently held that "an employer may not, with impunity, discipline an employee for failing to follow the chain-of-command, failing to conform to established channels or circumventing a superior, when the employee raises a health or safety issue. ... Such restrictions on communication would seriously undermine the purpose of whistleblower laws to protect public health and safety." *Talbert v. Washington Public Power Supply System*, 93-ERA-35, slip op. at 8 (ARB Sept. 27, 1996) (citations omitted); *See also, Hoffman v. Bossert,* 94-CAA-4 (Sec'y Sept. 19, 1995); *Carson v. Tyler Pipe Co.,* 93-WPC-11 (Sec'y Mar. 24, 1995); *Sasse v. U.S. Department of Justice*, 1998 CAA 7 (ALJ May 8, 2002).

In *Talbert*, the complainant spoke out about safety problems at a publicly held meeting of employees. *Id*. at 8. Management argued that the complainant should have first informed them so they could have the opportunity to fix the problem "at an opportune time, quietly and privately." *Id.* However, the Board found otherwise, stating that such a holding would go against the very purpose of the whistleblower laws and that the "rationale does not support discipline for protected activity under the [Act]." *Id.* The Circuit Courts have also adopted this position. *See Pogue v. United States Dep't of Labor,* 940 F.2d 1287, 1290 (9th Cir. 1991); *Ellis Fischel State Cancer Hospital v. Marshall,* 629 F.2d 563, 565-566 (8th Cir. 1980), *cert. denied,* 450 U.S. 1040 (1981); *Pillow v. Bechtel Construction Company,* Case No. 87-ERA-35, Sec. Rem. Dec., Jul. 19, 1993, slip op. at 22-23, *appeal docketed,* No. 94-5061 (11th Cir. Oct. 13, 1994); *Nichols v. Bechtel Construction Co.,* Case No. 89-ERA-44, Sec. Rem. Dec., Oct. 26, 1992, slip op. at 17, *aff'd,* 50 F.3d 926 (11th Cir. 1995).

Accordingly, I find that Respondent has not negated the inference of discrimination.

CONCLUSION

The record demonstrates substantially that Complainant proved by a preponderance of the evidence that his protected activity was a contributing factor to his termination. Furthermore, Respondent has failed to present sufficient evidence to rebut this inference of discrimination. In sum, Respondent has failed to establish the existence of legitimate, nondiscriminatory grounds for Complainant's termination. I have analyzed all of evidence and testimony of record, and when I consider all the evidence as a whole, I continue to find that Respondent acted with discriminatory intent. The proffered reasons are disingenuous and intentionally polemic, and therefore, support a circumstantial finding that discriminatory intent is present. Consequently, relief shall be accorded to Complainant.

Damages and Relief

Complainant seeks the following relief: 1) compensatory damages for back pay amounting to $25,000; 2) compensatory damages for emotional distress and loss of reputation in the amount of $25,000 to $50,000; 3) prejudgment interest; 4) reasonable attorney's fees and costs; 5) punitive damages; 6) abatement; and, 7) a purge of Complainant's personnel file of the termination. (Complainant's Post-hearing Brief at 14-5).

A. Back Pay

Back pay is awarded to a complainant when it is necessary to make him/her whole again. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). The purpose is to put "the employee in the same position he would have been in if not discriminated against." *Id.* Complainant has the burden to prove the back pay he has lost. *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y July 19, 1993). However, any uncertainties are resolved against the discriminating party, the Respondent. *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002); *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB Sept. 24, 1997). Therefore, "unrealistic exactitude is not required" when calculating back pay. *Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992), slip op. at 9-10.

Complainant testified to his lost regular wages and the overtime he would have received. (Tr. 70-1). Complainant's timesheets indicate that he worked an average of eight hours a day during the week and four hours of overtime a weekend. (RX A). The record also includes a breakdown of what Complainant would have made during the months after his termination. (CX 10-11). He was terminated on August 31, 2005, and reinstated on July 18, 2006. He testified that his lost wages during this time were $22,464.12, not including overtime he would have received or a cost of living raise. (Tr. 70-1). The evidence in the record supports this figure. (EX A; CX 10-11).

Therefore, when adding together Complainant's lost wages of $22,464.12, the standard of living raise he would have received in August 2005, and the lost overtime pay for snow removal and other Village repairs he would have received, I find that Complainant is entitled to $25,000 of back pay, plus interest in accordance with prevailing case law, until the date it is paid to Complainant.

A respondent has a duty to show that a complainant failed to mitigate damages. *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001); *Timmons v. Franklin Electric Coop.*, 1997-SWD-2 (ARB Dec. 1, 1998); *West v. Systems Applications International*, 94-CAA-15 (Sec'y Apr. 19, 1995). The Respondent must show that Complainant failed to use reasonable diligence to get the substantially equivalent positions that were available. *Id.* Respondent presented no such evidence. However, Complainant testified that he tried numerous avenues to find a job after his termination. (67-8). However, he was unsuccessful. (Tr. 67-8). All doubt is resolved in favor of Complainant. *Id*. Complainant received no other income during this time period. (Tr. 67-9). He received unemployment benefits, but the Administrative Review Board has consistently held that unemployment benefits should not be subtracted from an employee's back pay award. *Keene v. Ebasco Constructors, Inc.*, 95-ERA-4

(ARB Feb. 19, 1997), citing *Artrip v. Ebasco Services, Inc.*, 89-ERA-23, slip op. at 4-5 (ARB Sept. 27, 1996); *Rexroat v. City of New Albany, Indiana*, 85-WPC-3 (ALJ Apr. 20, 1987).

B. Non-Economic Compensatory Damages

"Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001). Complainant has the burden to prove that he has suffered from mental pain and suffering and that the discriminatory discharge was the cause. *Crow v. Noble Roman's Inc.*, 95-CAA-8 (Sec'y Feb. 26, 1996), citing *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992). Complainant argues that he has suffered from emotional distress, mental anguish, impairment to his reputation, depression, and marriage problems all because of his discriminatory termination.

A determination on whether a complainant is entitled to noneconomic compensatory damages is a subjective determination. One must take into consideration the facts and circumstances of each individual claim. *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y July 19, 1993); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Dec. 30, 2004). Furthermore, although psychiatric or medical testimony makes it easier to prove damages, a complainant can still receive those damages without such testimony. *Smith v. Littenberg*, 92-ERA-52 (Sec'y Sept. 6, 1995), citing *Blackburn Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Aug. 16, 1993); *Assistant Sec'y of Labor for OSHA v. Guaranteed Overnight Delivery*, ABA Case No. 96-108, ALJ Case No. 95-STA-37 (Sept. 5, 1996); *Jones v. EG&G Def. Materials, Inc.*, ARB Case No. 97-129, ALJ Case No., 95-CAA-3 (ARB Sept. 29, 1998). Figuratively speaking, Courts have awarded damages between $20,000 and $75,000 for emotional distress in similar claims, with and without medical evidence. *See Jones*, 95-CAA-3 (awarded $50,000); *Assistant Sec'y of Labor for OSHA*, 95-STA-37 (awarded $20,000); *Beliveau, Jr. v. Naval Undersea Warfare Center*, 97-SDW-1 (ALJ June 19, 2000) (awarded $50,000).

Complainant testified that after his termination he suffered from depression, humiliation, headaches, loss of sleep, loss of self-esteem, and weight gain. (Tr. 72). He attributes all of these ailments to his termination. (Tr. 72-73). Complainant had never been fired before these events. (Tr. 74). Complainant's wife had to support him during this time period and his relationship with her suffered. (Tr. 74). He testified that the termination really took a toll on his marriage. (Tr. 74). He was also unable to participate in many social activities due to loss of income and depression.[10] (Tr. 74, 75). Complainant also stated that due to the impending criminal investigation and charges, he feared being arrested or being questioned about the incident when going out in public. (Tr. 72-76). Complainant's wife's testimony supported his allegations. (Tr. 101-6). She stated that Complainant was depressed and would not even leave the house. (Tr. 101-6). The situation took a huge toll on the couple's marriage. (Tr. 101-6). I find the

[10] On cross-examination, Respondent questioned Complainant regarding his hobby of trap shooting, the money he made at tournaments, and Complainant's position on a semi-pro football league. (Tr. 86-88). These funds are not directly relevant to the issues at hand. Complainant made this money prior to his termination and there was no testimony of funds made after his termination. It appears that this testimony may have been used to try to impeach Complainant's credibility; however, I find no such evidence.

testimony of Complainant and his Wife very credible on the issue of emotional distress. Furthermore, there is no evidence in the record to refute their testimony.

Complainant also argues that he has suffered damages for loss of reputation. Complainant has the burden to prove he has suffered loss of reputation. *Jenkins v. U.S. Envtl. Protection Agency*, 92-CAA-6 (ALJ Dec. 14, 1992). The Court must take into consideration how Respondent's actions had a negative impact upon Complainant's reputation. *Van Der Meer v. Western KY Univ.*, 95-ERA-35 (ARB Apr. 20, 1998). In this claim, immediately before terminating Complainant, Mayor Priore called and asked for a criminal investigation. The Chief of Police opened a criminal investigation and a warrant was later issued for Complainant's arrest. Complainant was fearful of being arrested and upon leaving his home he was questioned about the incident by neighbors and friends. Although the charges were later dropped and Complainant never had to make a court appearance, the Village is a very small town and word of the investigation and charges spread throughout. Therefore, Complainant certainly suffered from a loss of reputation within the community.

Accordingly, based upon all the evidence in the record, I find that Complainant is entitled to $25,000 in non-economic compensatory damages for loss of reputation, emotional distress, and mental anguish.

C. Punitive Damages

Forty-two U.S.C. § 300j-9(i)(2)(B)(ii) of the Act specifically allows for exemplary damages where appropriate. However, exemplary damages should only be awarded when necessary to punish and deter the respondent's reprehensible conduct. *Beliveau v. Naval Underseas Warfare Center*, 1997-SDW-1 and 4 (ALJ June 29, 2000). The Court should look at the circumstances of each claim subjectively. A respondent's state of mind should be analyzed to determine whether the respondent acted with reckless disregard for the complainant's rights and then whether the respondent engaged in "conscious action in deliberate disregard of those rights." *Johnson v. Old Dominion Sec.*, 1986-CAA-3, 4 and 5 (Sec'y May 29, 1991), slip op at 16-17. *See also, Jones v. EG&G Def. Materials, Inc.*, 1995-CAA-3 (ARB Sept. 29, 1998).

Respondent's state of mind in this claim warrants an award of punitive damages. Mayor Priore acted with reckless disregard for the law when he terminated Complainant. He failed to conduct an investigation or even ask Complainant's side of the story. Even during his testimony, his demeanor continued to show his animosity toward Complainant and the situation. Mayor Priore truly believes he and Respondent are in the right, despite the fact that he testified that it is a violation of the environmental protection statutes to terminate an employee for participating in protected activity. Furthermore, the fact that Mayor Priore's first reaction was to call the police and not conduct his own internal investigation shows that Mayor Priore acted with complete indifference to Complainant's rights. *See Jayco v. OH Env't Prot. Agency*, 1999-CAA-5 (ALJ Oct. 2, 2000); *Beliveau*, 1997-SDW-1.

Therefore, I find that Respondent should pay $20,000 in punitive damages to Complainant. In awarding this amount, I have considered all the circumstances of this case, including Complainant's rehiring after one year.

D. Abatement and Complainant's Personnel File

Complainant also requests the removal of all documentation of his termination from his personnel file. In *Doyle v. Hydro Nuclear Services*, 89-ERA-22 (ARB Sept. 6, 1996), the respondent was ordered to expunge from complainant's records all derogatory or negative information related to the failure to hire him, to provide neutral employment references, not to divulge any information pertaining to not hiring complainant or denying him unescorted access to a nuclear facility, and to post the Administrative Review Board's Decision. I find that Complainant's remedial action is warranted. Respondent is thereby ordered to purge any documents referencing Complainant's termination.

Respondent is also ordered to refrain from any and all other violations of the whistleblower statutes. Mayor Priore testified at the hearing that he knew it was a violation to discriminate against an employee who files a safety complainant. Therefore, he and the rest of the Village is hereby ordered to abide by the applicable statutes and regulations.

E. Attorney Fees and Costs

Counsel for Complainant may submit a Fee Petition within thirty (30) days of this decision detailing the aggregate amount of all costs and expenses that were reasonably incurred by Complainant in this case. Supportive documentation must be attached. Thereafter, Respondent shall have twenty (20) days within which to challenge the payment of costs and expenses sought by Complainant, and Complainant shall then have ten (10) days within which to file any reply to Respondent's response.

RECOMMENDED ORDER

1. Respondent shall pay to Complainant the sum of $25,000 in back pay plus the appropriate interest at the IRS rate, computed from the date of termination until the date of payment to Complainant.

2. Respondent shall pay to Complainant noneconomic compensatory damages in the amount of $25,000.

3. Respondent shall pay to Complainant punitive damages in the amount of 20,000.

4. Respondent shall purge Complainant's personnel file as outlined above.

5 Respondent shall pay Complainant's attorney's fees in the amount to be determined after briefing.

6. Both Parties shall submit their respective briefs within the time stated regarding attorney fees.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the Administrative Law Judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC, 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case 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, 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and Briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC, 20210.

If no Petition is timely filed, the Administrative Law Judge's Recommended Decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).