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Issue Date: 21 April 2011

CASE NO.: 2010-SDW-00001

In the Matter of:

GREGORY MILLLIKEN,
Complainant,

v.

LEE COUNTY BOARD OF COMMISSIONERS,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

Appearances:

Geralyn F. Noonan, Esq., Law Office of Geralyn F. Noonan, Fort Myers, FL
For Complainant

Jack Peterson, Esq., Assistant County Attorney. Lee County, Fort Myers, FL
For Respondent.

BEFORE: PAMELA J. LAKES
Administrative Law Judge

The instant case has been brought under the employee protection (whistleblower) provisions of the Safe Drinking Water Act (SDWA) (42 U.S.C. §300j-9, with implementing regulations appearing at 29 C.F.R Part 24). The case arises out of the assertion by Complainant Gregory Milliken ("Complainant") that he was retaliated against and ultimately terminated by Respondent Lee County Board of Commissioners ("Respondent") based upon his participation in a previous SDWA whistleblowing action against Respondent. For the reasons set forth below, I find that this case must be dismissed because the Complainant cannot establish by a preponderance of the evidence that he engaged in protected activity that was a motivating factor to the adverse employment action taken against him and he has therefore failed to establish a cause of action cognizable under the SDWA. Further, even if he were to establish such a connection, Respondent has established that Complainant would have been terminated for a legitimate, nondiscriminatory reason absent his protected activity.

PROCEDURAL BACKGROUND

Complainant made a complaint against Respondent that was verbally communicated to the Occupational Safety and Health Administration (OSHA) in Ft. Lauderdale on July 1, 2008, with a formal complaint dated June 30, 2008 filed with OSHA on July 3, 2008. (ALJ 1). The complaint alleged that Complainant had received a corrective action on June 4, 2008 as a result of what he characterized as a "'staged' event that occurred on ***January 25, 2008***." [Emphasis in original.] *Id.* Complainant was subsequently terminated in June 2009, and the termination and events leading up to it were also investigated by OSHA. Upon completion of the investigation, on October 19, 2009, the Area Director of OSHA found no merit to the complaint. By facsimile and letter of November 12, 2009, Complainant, through counsel, filed timely objections and a request for a hearing.

A hearing was held before the undersigned administrative law judge on March 10 and 11, 2010 in Fort Myers, Florida. At the hearing, Administrative Law Judge Exhibit 1 (ALJ 1), Complainant's Exhibits 4 (as modified), 11 (as modified), 22, 32, 34, 35, 36 and 37 and Respondent's Exhibits 1 through 11 were admitted.[1] Testimony was provided by Complainant, a former water plant operator at the Olga Water Treatment Plant; Gary Fernberg, Complainant's immediate supervisor; Chad Denney, Gary Fernberg's supervisor; Henry Barroso, Chad Denney's supervisor; Frank Kane, night shift water plant operator at the Olga plant; Gary Waters, a water plant operator at the Waterway Estates Water Treatment Plant; Jon Meyer, operations manager with Lee County; and Thomas Hill, Deputy Director for Lee County Utilities. The record closed at the end of the hearing; however, the parties were allowed until May 17, 2010 to file initial briefs and June 17, 2010 to file any responses. As extended post-hearing, Respondent's brief was timely filed on May 24, 2010 and Complainant's brief was timely filed on June 28, 2010. There were no responses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTS

Background

Complainant was formerly employed by the Lee County Government, Department of Public Works/Utilities as an Operator A (Water).[2] (CX 36.) He was employed by Lee County as a water plant operator from January 2001 through June 2009. (Tr. 22-23). In that capacity, according to his own description, he was responsible for maintaining a drinking water plant for the purpose of producing a safe drinking water for the public consumption. (Tr. 23-23). His supervisor was initially Chad Denney, then Lenny Sword [mistranscribed as "Seward"], and finally Gary Fernberg. (Tr. 23, 143-144; CX 36). According to Complainant, the chain of command "goes Gary Fernberg, Chad Denney, Henry Barroso, Jon Meyer, and then Tom Hill."

[1] Administrative Law Judge, Complainant's, and Employer's exhibits will be referenced as "ALJ," "CX," and "EX," respectively, followed by the exhibit number. References to the hearing transcript will appear as "Tr." followed by the page number. Witnesses will be identified by their last names.

[2] Complainant testified that he was licensed as an A operator, which was the highest level. To achieve that level, he passed three separate Florida state board exams, for C level, B level, and A level. (Tr. 25).

(Tr. 24). During the last period of his employment, Complainant was employed in Alva, Florida under Fernberg's supervision. (Tr. 25-26). At the end, he was working four 10-hour days, and he rotated between the 6:00 a.m. to 4:00 p.m. shift, the noon to 10:00 p.m. shift, and the 8:00 p.m. to 6:00 a.m. shift. (Tr. 26). Complainant testified that he was terminated on June 18 or 19 of 2009. (Tr. 41).

Previous Whistleblower Case and Settlement

Complainant's earlier SDWA whistleblower case against the Respondent (filed in March 2007 and amended in April 2007) was settled by an agreement executed on July 6, 2007 and approved by the Supervisory Investigator on behalf of OSHA on July 9, 2007 ["Agreement"]. (Tr. 26-27; CX 22). It followed an October 2006 complaint that he filed with the Department of Environmental Protection (DEP) based upon the filing of a false report, and he alleged that he was directed by Denney to change a report that was subsequently filed with DEP by Leonard Stuart, the lead operator at the time.[3] (Tr. 26-28). At that time, he was required to sign a "last-chance" agreement by his supervisors (Hill, Denney, and Fernberg) and Human Resources (Stephanie Figueroa). (Tr. 32). Under the terms of the Agreement before OSHA, his "last chance warning" would be rescinded, his last appraisal overall rating would be changed to a "Meets" (along with a memorandum explaining the change), his personnel record would be purged of derogatory references to his exercise of rights under the jurisdiction of OSHA, he would be reimbursed for wages lost during his one-week suspension, he would be reinstated to his former position, and Respondent agreed not to mention his protected activity to third parties, including prospective employers. (CX 22). The Agreement referenced another agreement encompassing matters not within OSHA's jurisdiction. *Id.* According to Complainant, he learned that Respondent did not comply with the requirement that it not mention his having engaged in protected activity and there was a delay in compliance with the terms relating to the performance evaluation and the placement of a memorandum explaining the change in his record. (Tr. 37-41).

A memorandum of December 4, 2006, from Gary A. Maier, Environmental Engineering. Lee County Health Department to Greg Parker entitled "Complaint Investigation Report" concluded (in response to an anonymous complaint) that Lee County Utilities (LSU) had not intentionally falsified the September 2006 MOR by leaving certain information blank; however, it found that LSU had pumped high pH water into the distribution system but did not report the pH readings, as alleged, and that "LCU should have reported a short term pH secondary violation to the Lee County Health Department within 48 hours." (CX 4). As a result, a non-compliance letter was to be issued to LCU "documenting the secondary pH and reporting violations, and requesting a written corrective action plan to prevent recurrence." *Id.* The memorandum indicated that the anonymous complainant had been contacted and that Denney, Barroso, and Lenny Sword had been interviewed concerning the incident.[4] *Id.*

[3] According to Complainant, Denney also withheld his performance appraisal that was due in January 2007. (Tr. 27).

[4] Lenny Sword [mistranscribed as "Seward"] was Complainant's supervisor at the time he made his initial SDW complaint. (Tr. 143-144; *see also* Tr. 141). It is not entirely clear that Complainant was the one who made the anonymous complaint; however, the time frames correspond.

Hill acknowledged that there had been a prior violation due to elevated pH levels and he was involved in the response, which included shutting off the system and having the whole system back flushed. (Tr. 451). He did not know whether Complainant was involved in that matter and he did not recall whether Complainant had alleged that Denny had instructed him to falsify a report. (Tr. 454-455). He was, however, knowledgeable about the settlement agreement and it was his understanding that nothing prior to Complainant's complaint could be utilized against him. (Tr. 476-477).

Denney thought that the prior complaint was resolved "in that the complaints that [Complainant] made were totally wrong" and he disputed that the County had submitted false information, as alleged. (Tr. 141-142). He was not a party to the settlement and would have objected to it had he been asked because "everything that [Complainant] had said was false." (Tr. 142).

At the hearing, Fernberg, Barroso, and Meyer denied personal knowledge of the resolution of Complainant's earlier complaint. (Tr. 192, 228-229, 356, 371).

Termination

According to Complainant, the circumstances surrounding his firing occurred as follows: He had been working midnights for approximately seven weeks and he had submitted a vacation request for an extended vacation in Europe well in advance. (Tr. 41-42). Complainant's request for leave from June 15, 2009 [Monday] through July 5, 2009 [Sunday] had been approved by Fernberg over one year before. (CX 32). The week prior to the trip, Complainant had surgical procedures performed on a Monday, and he worked on Monday night, as scheduled, but was uncomfortable. (Tr. 41-42). The following night, he called in sick because he was so uncomfortable with the surgical procedures and injections. (Tr. 42). On Wednesday [June 10] at approximately noon, Fernberg told him that he needed to report downtown for an administrative hearing; however, Complainant told him that was not possible and he needed more consideration than that as he had swelling and was unable to get dressed. (Tr. 42-43; *see also* Tr. 113). He was on sick leave the following day and he was scheduled to be off the next three days, to return to work on Sunday, prior to his European vacation. (Tr. 43). According to Complainant's understanding, he was terminated while he was on vacation in Europe and the decision to terminate him was made by Tom Hill. (Tr. 45). He was sent a letter from Lee County, from Tom Hill, on a Thursday directing him not to report to work on Sunday. (Tr. 45-46; *see also* Tr. 113-114; RX 2). He received a notice of corrective action (termination) that was sent to his home, and he also received a copy from his counsel when he returned from vacation. (Tr. 46-47).

A Lee County Notice of Proposed Corrective Action ["Notice"], dated June 10, 2009, proposed that Complainant be terminated, with a termination date "TBD" [to be determined] based upon multiple violations of Lee County Policy 101 Behavior of Employees, Policy 203 Workplace Violence, and Policy 313 Code of Employer-Employee Relations. (CX 34). The Notice specifically stated the following, in pertinent part:

> On 02/12/09 you reported the 4:00 PM routine hourly pH check of raw water entering the plant for processing indicated a serious change in intake water quality. You reported and entered into the log that the raw pH was in excess of 9 and had a slight musty algae smell. Your log entry indicates that in response you increased the PAC auger speed to 60 hz. You know that such a report is a serious public health matter requiring immediate action to remedy. However, the report was wrong. Your erroneous reporting required a heightened response by Lee County Utilities which involved notifying a number of other state and local agencies of the situation. The raw water pH was, in fact, well within acceptable parameters and no extraordinary steps were required. Further, it is obvious you changed the entry in the official plant log book to reflect the correct pH. Your responses to this incident have been neither candid nor forthright. Investigation of this incident can only conclude that this "error" was either made deliberately or, if simple negligence, was subject to an attempt to cover it up. You were the only operator on duty. The log entries were, without question, made by you. . . .
>
> Later, on 03/06/09 you participated in a verbal confrontation which occurred at the Olga Water Treatment Plant between yourself and a Lee County Utilities Manager. This confrontation was witnessed by your immediate supervisor. You have previously received two Written Warnings and a mandatory EAP referral for anger management. These incidents clearly demonstrate a continued pattern of confrontational behavior. . . .
>
> On your annual Performance Evaluation dated 01/31/09, you refused to sign your goals and objectives for the current evaluation period. However, you were informed by the Lee County Operations Manager on 02/05/09 that you would be expected to perform, and would be evaluated on your current goals and objectives. You have refused and failed to perform the Safety Officer duties outline in Objective #1 due by 04/01/09. . . .

(CX 34). Barroso testified that he did not believe that the Notice was ever issued, in that it was a proposed corrective action and, although Complainant was notified by letter that he was going to receive it, he never showed up. (Tr. 256, 259).

The final version of the Notice, entitled "Notice of Corrective Action," was signed (by Hill as Supervisor, Douglas Meurer as Div. Director, and Lindsey Sampson as Acting Dept. Director) and dated June 24, 2009. (RX 7). It indicates that corrective action was taken as a result of the Notice dated June 10, 2009 and that Complainant was terminated "effective 06/19/09." *Id.*

January 2008 Sneary Confrontation

With respect to the two written warnings referenced in the Notice, Complainant believed that one of the references was to an incident in 2004 that was supposed to be expunged pursuant to the Agreement while the other involved a maintenance person (Sneary) and occurred in January 2008. (Tr. 53-61.) Complainant testified as to two occurrences involving Sneary. The

first, in which Sneary shook his fist at him, Complainant reported to Fernberg, who told him to ignore Sneary. (Tr. 56). Fernberg did not dispute that Complainant had contacted him about the first incident but did not recall the specifics. (Tr. 193-194). The second, which occurred about two weeks later, involved a short verbal altercation, followed by Sneary following him across the parking lot, carrying a piece of PVC pipe, and stating that Complainant "was through" and "his days there were up," at which point Complainant told him that he had lost his mind and needed to back off. (Tr. 57). Sneary continued to follow him, approaching from behind, and Complainant again told him to stop what he was doing as he was interfering with Complainant's work. (Tr. 57-58). There was no physical contact, the entire incident lasted no more than two to two and one half minutes, and it ended when Complainant walked away. (Tr. 58-59.) Later the same morning, Complainant was directed to report to Elaine Schultz from Human Resources and he was advised that he was under investigation for his actions concerning Sneary; however, he was not disciplined until five months later, when he was sent to EAP [employee assistance program] for a psychological investigation. (Tr. 60-61). According to Complainant, after a 50-minute session, the counselor returned him to work. (Tr. 61). He understood Sneary was subjected to a lesser disciplinary action, such as a reprimand. (Tr. 61). Although Complainant viewed footage from three security cameras in April 2008, he testified that there were significant gaps and only one or two frames could be viewed, making him "disappointed and suspicious that these cameras had all managed to fail at the same time." (Tr. 96-97).

Barroso was not involved in the Sneary matter apart from reviewing the paperwork. (Tr. 231). However, it was his understanding that the reference to anger management training in the Notice referred to the Sneary incident. (Tr. 254-255). He did not know whether Sneary was sent to anger management. (Tr. 255). He explained that the imposition of more severe penalties on Complainant was warranted by the structured progressive discipline system in which discipline is based upon past incidents. (Tr. 233-234). Barroso was aware that Gary Waters had complained about the parking situation at Waterway Estates but he did not mention Sneary in particular. (Tr. 235).

Meyer became acquainted with Complainant as a result of the Sneary incident. (Tr. 369). He recalled that both Complainant and Sneary were involved in the confrontation so they took corrective action but he was not very involved. (Tr. 369-370). It was his understanding that Sneary received a verbal warning or a coaching and counseling session, while Complainant received a written warning and may have also been requested to go to the employee assistance program. (Tr. 387-388). As it was Complainant's second documented case of confrontation, it went to the next progressive disciplinary level. (Tr. 388).

Hill testified similarly. (Tr. 479-481). He acknowledged that there was a delay in imposition of discipline because of the need to investigate, wade through the issues of viewing the videos and pictures, determine whether that was allowable, and run everything through the County Attorney's office. (Tr. 485). Ultimately, he stated that it was "plain and simple" as both parties admitted to the incident. *Id.*

Waters testified that he had never had a confrontation with Sneary but that he observed him arguing with another maintenance employee, about one and one half to two years before.

(Tr. 416-418). He reported the incident with the woman from human resources when she asked him questions about Complainant when he was still employed there. (Tr. 415-418.)

Proposed Transfer

In January 2009, according to Complainant, he was advised by Barroso that the transfer he had requested had been approved.[5] (Tr. 72). In response, Complainant advised that he had not requested a transfer. *Id.* Although he did not submit a written request, as required, he mentioned that it was time for him to consider moving to another plant during the Sneary write-up in 2008. *Id.* Complainant was not interested in the proposed transfer to Waterway Estates because it would result in his being placed back on probationary status, Fernberg and Denney would still remain his supervisors, and he would be displacing another worker, Gary Waters. (Tr. 73). Fernberg verified that he was lead operator of the Waterway Estates Water Treatment Plant in North Fort Myers and that Waters was the operator there. (Tr. 196).

Waters testified that Barroso told him that they wanted him to swap jobs with Complainant and he would be transferred to the Olga plant; however, he objected because he lived 50 feet from the Waterway Estates plant and did not want to commute to Olga. (Tr. 418-420). He testified that Complainant told him that he did not want the transfer either and felt that he was being harassed by management. (Tr. 419). A week later, Barroso came back and told him they were not going to make the transfer. (Tr. 420).

According to Hill, Complainant was provided with the opportunity to transfer, "basically at his request at one time." (Tr. 482). Barroso indicated that Complainant was not transferred because he declined the offer. (Tr. 212-213). He verified that Fernberg and Denney would still remain his supervisors but denied that he would be placed on probationary status as the proposed transfer was not disciplinary in nature. (Tr. 237-238). Meyer also denied that Complainant would have been placed on probationary status. (Tr. 384).

Performance Evaluation for January 2008 to January 2009 and Safety Officer Assignment

Fernberg was Complainant's supervisor until his termination, and he was responsible for preparing annual performance reports. (Tr. 166, 178-179).[6] He rated Complainant as "a very good operator that evaluated well." (Tr. 166).

On his performance evaluation prepared by Fernberg, dated January 31, 2009 and covering the preceding year, Complainant received a "Meets Expectations" rating. (CX 36). On most job elements (objectives/functions and work traits), Complainant received a "Meets" rating and he received an "Exceeds" rating on three out of five objectives/functions and on one out of twelve work traits. *Id.* Under "Professionalism," Complainant received a "Meets" with the following comments:

[5] Barroso testified that Complainant had asked for a transfer either verbally or in writing but the request was not made to him personally. (Tr. 212, 237). He did not recall whether the request was made to Denney or Meyer or whether it was made at a meeting. (Tr. 212).

[6] The period of time that Fernberg served as Complainant's supervisor was transcribed as: "Two or three months, I guess." (Tr. 178-179). According to my notes, he testified that he supervised Milliken for "2-2 ½ yrs."

> Greg shows professionalism in most areas. He may have lapses in professional behavior when dealing with coworkers or internal employees. These are quickly corrected. A professional appearance is maintained. In addition on June 4, 2008 he received a Notice of Corrective Action for a confrontation between him and another Utility employee. Since this incident happened there have not been any other problems with his professional behavior. This kind of positive attitude towards his job and coworkers should continue.

Id. The end of the evaluation listed objectives for the upcoming evaluation period, which included "Objective/Major Job Function #1" setting forth Complainant's assignment as safety officer for the Olga WTP [water treatment plant]. *Id.* The job entailed inspecting the safety equipment at the facility, doing any necessary reporting, reviewing any SSOP's with safety concerns to ensure all issues have been addressed, performing a total plant inspection to identify safety problems, and completing the SSOP review and inspection by April 1, 2009 (to receive an "exceeds" rating). *Id.*

Complainant testified that he objected to the safety officer assignment because it involved performing all inspections on safety equipment, fire equipment, eyewashes, etc., and "to establish and inspect the plant for anything that had been overlooked" in the previous 40 to 42 years, "however long the plant had been in existence," and to write SSOP's [standard safe operating procedures] on any substandard or safety concerns. (Tr. 62-63). He was concerned about the assignment because he had no formal safety training or experience with safety requirements and regulations, and he voiced those concerns in writing to Fernberg. (Tr. 63-64). Specifically, he had no idea as to the safety requirements for inspecting fire extinguishers; he had no knowledge of the code requirements for safety lights in work areas or for illuminated signs; and he was concerned about his ability to make evaluations concerning the safety of confined spaces within the plant.[7] (Tr. 64- 67). As a result of his concerns, Cadd Balogh, the operator who was serving as the safety officer, was directed to train him; however, Balogh indicated that he was "pretty much self-trained." (Tr. 67).

Despite his concerns, Complainant testified that he did ultimately sign the evaluation, but he submitted a four or five page document setting forth his concerns to Fernberg. (Tr. 69). Fernberg testified that, although Complainant signed the evaluation itself, he did not sign the page setting forth the safety responsibilities. (Tr. 186).

The record contains Fernberg's March 5, 2009 directions concerning Complainant's responsibilities for checking the emergency and exit sign lights and Fernberg's March 24, 2009 memo directing him to inspect the fire extinguishers; it also includes Complainant's March 30, 2009 response, complaining of his lack of training from qualified persons and refusing to accept the responsibility until he had received such training.[8] (RX 5, 9). Complainant further stated that the responsibility for safety was that of supervision, as reflected by a safety film, and he

[7] Signup sheets for training reflect that Complainant received "Confined Space Entry" training in April 2007 and (after the safety officer assignment) "Confined Space" training in April 2009. (RX 11, RX 10).

[8] On cross examination, Complainant admitted that he was capable to of determining whether the needle at the top of a fire extinguisher was green or red or whether a light was out. (Tr. 102-103).

attached the signup sheet for the film that was signed by both him and by Fernberg. *Id.; see also* Tr. 97-100. In the same response, Complainant asserted:

> Obviously it is your intent to continue the relentless harassment and retaliation directed at me; while being negligent of your responsibilities and duties as lead operator/supervisor at the Olga Water Treatment Plant.

(RX 5).

Fernberg explained that the safety officer job entailed inspecting safety equipment (such as fire extinguishers and eyewashes), performing a total plant inspection (which involved looking for potential trip hazards such as ladders or fire hoses), and reviewing existing standard operating procedures to make sure all issues had been addressed (as, for example, when there was new equipment) (Tr. 181-184). Fernberg and Barroso both verified that Complainant refused to do the job because he felt that he lacked training to do the job correctly. (Tr. 185, 244-245).

Denney explained that the safety officer job was just a function and not a separate job, and it only required four to five hours per month as another duty added on to the operator's job. (Tr. 152-153). Denney's involvement in this matter consisted of his sending a memo to his boss indicating that Complainant had refused to perform the safety officer duties and that they needed to address the issue. (Tr. 147-148).

February 12, 2009 Log Book/Raw Water Incident

With respect to the February 12, 2009 incident, Complainant testified as follows:

> As I was making my entry, I was writing the initial number, and I realized as I was sitting there writing the number that I had begun to write the number 9, and I did an over-write correction as I sat there.

(Tr. 75). He explained that an over-write correction was "where you begin to enter a number and you realize you're making a mistake and you make it right" and that this had long been an accepted practice. *Id.* Aside from correcting it as he was sitting there, Complainant denied changing the entry in the official plan log book, disguising or hiding it, or improperly altering it. (Tr. 76). Further, he testified that other employees had changed the log book entry in the same manner and they were not, to his knowledge, disciplined. *Id.* Specifically, he mentioned that he witnessed Fernberg do an over-write correction on another operator's entry about two months after the incident. (Tr. 87). When asked about the alleged over-write, Fernberg did not recall doing so and stated that it was unlikely that he ever did so. (Tr. 178). Complainant testified that a raw water pH reading in excess of 8.0 or 9.0 meant "[n]othing" and he denied that there was a threat to public health. (Tr. 76-77). He also disputed that he implied that there was algae in the raw water and he stated that there was no log book entry concerning algae smell (as opposed to musty odor). (Tr. 77). He denied that he recorded an algae bloom in February 2009. (Tr. 81). Complainant indicated that there were numerous monitoring spots throughout the plant

measuring chlorine levels and the like but that whether there was an algae bloom could only be analyzed by visual inspection of the raw water intake and the treatment process itself.[9] (Tr. 82).

A copy of the color-coded log book entry was admitted as Respondent's Exhibit 1 [RX 1]. The entry for Thursday 2/12/09 at 1620 [4:20 p.m.], highlighted in a light red or pink color, states:

> Raised PAC auger speed ↑ to 60 HZ. Raw water pH is in excess of **8**.0, slight musty odor detected at aerator.[10]

(RX 1). The next entry, for 1630, is lightly highlighted in yellow and states: "Added 2 bags (80 lbs) of PAC to hopper." *Id.*

Complainant testified that while he was performing his normal duties, at 4:00 p.m., Denney entered the lab, contrary to the termination notice, which reflected that he was working alone. (Tr. 83). Denney is a supervisor as well as an A licensed operator. (Tr. 85-86). According to Complainant, Denney stated that he did not smell any odor at the aerator and, after a brief discussion in which Complainant told him that he had "raised the PAC for odor purposes," Denney told Complainant that he was going down to the river to inspect. (Tr. 84). On cross examination, Complainant testified that he had added the 80 pounds of PAC to the hopper as part of his routine round (not due to the odor).[11] (Tr. 105-106). He also testified that Denney could have looked at the on-time real-time monitoring equipment, located within five to ten feet from him, to check the pH level. (Tr. 110-111).

When Complainant left at the end of his shift at 8 p.m., Frank Kane, the night shift operator, took over. (Tr. 88, 271, 285, 303). When he came on duty, he reduced the PAC speed because he "realized everything was cool" and they try not to waste money on chemicals. (Tr. 321). Kane testified that Complainant was a meticulous worker ("[s]econd to none") but that it was not uncommon for operators to make errors in log books. (Tr. 283, 323). He testified that under such circumstances, the operator was supposed to cross out the incorrect entry, initial it, and put the right one next to it. (Tr. 284). He testified that a pink highlight would be warranted for a slight musty odor as well as for an elevated pH. (Tr. 321-322). According to Kane, nobody contacted him to discuss the log book entries on February 12, 2009; however, days later it was brought to his attention by the day shift operator "because it was all of a sudden a big deal" and he was not sure why. (Tr. 287, 304-305).

Denney testified that he was an A certified water operator and had been a county employee for 30 years. (Tr. 120). Although he was not Complainant's immediate supervisor, he was his boss's boss, he was responsible for all the water plants, and he was in charge of the lead operator [Fernberg]. (Tr. 121, 134). He explained that he had been at the Olga Water Treatment

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[9] Barroso testified that there were various types of instruments that were available to identify potential algae problems and he disputed that a visual inspection was the only way. (Tr. 261)

[10] Based on my own visual inspection of the log entry, it looks as if an "8" was written over a "9." (RX 1). At the hearing, I was able to inspect the actual log book as well as the color copies that were offered as exhibits.

[11] On redirect, Complainant explained that sometimes more than 80 pounds was added, and 160 pounds (four bags) had been added in the previous shift, the same total amount that he added during his shift. (Tr. 115-116; RX 1).

Plant at about 4:00 p.m. on February 12, 2009 because he was doing paperwork and his regular office was located at the site. (Tr. 121). According to Denney, Complainant came to him at about 4:20 in the afternoon, told him that he smelled something in the aerators, asked him to check it out to see what he thought, and recommended that they raise up the PAC's "with the pH being higher." (Tr. 121-122). Denney did not recall whether he said exactly 9.0 or higher than 9.0, but, as that was an indication that they could have an algae bloom happening, he agreed with Complainant that they should raise the PAC. (Tr. 122). He went down to the river and did not notice anything unusual, but he explained there was not always advance notice of an algae bloom so steps would be taken ahead of time to err on the side of caution. (Tr. 122). He did not actually see the log book entries until the next day. (Tr. 122-123). He explained that an unusual occurrence was highlighted in pink, the date was highlighted in blue, and a chemical change was highlighted in yellow. (Tr. 123-124).[12] As reflected by the log book entry, the PAC auger speed was raised to 60 hertz, which is the maximum speed rate, and more chemical was added to the water because of the increased output. (Tr. 124-125; *see also* Tr. 213-214). Denney explained that an 8.0 reading was perfectly normal but a 9.0 was not, and the difference was tremendous because the numbers were logarithmic.[13] (Tr. 125-126). He further explained that certain events were triggered by a 9.0 reading "because there is potentially a taste and odor algae bloom happening." (Tr. 126).[14]

Denney testified that he called Barroso (his immediate supervisor), who called Hill concerning the incident, and Hill in turn alerted the appropriate agencies that they could potentially have an algae bloom.[15] (Tr. 162). According to Denney, there was a procedure in place at Lee County for log book entry changes that involved striking out the incorrect entry so that it could still be read (by drawing a line though it) and initialing it. (Tr. 162-163). Barroso also testified that, under State rules, log book changes were supposed to be made by drawing a single line through the error, initialing it, and putting in the corrected number. (Tr. 223).

Barroso, a class A certified water operator, testified that Denney called and told him that the pH "had increased drastically up to the 9.0" but that he had not seen anything abnormal at the river from which the raw water was drawn (the Caloosahatchee, above the Franklin lock). (Tr. 211, 215-216, 219). He told Denney to follow the SOP for triggers for algae blooms and was advised that it was already implemented. (Tr. 216). At that point, he sent an email out to his director, Doug Meurer; the deputy director, Tom Hill; his supervisor, Jon Meyer, the operations manager for Lee County Utilities; and Chuck Walther, who is the director for the environmental health section of the Department of Health. (Tr. 216-217, 226). The next day, he called Denney and was told "it looks like the pH was not a 9.0" and that it was lower. (Tr.217- 218). He then had Denney and Fernberg look into the computer readings. (Tr. 218). He explained that the plant could handle normal algae blooms by increasing alum feeds and PAC (powder activated carbon), but that serious algae blooms could necessitate closing the plant and obtaining water

[12] The color highlights to the entries were generally made contemporaneously by the operators. (Tr. 208, 215). Kane testified that it depended upon how busy the operator was, and sometimes it would take three hours before an entry was made; however, the highlights were made while the operator was there. (Tr. 305).

[13] Denney explained that the readings during the following shift (e.g., 8.77) were taken of water going into the ground storage tank, which had already been treated and had the pH adjusted. (Tr. 127-128). Those readings did not correlate with the raw water readings which were taken of untreated river water. *Id.*

[14] The Olga Water Treatment Facility Standard Safe Operational Procedure for "Algae Response" appears in RX 4.

[15] Complainant was not aware at the time of the incident that Denney had provided notice to Barroso. (Tr. 85).

from another source. (Tr. 219-220). He further explained that a reading of 9.0 would be a trigger, and "a drastic one." (Tr. 220-221). On cross examination, Barroso testified that they would routinely get calls about odor at the distribution center and sometimes at the plant, and they would "continually add PAC." (Tr. 225). He also indicated that the computer readings did not show an abnormal pH range. (Tr. 262). According to Barroso, under the SOP at the plant, the PAC feed would be adjusted according to pH. (Tr. 263).

Jon Meyer, Operations Manager, was a class C certified water plant operator. (Tr. 335). He stated that according to Complainant's supervisors, he was meticulous in his work. (Tr. 346). Meyer testified that he was contacted either by phone or by email concerning the log book entry, and he believed that he was contacted by Barroso on February 12th or the following day. (Tr. 337). He spoke with Complainant and Denney about the entry at a meeting a day or two, or possibly three, days later. *Id.* He testified that while there was nothing unusual about an 8.0 reading, a 9.0 reading was a trigger for action. (Tr. 339). He also testified that, while the proper procedure for changing an entry was "to mark through it so it's still legible and then put your initials beside it acknowledging that it had been changed," that did not happen every time. (Tr. 341). The log books were reviewed by operations staff, consultants performing a troubleshooting function, and health department regulators, who periodically did inspections and audits. (Tr. 342). According to Meyer, Complainant acknowledged that he put the entry in, and when he said this looks like it has been changed from a 9.0 to an 8.0, he said, "lots of luck proving that." (Tr. 343). Meyer described Complainant as being "kind of cocky about it" and not entirely cooperative (Tr. 345-347). During a subsequent meeting with Hill, Complainant again denied changing the entry, and stated that it was a "continuation of his entry." (Tr. 348-349). Meyer testified that he never got a straight answer from Complainant. (Tr. 349). After looking into this matter, he determined that this was a terminable offense. (Tr. 349-350). The terminable offense was not the incorrect log entries, but "not following directions." (Tr. 350-351). In addition to the management staff (Fernberg, Denney, Hill, and himself), human resources, the Director, Doug Meurer, and the County Attorney's Office were involved in the decision to terminate. (Tr. 350).

Thomas Hill was the Deputy Director for Lee County Utilities, Engineering Operations; he was a certified A operator for water; and he previously worked as a water operator. (Tr. 428). He testified that the log was recordkeeping for the state of Florida and it was a "legal binding document" used for operational functions. (Tr. 431). He indicated that the logs were important records of what was going on at a facility and they could be reviewed by regulatory agencies, and specifically the Lee County Department of Health. (Tr. 432). Hill substantiated what the other witnesses said to the effect that 60 hertz was the maximum speed for chemical feed, that an 8.0 pH reading was normal but a 9.0 was not, that a 9.0 reading required specific action, and that a slight musty odor could be indicative of algae growth. (Tr. 433-435). Typically, with that kind of reading, he would give DOH [the Department of Health] a call, and he did so the following day; he would also call upper management (his boss, the Director) and the compliance officer. (Tr. 437, 457). With respect to the log book for February 12, 2009, he reviewed the log entry and noticed that it looked as if a 9.0, which is the amount that was reported to him, had been changed to 8.0. (Tr. 438-439). He had been particularly concerned about the high pH reading because of a severe algae bloom that they had before, probably in the spring of 2008. (Tr. 439-440).

As a result of his concerns, Hill went with Meyer to the Olga plant to meet with Complainant and asked Complainant what had happened and whether the number had been changed. (Tr. 440-441). Like Meyer, he complained that they did not really get a straight answer, because Complainant indicated that he did not change the number but it was a continuation of the number that he was putting into the log book. (Tr. 441-442, 493-494). To Hill's knowledge, Complainant never admitted that he had made an error. (Tr. 442). As a result of the incident, Hill lost his confidence in Complainant's ability to do the job. (Tr. 445). He explained:

> He has always been a meticulous, good operator. There has never been really a question of that. The misrepresentation of the way this was presented to management, the unwillingness to basically give a direct, straight, definitive answer to a yes or no, and basically misrepresentation of the facts. It became very evident that it was a lot of. . .uncooperation, and that just led to sheer not having the ability to have faith in the operations anymore.

(Tr. 445). On cross examination, Hill indicated that he had asked Denney whether he could have been mistaken about the 9.0 pH level and Denney said that he was told that it was in excess of a 9.0. (Tr. 461-462). He acknowledged that the log book entry did not mention "algae," contrary to the Notice, but stated that "algae is synonymous with a pH jump," which is one of the major indicators of an algal bloom. (Tr. 486-487). He further acknowledged that despite the seriousness of the offense in terms of public safety, he allowed Complainant to continue working at the plant from February 12, 2009 through June 10, 2009 "to allow due process in terms of going through the steps of the progressive disciplinary action." (Tr. 488).

Work Environment and March 6, 2009 Verbal Confrontation

Complainant described the work environment prior to his termination with Tom Hill and Chad Denney as "increasingly hostile." (Tr. 47-49). Although he only saw Hill infrequently, "perhaps once a year," he interacted with Denney on a regular basis when he was on the day shift. (Tr. 48).

Complainant testified that on March 6, 2009, while he was performing computer work pertaining to his job, Denney and Fernberg entered the lab. (Tr. 49). According to Complainant, Denney began screaming at him that he was a liar and needed to grow up. *Id.* Complainant testified that his response to Denney was "very simple"—that his behavior was inappropriate and if he had issues that needed to be addressed, "it should be conducted downtown." *Id.* According to Complainant, Denney stated that he was upset and he continued to insist that Complainant needed to grow up and was a liar. *Id.* As a result of the incident, Complainant filed a written complaint with Barroso. *Id.* In the March 7, 2009 letter complaint addressed to Barroso (with a copy to Elaine Schultz, Human Resources, and to his counsel), Complainant stated that, after he responded to Denny's questions about statements he had made concerning problems with PAC, Denny began calling him a liar and stated that he needed to grow up, and, over Complainant's objections, he repeated those statements "numerous times." (CX 35). Complainant further stated that he took "great offense to Mr. Denney's aggressive behavior and statements" and he

accused Denney of posting naked pictures of county employees throughout the workplace and directing "falsification of drinking water reports which jeopardizes the health and safety of the public." *Id.* He concluded by stating that Denney's behavior was "another example of the relentless, continued harassment and retaliation [he had] been subjected to from Lee County Utilities management." *Id.*

Denney's account of the incident was somewhat different. He testified that he, Complainant, and Fernberg were on duty at the Olga Water Treatment Plant, and Fernberg came into his office first thing in the morning and reported that Complainant had asked him to remove a piece of paper from the hopper, supposedly at Denney's direction. (Tr. 128-129). Denney thought it was "kind of silly" because it would make no sense for him to direct an operator to ask the lead operator to remove the paper, as it was standard operating procedure to remove something from the hopper, and he decided to ask Complainant about it. (Tr. 129). When he confronted Complainant about Fernberg's statement, Complainant continued to claim that he "did say that," which Denney denied. (Tr. 129-130). As they talked, Complainant, who was seated, became hotter and hotter and then, all of a sudden, he jumped out of his chair and got in Denney's face. (Tr. 130). Complainant's tone of voice was a little bit higher than normal, but he did not take a swing at him or anything. (Tr. 130). When asked whether he had asked Complainant to grow up during a two-week-earlier confrontation, Denney indicated that he made that statement during the March 6, 2009 incident. [16] (Tr. 138).

According to Fernberg, Complainant told him that Denney told him there was foreign material in the PAC machine and wanted Fernberg to get it out, so he had a maintenance man go down and remove it. (Tr. 173). When asked, he agreed that it "did not seem like a big deal." (Tr. 172). He recalled that Denney came in and said something to Complainant about the paper in the PAC machine, "they kept getting a little louder and a little louder," and Complainant "took a couple of steps" toward Denney. (Tr. 201) At the closest, he observed them to be three or four feet away from each other. (Tr. 201-202). However, he left because the phone rang and the gate buzzer went off at the same time, and after taking care of that, he returned to his office. (Tr. 201).

Denney complained to his boss, Barroso, about the incident; Barroso went to Jon [Meyer] and Tom [Hill] about it; and they all went to HR [Human Resources]. (Tr. 132). He saw Complainant's complaint about the incident and discussed it with the supervisory staff, indicating that it was not correct. (Tr. 139). He understood that Fernberg submitted a letter concerning the incident and he also did so; Fernberg generally substantiated his account. (Tr. 139-140). He was not satisfied with the outcome because the incident warranted action and none was apparently taken. (Tr. 133).

Barroso was aware of Complainant's complaint about the incident, but he did not recall that it was directed to him. (Tr. 239-240; *see also* CX 35). He did not take action because he believed that human resources already had the information. (Tr. 240). He recalled that he had received a complaint from Denney the previous day. (Tr. 242). His understanding was that both complaints were investigated at the same time and that disciplinary action was taken against

[16] During questioning, the date "March 9, 2009" was used, but the reference was to the same incident. (Tr. 128, 138).

Denney. (Tr. 242-243). Meyer, Barroso's supervisor, testified that he did not play any role in investigating the incident. (Tr. 383).

Hill, Meyer's supervisor, indicated that he was aware of the altercation between Complainant and Denney, which was reported by Fernberg and Denney on the day it occurred, a Friday, and by Complainant the following Sunday. (Tr. 471-472). However, the incident occurred on Friday, March 6, 2009, according to the Notice, and the complaint from Complainant was dated March 7, 2009. (CX 35). Although the incident was referenced in the Notice, Hill denied that it was one of the reasons that Complainant was terminated or that the Notice constituted discipline. (Tr. 474).

Complainant stated that he was not contacted by Barroso or Human Resources concerning the complaint that he had filed but that several weeks later, he learned from another employee (Frank Kane) that Denney had filed a violence in the workplace complaint against him. (Tr. 51). He did not receive written notice of Denney's complaint until he received the proposed notice of corrective action on June 10, 2009. *Id.*

Involvement by Management in Termination

Fernberg, Complainant's immediate supervisor, testified that he was not involved in the decision to terminate Complainant. (Tr. 189). His understanding was that it was a group decision, and that HR and the legal department looked into it. *Id.* When asked whether an error of changing an 8.0 to a 9.0 would be significant enough to get someone fired, he stated that "usually if a person makes a mistake and just owns up to it, there's usually not going to be a whole lot. . .done." (Tr. 205).

Denney, Fernberg's supervisor, testified that his only role in Complainant's termination was that he pointed out the log entry; however, Meyer testified that he was "part of the team." (Tr. 135, 361-364). It was Denney's understanding that Tom Hill, the HR department, and the County Attorney's Office made the decision. (Tr. 136). As discussed earlier, he believed that Complainant's prior complaint was found to lack merit and he disputed that the County had submitted false information, as alleged.[17] (Tr. 141, 144). He testified that he heard something about a settlement agreement but was not a party to it and stated that, if anyone from the county had asked him about it, he "would have said that what we're doing isn't right." (Tr. 142). He had seen the settlement documents but was unaware of the terms, apart from Complainant's return to work and the fact that his evaluation was redone. (Tr. 142-144).

Barroso, Senior Operations Manager, Water Treatment, and Denney's supervisor, indicated that he was involved in the fact-gathering portion of the termination process. (Tr. 221, 251). He indicated that the decision to terminate was that of Jon Meyer, his supervisor; Tom Hill, their director; human resources; and the county attorneys. (Tr. 222). He did not interview Complainant but he spoke with Meyer and Denney, who had interviewed him. (Tr. 221). As to whether a change in a log book was a terminable offense, Barroso testified that it depended on the circumstances. (Tr. 224). Barroso indicated that Denney had told him that he wanted

[17] A reporting violation in the form of an omission was, however, found by the Lee County Health Department for an incident that may or may not have been the one in which Complainant was involved. (CX 4, discussed above).

Complainant to quit but he never actually said that he wanted to fire him. (Tr. 233). He indicated that everyone in the management chain, from Fernberg to Meurer, were involved in the termination process, along with Human Resources and the County Attorney's office. (Tr. 255-256). He spoke with the Human Resources liaison, Elaine Schultz. (Tr. 256).

Meyer, Operations Manager and Barroso's supervisor, was involved in the termination process and reviewed the paperwork in regards to the termination, which was drafted by Elaine Schultz from Human Resources. (Tr. 354-355). He explained that he, Tom Hill (his supervisor), Denney, and Barroso investigated the situation and provided the information to Schultz. (Tr. 355, 358). His only explanation for the delay from February 2009 until the date of termination was that they encouraged input from the County Attorney's office and from Human Resources and that they took their time to make sure they got it right. *Id.* He did not know about the Complainant's prior complaints until they started to work on "this particular issue" but it did not enter into his decision-making process. (Tr. 356). He was unaware of the settlement terms. (Tr. 371). However, he recalled that they were concerned about how what they were doing was going to be perceived. (Tr. 403). The actual decision to fire Complainant was made by Utilities management, Human Resources, and the County Attorney's Office, but there was no vote taken. (Tr. 364-365). According to Meyer, he participated along with Hill, Barroso, Doug Meurer, Andrea Fraser, Jack Peterson, and Elaine Schultz, but there may have been others. (Tr. 364-366). While Fernberg's role was purely informational, he was part of the team, as was Denney. (Tr. 361-364). According to Meyer, the basis for the termination was the log entries and the lack of cooperation, and he stressed the need to trust the information being put into the log. (Tr. 396-397). Tom Hill was the person who signed the proposed corrective action. (Tr. 364). As a general rule, the actual corrective action is issued 24 hours after the proposed corrective action, but that was not done here because they were unable to give the proposed corrective action to Complainant. (Tr. 366-367).

Hill, the Deputy Director for Lee County Utilities, Engineering Operations, and Meyer's supervisor, stated that he was involved in the termination, along with numerous other people, including his boss, the public works director (Jim Lavender), and the County Attorney's Office. (Tr. 444). He testified:

> The ultimate decision, in reality, was a collaborative effort of everyone, but ultimately I signed the documents for the proposed corrective action, the final corrective action and the letter that was sent indicating that the proposed corrective action was being issued. . . .

(Tr. 445). Hill stated that he was aware of Complainant's prior Safe Drinking Water Act complaint against the county in 2006 or 2007 as he was public works manager at the time. (Tr. 449). He believed that Denney was under his direct supervision then. (Tr. 448-449). He denied that questioning Complainant about the entry was an act of reprisal or that the filing or settlement of the prior complaint played any part in his termination. (Tr. 468, 470-471). Hill's understanding of the settlement was that nothing prior to Complainant's initial SDWA complaint could be utilized against him. (Tr. 476-477). He admitted that the reference to two prior warnings and referral to anger management included an altercation with Lenny Sword [mistranscribed as "Seward"] that took place in 2004, prior to the settlement agreement. (Tr.

478). He believed that the other incident involved an altercation with Tom Sneary, a maintenance worker. (Tr. 478-479). When asked, Hill testified from his perspective that Complainant would have still been terminated based upon the log book incident even if the other allegations in the Notice had not occurred. (Tr. 497). However, he admitted that he had never terminated anyone else for a log book error or issue. (Tr. 498). His explanation for inclusion of the other matters is that they occurred subsequent to the original incident and they were just putting down all of the facts.[18] (Tr. 498).

LEGAL BACKGROUND

The employee protection/whistleblower provisions of the Safe Drinking Water Act appear at 42 U.S.C. § 300j-9(i), which provides, in pertinent part:

> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has--
> (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,
> (B) testified or is about to testify in any such proceeding, or
> (C) 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 subchapter.

The implementing regulations for the six environmental whistleblower statutes (of which the SDWA is one), appearing in 29 C.F.R. Part 24, were recently amended to implement changes with respect to the Energy Reorganization Act and to make the regulations consistent with other OSHA statutes to the extent possible. 76 Fed. Reg. 2808 (Jan. 18, 2011).[19] The regulations provide that no employer subject to any of the statutes "may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in this section." 29 C.F.R. §24.102(a). They also provide that it is a violation "to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee" because he commenced, testified, assisted, or participated in any manner in a proceeding under one of the statutes "or in any other action to carry out the purposes of such statute." 29 C.F.R. §24.102(b).

The burdens of production and persuasion in whistleblower cases brought under environmental statutes such as the Safe Drinking Water Act are based on the framework applied under Title VII of the Civil Rights Act of 1964. *Odom v. Anchor Lithkemko*, ALJ Case No. 1996-WPC-1 (ARB, Oct. 10, 1997).

[18] The performance evaluation/safety officer assignment and two of the three referenced confrontations occurred before the log book incident, however. (CX 34).
[19] References are to the 2011 edition of the regulations unless otherwise indicated.

As set forth in the regulations, to establish a prima facie case of a violation of the SDWA's employee protection provision (at the investigatory stage), the employee must show that he (or she) engaged in protected activity; that the respondent knew or suspected that the employee engaged in the protected activity; that the employee suffered an adverse action; and that circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the unfavorable action. [20] 29 C.F.R. §24.104(e). *See also Bartlik v. U.S. Department of Labor*, 73 F.3d 100, 103 n. 6 (6th Cir. 1996) (listing different standards applied by Courts and finding "slight variation," in that "the common thread is that plaintiff must set forth facts which justify an inference of retaliatory discrimination"). The inference may be raised by direct or circumstantial evidence, such as by the temporal proximity between the whistleblowing activities and the adverse action. 29 C.F.R. § 24.104(e). *See also Tyndall v. U.S. Environmental Protection Agency*, ALJ Case Nos. 1993-CAA-6, 1995-CAA-5 (Administrative Review Board, June 14, 1996), citing *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386 (8th Cir. 1995). Likewise, a lack of temporal proximity is also a consideration, particularly where the record reveals a legitimate intervening basis for the adverse action. *Evans v. Washington Public Power Supply System,* ALJ Case No. 1995-ERA-52 (ARB July 30, 1996) (citing *Williams v. Southern Coaches, Inc.*, ALJ Case No. 1994-STA-44 (Sec'y Sept. 11, 1995)).

As revised, the regulations set forth the burdens of proof before the administrative law judge:

> (2) In cases arising under the six environmental statutes listed in Sec. 24.100(a), a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.

29 C.F.R. §24.109(b)(2).

To be actionable, the alleged adverse employment action must involve a tangible job detriment (such as dismissal, failure to hire, or demotion) or it may take the form of harassment

[20] Although establishment of a prima facie case is relevant at the investigatory stage of proceedings, once a case is tried on the merits before an administrative law judge, "the ALJ does not determine whether a prima facie showing has been established, but whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity." *Williams v. Baltimore City Public Schools System,* ARB No. 01-021, ALJ No. 2000-CAA-15 (ARB, May 30, 2003) at n. 7, *aff'd* 157 Fed. Appx. 564, No. 03-1749 (4th. Cir. Nov. 18, 2005) (unpub.) *See also Jiminez v. Mary Washington College,* 57 F.3d 369, 377 (4th Cir.), *cert. denied* 516 U.S. 944 (1995) (Title VII case). In *Williams* at footnote 3, the Fourth Circuit questioned the ARB's suggestion in footnote 7 of its decision that a prima facie case in a charge of discrimination did not need to be established by a preponderance of the evidence but stated that if the footnote was "meant to emphasize that following a trial on the merits in such cases, the proof of a prima facie case is usually inconsequential," it was consistent with *Jiminez*.

that is sufficiently pervasive as to alter the conditions of employment and create an abusive or hostile work environment. *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 (ARB Feb. 29, 2000). *See also Martin v. Dept. of Army,* ARB No. 96-131, ALJ No. 1993-SDW-1 (ARB July 30, 1999).

The complainant always bears the burden of proving by a preponderance of the evidence that retaliation was a motivating factor in the respondent's actions. [21] *Jackson v. The Comfort Inn, Downtown,* ALJ Case No. 1993-CAA-7 (Sec'y, March 16, 1995). Once an employee has established a prima facie case of discrimination, the respondent has the burden of producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. *See Guttman v. Passaic Valley Sewerage Comm'rs v. Department of Labor*, ALJ No. 1985-WPC-2 (1992), *aff'd sub nom, Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474 (3d Cir.), *cert. denied*, 510 U.S. 964 (1993). *See also Dysert v. United States Sec'y of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997) [ERA case]. The complainant, as the party bearing the ultimate burden of persuasion, must then show that the proffered reason was not the true reason, but was a pretext for retaliation. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Once the employee has shown that illegal motives played some part in the discharge (or other adverse action), which may be established by either direct or indirect evidence, the employer must prove that it would have taken the same actions in regards to the employee even if he had not engaged in protected conduct. *Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003) [ERA case], slip op. at pages 3 to 6 and n. 19. In such "dual motive" cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated. *Pogue v. U.S. Department of Labor*, 940 F.2d 1287 (9th Cir. 1991). As amended, the regulations specifically state that relief will not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity. 29 C.F.R. §24.109(b)(2).[22]

DISCUSSION

Protected Activity

The first element, that the employee establish that he or she has engaged in protected activity, has been satisfied, both as part of Complainant's prima facie case and based upon a preponderance of all of the evidence of record. Complainant has established that he engaged in protected activity because he commenced and participated in whistleblower proceedings under the Safe Drinking Water Act. The protected activity in this matter is Complainant's filing of, and participation in, his previous whistleblower suit against the Respondent as well as his filing of, and participation in, the instant whistleblower complaint prior to his termination.

Respondent's Awareness of Protected Activity

The second element, that respondent was aware of the protected activity, has also been satisfied. As the Lee County Board of Commissioners was the respondent in the first suit, as

[21] As amended in 1992, the ERA requires that the behavior complained of be a "contributing factor" rather than a "motivating factor." *See Remusat v. Bartlett Nuclear, Inc.*, ALJ Case No. 1994-ERA-36 (Sec'y Feb. 26, 1996).
[22] For ERA cases, the standard is "clear and convincing evidence." 29 C.F.R. §24.109(b)(1).

well as in the instant suit (which was initiated prior to Complainant's termination), it is axiomatic that it was aware of the Complainant's protected activity. Also, managerial officials in Complainant's supervisory chain also testified as to their awareness of the prior action and its settlement.

Adverse actions

With respect to the third element, the termination (dismissal) is clearly an adverse action. 42 U.S.C. § 300j-9(i); 29 C.F.R. §24.102(a). *See also Berkman, supra*. However, other allegations, made in the complaint initially or raised subsequently, do not rise to the level of adverse actions.

To be actionable, an alleged adverse employment action must constitute a "tangible employment action," for example "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), *citing Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). "[A]dverse actions must be materially adverse to be actionable, meaning more than a 'mere inconvenience or an alteration of job responsibilities' [citation omitted]." *Oest v. Illinois Dept. of Corrections*, 240 F.3d 605, 613-14 (7th Cir. 2001). *See also Hilt-Dyson v. City of Chicago*, 282 F.3d 456 (7th Cir. 2002) (demeaning uniform inspection insufficient to constitute an adverse employment action.) "Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action." *Jenkins, supra. But see Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998 ERA-19 (ARB Nov. 13, 2002) (negative comments in performance evaluation are actionable when accompanied by subsequent limitation of pay increase.)

Here, there are several actions predating the termination that Complainant has alleged were retaliatory in nature. Although it is not clear whether Complainant is still relying upon them as separate adverse actions in view of the termination, they will be discussed briefly. None of these constitute actionable adverse actions.

In the complaint filed on July 3, 2008 in this matter, prior to his termination, Complainant alleged that on June 4, 2008 he received a Notice of Corrective Action for an event that occurred on January 25, 2008 (specifically, the Sneary confrontation and his referral for anger management as a result of it) and he alleged that it was "staged" and was in response to requests for production of documents by his counsel relating to the settlement agreement for the prior action (which allegedly was not implemented in a timely manner).[23] (ALJ 1; Tr. 40). In his posthearing brief, Complainant alleged that, although the event occurred in January 2008, the discipline was not imposed until five months later, and that "this delay was deliberate to make it appear that there was no nexus between his retaliation complaint and his having engaged in protected activity and reinstatement," but that there was such a nexus. Complainant's Closing Brief at 5. Complainant also asserted that the discipline imposed upon him was based in part

[23] Complainant's allegation that the settlement agreement for the prior action was not implemented in a timely manner relates to enforcement as opposed to the terms and conditions of employment. It does not constitute an adverse action.

upon an incident predating the settlement agreement that was supposed to be expunged from his records. *Id.* at 12. According to Complainant, the disparate treatment he received in discipline as compared with Sneary was retaliatory in nature. *Id.* at 5, 11-12. Putting aside the merits of these allegations, they are insufficient to constitute an adverse action.

In considering whether the Notice of Corrective Action for the Sneary incident was sufficient to constitute an adverse action, I am guided by the Administrative Review Board decision in *Shelton v. Oak Ridge National Laboratories,* ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB March 30, 2001). In that case, which arose under the ERA as well as various environmental statutes, after a lengthy trial over which I presided, I found that a senior health physics technician had been subjected to an adverse action when she was issued an oral reminder – which was the first step in a formal disciplinary process that could ultimately lead to her termination – but that the employer had established by clear and convincing evidence that it would have taken the same action against her even if she had not engaged in the protected activity.[24] In so finding, I relied upon the case of *Helmstetter v. Pacific Gas and Electric,* ALJ No. 1986-SWD-2 (Sec'y Sept. 9, 1992), which found a disciplinary letter to constitute an adverse action under the environmental whistleblower statutes. In *Shelton*, however, the ARB modified the Secretary's ruling in *Helmstetter*, adopting instead the standard espoused in Title VII cases postdating my decision such as *Oest v. Illinois Dept. of Corrections*, 240 F.3d 605 (7th Cir. 2001), which held that oral or written reprimands issued under a progressive discipline system do not sufficiently implicate "tangible job consequences" so as to form a basis for liability. Likewise, the corrective action imposed as a result of the Sneary incident is insufficient to constitute an adverse action. For the same reason, apart from the termination, the reliance upon the Sneary matter in evaluating the subsequent confrontation between Complainant and Denney does not constitute an adverse action. As the Complainant's problems with confrontations were part of the articulated basis for his termination, however, that issue will be discussed further below with respect to the causal relationship issue.

There are also a number of other allegations made primarily for the purpose of establishing that Respondents' actions were retaliatory in nature and motivated by Complainant's previous whistleblower action. None of these qualify as adverse actions but, as appropriate, will be considered in the causal relationship part of this decision.

First, Complainant argued that Respondent's attempt to transfer Complainant to another facility and to place him under a six-month probation period was retaliatory in nature. (Complainant's Closing Brief at 6.) There was unrefuted testimony to the effect that, as the transfer was not disciplinary in nature, there would be no new probationary period. Further, the transfer was never implemented because Complainant did not want it, so it was clearly not an adverse action. The offering of a purely voluntary transfer was clearly not retaliatory.

Second, Complainant argued that his assignment to perform duties as a safety officer without proper training (which he was to perform in addition to his regular duties) was retaliatory in nature. (Complainant's Closing Brief at 6.) In that regard, while a reassignment or lateral transfer unaccompanied by a reduction in earnings, benefits, work hours, or duties is not

[24] The clear and convincing standard only applies to cases under the Energy Reorganization Act, not to cases under the six environmental statutes. *See* 29 C.F.R. Part 24; 76 Fed. Reg. 2808 (Jan. 18, 2011)

an adverse action, transfer to a job that the employee knows he cannot perform may constitute adverse action. *See Jenkins*, *supra.* *See also Dilenno v. Goodwill Industries of Mid-Eastern Pennsylvania*, 162 F.3d 235, 236 (3d Cir. 1998). However, there was testimony concerning the fact that the safety officer duties were routinely assigned to operators to be performed in addition to their regular duties, and the expected duties were neither arduous nor complicated. There has been no showing that Complainant was not capable of performing the assigned duties in a satisfactory manner. Although Complainant apparently felt that he was being set up by this assignment, that conclusion is unsupported by any evidence. Thus, the assignment of the safety officer job did not constitute an adverse action. However, as the Complainant's failure to perform the job was part of the articulated basis for his termination, it will be considered in that context below.

Finally, Complainant has alleged that he was subjected to an increasingly derogatory and hostile work environment with Hill and Denney following his reinstatement. (Complainant's Closing Brief at 10).[25] However, the record before me reflects only isolated or trivial incidents, which will be discussed to the extent that they shed light on Respondent's motivation. In any event, these vague allegations are insufficient to establish harassment that is sufficiently pervasive as to alter the conditions of employment or create an abusive or hostile work environment. *See Berkman, supra.* "Employer criticism, like employer praise, is an ordinary and appropriate feature of the workplace. . . [T]o permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer's ability to maintain and improve job performance." *Shelton* at 7, quoting *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232, 1242 (11th Cir. 2001).

Causal Relationship

The final element requires the employee to produce enough evidence to raise the inference that the motivation for the adverse action was protected activity; to prevail on the merits, the employee must establish that element by a preponderance of the evidence. Under the regulations relating to the environmental statutes, as amended, the complainant must demonstrate by a preponderance of the evidence that the protected activity "caused or was a motivating factor" in the alleged adverse action; however, even if he is able to do so, "relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity." [26] 29 C.F.R. §24.109(b)(2).

[25] Complainant has offered these allegations for the purpose of showing pretext with respect to the termination. (Complainant's Closing Brief at 10). They will be considered in that context below.

[26] In the Preamble to the amended regulations, in discussing the standards derived from the case law, the Department of Labor stated: "Under these standards, a complainant may prove retaliation either by showing that the respondent took the adverse action because of the complainant's protected activity or by showing that retaliation was a motivating factor in the adverse action (i.e. a 'mixed-motive analysis'"). 76 Fed. Reg. 2808, 2811 (Jan. 18, 2011).

Direct Evidence of Causal Relationship

In the context of discrimination cases, "direct evidence" (as opposed to circumstantial evidence) has been defined as evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor. *See, Bartlik, supra* at n. 5. Complainant argues that when Respondent disciplined him more severely than it disciplined Sneary for the January 2008 incident, it suggested that Respondent "had an agenda regarding [his] dismissal" and constituted direct evidence of retaliation. Complainant's Closing Brief at 13. The Sneary incident was listed in the Notice as part of one of the bases for the termination, along with the confrontation with Denney, who apparently harbored animosity toward him as a result of the prior case, as discussed below, and a confrontation that predated the settlement. In my view, that evidence is indirect or circumstantial evidence because, even if it is believed, it does no more than raise an inference of a causal relationship. However, the question before me is whether complainant has established a causal relationship by a preponderance of the evidence, and both direct and circumstantial evidence may be used to satisfy that burden. *See Kester, supra*, at n. 19 (discussing *Talbert* v. *Washington Publ. Power Supply Sys.*, ARB No. 96-023, ALJ No. 1993-ERA-35 (ARB Sept. 27, 1996) and noting that it is unnecessary to produce direct evidence in order to trigger the dual motive analysis).

Indirect Evidence of Causal Relationship

There is some indirect or circumstantial evidence of a causal relationship between the Complainant's protected activity and his termination, which reveals a possible motivation on the part of the individuals who participated in the termination or otherwise suggests a causal nexus. First, two of the supervisors who were involved in the incident that gave rise to Complainant's previous whistleblower complaint, Denney and Hill, were active participants in the proceedings to terminate him, providing them with a motive to take action against him. Second, Denney actually admitted to wanting Complainant to quit, he exhibited anger when discussing the prior settlement (which he did not believe was warranted), and there was clearly animosity between the two which culminated in the March 2009 confrontation. Third, as discussed above, Sneary and Complainant received disparate discipline with respect to the January 2008 incident. Although Complainant's previous (2004) confrontation with his supervisor (Lenny Sword) was not supposed to be used against him as a part of the previous settlement, it was nevertheless taken into consideration when management determined what level of discipline to impose upon him as a result of the Sneary incident, and it was cited as a basis for disciplinary action in the Notice relating to the termination. Fourth, although Hill testified that the reason for Complainant's termination was the log book incident, he nevertheless signed a notice of corrective action that also listed other matters, and his explanation as to why those matters were also listed did not make sense to me. The inclusion of these other matters suggests that Respondent was looking for a reason to get rid of Complainant and undermines the clear basis for termination asserted based upon the log book incident and its aftermath. These matters are also relevant on the issue of pretext, discussed below.

On the other hand, there is also evidence supporting a finding that there was no causal relationship between the protected activity and the termination. First, as Respondent points out (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, *rehearing denied*, 533 U.S. 912

(2001)), the earlier case occurred in 2007 (leading to a July 2007 settlement) and the termination occurred nearly two years later in June 2009, so there was no basis for a temporal inference of causation (at least for the previous whistleblower case and the termination).[27] (Respondent's Closing Brief at 7). Second, each of Complainant's supervisors, up the supervisory chain (including those who were not involved in the previous whistleblower case) denied that the termination was in any way related to Complainant's protected activity, and the testimony to that effect was generally credible. Third, the decision to terminate Complainant was made by a group of people, including those who were not at all implicated in the activities that gave rise to Complainant's initial whistleblower complaint, and there was no evidence suggesting a conspiracy.

Fernberg, Barroso, and Meyer were highly credible witnesses; Complainant, Denney, and Hill, somewhat less so. Although Complainant was generally credible, his explanation for the change in the log book entry was not. Having observed Complainant's demeanor, I did not find his testimony on the issue to be convincing. Moreover, Meyer's description of his attempt to get information from Complainant about the incident shortly after it happened, but his failure to get a straight answer, undermines Complainant's credibility. According to Meyer, who was a credible witness, Complainant responded "lots of luck proving that" when questioned about whether he altered the record. Hill also testified that they were unable to get a straight answer from Complainant. Hill was credible until he attempted to explain why extraneous incidents were referenced in the Notice as being part of the basis for Complainant's termination if, as he asserted, the log book incident was the only reason; his testimony on that point was not convincing. Like Complainant, Denney was generally credible, but he clearly exhibited animosity when asked about the prior settlement and when discussing Complainant. He even told Barroso that he wanted Complainant to quit, and his objectivity is subject to question. Although both Complainant and Denney filed complaints as a result of the March 2009 confrontation, Fernberg, who witnessed most of it, did not think it was "a big deal," suggesting that both Complainant and Denney exaggerated the event, each for the purpose of undermining the other.

Complainant argues that the gravamen of his reprisal complaint is that he was falsely accused of changing the operator's log in February 2009 by Denney, the "very person" that he contended directed him to file a false report with the Florida Department of Environmental Protection. Complainant's Closing Brief at 2. Also, Complainant argues that Denney's testimony reveals that he held a grudge against Complainant. *Id.* at 4. I agree on the latter point. If, in fact, Denney were the only employee shown to be motivated to retaliate against Complainant, and if in fact he did so by misrepresenting the facts to his superiors, Respondent would still be liable. *See generally Chen v. Dana-Farber Cancer Institute,* ARB No. 09-058, ALJ No. 2006-ERA-009 (ARB, March 31, 2011) (Royce, J. dissenting). In *Chen*, an ERA case, the majority opinion found that substantial evidence supported the administrative law judge's finding that the protected activity was a contributing factor to the adverse action, as required by the ERA. The dissent agreed on that point, and noted that the ALJ, while not specifically

[27] There was arguably some weak temporal proximity between (1) the July 2007 settlement agreement and the January 2008 Sneary incident (and its aftermath), which prompted the filing of the instant complaint and (2) the filing of the complaint in July 2008 and the events leading up to the termination (beginning in January 2009, as summarized above) that Complainant argues were retaliatory in nature.

referencing it, "appeared to apply reasoning consistent with the 'cat's paw' theory of liability recently approved by the Supreme Court" in *Staub v. Proctor*, 131 S.Ct. 1186 (2011), which "held that an employer may be held liable for the discriminatory actions of a lower level supervisor who influences the decision to take adverse action by a higher level supervisor who lacks discriminatory animus." *Chen* (Royce J. dissenting), slip op. at 17-18.[28] There is, however, evidence besides Denney's testimony that undermines Complainant's version of events.

Legitimate Basis for Employment Action/Pretext and Mixed Motives

Respondent has argued that Complainant was terminated because of the log book entry change and his failure to be forthcoming about it. There was a significant amount of credible evidence establishing that the log book incident was, in and of itself, a sufficient basis for Complainant's termination. As Hill credibly testified, he lost his confidence in Complainant's ability to perform his job as a water operator based upon Complainant's unwillingness to give a direct answer when asked what happened, his misrepresentation of the facts, and his lack of cooperation. Meyer testified similarly. As Respondent has therefore articulated a valid basis for its action, the burden shifts to the Complainant to establish that the articulated basis was not the real basis for the termination but was merely a pretext.

In its closing brief, Respondent asserts that Complainant "presented no evidence that the ultimate decision to terminate his employment was related to anything other than the February 12, 2009 log book incident." Respondent's Closing Brief at 7. That is not true, however, as the Notice relating to the termination specifically lists at least two other reasons for the termination – Complainant's confrontations (consisting of the confrontations with Sneary and Denney, and the one that occurred prior to the settlement) and his failure to assume the assigned safety officer responsibilities. Although Hill attempted to explain away the inclusion of these other matters, his testimony on the issue was confusing and unconvincing. While the inclusion of these other matters somewhat undermines the articulated basis for the decision, the preponderance of the credible evidence establishes that the log book incident was, in fact, the real reason for the termination.

Complainant's explanation for the log book changes is simply not credible. Although the testimony of Denney and Hill, as well as that of Complainant, is not credible in some respects, Barroso and Fernberg seemed both objective and credible, and I have no reason to question Meyer's credibility. These witnesses substantiated that Denney contemporaneously reported the possible algae bloom to his superiors, who took action in accordance with established protocols. Despite his acknowledged animosity toward Complainant, Denney's testimony to the effect that Complainant had reported a pH reading of 9.0 or higher to him on the date of the incident and that he took appropriate action based upon that report was believable. If Denney is to be

[28] The Supreme Court explained the derivation of the principle in note 1 of its decision in *Staub*:

> The term "cat's paw" derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Posner in 1990. [Citation omitted.] In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. A coda to the fable (relevant only marginally, if at all, to employment law) observes that the cat is similar to princes who, flattered by the king, perform services on the king's behalf and receive no reward.

believed, Complainant provided him with false information concerning the pH levels. To accept Complainant's suggestion as to what happened, Denney would have had to notice Complainant's error and capitalize on it by falsely reporting a high pH level to his supervisors and then trying to blame Complainant for the mistake. None of Denney's superiors found any reason to question his report concerning the elevated pH levels and the possibility of an algae bloom, which they took seriously. After taking these matters into account, I accept Denney's testimony concerning the false 9.0 reading that Complainant reported to him. On the other hand, even if I were to ignore Denney's testimony, there is ample evidence that Complainant was evasive and uncooperative when questioned about the incident. Meyer credibly testified that Complainant stated "lots of luck proving that" when asked whether he altered the record.[29] That statement is incomprehensible if, in fact, Complainant made a minor error in an entry that he corrected while writing it and if, in fact, he was cooperating in the investigation of the incident. Both Meyer and Hill commented that they were unable to get a straight answer from him, and Hill's testimony to the effect that he no longer had faith in Complainant's reliability as an operator rang true.

It is thus clear that the main basis for Complainant being fired was the log book incident and its aftermath. There is, however, some evidence of a retaliatory motive (summarized above). Most notably, the Notice setting forth the basis for Complainant's termination listed other factors, including the subsequent confrontation with Denney (who may have had a retaliatory animus), as a basis for Complainant's termination. The question is whether this is sufficient for a mixed motive analysis – i.e., whether Complainant has established by a preponderance of the evidence that his protected activity was a motivating factor in his termination.

Although the issue is a close one, I find that Complainant has failed to establish by a preponderance of the evidence that he was fired even in part due to his protected activity. The Notice was drafted by a human resources person, after a consensus decision was made to fire Complainant; the decision was made by Utilities management in consultation with the legal staff and human resources. Hill, who was involved in the prior case, took the lead and signed the termination documents, but he denied that the prior action played any part in his decision and he articulated a legitimate, nondiscriminatory basis for the decision. Meyer credibly testified that he was unaware of the prior settlement until the termination proceedings but that he and the others involved in the termination were concerned about how their actions would be perceived – i.e., they were concerned, in view of the prior whistleblowing action, that the termination could be perceived as being retaliatory. However, participation in whistleblowing activities does not prevent an employee from being disciplined for activities that are not protected. Despite the inartful drafting of the Notice and its inclusion of other matters, the weight of the evidence establishes that Complainant's alteration of the log book record and his failure to cooperate or provide a plausible explanation for what happened was the real reason that he was fired. Quite simply, the alteration of the log book and Complainant's lack of cooperation in the investigation were serious matters that required disciplinary action.

It is also true that, even if this case were determined to warrant a mixed motive analysis, Respondent has proven, by a preponderance of the evidence, that Complainant would have been

[29] Although Complainant has suggested that the remark could be explained because he felt that he was being retaliated against (e.g., Tr. 401-402), the remark was made to Meyer, who was not involved in the prior action and had no apparent basis for a retaliatory animus.

terminated based upon the log book incident and his failure to be forthcoming about it even if he had not engaged in protected activity.

In the final analysis, no matter how this case is analyzed, it is clear that Complainant's version of what happened with respect to the log book alteration is simply not credible, and regardless of anything else that occurred, he would have been terminated because of the log book incident and his failure to be forthcoming during its investigation.

Conclusion

In view of the above, Complainant has not established by a preponderance of the evidence that he engaged in protected activity that was a motivating factor in the adverse employment action taken against him. Even if he did so, Respondent established by a preponderance of the evidence that Complainant was terminated for legitimate, nondiscriminatory reasons unrelated to the protected activity.

ORDER

IT IS HEREBY ORDERED that the claim by Gregory Milliken for relief under the employee protection (whistleblower) provisions of the Safe Drinking Water Act be, and hereby is, **DISMISSED**.

A

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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

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

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

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.