



Issue Date: 10 April 2015

CASE No:2012-SDW-00002

In the Matter of:

TIM TOMLINSON,
Complainant,

v.

**FRONTLINE RESIDENTIAL TREATMENT
CENTER, LLC, D/B/A
NORTH STAR BEHAVIORAL HEALTH,**
Respondent.

Appearances: Steven D. Smith, Esq.
For Mr. Tomlinson

Linda J. Johnson, Esq.
For the Respondent

Decision and Order

Tim Tomlinson worked as a maintenance and housekeeping employee for North Star Behavioral Health (“North Star”) from June 12, 2004 to April 21, 2010. During the course of his employment, Mr. Tomlinson reported safety concerns to both North Star’s management and agencies of the State of Alaska. Mr. Tomlinson was responsible for maintaining the potable water system at the residential treatment center where he worked, under a license he had obtained from the State of Alaska. In April 2010, that system’s ability of to deliver water was disrupted. After an internal investigation, North Star blamed Mr. Tomlinson for what it characterized as sabotage of its water system, and fired him. Tomlinson now brings a claim under the whistleblower provisions of the Safe Drinking Water Act of 1974 (“SDWA”), alleging that another North Star employee framed him by causing the problem with the water system in retaliation for Mr. Tomlinson’s reports of safety concerns to Alaska state agencies. Some concerns he brought to

the state pertained to the water system, so the SDWA protected those disclosures.

I find that North Star violated the whistleblower provisions of the SDWA by retaliating against Mr. Tomlinson for his protected activities, and award him the monetary and non-monetary relief the Secretary's regulations offer.

I. Background

North Star blames Mr. Tomlinson for what it saw as damage to the potable water system at its Palmer Residential Treatment Center ("Palmer Residential") in April 2010; that damage was North Star's primary motivation for his firing. Mr. Tomlinson accuses another North Star employee—Bradley Ohs, the director of Palmer Residential at the time—of sabotaging the water system to get him fired.

To evaluate the claim it is first necessary to understand what Palmer residential is, and how its water system works. Then background information on Mr. Tomlinson's duties over the years at Palmer Residential, who supervised him, and the performance evaluations they gave him are laid out. Next, the events of April 15, 2010, North Star's investigation into them while Mr. Tomlinson was suspended, and its termination of Mr. Tomlinson's employment are described. Finally, what North Star must do to remedy its retaliation, including what North Star must pay Mr. Tomlinson as compensation is ordered.

A. The Palmer Residential Treatment Center

Palmer Residential is a 30 bed treatment facility for boys between the ages of 11 and 17 who need residential treatment for their mental health.¹ It is but one campus of North Star, which is in turn a subsidiary of Universal Health Services ("UHS").² Palmer Residential lies in a remote area outside Palmer, Alaska, approximately 45 miles from Anchorage.³ It offers activity-based treatment in a wilderness-focused residential environment.⁴ Treatments include individual, group, and milieu therapy,⁵ along with recreational, activity, and

¹ R. Stip. Facts at 40; Tr. at 9. This Decision and Order cites to the record in the following way: citations to the trial transcript are abbreviated as Tr. at [page number]; North Star's exhibits are abbreviated as R. Ex.-[exhibit letter] at [page number]; the Complainant's exhibits are abbreviated at C. Ex.-[exhibit number] at [page number]; and the Respondent's Stipulated Facts are abbreviated as R. Stip. Facts at [stipulation number].

² R. Ex.-AA at 561.

³ R. Stip. Facts at 39.

⁴ R. Stip. Facts at 40.

⁵ R. Stip. Facts at 41.

family therapies.⁶ About two-thirds of the youths attend school on-site in North Star classrooms; the other third attend regular school.⁷

B. Palmer Residential's Water System

Palmer Residential primarily gets its water from underground wells.⁸ Mr. Tomlinson was the certified operator for the water system.⁹ Initially, Mr. Ohs had been certified too,¹⁰ but Mr. Tomlinson was responsible for its day to day operation and maintenance.¹¹ Each of two wells has its own pump in the facility's water room that pumps water to a 2,500 gallon storage tank.¹² A float meter monitors whether the tank is full and triggers the well pumps when the tank's water level drops.¹³ Once triggered, each well pump sends water to the storage tank until either the tank is full or the well temporarily runs out of water.¹⁴

Each well pump connects to a timer.¹⁵ When a timer detects that its well is empty, that well's pump shuts off for a preset period, known as the pump's "time-out period," to allow the well to recharge with groundwater.¹⁶ The time-out period can be manually changed to as little as two minutes or as long as 90 minutes.¹⁷ Once the time-out period passes, the pump resumes pumping water if the float meter in the storage tank signals that the tank is not full. Once activated, the weaker of the two well pumps typically runs for about 10 to 20 minutes before depleting its well of water; the stronger well pump can run for about 30 minutes before depleting its well.¹⁸

The water the wells deliver to the storage tank is pressurized for use throughout Palmer Residential by two other pumps, known as Aquavar pumps, also located in the water room.¹⁹ The Aquavar pumps pressurize the water to 60 pounds per square inch.²⁰ A one-inch water

⁶ R. Stip. Facts at 42.

⁷ Tr. at 602-03.

⁸ R. Stip. Facts at 49; Tr. at 91-92. Water could also be delivered by truck if needed. Tr. at 611.

⁹ Tr. at 330; R. Stip. Facts at 3.

¹⁰ R. Stip. Facts at 6.

¹¹ Tr. at 343.

¹² Tr. at 209; R. Stip. Facts at 44.

¹³ Tr. at 1029-30.

¹⁴ Tr. at 275.

¹⁵ R. Stip. Facts at 50; Tr. at 533-34.

¹⁶ Tr. at 211-212; R. Stip. Facts at 51.

¹⁷ Tr. at 276.

¹⁸ Tr. at 416-17.

¹⁹ Tr. at 91; R. Stip. Facts at 48; R. Ex.-AV at 995.

²⁰ Tr. at 205, 314, 783-84.

line runs from the well pumps to the storage tank.²¹ Another line runs from the storage tank to the Aquavar pumps.²²

Water running from the well pumps to the storage tank can also be diverted to a branch water line.²³ This diversionary branch line meets the water line coming out of the Aquavar pumps, bypassing the storage tank.²⁴ The diversionary branch line can be fed low pressure water from the well pumps or high pressure water from the Aquavar pumps.²⁵ A spigot is located at one end of the diversionary branch line, shortly after it branches off from the line that joins the well pumps to the storage tank.²⁶ A valve is located at the other end of the diversionary branch line, before it meets the line leaving the Aquavar pumps.²⁷

If the spigot is opened but the valve is left closed, low pressure water flows from the spigot when either of the two wells pumps is running.²⁸ If the well pumps are not running, however, no water comes from the spigot.²⁹

If the spigot is opened and the valve is also open, high pressure water from the Aquavar pumps will flow out of the spigot into the water room, whether or not the well pumps are on (assuming there is water in the storage tank to be pressurized).³⁰ Water immediately flows from the spigot whenever both the spigot and valve are opened and the Aquavar pumps run.³¹ The flow out of the spigot can't be delayed in this a scenario.³²

C. Mr. Tomlinson's Employment with North Star

Mr. Tomlinson's employment relations with North Star management became progressively dysfunctional from 2008 until he was terminated. It would be both unrealistic and unnecessary to detail every issue one had with the other. The most relevant matters are chronicled next. Evidence proving that North Star fired him, at least in part, to retaliate for his protected activities is detailed later in the decision.

²¹ Tr. at 92; R. Ex.-AV at 995-97.

²² R. Ex.-AV at 995-97.

²³ R. Ex.-AV at 995-97.

²⁴ R. Ex.-AV at 995-97.

²⁵ Tr. at 92-94.

²⁶ R. Ex.-AV at 995-97.

²⁷ R. Ex.-AV at 995-97.

²⁸ R. Stip. Facts at 45; R. Ex.-AV at 995-97.

²⁹ Tr. at 531-32.

³⁰ Tr. at 93-94.

³¹ Tr. at 95-96.

³² Tr. at 95-96.

1. Highly Regarded Performance Before 2008

Mr. Tomlinson was hired as a maintenance/housekeeping worker at Palmer Residential on June 12, 2004.³³ He became certified as an Alaska Water and Wastewater Operator on April 7, 2006,³⁴ and managed the on-site potable water system.³⁵ His early employment at North Star was unremarkable. His employment record contained minor blemishes, such as being counseled for working overtime without approval twice in August 2004, and receiving a performance evaluation that directed him to “[c]ommunicate directly with immediate supervisor/co-workers for conflict resolution” in 2005.³⁶

North Star management was more than satisfied with Mr. Tomlinson’s performance.³⁷ Yet Mr. Tomlinson hadn’t hesitated to complain about operations at Palmer Residential. In 2005, he had complained to North Star that Mr. Ohs was incompetent.³⁸ In 2007, he accused Mr. Ohs of intentionally dumping water from a holding tank, and demanded that Mr. Ohs’s access to the facility’s water room be revoked.³⁹

Nonetheless Mr. Tomlinson was named Palmer Residential’s 2007 Employee of the Year.⁴⁰ Both James Sheil, the CEO for North Star then, and Mr. Ohs, Palmer Residential’s Administrator at the time, thought Mr. Tomlinson was a great employee whose work was essential to the maintenance group.⁴¹ Before Mr. Sheil left North Star in 2008, he demonstrated his regard for Mr. Tomlinson monetarily. Pat Higgins, North Star’s former Human Resources Director, testified that Mr. Sheil (with strong support from Mr. Ohs as Mr. Tomlinson’s direct supervisor) gave Mr. Tomlinson a special pay raise in 2008 to show appreciation for Mr. Tomlinson’s work; Mr. Tomlinson was one of two or three employees who received such a raise.⁴² Dr. Andrew Mayo, who replaced Mr. Sheil and remains North Star’s CEO, testified that Mr. Higgins gave him a different explanation for the raise: that special pay raise was offered to settle a dispute about whether Mr. Tomlinson was entitled to on-call pay.⁴³

³³ R. Stip. Facts at 1.

³⁴ R. Stip. Facts at 3.

³⁵ Tr. at 330.

³⁶ R. Ex.-E at 356; C. Ex.-1 at 8.

³⁷ Tr. at 64–65.

³⁸ Tr. at 615.

³⁹ Ex.-F at 371.

⁴⁰ R. Stip. Facts at 5.

⁴¹ Tr. at 149.

⁴² Tr. at 149.

⁴³ Tr. at 812.

I believe Dr. Mayo misunderstood what happened for three reasons. First, Mr. Higgins was at North Star when Mr. Tomlinson received the raise; Dr. Mayo was not. Second, as the head of Human Resources, Mr. Higgins ought to have known why Mr. Sheil gave that raise. Third, whether on-call pay was due remained a bone of contention in e-mails Mr. Tomlinson wrote in the second half of 2008—one to Mr. Smith in August and one to an Alaska state agency in November. Had that issue been resolved through the special pay raise Mr. Sheil granted, I would expect that, as the head of Human Resources, Mr. Higgins would have said so in a memo he and Mr. Smith wrote to Mr. Tomlinson in December of 2008, a memo of which more will be said later.

In 2007, Mr. Ohs began holding weekly meetings with his staff, including Mr. Tomlinson.⁴⁴ Mr. Ohs explained that he “wanted to start out my Monday morning finding out what the maintenance priorities were, to bring forth priorities that I had received from other departments or had heard over the weekends, you know, he would be getting work orders. So, it was just kind of setting up the week . . .”⁴⁵ Mr. Ohs testified that meetings lasted from about 15 minutes to an hour.⁴⁶ Mr. Tomlinson testified these weekly meetings sometimes lasted hours, which wasted his time and impeded his productivity.⁴⁷

2. 2008 Employment

Tension between Mr. Tomlinson and North Star management began to escalate in 2008, after Mr. Sheil left.

In an August 2008 e-mail to Mr. Smith, Mr. Tomlinson raised several issues: he wasn’t receiving on-call pay, he had safety concerns about Palmer Residential, his work load was unrealistic, and he believed he had been subjected to retaliation for raising concerns in the past.⁴⁸

Mr. Tomlinson’s supervisor changed from Mr. Ohs to Randy Smith in September 2008.⁴⁹ Dr. Mayo made Mr. Smith Mr. Tomlinson’s supervisor partially due to concerns about the relationship between Mr. Tomlinson and Mr. Ohs.⁵⁰ Tomlinson nonetheless continued to receive instructions from Mr. Ohs, who continued the weekly

⁴⁴ Tr. at 618.

⁴⁵ Tr. at 619.

⁴⁶ Tr. at 619.

⁴⁷ Tr. at 471.

⁴⁸ C. Ex.-2 at 70–73.

⁴⁹ R. Stip. Facts at 8.

⁵⁰ Tr. at 817–18.

meetings.⁵¹ Mr. Ohs explained that, “even though the direct supervision went through [Mr. Smith], I needed to be aware of what was being prioritized [at Palmer Residential].”⁵²

Mr. Ohs’s certification as an Alaska water system operator lapsed on January 1, 2008.⁵³ On November 14, 2008, Mr. Tomlinson reported to the Alaska Department of Environmental Conservation (“DEC”) that 1) Mr. Ohs was working on Palmer Residential’s water system without certification, and 2) Mr. Tomlinson was not being paid to remain on-call to deal with any emergency water system maintenance (something he believed was required by an Alaska statute).⁵⁴

Mr. Tomlinson was orally counseled on November 19, 2008, for failing to test a Palmer Residential generator at regular intervals in the manner prescribed by the Joint Commission on the Accreditation of Healthcare Organizations.⁵⁵

The next day, on November 20, 2008, Mr. Tomlinson sent a memo to Dr. Mayo and Mr. Smith that raised two issues. The first was that Mr. Ohs was working on Palmer Residential’s water system without current certification. The second was that he was not being paid to remain on-call, repeating his belief that on-call status was mandated by statute.⁵⁶ He included a link to the relevant Alaska statute in his memo.⁵⁷ He did not mention that he already had raised these issues with DEC.⁵⁸

After Dr. Mayo received the memo, he told Mr. Ohs to stop working on the water system.⁵⁹ He also instructed Mr. Ohs to call DEC and inform the agency of the potential violation.⁶⁰

Mr. Tomlinson felt his work environment changed “drastically” after he sent that November 20, 2008 memo.⁶¹ Meetings with Mr. Ohs thereafter turned into “kind of like attack sessions.”⁶² He started to be “super micro-managed and super, like, nit-picked.”⁶³ He also believed

⁵¹ Tr. at 346.

⁵² Tr. at 631.

⁵³ R. Stip. Facts at 6.

⁵⁴ R. Stip. Facts at 9; R. Ex.-G at 388.

⁵⁵ R. Ex.-C at 321.

⁵⁶ C. Ex.-3 at 75–76.

⁵⁷ C. Ex.-3 at 76.

⁵⁸ C. Ex.-3 at 75–76.

⁵⁹ Tr. at 809–810.

⁶⁰ Tr. at 809–811.

⁶¹ Tr. at 339–40.

⁶² Tr. at 346.

⁶³ Tr. at 340.

he began to receive more work assignments without being allowed enough time in his schedule to complete all of the additional work.⁶⁴

Mr. Tomlinson's supervisor (Mr. Smith) and Mr. Higgins sent Mr. Tomlinson a memo on December 8, 2008 that, among other things, assured him that he had the right to raise any concerns about safety issues or North Star's compliance with regulations.⁶⁵ They explained that "UHS will not tolerate any adverse action taken against employees for raising concerns, either to management or regulatory agencies."⁶⁶

In late 2008, Mr. Ohs tried to interfere with Mr. Tomlinson's efforts to renew his water system operator's certification.⁶⁷ That renewal was due by December 31, 2008.⁶⁸ Beginning around October 2008, Mr. Ohs repeatedly said he would provide Mr. Tomlinson with instructional materials needed to renew his certification.⁶⁹ When Mr. Tomlinson followed up with Mr. Ohs about the materials in mid-December, Mr. Ohs told Mr. Tomlinson he didn't know what Mr. Tomlinson was talking about; the materials had never been ordered.⁷⁰ DEC told Mr. Tomlinson he could take the required course online, but Mr. Tomlinson had trouble getting the course to work on North Star's computers.⁷¹ He finally got the course set up around 2:00 p.m. on December 31.⁷² The course typically takes about 12 hours to complete.⁷³ Mr. Ohs interrupted him six or seven times during the course.⁷⁴ "He just kept bugging me and bugging me and bugging me. . . . He was trying to screw me on trying to get a renewed license, time-wise."⁷⁵ Mr. Tomlinson nonetheless completed the course with about an hour to spare before the deadline.⁷⁶

Mr. Ohs's account of events differs. He could not recall Mr. Tomlinson asking him to provide the materials he needed for the course to renew his certification.⁷⁷ Mr. Ohs testified that he reminded Mr. Tomlinson of the upcoming deadline to renew his license on

⁶⁴ Tr. at 340.

⁶⁵ C. Ex.-4 at 77.

⁶⁶ C. Ex.-4 at 77.

⁶⁷ Tr. at 352-59.

⁶⁸ Tr. at 354.

⁶⁹ Tr. at 353-54

⁷⁰ Tr. at 354.

⁷¹ Tr. at 354-56.

⁷² Tr. at 357-58.

⁷³ Tr. at 357-58.

⁷⁴ Tr. at 358.

⁷⁵ Tr. at 358-59.

⁷⁶ Tr. at 359.

⁷⁷ Tr. at 640.

December 24.⁷⁸ He also explained that Mr. Tomlinson didn't need any special materials because he could simply take the renewal course online, as Mr. Tomlinson ultimately did.⁷⁹ Mr. Ohs denied he attempted to make Mr. Tomlinson fail his course by repeatedly interrupting him.⁸⁰

3. Post-2008 Employment

Problems between Mr. Tomlinson and North Star management persisted after 2008.

On January 1, 2009, Mr. Tomlinson e-mailed Dr. Mayo, Mr. Higgins (the Human Relations manager for North Star), Laura McKenzie (North Star's Director of Quality Improvement and Risk Management), Mr. Smith, Mr. Ohs, and DEC, to tell them all that, on December 24, 2008, Mr. Tomlinson had discovered that Palmer Residential's well pumps had been turned off, and only about 200 gallons of water had remained in the 2,500 gallon tank.⁸¹ Mr. Tomlinson claimed that he had reported the problem to Mr. Smith the morning of December 24,⁸² but Mr. Ohs and Ms. McKenzie seemed to be under the impression that Mr. Tomlinson reported the incident for the first time on January 1.⁸³ They were concerned that he had delayed in reporting potential tampering with the water equipment.⁸⁴ They suspected he only informed them of the incident on January 1 because he was upset about staying late to complete his water license renewal course the night before.⁸⁵ Mr. Ohs thought there was "a pattern that was becoming more and more evident, as when [Mr. Tomlinson] was confronted or when there was a written warning or a confrontation, that there would be a reaction shortly thereafter, of some nature."⁸⁶ The "reaction" Mr. Ohs meant was reporting problems externally to a government agency, and internally within North Star. Ms. McKenzie also testified that it was not mandatory for Mr. Tomlinson to report the issue to DEC; she thought he made the report to intimidate his managers.⁸⁷ Dr. Mayo thought copying the e-mails to DEC indicated a lack of trust in North Star.⁸⁸ He found doing so disruptive because it

⁷⁸ Tr. at 639-40.

⁷⁹ Tr. at 641.

⁸⁰ Tr. at 641.

⁸¹ R. Ex.-L at 419.

⁸² C. Ex.-L at 418.

⁸³ Tr. at 645-46, 950-51.

⁸⁴ Tr. at 645-46; 950.

⁸⁵ Tr. at 645, 950-51.

⁸⁶ Tr. at 645.

⁸⁷ Tr. at 951.

⁸⁸ Tr. at 827.

didn't give North Star an opportunity to address the problem on its own, so it could look like North Star had failed to take corrective action.⁸⁹ "The issue isn't about a fear of an agency. The issue is about somebody has to tell me I have a problem."⁹⁰ "[I]t's not fair to withhold that information, not from the organization or from the problems that it creates for our patients and our staff."⁹¹

In March 2009, Mr. Tomlinson was orally counseled about communication expectations, which was documented in a memo.⁹²

In June 2009, Mr. Tomlinson was given preventative counseling for failing to have a licensed plumber inspect an underground copper pipe that Mr. Tomlinson had replaced due to a water leak.⁹³ Mr. Tomlinson wouldn't sign his reprimand because he disagreed with it.⁹⁴ According to him, Mr. Ohs originally wanted the repaired water line inspected by a licensed plumber before being reburied, but later changed his mind after Mr. Tomlinson told him that no plumber would be willing to do it.⁹⁵ Mr. Tomlinson also believed that, in Alaska, a certified water operator (such as himself) had the same authority to work on Palmer Residential's water system as a licensed plumber.⁹⁶

In July 2009, Mr. Ohs asked Mr. Tomlinson for historical data on arsenic levels in Palmer Residential's water system.⁹⁷ In his e-mail, Mr. Ohs stated "I *do not want* any State DEC personnel contacted for this data . . ."⁹⁸ Mr. Ohs explained at trial that his e-mail had not meant Mr. Tomlinson could never contact DEC;⁹⁹ he simply wanted the information straight from the labs that North Star had hired to conduct the tests.¹⁰⁰ Mr. Ohs believed it was not DEC's job to "regurgitate the labs" performed by North Star's lab company.¹⁰¹

Mr. Tomlinson's 2009 performance evaluation identified a number of problems. The evaluation's comments noted, among other things, that Mr. Tomlinson:

⁸⁹ Tr. at 827–28.

⁹⁰ Tr. at 829.

⁹¹ Tr. at 829.

⁹² R. Ex.-C at 322–23. The memo also noted that the Complainant had been verbally counseled on September 9 and November 25, 2008 for his failure to communicate effectively with Mr. Ohs. R. Ex.-C at 322.

⁹³ R. Ex.-C at 315.

⁹⁴ Tr. at 331.

⁹⁵ Tr. at 473.

⁹⁶ Tr. at 333.

⁹⁷ R. Stip. Facts at 14.

⁹⁸ C. Ex.-8 at 89 (original emphasis as underlining rather than italics).

⁹⁹ Tr. at 686.

¹⁰⁰ Tr. at 686.

¹⁰¹ Tr. at 686.

1. had failed to wear North Star work shirts, as directed;
2. was counseled to keep his tools and the tools of contractors in a secured location;
3. had failed to complete work assignments on time;
4. had failed to communicate effectively with Mr. Ohs; and
5. had failed to give a 10–15 minute safety presentation, as directed.¹⁰²

Mr. Tomlinson responded defensively to this criticism, denying responsibility for the problems.¹⁰³

Mr. Ohs resumed direct supervision of Mr. Tomlinson on January 1, 2010.¹⁰⁴

On February 15, 2010, Mr. Ohs warned Mr. Tomlinson in writing not to work overtime without prior approval, accusing Mr. Tomlinson of having already done so.¹⁰⁵ Mr. Tomlinson denied responsibility, testifying that he had informed Mr. Ohs of a project that necessitated overtime, which Mr. Ohs had approved.¹⁰⁶

On March 11, 2010, Mr. Tomlinson called the Alaska Department of Public Safety, division of State Troopers (the state police) to report having overheard that Mr. Ohs had exposed himself to Palmer Residential patients in June 2009 while on a camping trip.¹⁰⁷ Mr. Tomlinson had heard accounts of the incident from both North Star patients and staff.¹⁰⁸ Although other North Star employees claimed they had reported the incident, Mr. Tomlinson called the Troopers to make sure it had actually been reported;¹⁰⁹ it hadn't.¹¹⁰ Mr. Ohs explained that, while on a camping trip with several Palmer Residential patients and staff, he and another chaperone had gone to a stream 300–400 feet from the campsite and down an embankment to bathe.¹¹¹ They thought the patients would be occupied for 30–45

¹⁰² C. Ex.-1 at 41–44.

¹⁰³ C. Ex.-1 at 55–58.

¹⁰⁴ R. Stip. Facts at 15.

¹⁰⁵ R. Ex.-C at 316–17. Mr. Tomlinson had previously been counseled for the same issue on February 8, 2010 and January 1, 2010. R. Ex.-C at 317.

¹⁰⁶ Tr. at 350.

¹⁰⁷ Tr. at 579. Alaska statutes require members of school administrative staff to report suspicion of harm to a child. Alaska Stat. §§ 47.17.020(a)(2), (c) (2014). An internal report is insufficient. § 47.17.020(g) (2014). This requirement was in effect in March 2010, when Mr. Tomlinson contacted the State Troopers.

¹⁰⁸ Tr. at 579–80.

¹⁰⁹ Tr. at 580.

¹¹⁰ Tr. at 581–82.

¹¹¹ Tr. at 710–11.

minutes with another chaperone in a group activity.¹¹² Some of the patients caught Mr. Ohs by surprise while he was unclothed; he quickly wrapped himself in a towel.¹¹³ That incident was the source of the stories Mr. Tomlinson heard.

The investigation by the State Troopers found that the incident was unintentional and no criminal laws had been violated.¹¹⁴ In the investigation, the Troopers contacted two chaperones from the camping trip,¹¹⁵ one on March 11, 2010, the other on April 16, 2010.¹¹⁶ Although the Troopers contacted the two North Star chaperones around the time Palmer Residential's water system was damaged and Mr. Tomlinson was terminated, I accept Mr. Ohs's testimony that he did not learn of the Troopers' investigation until after Mr. Tomlinson had already been fired.¹¹⁷

On March 25, 2010 Mr. Tomlinson filed a complaint with Alaska Occupational Safety and Health ("AKOSH") about Palmer Residential employees cleaning floors without gloves or respirators, and about the lack of hazardous materials training at the facility.¹¹⁸ AKOSH made an unannounced inspection of Palmer Residential that found several violations (though not the ones in Mr. Tomlinson's original complaint), which ultimately resulted in a fine of about \$4,500.¹¹⁹

Mr. Tomlinson testified that his last two weeks at work were particularly unpleasant because he was given an unrealistic work load.¹²⁰

It was just wanting everything done like yesterday and it didn't matter what I did, I was damned if I did, damned if I don't. And if I didn't get this done over here, well, then he'd complain about that over there. It was just stuff on the list, like, you know, there was different things that I was doing, that he would tell me, verbally, to do, that aren't on the list.¹²¹

4. April 15, 2010 Incident Involving the Water System

On the morning of April 15, Mr. Tomlinson installed an eye wash station in the water room.¹²² Later that day, he was issued a written

¹¹² Tr. at 711.

¹¹³ Tr. at 711–12.

¹¹⁴ R. Ex.-WW at 729.

¹¹⁵ R. Ex.-WW at 731–32.

¹¹⁶ R. Ex.-WW at 731–32.

¹¹⁷ Tr. at 773.

¹¹⁸ R. Stip. Facts at 17.

¹¹⁹ R. Stip. Facts at 18; Tr. at 771–72.

¹²⁰ Tr. at 361.

¹²¹ Tr. at 361.

¹²² Tr. at 526.

warning for failing to complete high priority work assignments as he had been directed.¹²³ He left work at 2:34 p.m.¹²⁴

Mr. Ohs testified that as he walked his usual rounds of Palmer Residential that afternoon, he discovered baseboards had been torn up around the entire right wing of the facility.¹²⁵ Mr. Ohs said he instructed Mr. Tomlinson to replace only specific baseboards.¹²⁶ I am persuaded, however, by Mr. Tomlinson's testimony that Mr. Ohs told him to replace them all.¹²⁷ Mr. Ohs saw that Mr. Tomlinson had left supplies for installing the baseboards in the room the facility used for dirty laundry.¹²⁸ Mr. Ohs knew that Mr. Tomlinson had already left for the day, so he returned the supplies to the maintenance area himself.¹²⁹ Mr. Ohs testified that he remembered it being 4:20 p.m. when he gathered up those supplies.¹³⁰

According to Mr. Ohs, within ten minutes of picking up the supplies, he entered the maintenance area and heard the loud sound of gushing water.¹³¹ He testified that he walked into the water room and found the spigot wide open, "spilling, splattering water."¹³² "I had never heard that kind gushing noise."¹³³ "[I]t was cascading down in a funnel, it was of some force."¹³⁴ According to Mr. Ohs, the spigot, which is about six feet above the ground, was pouring water down onto the floor and into the drain at the center of the room.¹³⁵ The discharging water had splashed on the wall.¹³⁶ "The entire wall was soaked."¹³⁷ "There was an electrical, four plug electrical, that was there, with different metering devices and CO2, I think, and an alarm, that was wet in the electrical area there."¹³⁸ Water was flowing through the drain on the floor, but it had pooled up because there was such a large discharge of water.¹³⁹ He also saw water on one of the pipes right near

¹²³ C. Ex.-12 at 113.

¹²⁴ Tr. at 363; R. Stip. Facts at 22.

¹²⁵ Tr. at 733-34.

¹²⁶ Tr. at 735.

¹²⁷ Tr. at 521.

¹²⁸ Tr. at 735-36.

¹²⁹ Tr. at 736-37.

¹³⁰ Tr. at 736-37.

¹³¹ Tr. at 737-38.

¹³² Tr. at 738-39.

¹³³ Tr. at 739.

¹³⁴ Tr. at 739.

¹³⁵ Tr. at 739.

¹³⁶ Tr. at 739.

¹³⁷ Tr. at 739.

¹³⁸ Tr. at 739.

¹³⁹ Tr. at 739.

the spigot, water Mr. Ohs did not believe came from condensation.¹⁴⁰ He believed no condensation collected on that pipe,¹⁴¹ otherwise it would have been wrapped.¹⁴² Mr. Ohs testified that he immediately turned off the water.¹⁴³

Mr. Ohs made personal notes of the incident that were equally dramatic. He claimed to have seen that one of the well pumps was running.¹⁴⁴ He believed the weaker well pump was off because that pump came from the well which produced less water, and it would typically time out before the stronger well pump.¹⁴⁵ The water tank had lost around 500 gallons of water.¹⁴⁶ His notes say the spigot was

fully open spraying water onto the floor, water pumps, meters, canister filters, and electrical monitoring devices. The walls were saturated with splattered water up to 5 ft. high including the meters & electrical supply, electrical outlet, CO2 alarm, filter canisters, return pipes, etc. The majority of the water was successfully flowing into the nearby floor drain. Excess water of over 1 inch was dammed up against the adjoining wall and flowing under the wall into the maintenance storage room under the fuse box area. The excess water was flowing down the wall and under the work bench The 2,500 gallon water tank was down approximately 500 gallons and well #2 was successfully pumping; well #1 had pumped dry and was timed out displaying a red light The water pipe was pressurized to approximately 60 psi and the open valve was producing approximately 5–15 gallons per minute.¹⁴⁷

Mr. Ohs testified that he then walked back into the maintenance area and saw that water had seeped underneath the wall, which was saturated with water, and had puddled on the other side of the wall.¹⁴⁸

Mr. Ohs thought the problem had been caused by an intentional act.¹⁴⁹ “It really appeared like this was just sabotage, someone left this spigot on and walked away.”¹⁵⁰ Mr. Ohs did not believe an out-of-the-way, rarely used spigot could have been opened accidentally.¹⁵¹

¹⁴⁰ Tr. at 743–44; R. Ex.-EE at 642.

¹⁴¹ Tr. at 744.

¹⁴² Tr. at 744.

¹⁴³ Tr. at 739.

¹⁴⁴ Tr. at 740.

¹⁴⁵ Tr. at 740.

¹⁴⁶ Tr. at 740–41.

¹⁴⁷ R. Ex.-O at 443.

¹⁴⁸ Tr. at 741.

¹⁴⁹ Tr. at 746.

¹⁵⁰ Tr. at 746.

¹⁵¹ Tr. at 746.

Mr. Ohs called North Star's Clinical Director, Ron Meyer, from inside the water room and asked him to come there immediately.¹⁵² He also contacted North Star's Human Resources Director at the time, Jana Durr, and described the situation.¹⁵³

Gregory Foxley, an educational coordinator and teacher who worked at North Star from May 17, 2004 to March 9, 2012,¹⁵⁴ disputed aspects of Mr. Ohs's account of events. Mr. Foxley's classroom was in the same building as the water storage tank.¹⁵⁵ On April 15, 2010, Mr. Foxley worked most of the day in the administrative section of the facility because his teaching assistant, Sandy Colee, taught his class that day.¹⁵⁶ Ms. Colee was in Mr. Foxley's classroom from 9:00 a.m. to 12:00 p.m. and from 1:00 p.m. to 4:00 p.m. that day.¹⁵⁷ She heard no water running while in the classroom.¹⁵⁸ Mr. Foxley went to his classroom at 4:20 p.m., after Ms. Colee and the students had left, to continue working.¹⁵⁹ When he entered the classroom, he heard the sound of gushing water.¹⁶⁰

There was something so unusual that it had never happened in the last six years. And I went in at 4:20 o'clock p.m., and as I went in, at 4:20 o'clock p.m., I heard the sound of water gushing and I knew that to be extremely odd, because that had never happened, in all the years that I taught at North Star.¹⁶¹

Mr. Foxley described the sound as "water, under pressure, gushing."¹⁶² "[W]hen I went into the bathroom there was absolutely nothing, no water running in the bathroom, at all. There was no water in the classroom itself. And so I thought that was extremely odd. I couldn't figure out why I'm hearing water running."¹⁶³ Mr. Foxley determined that he was hearing the sound of water through a vent in his classroom that was connected to the facility's water room.¹⁶⁴

¹⁵² Tr. at 745–46.

¹⁵³ Tr. at 748.

¹⁵⁴ Tr. at 9.

¹⁵⁵ Tr. at 11.

¹⁵⁶ Tr. at 14–17.

¹⁵⁷ Tr. at 247–48.

¹⁵⁸ Tr. at 249.

¹⁵⁹ Tr. at 17.

¹⁶⁰ Tr. at 17.

¹⁶¹ Tr. at 17.

¹⁶² Tr. at 17.

¹⁶³ Tr. at 18.

¹⁶⁴ Tr. at 18.

Mr. Foxley recalled hearing the sound of running water from 4:20 p.m. to 4:30 p.m.¹⁶⁵ He also heard Mr. Ohs's voice coming from the water room during that ten minute period, while the water was running.¹⁶⁶ Mr. Foxley assumed that Mr. Ohs had a valid reason to be in the water room, so he clocked out around 4:30 p.m. and went home.¹⁶⁷

Mr. Foxley testified at trial that he also heard the Aquavar pumps running on the day of the incident.¹⁶⁸ His responses to further questioning suggest he had deduced the Aquavar pumps were running because of how loud the sound of flowing water was, more than having a specific recollection of hearing the sound of the pumps themselves that day. Mr. Foxley explained, "I'm not a system operator, but I'm obviously not hearing water that's just like going out of a spigot, like in a house. I'm hearing water that is gushing. So, yes, I think it was pressurized water and I think it was, probably, from Aquavar pumps."¹⁶⁹ He explained further that,

"[w]hen I did my deposition, and had time to think about it, there's only two possible ways that the water could be running in that room. One could be a tiny little spigot, which is at the base of the 2,000 gallon tank—which would be impossible for me to hear next door. And the only other possibility would be the Aquavar pumps, that are there, that are used, that can run water under high pressure and can be fairly noisy, and would create a gushing sound. There would be no gushing sound otherwise."¹⁷⁰

Having heard the Aquavar pumps from his classroom on earlier occasions, Mr. Foxley knew them to be "fairly loud."¹⁷¹ Since water is not usually discharged from the spigot while the Aquavar pumps are running, this would suggest that the pumps themselves are audible from the classroom when active. Taken as a whole, I infer from Mr. Foxley's testimony that he heard the Aquavar pumps the day of the incident. He heard both water running and Mr. Ohs's voice.

Sometime between 4:45 and 5:00 p.m., Ms. McKenzie arrived at Palmer Residential to drop off paperwork.¹⁷² Once she spoke with Mr.

¹⁶⁵ Tr. at 18, 20.

¹⁶⁶ Tr. at 18–19, 25.

¹⁶⁷ Tr. at 20.

¹⁶⁸ Tr. at 25–26.

¹⁶⁹ Tr. at 28.

¹⁷⁰ Tr. at 43.

¹⁷¹ Tr. at 26.

¹⁷² Tr. at 749, 967.

Ohs, she suggested they do a complete safety walk-through of the facility, and they did.¹⁷³

Mr. Ohs then contacted Earl Kimberley, a maintenance technician and the only other employee who had regular access to the maintenance area that day, other than Mr. Tomlinson.¹⁷⁴ Mr. Kimberly told Mr. Ohs that he had not been in the water room at all that day, but Mr. Tomlinson had been in there to install an eyewash station.¹⁷⁵

5. Investigation of the Incident

The following morning, Mr. Ohs and Ms. Durr met with Mr. Tomlinson to discuss what had happened.¹⁷⁶ Mr. Tomlinson acknowledged that he had been working on the baseboard project and had left his supplies in the dirty linen room.¹⁷⁷ He also acknowledged that he had been in the water room to install the eyewash station.¹⁷⁸

Mr. Tomlinson was allowed to see the water room.¹⁷⁹ He did not claim that the incident had been caused by accident.¹⁸⁰

Both Mr. Tomlinson and Mr. Kimberley were suspended with pay while North Star investigated the incident.¹⁸¹ Mr. Ohs, who was just about the only other employee with access to the water room, was not suspended—he led the investigation.

Mr. Ohs interviewed everyone who had access to the water room or may have heard or seen anything unusual.¹⁸² Mr. Ohs determined that no one other than Mr. Tomlinson had been in the water room that day.¹⁸³

Mr. Foxley doubted Mr. Tomlinson's involvement in the water incident because Mr. Tomlinson wasn't in the water room while the water was running, but he knew Mr. Ohs was.¹⁸⁴ Mr. Foxley expressed doubts to Mr. Ohs that Mr. Tomlinson had caused the water spill, and he accused Mr. Ohs of having caused it.¹⁸⁵ Mr. Ohs became confrontational at this suggestion.¹⁸⁶

¹⁷³ Tr. at 750.

¹⁷⁴ Tr. at 751; Ex.-O at 443–44.

¹⁷⁵ Tr. at 751; Ex.-O at 444.

¹⁷⁶ Tr. at 755.

¹⁷⁷ Tr. at 755.

¹⁷⁸ Tr. at 755.

¹⁷⁹ R. Stip. Facts at 24; Tr. at 897.

¹⁸⁰ Tr. at 758.

¹⁸¹ Tr. at 532, 756–58.

¹⁸² Tr. at 753–55; R. Ex.-O at 444–45.

¹⁸³ Tr. at 758.

¹⁸⁴ Tr. at 27.

¹⁸⁵ Tr. at 29–30.

¹⁸⁶ Tr. at 29–30.

Mr. Foxley later told Mr. Ohs that he did not trust him.¹⁸⁷ According to Mr. Foxley, during that same discussion, Mr. Ohs told him, “[m]aybe you ought to consider not working for North Star anymore,” which Mr. Foxley interpreted as a threat.¹⁸⁸ According to Mr. Foxley, his relationship with Mr. Ohs deteriorated “markedly” after that conversation,¹⁸⁹ leading to what he felt were intimidation and harassment by Mr. Ohs.¹⁹⁰ Mr. Foxley left North Star in March 2012, two years later.¹⁹¹ This testimony, along with that from Mr. Tomlinson, show two occasions when Mr. Ohs retaliated against staff who displeased him.

Mr. Foxley believed that Mr. Ohs, rather than Mr. Tomlinson, caused the water loss because Mr. Tomlinson had left work on the day of the incident before Mr. Foxley or Ms. Colee heard running water, and because Mr. Foxley heard Mr. Ohs in the water room.¹⁹² Mr. Foxley had a limited understanding of how Palmer Residential’s water system functions.¹⁹³ He did not seem to appreciate that there could be a way for someone to open the spigot and cause water to leak later (although not under significant pressure). Mr. Foxley’s conclusion that Mr. Ohs must have caused the leak, by itself, is not persuasive. Mr. Foxley’s lack of trust in Mr. Ohs, and his willingness to accept that Mr. Ohs would sabotage the water system to frame Mr. Tomlinson, is significant for reasons explained later.

Mr. Ohs testified that Mr. Foxley did not accuse him of causing the leak.¹⁹⁴ On this point I accept Mr. Foxley’s version of events. Accusing the facility’s director of misconduct is something an employee like Mr. Foxley would remember, and something Mr. Ohs would not forget. Ms. Durr testified that Mr. Foxley never told her that he thought Mr. Tomlinson had been framed.¹⁹⁵ Mr. Foxley may well not have expressed that thought to anyone but the person he suspected—Mr. Ohs. What Ms. Durr had to say does not incline me to accept the idea that Mr. Foxley had not confronted Mr. Ohs on this topic.

Despite Mr. Foxley’s concerns, North Star concluded that, on April 15, 2010, before Mr. Tomlinson left work, he sabotaged the water system:

¹⁸⁷ Tr. at 34.

¹⁸⁸ Tr. at 34.

¹⁸⁹ Tr. at 39.

¹⁹⁰ Tr. at 34.

¹⁹¹ Tr. at 35–36.

¹⁹² Tr. at 29–30.

¹⁹³ Tr. at 47–49.

¹⁹⁴ Tr. at 764–65.

¹⁹⁵ Tr. at 900.

[H]e sabotaged the water system by leaving that spigot in the open position, without water running, because the pumps had not been activated, since they were on a timer. And then, in his absence, when the pumps were activated, that the faucet became fully active and spewed water from both wells, discharging until they, the wells, would have discharged or would have dried up, so to speak. And that he was, indeed, the person who, you know, sabotaged the system.¹⁹⁶

Mr. Ohs explained, “I can’t tell you [Mr. Tomlinson’s] motive for doing this, other than there had been a pattern of—when he was consequence, either verbally reprimanded or there was a written corrective action, that there was a response very close thereafter, that often involved contacting a public agency.”¹⁹⁷

Dr. Mayo was convinced Mr. Tomlinson had sabotaged the water system.¹⁹⁸ He never considered Mr. Ohs a suspect during the investigation.¹⁹⁹ Dr. Mayo testified at trial that he believed Mr. Tomlinson, rather than Mr. Ohs, had caused the water leak for several reasons:

1. no one saw Mr. Ohs enter the water room before he discovered the leak, and there was too much water lost for it all to have been pumped out of the spigot while Mr. Ohs was in the room;
2. Mr. Ohs had always taken responsibility for his mistakes in the past;
3. Mr. Tomlinson had a history of retaliating after receiving negative feedback; and
4. Mr. Tomlinson was impulsive and Mr. Ohs was not.²⁰⁰

Ms. McKenzie also did not suspect Mr. Ohs of causing the water spillage.²⁰¹ “[H]is demeanor was not consistent with someone who had done that and then was acting like he was surprised. He was truly upset. This was really upsetting for him, is just the way he said.”²⁰² She explained further that she had never seen Mr. Ohs do anything unethical, and that Mr. Ohs had nothing to gain from causing the

¹⁹⁶ Tr. at 758.

¹⁹⁷ Tr. at 777–78.

¹⁹⁸ Tr. at 84748.

¹⁹⁹ Tr. at 847–48.

²⁰⁰ Tr. at 847–48.

²⁰¹ Tr. at 970.

²⁰² Tr. at 970–71.

problem, since any damage would reflect poorly on his management of the facility.²⁰³

North Star fired Mr. Tomlinson on April 21, 2010.²⁰⁴ The decision to terminate the Complaint's employment was made by Mr. Ohs, Ms. Durr, and Dr. Mayo.²⁰⁵ The sabotage was the predominant reason, although North Star's Employee Corrective Action Report gave three reasons for his termination:

1. Mr. Tomlinson had previously received corrective action for failing to complete projects in a timely manner (including removing items from the "mechanical/boiler/furnace/water storage areas," which had been identified as a safety concern and an immediate priority), and Mr. Tomlinson was argumentative with his supervisor during counseling on that matter;
2. Mr. Tomlinson removed the baseboards from an entire area of Palmer Residential (despite being instructed to remove baseboards from a small section) and, during the process, left his tools in the facility's dirty linen room, which posed a safety hazard;
3. Mr. Tomlinson sabotaged Palmer Residential's water system, which created a safety hazard.²⁰⁶

6. Further Contact with Governmental Organizations

While suspended from work, on April 19, 2010, Mr. Tomlinson filed a complaint with DEC reporting 1) Mr. Ohs's status as a water operator, and 2) that Mr. Ohs had failed to report to DEC the fact that a water line had been cut by a contractor in July 2009 and caused contamination of the water system.²⁰⁷ Mr. Tomlinson also filed a complaint with the fire marshal on April 19, 2010, and a complaint with the Equal Employment Opportunity Commission on March 7, 2011.²⁰⁸

II. Mr. Tomlinson Proved the Elements of Discriminatory Retaliation

Congress enacted the SDWA "to assure that water supply systems serving the public meet minimum national standards for

²⁰³ Tr. at 971.

²⁰⁴ C. Ex.-14 at 123.

²⁰⁵ Tr. at 899.

²⁰⁶ C. Ex.-14 at 123.

²⁰⁷ R. Stip. Facts at 27; Tr. at 374-75, 482.

²⁰⁸ R. Stip. Facts at 28, 33.

protections of public health”²⁰⁹ and “to assure safe drinking water supplies, protect especially valuable aquifers, and protect drinking water from contamination by the underground injection of waste.”²¹⁰ The SDWA prohibits an employer from discriminating against an employee “with respect to his compensation, terms, conditions, or privileges” because the employee engaged in protected activity.²¹¹

The elements that make out an employment protection claim under the SDWA are that:

1. the employee engaged in a protected activity;
2. the employer knew or suspected, actually or constructively, that the employee engaged in the protected activity;
3. the employee suffered some adverse action in his job; and
4. the circumstances show or lead the adjudicator to infer that the protected activity motivated, in some way, the adverse action.²¹²

Proof of these elements, by preponderance of evidence, leads to an order from the Assistant Secretary granting the worker relief under the SDWA.²¹³ Linking the protected activity to the adverse action often requires inferences about the “motivating factor[s]”²¹⁴ for the discharge or other adverse action. A guilty employer rarely admits retaliation. A complainant may link them by showing a close temporal proximity between the protected activity and the employer’s adverse action.²¹⁵ An employer can rebut this inference if it demonstrates by a preponderance of the evidence “that it would have taken the same

²⁰⁹ H.R. Rep. No. 93-1185 (1974), reprinted in 1974 U.S.C.C.A.N. 6454.

²¹⁰ *Natural Res. Def. Council, Inc. v. U.S. E.P.A.*, 824 F.2d 1258, 1268 (1st Cir. 1987).

²¹¹ 42 U.S.C. § 300j-9(i)(1).

²¹² 29 C.F.R. § 24.104(e)(2).

²¹³ 29 C.F.R. § 24.105(a)(1), (c).

²¹⁴ “A complainant must prove more when showing that protected activity was a ‘motivating’ factor than when showing that such activity was a ‘contributing’ factor.” *Lopez v. Serbaco*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. at 5 (ARB Nov. 29, 2006) (citing *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 5–7 (ARB Sept. 30, 2003); *Vander Meer v. Western Ky. Univ.*, ARB No.97-078, ALJ No. 1995-ERA-38, slip op. at 3 (ARB Apr. 20, 1998)). A motivating factor need not be the only factor or the primary factor; it may be one of several motives. *Cf.*, *Cosa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) (discussing the definition of “motivating factor” as used in discrimination cases under Title VII, and codified at 42 U.S.C. § 2000e-2(m)).

²¹⁵ 29 C.F.R. § 24.104(e)(3).

adverse action in the absence of any protected activity.”²¹⁶ The ultimate burden of proof, however, remains with Mr. Tomlinson to show by a preponderance of the evidence that the “protected activity caused or was a motivating factor in the adverse action alleged in the complaint.”²¹⁷

A. Mr. Tomlinson Engaged in Protected Activity

1. Standard of Law

The SDWA protects activities that promote the availability of safe drinking water. The implementing regulation for the SDWA, 29 C.F.R. § 24.102, forbids an employer from discriminating against any employee who has engaged in protected activity.²¹⁸ The whistleblower protection scheme protects an employee’s participation in activities that further the statute’s objectives.²¹⁹

An employee engages in protected activity if he:

1. commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the federal statutes listed in § 24.100(a) or a proceeding for the administration or enforcement of any requirement imposed under such statute;
2. testified or is about to testify in any such proceeding; or
3. assisted, 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 such statute.²²⁰

Protected activity includes external and internal complaints, both written and oral.²²¹ The protection extends to the “raising of employee safety and health complaints, including the filing of complaints under OSHA . . . when such complaints touch on the concerns for the

²¹⁶ 29 C.F.R. § 24.109(b)(2).

²¹⁷ 29 C.F.R. § 24.109(b)(2).

²¹⁸ 29 C.F.R. § 24.102.

²¹⁹ *Jenkins v. U.S. Emtl. Prot. Agency*, 92-CAA-6, slip op. at 6 (Sec’y May 18, 1994).

²²⁰ 29 C.F.R. § 24.102(b). Part 24 of Title 29 of the Code of Federal Regulations implements the whistleblower protection provisions of six environmental protection statutes and the Energy Reorganization Act (ERA). 29 C.F.R. § 24.100. Decisions under any of the six environmental acts or the ERA apply a common legal framework.

²²¹ *See Hermanson v. Morrison Knudsen Corp.*, ARB No. 29-CER-2, ALJ No. 94-CER-2, slip op. at 5 (ARB June 28, 1996).

environment and public health and safety that are addressed by [the statute].”²²²

Whistleblower protection requires that an employee’s complaints be “grounded in conditions constituting reasonably perceived violations of the environmental acts.”²²³ “[T]he reasonableness of a whistleblower’s belief regarding statutory violations by an employer is to be determined on the basis of ‘the knowledge available to a reasonable [person] in the circumstances with the employee’s training and experience.’”²²⁴

2. Mr. Tomlinson’s Protected Activities

Mr. Tomlinson engaged in protected activity each time he reported concerns about Palmer Residential’s water system to Alaska’s DEC. Mr. Tomlinson’s communications with DEC include:

1. his November 14, 2008 complaint regarding Mr. Ohs’s work on Palmer Residential’s water system when Ohs was not certified as a water operator, and North Star’s decision not to pay “on-call” pay when he was the system’s certified operator;²²⁵
2. his January 1, 2009 e-mail (copied to DEC) stating that Palmer Residential’s well pumps had been turned off, leaving only a small amount of water in the facility’s storage tank;²²⁶ and
3. his April 19, 2010 complaint about Mr. Ohs status as a water operator and a 2009 incident where a water line had been cut by a contractor.²²⁷

I reject North Star’s argument that Mr. Tomlinson’s April 19, 2010 complaint to DEC did not constitute protected activity because Mr. Tomlinson knew the issues reported had already been resolved.²²⁸ Mr. Tomlinson no doubt knew that Mr. Ohs had renewed his water operator’s certification in 2009, but it is less clear that Mr. Tomlinson

²²² *Melendez v. Exxon Chemical Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6, slip op. at 17 (ARB July 14, 2000) (citing *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3, slip op. at 7 (ARB Sept. 29, 1998)).

²²³ *Powell v. City of Ardmore, Oklahoma*, ARB No. 09-071, ALJ No. 2007-SDW-1, at 5 (ARB Jan. 5, 2011) (quoting *Minard v. Nerco Delamar Co.*, 1992-SWD-001, slip op. at 5 (Sec’y Jan. 25, 1994)).

²²⁴ *Melendez*, ARB No. 96-051, ALJ No. 1993-ERA-006, at 27 (quoting *Minard v. Nerco Delamar Co.*, 92-SWD-1, slip op. at 7 n.5 (Sec’y Jan. 25, 1994)).

²²⁵ R. Stip. Facts at 9; R. Ex.-G at 388.

²²⁶ R. Ex.-L at 419.

²²⁷ R. Stip. Facts at 27; Tr. at 374–75, 482.

²²⁸ Respondent’s Post-Trial Brief at 15–17.

was convinced the cut in the water line and the resulting contamination to the potable water system had been reported. Mr. Smith sent an e-mail to Mr. Tomlinson telling him that Mr. Ohs had reported the problem to DEC,²²⁹ and indeed the incident was reported.²³⁰ Mr. Tomlinson testified that he was later told by a DEC employee that the incident hadn't been reported.²³¹ That DEC employee's notes confirm that Mr. Ohs had informed her of the problem, however.²³² Nevertheless, Mr. Tomlinson's trust in North Star's management had eroded sufficiently by the time of his April 19, 2010 complaint that he likely put little faith in Mr. Smith's secondhand account of Mr. Ohs's conversation with DEC. Mr. Tomlinson's complaint wasn't contemporaneous with the incident; nevertheless, it raised a genuine issue of regulatory compliance. Following up with DEC to ensure that the matter had, in fact, been reported qualifies as protected activity.

B. North Star Had Knowledge of Mr. Tomlinson's Protected Activity When It Fired Him

Three people made the decision to terminate Mr. Tomlinson: Mr. Ohs, Ms. Durr, and Dr. Mayo.²³³

Dr. Mayo knew of Mr. Tomlinson's November 14, 2008 complaint to DEC. He testified at trial that he learned about the complaint sometime after receiving Mr. Tomlinson's November 20, 2008 memo to Dr. Mayo and Mr. Smith, which contained much of the same information Mr. Tomlinson had sent to DEC.²³⁴ Mr. Ohs knew of the complaint—Dr. Mayo instructed Mr. Ohs to call DEC and inform the agency of the potential violation.²³⁵

Similarly, there is no doubt that both Dr. Mayo and Mr. Ohs knew about Mr. Tomlinson's January 1, 2009 e-mail to DEC, since that e-mail was sent to Dr. Mayo, Mr. Ohs, Mr. Higgins, Ms. McKenzie, and Mr. Smith when it went to DEC.²³⁶

Mr. Ohs and Ms. Durr testified that they were unaware of Mr. Tomlinson's April 19, 2010 complaint to DEC before the termination.²³⁷ Dr. Mayo acknowledged he was aware a complaint had been made, but

²²⁹ C. Ex.-9 at 96.

²³⁰ R. Ex.-G at 403.

²³¹ Tr. at 486–87.

²³² R. Ex.-G at 403.

²³³ Tr. at 899.

²³⁴ Tr. at 813–14; C. Ex.-3 at 75–76.

²³⁵ Tr. at 809–811.

²³⁶ R. Ex.-L at 419.

²³⁷ Tr. at 759, 899.

I reject his testimony that he was unaware Mr. Tomlinson was the source of the April 19 complaint to DEC.²³⁸

Mr. Smith testified that he got a copy of the complaint from DEC the same day the complaint was made.²³⁹ DEC records indicate that Mr. Smith actually requested a copy of the complaint on April 20, 2010, to which North Star stipulated.²⁴⁰ Whether Mr. Smith got a copy of the complaint on April 19 or 20 is immaterial, as Mr. Tomlinson was fired after both dates, on April 21.²⁴¹ DEC staff told Mr. Smith that Mr. Tomlinson had made the complaint.²⁴²

Mr. Smith informed Dr. Mayo on April 20, 2010 of Mr. Tomlinson's complaint to DEC.²⁴³ Dr. Mayo recalled the conversation somewhat differently. He testified that Mr. Smith approached him on April 20 and told him that a complaint had been made to DEC.²⁴⁴ Dr. Mayo testified that Mr. Smith asked Dr. Mayo if he wanted to know who had made the complaint, and that Dr. Mayo "interrupted him mid-sentence and said, 'No, no, no, no, no. I am not interested in who it was. Don't want to know. Don't want to hear it.'"²⁴⁵ He explained that "all I need to know his [sic] how did it get the way it got, who is responsible for allowing it to get there, because we need to hold somebody accountable, and then what are we going to do to fix it?"²⁴⁶

Mr. Smith informed Dr. Mayo in writing of the complaint Mr. Tomlinson made to the DEC in addition to doing so orally. An e-mail Mr. Smith drafted to Dr. Mayo dated April 20, 2010, explained that Mr. Tomlinson had complained to DEC.²⁴⁷ Dr. Mayo said the e-mail was never actually sent to him, so he had not seen it.²⁴⁸ The e-mail itself shows that it was sent on April 20, 2010 at 10:26 a.m., but it also says that it was sent both to and from Mr. Smith.²⁴⁹ Dr. Mayo testified the e-mail was forwarded to him at his request months later, on September 14, 2010, by North Star's Information Technology Manager.²⁵⁰

Even if Dr. Mayo testified accurately both that he stopped Mr. Smith from orally identifying the person who complained to DEC, and

²³⁸ Tr. at 849–51.

²³⁹ Tr. at 110–11.

²⁴⁰ R. Ex.-G at 410; R. Stip. Facts at 29.

²⁴¹ R. Stip. at 30.

²⁴² Tr. at 107–08.

²⁴³ Tr. at 110–11.

²⁴⁴ Tr. at 849–50.

²⁴⁵ Tr. at 849–50.

²⁴⁶ Tr. at 850.

²⁴⁷ R. Ex.-AU at 922.

²⁴⁸ R. Ex.-AU at 923; Tr. at 850.

²⁴⁹ R. Ex.-AU at 923; Tr. at 850–53.

²⁵⁰ R. Ex.-AU at 923.

never received the e-mail from Mr. Smith, I find it more probable than not that Dr. Mayo would have, and did, assume that Mr. Tomlinson was the person who had complained to the Alaska DEC. Mr. Tomlinson had a history of contacting DEC; that the complaint happened while Mr. Tomlinson was suspended by North Star. Dr. Mayo had ample reason to infer Mr. Tomlinson was the source. I find that he actually believed Mr. Tomlinson had made the complaint. Interrupting Mr. Smith could give Dr. Mayo a plausible basis to say he didn't know. But the very act of inhibiting Mr. Smith from stating an obviously relevant matter has significance to me. He didn't need to hear it from Mr. Smith, because he already had inferred Mr. Tomlinson was the source of the complaint. The inference was spot on.

Certain knowledge that an employee made a protected disclosure is more than the governing regulation requires for an employer to be liable. The second element to be proven is that the "employer knew or suspected, actually or constructively, that the employee engaged in the protected activity."²⁵¹ Dr. Mayo not only suspected Mr. Tomlinson was the source of the complaint to DEC, he knew. Yet suspicion that Mr. Tomlinson was the source of the report makes out the necessary element of the claim.

The North Star administrators who terminated Mr. Tomlinson's employment were aware of Tomlinson's protected activities when they terminated him.

C. Mr. Tomlinson's Protected Activities Motivated North Star's Decision to Terminate Him in Some Part

Mr. Tomlinson was fired because he was blamed for the April 15, 2010 sabotage of Palmer Residential's potable water system. Sabotage would justify termination. In that sense, the decision to terminate Mr. Tomlinson was not directly motivated solely by his protected activity. The evidence convinces me, however, that Mr. Tomlinson was not the saboteur; another North Star employee sabotaged the system in an attempt to frame Mr. Tomlinson and get him fired. That manager's sabotage was motivated, at least in part, by Mr. Tomlinson's protected activities. North Star bears responsibility for that managerial action.

1. Mr. Tomlinson Did Not Sabotage the Water System

Mr. Tomlinson left Palmer Residential at 2:34 p.m. on April 15, 2010.²⁵² If the time-out periods for the well pumps were changed while the pumps were already in time-out periods, the time-out periods would start anew. The pumps would remain off until the new time-out

²⁵¹ 29 C.F.R. § 24.104(e)(2)(ii).

²⁵² R. Stip. Facts at 22.

period had passed.²⁵³ Had Mr. Tomlinson changed the time-out periods to 90 minutes, it would take that long for the pumps to begin to run. It could be longer, however, depending on the water level in the storage tank after the 90 minutes has passed.²⁵⁴ Had Mr. Tomlinson set the time-out period for the well pumps to 90 minutes and opened the spigot in the water room before he left work on April 15, 2010, it is possible water would not have begun draining into the water room until later in the day, around the time Mr. Ohs claims to have discovered the water running.

But this isn't what Mr. Ohs described. The scene described in his testimony and personal notes could only happen if the valve in the water room that connects the spigot to the Aquavar pumps was open. When the valve and spigot are open, water under pressure discharges immediately. Mr. Tomlinson, who left work long before the leak was "discovered," could not be responsible. Testimony from two professionals confirms this.

a. Evidence from Jeffrey Hoffman, Ph.D., P.E.

Dr. Hoffman, a professional engineer North Star offered as its expert witness, couldn't reproduce what Mr. Ohs described. Dr. Hoffman estimated that the well pumps that fill the storage tank produce about three to five gallons per minute.²⁵⁵ Dr. Hoffman attempted to reproduce the scenario that occurred on April 15, 2010 by opening the spigot with the well pumps active and observing the results.²⁵⁶ He couldn't reproduce what Mr. Ohs so floridly described—spraying water that soaked far up the walls to the electrical outlets near the valve.²⁵⁷ Dr. Hoffman explained that

[t]he water spray pattern was narrow and did not directly touch the wall or electronics" We were able to duplicate water coating the lower portions of the wall simply from the water impacting the ground and splashing radially from the point of impact. It is possible that with enough time, the splashing water could wet the base of the walls and the outer edges of the containment.

Dr. Hoffman acknowledged it was possible, given enough time, that water splashing onto the walls could drip down and eventually seep under the wall into another room.²⁵⁸ He explained, however, that

²⁵³ Tr. at 1025.

²⁵⁴ Tr. at 1029.

²⁵⁵ Tr. at 872.

²⁵⁶ R. Ex.-AV at 997.

²⁵⁷ R. Ex.-AV at 997.

²⁵⁸ Tr. at 872–73.

he only observed water splash about 12 to 14 inches up the wall, far below where the electrical box was located.²⁵⁹ This is not the splashing Mr. Ohs reported.²⁶⁰

Dr. Hoffman thought the water Mr. Ohs's had seen on pipes near the spigot was likely caused by condensation rather than water that had sprayed from the spigot.²⁶¹ He found that the floor drain in the water room "appeared more than adequately sized to accommodate the estimated 3–5 gal/min flow rate exiting the valve."²⁶²

Dr. Hoffman did not test the scenario where both the spigot and valve were opened.²⁶³ Although he requested another site visit to perform the test, he never did.²⁶⁴ He suspected, however, that opening both the spigot and valve would result in a higher flow rate.²⁶⁵

b. Evidence from Daniel Steiner, P.E.

Mr. Steiner, a professional engineer retained by Mr. Tomlinson, tested Palmer Residential's water system with the spigot open and one of the two well pumps active.²⁶⁶ He could not recall with certainty which of the two well pumps were running for the test, but he acknowledged that it may have been the pump with the lower flow rate.²⁶⁷ He estimated that water flowed out of the spigot at about one to two gallons per minute,²⁶⁸ somewhat less than the three to five gallon per minute flow Dr. Hoffman had estimated. Mr. Steiner explained that both well pumps are "low-flow, low-head pumps," meaning they are low pressure.²⁶⁹ The water discharged from the low-flow pump during his test easily drained in the water room's floor drain, without coming near the concrete curb, a bowl-like containment barrier.²⁷⁰ Little water puddled during the test; none splashed over the containment curb.²⁷¹

Mr. Steiner concluded that leaving only the spigot open was unlikely to have caused all of the conditions described by Mr. Ohs following the April 15, 2010 incident.²⁷² He also explained that, in his

²⁵⁹ Tr. at 876.

²⁶⁰ Tr. at 876.

²⁶¹ R. Ex.-AV at 997–98.

²⁶² R. Ex.-AV at 998.

²⁶³ R. Ex.-AV at 998.

²⁶⁴ R. Ex.-AV at 998.

²⁶⁵ R. Ex.-AV at 998.

²⁶⁶ C. Ex.-26 at 197.

²⁶⁷ Tr. at 216–17.

²⁶⁸ C. Ex.-26 at 197.

²⁶⁹ Tr. at 203.

²⁷⁰ C. Ex.-26 at 197.

²⁷¹ Tr. at 210–11.

²⁷² C. Ex.-26 at 197.

opinion, Mr. Tomlinson could not have created any form of hazard, electrical or otherwise, by leaving the spigot open intentionally or unintentionally.²⁷³

c. Conclusion

Mr. Tomlinson never left water running in the water room that day. Neither expert engineer could recreate anything like the dramatic scene Mr. Ohs described. Although Dr. Hoffman suggested that a longer test may have resulted in more water splashing onto the walls and perhaps seeping under the wall, the evidence from Ms. Colee, Mr. Foxley, and Mr. Ohs suggests that the actual water leak lasted only about ten to twenty minutes. Dr. Hoffman's test lasted five to ten minutes.²⁷⁴ Furthermore, neither Dr. Hoffman nor Mr. Steiner could explain how water from the well pumps could reach several feet up the wall or near the electrical equipment, as Mr. Ohs emphasized. The experts also agreed that the Aquavar pumps that pressurize the school's water system produce more flow than the well pumps.

Mr. Steiner may have used the weaker of the two well pumps.²⁷⁵ It is unclear whether Dr. Hoffman's test involved both. North Star asserts that Dr. Hoffman's test was conducted with only the stronger of the two well pumps,²⁷⁶ and some of Dr. Hoffman's trial testimony suggests that only one pump was used,²⁷⁷ but his written report refers to both well pumps: "The configuration the author was able to observe was the condition where the well pumps are energized and supplying pressurized water to the water supply tank."²⁷⁸ Any additional pressure from running both well pumps would not account for the striking differences between Mr. Ohs's description and the results of the experts' tests.

I also find it suspicious that Mr. Ohs managed to discover the water flowing in the water room so quickly. North Star contends that Mr. Tomlinson arranged for water to discharge long after he left work, and Ms. Colee did not hear water from Mr. Foxley's classroom before she left at 4:00 p.m. That would make it a happy accident that Mr. Ohs, who testified that he entered the water room at 4:20 p.m., discovered the leak no more than 20 minutes after it began. The more troublesome evidence is that, despite Mr. Ohs's testimony that he immediately shut off the running water when he discovered it, Mr.

²⁷³ C. Ex.-26 at 197.

²⁷⁴ Tr. at 872.

²⁷⁵ Tr. at 216-17.

²⁷⁶ Respondent's Post-Trial Brief at 35.

²⁷⁷ Tr. at 871-72.

²⁷⁸ R. Ex.-AV at 997.

Foxley heard Mr. Ohs talking in the water room while water was running.

The very structure of North Star's investigation was flawed. Mr. Ohs, who had a poor relationship with a primary suspect, and himself one of the few people with access to the water room, led North Star's investigation. Small wonder then that the condition of the water room Mr. Ohs described could not be reproduced.

The conclusions of Dr. Mayo and Ms. McKenzie that Mr. Tomlinson—rather than Mr. Ohs—committed the sabotage are largely based on their impressions of Mr. Ohs's and Mr. Tomlinson's personalities. These subjective assessments are less convincing than test results of professional engineers.

One could contrive a set of circumstances where it would be possible for Mr. Tomlinson to cause a water leak nearly two hours after leaving Palmer Residential, but it would not include high pressure spraying. I find it more likely that Mr. Ohs, who was in the water room at the time of the leak, released high-pressure water from the Aquavar pumps out of the spigot. Mr. Foxley heard Mr. Ohs speaking (on his cell phone) while water was running. Had Mr. Ohs found what he described, he would not have called anyone on the phone before he shut the water off.

North Star got it wrong.

2. Protected Activity Motivated North Star's Termination of Mr. Tomlinson

If the objective facts the engineers found weren't enough, three other circumstances reinforce my finding that Mr. Ohs retaliated against Mr. Tomlinson: the hostility Mr. Ohs and Dr. Mayo expressed to the contacts Mr. Tomlinson had with regulatory agencies; the testimony of the former head of HR at the North Star's corporate office in Anchorage, Mr. Higgins, about retaliation attempts he thwarted and discrimination he suffered; and the way Mr. Tomlinson's performance evaluation for 2009 flipped from positive to progressively more negative as people who were not Mr. Tomlinson's supervisor took the unusual step of inserting themselves into writing the Tomlinson evaluation.

a. Mr. Tomlinson's Relationship with Mr. Ohs

Mr. Ohs frequently told Mr. Tomlinson not to contact government agencies.²⁷⁹ In one conversation Mr. Ohs was "pacing back

²⁷⁹ Tr. at 360.

and forth, red in the face, fists clenched, in Randy Smith's office, and told [Mr. Tomlinson], 'You are not to contact DEC, under any circumstances.'"²⁸⁰

Mr. Tomlinson's relationship with Mr. Ohs changed "drastically" in 2008, after he complained about Mr. Ohs's uncertified work on the water system and his own lack of on-call pay.²⁸¹ Mr. Ohs response was to increase his workload and find fault with his work.²⁸² These specific actions incline me to infer retaliation for making reports to the Alaska state agency with oversight of potable water systems more likely than not occurred.

b. Insights from Mr. Higgins about Management Culture at North Star

Mr. Higgins had been North Star's Human Resources Director before 2009, though during his tenure, his other responsibilities had included managing North Star's facilities department for a time.²⁸³ He described a culture of hostility within North Star's management that, as the head of HR, he was in a unique position to observe. Managers did not react well when they heard problems had been reported externally to government agencies. Formal HR policy prohibited adverse action against employees who raised concerns to management or regulatory agencies, but North Star had failed to adhere to that policy, particularly with Mr. Tomlinson.²⁸⁴

Shortly after Dr. Mayo became North Star's CEO in the fall of 2008, Dr. Mayo got upset when he learned Mr. Tomlinson had complained to a state agency.²⁸⁵ Dr. Mayo directed Mr. Higgins to draft a policy that prohibited employees from reporting a concern to the State unless the employee first reported it to Dr. Mayo.²⁸⁶ Dr. Mayo had implemented this sort of policy at a facility North Star's parent owned in Mississippi.²⁸⁷ Mr. Higgins explained that no such policy could be lawful.²⁸⁸ Dr. Mayo took that policy rebuff as a challenge to his executive authority; he intentionally made Mr. Higgins uncomfortable for refusing to follow that instruction. Mr. Higgins felt

²⁸⁰ Tr. at 488.

²⁸¹ Tr. at 339-40.

²⁸² Tr. at 340-46.

²⁸³ Tr. at 120-21.

²⁸⁴ Tr. at 129.

²⁸⁵ Tr. at 123-24.

²⁸⁶ Tr. at 124.

²⁸⁷ Tr. at 124.

²⁸⁸ Tr. at 124.

his refusal to implement an unlawful policy damaged his relationship with Dr. Mayo.²⁸⁹

External reports to state regulators were not the only ones that drew a negative reaction. The hostility could extend to any shortcoming brought to Mr. Ohs' attention. Mr. Higgins believed Mr. Ohs also punished Mr. Tomlinson for raising concerns by making Mr. Tomlinson personally responsible for addressing any issue he raised. For example, Mr. Tomlinson once told Mr. Ohs that filters on laundry room dryers were not being cleaned, which represented a fire hazard. Mr. Ohs response was to require Mr. Tomlinson to check every dryer filter twice a day. "[Y]ou are responsible for it. That way you can't raise any concerns."²⁹⁰

As Mr. Higgins saw it, "I think [Mr. Ohs] was trying to tell people—you do not report concerns, if you've got—even reporting it to him, he was then taking a negative reaction."²⁹¹ Mr. Higgins explained, "I think that was the way [Mr. Ohs] was looking at it. He said, 'You raised a concern, you're now responsible for fixing it, that's how we'll get even. So, if you want to raise anymore concerns, you're going to have more work on your plate.'"²⁹²

Mr. Higgins believed Mr. Ohs did treat Mr. Tomlinson more harshly in retaliation for reports Mr. Tomlinson had made outside North Star. Mr. Ohs began to interrupt Mr. Tomlinson's work frequently with meetings after Mr. Ohs learned about a report Mr. Tomlinson made to a state agency.²⁹³ Frequent short meetings Mr. Ohs called forced Mr. Tomlinson to put away the materials in active use. Having to reassemble the tools and materials when he returned impaired his productivity.²⁹⁴

Mr. Higgins found, during his tenure, that North Star's managers made it known, informally, that bad things would happen to an employee who reported problems at North Star to the government. The way Mr. Tomlinson was treated, in particular, had created an environment that discouraged employees from identifying problems.²⁹⁵

"[M]y concern is that it creates a chilling effect. That means that everybody in the organization knows that if you raise concerns, something will happen. And it was widespread that [Mr. Tomlinson] was raising concerns and people [*i.e.*,

²⁸⁹ Tr. at 124–25.

²⁹⁰ Tr. at 147.

²⁹¹ Tr. at 147.

²⁹² Tr. at 147.

²⁹³ Tr. at 127–28.

²⁹⁴ Tr. at 127–28.

²⁹⁵ Tr. at 147–48.

managers] were mad. And so anybody who wanted to raise a concern, at that point in time, did so at great peril or great risk, and they knew that.”²⁹⁶

Mr. Higgins witnessed efforts by North Star management to terminate or harass Mr. Tomlinson.²⁹⁷ He heard Ms. McKenzie say Mr. Tomlinson was causing problems, Dr. Mayo wanted him gone, and something needed to be done about it.²⁹⁸ This happened shortly after Mr. Higgins refused to implement Dr. Mayo’s desire to prohibit reports by employees to outside agencies before first reporting to Dr. Mayo.²⁹⁹ Around that time, Mr. Ohs and Ms. McKenzie repeatedly asked Mr. Higgins how they could get rid of Mr. Tomlinson.³⁰⁰ They asked specifically if they could fire Mr. Tomlinson if he failed to get his water operator’s certification renewed.³⁰¹ Sometime in 2009, Mr. Ohs also asked Mr. Higgins whether North Star could fire Mr. Tomlinson if Mr. Tomlinson left water running again (Mr. Ohs believed Mr. Tomlinson had left the a hose running once before, something never proven).³⁰²

Dr. Mayo and Ms. McKenzie responded to this damaging testimony by try to discredit Mr. Higgins as someone who nursed a grudge against North Star from the time he left the company.

Dr. Mayo testified that he had written up Mr. Higgins for problems with attendance (missing phone calls and meetings), and for being verbally abusive and aggressive with his staff.³⁰³ Dr. Mayo characterized Mr. Higgins as someone who responded angrily to criticisms of his performance.³⁰⁴

Dr. Mayo testified that it was Mr. Higgins who had threatened to retaliate against North Star. The threat was that if he (Mr. Higgins) suffered any adverse actions, Mr. Higgins would claim that:

1. Dr. Mayo had instructed him to fire Mr. Tomlinson, and
2. Mr. Higgins had protected Mr. Tomlinson.³⁰⁵

Dr. Mayo testified Mr. Higgins “said he would specifically do that, as a way to retaliate against me.”³⁰⁶

²⁹⁶ Tr. at 147–48.

²⁹⁷ Tr. at 126–130.

²⁹⁸ Tr. at 125.

²⁹⁹ Tr. at 124–25.

³⁰⁰ Tr. at 126.

³⁰¹ Tr. at 126.

³⁰² Tr. at 131.

³⁰³ Tr. at 836–37.

³⁰⁴ Tr. at 836.

³⁰⁵ Tr. at 836.

³⁰⁶ Tr. at 836.

Dr. Mayo believed that Mr. Higgins had wanted to be considered for the position as CEO of North Star, and was upset when Dr. Mayo was chosen instead.³⁰⁷ Dr. Mayo believed that Mr. Higgins was “[n]ot at all” happy when he left North Star.³⁰⁸

Ms. McKenzie criticized Mr. Higgins too. She testified that Mr. Higgins was frequently in violation of many Joint Commission standards.³⁰⁹ She also “found him to be pretty unethical and to do many things that I would not have considered professional.”³¹⁰ Ms. McKenzie testified that a North Star employee at human resources told her, “if you guys get rid of [Mr. Higgins], he’s going to set the company up for [Mr. Tomlinson]. . . . He’s going to make it look like you guys retaliated against him.”³¹¹ Overall, Ms. McKenzie thought Mr. Higgins did not have a good relationship with North Star after leaving the company.³¹²

c. Mr. Smith Serves as Mr. Tomlinson’s Supervisor

When Randy Smith began at North Star in September 2005, he heard nothing but positive comments about Mr. Tomlinson from James Sheil (North Star’s CEO at the time) and Mr. Ohs.³¹³ Mr. Smith testified that “Mr. Ohs was “constantly boasting about [Mr. Tomlinson] and his behavior, his work, productivity.”³¹⁴ Mr. Smith supervised Mr. Tomlinson throughout 2009.

Mr. Smith took issue with some of the later disciplinary action taken against Tomlinson. For example, Mr. Smith had a problem with Mr. Tomlinson being written up for locking his tools in a room at Palmer Residential that was not the tool room.³¹⁵ He explained that, although that was not the preferred method of storing tools, employees were not usually written up for leaving tools in a locked room.³¹⁶ Similarly, Mr. Smith testified that leaving his tools in the laundry room (which North Star cited as one of the grounds for Mr. Tomlinson’s termination) was not a good reason to fire Mr. Tomlinson.³¹⁷ He

³⁰⁷ Tr. at 837–38.

³⁰⁸ Tr. at 837.

³⁰⁹ Tr. at 972.

³¹⁰ Tr. at 973.

³¹¹ Tr. at 974.

³¹² Tr. at 973.

³¹³ Tr. at 64.

³¹⁴ Tr. at 64.

³¹⁵ Tr. at 85.

³¹⁶ Tr. at 85.

³¹⁷ Tr. at 86.

explained, however, that “[i]f you’re trying to create a paper trial to assassinate someone, it’s a perfectly good example to use.”³¹⁸

Mr. Smith also took issue with Mr. Tomlinson being written up for failing to complete tasks on time and working overtime.³¹⁹ In his opinion, it was not Mr. Tomlinson’s fault that he did not finish on time; Mr. Tomlinson was just busy.³²⁰

A number of people intervened as Mr. Smith wrote Mr. Tomlinson’s 2009 performance evaluation, one of his duties as Mr. Tomlinson’s direct supervisor. On December 9, 2009, he received an e-mail from Ms. McKenzie requesting that Mr. Ohs and Ms. Durr review the evaluation before it was given to Tomlinson.³²¹ Dr. Mayo also told Mr. Smith that Mr. Ohs, Ms. McKenzie, and Ms. Durr would read the evaluation before it was given to Mr. Tomlinson.³²² Dr. Mayo made it clear that if Mr. Smith did not follow his instructions, Mr. Smith would lose his management responsibilities at Palmer Residential.³²³ Mr. Smith exchanged several drafts of the evaluation with Mr. Ohs.³²⁴ The evaluation originally summarized the relationship between Mr. Tomlinson and Mr. Ohs, but by the end, much of the information on Mr. Ohs was removed, and the evaluation focused more on problems with Mr. Tomlinson.³²⁵ Mr. Smith had never experienced that level of interference with an employee evaluation before.³²⁶ “The product that was finally delivered wasn’t my work, 100 percent.”³²⁷ “It was collaborated efforts of three directors and me, with the instruction of the CEO.”³²⁸

Mr. Smith also testified that Dr. Mayo sometimes got upset when his employees talked to DEC or other agencies, depending on the circumstances.³²⁹ Mr. Smith wrote a letter to Dr. Mayo trying to explain that it was normal for such communications to occur.³³⁰

Mr. Smith explained that, towards the end of Mr. Tomlinson’s employment at North Star, Mr. Smith was “starting to see that this was not going to work and I was hopeful that [Mr. Tomlinson] would

³¹⁸ Tr. at 86.

³¹⁹ Tr. at 96.

³²⁰ Tr. at 96.

³²¹ Tr. at 100.

³²² Tr. at 100.

³²³ Tr. at 100.

³²⁴ Tr. at 101.

³²⁵ Tr. at 101–02.

³²⁶ Tr. at 103.

³²⁷ Tr. at 103.

³²⁸ Tr. at 103.

³²⁹ Tr. at 106.

³³⁰ Tr. at 106.

come to terms with what was going on and move on, go find a better job that would pay better, and he'd be happy. Because this personality breakdown was not correcting itself.”³³¹

d. Timothy Attwood, who Replaced Mr. Tomlinson, Quits After a Year

Mr. Attwood worked as a water systems operator for North Star at Palmer Residential after Mr. Tomlinson, from March 2010 to April 2011.³³²

Mr. Attwood lost respect for Mr. Ohs when he learned that employees at Palmer Residential felt they would be punished for reporting problems to an outside agency.³³³ The only specific person he could remember complaining about that issue was Greg Foxley, though he claimed to have heard other stories to the same effect.³³⁴

North Star attempts to discredit Mr. Attwood's testimony by describing him as disgruntled about his work after being turned down for the position of Facility Manager at Palmer Residential, which would have been a promotion.³³⁵ Mr. Attwood quit without notice a week after being turned down.³³⁶

e. Threats Made to Mr. Foxley

Mr. Ohs supervised Mr. Foxley.³³⁷ Until April 2010, Mr. Foxley had received excellent reviews.³³⁸ After the water leak incident, Mr. Foxley told Mr. Ohs that he did not trust him.³³⁹ Mr. Ohs responded “[m]aybe you ought to consider not working for North Star anymore,” which Mr. Foxley interpreted this as a threat to fire him.³⁴⁰ Mr. Foxley also testified that the conversation marked beginning of intimidation and harassment against him.³⁴¹

f. Testimony of Mr. Ohs

Mr. Ohs testified to a number of significant matters. He decided to fire Mr. Tomlinson because Mr. Tomlinson had sabotaged the water system, and because he had left tools out again.³⁴² He would have

³³¹ Tr. at 102.

³³² Tr. at 252.

³³³ Tr. at 263–64.

³³⁴ Tr. at 263–64.

³³⁵ Tr. at 269–71.

³³⁶ Tr. at 270.

³³⁷ Tr. at 36.

³³⁸ Tr. at 34.

³³⁹ Tr. at 34.

³⁴⁰ Tr. at 34.

³⁴¹ Tr. at 34.

³⁴² Tr. at 760.

terminated any of North Star's other maintenance employees for the same acts, so the firing was not personal.³⁴³ Mr. Ohs further testified he was unaware that Mr. Tomlinson had made his April 20, 2010 complaint to DEC when he decided to fire Mr. Tomlinson,³⁴⁴ so a complaint to DEC had no influence on his decision to fire Mr. Tomlinson.³⁴⁵

Mr. Ohs recalled conferring with Mr. Higgins about Mr. Tomlinson's performance on several occasions. They discussed corrective action, including oral warnings, written warnings, and termination,³⁴⁶ all due to Mr. Tomlinson's ongoing performance issues.³⁴⁷

Mr. Ohs testified that Mr. Smith wrote Mr. Tomlinson's 2009 performance evaluation with Mr. Ohs's input.³⁴⁸ Mr. Ohs acknowledged that he gave suggestions and that Mr. Smith edited the evaluation,³⁴⁹ but denied being as involved as Mr. Smith had claimed. In fact, Mr. Ohs said he was "real frustrated, because [Mr. Smith] didn't even put some of the things I wanted in there. He modified it."³⁵⁰

g. Testimony of Dr. Mayo

Dr. Mayo testified that he had an open door policy and could not recall ever failing to return an employee phone call or e-mail.³⁵¹ He believes he is open to complaints.³⁵²

Dr. Mayo testified that it didn't matter to him that someone had contacted DEC while Mr. Tomlinson was suspended.³⁵³ He also explained that he didn't even know who had made that complaint before Mr. Tomlinson was fired.³⁵⁴

It was ultimately Dr. Mayo's decision to terminate Mr. Tomlinson.³⁵⁵ He reached his decision after speaking with the North Star employees who had conducted the investigation into the water leak incident, and with staff from North Star's corporate headquarters.³⁵⁶ At trial, Dr. Mayo explained that he was hesitant to

³⁴³ Tr. at 763.

³⁴⁴ Tr. at 759.

³⁴⁵ Tr. at 759–60.

³⁴⁶ Tr. at 781.

³⁴⁷ Tr. at 781.

³⁴⁸ Tr. at 693–94.

³⁴⁹ Tr. at 694.

³⁵⁰ Tr. at 694.

³⁵¹ Tr. at 806.

³⁵² Tr. at 806–07.

³⁵³ Tr. at 855–856.

³⁵⁴ Tr. at 849.

³⁵⁵ Tr. at 853.

³⁵⁶ Tr. at 853.

fire Mr. Tomlinson because “[Mr. Tomlinson] was, probably, the most protected employee we had in the North Star system. I knew, for sure, anything we did with [Mr. Tomlinson], I was going to end up sitting exactly where I’m sitting today.”³⁵⁷

Had this been any other thing, other than where we ended up, which was water being close to a kids classroom, [Mr. Tomlinson] would, probably, still be working with us, quite frankly. Because—was it difficult to work with him? Absolutely it was. But with that being said, he was still the most productive employee we had. . . .” The choice was either protect everybody else and risk going to court, or either let [Mr. Tomlinson] go, let the powers go and let it be where it is.³⁵⁸

According to Dr. Mayo, he would have fired anyone responsible for what Mr. Tomlinson was accused of doing.³⁵⁹ “When you put people’s safety at risk, it’s a done deal.”³⁶⁰ Dr. Mayo testified that it would not have made any difference if Dr. Mayo had suspected him of making another complaint to DEC.³⁶¹

h. Testimony of the New HR Director, Ms. Durr

Ms. Durr is the former Human Resource Director for North Star.³⁶² She began working at North Star in September 2009 and left in March 2012 on good terms.³⁶³

Ms. Durr denied she told Mr. Smith what to write in Mr. Tomlinson’s 2009 performance evaluation.³⁶⁴ She explained that an employee’s supervisor is responsible for writing such evaluations.³⁶⁵ Mr. Durr did, however, ask Mr. Ohs and Mr. Smith to collaborate on Mr. Tomlinson’s 2009 performance evaluation because Mr. Tomlinson reported directly to Mr. Smith, who worked in Anchorage, but received day-to-day instructions from Mr. Ohs.³⁶⁶

The only account Ms. Durr heard of the water leak incident came from Mr. Ohs.³⁶⁷ She and Mr. Ohs asked Mr. Tomlinson for his version of events, but he did not provide any information on how the

³⁵⁷ Tr. at 854.

³⁵⁸ Tr. at 854–56.

³⁵⁹ Tr. at 856.

³⁶⁰ Tr. at 856.

³⁶¹ Tr. at 857.

³⁶² Tr. at 880.

³⁶³ Tr. at 880.

³⁶⁴ Tr. at 881.

³⁶⁵ Tr. at 881.

³⁶⁶ Tr. at 881–82.

³⁶⁷ Tr. at 908–09.

leak could have happened.³⁶⁸ North Star's investigation found that the Clamant was the only person to have been in the water room (besides Mr. Ohs) on the day of the incident.³⁶⁹

Dr. Mayo, Mr. Ohs, and Ms. Durr made the decision to terminate Mr. Tomlinson together.³⁷⁰ She testified that no one involved was pushing for the decision to terminate.³⁷¹ Based on the information gathered, they concluded that the water leak represented a sabotage of the water system, which was both a safety issue and a terminable offense.³⁷² Ms. Durr would have terminated another employee found guilty of the same offense.³⁷³

Ms. Durr was unaware of Mr. Tomlinson's April 19, 2010 complaint to DEC. It played no part in her decision to terminate Tomlinson.³⁷⁴

i. Testimony of Ms. McKenzie

Ms. McKenzie explained that, when North Star discovered problems, it would typically call the relevant agency and report what they had discovered and how they were addressing the problem.³⁷⁵ She considered it "no big deal" for North Star to call and report a problem.³⁷⁶

She recalled Mr. Tomlinson's AKOSH complaint, and did not consider it cause for concern.³⁷⁷ North Star was ultimately fined \$4,500 based on violations, an amount not significant for North Star.³⁷⁸ According to Ms. McKenzie, no one was upset that AKOSH had identified problems.³⁷⁹ In her opinion, the AKOSH citations were a non-issue.³⁸⁰

Ms. McKenzie was not involved in the investigation of the water incident and made no recommendation regarding discipline.³⁸¹ She denied ever asking Mr. Higgins, or anyone else, whether she could terminate Mr. Tomlinson.³⁸²

³⁶⁸ Tr. at 909.

³⁶⁹ Tr. at 908.

³⁷⁰ Tr. at 899.

³⁷¹ Tr. at 899.

³⁷² Tr. at 900.

³⁷³ Tr. at 903.

³⁷⁴ Tr. at 902-03.

³⁷⁵ Tr. at 948.

³⁷⁶ Tr. at 948.

³⁷⁷ Tr. at 957.

³⁷⁸ Tr. at 957.

³⁷⁹ Tr. at 957-58.

³⁸⁰ Tr. at 966.

³⁸¹ Tr. at 974.

³⁸² Tr. at 975.

j. Analysis

The testimony of Mr. Tomlinson, Mr. Higgins, Mr. Smith, Mr. Attwood, and Mr. Foxley convinces me that employees of North Star, and particularly Mr. Tomlinson, suffered retaliation for reporting concerns internally and to state agencies. The testimony of Mr. Higgins, North Star's former Human Resources Director, is particularly persuasive. He saw the hostility Mr. Ohs and Dr. Mayo bore to employees who reported concerns to North Star management or the government. He described retaliation Mr. Ohs visited on Mr. Tomlinson, though not all of it was motivated by Mr. Tomlinson's reports to DEC. Mr. Higgins knew of repeated attempts by Mr. Ohs and Ms. McKenzie to find a way to fire Mr. Tomlinson.

The poor terms on which Mr. Higgins departed from North Star call into question whether his testimony was sincere and accurate. I believe Mr. Higgins. The threat attributed to Mr. Higgins—that he would “set the company up” for firing Mr. Tomlinson—in my judgment damages North Star. North Star has failed to persuade me that, out of all North Star employees, Mr. Higgins fortuitously threatened to invent and then expose impropriety in the discipline of Mr. Tomlinson. I don't understand how Mr. Higgins could foresee Mr. Tomlinson's termination after Mr. Higgins was gone if North Star's account of events were true. What North Star has described would represent a threat only if Mr. Higgins were aware of an ongoing desire and effort to be rid of Mr. Tomlinson.

Mr. Smith, Mr. Attwood, and Mr. Foxley thought Mr. Tomlinson had been treated unfairly. They also testified that they themselves, or other employees at North Star, had been subjected to retaliation or feared retaliation. Mr. Foxley was quick to accept that Mr. Ohs would sabotage the water system to frame Mr. Tomlinson for a reason: his lack of confidence in Mr. Ohs.

North Star painted Msrs. Attwood, Foxley, Higgins, and Tomlinson, in different degrees, as malcontents who left North Star on bad terms. So many former employees were willing to criticize North Star and its management—and with such passion—that I am inclined to believe North Star managers treat some employees shabbily.

The testimony of North Star's witnesses paints a different, but less persuasive picture. I find that Mr. Ohs sabotaged Palmer Residential's water system to get Mr. Tomlinson fired. He was motivated, at least in part, by a desire to retaliate against Mr. Tomlinson for reporting concerns to DEC, some of which had pointed to Mr. Ohs as a problem. I also find that Dr. Mayo's decision to terminate Mr. Tomlinson was motivated, in part, by Mr. Tomlinson's April 19, 2010 protected disclosure to the Alaska state agency. Of the three

managers who decided to fire Mr. Tomlinson, only Ms. Durr had no retaliatory motive.

None of this is meant to find Mr. Tomlinson a faultless employee. But he was not fired for poor communication with supervisors, or failing to following through with instructions; he was fired because he was blamed for sabotaging Palmer Residential's water system—an act he was framed for, in part, because he had engaged in protected activity.

III. North Star Would Not Have Fired Mr. Tomlinson Absent the Water Room Incident

An employer avoids liability under the SDWA if it demonstrates by a preponderance of the evidence that it “would have taken the same adverse action in the absence of the protected activity.”³⁸³

Had Mr. Tomlinson sabotaged the potable water system, North Star would justly have terminated him without regard to earlier protected activity. He didn't.

North Star did not argue that the other problems listed in the letter that fired Mr. Tomlinson would have led to termination. The proof shows he would not have been fired. Before his termination, Mr. Tomlinson had never been disciplined more severely than a written reprimand.³⁸⁴ Termination represented a significant escalation in discipline. Mr. Tomlinson had previously been counseled about storing his tools properly,³⁸⁵ and for failing to clean up the “mechanical/boiler/furnace/water storage areas,”³⁸⁶ which were the other reasons listed for his termination. Those issues were not considered serious enough in the past for North Star to have imposed harsh punishment. North Star proved it would not have fired him for those reasons.

Mr. Smith testified that leaving Mr. Tomlinson's tools in the laundry room was not a good reason to fire Mr. Tomlinson.³⁸⁷ Ms. Durr also did not consider leaving tools in the locked laundry room a sufficient reason to fire him.³⁸⁸ The water room incident was the primary reason for his termination.³⁸⁹ Dr. Mayo stated that Mr. Tomlinson would be employed at North Star if he had not been blamed for the sabotage, something Dr. Mayo considered a serious safety issue:

³⁸³ 29 C.F.R. § 24.109(b)(2).

³⁸⁴ Respondent's Post-Trial Brief at 27.

³⁸⁵ C. Ex.-1 at 41.

³⁸⁶ C. Ex.-12 at 113.

³⁸⁷ Tr. at 86.

³⁸⁸ Tr. at 907–08.

³⁸⁹ Tr. at 908.

“Had this been any other thing, other than where we ended up, which was water being close to a kids classroom, [Mr. Tomlinson] would, probably, still be working with us, quite frankly. Because—was it difficult to work with him? Absolutely it was. But with that being said, he was still the most productive employee we had, and I knew exactly where this was going to end up.”³⁹⁰

It is North Star’s burden to show, by a preponderance of the evidence, that it would have terminated Mr. Tomlinson absent his protected activity. It has not.

IV. Damages

Determining Mr. Tomlinson’s damages is difficult because Mr. Tomlinson’s post-trial brief falls on the wrong side of the line between the tolerably terse and the intolerably mute.

A. Past Wage Loss

In 2008, Mr. Tomlinson earned \$48,288.74 at North Star.³⁹¹ In 2009, he earned \$46,036.94.³⁹² Those figures average to \$47,162.84 per year, which I use as the yardstick for Mr. Tomlinson’s past wage loss.

Mr. Tomlinson argues his lost wage calculations should include a five percent raise each year, citing a 2010 Wage Adjustment Memo³⁹³ and his own testimony that he averaged a five percent raise each year at North Star.³⁹⁴ Mr. Tomlinson received scheduled pay raises of two percent in 2005; six percent in 2006; four percent in 2007, 2008, and 2009; and three-and-a-half percent in 2010.³⁹⁵ He also received another roughly five percent unscheduled pay raise in 2008.³⁹⁶ Dr. Mayo thought that raise was offered to settle a dispute over whether Mr. Tomlinson was entitled on on-call pay,³⁹⁷ while Mr. Higgins believed it had been offered as a parting gift from Mr. Sheil (North Star’s former CEO), to show appreciation for Mr. Tomlinson’s work.³⁹⁸ Regardless of who is correct, it was not a normal annual raise. The average raise

³⁹⁰ Tr. at 854–55.

³⁹¹ C. Ex.-29 at 208.

³⁹² C. Ex.-29 at 209.

³⁹³ R. Ex.-U at 469. The memo states “90% of eligible employees received merit increases of 3% or greater.” R. Ex.-U at 469. The Complainant only received a three-and-a-half percent raise that year. C. Ex.-1 at 37, 60. This is not strong evidence he would have received five percent raises each year after being terminated from North Star.

³⁹⁴ Tr. at 393.

³⁹⁵ C. Ex.-1 at 1, 12, 25, 36, 37, 60.

³⁹⁶ C. Ex.-1 at 35.

³⁹⁷ Tr. at 812.

³⁹⁸ Tr. at 149.

North Star gave employees in 2011 was three percent.³⁹⁹ It was rare for someone to receive a five percent raise that year.⁴⁰⁰

The Complaint received decreasing raises over time at North Star. With limited information, the fairest approach for calculating Mr. Tomlinson's wage loss is to average his annual pay raises during his employment at North Star (excluding the 2005 increase, which was unusually low because Mr. Tomlinson had not worked the full prior year). This yields an average raise of 4.3 percent, which I apply in the years after he was terminated.

In 2010, Mr. Tomlinson earned \$19,036.14.⁴⁰¹ His wage loss was \$28,126.70 (\$47,162.84 – \$19,036.14) that year.

In 2011, Mr. Tomlinson earned \$36,744.71 (\$2,053.44 from Palmer-Wasilla Health System LLC and \$34,691.27 from John Richard Carr Corporation).⁴⁰² With a 4.3 percent wage increase, he would have earned \$49,190.84 (\$47,162.84 × 1.043) at North Star that year. His wage loss was \$12,446.13.

In 2012, Mr. Tomlinson earned \$41,824.13.⁴⁰³ With a 4.3 percent wage increase, he would have earned \$51,306.05 (\$49,190.84 × 1.043) at North Star that year. His wage loss was \$9,481.92.

As of July 27, 2013 (the end date of his most recent pay period), Mr. Tomlinson had earned \$29,928.84.⁴⁰⁴ July 27, is 208 days into the calendar year, which equates to 56.98 percent of a year. Mr. Tomlinson would have earned \$30,491.26 (0.5698 × \$51,306.05 × 1.043) during that same fraction of 2013, had he still been working at North Star. He suffered wage loss of \$562.42.

Mr. Tomlinson's total past wage loss totals \$50,617.17.

I reject North Star's argument that Mr. Tomlinson's wage loss should be reduced because of a failure to mitigate damages by obtaining work more quickly. It is true that a wrongfully discharged complainant is obliged to use reasonable efforts to mitigate loss of earnings.⁴⁰⁵ The employer bears the burden of proof on this affirmative defense. North Star must show that Mr. Tomlinson did not exercise reasonable diligence to mitigate the losses its illegal action caused.⁴⁰⁶ In order to satisfy its burden, an employer "must show that (1) there

³⁹⁹ Tr. at 982.

⁴⁰⁰ Tr. at 982.

⁴⁰¹ C. Ex.-29 at 210.

⁴⁰² C. Ex.-29 at 211–12.

⁴⁰³ C. Ex.-29 at 213.

⁴⁰⁴ C. Ex.-29 at 214.

⁴⁰⁵ *White v. Osage Tribal Council*, ARB No. 00-078, ALJ No. 95-SDW-1, slip op. at 4 (ARB April 8, 2003).

⁴⁰⁶ *White*, ARB No. 00-078, ALJ No. 95-SDW-1, slip op. at 4.

were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions.”⁴⁰⁷ Substantially equivalent employment is a position that offers “the same promotional opportunities, compensation, job responsibilities, working conditions, and status.”⁴⁰⁸ Mr. Tomlinson’s unemployment is due to the employer’s wrongdoing. He may have acted reasonably even if suitably equivalent positions had existed. Mr. Tomlinson is not required to conduct the perfect job search;⁴⁰⁹ he receives the benefit of the doubt.⁴¹⁰

Mr. Tomlinson searched for work after being terminated primarily by looking for jobs online.⁴¹¹ He focused principally on jobs in the fields of facilities maintenance or building maintenance.⁴¹² Although he preferred jobs near his home, he also searched for work in Anchorage, Alaska.⁴¹³ Mr. Tomlinson was unsuccessful at finding work until he got a job at Service Master in 2011.⁴¹⁴

North Star offered no evidence that suitable equivalent positions were available to Mr. Tomlinson earlier—it offered no evidence of available positions at all. North Star argues Mr. Tomlinson supplied inadequate evidence of his job search. But it is North Star who bears the burden in showing a failure to mitigate, and North Star failed to offer any evidence of work available to Mr. Tomlinson before the jobs he found.

North Star also faults Mr. Tomlinson’s search for employment in the same type of position he held at North Star, because he “looked only for hospital maintenance work” when “he had a myriad of other skills to draw from.”⁴¹⁵ Mr. Tomlinson’s duty to mitigate extends only to seeking suitably equivalent positions, *i.e.*, positions with similar promotional opportunities, compensation, job responsibilities, working conditions, and status. I find no fault with Mr. Tomlinson limiting his search to positions of the same type of responsibilities he had at North Star.

Mr. Tomlinson appropriately mitigated his damages.

⁴⁰⁷ *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 20 (ARB Feb. 9, 2001).

⁴⁰⁸ *Hobby*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 20.

⁴⁰⁹ *Hobby*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 20.

⁴¹⁰ *Hobby*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 20.

⁴¹¹ Tr. at 543, 545.

⁴¹² Tr. at 543.

⁴¹³ Tr. at 543–44.

⁴¹⁴ Tr. at 545–46.

⁴¹⁵ Respondent’s Post-Trial Brief at 40.

B. Union Dues

After beginning work at Mat-Su Regional Medical Center (Mat-Su) in December 2011,⁴¹⁶ Mr. Tomlinson became a member of the International Brotherhood of Electrical Workers.⁴¹⁷ He pays union dues of \$209.72 per month to maintain his membership.⁴¹⁸ He paid no union dues at North Star.⁴¹⁹ Twenty one months elapsed between the start of Mr. Tomlinson's employment at Mat-Su in December 2011 and his trial in August 2013. Mr. Tomlinson is entitled to \$4,404.12 for union dues he would not have paid had North Star not illegally terminated him.

C. Loss of Leave and Paid Time Off

The cash value of fringe benefits, such as paid time off ("PTO") and sick leave can be compensable forms of back pay.⁴²⁰

Where it is the practice of the employer to pay an employee for vacation time not taken, it is equitable that a complainant receive both straight wages and vacation pay for the same period. Where, however, an employee must take his vacation or lose it, the addition of vacation pay to a back pay award of straight salary for the same period would compensate Mr. Tomlinson for more than he lost as a result of the employer's illegal discrimination.⁴²¹

Mr. Tomlinson received PTO and extended leave benefits ("ELB")—a form of leave that can be used only for medical purposes—during his employment at North Star.⁴²²

Mr. Tomlinson offered as an exhibit his calculation of compensation owed for past wage loss, including compensation owed for lost PTO and ELB.⁴²³ But his calculation is devoid of any citations explaining from where he drew the numbers. Pure math—without an explanation for where the numerals came from—isn't useful. Mr. Tomlinson did testify at trial that the final total from the calculations was the amount it would take to make him whole for lost wages, PTO,

⁴¹⁶ Tr. at 546.

⁴¹⁷ Tr. at 552–53; C. Ex.-30 at 215.

⁴¹⁸ C. Ex.-30 at 215; Tr. at 398–99.

⁴¹⁹ Tr. at 398.

⁴²⁰ *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 33–34 (ARB Feb. 9, 2001).

⁴²¹ *Hobby*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 34 (quoting *Palmer v. Western Truck Manpower, Inc.*, No. 85-STA-16, slip op. at 4–5 (Sec'y June 26, 1990), *vac'd on other grounds*, *Western Truck Manpower, Inc. v. United States Dep't of Labor*, 943 F.2d 56 (9th Cir. 1991)).

⁴²² Tr. at 394–95.

⁴²³ C. Ex.-36 at 245C.

and ELB (\$77, 314)⁴²⁴, but he did not explain his process for arriving at that figure. Given that I have already identified problems with Mr. Tomlinson's calculation of lost wages, his testimony that the final total is accurate—which it is not—is not enough to prove he is entitled to compensation for PTO and ELB in the amounts he claims.

Neither Mr. Tomlinson's calculations nor his post-trial brief point to any record about how much leave (of either variety) he had accumulated when North Star terminated him. North Star claims it paid him for any PTO he had accumulated before termination, and Mr. Tomlinson testified that it did.⁴²⁵ I accept North Star's evidence on this point as accurate.

Similarly, Mr. Tomlinson testified that he had ELB accumulated when he left North Star, but did not testify as to how much. He also offered no evidence that ELB could be cashed out or carried over into future years. Neither did he prove that he would have used ELB had it been available.

Mr. Tomlinson is not entitled to compensation for PTO or ELB accrued before his termination.

Furthermore, neither Mr. Tomlinson's calculations nor his post-trial brief cite to any evidence in the record that would inform me of the rate at which Mr. Tomlinson accrued PTO or ELB while at North Star. Mr. Tomlinson's calculations suggest he earned five weeks of PTO per year at North Star.⁴²⁶ The calculations also suggest he would have earned 3.5 weeks of ELB between the time of his termination and the date of trial,⁴²⁷ from which I suppose it is possible to extrapolate the rate at which he claimed ELB accrued. This is unnecessary, however, because I cannot base a compensation award on a calculation of benefits without evidence to support it. The exhibit containing the calculations is not the sworn testimony of Mr. Tomlinson; it isn't signed or otherwise endorsed as his. The calculation is argument, not evidence. Had Mr. Tomlinson provided me with an employee handbook detailing North Star's leave policies, or earnings and leave statements from his time at North Star, he may have proven entitlement to compensation for the difference in leave provided by North Star and Mat-Su. He did not.

Mr. Tomlinson testified that, at Mat-Su, he now earns 24 days of PTO a year.⁴²⁸ With nothing to compare this to during his time at North Star, I cannot award him compensation for lost PTO. Similarly,

⁴²⁴ Tr. at 396.

⁴²⁵ Tr. at 596.

⁴²⁶ C. Ex.-36 at 245C.

⁴²⁷ C. Ex.-36 at 245C.

⁴²⁸ Tr. at 554.

Mr. Tomlinson testified that he now receives no ELB. He offered no proof of the rate at which ELB accrued at North Star, let alone North Star's policies regarding cashing out ELB or permitting it to carry over into future years.

Mr. Tomlinson has failed to carry his burden in showing that he is entitled to compensation for lost ELB or PTO.

D. Loss of Benefits from Health Insurance Coverage

1. Deductibles

Mr. Tomlinson's wife was diagnosed with cancer about a year before trial.⁴²⁹ She reached her maximum out-of-pocket expenditures under Mr. Tomlinson's health insurance plan at Mat-Su both the year before trial and the year of trial.⁴³⁰ It would not be possible for her to reach her maximum out-of-pocket expenditures in those years without also reaching her maximum individual deductible amount.

Mr. Tomlinson's insurance plan at Mat-Su has an individual deductible of \$615.⁴³¹

Mr. Tomlinson's maximum individual deductible and out-of-pocket expenditure while at North Star are less clear. Mr. Tomlinson offered a packet into evidence explaining the insurance options available to him at North Star.⁴³² Mr. Tomlinson did not testify as to which specific plan within the packet he had elected. It appears that the deductibles and maximum out-of-pocket expenditures are the same whether Mr. Tomlinson chose coverage under a Preferred Provider Organization, Exclusive Provider Organization, or Out of Area Plan.⁴³³ Within those three options, however, there is a difference in both the individual deductible and maximum individual out-of-pocket expenditure depending on whether Mr. Tomlinson chose the "\$400 Deductible Plan" or the "\$200 Deductible Plan."⁴³⁴

In Mr. Tomlinson's calculation of medical benefits, he listed his family deductible at North Star as \$800.⁴³⁵ That would correspond to the \$400 Deductible Plans.⁴³⁶ He went on to list "Out of pocket individual" as \$1,750,⁴³⁷ which would correspond to the \$200 Deductible Plans.⁴³⁸

⁴²⁹ Tr. at 401-02.

⁴³⁰ Tr. at 401-02.

⁴³¹ C. Ex.-32 at 231.

⁴³² C. Ex.-31.

⁴³³ C. Ex.-31 at 228-230.

⁴³⁴ C. Ex.-31 at 228-230.

⁴³⁵ C. Ex.-36 at 245D.

⁴³⁶ C. Ex.-31 at 228-230.

⁴³⁷ C. Ex.-36 at 245D.

⁴³⁸ C. Ex.-31 at 228.

Mr. Tomlinson bears the burden of proving damages. He testified at trial that his family deductible was \$800 at North Star.⁴³⁹ He did not testify to his maximum out-of-pocket expenditure. I will assume Mr. Tomlinson had a \$400 Deductible Plan with an individual deductible of \$400 and an individual maximum out-of-pocket expenditure of \$2,500. I do this both because Mr. Tomlinson's trial testimony supports this conclusion and because that plan results in a lower award for Mr. Tomlinson, who bears the burden of proving his damages.

Each year, Mr. Tomlinson was forced to spend \$215 more (\$615 at Mat-Su – \$400 at North Star) in individual deductibles for his wife. Multiplied by two years, he spent an additional \$430.

The fact that Mr. Tomlinson's wife reached the maximum out-of-pocket expenditures does not mean that Mr. Tomlinson reached the maximum family deductible. Once Mr. Tomlinson's wife reached the maximum individual deductible, Mr. Tomlinson would no longer pay deductibles for her care. The remaining \$615 of the family deductible would be paid if Mr. Tomlinson or family members other than his wife required medical care.

It is unclear from the evidence offered how much of the remaining family deductible Mr. Tomlinson actually paid. No evidence is cited to support Mr. Tomlinson's math in the calculations themselves, or in his post-trial brief. Mr. Tomlinson did offer some form of print out listing various medical charges to his insurance plan in C. Ex.-32 at 235–44. Although most of these charges identify the patients by name, and some of the charges seem to have corresponding deductible amounts, the evidence simply isn't clear enough to award compensation. The deductible amounts are listed on separate pages from those identifying the patient by name and it is not clear which deductibles correspond to which patients. Furthermore, some of the entries in the list were replaced by "#####," as one would expect in an Excel spreadsheet when an entry is too large to display in its column. Finally, there are no entries showing amounts actually *paid* by Mr. Tomlinson.

Mr. Tomlinson bears the burden of proving damages. The information I would need to award further compensation for deductibles is either missing or has been presented in a way I cannot decipher. I award the \$430 more that Mr. Tomlinson paid for his wife's deductibles.

⁴³⁹ Tr. at 400–401.

2. Out-of-Pocket Medical Expenditures

Mr. Tomlinson's wife reached her out-of-pocket expenditures for the year before trial and the year of trial.⁴⁴⁰ Mr. Tomlinson's insurance at Mat-Su has a maximum individual out-of-pocket expenditure of \$6,150.⁴⁴¹ As discussed above, I find that Mr. Tomlinson's plan at North Star had a \$2,500 maximum individual out-of-pocket expenditure.

Mr. Tomlinson was forced to spend \$3,650 (\$6,150 – \$2,500) more in out-of-pocket expenditures for his wife each year. Multiplied by two years, he spent an additional \$7,300.

I am unable to award any compensation for higher out-of-pocket expenditures paid on behalf of Mr. Tomlinson or family members other than his wife, again for lack of proof. Mr. Tomlinson's calculations in C. Ex.-36 at 245D appear to misuse the term "deductible." He lists one field of his calculation as "Total deductibles paid by family members other than [my wife]," and gives " $\$7436 \times 25\% = 1856$ " as the value for that field. Mr. Tomlinson has a family deductible limit of \$1,230 per year at Mat-Su. The maximum amount he could spend on deductibles for family members other than his wife (given that she had reached her maximum individual deductible) during a two year period is \$1,230 (adding his wife's deductibles would bring the total family deductible for a two year period up to \$2,260). Multiplying by a percentage is also nonsensical when dealing with deductibles.

I assume that Mr. Tomlinson was actually trying to calculate out-of-pocket expenses for family members other than his wife in that field. But even with the benefit of that doubt, he again cites to no information to support his calculation, and the information available to me in C. Ex.-32 regarding out-of-pocket expenditures suffers from the same shortcomings as the information regarding deductibles.

I cannot determine, on a more probable than not basis, the amount that Mr. Tomlinson actually paid in out-of-pocket expenditures during the year before trial or the year of trial. I cannot award compensation without the support of evidence.

I award the \$7,300 more that Mr. Tomlinson paid for his wife's out-of-pocket expenditures.

3. Emergency Room Deductibles

Mr. Tomlinson's calculations of lost health benefits contain a category titled "ER or hospitalization co-pay."⁴⁴² He states that the relevant co-pay at North Star was \$50, and it is now \$800 at Mat-

⁴⁴⁰ Tr. at 401–02.

⁴⁴¹ C. Ex.-32 at 231.

⁴⁴² C. Ex.-36 at 245D.

Su.⁴⁴³ The record confirms a \$50 co-pay for emergency room visits under North Star’s health insurance plan.⁴⁴⁴ The \$800 figure for Mat-Su’s plan appears erroneous, however. Mat-Su’s insurance plan shows a \$100 deductible for an “In-Network Facility Emergency Room.”⁴⁴⁵ There are only two services under Mat-Su’s insurance plan that list co-pays of \$800: “Out-of-Network Outpatient Surgery Hospital” and “Out-of-Network Behavioral Health Room & Board.”⁴⁴⁶ Neither seems relevant here.

Furthermore, Mr. Tomlinson’s calculations simply multiply the supposed difference in co-pays by two for the two years at Mat-Su. That makes no sense. The co-pay would be paid each time someone covered by the plan visited an emergency room, not simply once each year.

Regardless of the apparent errors, I cannot award any compensation for emergency room co-pays, as Mr. Tomlinson has offered no evidence that he or his family members actually visited the emergency room. None of the medical claims offered as evidence show that they resulted from an emergency room visit.⁴⁴⁷ Mr. Tomlinson testified that the co-pay was \$50 at North Star and \$800 at Mat-Su,⁴⁴⁸ but never testified that he had made such a co-pay.

E. Attorney’s Fees

The SDWA provides that the relief the Secretary may order includes a requirement that employer pay all costs and expenses, including attorney’s fees, “reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.”⁴⁴⁹ The lodestar method of calculation is used, which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.⁴⁵⁰ Attorney’s fees are not proven as a substantive part of a claim under the SDWA, as they might be in a contract dispute.

Mr. Tomlinson’s contractual arrangement with his lawyer to pay a contingency fee of 40 percent, plus costs incurred, has no effect on a fee the Secretary awards. A fee agreement is a private contractual

⁴⁴³ C. Ex.-36 at 245D.

⁴⁴⁴ C. Ex.-31 at 228.

⁴⁴⁵ C. Ex.-32 at 232.

⁴⁴⁶ C. Ex.-32 at 231–34.

⁴⁴⁷ C. Ex.-32 at 235–44.

⁴⁴⁸ Tr. at 402–03.

⁴⁴⁹ 42 U.S.C.A. § 300j-9(i)(2)(B)(ii); see also the implementing regulation at 29 C.F.R. § 24.109(d)(1).

⁴⁵⁰ *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

matter between Mr. Tomlinson and his lawyer. The SDWA does not implement private agreements. Mr. Tomlinson must “produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.”⁴⁵¹

Mr. Tomlinson must submit a fee petition, along with supportive documentation, that comports with Local Rule 54.3 of the U.S. District Court for the District of Alaska within 30 days of this decision.

F. Reinstatement

The employee protection provision of the SDWA reinstates a wrongfully terminated employee “to his former position.”⁴⁵² This restores the worker to a position equivalent to that which he or she would have occupied absent the employer’s wrongful conduct. Reinstatement is the presumptive remedy.⁴⁵³

Alternative remedies sometimes apply. Front pay in lieu of reinstatement may be appropriate where the parties have demonstrated “the impossibility of a productive and amicable working relationship.”⁴⁵⁴ Front pay may substitute when reinstatement is not possible because the position lost no longer exists due to a change in business,⁴⁵⁵ or other reasons such as the completion of a construction project.⁴⁵⁶

Mr. Tomlinson requests reinstatement.⁴⁵⁷ He is entitled to that relief. The testimony North Star offered of Dr. Mayo and Ms. McKenzie to show that reinstatement is not feasible is unpersuasive.

Dr. Mayo did not believe the relationship would work were Mr. Tomlinson reinstated.⁴⁵⁸ He was concerned that Mr. Tomlinson had a

⁴⁵¹ *Blum v. Stenson*, 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541 (1984); *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1206 (9th Cir. 2013); *Automattic Inc. v. Steiner*, ___ F.Supp. ___, 2015 WL 1022655, *15–*16 (N.D.Cal. Mar. 2, 2015) (adopting Magistrate Judge’s Report and Recommendation).

⁴⁵² 42 U.S.C.A. § 300j-9(i)(2)(B)(ii).

⁴⁵³ *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 6–8 (ARB Feb. 9, 2001).

⁴⁵⁴ *Hobby*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 8.

⁴⁵⁵ *Doyle v. Hydro Nuclear Servs., Inc.*, No. 89-ERA-22, slip op. at 7 (ARB Sept. 6, 1996) (finding reinstatement impractical because the company no longer engaged workers in the worker’s job classification, and the worker was qualified for no other positions).

⁴⁵⁶ See, e.g., *Blackburn v. Metric Constructors, Inc.*, No. 86-ERA-4, slip op. at 12 (Sec’y Oct. 30, 1991) (reverses earlier reinstatement orders based on evidence developed on remand that the company’s electricians were terminated at the conclusion of the project with no expectation of continued employment).

⁴⁵⁷ Complainant’s Post-Trial Brief at 10.

history of discovering safety concerns at North Star, but withholding that information until he was later reprimanded for his performance.⁴⁵⁹ Because of this, Dr. Mayo did not trust Mr. Tomlinson to report safety concerns in a timely manner.⁴⁶⁰

[I]f you're responsible for the safety of our organization, and you don't tell me that I need to fix something, how can I fix it, if I'm not told?

So, we didn't have a place where I felt like I'm going to have concerns if he were to ever return to us, whether or not we're ever going to be safe where he knows we're not safe and I'm not being told.⁴⁶¹

Dr. Mayo also believes Mr. Tomlinson is impulsive, largely because he blames Tomlinson for sabotaging the water system.⁴⁶² “[T]hat acting out, impulsivity is something I can't predict. I could never feel safe with him in our organization, if I don't know what he's going to do and he's not willing to talk about it, it's reactive, and that's going to get somebody hurt.”⁴⁶³

Dr. Mayo did not think it would matter that Mr. Ohs had since left North Star because others had struggled to work with Mr. Tomlinson in the past as well.⁴⁶⁴

Dr. Mayo explained that he would rather pay Mr. Tomlinson off than hire him back.⁴⁶⁵ “I don't know that I could let him [come back]—I'd have to pay him. I don't know that I could bring him back, or I'd have to have somebody follow him around. I can't—he'd have to work in teams. I just couldn't allow him to work on his own.”⁴⁶⁶

Ms. McKenzie expressed similar reservations about allowing Mr. Tomlinson to return to North Star. She explained that she would have serious concerns about him acting out or retaliating against the company when criticized for his performance.⁴⁶⁷ Ms. McKenzie testified that she could not trust him.⁴⁶⁸

Many of Dr. Mayo's and Ms. McKenzie's concerns stem from their belief that he sabotaged Palmer Residential's water system. If Mr. Tomlinson were responsible for the sabotage, I would find no fault

⁴⁵⁸ Tr. at 858.

⁴⁵⁹ Tr. at 859.

⁴⁶⁰ Tr. at 859.

⁴⁶¹ Tr. at 859.

⁴⁶² Tr. at 859.

⁴⁶³ Tr. at 860.

⁴⁶⁴ Tr. at 860.

⁴⁶⁵ Tr. at 860.

⁴⁶⁶ Tr. at 860.

⁴⁶⁷ Tr. at 976.

⁴⁶⁸ Tr. at 976.

in their reasoning. Reinstatement wouldn't arise, because North Star would have had good cause to fire him. Mr. Tomlinson was not responsible for the sabotage, so many concerns they articulated don't apply.

Mr. Ohs, the supervisor that Mr. Tomlinson most consistently struggled with while employed at North Star, has since left the company.

Many of the other North Star managers Mr. Tomlinson has clashed with in the past, including Dr. Mayo, do not work at the same physical location (Palmer Residential), and Mr. Tomlinson will not be required to interact with them on a day-to-day basis. Supervision by Mr. Ohs was a problem, but Mr. Tomlinson performed well enough in 2008 while supervised by Mr. Smith, by Mr. Smith's assessment. His earlier performance at North Star under Mr. Sheil's leadership was fine enough to merit a special pay increase by Mr. Sheil and recognition as Palmer's Residential's Employee of the Year. Furthermore, Mr. Tomlinson continues to work at his new job with Mat-Su, and North Star has provided no documentary proof that Mr. Tomlinson has been disciplined there. From these facts I infer that Mr. Tomlinson is able to do satisfactory work with appropriate supervision.

Nothing in the record leads me to doubt that Dr. Mayo would honor an order from the Secretary of Labor to reinstate Mr. Tomlinson to his former, or an equivalent position.

North Star must make an unequivocal offer to reinstate Mr. Tomlinson upon the next available vacancy in a position with comparable pay, benefits, job responsibilities, working conditions, status, and potential for advancement.

Until that offer is made, Mr. Tomlinson must be paid the difference proven at trial between his earnings at North Star at the time of termination, plus annual increases of 4.3%, minus his earnings at Mat-Su.

G. Noneconomic Damages

Compensatory damages compensate an employee who has suffered invidious discrimination not only for economic losses, but also for harms such as loss of reputation, personal humiliation, mental anguish, and emotional distress.⁴⁶⁹ Emotional distress must be proven

⁴⁶⁹ *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 31 (ARB Feb. 9, 2001). Congress enumerated several types of compensatory damages in 42 U.S.C. § 1981a(b)(3), while setting the cap for compensatory and punitive damages in Title VII cases. It included as compensatory damages "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . ." The same categories of compensatory damages apply here.

it is not presumed.⁴⁷⁰ Awards generally require an employee to demonstrate both (1) some objective manifestation of distress, *e.g.*, sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the discrimination and the distress.⁴⁷¹

Unemployment affected Mr. Tomlinson's family life.⁴⁷² He "didn't feel like doing anything" and he became depressed.⁴⁷³ This is depression as a lay person understands it, not as defined under the well-recognized classification and diagnostic tool of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Mr. Tomlinson offered no medical evidence of a diagnosis of clinical depression nor was he treated by a mental health professional.

Mr. Tomlinson now finds it difficult and uncomfortable to talk with supervisors at work because of "this fear that comes over me and I feel like I'm going to be attacked, even though I've gone and talked to [my current supervisor], he doesn't do anything wrong, he doesn't attack me."⁴⁷⁴

Mr. Tomlinson proved symptoms that warrant an award that Congress made available for emotional distress. He became depressed during his unemployment and his experiences at North Star leave him feeling anxious at work. These are objective manifestations (what clinicians call "signs") of emotional distress. His feelings of depression flowed from his unemployment after a discriminatory termination. The anxiety he described have a basis in his experiences at North Star, where managers falsely accused him of sabotaging the water system and otherwise treated him differently than other employees in retribution for his protected activities.

Mr. Tomlinson also seeks compensation for pain and suffering caused by a delay in medical treatment for an eye condition. Mr. Tomlinson underwent a bilateral cataract extraction with lens implants in May 2009, while he worked for North Star.⁴⁷⁵ He had problems immediately after that surgery.⁴⁷⁶ During the procedure, Mr. Tomlinson's surgeon misaligned one of the lens implants, causing a

⁴⁷⁰ *Moder v. Village of Jackson, Wis.*, ARB Nos. 01-095, 02-039, ALJ No. 00-WPC-005, slip op. at 10 (ARB June 30, 2003).

⁴⁷¹ *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993-SWD-001, slip op. at 17 (ARB July 30, 1999).

⁴⁷² Tr. at 379.

⁴⁷³ Tr. at 379.

⁴⁷⁴ Tr. at 414-15.

⁴⁷⁵ R. Stip. Facts at 13.

⁴⁷⁶ Tr. at 573.

condition known as posterior capsule contraction syndrome.⁴⁷⁷ Mr. Tomlinson explained, “[i]t gave me headaches, migraines. I didn’t have much of a life after work, because it was like I had to lay down all the time. That’s the only way to ease the headaches.”⁴⁷⁸ Mr. Tomlinson’s vision was also to some degree impaired.⁴⁷⁹

Mr. Tomlinson had scheduled an appointment to begin treatment to remedy the problem in late April 2010, the month North Star fired him.⁴⁸⁰ His coverage under his North Star insurance lasted until the end of that month, but he did not believe it would be possible for his ophthalmologists to complete treatment during that limited time.⁴⁸¹ As a result, the problem went untreated.⁴⁸²

Mr. Tomlinson obtained Blue Cross health insurance through his employment with Mat-Su by May 2012,⁴⁸³ and finally had the surgery to correct his lens in June 2013.⁴⁸⁴ The delay occurred because, although he sought pre-approval of the procedure, Blue Cross refused to guarantee it would assume liability for those medical costs.⁴⁸⁵ Ultimately it did.

Mr. Tomlinson would be entitled to any additional out-of-pocket costs he paid as a result of having the procedure performed while covered by insurance through Mat-Su rather than North Star. His proof with respect to the eye injury was limited to pain and suffering (*i.e.*, noneconomic damage) the delay in treatment caused.

Mr. Tomlinson offered no testimony from a medical expert about his eye condition. The testimony of medical or psychiatric expert can strengthen a claim for compensatory damages, but is not required.⁴⁸⁶ His eye problems caused him headaches and impaired his vision. The initial eye surgery and the later corrective surgery are experiences he can testify about firsthand. He is competent to testify to headaches or impaired vision. Similarly, the testimony of a physician is unnecessary to explain the causal connection between the loss of health insurance shortly after termination by North Star and the delay it set in motion for treatment of his eye condition. That is an insurance issue, not a medical one.

⁴⁷⁷ Tr. at 384–85.

⁴⁷⁸ Tr. at 382.

⁴⁷⁹ Tr. at 383, 385–86.

⁴⁸⁰ Tr. at 377.

⁴⁸¹ Tr. at 377–78.

⁴⁸² Tr. at 377–78.

⁴⁸³ Tr. at 574.

⁴⁸⁴ Tr. at 576.

⁴⁸⁵ Tr. at 574–76.

⁴⁸⁶ *Thomas v. Arizona Public Service Co.*, 89- ERA-19, slip op. at 14 (Sec’y Sept. 17, 1993).

I reject North Star’s argument that Mr. Tomlinson himself is responsible for any unnecessary pain and suffering because he delayed treatment to have the problem corrected, both while at North Star and after obtaining coverage working for Mat-Su. Mr. Tomlinson was under no obligation to seek medical care under a timeline North Star dictates. Mr. Tomlinson had scheduled a procedure to remedy the problem before North Star terminated his employment. That treatment was delayed by issues of coverage rooted in his loss of health insurance. Even if Mr. Tomlinson could have had the procedure done more quickly after he obtained Blue Cross insurance through his new job (which Mr. Tomlinson disputes and no proof from North Star contradicts), I find the delay was not a purposeful scheme he invented to increase his damages here.

Awards for compensatory damages are fact-intensive, so they vary substantially from case to case. Nonetheless administrative law judges (“ALJs”) consider earlier cases as one source of guidance on appropriate awards. Compensatory damage awards under other discrimination-related statutes can be instructive in setting damage awards in environmental whistleblower cases, including awards by courts or juries in cases brought outside the Department of Labor’s administrative law system.⁴⁸⁷ I review below compensatory awards for employment discrimination.

An ALJ awarded a complainant \$100,000 in compensatory damages in *Hamilton v. PBS Environmental Building Consultants, Inc.*,⁴⁸⁸ after finding that she had suffered “genuine mental anguish and damage to her professional reputation as a result of her termination.” In setting the award, the ALJ recognized the “harsh toll” the firing took on the worker’s professional reputation, how visibly upset she was when as she discussed the firing at trial, the paranoia she felt at her new job, and distress she felt when she had to move from Oregon to Virginia, leaving behind her cat, her friends, and her family.⁴⁸⁹

In *Speegle v. Stone & Webster Constr., Inc.*,⁴⁹⁰ the “termination caused at least some distress and exacerbated to some degree

⁴⁸⁷ *Leveille v. N.Y. Air Nat’l Guard*, ARB No. 98-079, OALJ No. 1994-TSC-3, Decision and Order on Damages, slip op. at 5 (ARB Oct. 25, 1999); *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 32 (ARB Feb. 9, 2001); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-022, slip op. at 14 n.3 (May 17, 2000).

⁴⁸⁸ 2009-CER-00003, slip op. at 51 (ALJ October 19, 2010).

⁴⁸⁹ *Hamilton v. PBS Environmental Building Consultants, Inc.*, 2009-CER-00003, slip op. at 51 (ALJ October 19, 2010).

⁴⁹⁰ 2005-ERA-00006, slip op. at 35–38 (ALJ February 9, 2011).

preexisting physical and psychological problems.” The ALJ awarded \$50,000 in compensatory damages because unemployment caused him to lose medical insurance and he could not pay medical bills, which led to being importuned by a collection agency.⁴⁹¹ The worker withdrew from his normal family and community activities.⁴⁹² He had problems sleeping and even discussed suicide with his wife.⁴⁹³ The ALJ found, however, that some of the complainant’s problems pre-existed his termination or were not caused by the employer’s actions.⁴⁹⁴

In *Abdur-Rahman v. DeKalb County*,⁴⁹⁵ an ALJ awarded two workers \$85,000 and \$40,000 in compensatory damages, respectively. The \$85,000 was awarded, in part, because the wrongfully fired worker had an autoimmune disorder that required “extensive monitoring and treatment,” and loss of her medical coverage had been “undoubtedly devastating.”⁴⁹⁶ The loss of her job delayed gall bladder surgery, which became infected and ultimately had to be removed in emergency surgery; this contributed to irritable bowel syndrome.⁴⁹⁷ Finally, she was unable to find work in her chosen career, which was “emotionally and mentally devastating for her.”⁴⁹⁸ On the other hand, the worker had not alleged any psychological injury or strain on familial relations, which are typical in claims for compensatory damages.⁴⁹⁹ The worker had not shown she would be unable to “reach her full potential” working for her former employer once reinstated.⁵⁰⁰ The ALJ found the complainant’s requested \$650,000 in compensatory damages out of proportion with awards in similar cases and awarded \$85,000.⁵⁰¹

The second complainant was awarded \$40,000.⁵⁰² The ALJ found the complainant had been emotionally and mentally “devastat[ed]” by the loss of his job; had been unable to find work in his chosen career field; and had lost insurance coverage, which had left him unable to afford treatment for a scalp condition that left him with permanent

⁴⁹¹ *Speegle v. Stone & Webster Constr., Inc.*, 2005-ERA-6, slip op. at 36–37 (ALJ February 9, 2011).

⁴⁹² *Speegle*, 2005-ERA-6, slip op. at 37.

⁴⁹³ *Speegle*, 2005-ERA-6, slip op. at 37.

⁴⁹⁴ *Speegle*, 2005-ERA-6, slip op. at 36–37.

⁴⁹⁵ 2006-WPC-2 & 3, slip op. at 16, 18 (ALJ January 17, 2012).

⁴⁹⁶ *Abdur-Rahman*, 2006-WPC-2 & 3, slip op. at 16.

⁴⁹⁷ *Abdur-Rahman*, 2006-WPC-2 & 3, slip op. at 13.

⁴⁹⁸ *Abdur-Rahman*, 2006-WPC-2 & 3, slip op. at 16.

⁴⁹⁹ *Abdur-Rahman*, 2006-WPC-2 & 3, slip op. at 15.

⁵⁰⁰ *Abdur-Rahman*, 2006-WPC-2 & 3, slip op. at 14.

⁵⁰¹ *Abdur-Rahman*, 2006-WPC-2 & 3, slip op. at 12, 16.

⁵⁰² *Abdur-Rahman*, 2006-WPC-2 & 3, slip op. at 18.

scarring and hair loss.⁵⁰³ The ALJ found the \$175,000 requested as compensatory damages excessive.⁵⁰⁴

Mr. Tomlinson suffered mental and emotional distress as a result of his termination. He felt depression, experienced a reduction in his daily activities that affected his family life, and suffered anxiety at his new job. He endured headaches and impaired vision from his eye condition longer than he otherwise would have. His wife was laid off from her job in January or February 2010, not long before Mr. Tomlinson was fired.⁵⁰⁵ Mr. Tomlinson had been his family's "primary breadwinner" when he was terminated from North Star.⁵⁰⁶ Mr. Tomlinson's stress from termination was no doubt compounded by the stress caused by his wife's cancer.

Factors also cut against awarding Mr. Tomlinson high compensatory damages. Mr. Tomlinson was eventually able to secure work in a similar position to the one he occupied at North Star. After reinstatement at North Star, he should have virtually the same career opportunities available before his termination. Although depressed and listless (he didn't feel like doing anything), the symptoms didn't drive him to get psychological care. Unlike the worker in *Speegle*, for example, Mr. Tomlinson did not come to a point where he discussed suicide with his wife. Despite the added time Mr. Tomlinson waited for treatment of his eye condition, and suffering from impaired vision and headaches as a result, after the corrective procedure, his eyesight is nearly normal.⁵⁰⁷ No permanent damage flowed from the delay, as there was for the complainants in *Abdur-Rahman*.

I find that Mr. Tomlinson is entitled to damages somewhere in the \$40,000–\$100,000 range set by the similar cases discussed above. Three things in particular convince me that he suffered emotional distress that requires an award near the higher end of this range to be compensated appropriately: Mr. Tomlinson's position as his family's primary earner at the time of his termination, his wife's cancer during his unemployment, and his inability to get a prompt revision to the problem with the lens in his eye. For his noneconomic damages, Mr. Tomlinson is awarded \$80,000.

H. Exemplary Damages

The SDWA permits an award of exemplary (*i.e.*, punitive) damages,⁵⁰⁸ which serve as punishment for wanton or reckless conduct,

⁵⁰³ *Abdur-Rahman*, 2006-WPC-2 & 3, slip op. at 16–18.

⁵⁰⁴ *Abdur-Rahman*, 2006-WPC-2 & 3, slip op. at 16, 18.

⁵⁰⁵ Tr. at 379.

⁵⁰⁶ Tr. at 379.

⁵⁰⁷ Tr. at 285–86.

⁵⁰⁸ 42 U.S.C.A. § 300j-9(i)(2)(B)(ii).

and deter future misconduct.⁵⁰⁹ The Administrative Review Board applies the standard found in the Restatement 2nd of Torts § 908: exemplary damages are appropriate when an employer acted with reckless disregard for the worker's rights and took conscious action in deliberate disregard of those rights.⁵¹⁰ They "serve in punishment for wanton or reckless conduct to deter such conduct in the future."⁵¹¹

The North Star employee who sabotaged Palmer Residential's water system to get Mr. Tomlinson fired consciously violated Mr. Tomlinson's rights. I am not convinced that Mr. Ohs's actions were representative of North Star as a whole. Some North Star managers resented reports about regulatory compliance issues an employee had made to government agencies, wanted to put a stop to them, and wished to fire the employee responsible for the reports. Nothing suggests more senior managers at North Star knew what Mr. Ohs had done and condoned his actions.

The other two managers involved in Mr. Tomlinson's termination, if convinced that Mr. Tomlinson was actually guilty of the sabotage, had a valid, non-discriminatory justification for deciding to terminate him. The ordinary remedies for the discriminatory termination redress the wrong adequately.

Mr. Ohs has left North Star, and I have insufficient evidence to believe that the other managers involved in the decision to terminate Mr. Tomlinson acted with knowledge that the accusation of sabotage was contrived. North Star does not seem likely to repeat its illegal behavior in the future.

Compensatory damages will make Mr. Tomlinson whole for the injustice he has suffered. Exemplary damages are inappropriate in this instance.

V. Order

1. North Star must pay to Mr. Tomlinson \$62,606.84 in back pay (\$50,617.17 for wage loss + \$4,404.12 for union dues + \$7,730 for health insurance deductibles and out-of-pocket expenditures) plus interest from the date of termination until the date of payment, calculated in accordance with 29 C.F.R § 20.58 (a), at the rate specified in the Internal

⁵⁰⁹ *Johnson v. Old Dominion Sec.*, 1986-CAA-3, 4 and 5, slip op. at 16–17 (Sec'y May 29, 1991).

⁵¹⁰ *Johnson*, 1986-CAA-3, 4 and 5, slip op. at 16–17; Restatement (Second) of Torts § 908 & Comment b (1976).

⁵¹¹ *Johnson*, 1986-CAA-3, 4 and 5, slip op. at 16.

Revenue Code at 26 U.S.C. § 6621, compounded quarterly.⁵¹²

2. North Star must pay to Mr. Tomlinson noneconomic compensatory damages in the amount of \$80,000. Interest does not accrue on compensatory damages awards.⁵¹³
3. North Star must reinstate Mr. Tomlinson to his pre-termination position if currently available, or to the next available vacancy in a position with comparable pay, benefits, job responsibilities, working conditions, status and potential for advancement. Until North Star makes an offer to reinstate Mr. Tomlinson, it must pay him the difference between my estimation of his 2013 earnings at North Star had he not been fired and my projection for his full 2013 earnings at Mat-Su.⁵¹⁴ Compensation must be paid at a rate of \$992.85 per year, or \$19.09 per week. Interest on any such payments shall accrue at the rate discussed in Order 1 above.
4. North Star must pay Mr. Tomlinson's attorney's fees in the amount to be determined under 29 C.F.R. § 24.109(d)(1) after briefing. Counsel for Mr. Tomlinson must submit a fee petition that comports with Local Rule 54.3 of the U.S. District Court for the District of Alaska within 30 days of this decision. Supportive documentation must be attached. Thereafter, North Star must file objections no more than 21 days after it has been served with the petition; Mr. Tomlinson may serve a reply to North Star's objections no more than 14 days after those objections are served.

⁵¹² *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22, at 19-20 (ARB May 17, 2000).

⁵¹³ *Creekmore v. ABB Power Sys. Energy Services, Inc.*, 93-ERA-24, at 14 (Sec'y Feb. 14, 1996).

⁵¹⁴ As of July 27, 2013 (the end date of Mr. Tomlinson's most recent pay period), Mr. Tomlinson had earned \$29,928.84 at Mat-Su. C. Ex.-29 at 214. Using that figure to project his earnings for the full year, Mr. Tomlinson would earn \$52,519.36 in 2013 at Mat-Su. Based on my assumption that Mr. Tomlinson would have earned 4.3 percent annual raises had he stayed at North Star, Mr. Tomlinson would have earned \$53,512.21 in 2013, had he not been terminated. $\$53,512.21 - \$52,519.36 = \$992.85 \div 52 = \19.09 .

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE
San Francisco, California

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.