UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 20 December 2013

CASE NO.: 2009-SWD-00003

In the Matter of:

JIMMY R. LEE
Complainant,

v.

PARKER HANNIFIN CORPORATION,
ADVANCED PRODUCTS BUSINESS UNIT,
Respondent.

Appearances:

John M. Brown, Esq., Hartford, Connecticut, for Complainant

Bruce G. Hearey, Esq. and Natalie M. Stevens, Esq., *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, Cleveland, Ohio, for Respondent

Before: Daniel F. Sutton, Senior Administrative Law Judge

DECISION AND ORDER ON REMAND

This matter arises from a complaint filed by Jimmy R. Lee ("Lee") alleging that Respondent Parker Hannifin Corporation, Advance Products Business Unit ("Parker-Hannifin"), violated the employee protection provisions of the Solid Waste Disposal Act of 1976 (the "SWDA"), as amended by the Resource Conservation and Recovery Act (the "RCRA") of 1976 and codified at 42 U.S.C. § 6971, by suspending and then terminating his employment in retaliation for his engaging in activities protected under the SWDA and the implementing regulations promulgated by the Department of Labor ("DOL") at 29 C.F.R. Part 24. The case is before the senior administrative law judge ("ALJ") on remand from DOL's Administrative Review Board ("ARB") which reversed the ALJ's prior decision granting summary decision in Parker-Hannifin's favor based on a finding that Lee had not engaged in activity protected by the SWDA. Following the BRB's remand, new motions for summary decision filed by both parties were denied, and the matter proceeded to a hearing on the merits. Upon consideration of the evidence in light of the BRB's remand instructions, the ALJ concludes for the reasons discussed

below that Lee has failed to prove a violation of the SWDA. Accordingly, his complaint is **DISMISSED**.

I. Background and Procedural History

Lee was hired by Parker-Hannifin in December of 2006 as the Environmental Health and Safety Coordinator / Facilities Lead at Parker-Hannifin's Advance Products Business Unit in North Haven, Connecticut. One of the systems operated at the North Haven facility during the period of Lee's employment was Evaporator No. 2 which was used to reclaim precious metals contained in hazardous silver cyanide and gold wastewater or rinse water produced by industrial electroplating processes. Prior to the events giving rise to Lee's SWDA retaliation complaint, the reclamation process utilized in Evaporator No. 2 had been conducted for several years pursuant to a precious metals exemption under pertinent federal and state regulations implementing the hazardous waste provisions of the RCRA. The precious metals exemption is available where the level of precious metals contained in hazardous wastewater exceeds specified minimum concentrations and reclamation has significant economic value. *See* 40 CFR Part 266 Subpart F. On November 4, 2008, Lee shut down and locked Evaporator No. 2, in contravention of orders from his superiors not to do so, based on his belief that the evaporator was not operating in compliance with the applicable regulatory requirements. Lee was immediately suspended and, following an internal investigation which concluded that his allegations relating to the non-compliant use of Evaporator No. 2 were without merit, Parker-Hannifin terminated Lee's employment on November 10, 2008 for insubordinate conduct in shutting down Evaporator No. 2.

Lee filed his initial SWDA complaint with DOL on November 8, 2008, alleging that Parker-Hannifin unlawfully suspended him in retaliation for his conduct in shutting down Evaporator No. 2. He subsequently amended the complaint to include Parker-Hannifin's termination action. By letter dated June 16, 2009, the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), acting as agent for the Secretary of Labor (the "Secretary"), notified Lee of the Secretary's preliminary finding that there was no reasonable cause to believe that Parker-Hannifin had violated the SWDA. On July 15, 2009, Lee filed a notice of objections and request for a *de novo* hearing before an ALJ pursuant to 29 C.F.R. § 1980.106. On August 31, 2009, Parker-Hannifin filed its motion for summary decision, asserting therein that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law. Lee filed a response in opposition on September 16, 2009, alleging that there was a genuine issue of material fact and urging denial of Parker-Hannifin's motion for summary decision. Parker-Hannifin subsequently filed a reply brief on September 23, 2009.

On October 29, 2009, the ALJ issued a decision and order granting Parker-Hannifin's motion for summary decision and dismissing Lee's complaint, concluding that Lee could not prove a violation of the SWDA because the undisputed facts established that Parker-Hannifin suspended and terminated his employment for engaging in unauthorized conduct—shutting down Evaporator No. 2—that was not protected under the SWDA based on the decision of the Court of Appeals for the Second Circuit in *Harrison v. Administrative Review Board, U.S. Department of Labor*, 390 F.3d 752 (2d Cir. 2004). ALJ Dec. & Ord. at 9. Lee appealed to the ARB which reversed the ALJ's dismissal of Lee's complaint and remanded the case for additional fact-

finding on the issue of whether Lee had engaged in conduct protected under the SWDA. *Lee v. Parker-Hannifin Corp., Advanced Products Business Unit*, ARB No. 10-021, ALJ No. 2009-SWD-3 (Feb. 29, 2012). Specifically, the ARB held that the ALJ had misread the Court's decision in *Harrison* and erroneously relied on other precedent in determining that Lee's conduct was unprotected by the SWDA. Contrary to the ALJ, the ARB concluded, after a thorough review of the SWDA and whistleblower case precedent, that an employee's conduct based on his reasonable belief that such conduct is in furtherance of the SWDA's purposes can be afforded whistleblower protection under the SWDA even if the conduct is undertaken in contravention of his employer's orders. Slip op. at 12.

On remand, Lee filed a motion for summary decision, asserting that the undisputed facts establish that he engaged in protected conduct when he shut down Evaporator No. 2 to ensure compliance with the SWDA, and Parker-Hannifin responded in opposition that summary decision was inappropriate at that point because it had not had an opportunity to depose or cross-examine Lee. By order issued on June 12, 2012, ALJ Calianos, to whom the matter had been initially assigned on remand, denied Lee's motion for summary decision. Judge Calianos thereafter issued an order establishing pre-hearing deadlines which were modified, after the case was reassigned to this ALJ,[1] by agreement of the parties reached during a status conference held on September 27, 2012 and confirmed in a notice of hearing and pre-hearing order issued on that date. The pre-hearing order established a new deadline for completion of discovery and set times for Parker-Hannifin to renew its motion for summary decision and for Lee to file a response. Within the time allowed, Parker-Hannifin filed a renewed motion for summary decision on December 10, 2012, and Lee filed his response in opposition and counter-motion for summary decision on January 9, 2013. Parker-Hannifin filed its opposition ("Parker-Hannifin Opp.") to Lee's counter-motion on January 23, 2013. Both motions were denied by order issued on March 14, 2013.

A *de novo* evidentiary hearing convened in Hartford, Connecticut on April 2, 2013 at which time both parties had a full and fair opportunity to introduce evidence and argument.[2] Testimony was heard from Lee and several other witnesses, and documentary evidence was admitted as Joint Exhibits ("JX"), Complainant's Exhibit ("CX") 1, and Respondent's Exhibits ("RX") A-LL.[3] See Hearing Transcript ("HT") at 7-10. The hearing concluded after a second

[1] The ALJ retired after issuing the first decision and order granting Parker-Hannifin's motion for summary decision and returned in senior status on July 30, 2012.

[2] The hearing on remand was originally scheduled to convene, by agreement of the parties, on February 12, 2013. However, due to the uncertain status of the federal budget for Fiscal Year 2013 as of mid-January 2013, the ALJ notified the parties during a telephone status conference on January 15, 2013, that it was necessary to reschedule the hearing to a later date by which time the budget uncertainties, hopefully, would have been resolved. At that time, the parties agreed to the rescheduled date and indicated that Hartford was their preference for a hearing location.

[3] The parties' joint exhibit package, which initially consisted of 1,030 pages, was revised and resubmitted post-hearing and now consists of 1,959 pages. The parties were granted leave at the hearing to raise any objections to the revised joint exhibits after they were submitted. In a letter dated May 14, 2013, Parker-Hannifin asserted that certain documents included in the joint exhibit package should not be admitted because they either constitute argument submitted by counsel (*e.g.*, pre-hearing pleadings filed by Lee's attorney) or affidavits and pre-hearing depositions which, Parker-Hannifin argues, "should not be considered . . . unless a document or statement specifically contradicts a statement made at the hearing such that it can be considered a prior inconsistent

day of testimony on April 3, 2013. Both parties filed post-hearing briefs which are referred to herein as "Lee Br." and "PH Br." Parker-Hannifin also filed an unopposed motion to correct errors in the hearing transcript. That motion is granted, and the transcript is corrected as noted in the motion. The record is now closed.

II. Stipulations

The parties have offered the following stipulations for fact:

1. The Complainant's name is Jimmy R. Lee, Sr. Jim Lee resides at 20 John Street in Enfield, Connecticut 06082.
2. Jim Lee began working for Parker-Hannifin on or about December 11, 2006.
3. Parker-Hannifin maintains a manufacturing facility located at 33 Defeo Park Road in North Haven, Connecticut, 06473, known as its Advanced Products Business Unit.

Lee Br. at 1; PH Br. at 1.

III. Findings of Fact

Based on the testimony heard at the hearing, the documentary evidence contained in the record and reasonable inferences drawn from the evidence, I find that the facts set forth below have been established by a preponderance of the evidence.

Lee was employed as Parker-Hannifin's Environmental Health and Safety ("EHS") Coordinator/Facilities Lead at the North Haven plant from December 11, 2006 until November 10, 2008. Joint Exhibits ("JX") at 1234-1237. In this capacity, Lee had "[o]verall responsibility for the efficient operation, maintenance, and coordination of all services, processes, facilities, systems and contracts involved with the site . . . performing and/or coordinating all Environmental, Health and Safety (EHS) facility functions . . . [and] EHS compliance at the site including reporting, record keeping, training, measurement, monitoring and control." JX at 1238-1239. As stated in his job description, Lee's EHS "areas of responsibility included (1) waste management, (2) air emission permits, (3) water discharge permits, (4) pollution control systems, (5) recycling, (6) chemical management, (7) safety programs, (8) emergency response and evacuation, (9) accident reporting and response and (10) "other applicable EHS programs." *Id.* Lee reported to Chris Roman, the Manufacturing Manager at the North Haven facility, who reported to Sharon Chu, the Business Unit Manager, who reported to James Randall, the General Manager. HT at 31-32, 53; 84, 198. Parker-Hannifin also has a corporate EHS Department, located in Cleveland, Ohio, which oversees EHS matters at Parker-Hannifin facilities worldwide, including the facility in North Haven. *Id.* at 284, 316-317. During the relevant period of Lee' employment, Martha Connell was Parker-Hannifin's corporate EHS Manager with responsibility for training and assisting the facility-level EHS Coordinators such as Lee in complying with

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statement." May 14, 2013 Ltr. at 1. Lee responded by letter date May 17, 2013 in which he asserts that Parker-Hannifin's admissibility objections should be overruled for non-compliance with the ALJ's pre-hearing order. Upon review, the ALJ agrees. Accordingly, Parker-Hannifin's objections are **OVERRULED**, and the complete revised joint exhibit package has been admitted into evidence. The issues raised in Parker-Hannifin's objections have instead been considered in regard to the weight accorded to the documents in question.

regulatory and corporate requirements and for periodically reviewing regulatory compliance at the facility level. *Id.* at 309-314.

The North Haven site, which employed approximately 100 workers during the period of Lee's employment, manufactures metallic seals and gaskets for the aerospace, automotive and power generation industries. RX EE at 3. Some of the manufacturing processes conducted at the North Haven facility involve electroplating which produces wastewaters or rinse waters that are treated onsite in evaporation units. *Id.* One of these evaporators, known as Evaporator No. 2, is dedicated to processing hazardous silver cyanide and gold wastewaters or rinse waters produced by electroplating processes. *Id.* at 4. Prior to the events giving rise to Lee's SWDA retaliation complaint, Evaporator No. 2 had been registered with the Connecticut Department of Environmental Protection ("CT DEP") since 1995 to reclaim precious metals from the hazardous electroplating wastewater a precious metals exemption that is available under pertinent federal and state regulations implementing the RCRA when the level of precious metals contained in hazardous wastewater exceeds specified minimum concentrations. RX GG at 1.[4] If the concentrations of precious metals were below the minimum concentrations required for the exemption, Parker-Hannifin would be prohibited from treating the wastewater on-site as the North Haven facility is not a qualified or licensed hazardous waste treatment, storage or disposal facility. HT at 17-18; 328-329. When Parker-Hannifin acquired the North Haven facility in December of 2004, Connell visited the North Haven site and conducted a "due diligence review" of Evaporator No. 2 and other processes, concluding that the evaporator was operating in compliance with environmental laws. HT at 305-307, 314-315. At the time that he was hired by Parker-Hannifin, Lee had no prior experience with the precious metals exemption. *Id.* at 458).

On March 5, 2007, the Connecticut Department of Environmental Protection ("CT DEP") issued a Notice of Violation which cited Parker-Hannifin with certain record-keeping and information reporting violations of state and federal hazardous waste regulations that were detected during an inspection of the North Haven facility in late 2006. RX F. The cited violations, which did not specifically involve Evaporator No. 2 or its operation under the precious metals exemption, were resolved by a consent order in October of 2007, and the CT DEP issued a certificate of compliance on August 12, 2008, indicating that Parker-Hannifin had submitted documentation in December of 2007 demonstrating that it had complied with the terms of the consent order. RX L and O.

By letter dated March 13, 2007 addressed to Roman with a copy to Lee, CT DEP notified Parker-Hannifin that in addition to the violations cited in the March 5, 2007 notice of violation, the agency's inspection in late 2006 raised "additional concerns regarding ongoing RCRA compliance" relating to the operation of evaporators at the North Haven facility including Evaporator No. 2. RX G. Regarding Evaporator No. 2, the March 7, 2007 letter outlined the requirements for claiming the precious metals exemption under the RCRA, including a requirement that Parker-Hannifin document that each waste (*e.g.*, silver cyanide) entering Evaporator No. 2 actually contained the precious metal (*i.e.*, silver) to be reclaimed in sufficient quantities for recovery to be economically significant. *Id.* at 1-2. The CT DEP letter went on to note that the most recent report from Parker-Hannifin appeared to contain errors and / or outdated information, and it instructed that the report should be updated or corrected as

[4] *See* 40 CFR § 266.70.

necessary. *Id.* at 2-3. Roman responded to the CT DEP in a letter dated March 23, 2007 which enclosed the requested corrections to the most recent Biennial Report. JX at 1258. Roman's March 23, 2007 letter also notified the CT DEP that he had spoken to Parker-Hannifin's corporate offices and a consulting firm, Apex Environmental ("Apex"), and that Lee would be compiling the information needed to respond to the concerns raised in the March 13, 2007 letter. *Id.*

On April 16, 2007, Lee and Roman met with Apex representatives, including William Drouin, to discuss the possibility of Apex assisting Parker-Hannifin in responding to the CT DEP's questions related to wastewater evaporator compliance at the North Haven Facility. RX I at 1. Drouin had about 30 years of experience in working on RCRA compliance, but he had not previously dealt with the precious metals recovery exemption as a consultant. HT at 131-132, 170, 176-177, 185. Following the meeting, Lee sent an email ("Subject: State of Connecticut DEP documentation requirements for precious metals exemption") to Drouin and Roman on April 24, 2007 in which he described the "minimum requirements for sampling the precious metals wastewater to meet the DEP criteria." RX H at 1. This email outlined detailed sampling procedures and asked Drouin and Roman to "review these plans for accuracy and logic, feel free to challenge or suggest alternate methods that can be traced or proven." *Id.* at 2.

On April 25, 2007, Apex submitted a proposal, which was accepted by Roman on June 7, 2007, to assist Parker-Hannifin "in preparing letters and other documentation in support of compliance with the [CT DEP] Guidance Document Regarding Installation / Use of Wastewater Evaporators dated October 29, 2002 (attached)." RX I. Apex's proposal confirmed that it would analyze the results of the Evaporator No. 2 wastewater sampling to be conducted by Parker-Hannifin personnel as outlined in Lee's April 24, 2007 email and that upon completion of the analysis, it would assist Parker Hannifin in conducting an "initial assessment of compliance needs relative to the results of the system sampling" and working with Parker-Hannifin to identify remedies. *Id.* at 2. On June 8, 2007, the day after Roman accepted the Apex proposal, Lee forwarded his April 24, 2007 email outlining the sampling procedures (RX H) back to Drouin. RX J. The wastewater sampling for Evaporator No. 2 was conducted during May and June of 2007, and the results were analyzed for Apex by York Analytical Laboratories which produced reports containing the results of the analyses. JX 1132-1164; HT at 410-411.

On November 1, 2007, Drouin met with Lee and Roman to review the results of the sampling and discuss wastewater treatment options, and he confirmed the meeting in a memorandum issued the same day to Lee and Roman. RX M. Drouin's memorandum stated that the meeting was prompted by the March 13, 2007 letter from the CT DEP "related to the present operation of three evaporators at the [North Haven] facility used to consolidate silver concentration and treat plating rinsewaters." *Id.* at 1. Drouin further stated that some concern was noted in the [CT DEP's] letter, regarding . . . RCRA compliance . . . related to metals reclamation and wastewater neutralization." *Id.* Drouin's memorandum concluded with the following summary of the November 1, 2007 meeting:

> The November 1, 2007 meeting was scheduled to discuss the results of the analysis, disposal costs and the current production levels. Three methods were discussed during the meeting including: the compliant use of the evaporators,

> SPDES permitted wastewater treatment system and off-site shipping of raw wastewater. Apex also discussed the use of a silver electrolytic wastewater system with a cyanide destruct treatment system as ancillary amendments to these three different wastewater disposal methods. Due to the concentrations of silver in the wastewater, it would be advantageous to perform some type of silver recovery prior to wastewater disposal.
>
> At this time, due to current and future manufacturing capacity and cost constrains [sic], Parker has determine [sic] to pursue the SPDES permitted wastewater treatment system option. Mr. Lee has been tasked with providing treatment system construction and sanitary hook-up cost estimates and Mr. Drouin has been tasked with providing a proposal to assist Parker personnel in preparing a SPDES permit application.

Id.[5] A "SPDES permitted" treatment system would remove the metals and other contaminates from the wastewater which would then be tested for cleanliness and discharged into the municipal sewer system. HT at 62; 155-156. Lee was familiar with SPDES treatment systems from a prior employment and preferred this option over the process involving Evaporator No. 2 that was then in use at the North Haven facility. JX at 464-467. And Drouin regarded the SPDES treatment option as a potential business opportunity for APEX. HT at 154-155.

Six days after the November 1, 2007 meeting with Apex representative Drouin, Roman issued an oxymoronically-titled "Verbal Written Reminder" to Lee regarding the latter's use of internal email communication. RX N.[6] The desired objective of the reminder was set forth as getting Lee to "support the Parker environment of team work," and the document stated that "Jim must discuss his concerns with his supervisor and immediately stop writing emails and distributing them without prior approval of his supervisor." *Id.* The reminder charged that "Jim has been using email as a way to vent his concerns, even after several conversations with his supervisor advising him to stop," and it asserted that "[t]hese emails waste company time . . . [and] also frustrate the employees at Advanced because you are continually accusing the team as

[5] Lee and Drouin differed somewhat on whether Drouin expressed any opinion during the November 1, 2007 meeting as to whether Evaporator No. 2 was operating in compliance with the requirements for the precious metals exemption. Lee testified that Drouin expressed some concern regarding compliance and was instructed by Roman not to put anything in writing at that time that would "incriminate" Parker-Hannifin. HT at 420-422, 462-463. Drouin denied making any representation at the meeting that the evaporator was out of compliance but he did acknowledge that there was a "concern" raised by the CT DEP letter. HT at 171. He further testified that he felt that he would have to see additional documentation before he could reach any conclusion. HT at 179-180. While Drouin may not have said the he was personally concerned about the evaporator's compliance during the November 1, 2007 meeting, I find that Lee certainly could have formed a reasonable belief based on what Drouin did say that he had a concern about the Evaporator No. 2's compliance with the precious metals exemption requirements. However, I do not credit Lee's testimony that Roman asked Drouin not to put anything in writing that would "incriminate" the company based on Lee's acknowledgement that he never reported Roman's alleged obstruction to either the CT DEP or the internal ethics hotline. HT at 462-463. That is, his inexplicable silence with respect to such a significant and material act of alleged malfeasance is compelling evidence that no such statement was ever made, especially given Lee's demonstrated willingness to report his speculation about Roman's possible misconduct in relation to hazardous waste handling. *See* RX P, discussed infra.

[6] A verbal written reminder is a preliminary step in Parker-Hannifin's system of progressive discipline. HT at 232; 466.

not being supportive." *Id.* The reminder concluded that repeat incidents would be "subject to further disciplinary action including but not limited to a written reminder, RONA suspension and / or termination." *Id.* The reminder reflects that Lee initially declined to sign it on November 7, 2007 but did return and sign on November 8. *Id.* The record does not disclose the specific emails that motivated the November 7, 2007 Verbal Written Reminder, but I find it reasonable to infer from its tone and subsequent events that Lee's relationship with Roman and other managers in North Haven was becoming strained by late 2007.

In or around November of 2007, Lee conducted his own review of the sample analysis for Evaporator No. 2 which raised a concern in his mind as to whether the volume of precious metals contained in the wastewaters entering the evaporator was sufficient to be economically significant as required under the RCRA's precious metals exemption. HT 387-388, 412-416; JX at 1168. Though Lee was satisfied with his analysis and conclusions, he wanted a "second opinion" and was told by Roman to contact Parker-Hannifin's corporate EHS group. HT at 416-417. Lee then addressed his concerns in a January 29, 2008 email to Mike Michels in Parker Hannifin's Corporate EHS Group in Cleveland, Ohio:

> Mike you were very helpful in your guidance on the elimination of the culprit of chromium by isolation of that source.
>
> We are not out of the woods yet.
>
> I am concerned with the fact, (based on lab reports and records study), that we are failing to meet the criteria for exemption requirements for reclamation of precious metals with the gold and silver. So therefore we would be treating hazardous waste.
>
> There are several issues that concern me:
>
> - The evaporators are already unable to keep up with our waste water volume.
> - There are other streams added to the waste water that don't appear on any discharge or evaporation plans, namely tin plating, surfactants baths from ultrasonic and vibratory finishing operations, and sometimes just parts washing waters.
>
> I have brought in a couple of companies asking for quotes to develop a waste water treatment operation but have no results. Chris has Apex involved to this point to guide us by research and analytical.
>
> It seems that our effort to respond to the DEP questions of our evaporators has opened a Pandora's box.
>
> Perhaps we could schedule a conference call again. With your help maybe we can show diligent effort if we are challenged.

> Right now all of our effort is not helpful if there were any inquiry/follow up.
>
> Chris has indicated to DEP, on March 23, 2007, that we have hired APEX to help us resolve their concerns of their letter of March 13, 2007.
>
> I would not be surprised to hear from then since it has been 9 months since we have communicated with them.
>
> Please express your opinion. It would be helpful to us.

JX at 1165-1166.[7] Michels responded to Lee that same day, stating in his email,

> I would be happy to be on a call and I was also going to contact you because I need all the available information on the wastewater being generated. Any information on the material being removed from the evaporators as well as such as percent water. Volumes entering and exiting, percent water, analytical etc. Any anticipated increases or predictable operating ranges that the system needs to be able to accommodate. We also need information on the volume of natural gas or electricity being used in the evaporators, cost of any fees associated with hooking up to the sewer, discharge rate schedules etc. I would like to be in touch with APEX. They may be a qualified consultant but all consultants need to be watched closely and we have loads of experience internal to Parker with evaporators, and waste water treatment for metals. You are approaching a business decision and we need to gather all the available information and organize it in a method that corresponds to parker's standards so if any changes need to be made you can demonstrate proper evaluation. I can't be any help unless you can get me everything. I am in the office all week we can schedule a call at any time just let me know.

Id. at 1165. Lee never provided Michels, or anyone else at Parker-Hannifin, with his analysis of the Evaporator No. 2 wastewaters, HT at 451-454, and it does not appear from the record that Lee and Michels had any further communications regarding Evaporator No. 2. Lee also never provided his analysis of the Evaporator No. 2 wastewaters to Drouin, the Apex representative. HT at 146-147, 170-171.

On April 8, 2008, Connell sent an email to Lee and Sharon Chu, the Business Unit Manager at North Haven, asking them to let her and "Mike" [Michel] know "if we have heard anything or received any thing [sic] from the DEP following our Dec submission regarding hazardous waste compliance concerns from the last inspection." JX at 1172. On May 1, 2008, Lee forwarded Connell's email to Roman with the following message:

> Chris, could you please ask Sharon to send Martha and Mike a memo in response to hers. I know Sharon has been away, but I really need their help on our outstanding evaporator inquiry from DEP, and I'm afraid that unless we move forward and establish some documented effort/action for a viable waste water

[7] Lee sent a copy of this email to Roman. JX at 1165.

> treatment and discharge system, we could be viewed as negligent because we couldn't justify the validity of our precious metals reclamation process. Thanks Jim L.
> If you or she have questions I would be glad to provide an overview/essay at your request, if it will be of use to communicate with Martha and Mike.

Id. There is no evidence in the record that Roman ever responded to Lee's email or that either Lee or Chu ever responded to Connell's email of April 8, 2008. Connell's request eventually became moot when the CT DEP issued the Certificate of Compliance on August 12, 2008 based on the documentation submitted by Parker-Hannifin in December of 2007. RX O. There also is no evidence of any further communication between Parker-Hannifin and the CT DEP relating to the evaporator compliance concerns expressed in the March 13, 2007 letter between March of 2007 and November of 2008 when Lee's employment was terminated.

On or about September 19, 2008, Lee called Parker-Hannifin's "Ethics Hotline" to make a confidential report of an incident that occurred at the North Haven facility on September 17, 2008 involving mishandling of hazardous waste during a non-hazardous wastewater transfer by Peter Rodriguez, an employee under Lee's supervision. RX P.[8] In this report, Lee expressed concern that the mishandling may have been ordered by Roman "to save money" and that Roman might attempt to cover up the incident, dispose of the waste in a storm drain which could cost the company "millions of dollars" in clean-up fees, and / or retaliate against Lee for reporting the incident. *Id.* at 2. Lee further alleged that Roman told him not to report the incident or he would be terminated and that, instead of following Lee's recommendations on how to correct the cross-contamination legally, Roman decided on an alternate, more expensive plan that would "cover up" the incident from company officials. *Id.*

Lee's hotline report was investigated by Connell during a visit to the North Haven facility on September 25, 2008. RX P at 3. Connell's investigation confirmed that Rodriguez had improperly added hazardous wastewater from an evaporator to a tank truck containing non-hazardous rinse water while Lee was temporarily out of the area obtaining Roman's signature on some documents. *Id.* However, Connell also informed Lee that his allegations of intentional mishandling and cover-up were contradicted by other witnesses and were not substantiated by any "objective evidence." *Id.* Lee reportedly responded that he understood but felt that Rodriguez should be reprimanded and that environmental health and safety issues were not receiving adequate attention and priority at the facility. *Id.* Connell met with the North Haven General Manager, James Randall, while she was at North Haven on September 25, 2008, HT at 362-364. North Haven Business Unit Manager Chu was then informed by Randall that that Lee had filed a hotline report. *Id.* at 248-249.

[8] This was not the first hazardous waste incident involving Rodriguez who was referred to as "Peter" and "Pedro" at the hearing. *See e.g.*, HT at 32. In March of 2007, Rodriguez had comingled hazardous waste with non-hazardous waste that was being shipped off-site to a facility in New York. HT at 423-424; RX Z at 1. Lee, who was away for training at the time, discovered the error, contacted Connell, and traveled to New York to oversee the necessary remedial action which, by Lee's estimate, cost Parker-Hannifin approximately $50,000.00. HT at 425-426. Following this incident, Lee was instructed by Roman to be on-site in the future whenever Rodriguez was dealing with a hazardous waste transfer. *Id.* at 64.

On October 13, 2008, Lee met with Chu and Rachel McCaul, Human Resources Manager at North Haven, to discuss his hotline report and the results of Connell's investigation. HT at 251-252; RX LL. At this meeting, Chu expressed concern over the nature of Lee's hotline allegations: "And we also went over several of his other concerns that he brought up during that investigation to ensure that he felt he could continue to work with Mr. Roman, that he understood his role. Encouraging him to, again, use the open door policy." HT at 252. Chu then mentioned the prior waste cross-contamination incident involving Rodriguez and that Lee had been instructed not to leave the area in the future when Rodriguez was involved in a waste pickup. *Id.* At the conclusion of the meeting, Chu handed Lee a "Verbal Written Reminder" which stated that "Several hundred gallons of water became contaminated with hazardous waste because Jimmy was not supervising his employee during the transaction." RX Q. The reminder warned that if another incident occurred, he would be "subject to further disciplinary action including but not limited to a written reminder, RONA suspension and/or termination." *Id.*

Lee declined to sign the October 13, 2008 "Verbal Written Reminder" at the meeting with Chu and McCaul, and he submitted an undated, two-page response in which he challenged the version of the September 17, 2008 as set forth in the reminder. RX R. In particular, he took issue with the allegation that he was not present at the time of the waste transfer. *Id.* at 2. In this regard, Lee maintains that he was present for the transfer and only briefly left the area to get Roman's signature in accordance with Parker-Hannifin policy when Rodriguez, contrary to specific instructions, added the hazardous wastewater from the evaporator to the tank truck. HT at 427-428. After reviewing Lee's response, a revised Verbal Written Reminder was issued on October 24, 2008 which characterized Lee's misfeasance as follows: "Although Jimmy was not directly responsible for the cross-contamination, he was expected to be present during the entire transaction." RX T. The revision was not acceptable to Lee who again refused to sign and submitted a further response for the record on October 25, 2008. RX U.

On October 14, 2008, Lee also filed a complaint with CT DEP, alleging,

> My Company, Parker Hannifin APBU, was sited [sic] with RCRA violations in 2006. Then I was hired to correct them. We were given recent compliance certification to those violations. My Company also paid a $20,000,+ file as well. Since then my employer has reverted back in many ways to non-compliance of hazardous waste laws. I reported some of these more serious events to my immediate supervisor, and he threatened if I took action I would be fired. Then yesterday I was written up and asked to sign that I was the guilty one. Because I reported it for things that incriminated them.

RX S. The complaint did not mention Evaporator No. 2.

On or about October 27, 2008, Lee contacted Drouin and asked him to provide a follow-up memorandum discussing the results of Apex's analysis of the wastewater evaporators. HT at 165; 470. In response to Lee's request, Drouin transmitted a memorandum dated October 28, 2008 in an email sent during the afternoon on October 27, 2008. RX V. In this memorandum, Drouin stated,

> Based on the analytical results, it was determined that the concentrations of precious and semi-precious metals (predominantly silver and gold) in the wastewater were below levels that would be considered adequate for "speculative accumulation". However, the silver concentration in the rinsewaters are high enough to be considered a hazardous waste should they be shipped off-site as a wastewater.

Id. at 2 (internal quotation marks in original). The memorandum went on to recommend a SPDES wastewater treatment system as an alternative "that would be cost effective and provide regulatory compliance" and that "some type of silver/gold recovery occur prior to wastewater discharge." *Id.* Lastly, Drouin suggested that an anode / cathodic precipitation method would be "very efficient in removing silver/gold materials from wastewater." *Id.*

Lee responded to Drouin by email on the morning of October 28, 2008. In this email, he asked Drouin to consider revising the memorandum discussing the results of the analysis and its implications:

> Bill Thanks but there are some errors and as a result this memo is not correct. Let me try to capture the scenario. The sampling was to see if we had strong enough concentrations to be exempt through precious metals exemption from the standards as a hazardous waste, which we were not, yet we are over the hazardous waste levels. Therefore 1. We can't treat it and 2. being on site for extended periods of time is a violation of the Law. The crime is speculative accumulation. This clarity is for those other than ourselves that do not know the rules. If you agree with me could you write me another memo along those lines.

RX W. In response to Lee's request, Drouin revised the October 28, 2008 memorandum to add the following paragraph:

> Thus, the activity of storing the wastewater over an extended period of time would be considered "speculative accumulation". The USEPA subjects persons who "accumulate speculatively" as hazardous waste generators and can only store material on site as a large quantity generator for 90 days or as a "treatment storage and disposal" facility (TSDF) for 180 days. Storage of these materials for longer than these time frames violates storage requirements under 40 C.F.R. 262.34.

EX X. Although Drouin had not personally formed an opinion as to whether Evaporator No. 2 was being operated in compliance with applicable regulatory criteria, he knew that Lee believed that the evaporator was not in compliance and was willing to write the two versions of the October 28, 2008 memorandum because it was what his client requested and because Apex was interested in designing and building an alternate wastewater treatment system. HT at 139-145.[9]

[9] Drouin, a reluctant witness who made a concerted effort at the hearing to avoid giving either party the answers they were looking for, did allow that it was his opinion at the time that he wrote the October 28, 2008 memorandum at Lee's request that he "didn't see enough documentation to be able to show that they were actually recycling [the silver cyanide wastewater] appropriately." HT at 140. In essence, Drouin questioned whether the costs associated

Upon receipt of Drouin's revised memorandum, Lee immediately forwarded a copy via email to Chu, Connell and Michaels, stating,

> This is a clear explanation of what I have been complaining about. This is actually the answer to the question from the DEP on March 13, 2007 from Dennis Foran, which I gave all of you copies on 3/20/07 (including Chris Roman and Howard.

RX Y.[10] Connell responded by email on October 28, 2008, stating that she wanted to schedule a visit to "review this particular issue and hazardous waste management activities, in general, at North Haven." *Id.* Connell also asked Lee whether he would be available between November 18 and November 20. *Id.* On October 29, 2008, Lee responded to Connell in an email which reads,

> Yes, as soon as possible when you can, I would be very thankful to have both of you come and review all that you will. I would personally consider that a great help. Thanks Jim L. (Also I'm sure you realize we are and always have been treating RCRA hazardous waste, without a permit, with the number 2 Cyanaide evaporator.)

Id. The following day, October 30, 2008, Lee sent a memorandum to McCaul, the Human Resources Manager at North Haven, with copies to Connell, Chu and Randall, in which he expressed dissatisfaction with the handling of the September 17, 2008 waste contamination incident and stating, "I hereby revoke any and all prior approval and certification that I have given to Peter Rodrigues, proclaiming him unqualified to work with any form of hazardous waste of anything associated with RCRA." RX Z (emphasis in original). Lee concluded this memorandum as follows:

> Secondly, because you and your associates have refused to show diligence concerning the Cyanide rinse water evaporation process, (that is in fact treating hazardous waste), which is breaking the laws of hazardous waste storage as defined by Apex Companies, LLC as William Drouin's memo of 10/28/2008 indicated, which I sent to you. Our company was instructed by DEP over a year ago to respond with the results of those findings. I have been hindered from reporting my findings. I now hereby order The evaporator number 2 which is the Cyanide water evaporator to be shut down and not used again unless approved by the State, and the rinse waters collected and managed as RCRA hazardous waste from this point forward."

Id. (emphasis in original). The next day, Lee submitted a "Letter of Revoking" in which he stated that in the event his employment were to end "of my own free choice or by the choice of

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with reclaiming the precious metals from Evaporator No. 2 would exceed any benefit to the company. *Id.* at 174-175.

[10] The "Howard" referred to by Lee is Howard Rowley, another Parker-Hannifin EHS employee.

Parker Hannifin, I revoke all rights and privileges and approvals I have sponsored, performed, or endorsed immediately, because I will be unable to monitor, control and correct, or maintain a standard that is acceptable to my decisions." RX AA.

On Friday, October 31, 2008, Chu, who was accompanied by Randall and McCaul, met with Lee to discuss his October 30, 2008 memorandum (RX Z). In this meeting, which Lee described as "kind of intense," Chu told Lee that Connell had given permission to continue operating Evaporator No. 2 and that he did not have authority to shut the evaporator down, and she ordered him not to do so. HT at 479, 486-487; 100-101, 111, 115, 212, 215; CX at 148.[11] Chu also informed Lee that Connell would be coming to North Haven the following week on November 4, 2008 to investigate his concerns. *Id.* at 215.[12]

Following the October 31, 2008 meeting, Lee sent a memorandum dated November 2, 2008 to Chu, Randall and McCaul. RX BB. Referring to the meeting on October 31, 2008, Lee stated in this memorandum that he would "recap some of the more important substance" of the meeting, and he added that "[m]y comments are not necessarily in the order that the events actually occurred, nor complete concerning the entire discussion, but selected in an order that I choose." *Id.* at 1. He then stated that since Chu had "implied that it might not be true that I can actually revoke my certifications that I have given to others," he had contacted OSHA and received an answer that was "similar but more encompassing" which led him to conclude that he did have authority to revoke certifications that he had issued. *Id.* at 1. He then stated:

> Unqualified personnel cannot legally direct the disposition of hazardous waste operations and chemical treatment processes as all of you accepted what Sharon said about Martha Connell giving permission to continue running the cyanide treatment evaporator. Even higher qualified personnel such as Martha Connell could be considered presumptuous in overriding the **legal authority of the required on-site manager, (namely myself)**, that has conducted the research, and been advised by Apex Environmental. Unless Martha has a perfect knowledge of all circumstances and conditions, (which I have not shared with her entirely), she is culpable of knowingly contributing to your continuance of such crimes of committing said violations.
>
> * * * * *
>
> I have informed all of you that in my letter Dated 10/30/2008, APBU [Advanced Products Business Unit] has been and is engaged in illegal RCRA activities. And I ordered each of you in a word, to be responsible, and shut down these operations. You are culpable to the KNOWING CRIMINAL offenses by the insubordination to my direct order, and my on-site certified knowledge and

[11] Lee's notes of the October 31, 2008 meeting reflect that when Chu informed him that she had decided to follow Connell's advice that they could continue to operate Evaporator No. 2, he responded: "Then you are on your own, operating against my instructions. You are responsible for your own actions." CX at 148.

[12] Lee testified that he didn't "recall" and "may not have heard" Chu say that Connell had advanced her planned North Haven visit to November 4, HT at 487, but I credit Chu's account that she did so inform him.

> training, by using your offices of position as power to usurp over me and take the position not to do as I commanded. Your positions with all due respect, do not relieve you of your obligation to submit to the authority you have selected and endorsed, in matters that require knowledgeable on site certified personnel.

Id. at 1-2 (emphasis in original).[13] Lee then complained that he received inadequate support for his EHS responsibilities which, he noted, were now increased since he had decertified Rodriquez, and he concluded with the following warning: "**This time if I do not get your support to make APBU develope [sic] into a position of demonstrating the intent of compliance with the laws, I promise you I will file a complaint with FEDERAL OSHA with all of the detail necessary to make my unquestionable point.**" *Id.* at 2 (emphasis in original).

On the morning of November 4, 2008, the day Connell was due to arrive at North Haven to investigate his complaints, Lee shut down and locked Evaporator No. 2 contrary to the order he had received from Chu on October 31, 2008. HT at 387, 487-488; CX at 158. In an email sent to Chu, Connell, Randall and Roman at 8:25 A.M. on November 4, Lee advised,

> I have shut down and locked out the #2 Cyanide evaporator. Locked it out, placed signs, do not operate, and Reported to DEP that we have shut it down. We were found to be in violation upon receiving Apex's report that we were treating hazardous waste illegally and fail to qualify for the precious metals exemption. The State is informed that it will stay shutdown until a legal means of treatment is in place. In the interim, you may drum the rinse water as hazardous waste under RCRA for legal continuance.

RX CC. Although he had been in contact with the CT DEP, Lee acknowledged that "No one told me to shut it down." HT at 488. He took the unilateral action to shut down the evaporator because "formed an opinion that the evaporator was not producing a concentrate strong enough to be economically feasible." *Id.* at 387-388. He knew that he did not have authority to take this step as far as Parker-Hannifin was concerned, but felt that he was authorized to override his managers' orders under color of law. In this regard, he testified:

> Q. Okay. Did you have the regulatory authority to shut down the Number 2 Evaporator when you shut it down?
>
> A. I did and I did not. As far as my company was concerned, I did not have the authority because they were not supportive of me doing that. And, but under RCRA and the Solid Waste Disposal Act -- actually, I respect the authority of my superiors throughout -- all of those that are over me in Parker Hannifin. And yet, I have a higher authority and that's the -- obey the law of the Solid Waste Disposal Act, even if it goes against what would be good for me and what would be good for my company. They are the authority that I answer to.

[13] Connell testified that she first saw Lee's analysis and calculations on April 1, 2013, the eve of the hearing. HT at 501-502.

> Q. Okay. And when you shut down the Number 2 Evaporator, were you attempting to obey that, the Solid Waste Disposal Act?
>
> A. Yes, sir.
>
> Q. Okay. And why did you think that it was necessary to shut down the Number 2 Evaporator when you did?
>
> A. Well, it had come to the point of not only my own decision for the analysis of the waste streams, but also my second party, outside party, had agreed with me at this point in writing that -- he documented that he -- he said that -- and I didn't give him my calculation, but he agreed on his own that we were not showing enough metals to be economically feasible.
>
> Q. Okay. So in your opinion, Mr. Drouin had concluded that the Number 2 Evaporator was not compliant with the Solid 8 Waste Disposal Act in its then use?
>
> A. That's what I believed.

HT at 401-402.[14] Lee did not believe that the operation of Evaporator No. 2 posed any danger to the safety of the public or employees because he "felt that they were operating in a measure that was safe for handling cyanide," and he did not believe that the evaporator's continued operation was in violation of any compliance order. JX at 697. Neither Lee's job description (RX E), Parker-Hannifin's Corporate EHS Policy (RX JJ), nor the North Haven facilities Emergency Contingency Plan (CX 101-125) expressly provided him with authority as a facility-level EHS coordinator to shut down equipment in a non-emergency.[15] Nevertheless, Lee "absolutely" felt that he had authority based on his EHS duties to shut down the evaporator. HT at 498-499.

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[14] A more contemporaneous articulation of Lee's though processes in regard to his shuttering of Evaporator No. 2 is found in his personal notes dated November 4, 2008 in which he wrote:

> I came into my office at 7:45 AM, reviewed my notes and memos that I had sent, and I realized I had defended my authority over all those above me. I realized I had taken my Position and Title effectively. So then I said I must take charge and shut down evaporator #2. I must also send memos to those over me and call DEP to insure that they don't cut off my lock and continue operating it. So at 8:00 o'clock I shut #2 evaporator down, locked it out, turned off the air, and unplugged the blower. I called DEP earlier.

CX at 149.

[15] It is undisputed that Lee had authority to shut down equipment on his own in the event of an emergency posing a threat to health and safety. HT at 28; CX at 110. Connell confirmed that Lee was RCRA trained and certified, that he was responsible for hazardous waste handling at North Haven, that he was designated as the emergency coordinator at North Haven and that, as the emergency coordinator, he had authority in the event of an emergency to take all steps necessary to implement the contingency plan to mitigate immediate threats to environmental health and safety. HT at 295- 300. She also testified that Chu had the authority at North Haven to shut down an evaporator. *Id.* at 302.

Lee's actions in shutting down and padlocking the evaporator did not damage the unit which resumed full operation after Connell, as discussed below, conducted an investigation and determined that there were no compliance issues. *Id.* at 71-72.

Upon learning of Lee's actions, Chu immediately suspended him with pay pending further investigation. HT at 217; CX at 150. Connell, who had arrived at the North Haven facility on November 4, 2008 along with Howard Rowley, commenced an investigation of Evaporator No. 2's compliance, as well as the facility's RCRA compliance in general, between November 4th and 6th. *Id.* at 343. As part of her investigation, Connell and Rowley met with Lee on the morning of November 4th, shortly after learning that he had shut down and locked the evaporator. According to Connell's recollection,

> Mr. Lee was somewhat incoherent. He was speaking about Evaporator Number 2, spoke about the Drouin memo, but had no other information that he conveyed to us at that time about why he felt Evaporator Number 2 was operating out of compliance. He also spoke about Peter Rodriguez and his ability to direct Peter or his concerns with Peter's performance. He spoke about the fact that he didn't think he had enough resources dedicated to environmental health and safety. He spoke about needing to take care of the parking lots and the toilets and the need to implement an SPDES permit. And just a wide variety of issues.

HT at 342.[16] At the conclusion of her investigation, Connell prepared and issued a memorandum dated 11/6/2008 in which she stated that she had "reviewed the operation of the evaporator and applicable regulatory requirements and conclude that evaporator #2 at the facility is a legal and permissible process, per US EPA and CT DEP requirements." RX DD. In reaching this conclusion, Connell stated that her investigation identified four rinse water sources from silver and gold processes that contained precious metals, primarily silver, entering Evaporator No. 2 which concentrates the solutions, increasing the precious metal content. *Id.* Connell continued that the concentrated solution is then removed from the evaporator at least annually, so as to not be considered speculative accumulation, and sent to a precious metals refiner which pays Parker-Hannifin for the precious metals recovered. *Id.* Connell's memorandum further concluded that Evaporator No. 2 is "exempt from permitting and other hazardous waste (RCRA) requirements because of the precious metals recovery," and she stated that "the facility does have recordkeeping, notification, manifesting and labeling requirements" pursuant to applicable federal and state regulations. *Id.*

Based on the internal investigation conducted by Connell, Parker-Hannifin concluded that Lee's allegations relating to Evaporator No. 2 were without merit, and Chu terminated his employment on November 10, 2008 for insubordinate conduct in shutting down Evaporator No. 2 after she had instructed him not to do so. HT at 91-92; CX at 151; JX at 1755-1756.

Acting on Lee's October 14, 2008 complaint, the CT DEP conducted an on-site RCRA compliance evaluation inspection of the North Haven facility on November 19 and 20, 2008. RX EE. The inspection was broad-based and included precious metals recovery operations. *Id.*

[16] Lee, who testified after Connell at the hearing, did not contradict Connell's account of their November 4, 2008 meeting.

at 18. In a letter dated January 2, 2009, CT DEP advised that the report of the investigation did not indicate any violations, but it requested additional information regarding the maintenance and operation of Evaporator No. 2, noting that Parker-Hannifin must be able to document that the waste processed in the evaporator meets the applicable requirements to qualify for the RCRA's precious metals exemption. JX at 1256-1257. Parker-Hannifin provided additional information in letters dated February 13, 2009 and March 27, 2009, and CT DEP notified Parker-Hannifin in a letter dated April 9, 2009 that it appeared the operation of all three evaporation units at the North Haven facility, including Evaporator No 2, was "in compliance with the approval issued by DEP on April 6, 1998." JX at 1385-1386. Regarding Evaporator No. 2, the CT DEP letter stated that the concentrated hazardous waste generated by the evaporator is eligible for the precious metals recovery exclusion under applicable federal and state hazardous waste treatment and disposal laws and regulations, and it stated that Parker-Hannifin had produced documentation supporting its claim that the hazardous waste generated by Evaporator No. 2 is "conditionally exempt" under the precious metals recovery regulations. *Id.* at 1385.

V. Discussion and Conclusions of Law

As the ARB noted, "Lee's sole basis for claiming SWDA-protected activity was his shutting down of the No. 2 Evaporator due to his concern that it was operationally noncompliant with federal and state environmental health and safety regulations." Slip op. at 5. Since it is undisputed that Lee's employment was terminated because of this conduct, which Parker-Hannifin treated as insubordination, the sole issue for determination on remand is whether the conduct is protected by the SWDA. In this regard, the ARB concluded,

> An employee's conduct based on his reasonable belief that such conduct is in furtherance of the SWDA's purposes can be afforded whistleblower protection under the SWDA. Provided Lee can demonstrate that he had a reasonable (objective and subjective) belief that Evaporator No. 2's continued operation would violate the SWDA and/or pertinent environmental laws, and that his conduct was either taken pursuant to his employment authority or otherwise was within the rights afforded employees under the SWDA, Lee's conduct can constitute protected activity under the SWDA.

Slip op. at 12. The ARB remanded the case to the ALJ to make findings of fact in order to determine the reasonableness of Lee's beliefs. *Id.*

A. Did Lee have an objectively and subjectively reasonable belief that Evaporator No. 2's continued operation would violate the SWDA and / or pertinent environmental laws?

In order to be protected, a whistleblower's "belief must be reasonable for an individual in [the complainant's] circumstances having his training and experience." *Melendez v. Exxon Chems. Americas*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 2819 (ARB July 14, 2000). "An employee who makes a complaint to the employer that is 'grounded in conditions constituting reasonably perceived violations' of the environmental acts, engages in protected activity." *Erickson v. U.S. Envtl. Prot. Agency,*

ARB Nos. 04-024, -025; ALJ Nos. 2003-CAA-011, -019, 2004-CAA-001; slip op. at 7 (ARB Oct. 31, 2006) (quoting *Devers v. Kaiser-Hill Co*., ARB No. 03-113, ALJ No. 01-SWD-3, slip op. at 11 (ARB Mar. 31, 2005). "Similarly, expressing concerns to the employer that constitute reasonably perceived threats to environmental safety is protected activity under the environmental whistleblower protections." *Id.* The ARB further explained in *Erickson*:

> The employee need not prove that the hazards he or she perceived actually violated the environmental acts. Nor must an employee prove that his assessment of the hazard was correct. And we have also held that an employee need not prove that the condition he or she is concerned about has already resulted in a safety breakdown. On the other hand, a complaint that expresses only a vague notion that the employer's conduct might negatively affect the environment is not protected. Nor is a complaint that is based on numerous assumptions and speculation.

Id. at 8. Additionally, the ARB has held that a complainant need not explain his belief to his employer because "[t]he reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but not whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities." *Williams v. Dallas Independent School District*, ARB No. 12-024, ALJ No. 2008-TSC-1, slip op. at 10 (ARB Dec. 28, 2012) (quoting *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 14 (ARB May 25, 2011)).

The evidence in this case shows that shortly after finding that Parker-Hannifin had committed record-keeping and information reporting violations of state and federal hazardous waste regulations at the North Haven facility, the CT DEP wrote to the company on March 13, 2007, expressing additional concerns regarding ongoing RCRA compliance relating to the operation of evaporators including the necessary documentation to confirm that Evaporator No. 2 continued to be eligible for the precious metals exemption from the usual RCRA requirements for handling hazardous waste such as silver cyanide. The record further establishes that: (1) Lee was assigned responsibility for collecting data and working with Apex, the environmental consultant, in order to respond to the CT DEP's letter; (2) Apex's representative, Drouin, had expressed some doubt as to whether Parker Hannifin could successfully document that Evaporator No. 2 qualified for the precious metals exemption; and (3) although Chu informed Lee on October 31, 2008 that Connell had given permission to continue operating the evaporator, Connell had not at that point actually conducted any investigation of Lee's concerns related to the precious metals exemption and affirmatively determined that Evaporator No. 2 was in full compliance. Thus, as of November 4, 2008 when Lee decided to shut down the evaporator, it was less than entirely clear whether Parker Hannifin could establish that Evaporator No. 2 continued to meet all of the applicable criteria for claiming the precious metals exemption. Under these circumstances, I conclude that a reasonable person with Lee's experience and training in RCRA compliance could perceive that Evaporator No. 2 was being operated in violation of the applicable environmental laws and regulations. Accordingly, I conclude that Lee had an objectively and subjectively reasonable belief that Evaporator No. 2's continued

operation would violate the SWDA and / or pertinent environmental laws on November 4, 2008 when he shut the evaporator down in defiance of Chu's direct order not to do so.[17]

B. Did Lee have an objectively and subjectively reasonable belief that his conduct was either taken pursuant to his employment authority or otherwise within the rights afforded employees under the SWDA?

As set out above, the ARB held that Lee must demonstrate that he had a reasonable belief, both objectively and subjectively, that his conduct in shutting down Evaporator No. 2 was either taken pursuant to his employment authority or otherwise was within the rights afforded employees under the SWDA in order to constitute protected activity under the SWDA. The ARB provided the ALJ with the following guidance on the appropriate analysis to be employed in determining whether Lee had a reasonable belief that he had authority to shut down the evaporator:

> While an employee's authority (or lack thereof) is not necessarily determinative of whether particular speech or conduct is protected – it is a factor in assessing the *objective reasonableness* of an employee's belief that his conduct is in furtherance of the purposes of the whistleblower act under which he seeks protection. An employee may exceed his authority and thereby take his conduct outside of the protection afforded by the statute. "That employees are protected while presenting safety complaints does not give them *carte blanche* in choosing the time, place and/or method of making those complaints." *Garn v. Benchmark Techs.*, No. 1988-ERA-021, slip op. at 4 (Sec'y May 18, 1995). On the other hand, an unauthorized act may, under certain circumstances, be protected under the whistleblower statutes. The Secretary has concluded that the operative determination of whether intemperate or insubordinate (unauthorized) behavior may be eligible for protection requires a balancing of interests: "[t]he right to engage in statutorily-protected activity permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts." *Kenneway v. Matlack, Inc.*, No. 1988-STA-020, slip op. at 3 (Sec'y June 15, 1989). Determining whether conduct is protected can thus turn on the objective reasonableness of an employee's belief of a violation, which can be affected by the extent of his/her professional authority to even make such a decision. Even unauthorized conduct may be protected as long as it is lawful and "the character of the conduct is not indefensible in its context." *Id.*

[17] In concluding that Lee's belief was subjectively reasonable, I recognize that his failure to mention Evaporator No. 2 in his October 14, 2008 complaint to the CT DEP raises a fair question as to whether he really believed that there was any noncompliance issue or at least a serious enough issue to bring to the regulatory agency's attention. While Lee's subjective belief as to the severity of any noncompliance issue is a legitimate consideration as will be discussed, *infra* in determining whether he had a reasonable belief that he had authority to shut down the evaporator, I am satisfied that a preponderance of the evidence, which includes his expression of concern to Michel in early 2008 (JX at 1165-1166), supports a finding that he held a *bona fide* subjective belief that Parker- Hannifin might not have adequate documentation to qualify for the precious metals exemption.

> This balancing of interests to determine whether an employee's unauthorized actions are defensible is, in our view, simply another way of arriving at a determination of the objective reasonableness of an employee's belief that his actions were protected. These analyses turn on the distinctive facts of each case.

Slip op. at 11-12 (emphasis and quotations in original). The ARB further explained in a footnote that employee conduct is not perforce deprived of protection when it is undertaken in defiance of the employer's orders:

> We are not persuaded, as the ALJ apparently was, that an employee's conduct in contravention of a supervisor's order, without more, necessarily removes that conduct from whistleblower protection. If that were the law, presumably any conduct undertaken by an employee could readily be stripped of whistleblower protection by a supervisor's edict, right or wrong, directing the employee to cease and desist. As in *Harrison* and *Consolidated Coal*, for the SWDA's whistleblower protection to affix to Lee's conduct, there must be a showing that he acted under a reasonable belief that his conduct was in furtherance of SWDA's purposes, which can turn on the extent to which he acted within the scope of his employment authority or the extent to which his conduct is within the rights afforded employees under the SWDA.

Slip op. at 12, n. 20. Lee asserts argues that that he reasonably believed that his conduct in shutting down the evaporator was well within the scope of his employment authority *and* within the rights afforded employees under the SWDA. The evidence does not support either claim.

As to his employment authority, Lee argues that his position as the EHS Coordinator / Facilities Lead at the North Haven facility charged him with the authority and obligation to ensure environmental compliance. Lee Br at 27-30. Lee notes that he was the only person employed at the North Haven facility who had the required RCRA training and certifications as of November 4, 2008, that he was responsible for hazardous waste management operations and the EHS Coordinator / Incident Commander under the North haven Emergency Contingency Plan, that he had been assigned responsibility for responding to the concerns raised in the CT DEP's March 13, 2007 letter, that no one else was as familiar with the wastewater treated in Evaporator No. 2, and that he was the person at North Haven whose actions or inactions could result in RCRA noncompliance. *Id.* at 30-31. Lee thus suggests that Chu lacked proper authority to countermand him on matters involving EHS compliance, and he submits that it is "axiomatic that he cannot be insubordinate . . . for engaging in the very action he was hired to perform as Respondent's Environmental Health and Safety Coordinator/Facilities Lead." *Id.* at 31.

The foregoing represents an imaginative attempt by Lee's attorney to fashion a silk purse from a sow's ear that is unwoven by Lee's own testimony at the hearing which was quoted previously but bears repeating:

> Q. Okay. Did you have the regulatory authority to shut down the Number 2 Evaporator when you shut it down?

> A. I did and I did not. **As far as my company was concerned, I did not have the authority because they were not supportive of me doing that. And, but under RCRA and the Solid Waste Disposal Act -- actually, I respect the authority of my superiors throughout -- all of those that are over me in Parker Hannifin**. And yet, I have a higher authority and that's the -- obey the law of the Solid Waste Disposal Act, even if it goes against what would be good for me and what would be good for my company. They are the authority that I answer to.

HT at 401. While I quite agree that Lee's position vested him with broad responsibility and authority over EHS matters including environmental compliance at the North Haven facility, his testimony clearly and convincingly establishes that he knew before he shut down the evaporator on November 4, 2008 that he did not have authority by virtue of his position to take that action.[18] Indeed, any ambiguity in his position description or in the EHS policy document regarding the extent of his authority was certainly resolved, at least with respect to shutting down Evaporator No. 2, on October 31, 2008 when Chu specifically told him that he did not have such authority. Moreover, even if it is assumed that Lee somehow still held some subjective belief by November 4, 2008 that his position gave him authority to shut down the evaporator in the absence of an emergency, I conclude that no reasonable employee with his level of training and experience would maintain such a belief in the absence of any emergency and in the face of a direct order from his manager (Chu) and after being informed that a higher level EHS manager (Connell) has authorized the evaporator's continued operation. Therefore, I conclude that Lee has not met his burden of proving by a preponderance of the evidence that he had an objectively and subjectively reasonable belief that his conduct in unilaterally shutting down the evaporator on November 4, 2008 was taken pursuant to his employment authority.

Notwithstanding the conclusion that he failed to prove that he had a reasonable belief that his conduct was taken pursuant to his employment authority, Lee can still invoke SWDA protection if he demonstrates that he had an objectively and subjectively reasonable belief that his conduct was otherwise within the rights afforded employees under the SWDA. The record in this case raises significant doubt as to whether Lee harbored a subjective belief that shutting down Evaporator No. 2 was in furtherance of the purposes of the SWDA. Granted, he testified at the hearing with the benefit of the ARB's decision to guide him in this regard that he so believed; HT at 401-402; but his words and deeds leading up to November 4, 2008 paint a different

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[18] The finding that Lee knew that he had no authority to shut down the evaporator is reinforced by his contemporaneous notes of the October 31, 2008 meeting:

> Sharon said, we have spoken to Martha, and she said for us to continue running the evaporator, and we have decided to take her advice. I answered, you are going against the law. Sharon said, we don't want to go against the law, but we have decided to go with Martha's advice. I answered, then you are on your own operating against my instructions. You are responsible for your own actions. She answered that's what we have decided to do. Sharon said the other issue is not such a concern. We want you to handle all hazardous waste & no one else. I answered that's fine. I can do that.

CX at 148. Thus, Lee's personal notes of his October 31, 2008 meeting confirm that he understood that Chu had specifically relieved him of any perceived authority to shut down Evaporator No. 2 although he remained responsible for handling all hazardous waste.

picture. That is, the question of the evaporator's continuing qualification under the precious metals exemption had been lurking since at least November 1, 2007 when Drouin met with Lee and Roman to go over the lab analysis of the wastewater sampling and when Roman, according to Lee, admonished Drouin not to put anything in writing that would "incriminate" Parker-Hannifin. Yet, when Lee filed a complaint with the CT DEP on October 14, 2008, less than a month before November 4, 2008, alleging that Parker-Hannifin was backsliding into noncompliance, he said not a word about Evaporator No. 2. Although Lee did not have the October 28, 2008 memorandum, which he solicited from Drouin and helped edit, in hand when he filed the CT DEP complaint, he had performed his own analysis nearly a year earlier and concluded that there was a problem with the precious metals exemption, a concern that he outlined in his January 29, 2008 email to Mike Michels in Parker Hannifin's Corporate EHS Group in Cleveland. JX at 1165-1166. Significantly, Lee apparently never followed up on Michel's request for more data on Evaporator No. 2, JX at 1165, and then effectively punted Connell's April 8, 2008 request for an update to Roman and Chu. JX at 1172. Aside from the receipt of Drouin's October 28, 2008 memorandum which he solicited, nothing changed with regard to Evaporator No. 2 between May 1, 2008 when Lee passed Connell's request for an update along to Roman and November 4, 2008 when he allegedly felt compelled to resort to unilateral action. There was no emergency, no threat to the environment or employee of public health and safety, and no further communication from the CT DEP since March of 2007. I find that it is entirely reasonable to infer from the timing of events that Lee was far more concerned in October of 2008 with the way he had been treated following his internal ethics complaint over the September 17, 2008 waste contamination incident than he was regarding any potential issues relating to Evaporator No. 2's ongoing eligibility to operate under the precious metals exemption.[19] Indeed, I find that the weight of the evidence shows that Lee was profoundly upset with the way he was treated after filing his ethics hotline complaint (*i.e.*, his efforts to discipline Rodriguez were thwarted, his serious allegations of misconduct by Roman were discredited, and he was instead punished) and that he decided on or about October 27, 2008 when he contacted Drouin to request a memorandum on Evaporator No. 2 to breathe life back into the semi-dormant question regarding the precious metals exemption in order to create a new vehicle for venting his increasing job frustrations which centered on his perception that he was denied the authority and resources necessary to do his job.[20] While I have found that Lee held a reasonable subjective

[19] It is to be noted that Lee has not alleged that his internal ethics hotline complaint was protected under the SWDA or that he suffered any unlawful retaliation as a result of filing the ethics complaint. Nor was any issue relating to the hotline ethics complaint and any related reprisal raised at the hearing or tried by express or implied consent. Accordingly, the ALJ is precluded by the fundamental elements of procedural due process and the notice requirements of the Administrative Procedure Act, 5 U.S.C. § 554(b), from making any findings and conclusions with respect to whether the ethics hotline complaint was protected or whether Lee suffered any unlawful reprisal based on that complaint. *See Ass't Sec'y & Helgren v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-44, slip op. at 6-7 (ARB July 31, 2003).

[20] This ALJ is well aware the principle that as long as a complainant has a reasonable belief that that an employer is violating environmental laws, other motives he or she may have had for engaging in protected activity are irrelevant. *See, e.g., Smith v. Western Sales & Testing*, ARB No. 02-080, 2001-CAA-17, slip op. at 12 (ARB Mar. 31, 2004). Here, however, where the question posed by the ARB is whether Lee reasonably believed, objectively as well as subjectively, that his conduct in shutting down the evaporator was within the rights afforded employees under the SWDA, I find that consideration of his subjective state of mind and motives for engaging in the conduct at issue is relevant.

belief that Parker-Hannifin may have been operating Evaporator No. 2 under the precious metals exemption without meeting all of the requirements imposed by the RCRA and pertinent federal and state regulations, I find that the evidence does not establish that he had a reasonable subjective belief that his action in shutting down the evaporator on November 4, 2008 was within the rights afforded by employees under the SWDA. Rather, I find that the circumstantial evidence, particularly the fact that Lee saw no need to solicit the October 28, 2008 memorandum from Drouin until after he was disciplined, preponderantly shut down the evaporator, not because he believed that the SWDA authorized him to do so, but because he saw an opportunity to throw a wrench into the gears of the managerial machine that he felt had mistreated and disrespected him.

Finally, I conclude for similar reasons that Lee has not proved that he had an objectively reasonable belief that his conduct was within the rights afforded employees by the SWDA. As the ARB instructed, Lee's lack of authority to shut down the evaporator is not necessarily determinative of whether his conduct is protected, but it is a factor in assessing the objective reasonableness of his belief that his conduct was in furtherance of the purposes of the SWDA, an assessment that requires a balancing of interests -- the right of an employee to engage in statutorily-protected activity which may include some latitude for impulsive conduct against an employer's right to maintain order in its business. Slip op. at 11-12. Lee, I have found, clearly knew that he did not have authority to shut down the evaporator by October 31, 2008, so his decision to resort to self-help four days later on November 4, 2008 can hardly be viewed as impulsive especially in the absence of any actual or perceived emergency. Instead, the evidence shows that the decision to shut down the evaporator was Lee's final playing card in what had by then become a protracted and escalating struggle over his authority and position at North Haven. While it is true that Lee did not damage the evaporator or prevent Parker-Hannifin from resuming production operations using the evaporator, his actions were disruptive and required Connell to spend three days conducting an investigation while the evaporator was off-line to ensure that there were no compliance issues. Most importantly, there was simply no urgency for Lee to act when and in the manner that he did. Given the undisputed fact that there was no emergency and no threat to the environment or the health and safety of employees or the public, and noting that Lee failed to pursue available less drastic alternatives such as reporting to the CT DEP that he had been ordered to not shut down the evaporator and asking the agency how to proceed, I find that his unauthorized conduct in shutting down the evaporator was indefensible under the circumstances and outweighed by Parker-Hannifin's legitimate business interest in not having operations halted by an insubordinate employee. Consequently, I conclude that Lee has not proved that he had an objectively reasonable belief that his conduct was in furtherance of the SWDA.

Having determined that Lee has not proved by a preponderance of the evidence that he had an objectively and subjectively reasonable belief that his conduct was either taken pursuant to his employment authority or otherwise within the rights afforded employees under the SWDA, I conclude that his conduct in shutting down Evaporator No 2. on November 4, 2008, is not protected by the SWDA. Accordingly, his complaint must be dismissed.

VI. Order

The complaint filed by Jimmy R. Lee alleging a violation of the SWDA is **DISMISSED** in its entirety.

SO ORDERED.

Digitally signed by Daniel F. Sutton
DN: CN=Daniel F. Sutton, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

DANIEL F. SUTTON
Senior Administrative Law Judge

Boston, Massachusetts

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.