U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 December 2011

Case No: 2010-SWD-00001

In the Matter of:

WILLIAM CLINT JOYNER,

Complainant,

v.

GEORGIA PACIFIC GYPSUM, LLC,

Respondent.

APPEARANCES: Ellen L. Schoolar
William G. Glass
Attorneys for the Complainant

Kathleen M. Anderson
Joseph M. Murray, Jr.
Attorneys for the Respondent

BEFORE: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER – DENYING COMPLAINT

The above matter is a complaint of employment discrimination under Section 7001(A) of the Solid Waste Disposal Act (SWDA), 49 USC §6971, et. seq., as implemented by federal regulations set forth in 29 CFR Part 24. The case was referred to the Office of Administrative Law Judges for formal hearing upon the March 19, 2010 request of the Complainant regarding the Occupational Safety and Health Administration February 18, 2010, determination that the Complainant "was dismissed in accordance with company policy for knowingly and willfully withholding important information on an environmental issue as presented in letter drafted to Complainant's supervisor on June 30, 2008."

PROCEDURAL HISTORY

On September 8, 2008, the Complainant filed a complaint of discrimination under Section 7001(a) of the Solid Waste Disposal Act, 42 USC §6971 (ALJX 1, 2). In his initial complaint, the Complainant alleged being discharged by Respondent in violation of the Occupational Safety and Health Act of 1970, 29 USC §660(c)(1) and included a general statement of witnessing numerous violations of the Solid Waste Disposal Act and OSHA safety rules and procedures and five specific events. By letter date October 6, 2009, the Complainant, through counsel, supplemented the initial complaint and alleged "that GP [Respondent] retaliated against [the Complainant] because he reported GP's violations of OSHA rules and regulations and of the Georgia Waste Management ("GWM") rules." His counsel alleged the Complainant "contacted GP's 'Guideline' in early July 2008 to report numerous violations of the OSHA rules, violations of various environmental rules (including SWM rules), incidents of racial and gender discrimination and other incidents of unethical behavior on the part of upper management of GP's Savannah-Gypsum plant … In this [Guideline letter, the Complainant] reported [eight listed] violations of the OSHA rules and regulations … that the Plant may have been violating the Clean Air Act as it had removed barriers …[and] that the Plant was stockpiling rejected wallboard … outside of the waste pile and that this board had purposefully been excluded from the June 30 survey … required by Consent Order EPD-SW-2090." He alleges that the Complainant was placed in a "suspended with pay" status on August 1, 2008, while the Respondent investigated the complaints set forth in the Guideline Letter and had his employment subsequently terminated on August 8, 2008. He asserts that the Complainant "was engaged in protected activity when he reported alleged violations of the SWDA to GP Corporate in his Guideline Letter … [and] that but for [the Complainant's] submission of his Guideline Letter, he would not have been terminated."

On February 18, 2010, the Secretary entered findings on the complaint under the Solid Waste Disposal Act. The findings indicate that "on or about June 30, 2008, the Complainant drafted a letter to be sent from Complainant's manager to the State of Georgia's Environmental Protection Division … [certifying] compliance with the division's consent order to reduce the size of Respondent's reclaim pile"; the "Complainant contacted Respondent's corporate guidance hotline in early July 2008 to report various violations including alleged OSHA violations, EEOC violations, Environmental violations and ethical issues … [and] also submitted his concerns in writing to the corporate guidance department"; and "Complainant was dismissed in accordance with company policy for knowingly and willfully withholding important information on an environmental issue as presented in letter drafted to Complainant's supervisor on June 30, 2008." The Secretary found "that there is no reasonable cause to believe that Respondent violated" the Solid Waste Disposal Act. (ALJX[1] 1)

On March 22, 2010, the Complainant filed his objections to the Secretary's findings and requested a formal hearing. (ALJX 2)

By Order of May 12, 2010, Complainant's "Motion for Default Judgment" filed April 30, 2010, was denied. (ALJX 4)

[1] ALJX denotes Administrative Law Judge exhibit; JX denotes joint exhibit; CX denotes Complainant's exhibit; RX denotes Respondent's exhibit; TR denotes hearing transcript page

On July 19, 2010, Respondent's counsel filed a "Motion for Summary Judgment" with seven affidavits alleging that "the grounds that the pleadings and affidavits on file show that there is no genuine issue as to a material fact and that the undisputed material facts entitles the Respondent to judgment as a matter of law." On July 27, 2010, Complainant's counsel filed a "Brief in Opposition to Respondent's Motion for Summary Decision" with 27 documents. He submitted that the issues involved are (1) whether there are material facts which are in genuine dispute, (2) whether a summary decision can be entered when the Complainant has not had the opportunity to depose two witnesses, (3) whether the Complaint's report in a Guideline Letter was protected activity, and (4) the Respondent's reason for employment termination was a pretext for retaliation. By Order of August 19, 2010, Respondent's Motion was granted to the extent that the Complainant's alleged statements and "interactions with the Plant Manager [David Neal] and Business Unit Environmental Manager [Kenneth Blankenship] during the period April 2008 through July 15, 2008, including preparation and submission for signature of the July 15, 2008 certification letter, were not protected activity under the Solid Waste Disposal Act." The evidence established that the Complainant suffered adverse employment actions on August 1, 2008 and on August 8, 2008, and that the Complainant timely filed his objections to the Secretary's findings. Genuine issues of a material fact remained "as to whether the Complainant's 'Guideline' Letter to corporate managers outside his normal supervisory channels and statements to the assigned investigator on July 15, 2008 and July 28, 2008 were protected activity under the Solid Waste Disposal Act" and, if so, whether Respondent took the adverse employment actions in August 2008 for a legitimate, nondiscriminatory reason or whether the reasons offered by the Respondent were actually a pretext for discrimination. (ALJX 8)

A formal hearing was held on November 8, 9 and 10, 2010, in Savannah, Georgia, with all Parties present and represented by counsel. At the formal hearing, Administrative Law Judge exhibits (ALJX) 1 through 15, Joint Stipulations of Fact (JX 1), twelve oral stipulations, Complainant's exhibits 1 through 23, 25 through 37 and 39 through 47, and Respondent's exhibits 2,4, 6 through 12, 14 through 17, 19, 20, 22 through 29, and 31 through 47 were admitted without objection.[2] (TR 6-10, 18, 26-34) Respondent objected to Complainant's exhibit 24 which was an e-mail from Complainant to an investigator for the State environmental Protection Division. The objection was sustained on the grounds that the issue presented, complaint to an outside agency, was time barred under the SWDA. CX 24 was attached for record purposes and the Parties permitted to inquire of witnesses during the hearing as to the matters set forth in CX 24. (TR 18-25) Complainant objected to Respondent's exhibits 5, 13, 21 and 30 on grounds of relevance and materiality. The objections were overruled and the exhibits admitted into evidence. (TR 27-33) A copy of relevant excerpts of the Georgia Administrative Code, Title 391, Chapter 391-3-4 were received post-trial and considered as CX 48. A copy of e-mail chain from Complainant's 1:37 PM, July 7, 2008 e-mail was submitted post-hearing as considered as CX 49. Post-hearing briefs were submitted by the Parties and were considered during deliberations.

[2] RX 24 as submitted is a duplicate of RX 23 and not the described e-mail set forth in CX 12

STATUTORY AND REGULATORY FRAMEWORK

This complaint was referred for formal hearing under the SWDA. This Administrative Law Judge has no jurisdiction to address any allegations of violations related to the Occupational Safety and Health Act, the Equal Employment Opportunity Act, the Clean Air Act or ethics. Accordingly, only that portion of the complaint, response and evidence relevant to the SWDA is considered and addressed.

The evidence of record establishes that the above captioned matter arose from the Parties' actions in Savannah, Georgia, which is within the jurisdictional area of the U.S. Court of Appeals for the Eleventh Circuit. Accordingly, the judicial precedents of the U.S. Court of Appeals for the Eleventh Circuit apply.

The SWDA, at 42 USC §691, provides in pertinent part:

> "(a) General. No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee … by reason of the fact that such employee … has filed, instituted, or caused to be files or instituted, any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.
>
> "(d) Exception. This section shall have no application to any employee who, acting without direction from his employer … deliberately violates any requirement of this chapter."

Implementing federal regulations applicable to the SWDA at 29 CFR Part 24 were revised effective January 18, 2011.[3] The revision related to renumbering and procedural matters which did not change the substantive law related to SWDA. The revised regulations are used herein and provide, in pertinent part:

> "§24.102 Obligations and prohibited acts.
>
> "(a) No employer subject to the … [SWDA] may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee … engaged in any of the activities specified in this section.
>
> "(b) It is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee because the employee has:
>
> (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under … [SWDA] or a proceeding

[3] Fed. Reg., Vol 76, No. 11, 2808-2826 (Jan. 18, 2011)

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 or participated, or is about to assist or participate, in any manner in such a proceeding or any other action to carry out the purposes of such statutes. …

"(e) This part shall have no application to any employee who, acting without direction from his or her employer … deliberately causes a violation of any requirement of … [the SWDA]."

"§24.109 Decision and orders of the administrative law judge.

"(b)(2) In cases arising under the … [SWDA], a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the activity."

In order to establish a prima facie case for whistleblower protection under the SWDA, an employee must establish (1) that the complainant was an employee; (2) that the employee engaged in protected activity; (3) the employer had actual or constructive knowledge of the protected activity; (4) the alleged hostile act occurred; and (5) a causal connection existed making it likely that the protected activity resulted in the alleged discrimination. *Hall v. Department of Labor*, 476 F.3d 847 (10th Cir. 2007); *Sasse v. U.S. Department of Labor*, 409 F.3d 773 (6th Cir. 2005); *Simon v. Simmons Foods, Inc*., 49 F.3d 386 (8th Cir. 1995); *Williams v. U.S. Department of Labor*, 157 Fed. Appx. 564 (4th Cir, 2005) *unpub*; *Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998); *Miller v. Thermalkem, Inc.*, 94 F.3d 641 (4th Cir. 1996) *unpub*, citing *Ross v. Communications Satellite Corp*., 759 F.2d 355 (4th Cir. 1985); *Valley Sewerage Commissioners v. Department of Labor*, 992 F.2d 474 (3rd Cir. 1993). If the employee establishes a prima facie case, the burden shifts to the employer to provide sufficient evidence that the adverse action was taken for a legitimate, nondiscriminatory reason; that is, the evidence raises a genuine issue of fact as to whether it discriminated against the employee. If the issue is raised, the complainant must show by a preponderance of the evidence that legitimate reasons offered by the employer were actually a pretext for discrimination. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 US 248, 253; 101 S.Ct. 1089, 1093 (1981); *Williams v. U.S. Department of Labor*, supra, at 569; *Reeves v. Sanderson Plumbing Prods., Inc*., 530 US 133; 120 S.Ct. 2097 (2000).

Under the SWDA, where an employee is required as part of the assigned job duties to inspect, investigate, correct or report certain environmental matters within the coverage of the SWDA,

such actions taken within the scope of the assigned job duties and normal channels do not amount to "protected activities" because the whistleblower statute is designed to protect employees who risk their own personal job security for the advancement of the public good. See *Sasse v. U.S. Department of Labor*, supra at 779; *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed Cir. 1998) Voicing a concern or complaint involving the subject matter normally within assigned job duties to a supervisor does not rise to "protected activity" unless the employee makes the supervisor reasonably aware that the concern or complaint is being made outside normal assigned duties, i.e.: the supervisor is rationally aware that the concern or complaint is being made under whistleblower protections.[4] An employee may engage in "protected activity" if the employee brings the issue of concern to the attention of authorities in a position to correct fraudulent or illegal activity outside the normal channel of assigned duties. An employee may also engage in "protected activity" if the employee testifies, or is about to testify, in a proceeding under the SWDA.

Where an employee has established a discriminatory policy or practice within the 30-day complaint filing limitation of the SWDA and establishes an action taken pursuant to the policy or practice during the statutory period preceding the filing of the complaint, the continuing violation doctrine shelters claims for all other actions taken pursuant to the same policy prior to the 30-day filing limitation period. *C.D. Varnadore v. Secretary of Labor*, 141 F.3d 625 (6th Cir. 1998); *Holtzclaw v. Secretary of Labor*, 172 F.3d 872 (6th Cir. 1999) *unpub*.

FINDINGS OF FACT ENTERED BY ORDER OF AUGUST 19, 2010

By Order of August 19, 2010, the following Findings of Fact were entered on the Respondent's Motion for Summary Decision (ALJX 8):

1. Complainant's objections to the Secretary's findings and his request for hearing were timely filed.
2. Adverse work-related actions based on events occurring during the period from August 7, 2008, through September 8, 2008 may be considered as a basis for firing or other discriminatory acts under the Solid Waste Disposal Act.
3. The Complainant was an employee of Respondent from 1988 through August 8, 2008.
4. For purposes of this complaint under the Solid Waste Disposal Act, the Complainant was subject to a hostile act on August 1, 2008 and on August 8, 2008.
5. The Complainant's interactions with the Plant Manager and Business Unit Environmental Manager during the period April 2008 through July 15, 2008, including preparation and submission for signature of the July 15, 2008 certification letter, were not protected activity under the Solid Waste Disposal Act.
6. Respondent employer had actual knowledge of Complainant's "Guideline" Letter to corporate managers outside his normal supervisory channels and his July 15, 2008 and July 28, 2008, statements to the assigned investigator.

[4] See also *Robinson v. Morgan Stanley*, 30 IER Cases 518; 2010 WL 743929 (ARB No. 07-070, Jan. 10, 2010) which distinguished environmental whistleblower requirements and held that under the Sarbanes-Oxley Act an auditor is permitted to complain directly to a supervisor of identifiable fraud within the performance of job duties because the Sarbanes-Oxley Act specifically provides for such actions.

7. The Complainant's suspension from duties on August 1, 2008 and his termination of employment on August 8, 2008, were hostile employment actions.
8. A genuine issue of a material fact remains as to whether the Complainant's "Guideline" Letter to corporate managers outside his normal supervisory channels and statements to the assigned investigator on July 15, 2008 and July 28, 2008 were protected activity under the Solid Waste Disposal Act.
9. The Respondent is entitled to a summary decision as to allegations of protected activity involving Complainant's statements to Plant Manager David Neal and Business Unit Environmental Manager Kenneth Blankenship during the April 2008 to July 15, 2008 period.
10. An evidentiary hearing is required under 29 CFR §18.41(b).

STIPULATIONS OF FACT

The following written stipulations of fact were entered by the Parties and accepted by this Administrative Law Judge at the formal hearing (JX 1, TR 10):

1. Respondent Georgia-Pacific Gypsum, LLC ("GP") is a manufacturer of gypsum wallboard products in North America and has gypsum wallboard plants located in North America, including the plant located at Wahlstrom Road, Savannah, Chatham County, Georgia (the "Plant").
2. During his career at GP, the Complainant held a numerous positions at various plants.
3. In 2004 or 2005, the Complainant was transferred to GP's Savannah Plant as the Senior Regional Environmental Resource. In this position, he was responsible for environmental management for the Savannah GP gypsum plant. The Complainant served in that capacity under two previous Plant Mangers before David Neal assumed the Plant Manger's role in or about October 2006.
4. As Senior Environmental Resource, the Complainant reported directly to David Neal with "dotted-line" reporting to Ken Blankenship, the Business Unit Environmental Manger based in Atlanta.
5. If the Complainant needed additional guidance on environmental compliance issues, he could call on Senior Environmental Engineer Margarete Vest, a corporate-level technical environmental resource.
6. GP acquired the Plant in 1996.
7. In June 2001 the Plant shut down for over two years.
8. Gypsum board is used for many applications, such as covering interior walls to provide a visible "finished" surface. Accordingly, any board that does not meet specifications cannot be sold to customers.
9. Off-spec product that cannot be sold but is structurally sound is sometimes designated "riser food."
10. Using structurally sound off-spec gypsum board for risers is a standard practice throughout the gypsum board industry.
11. In or about March 2008, David Neal authorized the stacking of some riser food outside.
12. On July 2, 2008, at 1:34 PM, the Complainant sent an e-mail to Ken Blankenship stating the Plant "met the June 30th consent order milestone."

13. The Complainant submitted a written complaint to GP's Guideline (the "Guideline Letter") via e-mail to Timothy Pratt, Glenn E. Graves and Tim Martin at 8:19 AM on July 7, 2008. In his Guideline Letter, the Complainant reported the following concern –

> "The Plan Manager allows reject boards to be stacked inside the plant instead of being stacked in the reclaim pile. This is being allowed to make sure that the board is not being counted in the official surveys and to ensure that the plant meets the pile size reduction milestones listed in the consent order. The facility also keeps a large stack of unusable board outside on the pavement. This board is classified as 'riser food' but in fact has not been used for riser food. The Georgia EPD 60/90 rule applies to the board pile, but the Plant Manager allows surveyors to leave this board out of the official survey report. The EPD inspector even commented to me during an inspection that he believes the 'riser food' stacked outside and not used according to the 60/90 rule would be subject to the stipulations in the consent order. I've reported this to the Plant Manager and the Division Environmental Manager. I was again reminded that my approach and communications skill needed work, that everything is not 'black and white' and that I was on a developmental plan."

14. On July 7, 2008, the Complainant sent an e-mail at 1:37 PM to David Neal entitled "Consent Order Progress Report" along with an attached draft of a letter from David Neal to the EPD.
15. On August 1, 2008, the Complainant sent an e-mail entitled "Guideline Experience" to various employees of GP.
16. On August 2, 2008, the Complainant sent an e-mail entitled "Misunderstanding" to Robert Wolfe, Tom O'Connor, and Margarete Vest.
17. GP terminated the Complainant's employment on August 12, 2008.

The following oral stipulations of fact were entered by the Parties and accepted by this Administrative Law Judge at the formal hearing (TR 12-15):

1. The Complainant began work for the Respondent in 1988.
2. During the period of employment in 2008, Georgia-Pacific Savannah Gypsum Plant, Savannah, Georgia, Plant Manager David Neal was the Complainant's immediate supervisor.
3. Respondent Georgia-Pacific Savannah Gypsum Plant, Savannah, Georgia, was subject to consent order EPD-SW-2090 entered by the State of Georgia Department of Natural Resources, Environmental Protection Division, on November 21, 2006.
4. On June 30, 2008, EMC Engineering Services, Inc., performed a survey of certain material at the Georgia-Pacific Savannah Gypsum Plant, Savannah, Georgia, as part of the compliance requirements of consent order EPD-SW-2090.
5. On July 2, 2008, EMC Engineering Services, Inc., reported the results of its June 30, 2008, survey to the Complainant.
6. At 8:19 AM, Monday, July 7, 2008, Complainant submitted a "Guideline Letter" under Respondent's code of conduct program to certain employees of Respondent outside Complainant's line of supervision, which set forth that certain materials at the Georgia-

Pacific Savannah Gypsum Plant, Savannah, Georgia, were not being counted in official surveys to ensure that that the Georgia-Pacific Savannah Gypsum Plant, Savannah, Georgia, would meet the reduction requirements set forth in consent order EPD-SW-2090.

7. On July 15, 2008, the Complainant provided Plant Manager David Neal with a written letter to indicate to the State of Georgia Department of Natural Resources, Environmental Protection Division, that Respondent was in compliance with consent order EPD-SW-2090.
8. By letter dated and signed by Plant Manager David Neal on July 15, 2008, Respondent indicated to the State of Georgia Department of Natural Resources, Environmental Protection Division, that Respondent was in compliance with consent order EPD-SW-2090.
9. The Complainant was placed in a suspended-with-pay status on Friday, August 1, 2008, by Respondent's Division of Human Resource Manager Robert Wolfe.
10. The Respondent's Senior Vice-President of Operations, Tim Durkin, directed the Complainant's employment be terminated.
11. The Complainant filed his original complaint under §691 of the Solid Waste Disposal Act in a timely manner on Monday, September 8, 2008.

ISSUES

The following issued remained for determination (TR 15-17)

1. Was the Complainant an employee of Respondent acting without the direction of Respondent or its managers, who deliberately violated the Georgia solid waste implementation plan imposed by the November 21, 2006, consent order by not including in the June 30, 2008, compliance certification letter certain off-spec production material that was not in the facility's reject material pile and was subject to the State's 60/90 rule regarding resource material ?
2. Did the Complainant engage in protected activity under the SWDA by filing his "Guideline Letter" on July 7, 2008 ?
3. Did the Complainant engage in protected activity under the SWDA by providing written and/or oral statements to Respondent's employees associated with the investigation of relevant complaints set forth in the July 7, 2008, "Guideline Letter" ?
4. Did the Complainant suffer a firing or other discrimination by Respondent at any time during the period within 30 days of the complaint filed under the SWDA on September 8, 2008 ?
5. If so, is there a causal connection between protected activity under the SWDA and the firing or other discrimination ?
6. If so, did the Respondent have a basis for the firing or other discrimination unrelated to activity protected by the SWDA ?
7. If so, was the Respondent's basis for the firing or other discrimination a pretext for retaliation for activity protected by the SWDA ?
8. Is the Complainant entitled to appropriate relief under the SWDA, such as reinstatement, back pay, future pay, make-whole damages, attorney's fees and legal costs ?

POSITIONS OF THE PARTIES

a. ***Position of Complainant****:*

Complainant's counsel submits that the evidence establishes that the Complainant had an established solid reputation for ensuring facility compliance with environmental requirements and that there was no evidence that the Complainant that the Complainant "would knowingly violate the SWDA, Consent Order or any other environmental rules, laws or practices." He argues that the Complainant's only responsibility for the survey of solid waste at the Savannah Gypsum Plant "was to report whether [third party] survey results satisfied the reduction milestones under the Consent Order" and that the Complainant "did not have any power or authority to have the 'riser food' moved to the waste piles … or to direct the third-party surveyors to survey anything other than the piles already designated to be surveyed." He submits that the Complainant "would submit a draft of the certification letters to the Plant Manager, based on third-party surveys [and the] Plant Manager was responsible for signing the letter and, thereby, certifying compliance with the Consent Order." He argues that the Complainant was directed by superiors not to include certain reject/off-spec gypsum product in the compliance survey and that the Complainant reluctantly prepared the letter certifying the June 2008 survey results without raising the issue of whether all required material was surveyed because he "acted under duress for fear of losing his job."

Complainant's counsel submits that the Complainant's July 7, 2008, submission of a "Guideline Letter" related to the issue of not including certain reject/off-spec material in the June 30, 2008 third-party survey of solid waste was protected activity. He also argues that statements made and information submitted to Respondent's employees responsible for investigating his "Guideline Letter" complaints on July 28, 2008 and July 30, 2008 to B. Hawkins.

Complainant's Counsel submits that the Complainant suffered adverse employment actions on August 1, 2008 when he was suspended with pay pending completion of the investigation into his "Guideline Letter" complaint and again on August 12, 2008, when his employment was terminated by T. Durkin. He argues that the period of suspension was so closely intertwined with the termination of employment that both events must be considered as timely raised under the SWDA filing of September 8, 2008.

Complainant's Counsel submits that the Complainant was suspended by R. Wolfe on August 1, 2008, because the Complainant "was the author of the document [certification of compliance letter to the Georgia EPD for the June 30, 2008 milestone required by a Consent Order] that he was alleging was not true." He also argues that the Complainant's employment was terminated on August 12, 2008, by T. Durkin because the Complainant "either filed a false [complaint in the "Guideline Letter"] … or he prepared a [certification] letter which he knowingly knew was false." He argues that the statements of R. Wolfe and T. Durkin as well as the close proximity in time of the protected activity and the adverse employment actions demonstrate a causal connection between the Complainant's protected activity and the adverse employment actions in violation of the SWDA.

Complainant's Counsel argues that "the employer has utterly failed to articulate any legitimate, nondiscriminatory reason for terminating [the Complainant], but for his Guideline complaint." He submits that the June 2008 certification letter prepared by the Complainant was "truthful and accurate" and that the Guideline Letter complaints involving off-spec material being subject to the consent order were "logically consistent with the longstanding disagreement between GP and the EPD." He submits that the Complainant has rebutted Respondent's stated reasons for suspending and ultimately terminating the Complainant's employment and has demonstrated that Respondent's justifications for the adverse actions were "shifting and unreliable." He argues that "none of GP's witnesses refuted Wimberly's and [the Complainant's] consistent testimony that [the Complainant] was directed to report the survey results to his superiors and the EPD in accordance with Neal's and Blankenship's instructions" and "GP's assertion that it terminated [the Complainant] for legitimate and no discriminatory reasons is plainly disingenuous and corrupt." He argues that "the irregular investigatory procedures used by GP in [the Complainant's] case comprises additional evidence that GP had a retaliatory motive." He submits that "GP has failed to articulate any reason for its adverse [employment] action that is unrelated to [the Complainant's] protected activity.

Complainant's counsel seeks back pay at a rate of $1,958.12 per week with pre-judgment compound interested specified under 26 USC §6621; consequential damages from loss of insurance for medical expenses equal to $61,581.95; consequential damages for penalties imposed for withdrawals from GP retirement accounts in the amount of $29, 341.94; either reinstatement or payment of $1,100,000.00 in front pay for the differential in lost future earnings; and payment of legal fees and expenses reasonably incurred by the Complainant.

b. ***Position of Respondent****:*

Respondent's counsel submits that the Complainant was under a duty by GP's Code of Conduct "never to make a false or misleading statement in any of the Company's records" while he was employed in the "position of Senior Environmental Resource in charge of environmental compliance at GP's Savannah, Georgia Gypsum Plant." He argues that the Complainant "unequivocally announced that GP had met the milestone" under the Georgia EPD Consent Order on July 2, 2008; was later counseled that same day for unrelated performance and told about a proposed Performance Improvement Plan; and e-mailed a response to the issues raised by the proposed PIP on July 4, 2008 that included a list of 35-40 "indiscretions of the code of conduct" that" he thought should be reported – none of which related to the Consent Order that he had addressed on July 2, 2008." He submits that the Complainant raised the issue of a "Consent Order Potential Falsification of Records" in his July 7, 2008, Guideline Letter but did not reference any draft certification letter to the EPD, indicating compliance with the Consent Order milestones, that he sent to the Plant Manger that same day; nor did he raise any concerns about the accuracy of the certification letter on July 15, 2008 when he "watched Neal sign the hard, finalized copy of certification letter that was not due until two weeks later." He submits that it was not until July 22, 2008, when the Complainant began meeting with GP investigators, that he reported "he thought that the letter he prepared for Neal and watched him sign was a false representation to the government."

Respondent's counsel submits that "GP concluded that [the Complainant] violated company policy by submitting to his superior a draft letter to the government that [the Complainant] thought was false, without raising any 'red flags.' [The Complainant] failed to speak on a compliance area in which he was responsible and withheld information from his manager regarding his belief of the truthfulness of a document that he was asking that manager to sign [or the Complainant] did not really believe that the letter he prepared was false." He argues that the Complainant "was in charge of the Plant's environmental compliance [whose] duties included keeping track of when third-party surveys were due; arranging for the third-party surveys on the days set forth in the Consent Order; … preparing required certification letters of survey results for the Plant Manager to submit to the EPD, … for the designation of material as waste and for communicating with his peers about moving waste material to the proper areas … [and directing] further reduction in piles if it appeared that a milestone would not be met or if the milestone had not been yet met." He argues that the Plant Manager never told the Complainant not to include riser food material in the June 30, 2008, third-party survey but did direct the Complainant to determine is a separate "reclaim pile of material designated for agricultural use needed to be counted in the [June 30, 2008] survey." He submits that the Complainant "had a duty to continue to raise [environmental compliance] issues upon each triggering event [such as the June 30, 2008 third-party consent order compliance survey] so that the company would remain compliant" and did not do so until after the certification letter to the EPD was signed by the Plant Manager.

Respondent's counsel submits that the Complainant raised his belief that all reject wallboard had to be included in the surveyed solid waste piles and that a new compliance survey was required 13 days after he had mailed the July 15, 2008 signed certification letter to the EPD and that he communicated to the Plant Manger 16 days after he mailed the July 15, 2008 signed certification letter that he did an "estimated cubication" 8 days before the July 15, 2008 certification letter that indicated "approximately 2,600 cubic yards of reject board [stored] outside." He argues that the Complainant testified that he believed the July 15, 2008 certification letter to the EPA was false before he gave it to the Plant Manager for signature and that because of his submission of the certification letter to the Plant Manager without notice to the Plant Manager of it being false was the basis of the Complainant's suspension on August 1, 2008.

Respondent's counsel submits that the evidence establishes that the Complainant's employment "was terminated because he either filed a false internal complaint [,the Guideline Letter,] or he prepared a letter which he knowingly knew was false [,the July 15, 2008 certification letter to the EPD].

Respondent's counsel submits that the Complainant did not engage in protected activity under the SWDA when he submitted his Guideline Letter because there was no reasonable belief that a violation had occurred or was occurring but rather that a future violation would occur when the compliance report based on the June 30, 2008 third-party survey would be prepared by him as "squarely within his job responsibilities, and which came to pass only because he failed to address the issue in a forthright and timely manner with his supervisors or others within GP" and then voluntarily acted within the course and scope of his employment to effect the potential violation.

Respondent's counsel submits that the Complainant is precluded from whistleblower protection under §691(d) of SWDA for statements made after he mailed the July 15, 2008 certification letter because the Complainant acted without direction from his supervisors and "violated the Consent Order because he did not arrange to have the amount of resource material that had to be classified as solid waste under the '60/90 rule,' if any, included in the third-party survey of June 30, 2008 or referenced in the July 15, 2008 certification letter."

Respondent's counsel argues that GP is entitled to a judgment because the Complainant did not engage in protected activity; to the extent that the Complainant's allegation of a violation of the consent order was true, the Complainant was responsible for the violation and was not acting under the direction of his management; and the decision to terminate the Complainant's employment was due to the Complainant's failure to appropriately perform his environmental compliance function and "'ability to make sound judgments' based on his failure to disclose the potential falsity of a letter he drafted for signature."

SUMMARY OF RELEVANT EVIDENCE

a. Testimony of the Complainant (TR 78-186; 196-288; 623-631)

The Complainant testified that if he had questions related to his work duties he could contact K. Blankenship, M. Vest and D. Neal, as well as the company "Guideline" if issues were not resolved. He reported he was a "dotted-line resource" for other environmental coordinators at other gypsum plants, including W. Wimberly at the Brunswick, Georgia plant. In addition to environmental compliance his duties included facility security officer and behavior-based safety officer.

The Complainant testified that reject material at the plant is created when wet waste, that is production material not suitable for the wallboard drying process, is discarded in non-board form and is put into the one big reclaim pile and is created when wallboard goes through the drying process but is not suitable for customer use or for use as risers.[5] Off-spec paper-faced wall board and fiberglass-faced wallboard were stored in separate piles when saved for use as risers and were considered "riser food." The riser food was stored in areas both inside and outside the warehouse. Outside riser food piles began after the base-line survey of the only reject wallboard pile present when the consent order with the Georgia EPD was entered. The Complainant testified that the reject wallboard pile was regulated by the "60/90 rule" which limits speculative storing of waste material for a use that may arise later.

The Complainant testified that he was present during discussions leading up to the consent order related to the handling of the large reject wallboard material pile at the Savannah, Georgia plant. The EPD position was that the rejected material had to be either reused, recycled, sold or placed in a landfill. The EPD agreed that the reject material might be able to be recycled back into new wallboard but that the material would be subject to the "60/90 rule" and if it couldn't be used "at these rates then it is waste." The first consent order only applied to the paper-based pile that was present when the plant had shut down and later started back up. This consent order required

[5] Risers are used as separators in stacking and shipping finished wallboard and are created by gluing together board-width slices of off-spec wallboard to a specific height in a riser machine.

reduction of the pile size at specific milestone points. He identified CX1 as the second consent order entered after an annual EPD inspection identified stacks of fiberglass-based wallboard as being subject to the "60/90 rule."[6] He explained his understanding of the consent order to mean that stockpiled reject material that is accumulated speculatively at the Facility to be solid waste under the state solid waste rules such that the material was subject to the "60/90 rule." He reported the "60/90 rule" is in Georgia Rule 391-3-4-.04(7)[7] and required 60% of solid waste existing for 90 days and 60% of solid waste generated over the 90-day period to be recycled, reused, sold or otherwise properly disposed. He reported that material used under the "60/90 rule" had to be tracked and that material not claimed as being under the "60/90 rule" did not have to be tracked.

The Complainant testified that after the November 2006 consent order there was a baseline survey completed on the only pile of reject material at the plant, the other pile was raw gypsum material not yet used in the manufacturing process. The consent order required surveys of the pile on December 30 and June 30 of each year to determine the reduction in size of the pile of reject material with the goal of reducing the pile by 100% by August 3, 2010. When the plant failed to meet the required reduction percentage of the December 30, 2007 survey by 3,368 cubic yards, 2000 cubic yards of the material were designated for recycling by the plant and 10,000 cubic yards were removed from the pile to a landfill or an alternate daily cover study in order to bring the plant into compliance with the consent order. Subsequently, a January 24, 2008 combined survey of the "old paper pile," "processed reclaim pile," and "unprocessed reclaim pile" indicated that the piles had been reduced in size by a combined amount of 11.2% (CX 4). He stated the consent order required reduction had been achieved and was reported to the EPD Engineer D. Lyle by Plant Manager D. Neal by CX 5.

The Complainant testified that "riser food" was stockpiled outside beginning in March 2008 after the new plant started up and produced more wallboard than could be stored inside the warehouse. He considered this pile to be a new pile that "was being accumulated speculatively but not being put on the actual pile that would be surveyed" because none of the outside stored "riser food" was ever used to make risers, only inside stored board was used for "riser food." He stated that D. Lyle from EPD did an annual inspection on April 3, 2008, with him and explained concern that the outside stacked fiberglass wallboard was either subject to the "60/90 rule" or waste material for the reject pile. During a close-out meeting with Plant Manager D. Neal, D. Lyle explained that he did not know how long the outside fiberglass pile had existed for purposes of a violation under the "60/90 rule" but that material from the pile had to be used in accordance with the "60/90 rule" or placed in a pile and considered under the consent order surveys. He testified that there was no discussion of the application of the "60/90 rule" by D. Neal at that close-out meeting but later the same day D. Neal discussed the matter with him for about 5 minutes "and seemed very angry and agitated that I would agree with David Lyle on that issue." He stated that D. Neal disagreed and considered the outside stacked material as a product to be used as riser material to put between the stacks of wallboard. The Complainant testified that on June 11, 2008 he was in a walk-around of the facility with D. Neal and others when they approached the propane filing station and nearby stacks of "riser food" stockpile and that he told D. Neal that this stockpile was the wallboard D. Lyle talked about that should be on the reclaim pile. He

[6] The consent decree was entered by EPD and the September 9, 2006 Plant Manager on November 21, 2006.
[7] CX 48

reported that D. Neal instructed that the wallboard was not going to be moved to the reclaim pile but would be used as "riser food."

The Complainant testified that the outside stored "riser food" wallboard piles were never used and kept getting bigger and had been kept more than 90 days when he filed his Guideline Letter. He stated that he raised the issue of counting outside stored "riser food" under the consent order with K. Blankenship and W. Wimberly in a telephone conversation that might have occurred in May 2008.

The Complainant testified that he did not have authority to down-grade wallboard to a waste material status or what board could be used as "riser food," did not have any spending or requisition approval authority, and did not have employees to supervise. He stated all he could do was advise D. Neal of his opinion.

The Complainant testified that the June 30, 2008 third-party survey included a pile of screened material designated to be reclaimed as agricultural material for use by peanut farmers but did not include the designated stockpile of "riser food" stored outside (CX 9). He sent an e-mail to the survey company requesting a survey for June 30, 2008; received the report of survey (CX 10); did the calculations from the survey report and base-line survey report, and indicated the plant was in compliance with the consent order 10% reduction milestone for June 30, 2008. He then sent K. Blankenship an e-mail stating the plant had met the June 30, 2008 milestone even though he knew the "riser food" stockpile had not been included in the survey when he believed that it should have been included. He stated he did not bring up any concern of not including the "riser food" stockpile with K. Blankenship in the e-mail because he had earlier been directed by K. Blankenship not to bring up the issue. The Complainant testified that from careful communications training, "you always put factual information in written communications, and if you don't know it to be a fact, you do not put it in writing and send it in an e-mail. … don't use your opinions or speculate." He stated that he was unaware whether there had been a determination by corporate officers as to whether the "riser food" stockpiles were subject to the "60/90 rule."

The Complainant testified that he was called to D. Neal's office on Wednesday, July 2, 2008, for a meeting where either D. Neal or M. Rogers gave him a document for a performance improvement plan (PIP) which did not have anything to do with the June 30, 2008 survey or certification letters. D. Neal listened to the Complainant contradict several things listed in the PIP and decided to hold off on the PIP until after a Monday meeting the following week, which was not held.

The Complainant testified that he created and submitted a draft certification letter for submission to the EPD for legal review under the company's "government interaction compliance standard" on Monday, July 7, 2008. He submitted the draft compliance letter via e-mail to K. Blankenship and to D. Neal at 1:37 PM with a notation that the certification letter was due to be submitted by July 30, 2008 (CX 14). The Complainant testified that he did not include the issue of stockpiled "riser food" not being part of the June 30, 2008 survey because "I didn't think that would be a good career move because David Neal has already told me he disagrees with me. Ken Blankenship has already told me not to raise the issue anymore. I felt like I would be putting my

job in jeopardy if I were to write a letter that said we were out of compliance when my direct supervisors told me to write the letter based on what the survey said."

The Complainant testified that on July 7, 2008, before submitting the e-mailed draft certification letter to K. Blankenship and D. Neal, he contacted the company Guideline "because I had already talked to everybody in the plant [and] everybody told me they disagreed with me" and submitted his "Guideline Letter" (CX 13) via e-mail at 8:19 AM because he had more than one Guideline complaint that could not be handled with a telephone call (CX 12). He stated that one of the complaints described on page 10 of his "Guideline Letter" (CX 13) dealt with "the allegation that the Plant Manager is having these [off-spec wallboards] stacked outside of the official reclaim survey pile and not putting them on the pile so that they can be surveyed."

The Complainant testified that on July 7, 2008 he examined the off-spec wallboard stored outside the warehouse and calculated the approximate volume of "riser food" stockpile "to get a rough estimate … to see how much was there … to see if it would have been an issue if it would have been on the pile at all, if it had been surveyed would it have been an issue." He did not report his rough calculations or any concerns about the "riser food" not being included in the June 30, 2008 survey because "I had already told my supervisors my opinion of these 'riser food' piles and every time that I told them what I thought about 'riser food' piles they disagreed with me; so I didn't think that I could go to them with that information."

The Complainant testified that he called the assigned Guideline Letter investigator, B. Hawkins, on July 15, 2008, and told her about the certification letter being due in 15 days, that there was time to get another survey, and that the "Consent Order Potential Falsification of Records" issue in his Guideline Letter was a very important issue. He testified that he told B. Hawkins that the June 30, 2008 survey "did not include all of the reject gypsum wallboard that was on the site … that letter that we have to get signed is representing to the state that we're in compliance with the consent order. He reported he was instructed by B. Hawkins to continue business as usual and if he would normally submit the letter to do so. He considered this instruction "to be so out there" that he called M. Vest to get another opinion. He was advised by M. Vest to follow the instruction from B. Hawkins.

The Complainant testified that he gave the prepared certification letter to D. Neal in a manila folder while he "didn't think it would be right to get this letter submitted … I was hoping [someone] would say, look, we've got to stop the presses here, there's board that wasn't counted in the survey, why don't we stop and get another survey? … But they didn't do that in this case."

The Complainant identified CX 19 as his July 28, 2008 e-mail to B. Hawkins to inform her that the "riser food" boards were still being held and to give her a better understanding of the issues. He stated that he sent her pictures by e-mail on July 30, 2008, of the stockpiled wallboard taken "as they were being moved and stacked onto the official consent order stockpile." (CX 20) He stated that he got no response from B. Hawkins.

The Complainant testified that CX 18 were three photographs he took that showed an aerial view of stockpiled wallboard on March 26, 2008, that EPA D. Lyle indicated was subject to the "60/90 rule", showed the growth in the same pile by July 7, 2008 that he estimated to be 2,600

cubic yards, and showed the reduced size of the pile on July 30, 2008 after unbagged wallboard had been moved to the reject material pile on or about July 17, 2008.

The Complainant testified that CX 17 are August 1, 2008 e-mails where he sent M. Vest "some pictures so she could get a better understanding of the issue of riser food ... that I should call the EPD … need to report this to EPD … because it didn't get fixed when I reported it to GP, so I thought maybe it would get fixed if I reported it to the EPD. I was afraid that if GP just up and decided to report it themselves that I would just be terminated … I was afraid that I was going to be retaliated against for reporting it anyway." I was told by M. Vest to wait until a meeting on Monday (August 6, 2008).

The Complainant testified that he was working under the direction of K. Blankenship and D. Neal and "those directions were to write the [certification] letter according to the survey and ignore the 'riser food' pile" which he did and got fired.

The Complainant testified that he met with B. Hawkins and B. Briggs, together, about their investigation into the "Guideline Letter" complaints one time for 6-8 hours and told them everything. He stated he took them to the location of stockpiled material D. Lyle had seen and showed them what was left there and took them to the reject pile to show them where some of the stockpiled material had been moved by the time they arrived at the plant. He reported telling them about D. Lyle's visit and comments as well as D. Neal's response to that and being angry with him about the "riser food" and "60/90 rule" issues. He testified that, after he was suspended, he provided e-mails and pictures and statements to B. Briggs by e-mail on August 6, 2008, indicating D. Neal was not truthful about conversations with D. Lyle in April 2008 and that he had reported the entire incident about riser food not being counted in the June 30, 2008 survey to the EPD on or about August 5, 2008. (CX 21)

The Complainant testified that he notified B. Briggs that D. "Neal had said that we had to agree to disagree on this and that the consent order survey letter was directed to … I was directed to write the letter just based on survey results, I wasn't to put anything additional in that letter." He stated he did not want to get anyone fired, only to get stockpiled board removed to the consent order survey pile, get another survey, and submit accurate information to EPD.

The Complainant testified that at one point he went into D. Neal's office and was asked what it would take to stop the "Guideline Letter" investigation. He reported D. Neal offered to investigate another employee's investigation of people to correct her behavior if necessary and would investigate another employee and the plant's safety program. He did not recall if "riser food" was discussed. He testified that he would not stop the "Guideline Letter" complaints and was later on a conference call with B. Briggs and T. O'Connor where T. O'Connor asked if he wanted to stop the "Guideline Letter" complaint. Again he declined to stop the complaints.

The Complainant testified that he was called to G. Thompson's office on August 1, 2008 and participated in a telephone conference call with R. Wolfe in which R. Wolfe notified the Complainant was suspended pending the results of the investigation and that it looked like the Complainant had falsified a letter to the state concerning the June 30, 2008 compliance survey and then complained to the Guideline afterwards. He reported informing R. Wolfe that the

"Guideline Letter" was submitted before the certification letter. In response to being suspended, he sent the August 1, 2008 e-mail in CX 22. He testified that the purpose of CX 22 was to correct wrong information and try and explain he had not submitted a falsified certification letter, was not trying to get someone fired, and had submitted his Guideline complaint 8 days before he gave the certification letter to D. Neal to sign. He stated he submitted additional information by e-mail the next day (CX 23).

The Complainant testified that the certification letter given to D. Neal to sign on July 15, 2008, was "not inaccurate because the letter accurately reflects what's in the survey. That's what my job was. … [The July 15, 2008 certification letter signed by D. Neal] is saying that the consent order survey letter is accurate." He reported that his Guideline complaint involving potential falsification of records "is related to whether or not this letter could eventually become something that could be considered falsified. If GP [had investigated the Guideline complaint] immediately and they would have come back and said these boards have to be counted, then that would have made the letter false. That's why it's a potential falsification of letters." He reasoned that the July 2008 certification letter he drafted can be accurate while D. Neal is knowingly potentially violating the consent order "because Neal is the person at the plant who has authority and responsibility to have that board placed where it needs to be. I didn't have that authority. The EPD inspector came into the plant and told Neal this board has to be counted or used according to 60/90. So Neal had knowledge, that means knowing. … So it's a potential knowing violation; but that doesn't make the letter inaccurate. That's how it's done.

The Complainant testified that his conversation with EPD on or about August 4, 2008, was with the hope EPD would "issue some sort of directive to Georgia-Pacific to make them go back to the plant, do another survey, and show all the people that said I was lying that I was not lying."

The Complainant testified that he was called off suspension on August 12, 2008 and reported to M. Roger's office for a meeting with R. Wolfe. He was informed that his employment was being terminated and that they thought he had falsified a letter and complained to Guidelines afterward and was trying to get the plant manager fired.

The Complainant testified that after his employment was terminated he sold his three-bedroom brick house and move to Texas near his wife's family. He lives in a single-wide mobile home with his wife and 14-year old daughter. He reported earning $101,822.11 in 2007 with GP, including bonuses (CX 25), and $62,931.00 in 2008. There was also $3,630.00 in unemployment benefits in 2008 prior to obtaining work installing DirectTV systems. The Complainant testified that he subsequently formed a company with his wife and sister-in-law to install DirectTV systems. To fund the company he used his 401(k) and pension funds. HE incurred $11,269.00 in taxes for early withdrawal of the GP pension fund and $18,000.00 in taxes for early withdrawal of the 401(k) funds (CX 30). When the company operated, he took draws of $19,500.00 in 2009 and $28,399.53 in 2010 before taxes were paid (CX 28). He expects to earn $40,000.00 to $50,000.00 per year if his DirectTV company does well. He currently owes $17,000.00 in federal taxes because not enough was withheld in 2010. When his employment ended with GP he lost his life insurance, health insurance, dental insurance and eye insurance. He indicated his daughter was injured in 2009 and he incurred $61,581.95 in

uninsured medical expenses (CX 29). He and his wife pay for life insurance out-of-pocket on a monthly basis.

The Complainant testified that while he worked for GP "I tried to do my best all the time that I worked there. I never lied to anybody while I worked at Georgia-Pacific … everybody looked up to me as somebody that was a stickler for the rules, that was going to do the right thing; and that whole reputation is ruined now. I don't have a reputation at all except that I'm a liar."

On cross-examination, the Complainant testified that his DirectTV installation company has 7 to 10 subcontractors who do installations in San Antonio and Austin, Texas. He considers the company successful with some months with over 300 installations. His wife works full time in the office with orders, technician work assignments, payroll and accounting. He unpacks equipment for job orders, issues equipment to technicians, and backs up technicians in the field. His company can make more money by adding additional technicians. He reported that the money he used from his 401(k) and pension fund to start his company is now in company assets.

The Complainant testified that he had to pay for his life, dental and health insurance when employed by GP and that he expected to pay federal taxes on his 401(k) and pension funds at some point when they were withdrawn, if he had continued to work for GP to retirement. As to his daughter's medical bills, he reported he had to pay a few hundred dollars up-front for her MRI and that he still owes the bulk of the amount for medical bills in CX 29. He stated that there was no equity in his house when it was a short-sale and he left "with a terrible credit score." He did not recall if he had lost a down payment on the house.

The Complainant testified that he was an "employee at-will" with GP but that he expected to work at least another 20 years for GP before his employment was terminated. He acknowledged that his supervisors, managers and human resources department had talked to him about his performance and communication challenges. Some of the conversations involving improvement of personal interactions and communications with co-workers were with M. (Ivey) Rogers from Human Resources before July 2008. He acknowledged being involved in drafting a development plan in January 2008 to improve his communications and that RX 16 was his March 2008 performance review from his supervisor, D. Neal. He acknowledged that in the performance his communication skills were considered "often brash." He recalled meeting with M. Rogers and D. Neal on July 2, 2008, concerning allegations he was disrespectful and inconsiderate during an earlier meeting he had with the "pit crew." At the July 2, 2008 meeting he received a Personal Improvement Plan (PIP) (RX 21). He reported not being worried at that time about the PIP because he "had already been worried because there had been several instances of cases like that where I would bring up compliance issues and the next thing I know there's an investigation that's totally unrelated to the compliance issues, and it appears to me that I was being retaliated against and this was just another piece of the puzzle to me." He testified that he was angry and upset at the July 2, 2008 meeting and understood that D. Neal would revisit the issues involved and the PIP the following week. He reported the following week meeting did not take place for a reason unknown to him.

The Complainant testified that he was not given signatory authority to make reports to the government and "that responsibility laid squarely with the plant manager [who] was given

signatory authorization from the vice president of the company." He indicated that the code of conduct for GP applied to him as an employee for environmental compliance and that employees are always to prepare records truthfully, accurately and completely and never to give out false information or act deceptively. The Complainant testified that "there became a time during the [Guideline] investigation where I wasn't doing things that I would normally do because I was following the direction of the investigators … [in] that phone call that I made to [B. Hawkins] and she told me what to do. I told her I didn't think it should be done … I don't want to do this. I don't think this is right. She told me to do it. So at that point I think there must be some amnesty for me following her recommendations." He indicated that before July 15, 2008 he had received telephonic direction not to discuss the Guideline complaint with anyone. The Complainant testified that the GP challenge process meant the "if you don't agree with something that's going on, you raise that issue with a question.

The Complainant testified that he was in charge of environmental compliance for the Savannah facility. His duties included inspection, investigation, report environmental matters and make recommendations to correct items of concern. He did not have monetary ability to correct anything on his own. Necessary money would be subject to D. Neal's approval. He reported he "had a share" of the responsibility for the Savannah plants compliance with the November 26, 2006 consent order with Georgia's EPD. He was responsible for scheduling third-party surveyors and alerting security of their presence. He recalled that the December 2007 consent order milestone was not met and he was the liaison with the trucking company that removed material from the plant to achieve compliance but he "wasn't the person responsible for making sure the material got moved offsite" … R. Wassom was the person that had the decision making rights. He acknowledged that he was involved in the process to bring the plant into compliance with the December 2007 milestone requirements.

The Complainant testified that there was concern prior to the June 30, 2008 consent order survey about what should be included in the piles surveyed in relation to material going to peanut farmers and that his position was that the material needed to be included in the surveyed material even though it was in a separate pile of screened material and didn't have to be part of the actual consent order waste pile. He reported that he was not involved in arranging to have the peanut farmer designated material included in the survey and that he believed M. Dunnermann ensured it was included in the June 30, 2008 survey.

The Complainant testified that after D. Lyle had come onsite and made his comments about "riser food" and the 60/90 rule, he assumed that the 60/90 rule applied to all "riser food" whether stored inside or outside the warehouse at the plant. He testified that he did not make any calculations or record keeping regarding "riser food" "because right after that meeting [D.] Neal said that we're not going to do that and he disagreed with [D.] Lyle, so I was directed not to pursue that … not to do anything, not to mess with it."

The Complainant testified that in his discussion with D. Neal following the meeting with D. Lyle in April 2008 that D. Neal indicated that they would have to agree to disagree about "riser food" being a resource or waste material for the survey pile. He did not recall if there was specific discussion about the compliance survey during the April 2008 discussion. He reported that he did volume estimates of riser material stacks after he had submitted the draft certification letter

to D. Neal and believed he did the volume estimates before he tendered the final certification letter of the June 30, 2008 consent order survey to D. Neal; but that he was not sure if he shared the volume estimates of riser stock material with D. Neal, though he did share the information with some people. He never discussed having a separate survey of the riser material stacks with D. Neal. He testified that on June 11, 2008, while walking with D. Neal, there was a discussion of the riser material stacks seen by D. Lyle in April 2008 but there was no discussion about a survey. He stated that he could not state that he had a conversation with D. Neal in June 2008 about "riser food" in relation to the June 30, 2008 survey.

The Complainant testified that he discussed the 60/90 rule with K. Blankenship in a telephone call in May 2008 and that "riser food" had always been stored inside the warehouse and was also then stored outside. He indicated that he did not know what K. Blankenship's intentions were to the "riser food" stacked material but had said "we'll cross that bridge when we come to it or later." He testified "that implied to me that he didn't want me to pursue that issue any further. … When it is we'll cross that bridge later a good answer?" He testified that K. Blankenship's "implication" indicated don't raise the issue of "riser food" again. K. Blankenship did not say "do not raise this issue again." The Complainant stated that his concern involved putting the "riser food" material on the reject pile for consent order milestone survey.

The Complainant testified that the certification letter submitted on July 15, 2008 to D. Neal for signature was identical to the letter circulated on July 7, 2008 because legal made no changes to it and that the certification letter was prepared before he called B. Hawkins on July 15, 2008. He reported that he did not read the certification letter to B. Hawkins when he called her on the morning of July 15, 2008 and that he had not referred to the certification letter in his Guideline Letter to GP but had referenced the issue of stored "riser food". He stated that he may have possibly told B. Hawkins that the certification letter would be a misrepresentation to the government but denied telling her that the certification letter would have been a lie to the government. He testified that at the time of his July 15, 2008 telephone call to B. Hawkins he "had no idea [if the certification letter would be a misrepresentation to the government] because I didn't know what Georgia-Pacific was ultimately going to decide on whether that board should or should not be counted. If Georgia-Pacific decided the board doesn't need to be counted, then there is no misrepresentation. If Georgia-Pacific decides that the board should have been counted, then there would have been misrepresentation."

The Complainant testified that when he was in D. Neal's office on July 15, 2008, with the consent order certification letter he did not tell D. Neal that he would not sign the certification letter if he was the Plant Manager and assumed that D. Neal would know that the Complainant had concerns about a survey that did not count outside stacked "riser food" material "and that was going to cause a problem with the consent order. He testified that "I didn't say I was told to write a false or fraudulent letter. I was told to write that letter as it's written because it reflected the survey results as they were on June 30th. [I was told to do so by] D. Neal and K. Blankenship and the legal department [w]hen they said they were okay with the letter when I submitted it for legal review, and David sat in there with the EPD guy, and he sent a e-mail back, said I'm okay with this. K. Blankenship, we had had the conversation with me and Ken when we expressed our concerns that this board was not being counted. K. Blankenship forwarded it to legal review with no question about the riser food and sent it back to me saying the legal review process is

complete, submit the letter." He testified that on July 7, 2008, when he submitted the draft certification letter to K. Blankenship and D. Neal, he did not tell them that he thought that the certification letter sent for review was false or incorrect, though that was the same day he submitted his Guideline letter because he did not think the issue of counting "riser food" material stacks in the consent order survey would be resolved locally. He stated that he did not do an estimate of how the inclusion of the "riser food" material stacks would affect the June 30, 2008 milestone requirements of the consent order. He reported that he could not recall telling D. Neal or K. Blankenship that the June 30, 2008 survey should be redone to count "riser food" material stacks but that he did tell Guideline investigators the June 30, 2008 survey should be redone.

The Complainant testified that RX 33 e-mail of 5:29 PM, July 31, 2008 was the first time he sent pictures of outside "riser food" stacks to K. Blankenship, that the photos indicate that he did an estimated cubication of the stacked material on July 7, 2008, and that this was the first time he told K. Blankenship he had done a cubication estimate of the stacked material. He reported he also gave the same information to the Guideline investigators after the July 15, 2008 certification letter had already gone out from GP. He stated that he estimated there was 2,600 cubic yards of the stacked material and that this would roughly convert into tonnage by multiplying the cubic yards by 1.3 tons per cubic yard.

The Complainant testified that the events involving shipping approximately 10,000 cubic yards of wallboard to B&S Feed and Seed in Springfield, Georgia occurred after his employment with GP was terminated and that he was aware of the material movement from talking with B&S Feed & Seed personnel and information received from Georgia pursuant to an information request.

The Complainant testified that his Guideline complaint (RX 13) contained 35 to 40 different allegations and he discussed all or most of the allegations during the 10-12 hours of interview with investigator B. Briggs; but made clear to him that the concern over the Plant Manager allowing reject material to be stored inside the building to avoid count in consent order surveys and allowing the surveyors to leave unusable board stacked outside as "riser food" out of official survey report "was a high priority, very sensitive item." He reported that the wording in the last two sentences of his Guideline complaint on page 10 concerning communications skills and not everything being black and white was not in response to reporting using "riser food" under the 60/90 rule to his manager and divisional environmental manager nor made at the same time. He testified that he told B. Briggs, while interviewed on August 1, 2008, that he had obtained the June 30, 2008 survey results and had drafted and circulated the certification letter for review. He indicated that B. Briggs seemed surprised by that statement but he should have known that from his investigation. He testified that he "was trying to get across to Mr. Briggs was that the survey was accurate but that the material that was onsite was not included in the survey, therefore that was an inaccurate accounting of how much board was onsite" and that he was trying to indicate to Mr. Briggs that the survey results of June 30, 2008 being certified were inaccurate because they did not include the board stacked behind the facility that had been classified as "riser food." He also stated that he told B. Briggs on August 1, 2008, that he did not raise his concerns regarding the June 30, 2008 survey results with D. Neal or anyone else involved in the process when he circulated the July 7, 2008 draft certification letter for review. Later on August 1, 2008, the Complainant was suspended.

The Complainant testified that he was again interviewed by B. Briggs on August 6, 2008, and indicated to B. Briggs that when he had drafted the July 7, 2008, certification letter he thought D. Neal had knowingly violated the consent order and that he held this opinion prior to the July 15, certification letter. He reported the July 15, 2008 certification letter to Georgia EPD went out the same way that he had drafted the letter for review on July 7, 2008.

The Complainant testified that he met with R. Wolfe on August 12, 2008 and his employment was terminated. He stated that he did not think he understood that he was being terminated because the July 15, 2008, consent order certification letter he prepared to be submitted to a government agency (CX 15) contained the language "I certify that Georgia-Pacific is fully compliant with the above-mentioned consent order" when he did not believe that to be true. He stated that the survey report would not contain language that the survey was fully compliant with the consent order. That statement would be on the certification letter as a requirement of the consent order. He testified that he believed that the June 30, 2008 survey results show there was compliance with the June 30, 2008 consent order milestone even though he thought "riser food" should have been included in the survey "because I don't get to make that decision" of what to include in the survey. He testified that he drafted the July 15, 2008 certification letter and "it hadn't included that the riser food was not counted in the survey, but it's an accurate reflection of what the survey said … that could possibly not be right." He reported that he called B. Hawkins before he handed the July 15, 2008 certification letter to D. Neal for his signature without any warning of a possible misrepresentation to the government.

On redirect examination, the Complainant testified that had he left his 401(k) deposits in the account he would have assumed they would have grown and not been zero. He indicated that there are larger tax penalties for early withdrawal than if the funds had been withdrawn at maturity. He stated that he is still responsible for unpaid medical bills and receives bills for those expenses in the mail all the time. He could not afford COBRA health insurance payments at the time. He reported that his performance evaluations at GP were mostly good with the negative references dealing with communication skills. He reported that when terminated no one mentioned that he was being suspended or terminated because of problems with communication skills.

The Complainant testified that he made regular reports to M. Vest, K. Blankenship and D. Neal as part of his duties. He reported "decision-making right" involved an employee's authority to approve services, goods or product or whatever they needed up to a specific dollar limit. D. Neal and M. Dunnermann had "decision-making" rights. He had no "decision-making" rights and would have to ask others for approval of requests such as to move board material in the yard to the waste pile. He testified that "there was no point in putting in a requisition [to move board to the survey pile to D. Neal] because he had already verbally told me not to do that." He stated that "I believe the whole issue about my communications and how they were using that against me was an attempt to get me to not report issues and environmental or safety concerns."

The Complainant testified that he told investigator B. Briggs that he had talked to B. Hawkins and M. Vest prior to giving D. Neal the consent order certification letter for signature on July 15, 2008. He reported that during the April 2008 meeting with D. Lyle and D. Neal, D. Lyle stated to D. Neal that riser board had to be used according to the 60/90 rule or it would have to be

included in the survey. He stated that when he made his calculations of the volume of outside stacked "riser food" material he did not share that information with D. Neal because the Guideline investigation was coming down.

The Complainant testified that the due date for submission of the consent order certification letter was July 30, 2008, and that he had expressed his concerns to B. Hawkins and B. Briggs before that due date. He testified that he was directed to write the certification letter based on results of the survey by D. Neal. He testified that "I didn't think that [July 15, 2008, certification letter] would ever even get signed. I thought the investigation team would come down, do an investigation, and then if they said okay then the letter would get signed. I didn't know they were going to wait. … I had no idea that that was going to take that long." He testified that "the gist of what I was trying to get across to Mr. Briggs was that there was a survey done, there was some board that was not included in the survey, the survey results are accurate, but somebody needs to tell me whether or not the riser food board needs to be included in the survey or not."

On examination by this Administrative Law Judge, the Complainant testified that the State 60/90 rule was discussed during formulation of the first consent order dealing with paper-backed wallboard; the photographs of wallboard stacks were those outside stacks by the plant warehouse that were seen by D. Lyle on April 3, 2008; and that the outside stack of wallboard was a mix of covered and uncovered board. He estimated that approximately 25% of the board was uncovered with 75% covered. He reported that M. Dunnermann was the yard supervisor for March to August 2008 and would be the person responsible for moving raw materials around the yard. He stated that he believed there was an e-mail indicating that GP legal department had approved the July 7, 2008 draft certification letter.

The Complainant testified that D. Neal did not use the words "do the July compliance letter based solely on the June 30 survey report." He testified that "that's the direction I got from him based on that he disagreed … what he was saying was that we're going to do the surveys the same way we've always done them and we're not going to count riser food in these surveys. So in the past we had written letters just off the survey because there was no riser food outside. So he didn't say that directly, but that's what I implied from what his message was."

The Complainant testified that he was with D. Neal on June 11, 2008, in the yard next to the outside stacks of wallboard and pointed out to D. Neal that the stacks there were the stacks D. Lyle indicated were subject to the 60/90 rule or being counted in the survey. He reported D. Neal "told me again that he felt like that riser food was a product and that he didn't think it needed to be counted in the survey." He reported that the outside stacked wallboard was mostly uncovered at that point and that none of the stacked material had been moved to the survey pile for the June 30, 2008 survey.

The Complainant testified that the outside stack of wallboard for which he calculated the volume on July 7, 2008, was similar in size to the amount of wallboard present on June 11, 2008. He stated that the size of the outside stacked wallboard on June 11, 2008 was much larger than that he observed in April 2008. He reported there was no outside stacking of wallboard until sometime in March 2008.

On recross examination, the Complainant testified that he did not keep track of when wallboard was placed on the outside stacks or how long the wallboard was in the outside stacks. He reported that he did not talk to anyone at the plant, in his role as the environmental resource, about keeping any records on the riser food stack. The Complainant testified that RX 22 is the response to the proposed PIP he prepared and gave to D. Neal on July 4, 2008; that the response identified a list of code of conduct and compliance issues he noted; and that the response did not identify any problem with the June 30, 2008 survey or with the consent order.

On redirect examination, the Complainant testified that he did not include any problems with the outside stacked wallboard in his July 4, 2008 response to D. Neal "because the things that I put in the letter didn't implicate [D.] Neal and I had already brought that up with [D.] Neal before, so I knew I had to take a different avenue with that issue with respect to the boards. I couldn't bring it up to [D. Neal] again."

When called as a rebuttal witness at the close of the Respondent's case-in-chief, the Complainant testified that he was aware that GP had a loss reserve fund for the removal of gypsum waste at the Savannah plant but the he "had no authority whatsoever to withdraw money from that fund for any purpose at all." He reported he had "zero dollars decision rights." He stated that M. Fleming is an attorney with GP who reviews Title V certification documents. He stated that the certification letter he gave to D. Neal on July 15, 2008 is "not one of the Title V certifications, but it is a certification that [M. Fleming] reviewed and approved before it was submitted to the State of Georgia." He identified CX 49 as an e-mail he got back after starting the legal review of the draft July 2008 certification letter. He testified "I have never been on a conference call with [D.] Neal and the legal department or [D.] Neal and [K.] Blankenship or [D.] Neal, [K.] Blankenship and the legal department concerning any aspect of this certification letter or the issue with riser food." He reported he last discussed the outside stack of riser food with D. Neal on June 11, 2008 and was told "that board was not going to be counted in the survey because he considered it to be riser food which is a product." The last discussion about riser food with D. Neal before June 11, 2008, was in April following the EPD site inspection by D. Lyle immediately following D. Lyle's indication to D. Neal that a large stockpile of material outside the facility offended the 60/90 rule and that if it was not going to be used according to the 60/90 rule it had to be put onto the reclaim pile and counted in the official consent order surveys." He testified that "if I would have wrote [the certification] letter any differently, I would have been fired for insubordination because both of my supervisors told me to not include that board in the survey." He indicated that he did not put information in the certification letter such as "this letter does not include riser food separately stacked" because "I was directed by my supervisors to ignore that issue. … [and] I would have been terminated for insubordination" if that direction was not followed.

b. August 4, 2010 Deposition of Complainant (CX 47)

The Complainant testified by deposition on August 4, 2010that he graduated from high school and completed some college courses but did not have a college degree. He reported starting work for GP as a sweeper in Monticello, Georgia in February 1988 and being promoted to lift truck operator in three days. Over the next five-year period he was promoted through several production jobs and became a B-class electrician. In 1993 he moved to be a salary supervisor for

safety and environmental director at the Ahoskie, North Carolina Chip and Saw Plant. After two years he went to a plywood facility in Emporia, Virginia. In 2001 he went to an office at GP Brunswick, Georgia for work as the regional environmental resource since the Savannah plant was closed at the time. He was brought into Brunswick "exclusively to be the permitting engineer for the new [Savannah] plant so that I could make sure they got all of their permits in place so they could build the facility." He served as environmental resource for all GP gypsum plants on the East coast and for several mud plants in Atlanta. He made weekly trips to the Savannah facility while it was closed to do inspections and meetings. During that time he was part of the GP internal negotiation team dealing with the original consent order involving solid waste at the Savannah plant.

The Complainant testified that he was originally the senior regional environmental resource for Savannah at reopening when B. Belanger was Plant Manager. After a few months the Plant Manager changed to either H. Dodge or S. Carlier. They were followed by M. Philips and then D. Neal. While at the Savannah plant in 2006 or 2007, he set up the Process Improvement Team (PIT) Crew for focus on safety. He did not have an official safety role at the plant, C. Commodore was the actual safety manager at the Savannah plant until she left. He was subsequently made the compliance officer by D. Neal for safety and environmental matters. Subsequently he found C. Holmes who was hired as the facility safety resource at the Savannah plant to report to him as the compliance officer.

The Complainant testified that after leaving GP in 2008 he was on unemployment for 12 weeks and then worked four months installing DirectTV systems for Rudder Digital. When Rudder Digital closed he incorporated "Hill Sat" with his wife and sister-in-law to install DirectTV systems. He uses subcontractors to complete installation orders and is paid by a separate company from a DirectTV subcontractor. He estimated that earlier in 2010 the company may have broke even on what he invested and that they are now making a profit for the past few months. He intended to buy a single-wide trailer and 1/3 acre of land for $25,000.00 cash.

The Complainant testified that prior to reopening in 2006, the Savannah plant had a reject material pile that had accumulated during prior ownership and amounted to an unpermitted solid waste landfill. He reported that there was a reject pile survey in June 2007 and again in December 2007. Initially, someone from the plant would meet the survey crew and tell them what piles to survey for the consent order. He did not know if the same survey crew identified the piles to survey in subsequent surveys by using prior surveys or talking to people. He opined that probably no one showed the survey crew what to survey for the June 30, 2008 consent order survey. He testified that he sent out e-mails to schedule the dates for the consent order surveys. He stated that sometimes an interim survey would be done just to see where the plant stood in relation to the reject pile and upcoming milestones. He stated that he began training M. Dunnermann as a back-up environmental resource around May or June 2008. With respect to the June 30, 2008 survey, D. Neal had instructed him to inquire of the EPD whether reject material set aside for agricultural purposes had to be counted in the survey.

The Complainant testified that he sent an e-mail to K. Blankenship after receipt of the June 30, 2008 survey stating the plant had met the June 30, 2008 milestone. He elaborated that "it would have meant that based on the third party survey that reduction was met." He testified that he

believed "that the riser food should have been counted in the survey, but I was told by [D.] Neal, [M.] Vest and [K.] Blankenship on multiple occasions that it not need to be counted. So there was no point in putting that information in this e-mail because it would have just gotten me in trouble." He agreed that when he sent the July 2, 2008 e-mail to K. Blankenship about meeting the June 30, 2008 survey milestone, he personally believed that the survey was not correctly representing all of what he thought should be included in the June 30, 2008 survey. He testified " It was my opinion that the riser food that had been sitting outside, and inside for that matter, that was older than 90 days and not reused in accordance with the 60/90 rule as directed by [D.] Lyle should have been included in the [June 30, 2008] survey, but that had no bearing on whether or not the actual survey showed that we met the milestone or not because we did meet the milestone, and that's what this e-mail says. … I personally believe that the riser food should have been included in the survey. … My personal belief didn't change the fact that the official survey showed that the milestone was met. I had to report the results of what the survey said as directed. … there had been no legal determination made at that point. My belief is not law. It's not a regulation. It's not enforceable. Until somebody at [GP] says, 'yes, the riser food has to be counted' or 'no, the riser food doesn't have to be counted,' the milestone was met off the survey results and that is my belief." He stated that he believed that EPD believed riser food was subject to the 60/90 rule and excess should be placed on the survey pile. He reported that he had to follow the instructions of his supervisor who told him to disregard what D. Lyle of EPD had said regarding riser food.

The Complainant testified that he believed GP was not following EPD guidance on disposing of riser food wallboard stacks in April 2008 but did not file a Guideline complaint because the next consent order survey was not due until June 2008 and GP could have decided before then to follow the 60/90 rule regarding the stacked riser food wallboard and still had an opportunity to move wallboard to the survey pile. He reported that he did not have any information as to whether D. Neal had conversations with the third-party surveyors directing them to survey only the reject pile on June 30, 2008. He stated that he did not file a Guideline complaint after his June 11, 2008 conversation with D. Neal because "there wasn't a violation to report."

The Complainant testified that he was the person who drafted letters of compliance to the EPD after consent order surveys in the normal course of his job responsibilities. He reported that his e-mail of July 7, 2008 with the draft certification letter for the June 30, 2008 survey started the legal review process and that if the letter came back without comment it would be used as the certification letter to the EPD. He submitted the draft letter to K. Blankenship and understood that K. Blankenship would send it to the GP legal department and that he would only provide additional information to the legal department if asked. He testified that "I would provide all of my concerns and comments to Mr. Blankenship and if he felt they were important enough, he would talk to the legal group about those." He testified that he did not include a comment about the riser food in the July 7, 2008 draft complainant letter given to K. Blankenship "because the same day as I started the legal process for this [certification] letter to be reviewed, I started the Guideline process for an independent legal determination to be made by Georgia-Pacific. Because I already knew Mr. Blankenship's opinion and he had already told me not to bring it up again, so I knew there was no point of going through Mr. Blankenship again with the same issue that he told me not to bring up." He reported that he "was not sure if I did or did not" ask K. Blankenship if he could ask someone in-house at GP about the issue of riser food and that he did

not believe that he discussed the issue of riser food with any in-house GP lawyer prior to July 7, 2008. He was familiar with who the in-house environmental lawyers were from previous conferences.

The Complainant testified that he had received a copy of the Performance Improvement Plan to read during a meeting with M. Rogers and D. Neal on July 2, 2008. During the meeting he had been told there was an investigation completed concerning him and that he was given an opportunity to give his side of the story. He didn't agree with the matters as set forth in the PIP, which he considered a one-sided conclusion. After hearing his side of the story, D. Neal decided not to implement the PIP at that time and that they would meet again on Monday, July 7, 2008 to discuss the PIP. Between the July 2, 2008 meeting with D. Neal and July 7, 2008, he sent an e-mail with a letter attached to D. Neal "to correct what I felt like was a misunderstanding in the investigation that was conducted prior to the beginning of the implementation of the PIP." His attached letter dealt with the PIP PIT crew issues as well as bullet points of issues beyond the PIT crew and the PIT crew timeframe. He reported that he did not include environmental issues in the letter because the letter was going to D. Neal. The PIP was never implemented. He testified that D. Neal came to his office on July 7, 2008 and indicated that T. O'Connor was going to do an investigation into the PIP letter response complaints. He was not sure if D. Neal came to his office before or after he filed his July 7, 2008 Guideline letter.

The Complainant testified that he called the Guideline complaint telephone number from his office the morning of July 7, 2008, and was told to submit the complaint in writing to the Atlanta Security Office by e-mail. He reported that he had the Guideline letter prepared before he called the Guideline complaint number the morning of July 7, 2008. He believed he wrote the Guideline letter during the July 4, 2008 weekend but didn't believe he wrote it at the same time he wrote his PIP response for D. Neal. He assumed that an investigation would ensue based on what he had reported in the Guideline letter. He did not believe T. O'Connor was going to do an investigation into the Guideline letter. He contacted the Atlanta Security Department twice about receiving the Guideline letter and was called by B. Hawkins several days later who told him she and an outside attorney would be doing an investigation into his Guideline complaints. He testified that around July 15, 2008, he called B. Hawkins and told her "we've got this compliance deadline coming up, we have this important letter that needs to be signed … we still have 15 days before this letter has to be signed, I think we need to get a determination made on this riser food before this letter gets sent." He stated he made this call to B. Hawkins because "I had a real concern that Georgia-Pacific was conducting illegal activity by not having the third-party surveyors include the board, the riser food board, into the survey, and I felt like Georgia-Pacific was going down the wrong path and it was going to come back and bite us if we didn't fix it." He acknowledged that her direction was to do what I would normally do.

The Complainant testified that in his opinion D. Neal was not committing a knowing violation of compliance with the consent order by signing the July 15, 2008 certification letter to EPD at the time of signing because "it was still a potential violation. [D. Neal's] opinion was that the riser food didn't have to be counted, so based on that belief he is certifying a letter he believes to be true and accurate." He testified that he would not have signed the July 15, 2008certification

letter if he was plant manager knowing that the EPD considered riser food subject to the 60/90 rule.

The Complainant testified that the Weekly Plant Condition letter is updated on the public server each week by the person indicated to be responsible for the various sections in the letter. With respect to the Weekly Plant Condition letter for the week of July 17, 2008, he was responsible for the environmental compliance section. He stated the semi-annual consent order status report indicated as submitted was the July 15, 2008 certification letter he gave to D. Neal for signature.

The Complainant testified that on one occasion D. Neal was in his office and T. O'Connor was on the telephone to discuss stopping the investigation that T. O'Connor was conducting. He reported that D. Neal would follow-up on investigating the allegation concerning M. Rogers and C. Holmes if the investigation by T. O'Connor was stopped. He did not think environmental issues were discussed at that time.

The Complainant testified that he had a discussion with B. Brigg about transferring to another facility but did not know if the offer was made or who broached the subject. He stated that a former supervisor had discussed relocating him to one of the OSB group facilities in the panhandle section of Florida as a senior environmental resource manager, but not for gypsum. Those discussions were before the Guideline letter was filed. B. Briggs' and B. Hawkins' response was that they had nothing to do with that and if he wanted to pursue the transfer opportunity on his own he could because it had nothing to do with the investigation.

The Complainant testified that on August 1, 2008, he was escorted to a conference room, participated in a telephone call, on speaker, with R. Wolfe. R. Wolfe explained GP believed the Complainant had falsified a compliance letter, had D. Neal sign the letter and then complained in a Guideline letter that the compliance letter was false. The Complainant denied the activities and was placed on suspension pending further investigation. The Complainant sent an e-mail to R. Wolfe, M. Vest and T. O'Connor the following day to explain why he thought the discussions on August 1, 2008 were a misunderstanding because there had been no legal determination as to whether riser food should have been counted in the June 30, 2008 consent order survey.

The Complainant testified that his understanding of the Georgia 60/90 rule was that recovered material was tracked from when generated and that 60% of the generated material had to be used, reused or sold within 90 days of being generated and if less than 60% was used, reused or sold then the remaining portion of the 60% was waste material. He stated he would track generation and use on a daily basis, though Georgia EPD does not direct whether calculations are to be done on a daily, weekly or monthly basis. The plant would have to generate their own system of records to show compliance with the 60/90 rule. The Complainant testified that the intent at the plant is to stamp a manufacture date on all wallboard as produced, though sometimes the machine breaks and wallboards get through without a date stamp. He indicated that wallboard less than 90 days old would not be under the 60/90 rule. He reported that he did not look for manufacture dates on the riser food stacks of wallboard because the stacks kept growing and getting larger with none of the outside wallboard stacks ever being used for riser food because there was a sufficient supply of wallboard stored inside the warehouse for use in the machine that made risers. He testified that D. Neal, J. Scully and M. Dunnermann "were

telling employees to hold this board in this [outside] location knowing that this [board] was never going to be used for riser food" and that D. Neal directed that board stored outside was to be bagged and covered. He reported this was based on conversations during staff meetings he attended concerning the plant running out of room to store riser food inside the plant warehouse. He testified that in the beginning, the board had been all bagged; but that subsequently the bags got torn or blown off some wall board stacks. He reported that he considered the outside stacks of wallboard to always grow and not decrease until unbagged board was moved to the reject survey pile on July 30, 2008.

c. Testimony of David Lyle (TR 289-325)

Mr. D. Lyle appeared and testified that he is a Program Manager for the State of Georgia, Environmental Protection Division (EPD) for the past 11 months. Prior to that he was an environmental engineer for EPD for 15 years. He was assigned to monitor the gypsum production facility in Savannah, Georgia from 1998 through 2009.

Mr. Lyle testified that EPD was in discussions with Domtar Gypsum in the 1970's or 1980's about reject gypsum material that was being stockpiled or placed on the facility's property. Domtar Gypsum requested a solid waste permit that was not granted and the company agreed to reduce the rejected gypsum pile by recycling. In the 1990's EPD became concerned about the piled material. Subsequently discussions were held with GP Savannah Gypsum Plant through the consent process. GP made process changes and began manufacturing new material. The first consent agreement was closed out and a second consent order was entered in 2006 as set forth in CX 1. Under the consent order in CX 1 the GP Savannah Gypsum Plant ultimately removed all material, recycled some, and put some in the landfill.

Mr. Lyle testified that solid waste in Georgia is under the Georgia Solid Waste Management Act and solid waste management rules enforced by the EPD and Department of Natural Resources (DNR). He identified Georgia Code sections 391-3-4-.01 and 391-3-4-.04 (CX 48) as rules he would use in determining what is solid waste. He explained the 60/90 rule that exempts certain recovered materials from being regulated as solid waste provided that they are not accumulated speculatively and records are maintained to demonstrate that and they are not hazardous waste. The rule is applied by removing 60% of the potentially-recyclable, recovered material existing at the beginning of a 90-day period and removing 60% of the recovered material generated during the 90-day period from the waste stream. The material being removed from the waste stream may be used, reused or recycled, with documenting records. The portion of the 60% not used, reused or recycled is considered as solid waste under Georgia rules.

Mr. Lyle testified that the November 2006 consent order was driven by the fact that GP Savannah Plant had a reject pile of gypsum solid waste that was not being managed under the 60/90 rule which EPD considered an open dump or landfill without a permit. The 2006 consent order was to deal with the existing reject pile of material and GP Savannah operating a solid waste handling facility without a permit in violation of EPD rules. The 2006 consent order involved a negotiated settlement, removal of the reject pile over a period of 4 to 5 years through disposal at a landfill or recycling lawfully, meeting certain removal rate or percentage reduction milestones over time, completing surveys of the existing outside pile of gypsum waste every six

months, and reporting the results of the surveys to EPD. He reported that there was not one big pile of gypsum waste but a pile of paper-faced reject material and a pile of fiberglass-backed reject material that were closely joined, but separate, occupying roughly one contiguous area outside. He testified that solid waste "material generated during the term [between surveys] should have been part of the [consent order] survey results." He stated that it was expected that material that became waste under the 60/90 rule would be moved to the consent order survey pile as it was generated.

Mr. Lyle identified CX 6 as his February 4, 2008 letter to D. Neal after the GP Savannah Plant had missed the December 2007 milestone, removed the required material and resubmitted a January survey indicating that the milestone was now completed. The letter did note that a penalty could be assessed for failure to meet milestones in the future.

Mr. Lyle testified that he visited the Savannah Plant in April 2008 to do an inspection for an air quality permit but that he would evaluate the consent order survey pile for compliance with the consent order. During that visit he observed wallboard stacked in the parking lot and asked the Complainant about the material. He testified that he understood the stacked board was to be used as dunnage for shipping the good quality wallboard. He indicated that it was his belief that he told the Complainant that the material in the parking lot would be subject to the 60/90 rule, and if not used in accordance with the rule, it would have to be included in the consent order survey pile.

Mr. Lyle testified that he had a usual exit interview with D. Neal at the end of the April 2008 site inspection. During the exit meeting he discussed the 60/90 rule and the stacked wallboard with D. Neal. D. Neal's response was that the stacked wall board was a product to be used and not waste material. Mr. Lyle reported that at some subsequent time the company determined "that it was waste and at that time put it on the pile." He stated "the final determination was, G-P decided to not store … riser food outdoors, and decided to store it indoors." He testified that he did not recall GP acknowledging that if they stored wallboard outdoors it would be treated as waste.

In reference to an August 4, 2008 e-mail (CX 7), Mr. Lyle testified the August 4, 2008 meeting involved the Complainant coming to the EPD office and reporting discrepancies in riser food and the consent order. Based on that meeting EPD followed up with GP. He stated that he met with D. Neal on August 7, 2008, as referenced in CX 40. Prior to the meeting he and his supervisor "decided from the onset of the meeting … we would establish that the material [riser food] was subject to 60/90 [rule]." He believed that in the meeting he told D. Neal that riser food would have to be counted in the survey if the material offended the 60/90 rule. Mr. Lyle testified that he wrote the letter of October 9, 2008 (CX 39) to then Savannah facility Plant Manager A. Stefanoni "because I wanted to bring closure to the riser food argument … and say this is the Division's final … determination on this matter." The determination was that the riser food stacks cannot be accumulated speculatively and must be handled under the 60/90 rule for treating as waste material. He identified CX 41 as a November 12, 2008 letter from A. Stefanoni that brought the issue of riser food to a close in the third paragraph where GP understands "the Department agrees that so long as it's appropriately managed and stored indoors it will not be considered waste."

Mr. Lyle testified that he did not remember anyone contacting him about an investigation into the Complainant's internal compliant with GP. He reported that other than the consent survey of December 2007, he did not recall representatives from GP reporting an error in a survey report or telling him GP needed to make corrections in milestone reporting under the consent order.

On cross-examination, Mr. Lyle testified that he participated in negotiation of the 2006 consent order, as did the Complainant. He reported that the file disclosed that riser food was discussed being used to make dunnage. No formal EPD guidance was issued as to riser food at that time. He reported that the first time riser food became an issue under the consent order was during his April 2008 site inspection. He testified that after his visit to the Savannah plant in August 2008 to discuss riser food, the District's initial conclusion was that the 60/90 rule would not apply to riser food. He reported that EPD has not investigated whether riser food stored inside the facility is subject to the 60/90 rule. He stated that as of his appearance to testify, GP has completely removed the reclaim pile at the Savannah plant which was subject to the 2006 consent order.

On examination by this Administrative Law Judge, Mr. Lyle testified that the pile of wallboard he observed stacked outside during his April 2008 facility inspection was neatly stacked gypsum wallboard that was approximately half-covered with plastic or a tarp and was 15 to 20 feet tall. He reported the stacks looked as depicted in CX 9. He testified that he observed the pile again on August 7, 2008, and the size of the stacked wallboard was much smaller than he last saw in April 2008 and it was covered. He did not recall any GP participants in the August 7, 2008 meeting in CX 39, other than D. Neal, K. Blankenship and M. Dunnermann.

d. Testimony of Robert Wolfe (TR 326-345)

Mr. R. Wolfe testified that he is the Director of Human Resources for GP and held that same position in 2008. M. Rogers was the facility Human Resource manager of the Savannah plant in 2008. In early August 2008 he was apprised of the results of the investigation into the Complainant's Guideline complaint and was involved in the decision to suspend the Complainant pending further investigation because "that was when I realized from the investigation that was going on that [the Complainant] was the author of the letter that he was claiming to be a false submittal to the government. Making a false submission to the government is unacceptable." At the time D. Neal was being considered for a move to another facility as the facility manager, which had to be put on hold because if the allegations involving the false submission were true, "it was very likely that [D. Neal] would no longer be employed."

Mr. Wolfe testified that he made the decision to suspend the Complainant with pay pending further investigation. He stated the filing of a Guideline complaint did not factor into his decision to suspend the Complainant. He stated that T. Durkin, as Senior Vice-President of Manufacturing for Gypsum and Chemical, made the decision to terminate the Complainant's employment. He testified his belief the Complainant was terminated for failure to tell the truth and didn't do his job properly. "If [the Complainant] really believed that a report going to the government was false, it should never have gone to the government." He stated that there is never an excuse to submitting something to the government that you think is false. He testified that a person with something to mail to the government that they don't think is true "shouldn't mail it to the government, and they should escalate the issue." He reported that GP's "challenge

process" is company culture where "the goal of the challenge process is to seek the best knowledge in order to help you make a decision, and it can be asking people for their opinions. It can be challenging other people's decisions so that we don't do something improper or something inefficient." He reported that the Complainant was not terminated because he filed a Guideline letter.

On cross-examination, R. Wolfe testified he has worked for GP for 22 years. He reported that filing a Guideline letter is one way to escalate an issue. He stated he made the decision to suspend the Complainant and did not participate in the investigation nor discuss the matter with the Complainant or D. Neal prior to making the decision to suspend the Complainant. He reported that GP's position is that the July 15, 2008 certification letter was accurate.

On examination by this Administrative Law Judge, Mr. Wolfe testified that he did not have a written report of the Guideline investigation, nor did he discuss it with the investigators; but he did discuss some of the topics being investigated with inside counsel, T. O'Connor. He testified that he based his decision to suspend the Complainant based on information from T. O'Connor, his knowledge of the environmental resource position at a facility, and his knowledge of the responsibilities involved with the position of environmental resource at a facility. The information from T. O'Connor involved the Complainant "was the author of a document that he was alleging was not true." He testified that he expected an environmental resource who has been rebuffed by his superior about a concern over counting specific material as waste "to escalate the issue until the point that someone has acknowledged the point clearly and removed responsibility from that person. Escalation could include making a Guideline complaint, bring up the issue with dotted-line environmentalist, bring up with GP environmental lawyers, and any other hierarchy.

On re-direct examination, Mr. Wolfe identified RX 17 as a personnel action changing the Complainant's base pay from $86,400.00 to $88,560.00 per year on March 14, 2008. He reported that bonuses for people at the Complainant's level in GP the last couple of years had been next to nothing because the business was performing very poorly. He testified that in his opinion and environmental resource manager should not tender a letter he believes is false to his manager without telling that manager of that opinion.

On re-cross examination, Mr. Wolfe testified that an employee can increase pay by incentive awards, spot bonuses and bonuses. He testified that on August 1, 2008 he suspended the Complainant based on information received from T. O'Connor which was based on information he received from Guideline letter investigator B. Briggs. The basis for the suspension was because the Complainant had authored the certification letter that was sent to the EPD on July 15, 2008. He reported that GP had a policy of non-retaliation against an employee who files a Guideline "as long as the allegation is brought in good faith." Before suspending the Complainant, he did not contact M. Vest, D. Neal, B. Hawkins, B. Briggs or the Complainant about elevating issues before filing the certification letter with the EPD.

e. Testimony of Will Wimberly (TR 346-378)

Mr. W. Wimberly testified that he worked as the environmental/security coordinator at the GP Brunswick plant from the first quarter of 2006 through January 2009, when he was laid off. He served as the assistant environmental coordinator and purchasing manager at the Brunswick plant from 2003 to 2006. As environmental coordinator he reported to the Brunswick plant manager, the Complainant as the regional environmental resource and to K. Blankenship as the division environmental resource, as well a M. Vest as field engineer. He testified that there was a time when the Brunswick plant had to deal with rejected gypsum wallboard that was unsellable and was initially stored inside the facility but subsequently moved to outside storage as space inside decreased. He testified that he discussed the unsellable boards with his plant manager who was of the opinion that riser food was not waste material and his decision was final. He then discussed the matter with K. Blankenship in the office area. He told K. Blankenship that the stored boards had to be counted in the Brunswick survey and they discussed the matter while they did a perimeter walk of the Brunswick facility. The ultimate decision was that we were not going to place the unsellable wallboard on the Brunswick reject pile.

Mr. Wimberly testified he had no "decision making rights" to spend money or authorize expenditure of money, as an environmental coordinator. He could not direct relocation, removal or addition/removal of wallboard from the Brunswick consent order survey pile.

Mr. Wimberly testified that he engaged in only one three-way conversation with K. Blankenship and the Complainant while working as an environmental coordinator for the Brunswick plant. He and the Complainant explained to K. Blankenship that there was wallboard stored outside that was never going to be used as riser food and that the plant managers would not place the wallboard on the respective consent order survey piles in Savannah and Brunswick. He testified his understanding of K. Blankenship's direction as the unusable board stored outside "it's an issue that was raised, he has noted the issue and … if the issue ever comes up again then we would deal with it." He reported that he discussed the same issues with M. Vest after the discussion with K. Blankenship but before the May 30, 2008 consent order survey date for the Brunswick plant. He testified that he was walking in the facility with M. Vest during her visit to the Brunswick facility and they went to the area of the lab where the unsellable board was accumulated, at that point he discussed his conversation with the Brunswick plant manager, the Complainant and K. Blankenship. He reported that M. Vest opined that the wallboard should be placed on the Brunswick survey pile. He reported that the outside wallboard was not included in the May 30, 2008 survey and was disposed of in a landfill shortly before the three-year environmental audit by GP in October 2008. The cost of disposal in the landfill was $22.00 per ton tipping fee, $13.10 per ton trucking fee, and a $14.00 per month forklift fee. He testified that he did not file a Guideline complaint over the wallboard not being counted as waste for the survey because he didn't want to get fired.

Mr. Wimberly testified that he was trained in environmental matters by the Complainant and considered the Complainant to be a person who stood up to be heard when he saw something he did not thing was right. He had occasion to rate the Complainant's performance for GP and considered his performance as exceeding expectations.

Mr. Wimberly testified that he drafted two letters concerning the May 30, 2008 milestone. The first notified EPD that the Brunswick plant was approximately 3,000 ton of material over the May 30, 2008 milestone and the second was done after material was removed from the survey pile and a second third-party survey was completed showing the milestone was met. Neither letter included the reject board stored separately from the survey pile. He did not mention the stored board in the certification letter because he was not going to challenge the Brunswick plant manager's decision.

On cross-examination, Mr. Wimberly testified that GP expected him to do truthful reporting to the government and that he never had GP permission to submit what he thought was a false report to the government. He reported that his last day of work before being laid off was January 16, 2009, and later submitted a resignation so that he could withdraw funds from his 401(k). He later learned that management that hadn't resigned could get severance pay.

Mr. Wimberly testified that he never made a false report to the government while working for GP and never told GP that he had submitted anything he considered to be false. He reported that he was called up to assist at the Savannah plant during the fall of 2008 with daily walkarounds, using the hand scanner and things of that nature. He interacted with auditors as the environmental coordinator during the October 2008 environmental audit of the Brunswick plant.

On re-direct examination, Mr. Wimberly testified that when he submitted a consent order survey report to his plant manager he was reporting that the survey results indicated whether the milestone was met. He understood from his plant manager and K. Blankenship that outside reject stacked wallboard would not be moved to the survey piles. He reported that the outside reject wallboard was removed to a landfill within 30 days before the October 2008 environmental audit.

On re-cross examination, Mr. Wimberly testified that the October 2008 environmental audit was an internal GP audit by his peers. He reported that he would not contact internal auditors about a concern without first contacting his plant manager.

f. Testimony of Harlow Dodge (TR 380-396)

Mr. H. Dodge testified that in 2008 he was the Regional Operational Manager for GP and is currently the Operating Vice President for the Gypsum Group. He reported that he was involved in the consent order negotiations in 2006 for the Savannah plant and that GP created a $5.2 million reserve at the corporate level to meet the financial obligations of the consent order. In setting up the reserve under GP GAAP protocol, GP typically looks at the worst case scenario, which included $30.00 to $40.00 per ton charges to haul all the waste to a landfill. It is better to keep material out of a landfill if it has a beneficial reuse.

On cross examination, Mr. Dodge testified that GP has actually spent more than the reserved $5.2 million in complying with the consent order for the Savannah plant. In 2008 it would have been the Complainant's responsibility to keep GP in compliance with the 2006 consent agreement. It was his understanding that the Complainant authorized removal of waste from the Savannah plant. He reported that if waste was shipped to the landfill, there would be an

automatic move of the cost from the reserve fund to an actual expense on the profit & loss statement. He reported his understanding from cleanup e-mails he examined that the Complainant "was the one that actually set up the surveys and then look at it and make sure we wouldn't miss a milestone. And he would send an e-mail to management saying, hey we need to send this much more to the landfill to make sure we hit our milestone." The Complainant's "job was to keep us in compliance with the consent agreement." He testified to his understanding that the Complainant "had the authorization to take the material from the site to the landfill" and the accounting transaction from reserve fund to actual expense was a seamless process when the expense occurs. He stated he could not speak for the Savannah plant as to whether the Complainant could personally authorize the expenditure. He reported "decision making rights" involves to what extend a person has responsibility and accountability. He did not know if the Complainant had decision making rights. Decision makers do not have individual budgets.

Mr. Dodge testified that he took part in negotiating the 2006 consent agreement for the Savannah plant with D. Lyle present. He stated "the consent agreement said that the entire pile in the back, whether its screened or not screened, should operate under the consent agreement, and that's what we resolved." He recalled D. Lyle for EPD telling that any reject material in the back yard that was not used in accordance with the 60/90 rule was solid waste. He testified that the Complainant "was responsible to make sure the material was hauled to the landfill or sold to the beneficial reuse. [The Complainant] was to keep us in compliance with the ACL." He was unaware whether the Complainant had the authority to spend money on his own at the Savannah plant or if he had to go up his supervisory chain for sending approval.

Mr. Dodge testified that he was involved with the Complainant in negotiating the 2006 consent order for the Savannah plant and the consent order for the Brunswick plant. "At Brunswick and at Savannah, we handled the material the same way; if there was a beneficial reuse … a product that goes and is sold to our customers … if [material] could be used for risers, then that wouldn't be a waste … we manufacture riser food in all of our facilities to meet customer demands, it goes with our product. … when a customer puts in an order, we have so many risers that have to go with that associated board, so the material is a beneficial product that goes with our products. … sometimes … when a plant runs out of materials, … we'll sell finished risers and/or we'll ship product, the off-spec product [from plant to plant]." Hundreds of thousands of feet of manufactured risers are sold each year to some customers for things like closet liners.

On redirect examination, Mr. Dodge testified that the $5.2 million reserve fund was reevaluated and augmented at the corporate level as needed to cover the local plant spending. He reported that the discussion about reject wallboard during the 2006 consent order discussions involved that board that had been ground up at that point.

g. Testimony of Michael Dunnermann (TR 397-431)

Mr. M. Dunnermann testified that he began work at the Savannah plant in 2006 as a mill resource where he managed the production of stucco for the drywall plants, Line 1 and Line 2 as well as ordering rock and taking care of the yard. In August of 2008 he took over responsibility as the environmental resource for the Savannah plant. For yard management he would basically keep paths in the yard clear for loaders and trucks.

Mr. Dunnermann testified that during production startup or shutdown or other condition, "board that couldn't even make it to the dryer was rejected into the knife bunkers" as wet waste an moved by the machine to bunkers. A loader operator would move the wet waste from the bunkers to the reclaim pile. If the burners failed on the dryer, the board that came out of the dryer would be wet and crumbly and not suitable for sale or use as riser food. He reported riser food is unsellable wallboard that is cut into sections and glued together in 4 foot wide strips to about 3 to 4 inches in size to be used as spacers between bundles of finished goods. If unsellable wallboard failed to have starch it could not be used as riser food and "would be rejected and put on the recycle pile" by forklift operators in 3 to 5 days, depending on weather and schedules.

Mr. Dunnermann testified that material designated as riser food was stored inside the Savannah plant until the plant ran out of storage room because of wallboard production by two operating lines. In 2008 riser food material was stored outside the warehouse door in covered stacks to protect against the weather. The DENS wallboard is water-resistant material and did not have to be protected. He stated that the material in CX 18 photograph could have been material waiting to be transported to the recycle pile. He reported that employees would go to the riser food stack to pull out 5/8 inch DENS material for use in manufacturing risers because they could make riser cubes faster than using thinner ½ or 3/8 inch thick board. He reported that the outside stored material would become unusable as riser food "if the wind or weather blew bags off and it happened to be ToughRock" which would sag as it picked up moisture. He stated that when the outside stacked material became unusable, production employees would be notified to move the material to the bunker or edge of the pavement so yard employees could move it to the reclaim pile. He considered the process of moving material to the reclaim pile as "an ongoing process of in and out."

Mr. Dunnermann testified that prior to the third-party survey, the reclaim pile would be "shaped" by yard employees driving machinery over the pile to make it firm it and make it safe for the surveyor to walk upon. He stated the production employees would be notified to "get everything out of the warehouse and make room because during the two or three days prior to the survey, we didn't want any fresh board going out there and just to have more work." The wet waste coming out still went to the pile "because it could simply be pushed in."

Mr. Dunnermann testified that he did not recall the Complainant telling him that board was being improperly withheld from the reclaim pile leading up to consent order surveys or that riser food stored outside the plant should have been included in the consent order survey. He testified that he was never told by D. Neal not to include riser food in a consent order survey.

Mr. Dunnermann testified that CX 32 was a series of e-mails that identified two major cull events involving wallboard produced without starch and reverse mat, where paper may not bound to the wallboard and is unsellable and might be staged outside before it is moved to the reclaim pile. The e-mail mentioned hazardous condition which could mean some of the board began sagging from the weather exposure and the stack pile was beginning to lean. The e-mail from D. Neal was directing that any useable board coming out of the plant had to be bagged to be stored and they were out of bags and the material could not be used as riser food it was to go to the reclaim pile immediately. This procedure was not a change and was what was supposed to be happening.

Mr. Dunnermann testified that he became the Savannah plant environmental resource in August 2008 and participated in an August 2008 meeting with EPD to discuss the storage of wallboard outside and why it was being done. The EPD folk were taken around the plant, shown the outside stacked material, shown the riser machine area and shown the tight area where the warehouse was full. D. Lyle was one of the EPD individuals and appeared to be seeing the riser machine process for the first time. D. Lyle appeared to understand the process and was leaning to a designated outside area to store riser food material, "60/90 [rule] was riding on the fence at that time in his thoughts because he could understand why we needed the material." There was no fines or penalties imposed on the Savannah plant due to the handling of riser food.

Mr. Dunnermann testified that GP had a policy in government interactions that "states that any letter that's going to a federal [or state] agency has got to go through the initial writing, then the document id reviewed by your regional environmental resource, then it goes to your corporate environmental manager, and if it's going to the government, then it goes to our legal department." The GP code of conduct demands truthfulness to government agencies. He stated if his immediate supervisor wanted him to prepare a letter to a government agency that misrepresented an environmental compliance issue he would "put my concern in the letter, because that's where it starts." He reported that "the supervisor wouldn't see the letter until it ran up through the regional, corporate, and then legal department." If there was just a disagreement between he and his supervisor, he would gather enough facts and data and bring up the issue with his resources and elevate the issue to those above him.

On cross-examination, Mr. Dunnermann testified that riser food material was also stored outside at a Las Vegas facility, Blue Rapids facility and Brunswick facility. He stated he would have been in agreement to store riser food material outside but that the decision or recommendation would have come from the production superintendent. He stated he had the authority to shape the survey pile to make it safe and easier to survey. He testified that material inside the plant and that stored outside that could not be used as riser food would be moved to the reclaim pile before the third-party survey.

Mr. Dunnermann identified CX 43 at P8, as his July 10, 2008 e-mail to remove 20,000 tons of material from the survey pile "at a study rate of $20.00 per ton and 20,000 [tons] at the landfill rate of $30.00 per ton" which would take $1,000,000.00 to meet the December 30, 2008 consent order milestone. He reported that CX 32 indication that the Savannah plant was getting low on riser food on July 16, 2008, which he believed referred to riser food stored inside the plant. He explained the D. Neal had directed that all riser food stored outside was to be bagged. Mr. Dunnermann testified that he presented D. Neal with the results of the June 30, 2008 third-party survey.

Mr. Dunnermann testified that some wallboard that could not be used as riser food would be stored in the warehouse and be identified in a major cull event and then moved out of the warehouse and onto the reclaim pile.

On re-direct examination, Mr. Dunnermann testified that he believed that if bags were blown off, or not put on, wallboard stacked outside it could not be used as riser food material. He stated that his July 10, 2008 e-mail on the cost of removing waste material was based on the size of the

pile in the June 30, 2008 survey and the amount of the reclaim pile that had to be removed to meet the consent order milestone for December 30, 2008. The estimated removal amount did not include material that would be placed on the pile during the period to December 30, 2008, including that from the outside stacks of wallboard.

On re-cross examination, Mr. Dunnermann testified that outside stacked wallboard was used as riser food and moved back inside the plant.

h. Testimony of Kenneth Blankenship (TR 431-470)

Mr. K. Blankenship testified that he has been employed by GP since 1991, was the Business Unit Environmental Manager for Gypsum in 2008 and is currently the Regional Environmental Manager. He reported working with the Complainant on a frequent basis in a "dotted-line" relationship and not a direct reporting relationship. In 2008, M. Vest was not a dotted-line resource but one of GP's field engineers who provided technical support to a group of facilities across various business unit lines. He stated that in 2008 his responsibilities included keeping up and managing environmental business such as providing guidance to plants, keeping track of metrics, and making sure GP was addressing incidents. He was familiar with the 2006 consent agreement for the Savannah plant and was familiar with riser food.

Mr. Blankenship testified that he discussed the outside storage of stacked wallboard at the Savannah plant in the spring of 2008 and that there was a telephone call with the Complainant and W. Wimberly discussing the stacking of material outside. The discussion involved the application of the 60/90 rule to all outside stacked wallboard, not just riser food. At that time his belief was "that riser food was not subject to the 60/90 rule, and that's because it was, in my opinion, not a recovered material as defined by the [Georgia] rules." He stated telling the Complainant and W. Wimberly that riser food stored outside was not a regulatory issue and believed that they agreed with his opinion and did not indicate it was a big deal issue. Had they disagreed they could have escalated the concern to the GP legal department or other subject matter expert. The Complainant would have a challenge right even if D. Neal and he were telling the Complainant the same thing and the Complainant disagreed. He testified that if the Complainant "feels strongly that it's a compliance issue, I would say it's not just a right but more of an obligation to go ahead and run that to ground and take it up the ladder … because our governing principles include what we call '10,000 percent compliance' and that's where we strive for compliance 100 percent of the time and if there's a belief that we're out of compliance, expectation is that we will focus on getting the right answer [in] achieving compliance."

Mr. Blankenship testified that he did not tell the Complainant not to include riser food in the consent order survey; did not tell the Complainant he should not prepare a consent order certification letter which referenced riser food; and did not discourage the Complainant from discussing the 60/90 rule or consent order with other GP personnel. He identified RX 20 as an e-mail from the Complainant telling him that the June 30, 2008 consent order milestone had been met. The Complainant did not say anything to him that would indicate that the Savannah plant was not in full compliance with the consent order. He stated that if the Complainant believed the June 30, 2008 survey didn't really indicate full compliance with the 2006 consent order the Complainant had an obligation to make him aware of that belief. He testified that the GP

government interaction standard policy would have required the Complainant raise his thoughts that the report to the government "was not accurate, not complete, or in someway untrue, it would have been [the Complainant's] obligation to raise that to someone instead of just saying, hey, we met the milestone … If [the Complainant] believes that he and [the Complainant's] supervisor strongly disagree with him on that issue, [he should not prepare the certification letter] he should have elevated it to the next level which could be my supervisor or it could be our legal department."

Mr. Blankenship testified that he did not participate in the decision to terminate the Complainant's employment with GP.

On cross-examination, Mr. Blankenship testified that in prior performance reviews of the Complainant he reported the Complainant met or exceeded expectations, was an A player deserving of a merit increase, and strived to achieve GP guidance principal of 10,000 percent compliance. He reported that the GP Guideline procedure was one way to raise concerns and that he would not have a problem with the Complainant using Guideline procedures but "would have a problem with him reporting only to the Guideline and not reporting it up through me and Mr. Neal." He stated that the Complainant had expressed his belief outdoor stored wallboard should be included under the consent order and that he advised the Complainant of his opinion on what the consent order required GP to do, which was inconsistent with the Complainant's belief. He stated that his opinion "that material stored outside is not waste subject to the consent order, nor was it subject to the 60/90 rule" has not changed. He testified that the determination of what piles get surveyed by third-party surveyors is a local plant operational or environmental determination.

Mr. Blankenship testified that during his deposition he recalled discussing outdoor storage of wallboard in a three-way conference call with the Complainant and W. Wimberly; but could not recall the specifics of the conversation. He reported that he was interviewed by two individuals conducting a Guideline investigation involving the Complainant but that no one discussed with him either the Complainant's work suspension or employment termination.

Mr. Blankenship testified that the information he had received up to July 15, 2008 "led me to believe that we met our compliance obligations and it was good to go." That information included "the data supporting the survey, the calculations, and the cover letter showing that we met the consent order deadline." At that time he considered the letter a truthful and accurate record to the government to which "no objections were raised when it was submitted and circulated for review." He again stated that "I believe the material stored outside was not subject to the consent order." He testified that there was one missing piece of information that would have made him have a different opinion of the certification letter and that was "an objection raised by the person who prepared it and said it was in compliance."

Mr. Blankenship testified that the Complainant could raise his concerns about outside stored wallboard to D. Neal, himself, M. Vest, the legal department, and through the Guideline procedures. Each of the individual would have a duty to reach resolution on compliance concerns. He stated he assumed the issue of outside stored wallboard being subject to the consent order was a closed issue with the Complainant and W. Wimberly when he gave them his

opinion and "that they agreed with my opinion" so that he did not feel it was an issue to be reported up the chain.

Mr. Blankenship testified that the plant manager, D. Neal at the time, was responsible to certify compliance with the consent order to the Georgia EPD. He explained the 60/90 rule as "speculative accumulation" applied to recovered materials from the waste stream and those materials have to be recycled 60% over 90 days to be exempt from the rules of solid waste or they would be considered as solid waste. He stated that as of the date of hearing, "if reject wallboard is not used 60 percent in 90 days, then I would say, yes it could be subject to the 60/90 rule" based on a Georgia EPD interpretation given to GP after the Complainant's employment had been terminated. He again stated that his opinion was that the outdoor stored wallboard was not subject to the 60/90 rule because they were a useable product.

On examination by this Administrative Law Judge, Mr. Blankenship testified that in the spring of 2008 the outdoor stacked material included riser food and other material such as off-spec material that could be picked trough and made into saleable boards and moved out, though he did not know the ultimate disposition of that type board. He stated that he was with EPD in 2006 when the piles then existing outside were designated as subject to the 2006 consent order. He indicated that the outside stacked material created in March 2008 was the material the Complainant expressed concern about. He testified that because the draft certification letter of July 7, 2008 "clearly demonstrated we were in compliance and we met our goals, it would not have gone to legal. If we had failed to meet any condition of the consent order it would have been elevated. It would have gone to legal." He stated that had the July 7, 2008 letter contained language that there was an amount of uncovered material in the outside yard and that 60% of that should be counted under the 60/90 rule and if that was done the plant would be out of compliance with the 2006 consent order by an identified amount, the letter "would have been elevated to our legal department, as well, because that would have been non-compliance with the consent order" and calls would have been jointly made to the Complainant and plant management. He would have indicated his opinion in an endorsement if he had received and sent such a letter to the legal department, but he "would not have been the final source who could approve that letter going in because that concern was there." He stated that if the plant identified material as solid waste, he expected that it would have been subject to survey and the 2006 consent order.

On re-cross examination, Mr. Blankenship testified his opinion in July 2008 was that outdoor stored riser food material was not subject to the 2006 consent order.

i. July 15, 2010, Deposition Testimony of Kenneth Blankenship (CX 43)

Mr. K. Blankenship testified in deposition that T. Durkin notified him in 2008 that the Complainant had made a Guideline call and that he would be receiving a call from the counsel investigating the complaint. Subsequently he was asked questions by investigators over the telephone. He did not recall the questions asked. He indicated that his duties as Regional Environmental Manager for GP Gypsum since 2010 was to provide environmental support and guidance to selected facilities within the region and to perform other duties as assigned by his manager. He stated his duties as Business Environmental Manager for the gypsum business

from 2006 through 2009 were similar since the move to Regional level was a lateral move during reorganization. While the Business Environmental Manager four persons directly reported to him including M. Vest. The Complainant did not report directly to him nor did he have supervisory authority over the Complainant. He did have "dotted-line" reporting from the Complainant which means he would generally provide guidance, mentoring and assistance to the Complainant. The Complainant reported to the Savannah plant manager. He did not evaluate the Complainant directly but had provided input to Complainant's supervisor as part of GP's 360 evaluation process.

Mr. Blankenship testified he has known the Complainant since 2002 as a professional acquaintance. As Business Environmental Manager he talked with the Complainant and visited the Savannah plant as needed. He reported the Complainant's strengths as being detail and system oriented, work with permit management in an access database, and compliance project work. Observed weaknesses involved difficulty in communicating points to get others to do what was asked and occasional gaps in technical issues on what rules and regulations actually called for and getting proper interpretations. He testified that the Complainant "will grab onto a piece of information, make a determination it's either right or wrong, and not fully understand or include other body of information associated with a regulation, such as a preamble, such as interpretations that you'll find on Web sites, … the Applicability Determination Index, and things like that. He makes a decision, that's it, black and white, we're either in compliance or out, without understanding the full intent and requirements associated with that regulation."

Mr. Blankenship testified that within his duties he reviewed and commented upon draft letters regarding compliance with consent orders. He reported meeting with D. Lyle of Georgia EPD after the Complainant was terminated. The topic was the storage of off-spec material outside buildings at the Savannah facility and the difference between usable product and waste. EPD view was material stored outside that was waste was subject to the 60/90 rule. His position was that reject wallboard stored outside the building was usable product. The reject wallboard stored inside the plant and outside the building was viewed by EPD. He explained his understanding of the November 21, 2006 consent order applied to the Savannah plant and noted as an environmental resource he would answer questions and review issues involving compliance with the consent order. The plant manager would certify compliance with the consent order. He reported that the reject material pile included old accumulated crushed paper and fiberglass faced wallboard material and wet waste which had no useful purpose. He stated that all of the piles of waste wallboard material were under the consent order. There was wallboard stored inside and outside the plant that was for reuse or recovery and was not waste.

Mr. Blankenship testified that the 60/90 rule only applied to the plants in Georgia and involved the use of waste material. He stated riser food is a term used in the industry that refers to dunnage used to make pieces of wallboard used to separate lifts of finished wallboard. He believes that riser food is part of the process materials and not subject to the 60/90 rule as a recovered material. He reported that the EPD position on the application of the 60/90 rule to riser food was in a letter D. Lyle provided after his meeting with him at the Savannah plant. He stated his opinion that if reclaimed material does not pass the 60/90 rule test it is considered "accumulated speculatively." For riser food to be considered "accumulated speculatively" it would have to be reclaimed material that doesn't pass the 60/90 test. If riser food is "a useable

product, there's no way it's considered a reclaimable material, because it's a product." He added that reject material is that material that is not usable for any purpose and riser food is not reject material under solid waste rules because it is usable in the manufacture of risers. He reported that he does not consider himself an expert on Georgia Solid Waste Rules at the time of the deposition.

Mr. Blankenship testified that the Complainant consulted with him in April 2008 regarding the outside storage of material, not specifically the treatment of riser food. He provided the Complainant with his opinion that the outdoor stored reject wallboard was not subject to the consent order. He did not give the Complainant any instructions regarding the outside stored material. He did not recall discussing the same topic with the Complainant and W. Wimberly on a conference call. He testified that he has "never instructed anyone to look the other way and disregard an environmental compliance issue." He stated he was not a "process guy" and believed that "reject product which was set outside could have been off-spec for various reasons, blemishes, cracks, or whatever, and a single board in a stack may cause it to be set outside, and literally, I believe that some of that material could be brought in as saleable product." He reported being unaware that the Complainant had a specific issue with riser food and the way it was reported until after the Complainant was terminated and he was asked by D. Neal to be involved with EPD in addressing the issue of outside stacked material. EPD provided their interpretation letter after the meetings at the Savannah plant.

Mr. Blankenship testified that "10,000 percent compliance" is a company term meaning 110 % of the employees striving for 100% compliance 100% of the time. He indicated his belief that the Complainant strived for 10,000 percent compliance to the best of his abilities. The Complainant spear-headed a hand-scanner project at the Savannah plant which resulted in an environmental award offered every two years by GP in four categories. He became aware that the Complainant's employment was terminated but he did not give any input related to the termination.

Mr. Blankenship testified that it is very expensive to dispose of material at a landfill but that it is more important to comply with the consent order so that "cost is irrelevant when it comes to compliance." He identified a copy of the July 15, 2008 certification letter signed by D. Neal and reported he did not recall any controversy regarding the facts or statements indicated in the certification letter at the time it was submitted. When he received the letter the assumption was that it was accurate and it appeared to be consistent with the attached survey information of the reclaim piles. The survey team surveys plant piles, reports the remaining volume in the piles and the plant determines if it is compliance with the consent order. He testified that no one disagreed or expressed any disagreement with the contents of the certification letter "and it's my belief that [the Complainant] did not [disagree with the letter contents] at the time it was submitted, or we would have elevated it to the appropriate legal authority internal within GP."

Mr. Blankenship examined the March 26, 2008 picture of outside stacked wallboard (CX 18, page 1) and testified that there was a substantial volume of outside stacked material during his walk-through at the Savannah plant with some, if not most, covered to some degree. He stated that he did not know the condition of the boards but that if it's usable board it is not subject to the 60/90 rule. The stacked wallboard was not treated as waste and had not been collected for

inclusion in the consent order survey material. He stated that if the outside stacked wallboard "was not considered a reclaim material [that] is potentially subject to the 60/90 rule, the volume is irrelevant. … The 60/90 rule should be irrelevant when determining what a material is [such as product]." He testified that "there are two tests on the 60/90 rule. It must first be considered a reclaimed material and that material … has to pass that threshold of 60/90. If you don't meet the 60/90, that reclaimed, recovered, material … is then considered speculatively accumulated. A product is not a reclaim material. A material that is waste or inherently waste-like, or something like that, may be considered reclaim material. … Only recovered materials have to meet the 60/90 rule. … Riser food or product, usable product, may not be [recovered material]."

Mr. Blankenship testified that waste disposal costs in a landfill are $20.00 to $30.00 per ton of waste. If the material is "product being either sold or used for some other purpose … the only cost is transportation to the customer." He reported that after the July 31, 2008 e-mail related to treatment of riser food, there was a subsequent meeting with EPD "to get either their concurrence or understanding on … how we should handle riser food or … product stored outdoors as it relates to the consent order." He stated he did not recall discussing the Complainant's concerns about outdoor stacked material with M. Vest.

Mr. Blankenship identified CX 40 and testified that he participated in editing the letter and may have prepared the draft. He stated that when the production line is used to specifically produce riser food it is called a dunnage run. It is his belief that riser food is a product and is not a recovered material as defined by the Georgia Solid Waste regulations. He stated that excessive quantities of any product may eventually become waste, which could include riser food; but that he is unaware of how to determine what constitutes excessive quantities. He identified CX 39 as EPD letter to then plant manager A. Stefanoni and that receipt of the October 9, 2008 letter was "our first official interpretation from Georgia EPD in writing regarding expectations for managing riser food as a recovered material." He reported the letter does not relate or point back to the consent order, other than riser food exceeding the 90 day period would be included in the semi-annual surveys. The October 2008 EPD letter did 'not say that the riser food must be managed under the consent order or in surveys. It says it must be managed if it exceeds the 90-day limits [as] recovered material." He stated that the riser food material goes under the consent order if it fails the test respective to accumulation and doesn't meet the 60/90-day criteria and is moved as waste to the reclaim pile that is subject to the consent order.

Mr. Blankenship testified that raised the issue of outside stored wallboard sometime in the spring of 2008 and that it would be the Complainant's decision to make calculations that rejected wallboard stored outside exceeded the 90-day accumulation limit and raise the issue if he believed it was to be moved to the survey piles consistent with the view expressed in the October 2008 EPD letter.

Mr. Blankenship identified CX 41 and testified his understanding of the November 12, 2008 letter to EPD as indicating that the Savannah plant "will remove the riser feedstock by December 1st, 2008, and will manage it appropriately and store it indoors and will not consider it a waste." He indicated the survey waste pile could be reduced in volume by direct disposal to a landfill, use as alternative daily cover, use as a land amendment, or other internal recycling back into product.

On cross-examination, Mr. Blankenship testified that the Complainant had unlimited access to subject-matter experts and internal environmental lawyers if the Complainant was not satisfied with a provided opinion on environmental issues. If the Complainant was unhappy with the determination that was made or believed he was receiving guidance contrary to rules or whatever, the Complainant would have had an obligation to immediately report it and elevate it up to a high enough level, it's the corporate challenge system. If the Complainant was not satisfied with the opinion in the spring of 2008, June or July of 2008, he would have had the ability to go to another source to get another opinion within GP.

On re-direct examination, Mr. Blankenship testified that M. Vest was an environmental resource for the Complainant in 2008 and if he was not satisfied with her opinion he could still use the other available resources, i.e.: corporate expertise, legal or technical, and the Guideline. A plant manager is not an environmental professional.

j. Testimony of Bridget Hawkins (TR 471-490)

Ms. B. Hawkins testified that in 2008 she was the Manager of Affirmative Action and Compliance in GP corporate EEO department and is currently the Division Human Resource Manager with activities related to payroll, benefits, organizational changes and compensation. In 2008 her duties involved the affirmative action program and planning, responding to state and federal charges of discrimination, managing internal complaints, violations of the GP code of conduct, and creating and interpreting corporate human resource policy. About 20 percent of her time involved normal Guideline complaint investigations involving typical human resource-type complainants. She reported she had no training related to environmental compliance, OSHA or solid waste issues and had never conducted an investigation involving environmental compliance issues.

Ms. Hawkins testified that she received the Guideline complaint from her manager and was partnered with B. Briggs to investigate the allegations filed by the Complainant. She and B. Briggs discussed the "over 35 different types of allegations" and put together a bullet list of questions to cover, what witnesses to question and the order of the investigation. It was her first time working with B. Briggs.

Ms. Hawkins testified that she called the Complainant to advise him she would travel to the plant to conduct an investigation and to arrange a schedule. She received a quick call from the Complainant on July 15, 2008 "asking my opinion about how to handle a certification that he was in the process of preparing." There was no discussion in the phone call regarding what the certification was about. The call was more a general question of "I've got the certification that I'm preparing so how do I handle this in light of the impending investigation?" She stated her response to the call was "don't worry about the investigation, don't let it stop you from doing anything differently, just kind of go about your normal work activities as you would." She denied telling the Complainant to go ahead and submit the certification letter. She testified that "there wasn't any indication from [the Complainant] on that phone call that anything that he said during that phone discussion had anything related , was related, to the complaint at all." She identified RX 29 as the Guideline compliant made by the Complainant.

On cross-examination, Ms. Hawkins testified that before she and B. Briggs went onsite for investigation they had identified subject matter experts to assist in areas for which they were not subject matter experts. She indicated that the July 15, 2008 telephone call from the Complainant "was just a general question about how [the Complainant] should handle [his] work activities until [the investigators] come onsite to conduct the investigation." She did not "share the phone call with anyone above me because I didn't see a need to." She reported the Complainant sent an August 2, 2008 e-mail indicating he had a phone conversation with her regarding a certification "that was the first time there was any indication about that." She stated her first interview with the Complainant was August 21 or 22, 2008. During her interview of the Complainant, "he talked about the surveyor and the 60/90 day rule and how he believed that the unused board may apply to that rule" and was concerned about retaliation, such as losing his job. She was not consulted by R. Wolfe before the Complainant was suspended or by T. Durkin before the Complainant was terminated.

Ms. Hawkins testified that she and B. Briggs were unable to complete the onsite investigation together of all the identified witnesses, and that before the investigation returned to the plant she left the investigation to deal with another complex complaint that had class implications and several different types of allegations within her area of expertise. Her role in the investigation ceased after going onsite and completing those interviews. She did not file an official report and did not have any role in the determination to suspend or terminated the Complainant's employment.

k. July 16, 2008 Deposition Testimony of Bridget Hawkins (CX 42)

Ms. B. Hawkins testified that her maiden name was Shelton to May 23, 2008. In 2008 she was the manager for reformative action and compliance with GP in Atlanta, Georgia. Her responsibilities included the company's affirmative action programs; managing federal, state and internal complaints of discrimination; potential violations of GP's code of conduct; and HR policy. She has done "a thousand plus" investigations with GP.

Ms. Hawkins testified that employees can communicate complaints to their supervisor, the manager of the facility, the HR manager of the facility, the HR manager at the regional or corporate level for their business division, the GP Guideline, and e-mail to the compliance and ethics department. The most common method is through the Guideline at approximately 60% of complaints filed. Regardless of the method used, employees can remain anonymous and they shouldn't fear retaliation as a result of bringing forth a complaint in good faith. Guideline complaint are received by an external, non-GP vendor, the intake information is forwarded to GP compliance and ethics department for determination of which relevant department should handle the complaint based on the matters involved, such as EEO, harassment, disability, and FMLA matters go to EEO department.

Ms. Hawkins testified that she viewed the Complainant's Guideline letter within a few days of its submission in July 2008. She was to investigate all the allegations set forth in the Complainant's Guideline letter as "investigative lead" with outside attorney B. Briggs as an additional investigator, which was not unusual. She met with her supervisor and they broke the allegations into different areas, such as relative to safety, environmental and HR, and to identify subject

matter experts to "be available for questions I'm not familiar with." She then contacted the Complainant to schedule an on-site interview at the Savannah plant. She visited the Savannah plant within two weeks of the Guideline complaint and spoke with the Complainant, D. Neal, M. Rogers, C. Holmes and R. Williams. She reported that D. Neal had a copy of the Guideline letter by the time she was on-site for the initial interviews. She did not consult with the environmental expert on whether riser food should be included in the survey for the consent order. She stated that the Complainant was cooperative during the investigation and expressed concern that he may be retaliated against for submitting a complaint.

Ms. Hawkins testified she remembered the telephone call from Complainant in mid-July 2008 regarding his need to submit a compliance letter to D. Neal for signature and certification. She stated the Complainant called her and advised "he was in the middle of preparing some type of certification that needed to be submitted and he wanted to know if he should submit it or not in light of the pending investigation. … What I advised [the Complainant] was to just proceed with whatever the normal process is for managing those type of certifications." She did not consult with an environmental expert or recall the Complainant discussing movement of riser food material to the reclaim pile. She stated she thought the Complainant called her in mid-July because "he was trying to determine what the process was like for the investigation and whether or not he should move forward with business as is or if he needed to change anything." She was aware the Complainant was suspended August 1, 2008. She reported that after the initial site visit interviews, she was no longer involved in the investigation because her presence was needed for "another issue that arose at another facility" involving the federal EEOC coming on-site at that other facility. B. Briggs completed the investigation without consulting with her. She provided a copy of her investigation notes to B. Briggs. She did not consult with B. Briggs after leaving the investigation and did not have any role in the decision to terminate the Complainant's employment.

Ms. Hawkins testified that performance improvement plans (PIP) 'are utilized when areas of improvement have been identified for employees and it's utilized to communicate to them what those areas of improvement are needed and kind of set expectations of how they should kind of change those behaviors" on a case-by-case basis. She indicated PIPs usually provide for a period for the employee to improve or face termination. She stated "careful communications" is a GP term "to encourage employees to … stop and think before they speck or write, to make sure it's appropriate. … you should state the facts."

Ms. Hawkins testified that during her interview of the Complainant, he expressed concerns about retaliation for reporting to the Guideline and the PIP he had discussed earlier with D. Neal. She stated that confidentiality in Guideline complaints is to maintain objectivity of the investigation and limit involvement to those individuals who have relevant information concerning the allegations. She testified that the Guideline letter was sent by e-mail to D. Neal a few days before the initial on-site interviews because the "complaint was out of the ordinary in terms of the length and the amount of detail that was provided in the allegations", they didn't want D. Neal "spending tons of time trying to recollect what had occurred two, three years ago", didn't want to give D. Neal two weeks to think about the allegations, and several of the Guideline complaints were listed in the PIT crew letter the Complainant had previously given to D. Neal. She reported that the Complainant's Guideline letter would be considered complaints of both

environmental-health-safety (EHS) and non-EHS incidents. She stated that the compliance and ethics group would determine the level of severity of the Complainant's allegations; but that level 1s are typically handled locally and level 2 and 3 can be managed locally, divisionally or corporately. She testified that the Complainant's July 30, 2008 e-mail to her would have been after she left the investigation and she did not recall receiving the e-mail or acting upon it.

Ms. Hawkins identified CX 22 as an August 1, 2008 e-mail from the Complainant, discussed the contents of the e-mail with inside counsel T. O'Connor, and denied that the Complainant's statement in paragraph 4 that she told the Complainant "to go ahead and get [D.] Neal to sign the letter and submit it to the State." She testified her "advice to him was to proceed just as he would in any other process, whatever their normal procedures are for managing this, that's what he should do, that's the route he should go, and not wait for the investigation to handle it." She disagreed with the content of the first paragraph on page 2 of CX 22 because standard procedure in an investigation is to tell anybody interviewed to maintain confidentiality and not share what is discussed with others. She testified "I never contacted [the Complainant] to say, 'I'm not going to tell anybody about your complaint,' because you ... just can't conduct a thorough investigation without bringing folks in to interview and ask them questions relative to the complaint." She also disagreed with Complainant's statement that she had sent a copy of the Guideline letter to D. Neal.

Ms. Hawkins testified that she did not draft any portion of B. Briggs' investigation report of the Guideline complaints and had never seen the report until presented to her by Claimant's counsel at the deposition. She was a HR resource expert in the investigation.

l. Testimony of David Neal (TR 491-530)

D. Neal testified that he is currently the Regional Operations Manager for the Gypsum Business and that when he was plant manager for the Savannah plant he was responsible for production and maintenance operations, the safety program, the environmental program and all other activities occurring on the facility. The Complainant was responsible for all aspects of the plant's environmental program and reported directly to the plant manager. He relied upon the Complainant to keep him up to date on compliance issues at the facility. He stated that the fastest way for a manager to lose his job is "not to comply with known compliance standards, rules and regulations."

D. Neal testified that in April 2008 he had a discussion with D. Lyle of EPD concerning the 60/90 rule. Afterwards he talked to the Complainant in the Complainant's office during which he was not angry and did not raise his voice toward the Complainant.

D. Neal testified that the Complainant never told him about doing calculations regarding the volume of outside stacked riser food as related to the consent order, nor did the Complainant present any records or data as to how long any items had been placed in the outside stacked riser food material. He testified that the Complainant did not indicate to him that the outside stacked material should be surveyed.

D. Neal testified that he received the results of the June 30, 2008 survey shortly after it occurred. It was reported to him that the survey indicated the plant had "met the milestone for reduction of the pile." He reported that the Complainant did not report to him the belief that the June 30, 2008 survey was not an accurate reflection of the waste that needed to be surveyed under the consent order. He identified RX 26 as a copy of the July 7, 2008 draft certification letter composed by the Complainant. Based on the draft certification letter he assumed the Savannah plant "was fully compliant with the consent order" and the Complainant did not have any concerns about the consent order requirements being met. There was no indication in the draft certification letter that the survey should be redone.

D. Neal testified that on July 15, 2008 the Complainant came to his office and personally gave him the final certification letter to be signed, he signed the certification letter, placed the letter back into a manila envelope and returned it to the Complainant who took it with him when he left the plant manager's office. He stated that Complainant did not indicate by words or mannerisms that there was any potential falsification in the final certification letter as he waited for it to be signed. He reported that the Complainant did not indicate to him that he would not sign the final certification letter if he were plant manager. He stated the signed certification letter was mailed to the state EPD and he knew when he signed the certification letter that it was going to the government and regarded compliance with the consent order. He testified that he was surprised that the Complainant thought there was a potential violation of the consent order or an actual falsification in the certification letter and that this was disturbing to him. He stated that there was no time during the spring or summer of 2008 that he thought the riser material outside the facility exceeded the 60/90 rule.

D. Neal testified that bagging of material stored outside is to "protect the material so it can be used as intended [and] also to ensure that we designate that the material has an intended use that is vital for the production and sale of our wallboard to the market." If material is unbagged, "it should be inspected to determine whether or not the integrity is still valid for the use intended [and] if not, then it should be taken to the waste pile." If a few boards became wet it did not mean that the entire stack of wallboard had to be discarded, you'd have to examine the stack. He stated the Complainant never told him there was any material in the outside stacks for longer than 90 days and never indicated any particular percentage of material that had been in the outside stack of material longer than 90 days. He reported he "wanted the material that was moved outside for additional storage of riser material to be bagged so that it would not be potentially affected by inclement weather conditions [and] to ensure that the intended use was maintained intact." He reported that weather conditions would sometimes tear bags off the outside stacked material and that sometimes material would be staged in the same area because it was unsafe for yard operators to move the material to other locations, such as the waste pile. He denied material was stored outside to avoid having the material included in any survey.

D. Neal testified that outside stacked wallboard was utilized for the manufacture of risers during the spring and summer of 2008. He reported that he was present for initial trials and tests of using outside stored material for risers and that riser machine operator, D. Anderson, performed the tests. He did not recall any jamming of the riser machine during the tests. He stated that there were "consistent and constant communications with my direct reports [from employees] that were responsible for riser production to say that the material outside needed to be used for

the manufacture of risers." He testified that the Complainant did not have authority to have boards moved from pile to pile but he did have responsibility for designation of material. "If [the Complainant] felt as though material was waste and it needed to be moved, he would have to have good communications with his peers that were responsible for that product." The Complainant would have had to converse with production manager J. Scully and yard/mill manager M. Dunnermann and give his point of view as why material had to be moved as waste. He testified that if any of the three individuals disagreed, then he would expect the disagreement to be escalated to him as plant manager under company policy.

D. Neal testified that during the June 30, 2008 survey there was a waste pile, a pile of material designated for agricultural use by peanut farmers, and the outside stack of riser food material. The waste pile and the agricultural use pile were included in the June 30, 2008 survey.

D. Neal testified that "careful communications" policy at GP where employees are told to "state the truth, we are to ensure we do not give assumptions, and that we are always supposed to involve facts and data-driven decisions." There is an obligation to state points of view and why a document may not be compliant if someone has a concern that a document may be inaccurate. He testified that he "absolutely expect [someone with concerns about the veracity or accuracy of a document] to inform me that the document is not compliant and therefore it should not be drafted. Someone who prepares a document with GP and they have concerns over veracity, "they have an obligation to raise that concern about veracity to those individuals within the corporation who would have the ability to interpret and make a decision on it … if the person we raise it to does not accept that challenge, then we have to raise it to their supervisor."

D. Neal identified RX 21 as a performance improvement plan (PIP) presented to the Complainant on July 2, 2008 to address deficiencies in professional behavior and communication abilities precipitated by complaints from employee-members of the PIT team. During the July 2, 2008 meeting the Complainant provided comment as to why he believed some allegations were false. RX 22 was a written statement from the Complainant received July 4, 2008. D. Neal stated that the Complainant did not express any concern over the June 30, 2008 survey results in the July 2, 2008 meeting or July 4, 2008 written statement. When he returned to the facility after the July 4, 2008 weekend, he was informed the Complainant had made a Guideline complaint to GP in Atlanta, Georgia; that he was not aware of what the Guideline allegations were; and that he decided to not implement the PIP at that time.

D. Neal testified that he received a copy of the Complainant's Guideline letter a few days before the investigators appeared at the Savannah plant for their onsite investigation. He stated he was given a copy of the Guideline letter so that, as plant manager, he could understand the nature of the allegation and the number of allegations in light of the number of employees that would need to be interviewed, including him as facility manager. He reported that he took not steps to try and remedy any issue raised in the Guideline letter.

D. Neal testified that he was not involved in the decision to suspend or terminate the Complainant's employment. He testified that he never directed the Complainant not to include any of the outside stored material in the June 30, 2008 survey.

On cross-examination, D. Neal testified that the Savannah plant did not begin stockpiling riser food material outside until the spring of 2008. He acknowledged meeting with D. Lyle after D. Lyle made a plant inspection in April 2008. He denied that D. Lyle told him that the EPD position was that the outdoor riser food was subject to the 60/90 rule or it would have to be treated as waste. He denied that D. Lyle told him the outside stored riser food was subject to the consent order. He testified that he sought advice from K. Blankenship and legal department on the 60/90 rule and riser food in the spring of 2008, before the June 30, 2008 survey.

D. Neal testified that he was aware that the Complainant "felt that the [outside stored] material should be included in the consent order. He stated he believed the Complainant provided him with the results of the June 30, 2008 survey. He testified that if unbagged material was stored outside "it could be compromised by weather conditions and I was not storing trash outside, we were storing material to be used as risers … if [the material] was compromised, it should be moved to the waste piles." He examined CX 32 and reported that material was being brought out to the area on numerous occasions and cannot say whether the referenced material was present in the area during the June 30, 2008 survey. He explained that the stacks that had been described as hazardous in the July 15, 2008 e-mail had been staged over "the last week" so it had not been there a long time.

D. Neal testified that "the consent order required that the piles were surveyed and that the reductions had to meet certain milestones." He stated he did not modify the June 15, 2008 certification letter to the EPD and did not order a survey to supplement the survey completed on June 30, 2008. He did not notify EPD that he moved material to the waste pile on July 17, 2008.

D. Neal testified that he did not ask the Complainant to withdraw his Guideline letter. He was informed of the Complainant's Guideline letter by R. Wolfe in July 2008. He stated "decision rights are authorities that are granted to an individual based on the responsibility they have." He stated that the Complainant had decision rights and that the Complainant would have had the ability to provide a recommendation if he felt as though the $5.2 million reserve fund needed to be spent on environmental issues at the plant, he could not make a unilateral decision to spend the reserve funds.

On examination by the Administrative Law Judge, D. Neal testified that after he met with D. Lyle in April 2008 and discussed the 60/90 rule, he went to the Complainant's office and stated that they would have to agree to disagree. Shortly thereafter he escalated the question involving the 60/90 rule and stored riser food to K. Blankenship and the legal department. He testified that there was a conference call, close in time following D. Lyle's April 2008 site inspection, with a GP legal department representative, K. Blankenship, the Complainant and himself where legal's response was that the stored riser food was not subject to either the 60/90 rule or the consent order. This position was communicated to the Complainant because he was a participant in the conference call.

On re-direct examination, D. Neal testified that his understanding of the 60/90 rule has developed since April 2008. He stated that he did not notify EPD material was being moved to the waste pile in July 2008 because it was not subject to the consent order at the time. From March 2008 the outside stored riser food stacks fluctuated because "material was being added

and removed as it was consumed by the riser machine and/or as it was moved from the storage or moved outside from the manufacturing line, material came in and went out. He testified that just because material was moved out of the stacks in July 2008 did not mean it should have been included in the June 30, 2008 survey.

D. Neal testified that one of the Complainant's primary responsibilities is to raise environmental compliance issues with him and that he never directed the Complainant to stop raising any particular environmental compliance issues.

D. Neal testified that "if there is a triggering event that occurs which would require a legal interpretation so that we remain compliant, it should be raised again and again and again." He considered the June 30, 2008 and July 15, 2008 certification letter events that would trigger a reevaluation of the 60/90 rule if raised. He stated that had the Complainant given him the July 15, 2008 certification letter to sign with Complainant's commenting that he wouldn't sign mail the certification letter if he were plant manager because he thought there was some potential falsification or even falsification issues, he would not have signed or had mailed the July 15, 2008 certification letter.

On re-cross examination, D. Neal testified that he and the Complainant participated in telephone conferences with GP legal department before the June 30, 2008 survey regarding whether or not riser food was subject to the consent order. He stated that he advised those on the conference call that D. Lyle of EPD thought that the outside stored riser food was subject to the 60/90 rule. He reported his belief "that GP contacted the EPD and said we do not agree that this material is subject to the 60/90 or consent order." He stated that he thought the topic had come up in his deposition and had been told to either investigator B. Hawkins or investigator B. Briggs. He considered the subject an important issue. He did not know if there was a memorandum of the telephone conference calls.

On re-direct examination, D. Neal testified that between March 2008 and July 15, 2008 he had direct personal contact with EPD when D. Lyle during a meeting in April 2008 and "to the best of my recollection, GP did make contact with the EPD after that point to inform them we did not agree that the riser food material was subject to 60/90 or the consent order."

m. August 3, 2010, Deposition Testimony of David Neal (CX 45)

Mr. D. Neal testified by deposition that he began working for GP in 1997as a quality assurance supervisor at a gypsum plant in Texas. He served as the gypsum plant manager in Savannah, Georgia, for two years to October 2009 when he became Regional Operations Manager. While plant manager in Savannah, Georgia, the following people reported to him – A. Stefanoni as #2 plant start-up manager, M. Philips as #1 board plant manager, M. (Ivy) Rogers as human resources, the Complainant as environmental resource, T. Knight as warehouse manager, C. Dockree as #1 board plant resource, and G. Scott and R. Maier as maintenance supervisors.

Mr. Neal testified that the Savannah plant produced paper-face type gypsum wallboard and fiberglass-matted type gypsum wallboard. Upon his arrival as plant manager production line #2 was being brought online in the fall of 2007. Line #2 provided the ability to run production at

faster rates. He stated that production material that could not be sold "was either taken to the reject waste pile or off-spec pile … [and] could be turned into riser food or it could be utilized as recycle in the manufacture of our wallboard." He reported that records of the amounts placed on the waste pile were maintained by the Complainant or M. Dunnermann. Records were also made of material taken from the waste pile and recycled. The records were made daily with cumulative weekly reports and regularly scheduled surveys as part of the consent order. Records were not kept as to what was placed in the staging area for potential use as riser food.

Mr. Neal testified that his plant interactions for environmental issues were primarily the Complainant and M. Dunnermann. He stated the Complainant was the facilities security officer when he arrived and he asked the Complainant to handle safety compliance and be in charge of behavioral-based safety training. Facilities security officer requires a certification from the US Coast Guard.

Mr. Neal testified that Georgia EPD regulates activities at the Savannah plant. If EPD gives instruction with which GP does not agree, "that will require us to engage capabilities within our corporate structure and we will either make a determination off of the data provided by the EPD as to whether we agree with their point of view or disagree. If we disagree, then we provide feedback to the agency as to why [we disagree]. … If the issue came about by notification from the government agency, then we will respond accordingly so that we maintain our compliance with the agency, that means communications." He reported an example of when GP disagreed with an interpretation of EPD involved "an interpretation by [the Complainant] that the off-spec material that was stacked to be used as riser food that was placed outside, was subject to the consent order. … D. Lyle who was our direct contact with the Georgia EPD came to the facility" on one occasion and the Complainant "brought him into my office at which point [D. Lyle] told me his opinion was that the material should be part of a 60/90 rule." He reported his disagreement to D. Lyle and "notified [the Complainant] that he and I had to agree to disagree on the status of that material and, because that was the case, we needed to raise it a level." He stated he raised the issue in the spring of 2008 and both K. Blankenship and GP legal were of the opinion that the material was riser food and not subject to the consent order. He did not directly notify EPD of that internal opinion.

Mr. Neal testified that he was aware of the consent order entered into November 2006 that required the reduction of an accumulation of industrial waste over specific timeframes at specific percentages that increased over the term of the consent order. Proof of reduction was made "to the EPD stating the results of a third-party physical survey of the piles." The letter was written by the Complainant and signed by the plant manager. The results of the surveys were reviewed by him, the Complainant and M. Dunnermann. The Complainant "was responsible for the overall environmental capability at the facility. The consent order was his primary responsibility and he had the responsibility to notify me if we met the milestones and draft the letter for my signature." The Complainant did not sign the letter.

Mr. Neal testified that the plant satisfied the consent order reduction milestones by "recycling the material back into the process, sending material to landfill, and sending material to agriculture. … Off-spec material can be processed and utilized in the manufacture of gypsum drywall" including paper-faced wallboard and fiberglass matted wallboard. He indicated that the plant

tries not to intermix paper-faced product with fiberglass matted product because the paper-faced product is all organic. He stated that recycling off-spec wallboard back into the production process depends on the physical characteristics, product quality specifications, and physical testing parameters of the finished product so recycled wallboard cannot be used as 100% of the finished product. He recalled in incident where the Complainant and M. Dunnermann needed approval for the additional costs of removing waste to the landfill in order to satisfy a consent order milestone. He recalled giving the Complainant and M. Dunnermann permission to send material off site for use by peanut farmers after being provided proof that such action could be done under GP policy and government policy or law.

Mr. Neil testified that he was familiar with the "60/90 rule [which] relates to waste and I believe signifies that if to be reused in a beneficial manner must be consumed at a rate of 60 percent of the total in 90 days. … waste accumulation, it either needed to be disposed of or reused in a beneficial manner according to those guidelines, 60 percent in 90 days." He was aware of the 60/90 rule in June 2008 and it is aimed at limiting the accumulation of waste. He stated that the Savannah plant did not keep records under the 60/90 rule since "the waste piles were under a consent order which was separate from the 60/90 rule."

Mr. Neil testified that there were already stockpiles of reject wallboard intended to be used as riser food when he arrived at the Savannah plant. He stated the stockpiled material was located mainly inside the facility. In the spring of 2008, the Savannah plant began stockpiling riser food outside the facility because the Plant was in the process of starting a new board plant and a significant amount of off-spec material had been accumulated. The plant had to make a dunnage run of wallboard to be used as riser food on occasion prior to the startup of the second board line. He stated that the operators at the plant would use their discretion to identify off-spec wallboard as riser food or material to be placed on the reject/waste pile. He reported there was a riser machine at the Savannah plant when he arrived and that the plant purchased a new riser machine "very close to when I arrived." The warehouse manager would have records on how much riser food board was converted into risers. T. Knight was the warehouse manager upon his arrival and later C. Dockree became warehouse manager.

Mr. Neil testified that he made the decision to store riser food outside "and if stored properly, which we instructed the teams to bag the material so that it was not exposed to rain, it could be used for the purposes of manufacturing risers. … We had a need for space inside the plant; floor space and working areas were becoming congested." He consulted with production manager J. Scully "on what do we have as options to make more space [inside the facility] but maintain the level of riser food that we needed for the operation." Mill and yard resource, M. Dunnermann suggested outside storage of riser food based on his experience as environmental resource for the Las Vegas facility and outside storage.

Mr. Neil testified that it was his opinion that riser food stored outside was not subject to the 60/90 rule and that unbagged wallboard stored outside "was subject to the consent order and it was moved to the waste pile." He stated he did not believe riser food was not subject to the consent order and acknowledged he now knew that EPD believes that outside stacked wallboard "is not subject to the consent order." He stated that the agreement with EPD now provides "that any riser material stored outside that is not used as to that 60/90 rule must be moved over to the

waste pile." He reported that physical limitations and "the ability to protect it for the use intended" restrict the amount of riser food that can be stored at the plant. He indicated that the physical characteristics of off-spec material limits its potential as riser food. Plant operators determine if the material is suitable for riser food. He testified that "one stream of off-spec material is wet waste … accumulated in an area where board is formed yet has not been calcined, does not have defined edges … surfaces front and back or defined ends. That material is rejected from the production line via conveyors and a drop of 25 feet or more. When it hits the ground, its physical integrity is compromised … it cannot be used for riser material. … to be used as riser food [off-spec material that comes out at take-off at wallboard finishing and packaging] must have defined edges, defined surfaces and defined ends, if it does not, if it has been damaged by conveyors or by packaging equipment, it cannot be used as riser food, it has to be taken to the waste pile." He stated riser food material is also stored outside at the Las Vegas facility.

Mr. Neil testified that the Savannah plant failed to achieve a consent order milestone in December 2007, notified EPD, and achieved the required reduction by sending material to the landfill. He had notified his superiors that the milestone had been missed.

Mr. Neil testified that the April 2008 discussion took place in his office with the Complainant present. D. Lyle had stated that he and the Complainant had discussed the riser food material stacked outside and it was his opinion that the material was subject to the 60/90 rule. He thanked D. Lyle and subsequently told the Complainant "I guess we will have to agree to disagree and we need to raise this because I don't believe it should be part of 60/90." The Complainant had agreed with D. Lyle's opinion. He discussed the matter with K. Blankenship and with the GP legal department but does not recall the name of the person in the legal department he talked to during telephone conference calls. He believed the Complainant was a participant in the conference calls. He was aware that someone from GP notified EPD in late spring or early summer that GP did not agree with the opinion that riser food material was subject to 60/90 rule but did not know the identity of the individual.

Mr. Neil testified that prior to the June 30, 2008 consent order survey he asked the Complainant if a pile of gypsum waste to be sold as a soil amendment could be kept out of the survey and the Complainant responded that it had to be included after contact with EPD. He stated that he did not have any interaction with the June 30, 2008, third-party surveyors.

Mr. Neil testified that "the Guideline number is intended for employees to use if they have concerns or issues or ideas or anything that they would like to have vetted with corporate." He had no problem with the Complainant using the Guideline to communicate his concerns and first saw the Complainant's Guideline letter in July 2008 a few days before the on-site investigation. The Guideline letter had been sent to him by e-mail from B. Hawkins because the investigators would be coming to the facility.

Mr. Neil that on several occasions he directed unbagged riser food material be moved "because my initial instruction was no unbagged board is to be stored for riser food outside." J. Scully and the production supervisors were the people told to move the unbagged board. He did not recall if the instruction was given prior to the June 30, 2008 survey, but if unbagged board had been moved before the survey it would have been included in the June 30, 2008 survey.

Mr. Neil testified B. Hawkins and B. Briggs began their investigation at the Savannah plant in July 2008. He met with the investigators and answered questions similar to those presented during the deposition. He reported "I never confronted [the Complainant] about the allegation." He reported that while he and the Complainant were before B. Briggs, B. Briggs advised it was permissible for he and the Complainant to converse. Subsequently he and the Complainant had a conversation in the Complainant's office where the Complainant expressed reservations about the investigation going forward. The next day he initiated a conference call with T. O'Connor and with B. Brigg and the Complainant present, to see what options were available for the Complainant after B. Briggs had stated that the Complainant could stop the investigation. T. O'Connor advised that dropping the investigation was one option. He reported that he was not party to a subsequent conference call involving the Complainant and T. O'Connor but that after the second conference call the Complainant was suspended pending further investigation of matters from the second conference call.

Mr. Neil testified that the decision to suspend the Complainant was made by R. Wolfe as Director of Human Resources for Gypsum based on comments made by the Complainant during the second telephone call with T. O'Connor that may have been untruthful.

Mr. Neil testified that he found out about the Complainant being terminated when he "was called by [R.] Wolfe and told that based on the investigation into the comments that [the Complainant] made and division's point of view that the comments were untrue, that his conduct was not that of which is in line with our guiding principles, and because of my involvement in the investigation, I was told that I was not going to be a part of the actual termination and that I should leave the facility. … the point of view was that [the Complainant] was changing his position towards the status of the consent order milestone" for June 30, 2008, by changing to "the data that was submitted to the Georgia EPD was in fact true, I believe." He discussed the Complainant's termination with the plant human resource, M. Ivy, but did not discuss the reason for the termination. He was notified B. Briggs had completed his interviews and would not be returning to the plant after the Complainant had been terminated. He believed he notified D. Lyle after the Complainant was terminated that M. Dunnermann would now be the plant contact for EPD since the Complainant was no longer with the Savannah plant.

Mr. Neil testified that the purpose of performance improvement plans (PIP) is 'to document deficiencies in performance and as a communications tool provide the individual whose performance is not meeting expectations, specific examples of where their performance is failing and to give them examples of what type of behaviors are expected and a time line in which those expectations are to be met. A performance development plan is developed and produced by the individual person for the sole purposes of understanding what to do well and … [it may] have an action plan with actionable items" to continue doing things done well and improve on issues through feedback from others. All salaried employees at the Savannah plant had performance development plans. As Savannah plant manager he put two individuals on PIPs.

Mr. Neil testified that "10,000 percent compliance" was a GP term where "employees strive to comply with laws and policies 100 percent of the time. He believed the Complainant strove for 10,000 percent compliance.

Mr. Neil identified CX 1 and testified that "stockpiled reject material means to me the reject waste piles out back. … the piles of gypsum waste that we have been referring to. … reject material could include off-spec materials such as riser food." He reported that he understood the term "accumulate" but not "speculatively". He was sure he asked a GP environmental resource what "accumulate speculatively" would mean and that he did not ask EPD about the term. He stated that sometime after the Complainant raised the issue that riser food should be considered part of the consent order. After the Complainant was terminated D. Lyle and his supervisor came on-site "to review the status of riser food material that had been stacked outside." After that meeting "it was determined that the riser food material was not to be considered a part of the consent order unless the material did not meet the 60/90 rule and then any material that was left would then need to be transferred over to the waste pile and counted as waste … as part of the consent order." He reported the Complainant's position had been "that no material could be stacked outside" regardless of the 60/90 rule. He reported that the stacked wallboard had a production date so that boards 90 or more days old could be identified and the 60% usage could be calculated.

Mr. Neil identified CX 18 and testified that the three pictures depicted "the in which we were storing the wallboard for riser food." He reported that if he saw unbagged wallboard stacked outside he ordered the material to be moved to the waste pile because it would be considered waste. He stated "continuously I gave reminders to [J.] Scully, who was the operations manager, and [A.] Stefanoni, who was overall operations manager, e-mails telling them what my instructions were originally [that unbagged outside wallboard was to be placed on the waste pile] and those were to be kept."

Mr. Neil identified CX 15 and testified that he received the June 15, 2008 letter, reviewed the letter, signed the letter and gave the letter back to the Complainant. He did not do an independent investigation of the letter contents because "I take [the Complainant] at his word because he has primary responsibility for the environmental aspects of the facility." The Complainant authored the consent order certification letter but did not sign the letter. He reported that he had no reason to doubt that the letter certifying meeting the June 30, 2008 milestone was correct, accurate and true, even taking EPD's opinion existing on July 15, 2008. He reported that it would not be appropriate to notate the June 15, 2008 letter that "the June 30, 2008 survey was inaccurate because it did not include the riser food" and that he would not sign such a letter unless "corporate, environmental and legal said it was okay."

Mr. Neil reviewed CX 13 at page annotated "CB&S 0239" and testified that the entire second sentence in the Guideline letter paragraph on reject material being stacked inside in order to avoid placing the board on the reclaim pile and thereby included in consent order surveys in order to meet milestones is inaccurate and the statement that the statement that riser food was not being used as riser food was incorrect. He stated that employees actually used outdoor stored material to manufacture risers to demonstrate that the material had the physical integrity to manufacture risers. He reported that the sentence stating the 60/90 rule applied to the outside stacked wallboard was in dispute at the time the Guideline letter was written because GP's position was the board was not a waste. He also did not recall stating that the Complainant was on a development plan.

Mr. Neil testified that he made the determination as plant manager that off-spec material was not treated as waste so long as it could be used beneficially as riser food. He personally told EPD representatives of that position when the representatives visited the Savannah plant in the summer of 2008. He reported it was his decision to move riser food to outside storage when the plant produced more off-spec material than it could store inside the facility due to increased volume of on-spec product in the warehouse. The determination that riser food was not a solid waste because it could be reworked into the production process came out of telephone conference with him, the Complainant, corporate environmental resource and corporate legal before the June 30, 2008 survey. He stated he did not notify EPD of this determination but believed someone in GP did notify EPD. He reported that if riser food was subject to the 60/90 rule, the actual location of the wallboard, outside or inside the facility, would not matter.

Mr. Neil identified CX 40 and testified that the letter was written after meeting with D. Lyle on August 7, 2008 to discuss the regulatory status of riser food. K. Blankenship and M. Dunnermann from GP and D. Lyle and his supervisor from EPD also participated in the August 7, 2008 meeting. Both the outside stacks and inside stacks of riser food were viewed at the time. He stated that the EPD representative acknowledged "a better understanding of the use of the material and that they wanted us to recommend to them an amount that we would store that we would classify as beneficial because we had represented to the that the material can be stored … for extended periods of time and still be useable." He stated that excessive quantities of potential riser food could eventually become waste. He reported that the letters in CX 39 and CX 41 occurred after he had left the Savannah plant.

Mr. Neil testified that the issue of whether riser food material should be counted in the consent order surveys was discussed internally between D. Lyle's April 2008 visit and the June 30, 2008 third-party survey.

n. Testimony of Timothy Durkin (TR 539-621)

Mr. T. Durkin testified that from 2006 through January 2009 he was the Senior Vice-President of Operations and Compliance for GP and that he retired in January 2009 following reorganization within GP. Koch Industries owns GP. As Senior Vice-President of Operations and Compliance, he "was responsible for all the operating plants for the Gypsum and Chemicals Divisions and compliance requirements for any of the laws associated with those operations. He reported that when Koch Industries acquired GP in December 2005, management personnel and supervisors were retrained in principals of integrity and compliance.

Mr. Durkin testified he recommended the Complainant be dismissed following investigation into a Guideline complaint that did not make sense to him initially. The basic allegation was that the Savannah plant was "not in compliance but that the plant manager had ordered a letter that said we were in compliance." There were two meeting involving R. Wolfe, T. O'Connor, general counsel T. Darlan, Head of Corporate Compliance T. Butz, B. Brigg, and other attorneys. "When we did the investigation, it appeared that we were actually in compliance in that the head of compliance [at the Savannah plant] actually drafted a letter and then falsified some information so there's a discrepancy that either the letter was accurate … which meant that the [Guideline] allegation he made was wrong, or that … he wrote a letter that knowing was wrong

… It was against our culture … when you're responsible for something, you don't knowingly lie."

Mr. Durkin testified that after the initial meeting there were questions as to what was actually said and what had actually happened and items that needed to be verified. At the second meeting the verified facts involving the compliance issues were set forth and "we walked through the facts surrounding the circumstances … and it was determined that either the complaint about [D.] Neal was wrong and it was done in bad faith and/or that [the Complainant] … if he really believed the [certification] letter was wrong, he had an obligation to report the letter up that it was wrong and false and we shouldn't have submitted it. … it was an issue of the guy … was either untruthful in his allegation or is untruthful in the [certification] letter. One of them had to be wrong. In both cases, that was the reason for his discharge. That was the reason I recommended the discharge and we couldn't leave him in that role any longer."

Mr. Durkin testified that as "the environmental leader at the plant … [the Complainant] would have been responsible to make sure that all of the environmental rules and regulations were understood as it applied to the plant and we were in compliance with all those rules and regulations. If we weren't, he had the obligation to raise the issues to management to make sure we were in compliance with the rules and regulations." He stated that if the July 2008 certification letter was not accurate, "it's a serious problem … It's [the Complainant's] job and duty to raise that element and raise it to management to understand why aren't we in compliance because … it's our policy to operate all our plants in compliance with the law." He reported "the way the company works, it's a matrix organization… you really have two reporting structures. You can't hide behind a decision that says fine, I told somebody, my obligation is done … if there's something you believe is wrong, you're given multiple avenues to raise the issue in the organization to a level that gets involved properly. … there's no tolerance for inaccuracies or lying to the government."

Mr. Durkin testified that the Complainant's filing of a Guideline complaint had no bearing on the termination decision. "The whole basis for my recommendation to terminate [the Complainant] was because he either lied to his boss in the preparation of the [July 2008 certification] letter which was incorrect, or he lied to us. And so, irrespective, we can't leave someone in that role that operated that way. It's just not part of our culture, it's not allowed, it's not tolerated at all."

On cross-examination, Mr. Durkin testified that at the time he was the ultimate person responsible for the GP Gypsum Group complying with all environmental laws and regulations. He knew the name of D. Lyle coming up when the stockpiles of material at the Savannah and Brunswick plants came up for discussion, "so it probably came up through the consent order process." He indicated that "the first information I received on the issue was, we had a compliance complaint alleging that we had some information that … we had a non-compliance issue and we had a letter that basically said that we were in compliance when we weren't" in regards to a consent order with the Georgia EPD. He stated that the issues were run to ground before the Complainant was terminated.

Mr. Durkin testified he thought that "there's two issues. One, are we in compliance with the consent order … were we accurate in our communication, either to management or to the EPD."

He reported that he did not talk directly with D. Lyle of the EPD but did talk directly with Savannah plant manager D. Neal regarding the plant being in compliance. He testified that "we had ongoing discussions of both the Brunswick and Savannah plants on those issues all the time, because there was an element of concern for us because we had stockpiles." He stated he would have talked with D. Neal about whether the Savannah plant was in compliance between the time he learned of the Guideline complaint and the time he decided to terminate the Complainant's employment. He described the conversations about the stockpiles compliance as just normal conversations.

Mr. Durkin testified that he terminated the Complainant "because he either lied to us in his allegation that Mr. Neal told him to do something that was not in compliance or … he shouldn't have written [a certification letter] for Mr. Neal to sign and he should have raised the issue that the letter was false." He testified "we got an allegation that [the Complainant] prepared a letter for Mr. Neal to sign that said we were in full compliance with the law; and then [the Complainant] came back and said that he knowingly prepared this letter and it was inaccurate. … if he had his plant manager sign a letter that he prepared that was knowingly wrong, he should never have prepared the letter." He reported that it was GP's position that the July 2008 certification letter was accurate. It was also GP's position through at least December 2008 that riser food should not be added to the survey pile "because it is a product that we make, and it's required for manufacture and shipment, it's not waste."

Mr. Durkin testified that he talked to K. Blankenship between the time of the Guideline complaint and the Complainant's termination. The topic was to know where GP was with respect to compliance with the pile and the consent order because he wanted verification. "We verified the survey pile and we verified that we're in compliance with the consent order." He did not remember a specific conversation with D. Neal on the same subject but believed he would have had such a conversation. He did not discuss termination of the Complainant's employment with K. Blankenship.

Mr. Durkin again testified, in response to a question for the basis of terminating the Complainant's employment, that "there was a Guideline complaint made saying that we had a plant manager that had knowingly falsified a letter for compliance" and we asked for an investigation. "Upon investigation what came out was that there was the claim that said that we had falsified that letter was inaccurate … and so the [July 2008 certification] letter was accurate. … I couldn't reconcile the two. We either made a false claim or didn't, and if we didn't, then the allegation that we made a false claim was made in bad faith. … in either circumstance … the issue was we had a party in a responsible position at the company and we couldn't leave him in that position. So my recommendation was to terminate him." He testified that the Complainant 'was terminated because he either filed a false claim to us [in the Guideline complaint] or he prepared a [certification] letter which he knowingly knew was false. The issue came down just as simple as that."

Mr. Durkin testified that he did not read the Complainant's Guideline complaint, "was told that it was exceedingly long and there were issues all over the place [and] a lot of them didn't pertain to me, so I wanted to know what the issues that dealt with me … and my areas were. Really, it came down to the issue where we were in non-compliance with the EPD."

Mr. Durkin testified that after the first meeting with R. Wolfe and T. O'Connor "we were trying to verify exactly what was said and what was meant and basically who did what, because … we either had a plant manager that's falsifying documents, in which case he has to go, or we have an environmental guy that's not doing his job, in which case he has to go." He stated "the issue here was, did the plant manager direct a person to falsify a document or did the environmental person who was responsible for it falsify a document. The issue was falsifying a document and lying. It wasn't a function if we were in compliance or not." He denied personal knowledge of the Complainant raising the issue of adding riser food stacks to the survey pile with D. Neal or K. Blankenship. He testified "I terminated [the Complainant] because he prepared a [certification] letter that he either knowingly knew was false or he misled us as to the issues around it. He had a responsibility to raise the issue and it was never raised. … either he made a false allegation regarding Mr. Neal [in the Guideline complaint] or he made a false allegation to the EPD [in the July 2008 certification letter]."

Mr. Durkin testified that if the Complainant had concerns about complying with the consent order based on outdoor stacked riser food being included or excluded from the consent order surveys he could raise the issue with D. Neal as his direct supervisor, K. Blankenship as a matrix supervisor, M. Vest as a regional compliance person, and in a Guideline complaint if made in good faith. He reported that if the Complainant knowingly prepared a letter that he believed was false, he would have been terminated and that he learned about the Complainant's preparing the letter through the information gathered by B. Briggs in his Guideline complaint investigation. He did not independently verify the information B. Briggs provided. He identified exhibit P-10 to CX 46 as his affidavit.

Mr. Durkin testified that based on the development of the Complainant's allegations during the investigation the Complainant prepared the July 2008 certification letter "because he was directed to prepare that letter knowing it was false and he believed it to be false and misleading." He reported the July 2008 certification letter proved to be accurate. He stated that he has seen the July 2008 certification letter after it was submitted to the EPD. He testified that there was a conflict in the Complainant's statements to investigators because the Complainant stated at one time the certification letter was accurate and at another time it was false and inaccurate. He stated that "we did a thorough investigation with reputable people who were unbiased." Mr. Durkin testified that "it was clearly my impression from [the investigation] that [the Complainant's Guideline complaint] was made in bad faith." He stated "I don't know what he raised in his Guideline complainant … [because] I don't know the full context of the Guideline complaint."

Mr. Durkin testified that he understood the Complainant filed his Guideline complaint before the July 2008 certification letter was actually due at the EPD. He stated that if the Complainant submitted the certification letter with the personal opinion the certification letter was improper, "he shouldn't have written the letter to be signed." He reported that the chief responsibility for making the determination whether a plant is in compliance with a consent order "would fall on the [chief] environmental leader for the plant … [while] the plant manager has responsibility for the plant." He reported his assumption that the EPD would want the plant manager to sign the certification letter so the Complainant would not have authority to sign the certification letter.

Mr. Durkin testified that he made the recommendation to terminate the Complainant's employment but did not know who actually delivered the termination. He did not consult with K. Blankenship about the Complainant's termination. He stated that "if the Guideline complaint was accurate, one of our two people [D. Neal or the Complainant] falsified a document and one of them was going to be terminated."

On examination by this Administrative Law Judge, Mr. Durkin testified that the plant manager would have the power to set work hours but would not necessarily have the power to fire employees. "In most cases terminations are not unilaterally done. They are done in discussion with a number of people and there's a collective agreement." A dotted-line manager would not have authority to set work hours though "he may direct assignments as to focus areas." He testified that "it was my ultimate determination that [the Complainant] should be terminated. If there was anyone there [at the second meeting with B. Briggs] that disagreed with that, to challenge that, to say that's the wrong correction, we would have had discussion. There was none, so he was terminated." Human Resources and Legal Department were present during the second meeting and they would have communicated the termination decision. He reported his believe that statements made in a Guideline complaint and during a Guideline investigation "would have to be good faith, accurate statements [to be protected from adverse action] because that's the basis of everything we do."

On re-direct examination, Mr. Durkin testified he did not believe that a complaining party is not protected by the Guideline process from GP taking action on wrongful conduct revealed in the course of a Guideline complaint investigation. He stated that there was absolutely no excuse at GP for preparing a document for the government that is believed to be false.

On re-cross examination, Mr. Durkin testified that he never talked to the Complainant between the time he learned of the Guideline complaint and the time he terminated the Complainant.

o. Complainant's July 7, 2008, 8:19 AM, Guideline Letter (CX 12, 13; RX 29)

In his 15 page Guideline letter the Complainant listed numerous complaints involving safety issues, hazardous material spills, racial and gender based employment issues, hiring issues, surveillance issues, problems in the human resource department, improper audit actions, lockout violation, OSHA issues, interference with his performance of assigned duties, document forgery, airborne dust violations, waste water violations, buffer zone violations and being subject to investigations over a long period of employment. He complained if diminished pay, bonuses, evaluations and job responsibilities. These issues are not the basis of the cause of action before the Court.

The matters set forth in the paragraph titled "Consent Order Potential Falsification of Records" is the relevant portion of the Complainant's Guideline letter under the SWD. This paragraph states:

> "The Plant Manager allows reject boards to be stacked inside the plant instead of being stacked outside on the reclaim pile. This is being allowed to make sure that the board is not counted in the official surveys and to ensure that the plant meets

> the pile size reduction milestones listed in the consent order. The facility also keeps a large stock pile of unusable board outside on the pavement. This board is classified as 'riser food', but in fact has not been used for riser food. The Georgia EPD 60/90 rule applies to the board pile, but the Plant Manager allows the surveyors to leave this board out of the official survey report. The EPD inspector even commented to me during an inspection that he believes that 'riser food' stacked outside and not used according to the 60/90 rule would be subject to the stipulations of the consent order. I've reported this to the Plant Manager and the Division Environmental Manager. I was again reminded that my approach and communications skills needed work, that everything is not 'black and white' and that I was on a development plan. Interview [R.] Anderson riser machine operator." [underline emphasis included in original paragraph]

p. Complainant's July 28, 2008, 9:41 AM, report to B. Hawkins (CX 19; RX 31)

In part of this e-mail the Complainant stated that A. Stefanoni had been given directions to begin moving all unbagged board from the riser staging area to the reclaim piles. He indicated "in my opinion, as stated in my interview, this is a knowing violation of our Consent Order because 'all gypsum wallboard reject stockpiles' were supposed to be counted and reported to EPD on this survey date. These board were not counted in the June 30th survey and are now being moved to the reclaim stock piles after the survey has been completed. I believe we have an obligation to report this information to the EPD and schedule a new survey that will account for all reject board stockpiles as indicated by the Consent Order. This is a highly sensitive issue and it's one of the issues that I believe has previously resulted in retaliation."

q. Complainant's July 30, 2008, 7:59 AM, report to B. Hawkins (CX 20)

In this e-mail from a non-GP account, the Complainant reported that "all of the unbagged board that was staged outside by the riser machine has been put on the reclaim pile. The bagged board is still being staged by the riser machine but has been there much longer than 90-days and it cannot be used for riser food as the bags are torn and the boards have been exposed to the elements."

r. Complainant's August 1, 2008, 5:49 PM, e-mail to B. Hawkins and other GP managers (CX 22; RX 34)

In this e-mail from a non-GP account, the Complainant stated –

"As many of you may be aware, I called the Guideline to report unethical and potentially illegal behavior by senior management at the Savannah Gypsum Plant in Savannah, Georgia on July 7, 2008. One of my allegations was that stockpiles of reject boards were purposely omitted from official Consent Order Surveys. I made my allegation on July 7, 2008. The deadline for the next submittal for the consent order was July 30, 2008. [B.] Shelton [Hawkins] was in charge of the investigation. In my role as environmental Manager of the facility I had prepared documentation for the Plant Manager to sign that indicated we were in compliance with the stipulations of the consent order. [D.] Lyle of the Georgia Environmental Protection Division had preciously

informed the Plant Manager, [D.] Neal, that the stockpiled board needed to be included in the surveys but he refused and continued to allow the board to be omitted from the official surveys. I witnessed this conversation between [D.] Neal and [D.] Lyle. I called [B.] Shelton [Hawkins] on July 15th, 2008 and told her that I did not think it would be appropriate to get the Plant Manager to sign this certification because, in my opinion, it was a false representation to the State of the actual amount of reject board stockpiled at the facility on June 30, 2008, the date of the survey. I also told [B.S. Hawkins] that we had 15 more days to wait before the compliance deadline and I thought it would be better to wait and see what the investigation revealed and if necessary make changes to the letter and then submit it. [B.S. Hawkins] told me not to wait for the investigation and go ahead and get [D.] Neal to sign the letter and submit it to the State. As of August 1, 2008 I have been put on suspension."

s. Complainant's August 2, 2008, 1:22 PM, e-mail to GP managers (CX 23; RX 35)

In this e-mail from a non-GP account, the Complainant stated that –

"the allegations leading to my suspension were misunderstood. As it stands today, if the consent order letter were to be re-submitted, it would be submitted as written on July 15, 2008 with no changes. This is because as far as I know as of this date August 2, 2008, no legal determination has been made as to the status of 'riser food' stockpiled board that was at the plant on June 30th, 2008, therefore the letter is accurate and is not a false record. The fact that I disagree is a mute (sic) point. That is one of the reasons I called the Guideline, to get an independent unbiased opinion on the board stockpile. … Once the legal determination is made, then and only then, could the letter be considered inaccurate, it can never be considered to be purposely inaccurate on my part because I could not have knowingly prepared a falsified letter on July 15th, 2008, because the investigation had not determined if I was correct or not and the 'riser food' stockpile was not on the reclaim pile until July 30th, 2008, two weeks after I wrote the letter. The letter that was submitted to the EPD contained the same information from the 3rd party survey conducted on June 30, 2008. It was not falsified. I simply disagreed with [D.] Neal's interpretation that the board need not be counted. … My job is to prepare the documents in an accurate and truthful manner, which I did."

t. Complainant's August 3, 2008, 2:36 PM, e-mail to EPD (CX 24)

In this e-mail from a non-GP account, the Complainant reported to D. Lyle of the Georgia EPD that since his April 2008 site inspection "another stockpile of reject board has been allowed to accumulate which is not suitable for 'riser food.' This stockpile has grown significantly in volume. These stockpiled boards have not been reused or recycled according to the '60/90 rule.' These reject boards have been stockpiled out in the elements for well over 90-days uncovered. … During the June 30th survey, this large volume of reject board, unsuitable for 'riser food' remained stockpiled [see attached July 7, 2008 photo of stockpile] in back of the plant and it was not included in the survey. … By July 30, 2008, the reject board unsuitable for 'riser food' that had been stockpiled out back had been moved to the official stockpile. It is my opinion, based on my reading of the consent order and based on the your comments [regarding application of the 60/90 rule in April 2008] that the survey of June 30th, 2008, is not representative of 'all reject gypsum stockpiles' as required by the Consent Order. … As of August 1, 2008 I have been

suspended from my job pending completion of an internal investigation. It's my belief that the suspension is a retaliatory action because I reported this information to our internal compliance hotline. I am now reporting this issue to you because I was unable to get resolution internally."

u. Excerpt from Georgia Administrative Code 391-3-4-.04(7) (CX 48)[8]

"(7) Recovered Materials:

(a) Recovered materials … are excluded from regulation as solid wastes … To be considered exempt from regulation, the material must have a known use, reuse, or recycling potential; must be feasibly used, reused, or recycled; and must have been diverted or removed from the solid waste stream for sale, use, reuse, or recycling, whether or not requiring subsequent separation and processing.
(b) Materials accumulated speculatively are solid waste and must comply with all applicable provisions of these regulations.
(c) A recovered material is not accumulated speculatively if the person accumulating it can show that there is a known use, reuse, or recycling potential for the material, that the material can be feasibly sold, used, reused, or recycled and that during the preceding 90 days the amount of material that is recycled, sold, used, or reused equals at least 60 percent by weight or volume of the material received during that 90-day period and 60 percent by weight or volume of all material previously received and not recycled, sold, used, or reused and carried forward into that 90-day period. …
(f) A recovered material is 'used, reused or recycled' if it is either:
    1. Employed as an ingredient … in a process to make product … or
    2. Employed in the same or different fashion as its original intended purpose without physically changing its composition … or
    3. Employed in a particular fashion or application as an effective substitute for a commercial product … so long as such substitution does not pose a threat to human health or the environment …
    4. A material is not 'used, reused or recycled' when it is applied to or placed on or in the land in a manner that constitutes disposal which … may pose a threat to human health and the environment …"

v. November 21, 2006 Consent Order for the Savannah Gypsum Plant (CX 1; RX 4)

This consent order between EPD and GP applied to the Savannah, Georgia, Gypsum Plant, required GP to provide a third party survey "that establishes a baseline volume of all wallboard reject material stockpile(s), including paper-faced and glass mat material at the [Savannah] facility … reported in units of cubic yards." The Consent Order required the Savannah plant to reduce the volume of reject material in existing stockpiles and stockpiles generated during the term of the Consent Order by specific percentages of the baseline reject material stockpile(s) at defined six-month intervals commencing with a 1% reduction by December 30, 2006 and ending on August 30, 2010 at 100%. The Savannah plant was required to survey the reject material pile(s) using a licensed third-party on specific six-moth dates and to submit the results of the required survey with calculations for determining volume reduction milestones and certification

[8] Subpart (7)(c) is understood as the State's "60/90 rule"

signed by the plant manager "stating that the [plant] is compliant with the conditions of this Order." The Consent Order provided for a fine when the plant failed to meet a volume reduction milestone in the amount of $100.00 per day for the period from the day a third-party survey indicates the milestone volume reduction was not met to the subsequent third-party survey indicating that the missed milestone had been achieved by additional volume reduction.

w. Results of June 30, 2008 Third-Party Survey (CX 10, 11; RX 20)

A third-party survey required by the November 21, 2006 Consent Order was conducted by EMC Engineering Services, Inc. on June 30, 2008. The survey report indicated Piles 1, 2 and 3 had a total site volume of 137,554; Pile 4 had an average volume of 56,813; and the Peanut Farmer Fines had an average volume of 1,906. The numbered piles were not further identified.

The Complainant received the results of the survey by e-mail of July 2, 2008, 1:34 PM. The Complainant forwarded the e-mail to K. Blankenship on July 2, 2008, 2:23 PM, with the comment "We met the June 30th consent order milestone!"

x. July 7, 2008 Draft Consent Order Progress Report (CX 14, 16, 49; RX 24, 25)

The Complainant forwarded a draft "Consent Order Progress Report" to K. Blankenship and D. Neal, with a copy to M. Dunnermann, by e-mail July 7, 2008, 1:37 PM, with the comment, "Please review and provide comments. This is due NLT July 30, 2008."

D. Neal replied to all addressees "I'm ok with this…" by e-mail July 7, 2008, 2:49 PM. K. Blankenship replied to all addressees by e-mail July 8, 2008, 2:49 PM, asking "Are we required to have a 25% reduction by December 30? If so, and since we have only removed 10% in 18 months, do we have plans for re-use or should we start taking material to the landfill in the near future?" By e-mail of July 10, 2008, 9:42 AM, K. Blankenship indicated to all addressees that "[M.] Fleming from the legal department ahs (sic) reviewed and approved the Progress Report. We are good on this one."

M. Dunnermann replied to all addressees by e-mail July 8, 2008, 12:48 PM, that the plant had to remove 23,000 cubic yards in six months without adding more volume to the survey pile. He gave several options to reduce volume before the December 30, 2008 third-party survey.

y. July 15, 2008 Consent Order Compliance Certification Letter (CX 15; RX 26)

As plant manager, D. Neal signed a letter dated July 15, 2008 addressed to D. Lyle, Georgia EPD, referencing the November 21, 2006 Consent Order, condition #4 requiring third party surveys on specific dates. He reported in the letter –

> "The survey, performed on June 30, 2008, shows the remaining reclaim volume to be 138,126 cubic yards. Therefore, Georgia-Pacific has met the required June 30, 2008 milestone to reduce the pile size by 10%.

> "I certify that the Georgia-Pacific is fully compliant with the above mentioned Consent Order and that the enclosed survey demonstrates compliance with the June 30, 2008 milestone in condition #3 of the Consent Order."

The attached computation of pile size reduction and survey indicated that only Piles 1, 2 and 3 and the Peanut Farmer Fines were added to indicate a total volume of 139,462 for a net volume reduction over the baseline survey in 2006 of 16,131 a net 10.4% reduction. The results of the survey of Pile 4 were not included in the net volume reduction computations. The certification letter was mailed July 15, 2008 and received by the EPD on July 16, 2008.

z. July 8, 2010, Deposition Testimony of Margarete Vest (CX 44)

M. Vest testified that she has worked for GP for 19 years providing environmental guidance and has been a Regional Environmental Engineer for the past year. Prior to that she was the Southeast Field Environmental Manager for 9 to 10 years. In 2008 she worked in the environmental division of GP, separate from the gypsum division. In January 2009 the reporting structure changed so she now works within the gypsum division. In the 2004 through 2008 period her interaction with the Savannah and Brunswick gypsum plants was primarily with the plants' environmental coordinators, the Complainant and W. Wimberly. She did not supervise the environmental coordinators, but when they requested her services, she would give them suggestions and guidance. She stated K. Blankenship was the business unit manager within the gypsum division in 2008 and that she did not typically work with him but worked with environmental coordinators at 8 plants. She reported that the Complainant was the Savannah environmental coordinator with oversight of the Brunswick coordinator and that she talked to the Complainant on a monthly, as needed, basis. She would visit the Savannah plant when requested by the Complainant.

Ms. Vest testified that in 2004 she participated in meetings with D. Lyle of EPD, the Complainant, H. Dodge and G. Thompson regarding an existing gypsum pile of crushed off-spec, slurry material and wet gypsum board that had not been dried. The pile "had become large, as far as the State was concerned, so we needed to determine about permitting the pile, either as a recyclable pile under the recovered materials [regulations] or as an inert landfill in the landfill regulations. Eventually a consent order was written regarding the gypsum pile. The pile was from several years of accumulated off-spec material and production of off-spec material when the plant was restarted and the start-up process did not permit recycling for a period of time. Between 2004 and the consent order being entered, she attended meetings with EPD concerning the consent order and pile management in which B. Baker as D. Lyles' supervisor, the Complainant, and D. Lyle participated. GP decided not to pursue a landfill permit because the reject material was primarily calcium sulfate which effects storm water run-off and the consent order was entered as an alternative.

Ms. Vest testified that the 60/90 rule means that "60 percent of a recoverable material has to be used in the process that was generated in the last 90 days, and that needs to be used within the next 90 days, plus 60 percent of any carry-over from the previous 90 days." She reported that she became aware of stacks of reject wallboard being used as riser food when the Complainant called her in the summer of 2008. She was not aware of the business end of using reject board as

riser food but was aware recycling of crushed waste wallboard by reintroducing it back into the manufacturing process.

Ms. Vest testified that the current consent order required the staged removal of the waste pile. She had no duties under the consent order other than to inquire when the survey would be completed, when was it completed, where did GP stand with the completion, and removal rates. The Complainant was in charge of the survey process at the Savannah plant and the plant manager was responsible for ensuring compliance. K. Blankenship would also monitor the plant's progress. The Complainant would call her if compliance milestones were not going to be met. In that case she would assist in arranging truck to haul material off-site and involve the legal department if necessary.

Ms. Vest testified that under the consent order the piles had to be surveyed for volume and the plant manager would certify the survey results. The waste pile at the Savannah plant was entirely removed by the time of her deposition. The Complainant would order the surveys and the survey results would be reported back to the Complainant. When the Savannah plant did not meet the milestone reduction in December 2007, the Complainant arranged trucks to move the material from the site. She stated that product is marketable material, recovered material is off-spec product that can be modified or adjusted for reuse in the process. Processed material is material that has gone through the production process and may include off-spec material. She stated her opinion that riser food material "was not covered under the consent order and it's not waste because it is a necessary part of the [shipping] process" and would not be waste under the 60/90 rule "because it's still a usable part of the process." Many plants would purposely make board for use as riser food, including the Savannah plant. In the prior two years some risers were shipped from Brunswick plant to the Savannah plant because it was needed for shipping and there was a problem with the Savannah riser machine. It was not her responsibility to determine which reject material would be designated riser food because it was a plant operation decision. She stated that she had discussed her opinion that riser food was not waste with the environmental resource persons in the Savannah plant and had consulted with GP in-house solid waste person in arriving at that opinion. GP lawyers made the determination of whether GP complied with the consent order. Not all reject material could be designated riser food. Reject board designated as riser food can be stored onsite and not be subject to 60/90. She stated that "only material that definitely can be used for riser food would not be considered waste." Risers stored outside and inside was not waste, even under the 60/90 rule. EPD had a different opinion that riser food was waste. She stated the 60/90 board would apply to crushed reject board and to all material on the survey piles. When board is crushed, it cannot be used to manufacture risers. The plant is limited to the amount of risers that can be stored by the plant's physical storage capacity; the consent order does not limit the amount of risers that can be stored.

Ms. Vest testified that "speculative accumulation" means "we're saving/storing material, accumulating material, onsite that may have a use in the future." It would be speculative accumulation if the material is accumulated for unknown or speculative purposes that have not been clearly or imminently determined. If the material has no future use, GP is restricted or prohibited from keeping material speculatively and not treating it as waste under the consent order.

Ms. Vest testified that she discussed the 60/90 rule and riser food with the Complainant in the summer of 2008. The Complainant called her "to discuss the number of the pile of risers out on the facility area … there was a question in his mind as to whether or not to include that in the survey. … he thought there were a lot of boards there, riser boards out on the yard and questioned the quality of the boards." Another time the Complainant called her while she was on vacation "to tell me he had called the hotline, and there was this question about the report concerning the waste pile and the question on whether to include risers in the report or not, and the hotline contact had suggested … to give the report to the plant manager." She reported her advice was "I would follow what the hotline contact said to do." She reported the Complainant's concern was directed to "the damaged and exposed risers." She indicated that she believed the report involved "was a status report on the consent order" involving remaining waste volume based on a report of survey under the consent order that the Complainant had prepared. A few days later the Complainant called her to let her know he had been "let go" by the company.

Ms. Vest testified that the GP term "10,000 percent compliance" means 100 percent compliance 100 percent of the time. She opined that the Complainant demonstrated 10,000 percent compliance as well as integrity and compliance under GP Guiding Principles 1 and 2. In performing his job, the Complainant demonstrated the principles of ensuring excellence in environmental, safety and the other areas of compliance and in meeting the fundamental responsibility to do the right thing in the right way.

Ms. Vest testified that it is very expensive to dispose of gypsum reject board off-site than re-using and she wouldn't be surprised by the calculations completed by M. Dunnermann in RX 25. She reported that the $1,000,000.00 referred to by M. Dunnermann applied only to the existing crushed material on the waste pile and not to board qualified as riser food. She was aware of the EPD opinion that riser food should be under the 60/90 rule. She testified that GP determined to manage riser food internally which was a decision "not necessarily due to any Georgia EPD requirements. It was just a change of managers and his decision to handle risers differently." That was A. Stefanoni's decision to store riser food inside the facility sometime in late 2008. She reported that it was the Complainant's concern that if riser food exceeded the limitations under the 60/90 rule it should be considered waste and involved the condition of the riser food boards. EPD had the opinion that 60/90 rule applied to riser food boards, without consideration of the use or condition of the board. She reported that "in the last two years, any material outside the waste piles has been removed [from the plant] within 90 days." She reported the Savannah plant could have easily used up all stacked wallboard designated as riser food but she does not know if that was the case. She stated that someone had made calculations "that based on a production rate out the door, that [the riser food material] could be used up within a certain period of time … like a couple of months." She testified that the reclaim pile is the same pile known as the waste pile subject to the consent order surveys.

Ms. Vest testified that GP compliance standards describes three levels of environmental, safety and health incidents. Level 1 insignificant administrative errors and compliance issues that can be reported in the future. Level 2 involves warning letters from the State, citizen complaints, and short reporting times on environmental events to the media. Level 3 involves notice of violation and requires immediate notification to supervisors and GP legal department. A Guideline complainant can be made anytime. From the Complainant's view, his concerns of exposed and

damaged riser food in the July 2008 certification letter "would be considered a significant reporting error which would be a Level 3." She stated that whether riser food was waste or not was an issue between GP and EPD at the time the Complainant made his Guideline complaint.

Ms. Vest testified that her April 2008 e-mail question to the Complainant about storing finished wallboard outside was because that would raise storm water and BMP issues that would require the outside board to be indicated on a site map. She indicated that "careful communications" is a GP policy that "has to do with making sure that what we're saying is accurate and clear, and it could not be taken out of … context." The intent is "to keep communications factual, complete sentences." Inflammatory words and speculating on an idea" were to be avoided.

Ms. Vest identified RX 32 and testified that the market had turned down unexpectedly and during a market turndown the production rate is reduced, the recycling of reject material into production is reduced and the need for riser would also be reduced. The concern in RX 32 was that at the time the Savannah plant would "not be able to go through the reject pile material as quickly as expected" when the consent order was negotiated.

Ms. Vest identified the August 1, 2008 e-mail exchange in CX 17 and testified that "the key point [the Complainant] was making [was that the unbagged board] was obviously waste and though it was unusable and not counted in the survey." Her reply "may have meant since it was originally riser material the 60/90 rule would not apply." She reported not seeing the board stack other than in a photo. She testified that when she indicated that she would "make sure the question gets answered Monday" she was referring to "whether the riser material was considered waste or not" and raising the issue with M. Davis. In her opinion the July 15, 2008 certification letter was correct and an accurate certification.

Ms. Vest testified that board move to the waste pile before June 30, 2008 would have been included in the June 30, 2008 survey and board not moved to the waste pile until July 31,2008 would not have been determined to be waste prior to June 30, 2008 survey. She stated that how much material was rejected in production was part of the plant's production reports. How much material is recycled is from a report the Complainant generates. She reported that now reject material in Savannah is quickly reused in production or sent to broker S. Alford for farmers or a new chicken farmer.

On cross-examination Ms. Vest testified that if wallboard designated as riser material later became damaged it would be unsuitable for building risers. She stated that she had no independent knowledge of what the Guideline person may have advised the Complainant to do in July 2008. She has not seen a copy of the Complainant's Guideline complaint. She reported that in her experience it is not uncommon for a corporation to have an opinion different than a government agency.

aa. September 16, 2010, Deposition Testimony of Benjamin Briggs (CX 46)

B. Briggs testified that he is an attorney admitted to practice in Georgia and was hired by GP to investigate allegations made by the Complainant in CX 13 and RX 22 and "also to look into whether or not [the Complainant] had been subjected to retaliation as a result of raising concerns

over a period of time … from 2006." He was to "provide them with a factual determination about what happened … [and] legal opinions about whether I thought thing that would rise to the level of retaliation had occurred and whether I believed … that the company had violated legal compliance obligations." He was first contacted about conducting an investigation by T. O'Connor, GP in-house counsel for labor and employment. He made three on-site visits to the Savannah plant during the investigation. Ms. B. Hawkins was with him as an investigator during the first visit but not the second or third visit. He requested B. Hawkins investigation notes from her visit to the Savannah plant. L. Otwell was available as an environmental subject matter expert. M. Lowish was available as a safety subject matter expert. He did not speak to anyone from Georgia EPD and did not interview D. Lyle or M. Vest.

B. Briggs testified "that up to the point where I concluded my investigation, the company believed that riser food did not need to be included in the reclaim pile. That was Mr. [D.] Neal's belief [and] that was the belief of everybody I interviewed except for [the Complainant]. … they were going to look into it further to address the concerns that [the Complainant] raised and, if necessary, go to the EPD for a tie-breaker, if you will."

B. Briggs testified his understanding was that the Complainant was terminated for "alleging that the plant manager had knowingly falsified a certification to the state while at the same time facilitating that entire process without raising it with the plant manager or anyone else at the facility and sheparding that process through." He discussed the reject board and riser food with the Complainant during the first interview but the Complainant did not reveal he had written the July 15, 2008 certification letter, was coordinating all efforts to ensure compliance with the consent order, was the person effectively orchestrating and presenting it to other for their review, signature, certification, and handling, which he considered a very, very significant omission since the same person who was orchestrating all of those activities in the certification to the state was the same person who was saying that that certification was unlawful and was accusing someone else at the facility of what, in my view, may have risen to a level of criminal activity." He described four allegations investigated and reported that during the investigation the Complainant "complains about [an allegation event] after the fact and doesn't disclose the fact that he was the person responsible for coordinating that effort. … [he] found that there was a pattern of [the Complainant] blaming others for issues and accusing people of wrongdoing when he had an active role in it and wasn't told by anyone to do it that way."

B. Briggs testified he was not involved in the termination decision ending the Complainant's employment. He understood that the Complainant "was terminated based on the fact that he was accusing Mr. Neal of intentional wrongdoing, specifically that he had falsified the certification to the State of Georgia relating to the reclaim pile. At the same time [the Complainant] was orchestrating that entire process without [indicating] in any of the written communications about it, saying hey guys we need to put the brakes on this, this is a problem, and in concert with that, writing his own e-mail in which he says, 'I didn't know this was unlawful. How could it be unlawful, there's been no legal determination?' So he's acknowledging that he didn't know that not including the riser stacks in the reclaim pile was … unlawful; yet he was accusing somebody else of knowingly violating the consent order. … my understanding of why he was terminated is because of the fact that those two positions could not be reconciled and it suggested that he was being dishonest."

B. Briggs testified that he knew the Complainant stated that the reject board should be included in the survey pile before the certification letter was due to the EPD in July 2008. He reported D. Neal received a copy of the guideline complaint before the July 2008 certification letter to EPD was due. He stated that the Guideline letter was submitted by the Complainant the same day as the July 15, 2008 certification letter to the EPD and that there was no mention of the certification letter or consent order in the Guideline letter and that the Complainant made no mention in e-mails about the consent order June 2008 milestone of his concerns about reject board as stated in the Guideline letter. He reported that during his investigation it was clear that the Complainant believed there was no determination as to the legal status of reject board and there was no need for his investigation to reach a legal determination on reject board. The specific complainant about reject board was buried in the back of the Complainant's numerous Guideline letter complaint items.

B. Brigg testified that during the investigation the Complainant took the position, "without equivocating at all, that Mr. Neal knowingly violated the consent order and made false certification to the State, when [the Complainant] himself admitted that he didn't know whether or not … the riser boards needed to be included in the pile. Those two position are irreconcilable."

B. Briggs testified that he met with GP corporate attorneys T. O'Connor and M. Pesnell, human resources personnel R. Wolfe, and 5 or 6 other GP representatives, prior to the Complainant being terminated. D. Neal was not at the meeting. The meeting occurred after his second visit to the Savannah plant. He reported to the GP representatives about "inconsistencies between what [the Complainant] was alleging with respect to Mr. Neal and [the Complainant's] own actions with respect to the certification letters, with respect to documents that were being circulated, … a weekly facility update that … [stated] 'we met the compliance requirements and submitted the report', … [and] another written communication where [the Complainant] … was lauding the fact that … the survey results had shown that they met their compliance requirements. And that all seemed very much at odds to me with [the Complainant's] allegations that Mr. Neal was knowingly violating the consent order." He stated "we talked about the other issues that had been raised [in the Guideline letter] and whether I thought there were significant compliance concerns there. … I was asked also about whether I thought that any retaliation had taken place, whether any adverse action had been taken against [the Complainant] as a result of the myriad issues he had raised over a two-year time period." He stopped short of making a determination of whether GP was in compliance with the consent order but concluded there was a reasonable disagreement between the Complainant and other people at the facility. He testified that he never heard a single person with GP, other than the Complainant, say the Savannah plant was out of compliance with the consent order, "the most anybody said is 'it's a grey area.'" He reported that from discussions during the meeting he was under the impression that there was a serious problem with either the plant manager engaging in an elaborate cover-up or the Complainant grossly overstating thing he's accusing someone of something he doesn't believe himself to be a real problem and that somebody was going to lose their job over it.

B. Briggs identified CX 13 and testified that he had to talk to the Complainant and the environmental subject matter expert to better understand the Complainant's Guideline letter complaint about the reject board, June 30, 2008 survey and subsequent certification letter. He

stated that he discussed the stacked wallboard with the Complainant three or four times, D. Neal on several occasions, L. Otwell, and with M. Dunnermann, J. Scully and one other person. He didn't specifically discuss moving board to the survey pile after the survey and need to retroactively add the board into the survey results "because material was added to the pile every single day."

B. Briggs testified that on the basis of his investigation he does not "necessarily hold the same opinion" that the Complainant was a person of high integrity. His perception was that the Complainant "was often more interested in being right and proving others wrong rather than finding a compliance solution and working with others towards that goal, and that rubbed some people the wrong way." He stated that "it's the fact that [the Complainant] accused [D. Neal] of falsifying the certification when [the Complainant] himself was orchestrating the entire certification process that I think caused the termination. It's not the fact that he complained. It's the fact that he was throwing the plant manager under the bus on something (a) he was doing, he was orchestrating this process, and (b) later said he didn't believe it was unlawful despite the fact that he had accused the plant manager of engaging in what … could amount to criminal activity." He reported that the Complainant was terminated for what was revealed in the investigation.

B. Briggs testified that he first interviewed the Complainant July 22 or 23, 2008, after the Complainant had submitted the signed certification letter to the EPD on July 15, 2008 and before the report due date had arrived. He reported that on July 31, 2008, he met with the Complainant to discuss options including withdrawing or going forward with the complaint after D. Neal and he discussed getting others from GP corporate involved and going to the EPD to resolve the issue about the board pile. He advised the Complainant that he was under no pressure if he wanted to withdraw his complaint or not. Subsequently, T. O'Connor called and talked with the Complainant in B. Briggs presence and again advised the Complainant he was under no pressure to withdraw the complaint and that GP was going to go to EPD on the issue. B. Briggs testified that when T. O'Connor asked the Complainant "if the allegation was that Mr. Neal knowingly violated the consent order … [the Complainant] confirmed that he was alleging intentional wrongdoing by [D.] Neal with T. O'Connor on the phone."

B. Briggs testified that he interviewed the Complainant on August 6, 2008 and the Complainant could not reconcile the statements "[D.] Neal knew [riser food] had to be included in the reclaim pile" with "I can't say with certainty that … [riser food] has to be included in the reclaim pile or not until a legal determination is made" when the Complainant "believed that [D.] Neal had the exact same basis for [or] knowledge in terms of whether or not the riser food needed to be included in the reclaim pile."

B. Briggs testified that there was not a question of whether the survey should be of the piles surveyed June 30, 2008; but rather "whether something is moved from one part of the facility to the pile or not." He opined that D. Neal did not make determinations of what should be on the pile on his own, he communicated with people internally. D. Neal disagreed with the Complainant over moving riser food to the survey pile. He testified that an August 1, 2008, interview with K. Blankenship indicated that there was to be a telephone call that included M. Davis, M. Vest, D. Neal, K. Blankenship and the Complainant to work through the technical issue of whether riser food should be part of the waste pile

B. Briggs identified RX 41 as his final investigation report and testified that he did not believe there was any additional investigation after August 6, 2008 and the time between then and October 2, 2008 was spent as "a matter of getting organized and getting it down on paper in a comprehensive form that covered all of the [Guideline letter] issues." He reported that he was not hired to make a determination on whether the Complainant's August 1, 2008 suspension or subsequent termination were based on legitimate non-retaliatory business reasons. He stated that he investigated every allegation of retaliation made by the Complainant in his Guideline letter and determined each one alleged "were not in fact sufficient to rise to the level of unlawful retaliation based on the facts … gathered."

B. Briggs testified to his understanding that the Complainant "was suspended after making allegations that Mr. Neal knowingly violated the standard when we'd recently discovered as part of the investigation that he had presented Mr. Neal with the letter to certify prior or on the same day that he filed his Guideline complaint, that he had made other statements in written documentation that were simply inconsistent with his assertion that the certification was unlawful in some way … [and the Complainant] was terminated … based on the facts that were developed with respect to that specific issue in the following days." He reported that falsification of the consent order certification emerged as the central issue in the investigation and came to a head when he was at the Savannah plant during his second visit July 30, 2008 to August 1, 2008.

B. Briggs testified that he provided GP with a written "summary of the issues surrounding the waste pile and [the Complainant's] allegations regarding Mr. Neal and the inconsistencies with what he had said to me and the inconsistencies surrounding his August 2nd e-mail; and it was an overview of the facts." The written summary dealt with only one issue – "the allegations relating to not including riser food in the reclaim pile and [the Complainant's] facilitation of the certification at the same time that he's accusing Mr. Neal of knowingly violating the consent order." He reported that he had no telephone conversations with T. Durkin and did not recall for certain if T. Durkin participated in any meetings he attended to report on the investigation. He stated he may have discussed the matter with T. O'Connor on the telephone. There was nothing different in the written summary from his written October 2, 2008 final report of investigation.

B. Briggs identified CX 22 and testified that the handwritten notation "Not True" on the second page of the August 1, 2008, e-mail was made by him. He stated he made the notation because the statement "I had complained to the guideline seven days prior to preparing the letter and had called the official in charge of the investigation to make sure that I was doing the right thing, Stop, Think and Ask" was false because the Complainant "complained to the Guideline and prepared and circulated the letter on the same day, so that is not true." The certification letter was submitted on July 15, 2008, but the letter had been circulated eight days earlier on July 7, 2008 to begin the vetting and approval process. He testified the Complainant acknowledged "that the letter that went out was the same as the one that had been circulated originally." He reported his understanding that the Complainant "contacted the Guideline first and submitted and circulated the letter [for vetting and approval] after he had already raised the concerns."

B. Briggs testified that he did not interview the Complainant after August 6, 2008.

DISCUSSION

As set forth above, this Administrative Law Judge has previously found that the Claimant was subject to an adverse employment action on August 1, 2008 when he was suspended from his job duties and responsibilities pending completion of an investigation into the Complainant's Guideline letter complaint and was subject to an adverse employment action on August 8, 2008 when his employment was terminated. The termination event was within the 30-day filing requirement of the SWDA and the suspension event was found to be timely filed as part of a "continuing violation" ending with his termination of employment. Actions by the Complainant directly related to his performance of duties as the environmental resource at the Savannah, Georgia, gypsum plant, which included advising the plant manager and regional environmental resource of compliance issues, ensuring the plant remained in compliance with the November 2006 consent order with the State of Georgia, and preparing, routing and submitting semi-annual certification letters to the Georgia EPD were found not to be protected activities under the SWDA.[9]

The Parties have stipulated that the Complainant was an employee of Respondent beginning in 1988 and ending on August 12, 2008. The Parties have stipulated the Complainant's employment ended on Tuesday, August 12, 2008.

I. The Complainant has failed to establish that his superiors directed him to perform any specific action outside his normal duties and responsibilities related to solid waste or to not perform any specific action contrary to his normal duties and responsibilities related to solid waste in the March 2008 to August 1, 2008 timeframe.

One of the main issues involved is the Complainant's actions and inactions related to GP's July 15, 2008 certification to the Georgia EPD that the Plant was in conformance with the November 12, 2006 consent order regarding solid waste piles at the facility.

In his Guideline complaint of July 7, 2008 the Complainant alleged that the Plant Manager purposely stacked off-spec wallboard outside instead of moving the wallboard not in compliance with the State 60/90 rule to the reject/claim subject to consent order survey in order to ensure the material would not be counted in the required June 30, 2008 third-party survey. He testified that he was directed not to count wallboard in the survey by D. Neal and K. Blankenship. However, the Parties have stipulated that off-spec wallboard that was suitable for use in the manufacturing of risers is a standard practice in the gypsum wallboard industry. The credible evidence also establishes that the outside stacks of wallboard were routinely culled for wallboard made unusable by the weather or other defects and that the unusable board was moved from the stacks to the reject/claim pile where it would be included in subsequent surveys.

Additionally, the uncontradicted evidence established that the Complainant was the individual charged with the responsibility to monitor the Plant's compliance with solid waste regulations and the November 21, 2006 consent order and to notify his superiors of corrective actions needed and with recommendations on how to correct deficiencies. The evidence established that the

[9] August 19, 2010 "Decision and Order Granting Respondent's Request for Summary Decision in Part and Denying Respondent's Request for Summary Decision in Part" (ALJX 8)

Plant kept production records that reflected the waste material created during wallboard production that went directly to the reject/claim pile as wet waste or unusable wallboard; the Plant kept production records on on-spec wallboard produced for sale and off-spec material retained as suitable for riser food; and the Plant kept yard records of material moved to the reject/claim pile. The Complainant testified to his one-time "cubication" of stockpiled wallboard stored outside and his estimate of how much was bagged for protection from the weather and how much had become unbagged for reasons such as winds.

The Complainant testified that he considered the outside stored wallboard as subject to the 60/90 rule, but did not maintain records of production, transfer to the reject/claim pile, or reutilization of recovered material for any 90-day period under the Georgia 60/90 rule. He did not provide any notice to his superiors of recovered material being handled in violation of the 60/90 rule and did not submit any recommendation to his superiors on how to correct perceived violations of the 60/90 rule. The credible evidence fails to establish that the Complainant was directed by the Respondent or its agents to ignore or violate the 60/90 rule. The Complainant's actions in ignoring the 60/90 rule and its record keeping and monitoring requirements until he alleged a violation in his July 7, 2008 Guideline complaint was a failure on his part to properly discharge his duties as the Plant environmental resource.

The Complainant submitted a draft certification letter for review on July 7, 2008, a few hours after his Guideline complaint was submitted. The draft certification letter indicated that the Plant had met the November 21, 2006 consent order requirements for reduction of solid waste in the reject/claim pile as of June 30, 2008. The draft letter did not refer to any violation of the 60/90 rule or the knowing withholding of solid waste from the reject/claim pile so that the June 30, 2008 survey results would be in compliance. The GP legal department approved release of the draft letter as written. On July 15, 2008, the Complainant presented the certification letter to the Plant Manager for his certifying signature and then mailed the signed certification letter to the Georgia EPD. The evidence of record establishes that when the Complainant presented the certification letter for signature and mailed the letter to the Georgia EPD, he did not express any concern to his superiors about the June survey not including all solid waste piles, did not express any concern to his superiors over violation of the 60/90 rule, and did not express any concern to his superiors over the need for another survey.

The Complainant testified that he did not put any additional information into the certification letter because he had been ordered by his superiors to ignore that issue and he would have been terminated for insubordination if that direction was not followed. After he was suspended, the Complainant stated in his e-mail that the July 15, 2008 certification letter was accurate. He subsequently stated it was not accurate and made a complaint to the Georgia EPD on August 3, 2008 by e-mail and August 4, 2008 in person. He testified he received specific direction from investigator B. Hawkins and M. Vest on July 15, 2008 about submitting the certification letter as prepared for signature; however, as set forth herein below, that was not the case. Here the credible evidence of record establishes that the Complainant was not directed by the Respondent's agents to include or exclude information in the July 15, 2008 certification letter and that the matters set forth within the July 15, 2008 certification letter were creation of the Complainant in his capacity as the Plant environmental resource.

The Complainant was suspended from his position as Plant environmental resource on August 1, 2008.

II. The Complainant has established by the preponderance of the evidence that only so much of his written complaints to the Georgia Pacific Guideline on July 7, 2008, alleging that "The facility also keeps a large stock pile of unusable board outside on the pavement. This board is classified as 'riser food', but in fact has not been used for riser food. The Georgia EPD 60/90 rule applies to the board pile, but the Plant Manager allows the surveyors to leave this board out of the official survey report" is protected activity under the SWDA.

On July 7, 2008, the Complainant submitted a written extensive list of complaints under the GP Guideline procedure to individuals outside his normal line of reporting superiors. The only portion of the Guideline letter which is relevant to the SWDA is the Complainant's report that:

> "The Plant Manager allows reject boards to be stacked inside the plant instead of being stacked outside on the reclaim pile. This is being allowed to make sure that the board is not counted in the official surveys and to ensure that the plant meets the pile size reduction milestones listed in the consent order. The facility also keeps a large stock pile of unusable board outside on the pavement. This board is classified as 'riser food', <u>but in fact has not been used for riser food</u>. The Georgia EPD 60/90 rule applies to the board pile, but the Plant Manager allows the surveyors to leave this board out of the official survey report. …" [underline emphasis included in original paragraph]

The words utilized indicate that the Complainant is reporting two violations under the SWDA: (1) that the D. Neal as the plant manager permits reject wallboard to be stacked inside a facility building in order to avoid including that board in the semi-annual survey of waste material required by the November 2006 consent order in order to meet consent order waste pile reduction milestones, and (2) that D. Neal as the plant manager allows surveyors to leave a large stockpile of unusable wallboard stored outside on the pavement out of the semi-annual survey of waste material required by the November 2006 consent order.

In order for either statement to be protected activity under the SWDA, the Complainant must establish by a preponderance of the evidence that (1) he actually believes that the alleged conduct was a violation that occurred or is occurring, even if the belief is wrong, (the subjective test); and (2) a reasonably prudent person with similar knowledge, experience and responsibility of the Complainant (i.e.: "in his position") would believe that the alleged conduct was a violation that occurred or is occurring, (the objective test). See *Gale v. Department of Labor*, 384 Fed. Appx. 926 (11th Cir. 2010) *unpub*, and cases sited therein [The 11th Circuit Court of Appeals entered its initial definition of "reasonable belief" required for whistleblower protected activity under a SOX[10] complaint. The Court adopted the uniform holdings of 1st, 4th, 7th and 9th Circuit Courts of Appeal that reasonable believe encompasses both a subjective and an objective component.]

[10] Whistleblower provisions under Section 806 of the Sarbanes-Oxley Act of 2002, 18 USC §1514(A)(a)(1)

a. The Complainant has failed to establish by a preponderance of the evidence that his July 7, 2008 Guideline complaint, "The Plant Manager allows reject boards to be stacked inside the plant instead of being stacked outside on the reclaim pile. This is being allowed to make sure that the board is not counted in the official surveys and to ensure that the plant meets the pile size reduction milestones listed in the consent order." is protected activity under the SWDA.

(1) Evaluation of Complainant's subjective belief that a violation occurred or is occurring.

In evaluating whether the Complainant's statement satisfies the subjective test of reasonable belief a violation has occurred or is occurring, the Complainant's statements and actions are considered in light of his actions, employment position, professional experience, knowledge, duties and responsibilities.

This first statement involves solely that off-spec wallboard material that is stacked inside a facility building. The Parties have stipulated that off-spec wallboard that cannot be sold to customers but is structurally sound is sometimes designated "riser food" and that using structurally sound off-spec gypsum wallboard for risers is a standard practice throughout the gypsum board industry.

The Complainant testified that he had been told on many occasions by D. Neal, K. Blankenship and M. Vest that riser food was part of the production and delivery process and did not need to be counted in surveys under the consent order because it had use as required shipping dunnage. That is, the off-spec wallboard considered appropriate for riser food would be cut along its width and the resulting strips glued together on a riser machine to produce risers of uniform thickness to be used to stack and ship saleable, on-spec wallboard.

The Complainant testified that he was involved in the development of the original and follow-on November 2006 consent order as the Savannah plant environmental resource. As such he was aware that the consent order required semi-annual survey and certification report of the solid waste pile(s) also known as the reject pile(s) at the facility. He testified that he believed the State 60/90 rule applied to all riser food. He testified his understanding of the 60/90 rule was that riser food older than 90 days that was not used in accordance with the 60/90 rule was material for the waste pile. In his August 3, 2008 e-mail to the State EPD the Complainant states that the 60/90 rule was part of the November 2006 consent order[11]. D. Dodge was also involved with the development of the November 2006 consent order and testified his understanding of EPD direction at that time to be that any reject material in the back yard that was not used under the 60/90 rule was solid waste. The November 2006 consent order involved off-spec material "stockpiled at the facility as reject material for recycling at a later date." The term "reject material" was not separately defined. The Complainant described this material as the only reject pile present when the consent order was signed. H. Dodged testified that the material so identified was the only reject at material in the outside waste pile in existence from prior owners at the time GP took over the plant for reopening in 2004. The evidence also demonstrates that it was this same outside reject material pile that was actually surveyed and certified in accordance

[11] The November 2006 consent order (CX 1, RX 4) deals solely with reject material references the Georgia Administrative Code 391-3-4-.04(7) on page 2 for "glass mat wallboard reject material" without using the common term for that code section of "60/90 rule." The code section was not linked to paper-faced wallboard.

with the November 2006 consent order and was not suitable for use in the manufacturing of risers. The evidence also established that the Savannah plant produced paper-faced wallboard and stored wallboard designated as riser food inside the plant facility before the second line for glass matted wallboard came on line and consumed warehouse space that required movement of some wallboard designated as riser food from inside the facility to outside storage in March 2008.

The evidence established that the Complainant was responsible for ensuring the Savannah plant operated within required environmental compliance standards, even though he had no authority to designate specific materials as waste or to direct materials be placed on the waste/reject pile. As the environmental resource he should have been aware of the State regulations concerning the generation, storage, diversion, and disposal of solid waste. He claims knowledge of the 60/90 rule, yet he never demonstrated any concern that any portion of off-spec wallboard stored inside a facility building was waste material before or after the April 2008 site inspection by D. Lyle of the State EPD. He never monitored the age, existing volume, volume increases and decreases over time, utilization rates or disposal rates for any off-spec material stored inside the facility which were basic required actions necessary to document and demonstrate compliance with the 60/90 rule. The Complainant testified that material under the 60/90 rule had to be tracked but that material not under the 60/90 rule did not have to be tracked. He testified that he did not talk to anyone in the plant about keeping records on riser food stacks. The evidence also demonstrates that the Complainant did not keep any records or track wallboard designated as riser food and stored inside the plant. Finally when he did his July 7, 2008, "cubication" estimate on off-spec stacks of wallboard, he only considered wallboard stacked outside the facility and not any riser food inside the facility. Additionally, his discussions with K. Blankenship after the April 2008 EPD site visit only related to off-spec wallboard stored outside on pavement being subject to the 60/90 rule. His discussions, e-mails and photos involving M. Vest in the summer of 2008 referred only to the "pile of risers out on the facility area". In his August 3, 2008 e-mail to EPD, the Complainant addresses only the off-spec wallboard stored outside the facility buildings during D. Lyle's April 2008 site inspection and the accumulation of new unusable stacks of wallboard "stockpiled out in the elements for well over 90 days uncovered."

After consideration of the evidence of record and the foregoing, this Administrative Law Judge finds that between the initial 2004 consent order discussions to July 7, 2008, the Complainant never treated wallboard designated and/or used as riser food that was stored inside the facility as material that had to be tracked and recorded in accordance with the 60/90 rule and that the Complainant has failed to establish a subjective belief that there was "reject board" being stacked inside the facility in a manner that violated the consent order requirements to survey "all reject material stockpiles" on a semi-annual basis.

(2) Evaluation of a reasonably prudent person's objective belief that a violation occurred or is occurring.

In evaluating whether the Complainant's statement satisfies the objective test of reasonable belief a violation has occurred or is occurring, the Complainant's statements and actions are compared to what a reasonably prudent person of Complainant's employment position,

professional experience, knowledge, duties and responsibilities, would believe under similar circumstances.

The Complainant testified that whenever he raised the issue of riser food being subject to the 60/90 rule or material that had to be moved to the waste/reject pile, he was advised that riser food was a necessary part of the production and transportation process. This is consistent with the positions expressed by the D. Neal as plant manager before and after consultation with GP legal department, K. Blankenship as a dotted line reporting senior to the Complainant, and with M. Vest as a regional resource to the Complainant. The evidence established a production process whereby that wallboard stacked inside the facility was culled and that off-spec wallboard that went through the entire wallboard production process and was not crushed, broken, or deficient in edging or backing, was designated as riser food. Material that did not make it through the production process or was not designated as riser food was transferred to the reject/waste pile for diversion from the waste stream or disposal.

A reasonably prudent person in Complainant's position, with responsibility for ensuring the Savannah gypsum plant complied with applicable environmental laws and regulations related to gypsum wallboard production and storage, would be expected to understand Georgia regulations[12] on solid waste designation, handling, reclamation, storage, transportation and disposal. The person would understand that "solid waste" includes garbage, refuse, certain sludge, and other discarded material resulting from industrial activity, but does not include "recovered material" that has been removed from the solid waste stream for sale, use, reuse or recycling. The person would be expected to know that turning riser food into risers is a proper use of riser food as a "recovered material" under the regulations. The person would also be expected to understand the "materials accumulated speculatively" are solid waste under the regulations.

The person would also be expected to understand the overall gypsum wallboard physical production process from receipt of raw materials through physical removal of product and by-product on a day-to-day operational basis. The person would be familiar with the potential environmental impact raw materials, product and by-product could have while at the facility and to take steps to minimize environmental impact and maximize environmental regulatory compliance. The person would be expected to physically view all areas of the facility on a regular basis, to promptly notify facility personnel of environmental issues and means to return to compliance, and to maintain necessary records, reports and documents.

The evidence of record demonstrates that wet waste, broken and crushed wallboard, wallboard that failed to dry properly and wallboard that could not be designated riser food because of deficiencies in edging or backing, was routinely culled and moved from the production facility to the waste/reject pile. The evidence of record demonstrates that riser food stored inside the facility was used in the construction of risers and that risers were required in the stacking and transportation of finished wallboard product saleable and sold to consumers. The evidence of record demonstrates that when readily available riser food inside the facility has been consumed, dedicated production of wallboard is run in order to specifically manufacture riser food or riser

[12] Georgia Administrative Code, Title 391, Subtitle 391-3, Chapter 391-3-4; Solid Waste Management (excerpts at (CX 48)

food is trucked into the Savannah facility. The evidence of record also indicates that when available space for the storage of riser food inside the building decreased due to required storage of on-spec wallboard inside the facility, some riser food was stored in bags outside the facility building. The evidence demonstrates that production records were maintained such that the volume and/or weight of material entering the production process, the volume and/or weight of finished on-spec wallboard product, the volume and/or weight of material being routed to the waste/reject pile, and the volume and/or weight of off-spec wallboard designated as riser food, and the volume and/or weight of riser food manufactured into risers, could have been determined on a scheduled basis.

After consideration of the evidence of record and the foregoing, this Administrative Law Judge finds that the Complainant has failed to establish an objective belief that there was "reject board" being stacked inside the facility in a manner that violated the consent order requirements to survey "all reject material stockpiles" on a semi-annual basis.

b. The Complainant has established by the preponderance of the evidence that his July 7, 2008 Guideline complaint, "The facility also keeps a large stock pile of unusable board outside on the pavement. This board is classified as 'riser food', but in fact has not been used for riser food. The Georgia EPD 60/90 rule applies to the board pile, but the Plant Manager allows the surveyors to leave this board out of the official survey report" is protected activity under the SWDA.

(1) Evaluation of Complainant's subjective belief that a violation occurred or is occurring.

This second statement in the July 7, 2008, Guideline letter refers solely to that "large stock pile of unusable board outside on the pavement" to which "the Georgia EPD 60/90 rule applies" and which is left out of the consent order required survey of waste/reject material.

Again, when evaluating the subjective reasonableness of the Complainant's belief a violation of the SWDA has occurred or is occurring, the Complainant's employment position, professional experience, knowledge, duties and responsibilities must be considered. Here, the Complainant was part of the delegation from GP involved in the consent orders of 2004 and November 2008 and was aware that the 60/90 rule applied to waste/reject piles on the back yard of the facility. After outside storage of off-spec wallboard began in March 2008, the Complainant discussed the applicability of the 60/90 rule with D. Lyle of the EPD in April 2008. He also in artfully raised the issue with his immediate supervisor, D. Neal and GP resource K. Blankenship between the April 2008 EPD site inspection and the June 30, 2008 consent order third-party survey. The term "in artfully" is used because the evidence established that during this time the Complainant was discussing the application of 60/90 rule to riser food and not to unusable board stacked outside. The evidence established that GP considered board unusable as riser food to be material to be moved to the waste/reject pile throughout the time period of Complainant's tenure at the Savannah plant.

The Complainant testified that he was told by the riser machine operator that board stored outside was not used in the manufacture of risers because it would jam the machine. It is reasonable to expect the Complainant to make such an inquiry as part of his duties as the facility

environmental resource. However, this testimony was contradicted by D. Neal and M. Dunnermann, as it related to outside stored wallboard that was still suitable as riser food. D. Neal testified that the riser machine operator made test runs of outside stored riser food through the riser machine and that the test demonstrated riser food stored outside was suitable for riser manufacturing. D. Neal also testified that outside riser food was actually used in riser manufacturing, that the actual volume of outside wallboard fluctuated as wallboard was added from production runs and riser food was removed for riser manufacturing, and that unusable board was moved to the waste/reject pile. M. Dunnermann testified that production workers would go to the outside stacks of riser food and pull out 5/8 inch DENS material for riser manufacturing because the thicker boards made risers cubes faster than the thinner wallboards. He also testified that outside stacked wallboard would become unusable as riser food if the wind or weather blew the bags off and it was damaged by moisture. He testified that outside stacked wallboard identified as unusable was restaged by production employees and moved to the waste/reject pile by yard employees.

It is also reasonable to expect the Complainant to make an inquiry as to continued storage and/or movement of unusable outside stacked wallboard to the waste/reject pile from the yard supervisor, M. Dunnermann, as part of his duties as the facility environmental resource evaluating the facilities compliance with the 60/90 rule for recovered material which would include unusable wallboard. The Complainant testified that he did not make any inquiry regarding records on the riser food stacks. From the Complainant's position and years of experience, it is also reasonable to expect the Complainant to understand that wallboard that cannot be used as riser food was considered by managers at the Savannah plant to be material to be placed on the waste/reject pile in a timely manner.

The 60/90 rule requires documentation of the amount of recovered material on hand at any one point, the amount of recovered material added on a continuing basis, and the amount of recovered material removed from the solid waste stream on a continuing basis. Such documentation is required to demonstrate that over a given 90-day period, 60% of the recovered material on hand at the beginning of the 90-day period has been removed from the solid waste stream by sale, reuse, recycling, or disposal and that 60% of the recovered material added during the same period has been sold, reused, recycled or disposed in a landfill. While daily production and discard information was available from the production and yard supervisors, the Complainant made no inquiry nor maintained any records that would permit computations under the 60/90 rule. Such computations and record keeping would be expected from the environmental resource charged with the duty and responsibility to maintain plant compliance with State environmental requirements. Here the Complainant made only a generalized "cubication" on July 7, 2008, of outside stored wallboard, both riser food and unusable board.

In light of the evidence in this case and the short time from the beginning of plant's outside wallboard storage in March 2008, and the Complainant's July 7, 2008 Guideline complaint, it is reasonable for the Complainant to believe that unusable wallboard stored outside was subject to the 60/90 rule.

(2) Evaluation of a reasonably prudent person's objective belief that a violation occurred or is occurring.

Off-spec wallboard that was unusable in riser manufacturing falls within the definition of recovered material under the 60/90 rule. This means that over a 90-day period, stored unusable wallboard must be reduced 60% from that present by weight or volume at the beginning of the 90-day period. Additionally, 60% of unusable wallboard produced during the 90-day period would have to be diverted from the waste stream or disposed as solid waste.

M. Dunnermann testified that riser food was stored outside at the Las Vegas facility, the Blue Rapids facility and the Brunswick facility as well as the Savannah facility. D. Neal testified that his instructions to the production and yard supervisor was that wallboard stored outside as riser food was to be bagged and that unbagged wallboard was to be inspected to determine if the integrity of the individual boards have been compromised and if the boards are unusable as riser food they were to be moved to the waste/reject pile. This was a continuing order. M. Dunnermann testified he understood from D. Neal that all outside stored wallboard was to be bagged. He stated that wallboards which were stacked outside and became exposed to the elements were identified to the production team so that unusable wallboard could be staged for movement to the waste/reject pile. He reported that movement of material to the waste/reject pile was a continuing evolution. He also stated that wallboard stacked inside the plant that was identified as unusable during culling events were moved from inside the plant directly to the waste/reject pile, weather permitting.

Since the unusable wallboard was removed to the waste/reject pile on a continuing basis, a reasonably prudent environmental resource with education, experience and knowledge similar to the Complainant, would consider the unusable wallboard as a recovered material subject to the 60/90 rule whether it sat in an outside staging area or on the waste/reject pile. With the continuing identification of bagged board stacked outside which became unusable due to being exposed to the elements, and their routine removal to the waste/reject pile, it is also reasonable that such an environmental resource person would not monitor the wallboard stacked outside, unless the unbagged boards were not routinely moved to the waste/reject pile over a 90-day period.

(3) Evaluation of 42 USC §6971(d) to Complainant's actions.

The SWDA provides that the whistleblower provision of the Act "have no application to any employee who, acting without direction from his employer (or his agent), deliberately violates any requirement of this chapter."

The Complainant, as the facility environmental resource, had the primary duty and responsibility to ensure the Savannah plant complied with federal and state environmental regulations and to make recommendation on how to correct items of concern. In this case, the evidence fails to demonstrate that the Complainant's failure to monitor unusable wallboard as a recovered material under the 60/90 rule was a "deliberate" violation of environmental regulations on his part. The evidence, as a whole, only establishes that he was negligent in performing those duties to monitor unusable wallboard as a recovered material under the 60/90 rule and make specific recommendations to avoid 60/90 rule violations, such as recommending certain volume of 90-day old unusable board be moved to the waste/reject pile to attain 60% reduction in that board or

recommending a certain volume of less than 90-day old board be moved to the waste/reject pile to attain 60% reduction in unusable wallboard produced during the 90-day period.

After deliberation on the credible evidence of record, this Administrative Law Judge finds that only so much of the July 7, 2008, Guideline complaint that alleges "The facility also keeps a large stock pile of unusable board outside on the pavement. This board is classified as 'riser food', but in fact has not been used for riser food. The Georgia EPD 60/90 rule applies to the board pile, but the Plant Manager allows the surveyors to leave this board out of the official survey report" is protected activity under the SWDA.

III. The Complainant failed to establish by a preponderance of the evidence that his July 15, 2008, oral statement to investigator B. Hawkins was protected activity under the SWDA.

The Complainant testified that on the morning of July 15, 2008, he called B. Hawkins in her capacity as the Guideline complaint investigator and told her that the certification letter had been prepared for the plant manager's signature, that it was potentially false because not all the reject material at the plant had been included in the June 30, 2008 consent ordered survey, and that potential falsification of records alleged in his Guideline complaint was a very important issue. He testified that B. Hawkins told him to continue business as usual and if he would normally submit the letter to do so. Later he testified that B. Hawkins "told me what to do. I told her I didn't think it should be done … I don't think this is right. She told me to do it." He also testified that he may have told B. Hawkins that the certification letter would be a misrepresentation to the government but denied telling B. Hawkins that the certification letter would be a lie to the government because at the time he called B. Hawkins he didn't know if GP had determined whether the board had to be counted in the survey or not.

B. Hawkins testified that the mid-July telephone call she received from the Complainant "was just a general question" on how he should handle his work activities during the investigation. It was not a discussion or part of the investigative process involving the Guideline complaint. In her prior deposition B. Hawkins reported the Complainant's mid-July 2008 telephone call as the Complainant reporting he was preparing a certification that needed submitted and inquiring if he should submit it or not in light of the Guideline investigation. B. Hawkins stated in deposition that she advised the Complainant to proceed with whatever the normal process was. She reported that the inquiry was whether the Complainant needed to change anything because there was an investigation underway. She denied the Complainant's statement in CX 22 that she told him "to go ahead and get [D.] Neal to sign the letter and submit it to the State" as alleged in Complainant's August 1, 2008 e-mail. Here the Complainant has failed to establish by a preponderance of the evidence that B. Hawkins received a communication that amounted to protected activity under SWDA or that she even knew the comments made by the Complainant related to violations of environmental implementation plans or environmental laws and regulations. Complainant has also failed to establish by a preponderance of the evidence that the July 15, 2008 statement was made as part of the investigation then assigned to B. Hawkins to investigate the Complainant's July 7, 2008 Guideline complaint.

B. Hawkins denies directing the Complainant to submit the July 15, 2008 certification letter to D. Neal for signature and then to submit the letter to the state as alleged by the Complainant. Her

direction was to proceed with normal operations while the investigation was proceeding. The Complainant has failed to establish by a preponderance of the evidence that he was directed by B. Hawkins to submit a fraudulent certification to D. Neal or Georgia. The evidence established that the Complainant had the duty and responsibility as the Savannah plant environmental resource to arrange for the survey used in the certification letters, compare survey data with prior survey reports, compute volume reduction in the waste/reject pile, determine if the milestones of the consent order had been met, prepare the correspondence necessary to report to the Georgia EPD whether the Savannah plant had attained or failed to attain the required consent order milestones, and to make recommendations to correct items of concern. The Complainant testified to his understanding of his duty to set forth facts accurately in reports to government agencies. It was the Complainant's duty to prepare the July 15, 2008 certification letter to the EPD accurately. His failure to include comments that not all waste/reject material was included in the June 30, 2008 survey prior to submitting the certification letter to D. Neal as he asserts, was a deliberate act on his part without direction from B. Hawkins or other supervisors of Respondent such that the Complainant's actions with respect to the July 15, 2008 certification letter fall within the parameters of SWDA §6971(d).

In view of the foregoing, the Complainant has failed to establish by a preponderance of the evidence that his oral communication to B. Hawkins on the morning of July 15, 2008, was protected activity under the SWDA.

IV. The Complainant failed to establish by a preponderance of the evidence that his July 15, 2008, oral statement to M. Vest was protected activity under the SWDA.

M. Vest testified in deposition that she was an environmental resource for the Complainant from 2004 to 2008 while she served as GP Southeast Field Environmental Manager. She provided suggestions and guidance to the environmental resource persons at the Savannah and Brunswick, Georgia gypsum plants. She understood the 60/90 rule, the consent order governing management of the waste/reject pile at the Savannah plant, was aware of recycling some waste/reject material back into the manufacturing process, and had arranged truck transportation in the past for removal of waste/reject pile material. She considered riser food material as not subject to the 60/90 rule because it was not waste. M. Vest testified in deposition that the Complainant called her while she was on vacation to report he had called the GP hotline, had issues about the consent order certification letter on the waste pile not including damaged and exposed riser boards, and that the hotline contact had suggested giving the report to the plant manager. She reported her advice as "I would do what the hotline contact said to do." She stated she was not aware of the Complainant's Guideline complaint or aware of what the hotline contact may have told the Complainant. There is no evidence that M. Vest took any actions as a result of the July 15, 2008 telephone call from the Complainant.

The Complainant testified that he called M. Vest after talking to B. Hawkins on July 15, 2008 and before he submitted the July 15, 2008 certification letter to D. Neal for signature. He reported that M. Vest told him to follow the instruction from B. Hawkins (set forth above). In CX 23 the Complainant stated he called M. Vest on July 15, 2008 and told her his opinion of riser food and that B. Hawkins "instructed me to get David to sign the letter and go on with business as usual." He states he did not divulge any specifics about the Guideline investigation.

He reported M. Vest was concerned but agreed to follow B. Hawkin's advice. In the same e-mail the Complainant set forth his detailed reasoning why the July 15, 2008 certification letter, which was the subject of that morning's telephone calls by Complainant to B. Hawkins and M. Vest, was not inaccurate or untrue. In CX 23 he challenged GP managers by stating "there is no way you can conclude that you honestly believe that I purposely prepared a false letter for David to sign."

The Complainant has failed to establish by a preponderance of the evidence that he was directed by M. Vest to submit a fraudulent certification to D. Neal or Georgia. The evidence established that the Complainant had the duty and responsibility as the Savannah plant environmental resource to arrange for the survey used in the certification letters, compare survey data with prior survey reports, compute volume reduction in the waste/reject pile, determine if the milestones of the consent order had been met, prepare the correspondence necessary to report to the Georgia EPD whether the Savannah plant had attained or failed to attain the required consent order milestones, and to make recommendations to correct items of concern. The Complainant testified to his understanding of his duty to set forth facts accurately in reports to government agencies. It was the Complainant's duty to prepare the July 15, 2008 certification letter to the EPD accurately. His failure to include comments that not all waste/reject material was included in the June 30, 2008 survey after talking with M. Vest on July 15, 2008, prior to submitting the certification letter to D. Neal as he asserts, was a deliberate act on his part without direction from M. Vest or other supervisors of Respondent such that the Complainant's actions in regard to the July 15, 2008 certification letter fall within the parameters of SWDA §6971(d).

In view of the foregoing, the Complainant has failed to establish by a preponderance of the evidence that his oral communication to M. Vest on the morning of July 15, 2008, was protected activity under the SWDA.

V. The Complainant has established by a preponderance of the evidence that his statements to investigators B. Hawkins and B. Briggs made in the course of their investigation of the Guideline complaint after July 15, 2008, related to wallboard unusable as riser food material were protected activity under the SWDA.

The Complainant's Guideline complaint related to off-spec gypsum wallboard that was unusable in the manufacturing of risers was protected activity as described above. This complaint initiated an investigation into the Savannah plant's compliance with the implementation plan for the reduction of solid waste at the Savannah facility, known as the November 21, 2006 consent order between GP and Georgia EPD, and evaluation of the Savannah facility's compliance with State regulations governing recovered material in the solid waste stream, the 60/90 rule. The SWDA protects employees who testify in a proceeding related to such an investigation.

Here B. Hawkins and B. Briggs were assigned by GP to investigate the protected allegations in Complainant's Guideline complaint. The investigation began after July 15, 2008 and included one site visit to the Plant by B. Hawkins before she left the investigation team. Accordingly, statements made by them in the course of the investigation were protected activity. This would include not only verbal statements taken during personal interview but also the Complainant's e-

mail submissions of July 28, 2008 (CX 19), July 30, 2008 (CX 20), August 1, 2008 (CX 22), and August 6, 2008 (CX 21).

VI. The Complainant's August 1, 2008 suspension with pay pending completion of the Guideline complaint investigation was an adverse employment action not entitled to relief under the SWDA.

a. The August 1, 2008 suspension with pay pending completion of the Guideline complaint investigation was an adverse employment action.

Under federal regulations, changes to an employee's compensation, terms of employment, conditions of employment, privileges of employment, discharge, restraints on employment, intimidation, threats, coercion and blacklisting may constitute an adverse employment action under the SWDA, 24 CFR §24.102.

Here the Complainant was suspended from performing his usual employment duties on August 1, 2008 by R. Wolfe, the Director of Human Resources for GP. While his compensation was not affected while in a suspended status, the Complainant was prohibited from performing his usual work duties and being present at the Plant. Such a restraint on completing his normal employment duties is an adverse employment action.

b. R. Wolfe was aware of the Complainant's protected activity of filing a Guideline complaint on July 7, 2008 at the time he placed the Complainant on suspended with pay status pending completion of the Guideline complaint investigation.

R. Wolfe testified that he did not participate in the Guideline complaint investigation and did not talk to the assigned investigators or to the Complainant or to D. Neal prior to deciding to suspend the Complainant's employment in a pay status pending completion of the investigation being conducted by B. Briggs following the Guideline complaint. He reported that he based his decision on conversations with in-house legal counsel, T. O'Connor as well as his knowledge of the responsibilities involved with the position of environmental resource at a GP facility and on how to escalate an environmental compliance concern when a supervisor does not agree. He acknowledged that using a Guideline complaint was one acceptable means to escalate an environmental concern as long as the complaint was truthful.

Investigator B. Briggs testified that when the Complainant was first interviewed he discussed the riser food and reject material with the Complainant during the first July 2008 Plant visit and the Complainant did not reveal that he was the person orchestrating all activities related to the July 15, 2008 consent order certification report to the EPD over D. Neal's signature while maintaining that the certification letter was unlawful. He reported that the Complainant had drafted and submitted the compliance letter for the vetting process the same day he submitted his Guideline complaint. B. Briggs reported that during the investigation the Complainant took the position that D. Neal had knowingly violated the November 21, 2006 consent order and had made a false certification to the State of Georgia. He testified that during an interview with the Complainant on July 31, 2008, GP in-house counsel, T. O'Connor, called in his presence and the Complainant stated that he was alleging intentional misconduct by D. Neal in violating the

consent order. B. Briggs stated that he last interviewed the Complainant on August 6, 2008 and provided an opportunity to the Complainant to explain discrepancies in his August 2, 2008 e-mail. He stated that he may have discussed the investigation with T. O'Connor over the telephone. T. O'Connor did not testify in this case.

In that R. Wolfe based his actions in suspending the Complainant in a pay status pending completion of the Guideline investigation on conversations with in-house counsel T. O'Connor, whose knowledge of the relevant events was based on the report of B. Briggs and the July 31, 2008 telephone conversation with the Complainant, this Administrative Law Judge finds that R. Wolfe was aware of the Complainant's protected activity of filing a Guideline complaint on July 7, 2008 and discussing the complaint with investigator B. Briggs.

c. The August 1, 2008 suspension with pay pending completion of the Guideline investigation was not in retaliation for the Complainant's protected activity between July 7, 2008 and August 1, 2008.

B. Briggs testified that during the first interview of the Complainant and the July 31, 2008 interview with the Complainant, the Complainant maintained that D. Neal had violated the November 21, 2006 consent order by not having stacked gypsum reject board counted in the June 30, 2008 third-party survey and D. Neal filed a false certification with the Georgia EPD. The Complainant also expressed this opinion to T. O'Connor on July 31, 2008 in B. Briggs presence.

R. Wolfe was aware that the Complainant asserted that D. Neal had violated the November 21, 2008 consent order and had filed a false certification letter to the Georgia EPD. He noted the seriousness of the allegations and the adverse impact it would have on D. Neal's pending transfer and future employment. Since the Complainant had not yet authored the August 1, 2008 and August 2, 2008 e-mails, not undergone his August 6, 2008 interview by B. Briggs, those factors did not enter into R. Wolfe's decision to suspend the Complainant with pay pending completion of the investigation. He was aware that the Complainant had drafted the July 15, 2008 certification letter. R. Wolfe testified that an environmental resource should not give his manager a certification letter to sign that contains false information without telling the manager about the concerns. He testified that he suspended the Complainant because the Complainant was the author of a certification letter sent to the government (EPD) on July 15, 2008 that the Complainant now claimed was false and if the falseness of the submission was true, the manager, D. Neal, would probably be no longer employed by GP.

Because of the proximity in time to the July 7, 2008 Guideline complaint which was protected activity under the SWDA and the adverse employment action of suspension with pay on August 1, 2008, the Complainant is given the inference that the suspension was in retaliation for engaging in protected activity under the SWDA. However, the Respondent has established that at the time the Complainant was suspended by R. Wolfe there was a need to determine if D. Neal had violated the November 21 2006 consent order or filed a false certification to Georgia EPD as well as determining Complainant's potentially fraudulent activity by either (a) making false statements in a Guideline complaint on July 7, 2008 concerning improper actions by a supervisor regarding handling, storage and reporting of solid waste material or (b) causing a false consent

order progress report to be made to Georgia state government officials (EPD) on July 16, 2008. The last two items were addressed with the Complainant after he was placed in a suspended with pay status.

After deliberation on the evidence of record, this Administrative Law Judge finds that the actions of R. Wolfe in suspending the Complainant with pay on August 1, 2008, was a sound business decision based on the need to complete the investigation into the issues of consent order compliance, false certification to the Georgia EPD, and the role that the Complainant and D. Neal played in those events and not the result of protected activity by the Complainant. Accordingly, the Respondent has established by a preponderance of the evidence that the suspension with pay was not an adverse employment action taken in retaliation for engaging in protective activity under the SWDA.

In view of all the foregoing, this Administrative Law Judge finds that the Complainant's August 1, 2008 suspension with pay pending completion of the Guideline complaint investigation was an adverse employment action not entitled to relief under the SWDA.

VII. The Complainant has failed to establish that his August 1, 2008 e-mail statement was protected activity under the SWDA.

CX 22 and RX 34 is the Complainant's 5:49 PM, August 1, 2008 e-mail to managers in which he reported that he had been placed on suspension after filing a July 7, 2008 Guideline complaint in which he had alleged "unethical and potentially illegal behavior by senior management at the Savannah Gypsum Plant in Savannah, Georgia … (and) that stockpiles of reject boards were purposely omitted from official Consent Order Surveys." He reported that "in my role as environmental Manager of the facility I had prepared documentation for the Plant Manager to sign that indicated we were in compliance with the stipulations of the consent order. [D.] Lyle of the Georgia Environmental Protection Division had preciously informed the Plant Manager, [D.] Neal, that the stockpiled board needed to be included in the surveys but he refused and continued to allow the board to be omitted from the official surveys. I witnessed this conversation between [D.] Neal and [D.] Lyle. I called [B.] Shelton [Hawkins] on July 15th, 2008 and told her that I did not think it would be appropriate to get the Plant Manager to sign this certification because, in my opinion, it was a false representation to the State of the actual amount of reject board stockpiled at the facility on June 30, 2008, the date of the survey. I also told [B.S. Hawkins] that we had 15 more days to wait before the compliance deadline and I thought it would be better to wait and see what the investigation revealed and if necessary make changes to the letter and then submit it. [B.S. Hawkins] told me not to wait for the investigation and go ahead and get [D.] Neal to sign the letter and submit it to the State."

During her testimony, B. Hawkins denied the actions and knowledge attributed to her by the Complainant in his August 1, 2008 e-mail.

The Complainant's self-serving August 2, 2008 e-mail was not part of the ongoing investigation made in response to questions from Respondent's agents. The statement was not made to promote the reduction of hazardous waste and minimize the present and future threats of solid waste to public health or environment. *Deavers v. Kaiser-Hill Co.*, ARB No. 03-113, *13 (Mar.

31, 2005), ALJ Case No. 01-SWD-00003 and cases cited therein. The statement did not instigate any additional proceeding into the Savannah plant's compliance with environmental requirements. When viewed as a whole, Complainant's August 1, 2008 e-mail is a communication in which the Complainant restates he filed a Guideline complaint, restyles the nature of "unethical and illegal activity", and presents false information as to actions attributed to B. Hawkins as a means to escape liability for his actions and inactions. Such activity as set forth herein is not protected activity under the SWDA. *Sasse v. U.S. Department of Labor*, 409 F.3d 773 (6th Cir. 2005) Accordingly, the Complainant has failed to establish his August 1, 2008, statement to GP superiors (CX 22; RX 34) was protected activity under the SWDA.

VIII. The Complainant has failed to establish his August 2, 2008 e-mail statement to GP managers was protected activity under the SWDA.

CX 23 and RX 35 is the Complainant's August 2, 2008 e-mail titled "Misunderstanding" related to his August 1, 2008 suspension. In this communication to GP legal counsel and human resource manager, the Complainant sets forth his rationale that since no legal department "determination has been made as to the status of the 'riser food' stockpiled board that was at the plant on June 30th, 2008 … [the July 15, 2008 certification] letter is accurate and is not a false record." He stated he "simply disagreed with [D.] Neal's interpretation that the board need not be counted."

The Complainant's self-serving August 2, 2008 e-mail was not part of the ongoing investigation into unusable wallboard. The statement was not made to promote the reduction of hazardous waste and minimize the present and future threats of solid waste to public health or environment. *Deavers v. Kaiser-Hill Co*., ARB No. 03-113, *13 (Mar. 31, 2005), ALJ Case No. 01-SWD-00003 and cases cited therein. The statement did not instigate any additional proceeding into the Savannah plant's compliance with environmental requirements. When viewed as a whole, CX 23 is a communication in which the Complainant argues that he was merely performing his assigned duties as the facility's environmental resource. Such activity as set forth herein is not protected activity under the SWDA. *Sasse v. U.S. Department of Labor*, 409 F.3d 773 (6th Cir. 2005) Accordingly, the Complainant has failed to establish his August 2, 2008, statement to GP managers (CX 23; RX 35) was protected activity under the SWDA.

IX. The Complainant has established by a preponderance of the evidence that his August 3, 2008, e-mail statement to EPD representative D. Lyle (CX 24) and his follow-on statements to D. Lyle on August 4, 2008 were protected activity under the SWDA.

(1) Evaluation of Complainant's initiation of Georgia EPD proceedings into administration of the implementation plan set forth in the November 2006 consent order.

On August 3, 2008, the Complainant sent an e-mail to D. Lyle at the Georgia EPD. He opened his correspondence with the words "I am writing this to inform you of a couple of serious issues of potential knowing violations of the Clean Air Act and the Georgia Solid Waste Act at the Savannah Gypsum Plant." He notified D. Lyle that he had been suspended from work at the Savannah plant and was reporting the issue to the EPD because he could not get satisfaction internally. (CX 24)

The Complainant described the April 2008 meeting with D. Lyle which occurred near wallboard stacked outside the facility's building, reported "another stockpile of reject board has also been allowed to accumulate which is not suitable for 'riser food'" since the April 2008 EPD visit, that the large volume of reject board unsuitable for use as riser food had been stockpiled well over 90 days and was not included in the June 30, 2008 consent order survey, and that the same stockpiled wallboard had been all moved to the waste/reject pile between July 17 and July 30, 2008. The Complainant reported to D. Lyle, "It's my opinion, based on my reading of the consent order and based on your comments during your last inspection that the survey of June 30, 2008 is not representative of 'all reject gypsum stockpiles' as required by the Consent Order."

The problem with evaluating the Complainant's subjective belief when he submitted this report to the Georgia EPD on August 3, 2008, is that the Complainant had made a series of contradictory statements that the July 15, 2008 certification letter to the Georgia EPD was a true and accurate representation of reject gypsum stockpile required to be surveyed under the November 2006 consent order. Additionally, he had stated to M. Vest that he needed to make a statement to EPD before GP reported the events to EPD in order to have "protection from retaliation under the law" (CX 17 August 1, 2008 e-mail; RX 34). It is reasonably inferred from CX 17, 23 and RX 34, 35, that the Complainant understood by August 3, 2008, that his personal actions reflected he had failed to properly perform his duties as the environmental resource for the Savannah facility and his future employment with GP was in question.

D. Lyle testified that he met with the Complainant on August 4, 2008, and discussed the Complainant's concerns with reporting discrepancies in riser food and the consent order. From the contents of CX 24, the conversations must have included stockpiled wallboard that was unusable in the manufacturing of risers. From the evidence as a whole, it is reasonably inferred that the discussions also included off-spec wallboard suitable for use in manufacturing risers as well as the 60/90 rule. From the evidence of record, it is also reasonable to infer that record keeping requirements and computations under the 60/90 rule were not discussed.

D. Lyle testified that based on the August 4, 2008 meeting with the Complainant, he initiated an August 7, 2008, meeting with D. Neal. This was followed with more discussion about riser food, recovered material, defined waste, and the outside storage of riser food. This chain of EPD driven events generated an August 22, 2008 position statement describing the Savannah plant facility practice of handling of off-spec wallboard suitable for use in manufacturing risers and the removal to the surveyed waste/reject pile of off-spec material not suitable for use in riser manufacturing (CX 40 August 22, 2008 letter; RX 37). In response to EPD letter of October 9, 2008 indicating that EPD agreed riser food could be stored outdoors in a designated area as long as storm water pollution was managed and riser food was considered a recovered material under state regulations (RX 42). By letter of November 12, 2008, the successor plant manager notified D. Lyle that GP understood EPD's environmental concerns about the outside storage of riser feed stock, that the Savannah plant would discontinue outside storage but continue inside storage of riser feedstock, and that the remaining outside stacked riser feedstock would be consumed by December 31, 2008. The letter acknowledged EPD's position that managed riser feedstock stored indoors would not be considered waste material (CX 41; RX 43).

The evidence of record demonstrates that the EPD initiated and participated in discussions with GP about the storage, use and handling of off-spec wallboard at the Savannah plant as a result of the Complainant's August 3, 2008 e-mail to D. Lyle and the follow-on meeting of August 4, 2008. Such action by the EPD is usually sufficient to constitute protected activity under the SWDA; however, §6971(d) of the SWDA must also be considered.

(2) Evaluation of 42 USC §6971(d) to Complainant's actions.

As stated above, the whistleblower provisions of the SWDA "shall have no application to any employee who, acting without direction from his superiors … deliberately violates any requirement of this chapter." 42 USC §6971(d)

As the facility environmental resource, the Complainant had the primary duty and responsibility to ensure the Savannah plant complied with federal and state environmental regulations and to make recommendation on how to correct items of concern. It was his duty to monitor the collection of solid waste on the Savannah facility and to ensure that all stockpiles of gypsum waste/reject were included in the semi-annual third party surveys required by the November 2006 consent order.

The Complainant's August 3, 2008 complaint was directed to wallboard stacked outside that was unusable in the manufacture of risers. He observed the outside stacks of wall board in April 2008 to the end of July 2008. He testified that the pile of off-spec wallboard stacked outside grew between April 2008 and the June 30, 2008 third party survey, and that approximately 25% of the outside stacks were uncovered to the weather. He argued that uncovered wallboard was unusable as riser food and that the 60/90 rule applies to the unusable wallboard. Yet he failed to take any steps to examine existing production records, to record the amount of off-spec material produced daily or weekly, he failed to examine existing yard records to ascertain the amount of off-spec material was moved to the waste/reject pile daily or weekly, he failed to familiarize himself with the daily movement of off-spec material to the waste/reject pile, he failed to examine existing production records to record the amount of off-spec material suitable for the manufacture of risers which was utilized daily or weekly, he failed to advise the plant supervisor, production manager and yard supervisor of the amount, if any, of off-spec material unusable as riser feedstock that had to be moved to the waste/reject pile prior to the June 30, 2008 survey, or otherwise subjected to third party survey, in order to meet the 60/90 rule for the period ending June 30, 2008. He made no effort to quantify the amount of off-spec wallboard that might have been unusable in the manufacture of risers until the morning of July 7, 2008, a point in time after he had been informed that he was being considered for a personal improvement plan related to factors not involving environmental compliance and the personal performance improvement plan was pending. The evidence of record is void of evidence establishing that the Complainant ever made any computations or maintained a system of documentation required under the 60/90 rule. The Complainant claims to have been seeking guidance from the legal department by filing the Guideline complaint and escalating his disagreement about riser food becoming a waste. While his argument would have been better presented had he had the documentation from production, storage, consumption, and waste/reject pile movement to explain how the 60/90 rule was or was not being followed, the lack of a more articulate analysis infers that the Complainant did not properly perform his duties.

Again, as above, the record of evidence as a whole fails to demonstrate that the Complainant "deliberately" violated the Georgia environmental regulations related to off-spec wallboard unusable in the manufacture of risers on his part. The evidence, as a whole, only establishes that he was negligent in performing those duties to monitor unusable wallboard as a recovered material under the 60/90 rule and make specific recommendations to avoid 60/90 rule violations, such as recommending certain volume of 90-day old unusable board be moved to the waste/reject pile to attain 60% reduction in that board or recommending a certain volume of less than 90-day old board be moved to the waste/reject pile to attain 60% reduction in unusable wallboard produced during the 90-day period.[13]

Accordingly, his August 3, 2008 e-mail and August 4, 2008 communications to D. Lyle of the EPD is not disqualified from being protected activity by operations of §6971(d) of the SWDA. Thus these communications to D. Lyle involving "reject board unusable for use as riser food" are protected activity under the SWDA.

X. The Complainant's August 12, 2008 termination of employment was an adverse employment action not due to protected activity under the SWDA.

a. The August 12, 2008 termination of employment was an adverse employment action under the SWDA.

Under federal regulations, the discharge of an employee may constitute an adverse employment action under the SWDA, 24 CFR §24.102.

Here T. Durkin directed the Complainant's employment with GP be terminated. The Parties stipulate that the termination was on August 12, 2008. The involuntary termination of employment, such as occurred here, is an adverse employment action.

b. T. Durkin was aware of the Complainant's protected activity between July 7, 2008 and August 6, 2008, except for protective activity involving statements made to EPD on and after August 3, 2008.

T. Durkin testified that he directed the termination of the Complainant's employment following investigation into the Complainant's July 7, 2008 Guideline complaint. He reported that he was personally aware that the Complainant had filed the Guideline Letter. He reported that he had two meeting in which investigator B. Briggs, Director of Human Resources R. Wolfe, in-house counsel T. O'Connor, general counsel T. Darlan, and Head of Corporate Compliance T. Butz were present. He identified the issues that either the Complainant in charge of Plant compliance knowingly falsified a certification letter or knowingly made a false Guideline complaint about the Plant Manager actions. He reported that he did not personally read the Complainant's guideline complaint that included many items unrelated to the allegation of wrongdoing by the Plant Manager D. Neal.

[13] The July 15, 2008 certification letter mailed to the EPD was addressed in the August 19, 2010 "Decision and Order Granting Respondent's Request for Summary Decision, in Part and Denying Respondent's Motion for Summary Decision, in Part" (ALJX 8)

T. Durkin testified that at the first meeting it was determined that questions remained about what was actually said, what had actually happened, and items that needed verified. He reported that the issues involved the Plant Manager directing the compliance officer to do something that was not in compliance with the handling of solid waste, the Plant Manager making a false certification to the EPD, the Complainant falsifying a certification document on his own as the Plant compliance officer, and the Complainant making a false allegation in his Guideline complaint involving the Plant Manager. He reported the concern was not a Plant compliance issue but an issue of "falsifying a document and lying," and that both were grounds to terminate employment. He stated that if the Guideline complaint about noncompliance with the November 21, 2006 consent order was accurate, then either D. Neal or the Complainant was going to be terminated.

T. Durkin testified that he talked with K. Blankenship between the time of the Guideline complaint and termination decision in order to verify where GP was in respect to compliance with the November 21, 2006 consent order.

T. Durkin testified that at the second meeting the verified facts involving the compliance issues were presented by B. Briggs.

B. Briggs testified that the first meeting in which he briefed corporate officials on his investigation was after his second interview of the Complainant at the end of July 2008. He subsequently interviewed the Complainant on August 6, 2008. At the beginning of August 2008 B. Briggs was aware that GP intended to contact EPD about handling wallboard stored outside facility buildings. By an August 4, 2008 e-mail from the Complainant (CX 21) B. Briggs was aware of D. Lyle's understanding of the April 2008 site visit but was not made aware that the Complainant had engaged in protected activity by making allegations to D. Lyle of the EPD by e-mail on August 3, 2008 (CX 24) or by making statements to D. Lyle on August 4, 2008 in EPD offices. The evidence of record also does not establish that B. Briggs was aware of D. Lyle's August 11, 2008 site visit to the Plant.

Here T. Durkin is imputed with the knowledge of all protected activity known or should have been known by investigator B. Briggs at the time of his oral reports in August 2008. This included knowledge of the Guideline complaint filing and allegations against the Plant Manager as well as statements made by the Claimant to investigators during the course of the investigation and by e-mail through August 6, 2008. The Complainant has failed to establish by a preponderance of the evidence that T. Durkin was aware of the Complainant's protected activity with the Georgia EPD beginning August 3, 2008.

c. <u>The August 12, 2008 termination of employment was not due to the Complainant's protected activity after July 7, 2008.</u>

T. Durkin testified that the results of the investigation were presented to him as Senior Vice President of Operations and Compliance "so I could make a decision on how to best address those findings" … because the Complainant's "allegations implicated Plant Manager David Neal." He testified that he considered whether the contents of the July 15, 2008, certification letter Complainant provided the Plant Manager was false or misleading with respect to the

company's actual compliance with the November 21, 2006 consent order. He concluded that the Complainant either lied in his internal complaint or misled his immediate supervisors regarding a significant compliance matter for which he was primarily responsible. He considered such conduct was inconsistent with Georgia-Pacific's values and expectations and elected to terminate Complainant's employment.

T. Durkin testified that after the discussion of the investigative findings at the second meeting with B. Briggs, it was his clear impression that the Complainant's allegations of wrongdoing by the Plant Manager in the Guideline complaint was false and made in bad faith. He considered the Plant in compliance with the consent order so that the July 2008 certification letter to the EPD was accurate. He testified that statements made in Guideline complaints and during investigations of Guideline complaints must be made in good faith and be accurate statements in order to protect the individual from adverse actions based on bad faith Guideline complaints and bad faith statements to investigators. He reported that the decision to terminate an individual is a group decision and he made the ultimate decision to terminate the Complainant at the second meeting and there was no further discussion by the group related to the Complainant's termination. He indicated that Human Resources was present and would be the department to effectuate the termination.

T. Durkin testified that lying to a supervisor in the preparation of a certification letter to the State EPD or lying in a Guideline complaint or Guideline investigation is not tolerated by GP. He reported his determination that the Complainant made false allegations of wrongdoing by the Plant Manager in the July 7, 2008 Guideline complaint and warranted termination of employment.

After deliberations on the evidence of record, this Administrative Law Judge finds that the decision to terminated the Complainant's employment was made by T. Durkin as Vice President of Operations and Compliance, T. Durkin was unaware of the Complainant's protected activity of August 3, 2008 and August 4, 2008 involving the Georgia EPD, the Complainant made allegations of wrongdoing by the Plant Manager as related to compliance with the November 21, 2006 consent order in his July 7, 2008 Guideline complaint and subsequent statements and e-mail correspondence to investigators, and that the Respondent has established by a preponderance of the evidence that Complainant's termination on August 12, 2008 was not an adverse employment action taken in retaliation for engaging in protective activity under the SWDA.

In view of all the foregoing, this Administrative Law Judge finds that the Complainant's August 12, 2008 termination of employment was an adverse employment action not entitled to relief under the SWDA.

CONCLUSIONS AND FINDINGS OF FACT

After deliberation on the administrative file and evidence submitted by the Parties, this Administrative Law Judge enters the following:

1. Respondent Georgia-Pacific Gypsum, LLC ("GP") is a manufacturer of gypsum wallboard products in North America and has gypsum wallboard plants located in North America, including the plant located at Wahlstrom Road, Savannah, Chatham County, Georgia (the "Plant").
2. GP acquired the Plant in 1996.
3. In June 2001 the Plant shut down for over two years.
4. Respondent Georgia-Pacific Savannah Gypsum Plant, Savannah, Georgia, was subject to consent order EPD-SW-2090 entered by the State of Georgia Department of Natural Resources, Environmental Protection Division (EPD), on November 21, 2006.
5. The Complainant began work for the Respondent in 1988.
6. During his career at GP, the Complainant held a numerous positions at various plants.
7. In 2004 or 2005, the Complainant was transferred to GP's Savannah Plant as the Senior Regional Environmental Resource. In this position, he was responsible for environmental management for the Savannah GP gypsum plant. The Complainant served in that capacity under two previous Plant Mangers before D. Neal assumed the Plant Manger's role in or about October 2006.
8. During the period of employment in 2008, Georgia-Pacific Savannah Gypsum Plant, Savannah, Georgia, Plant Manager D. Neal was the Complainant's immediate supervisor.
9. As Senior Environmental Resource, the Complainant reported directly to D. Neal with "dotted-line" reporting to K. Blankenship, the Business Unit Environmental Manger based in Atlanta.
10. If the Complainant needed additional guidance on environmental compliance issues, he could call on Senior Environmental Engineer M. Vest, a corporate-level technical environmental resource.
11. With respect to the November 21, 2006 consent order EPD-SW-2090, the Complainant had the duty and responsibility as the Savannah Plant environmental resource to arrange for the surveys required by the consent order, compare survey data with prior survey reports, compute volume reduction in the waste/reject pile, determine if the milestones of the consent order had been met, prepare the correspondence necessary to report to the Georgia EPD whether the Savannah plant had attained or failed to attain the required consent order milestones, and to make recommendations to correct items of concern.
12. Gypsum board is used for many applications, such as covering interior walls to provide a visible "finished" surface. Accordingly, any board that does not meet specifications cannot be sold to customers.
13. Off-spec gypsum board that cannot be sold to customers but is structurally sound is sometimes designated "riser food."
14. Using structurally sound off-spec gypsum board for "risers" is a standard practice throughout the gypsum board industry.
15. Off-spec gypsum wall board that is not structurally sound for use in manufacturing "risers" is "recovered material" subject to the Georgia "60/90" consumption/production rule pursuant to the Georgia Administrative Code 391-3-4-.04(7).

16. The Georgia "60/90 rule" requires that 60% of "recovered material", by weight or by volume, on-hand at the beginning of a 90-day period as well as that "recovered material" produced during the same 90-day period must be either removed from the solid waste stream by sale, use, reuse, recycling or be handled as solid waste material.
17. In or about March 2008, D. Neal authorized the stacking of some "riser food" in an area outside Plant buildings as long as it was protected from adverse weather.
18. During the time gypsum wallboard was stored outside Plant buildings, the board was routinely culled for unusable board which then was moved in due course to the reject/claim pile.
19. On June 30, 2008, EMC Engineering Services, Inc., performed a survey of certain material at the Georgia-Pacific Savannah Gypsum Plant, Savannah, Georgia, as part of the compliance requirements of consent order EPD-SW-2090.
20. At 1:37 PM, on July 2, 2008, EMC Engineering Services, Inc., reported the results of its June 30, 2008, survey to the Complainant.
21. At 2:23 PM, on July 2, 2008, the Complainant sent an e-mail to K. Blankenship stating the Plant "met the June 30th consent order milestone."
22. At 8:19 AM on July 7, 2008, the Complainant submitted a written complaint to GP's Guideline (the "Guideline Letter") via e-mail to GP management employees T. Pratt, G.E. Graves and T. Martin who were Complainant's line of supervision, which set forth –

> "The Plan Manager allows reject boards to be stacked inside the plant instead of being stacked in the reclaim pile. This is being allowed to make sure that the board is not being counted in the official surveys and to ensure that the plant meets the pile size reduction milestones listed in the consent order. The facility also keeps a large stack of unusable board outside on the pavement. This board is classified as 'riser food' but in fact has not been used for riser food. The Georgia EPD 60/90 rule applies to the board pile, but the Plant Manager allows surveyors to leave this board out of the official survey report. The EPD inspector even commented to me during an inspection that he believes the 'riser food' stacked outside and not used according to the 60/90 rule would be subject to the stipulations in the consent order. I've reported this to the Plant Manager and the Division Environmental Manager. I was again reminded that my approach and communications skill needed work, that everything is not 'black and white' and that I was on a developmental plan."

23. The Complainant has failed to establish by a preponderance of the evidence that his July 7, 2008 Guideline complaint, "The Plant Manager allows reject boards to be stacked inside the plant instead of being stacked outside on the reclaim pile. This is being allowed to make sure that the board is not counted in the official surveys and to ensure that the plant meets the pile size reduction milestones listed in the consent order." is protected activity under the SWDA.
24. The Complainant has established by the preponderance of the evidence that only so much of his written complaints to the Georgia Pacific Guideline on July 7, 2008, alleging that "The facility also keeps a large stock pile of unusable board outside on the pavement. This board is classified as 'riser food', but in fact has not been used for riser food. The Georgia EPD 60/90 rule applies to the board pile, but the Plant Manager allows the

surveyors to leave this board out of the official survey report" is protected activity under the SWDA.

25. At 1:37 PM, on July 7, 2008, the Complainant sent an e-mail to D. Neal, K. Blankenship and M. Dunnermann entitled "Consent Order Progress Report" along with an attached draft of a letter for review that would provide a consent order required progress report, based on the June 30, 2008 survey reports, to the Georgia Environmental Protection Division (EPD).
26. At 9:42 AM, on July 10, 2008, K. Blankenship advised the Complainant, D. Neal and M. Dunnermann that the GP legal department had reviewed and approved the July 7, 2008 e-mailed draft progress report prepared by the Complainant.
27. The Complainant failed to establish by a preponderance of the evidence that his July 15, 2008, oral statement to investigator B. Hawkins was protected activity under the SWDA.
28. The Complainant failed to establish by a preponderance of the evidence that his July 15, 2008, oral statement to M. Vest was protected activity under the SWDA.
29. On July 15, 2008, the Complainant personally delivered to Plant Manager D. Neal a prepared progress report letter for D. Neal's signature to indicate to the State of Georgia EPD, that Respondent was in compliance with consent order EPD-SW-2090.
30. The July 15, 2008 progress report letter was identical to that the draft progress report the Complainant had forwarded for review by e-mail on July 7, 2008.
31. Plant Manager D. Neal signed the prepared progress report letter and returned it to the Complainant for mailing on July 15, 2008.
32. The EPD received the July 15, 2008 signed progress report on July 16, 2008 by which the Respondent indicated to the State of Georgia EPD, that Respondent was in compliance with consent order EPD-SW-2090.
33. The Complainant has established by a preponderance of the evidence that his statements to investigators B. Hawkins and B. Briggs made in the course of their investigation of the Guideline complaint after July 15, 2008 through July 30, 2008, related to gypsum board that was unusable as "riser food" material, were protected activity under the SWDA.
34. The Complainant was placed in a suspended-with-pay status pending completion of the Guideline complaint investigation on Friday, August 1, 2008, by Respondent's Director of Human Resource, R. Wolfe.
35. The Complainant has failed to establish that his superiors directed him to perform any specific action outside his normal duties and responsibilities related to solid waste or to not perform any specific action contrary to his normal duties and responsibilities related to solid waste in the March 2008 to August 1, 2008 timeframe.
36. The Complainant's August 1, 2008 suspension in a pay status pending completion of the Guideline complaint investigation was an adverse employment action under the SWDA.
37. The Respondent has established that the Complainant's August 1, 2008, suspension in a pay status pending completion of the Guideline complaint investigation was for Complainant's potentially fraudulent activity by either (a) making false statements in a Guideline complaint on July 7, 2008 concerning improper actions by a supervisor regarding handling, storage and reporting of solid waste material or (b) causing a false consent order progress report to be made to Georgia state government officials (EPD) on July 16, 2008.
38. The Respondent has established by a preponderance of the evidence that the Complainant's August 1, 2008 suspension in a pay status pending completion of the

Guideline complaint investigation was not due to SWDA protected activity by the Complainant between July 7, 2008 and August 1, 2008.

39. At 5:49 PM, on August 1, 2008, after having been suspended pending completion of the ongoing investigation, the Complainant sent an e-mail entitled "Guideline Experience" to various employees of GP asserting his belief that the July 15, 2008 certification letter signed and submitted to the EPD "was a false representation to the State of the actual amount of reject board stockpiled at the facility on June 30, 2008, the date of the [consent order required compliance third-party] survey."
40. The Complainant has failed to establish his August 1, 2008 e-mail statements were protected activity under the SWDA.
41. At 1:22 PM, on August 2, 2008, the Complainant sent an e-mail entitled "Misunderstanding" to R. Wolfe, T. O'Connor, and M. Vest asserting that the July 15, 2008 certification letter signed and submitted to the EPD "is accurate and is not a false record."
42. The Complainant has failed to establish his August 2, 2008 e-mail statements were protected activity under the SWDA.
43. At 2:36 PM, August 3, 2008, the Complainant sent an e-mail to D. Lyle of the EPD stating that a significant quantity of gypsum board unsuitable for use in manufacturing "risers" had been accumulated since April 2008 and not considered and handled under the "60/90" rule or properly counted in the June 30, 2008 consent order survey in violation of the November 21, 2006 consent order requiring periodic third-party survey of "reject material."
44. On August 4, 2008, the Complainant met D. Lyle at his EPD office and described the stock piling of unusable gypsum board and movement of the unusable board to the reject/claim pile after the June 30, 2008 consent order survey.
45. The Complainant has established by a preponderance of the evidence that his August 3, 2008, e-mail statement to EPD representative D. Lyle and his follow-on statements to D. Lyle on August 4, 2008 were protected activity under the SWDA.
46. The Respondent's Senior Vice-President of Operations, T. Durkin, directed the Complainant's employment be terminated.
47. At the time he directed the Complainant's employment termination, T. Durkin was aware of the Complainant's SWDA protected activity after July 7, 2008 as related to the July 7, 2008 Guideline complainant and statements to the Guideline complaint investigators.
48. The Complainant has failed to establish by a preponderance of the evidence that T. Durkin was aware of the Complainant's August 3, 2008 or August 4, 2008 protected activity involving the Georgia EPD.
49. GP terminated the Complainant's employment on August 12, 2008.
50. The Complainant's August 12, 2008 employment termination was an adverse employment action under the SWDA
51. The Respondent has established by a preponderance of the evidence that the Complainant's August 12, 2008 employment termination was for Complainant's making false statements and his failure to perform assigned duties in a proper manner and not due to his SWDA protected activity on and after July 7, 2008.
52. The Complainant's August 12, 2008 employment termination was not the result of SWDA protected activity on or after July 7, 2008.

53. The Complainant filed his original complaint under §691 of the SWDA in a timely manner on Monday, September 8, 2008.
54. The Complainant has failed to establish entitlement to relief under the SWDA

ORDER

It is hereby Ordered that **Complainant's September 8, 2008 complaint under the SWDA is DENIED.**

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

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.