U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 June 2012

CASE NO.: 2012-SWD-1

IN THE MATTER OF:

WILLIAM THOMPSON

Complainant

v.

PEACOCK PRESS, LLC

Respondent

APPEARANCES:

WILLIAM THOMPSON, Pro Se

Complainant

PRAVIN PATEL, Pro Se

Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Solid Waste Disposal Act (herein the SWDA), 42 U.S.C. § 6971 (1988), and the regulations thereunder at 29 C.F.R. Part 24.

On October 31, 2011, William Thompson (herein Complainant) filed a complaint against Peacock Press, LLC (herein Respondent) with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL), complaining that Respondent had discharged him in retaliation for filing an illegal chemical

dumping complaint with the City of Garland, Texas. An investigation was conducted by OSHA, and on November 7, 2011, the Regional Supervisory Investigator for OSHA issued the Secretary of Labor's Findings concluding that Complainant's complaint lacked merit. (ALJX-1). Complainant subsequently filed a request for formal hearing with the Chief Administrative Law Judge, Office of Administrative Law Judges.

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a hearing in Dallas, Texas, on April 3, 2011. The parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Complainant offered ten exhibits and Respondent proffered three exhibits, which were admitted into evidence along with three administrative law judge exhibits. This decision is based upon a full consideration of the entire record.[1]

A post-hearing brief from Complainant was received on May 15, 2012, and a post-hearing brief from Respondent was received on May 31, 2012. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated, and I find:

1. That Complainant was employed by Respondent as a machine operator, and last worked for Respondent on October 28, 2011. (Tr. 11).

2. That the City of Garland conducted an environmental inspection of Respondent's facility on October 24, 2011, finding 14 chemical waste drums on the property. (Tr. 12-13).

3. That on October 24, 2011, the City of Garland advised Respondent to dispose of the chemical waste drums. (Tr. 14-15).

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-___.

4. That on October 28, 2011, the City of Garland returned to Respondent's facility and issued a citation. (Tr. 15-16).

5. That on October 28, 2011, Complainant's supervisor, Bhavin Patel, informed him his working hours would change from an early morning shift to an 8:00 a.m. to 5:00 p.m. shift. (Tr. 16).

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Respondent's alleged discriminatory conduct toward Complainant violated the employee protection provisions of the SWDA?

2. Whether Complainant was constructively discharged in retaliation for his protected activities in violation of the SWDA?

3. Whether Complainant is entitled to remedies?

III. STATEMENT OF THE CASE

The Testimonial Evidence

Complainant

Complainant testified he is 53 years old. He completed his GED, and was honorably discharged from the U.S. Navy after three years of service. His vocational history has involved print work. (Tr. 18). Complainant worked at a bindery for 18 years before beginning work with Respondent on May 6, 2008, as a machine operator. (Tr. 19).

As a machine operator, Complainant ran the guillotine cutter, paper folder machines and saddle stitcher. His department had very little contact with chemicals. The chemicals were mainly located in the prepress area and the press room. The chemicals were mostly petroleum based. (Tr. 20).

During his first week of employment, Complainant worked the 8:00 a.m. to 5:00 p.m. shift. (Tr. 20). After his first week, he was then given a shop key and began working from 6:00 a.m. to 2:00 p.m. When Complainant was hired, Ru Patel, a son of the

owner, told him to come into the facility and show them what he could do, and they would allow him to switch his hours to an earlier shift. (Tr. 21).

Complainant switched to an early shift to avoid traffic during his hour and one-half drive to Respondent's facility. His job duties did not change. (Tr. 22). When Complainant started working for Respondent he was paid $18.00 per hour and generally worked 40 hours per week. He occasionally worked overtime and was paid time and one-half. (Tr. 23).

Complainant testified he requested time records from Respondent, but he was not provided with the time records. He believed the time records would show he worked over eight hours on October 28, 2011, the last day of his employment. (Tr. 23-24).

Complainant was not involved in the inspection conducted by the City of Garland, but he was present during the inspection. The inspectors did not talk to Complainant about their observations. (Tr. 24). Complainant was not present when Bhavin Patel, another son of the owner, was advised to dispose of the 14 chemical waste drums. (Tr. 25). Complainant observed the drums, which contained a label warning not to let the chemicals enter drains, sewers or waterways. (Tr. 25, 27). Complainant observed Bhavin Patel and the press helper, "Armando" place three drums in the dumpster with a forklift. Bhavin Patel told Complainant the inspectors informed him that the drums needed to be disposed of because they could not be stored outside. (Tr. 25-26).

Complainant testified there were chemicals inside the drums. He believed there were chemicals in the drums because Respondent would throw the empty drums in the dumpster, and the drums the inspectors found had been sitting outside for an extended period of time. (Tr. 27).

Approximately one year before the inspection, Complainant observed chemicals being poured down the drain by the pressmen. He reported this activity to Bhavin Patel and Ed Fannin, and the pressmen stopped pouring the chemicals down the drain. (Tr. 28). Complainant testified that Ed Fannin was a former co-owner of Respondent, but Mr. Fannin told him he "took [his] name off of this company" because of the activity. (Tr. 28-29). He was

not aware of any inspections taking place between the time he witnessed chemicals being poured down the drain and October 24, 2011, when the City of Garland conducted its inspection. (Tr. 29).

When Complainant left Respondent's facility, 11 of the 14 drums found in the inspection remained outside. (Tr. 29-30).

Complainant called the City of Garland Code Enforcement and Health Department on October 26, 2011, to report that three drums were placed in the dumpster at Respondent's facility. He removed a label from one of the drums and gave it to the Health Department when they returned to Respondent's facility to investigate on October 28, 2011. (Tr. 30). The inspectors did not speak to Complainant when they returned on October 28, 2011. (Tr. 31).

On October 27, 2011, Complainant told Bhavin Patel, his immediate supervisor, he had reported the dumping to the City of Garland. (Tr. 32).

On October 28, 2011, Brad Clark, who worked in prepress, asked Complainant if he had reported Respondent's activities to the City of Garland. Complainant testified that Mr. Clark stated, "I have seven mouths to feed. If they shut this place down, I'm without a job." (Tr. 33). Bhavin Patel yelled at Complainant for 20 minutes and asked him to return the shop key. Complainant testified Bhavin Patel also told him that he would have to begin working the 8:00 a.m. to 5:00 p.m. shift. Complainant's "helper," Baltizar Castillo, told Complainant that Bhavin Patel asked him to dump the chemicals down the drain. (Tr. 34). Complainant testified Bhavin Patel stated he was not being fired but had "lost the privilege" to work an earlier shift. (Tr. 34-35).

Complainant testified he continued working for approximately 20 minutes, and finished the job he was working on when the confrontation with Bhavin Patel began. Bhavin Patel continued to yell at Complainant during this period. After completing the job, Complainant clocked out of work and went to his car. He called the police to escort him back in to get his check and return the shop key. (Tr. 35). Ru Patel handed Complainant a paper and told him he wanted Complainant "to put it in writing that you quit," and Complainant wrote that he "was leaving [Respondent] due to hostile work conditions after

reporting illegal dumping of chemicals." (Tr. 36; RX-3). Complainant testified he did not want to quit working there because he "did a good job for the company" and was making $24.00 per hour. (Tr. 36).

The City of Garland inspectors came out to Respondent's facility between the time that Complainant left the facility and returned with the police. Complainant called the City of Garland, and was informed that the inspectors issued a citation. He requested a copy of the citation, but did not receive it. (Tr. 37).

Complainant testified he called the police because he believed Bhavin Patel wanted to fight. (Tr. 38).

Complainant stated October 28, 2011, was payday. He was typically paid at the end of the day on payday. He called the police and asked them to send a police escort to go with him to pick up his paycheck. (Tr. 38). Complainant and the police officer entered Respondent's facility, and Complainant asked Ru Patel for his paycheck. While Complainant was waiting for his paycheck, he put his resignation in writing. He also returned his set of shop keys. He did not anticipate returning to work with Respondent. (Tr. 39).

Complainant's workday typically ended at 2:00 p.m., but he would go home early on occasions when there was no work. (Tr. 40).

Following his resignation, Complainant reported to the Texas Workforce Commission. He sent out approximately 40 job applications. He worked on a job through a temporary service for approximately six weeks. One week before the formal hearing, he began performing some remodeling work. (Tr. 40). Complainant began receiving unemployment compensation benefits after appealing an unfavorable original decision. (Tr. 40-41).

CX-1 is the Texas Workforce Commission Complaint Information Form that Complainant completed when he originally filed for unemployment. (Tr. 43; CX-1). CX-2 is the appeal Complainant filed on December 1, 2011, with the Texas Workforce Commission. (Tr. 44; CX-2). CX-4 is the fact-finding determination made by the Texas Workforce Commission, which concluded Complainant was entitled to unemployment benefits. (Tr. 45; CX-4).

CX-10 contains a picture of three drums placed in the dumpster on Respondent's facility and a picture of 11 drums sitting outside of Respondent's facility. (Tr. 47; CX-10).

Complainant testified he did not believe it was feasible for him to return to work for Respondent because it was a family owned company. (Tr. 48). He opined that he had lost approximately $20,000.00 in wages. (Tr. 49). He made $960.00 per week before taxes. During the six weeks of temporary employment he earned $290.00 per week. He earned $340.00 while working on a remodeling job during the week before the formal hearing. (Tr. 49).

On cross-examination by Pravin Patel, Complainant testified he worked in a "hostile work environment" for approximately one or two hours on October 28, 2011. (Tr. 50-51). He did not originally give Bhavin Patel the key to the facility because he did not intend to leave the company. (Tr. 51-52). He testified Bhavin Patel began yelling before he refused to relinquish the key. (Tr. 52).

Pravin Patel

Mr. Patel testified he has been the owner of Respondent for approximately 27 years. (Tr. 53-54). He stated Ed Fannin works for Respondent, but is not a co-owner of the company. (Tr. 54).

The chemicals found at the facility were used in the printing process. Manufacturers of ink and blanket wash must comply with regulations imposed by OSHA. (Tr. 54). Mr. Patel testified that the chemicals are labeled as nonhazardous. (Tr. 55; RX-1). RX-1 is a Certificate of Disposal dated November 3, 2011, noting nine chemical waste drums were disposed of on that date. (Tr. 56; RX-1, p. 2). Respondent frequently uses Rineco, a disposal company based in Benton, Arkansas, for disposal of chemicals. (Tr. 56-57; RX-1, p. 1). AET Environmental, Inc. was the transporter that picked up the drums from Respondent's facility. (Tr. 57; RX-1, p. 2). Mr. Patel was unsure where the drums were shipped. He opined that approximately one-half of a drum was filled with chemicals per month in the printing process. (Tr. 57-58). The chemical was used to make the paper shiny. Most of the chemicals were used in the process, and only five percent remained for disposal. (Tr. 58). Mr. Patel testified that 95 percent of the substance placed in the drums was water. (Tr. 58-59).

Mr. Patel stated there was not a regulation requiring periodic disposal of the drums. (Tr. 60). The City of Garland issued a citation because the drums were stored outside the facility rather than inside the building or under a covered area. (Tr. 59-60). They needed to dispose of the chemicals because they were "running out of space." Respondent typically disposed of the materials once every year and a half to two years. (Tr. 60).

Mr. Patel was present during the October 24, 2011 inspection. (Tr. 61). The inspectors asked his sons to store the chemicals inside. (Tr. 61-62).

On October 28, 2011, Mr. Patel was informed by his sons that Complainant had contacted OSHA and the City of Garland. The inspectors requested paperwork regarding the chemicals. (Tr. 62). Mr. Patel gave the inspectors the paperwork and was told "everything was okay." (Tr. 62-63). The City of Garland issued a citation on October 28, 2011 at 2:00 p.m. The citation listed a F508 violation, discharge of a prohibited substance to storm water. (Tr. 63-64; RX-2). Mr. Patel testified that Respondent paid a $500.00 fine, and they did not contest the citation "because it takes a long time." (Tr. 64-65). He did not ask anyone to what activity the violation referred, and he did not know the meaning of the citation. He did not believe chemicals were placed in the storm drain. He could have contested the citation. (Tr. 65).

Mr. Patel was present when Complainant returned to Respondent's facility with a police officer, but he did not have any contact with Complainant at that time. Mr. Patel spoke to his son, Ru Patel. He was aware of Complainant's hours being changed. He instructed his sons to change Complainant's hours because they "couldn't trust him anymore." He believed Complainant could "do anything when he comes by himself." (Tr. 66). He could not trust Complainant because he reported the incidents to OSHA and the City of Garland. He believed if Complainant went to work from 8:00 a.m. to 5:00 p.m. he would see "everything is being done because we weren't dumping chemicals." He could not trust Complainant to work an earlier shift from 6:00 a.m. to 2:00 p.m. He changed Complainant's hours because he reported the incidents and a perceived violation of City ordinances and OSHA regulations. (Tr. 67). He knew Respondent's actions were a violation of the law. (Tr. 68).

Mr. Patel was not present during the confrontation between his son and Complainant. (Tr. 68).

Mr. Patel possessed a copy of Complainant's written resignation. (Tr. 68-69; RX-3). No one asked Complainant what he was angry about. Both his sons were angry and yelled at Complainant. (Tr. 69). He testified that Complainant was not fired, but his hours were changed. Respondent stopped carrying Complainant as an employee on its payroll the day he left the company. (Tr. 70). He considered Complainant to be a good employee, and he would re-hire Complainant to work from 8:00 a.m. to 5:00 p.m. (Tr. 70-71).

Mr. Patel testified the drums that were placed in the dumpster were empty. (Tr. 71). He had no knowledge of chemicals being placed in the storm drains. (Tr. 71-72). There was a spill on the ground from one of the drums located outside of Respondent's facility. He never poured any of the chemicals into the storm drain. (Tr. 72).

The Contentions of the Parties

Complainant argues he engaged in protected activity by filing a complaint under the SWDA. He argues Respondent admitted to retaliating against him for this action. He requests back pay for lost wages and benefits and reinstatement with his former work hours, pay and benefits he previously received from Respondent.

Respondent argues, in brief, that adverse action was not taken against Complainant because he voluntarily left his job. Respondent asserts that Mr. Patel offered to rehire Complainant at the formal hearing, but Complainant indicated he did not want to work there.

IV. DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have

taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 slip op. at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe ... Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Complainant's burden of persuasion rests principally upon his testimony. His **prima facie** case is corroborated by the exhibits presented at the formal hearing and the testimony of Mr. Patel. I found Complainant generally an impressive witness

in terms of confidence, forthrightness and overall bearing on the witness stand. I found his testimony to be straightforward, detailed and presented in a sincere and consistent manner.

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B. The Statutory Protection

The SWDA "is a comprehensive environmental statute that governs generation, treatment, storage, and disposal of solid and hazardous waste." Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996). The Act's purpose is to promote the reduction of hazardous waste and the treatment, storage, or disposal of such waste so as to minimize threats to human health and the environment. 42 U.S.C.A. § 6902. The SWDA affords any employee who believes that he has been fired or otherwise discriminated against for engaging in protected activity the right to file a complaint with the Secretary of Labor. 42 U.S.C. § 6971(b). Upon finding a violation of the SWDA, abatement and other remedies may be awarded. Id.

The employee protection provision of the SWDA provides:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed 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.

42 U.S.C. § 6971(a).

An employee must establish the following to show unlawful discrimination: (1) Respondent is governed by the Act,[2] (2) the employee engaged in protected activity as defined in the SWDA and (3) as a result of engaging in such activity, the employee's terms and conditions of employment were adversely affected.

C. The Burdens of Proof

Under the burdens of persuasion and production in whistleblower proceedings, the complainant first must present a **prima facie** case. In order to establish a **prima facie** case, a complainant must show that: (1) the complainant engaged in protected activity; (2) the employer was aware of the conduct; (3) the employee suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the unfavorable action. 29 C.F.R. § 24.104(d)(2).

The respondent may rebut the complainant's **prima facie** showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. The complainant may counter the respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. Yule v. Burns International Security Service, Case No. 1993-ERA-12, slip op. at 7-8 (Sec'y May 24, 1994). In any event, the complainant bears the burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Dean Darty v. Zack Company of Chicago, Case No. 1982-ERA-2, slip op. at 5-9 (Sec'y Apr. 25, 1983)(citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)).

Since this case was fully tried on the merits, it is not necessary for the undersigned to determine whether Complainant presented a **prima facie** case. See Carroll v. Bechtel Power Corp., Case No. 1991-ERA-46, slip op. at 6 (Sec'y Feb. 15, 1995), aff'd sub nom Bechtel Corp. v. U.S. Dep't of Labor, 78 F.3d 352 (8th Cir. 1996); James v. Ketchikan Pulp Co., Case No. 1994-WPC-4 (Sec'y Mar. 15, 1996); Creekmore v. ABB Power Systems

[2] Respondent does not contest that it is governed by the SWDA. Moreover, the SWDA does not require Respondent to be a member of a specific class to be governed by the SWDA. The SWDA states that "No person shall fire, or in any other way discriminate...against, any employee or any authorized representative of employees..." 42 U.S.C. § 6971(a). Thus, I find that Respondent is governed by the SWDA and Complainant was protected under the employee protection provision.

Energy Service, Inc., Case-No. 1993-ERA-24 (Dep. Sec'y Feb 14, 1996). Once respondent has produced evidence that complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether Complainant presented a **prima facie** case. Instead, the relevant inquiry is whether Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. See Reynolds v. Northeast Nuclear Energy Co., Case No. 1994-ERA-47, slip op. at 2 (ARB Mar. 31, 1997); Boschuk v. J&L Testing, Inc., Case No. 1996-ERA-16, slip op. at 3, n.1 (ARB Sept. 23, 1997); Eiff v. Entergy Operations, Inc., Case No. 1996-ERA-42 (ARB Oct. 3, 2007). If Complainant did not prevail by a preponderance of the evidence, it matters not at all whether he presented a **prima facie** case.

Once the respondent has articulated a legitimate, nondiscriminatory reason for its termination of the complainant, the burden shifts to the complainant to demonstrate that the respondent's proffered motivation was not its true reason but is pre-textual and that its actions were actually based on discriminatory motive. Leveille v. New York Air National Guard, Case No. 1994-TSC-3 and 1994-TSC-4, slip op. at 7-8 (Sec'y Dec 11, 1995); Carroll, supra slip op. at 6; Bechtel Construction Company, supra at 934. The complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. 42 U.S.C. § 5851(b)(3)(c); Zinn v. University of Missouri, Case No. 1993-ERA-34, slip op. at 5 (Sec'y Jan. 18, 1996); Yellow Freight Systems, Inc., 27 F.3d 1133, 1139 (6th Cir. 1994). The complainant retains the ultimate burden of proving, by a preponderance of the evidence, that the adverse action was in retaliation for the protected activity in which he was allegedly engaged in violation of the SWDA. Id. (citing Texas Dep't of Community Affairs, supra). See also Creekmore, supra.

1. Complainant Engaged in Protected Activity

The SWDA provides that no person shall discriminate against any employee "by reason of the fact" that the employee has engaged in the following enumerated protected activities:

> filed, instituted, or caused to be filed 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.

42 U.S.C. § 6971(b).

The ARB has held that the term "proceeding" is to be construed broadly to encompass "all phases of a proceeding that relate to public health or the environment, including an internal or external complaint that may precipitate a proceeding." Lee v. Parker-Hannifin Corp., Case No. 2009-SWD-3, slip op. at 7 (ARB Feb. 29, 2012). The term "any other action" has been interpreted to extend whistleblower protection to internal complaints made to supervisors and others. Kansas Gas & Electric v. Brock, 780 F.2d 1505 (10th Cir. 1985).

Complainant testified, without contradiction, that he reported the dumping of drums containing chemical waste into a dumpster on Respondent's facility. He testified that he called the City of Garland Code Enforcement and Health Department on October 26, 2011, to report the incident. Complainant also stated that on October 27, 2011, he told Bhavin Patel, his immediate supervisor, he had reported the dumping to the City of Garland. Moreover, Respondent admits that it was aware of Complainant's protected activity.

A complainant is not required to prove an actual violation of the underlying statute. Yellow Freight System, Inc., supra, at 357; Crosier v. Westinghouse Hanford, Case No. 1992-CAA-3, slip op. at 4 (Sec'y Jan. 12, 1994). Instead, a complainant's complaint must be made in good faith and "grounded in conditions constituting reasonably perceived violations of the environmental acts." Johnson v. Old Dominion Security, Case No. 1986-CAA-3 (Sec'y May 29, 1991).

In the instant case, I find that Complainant's complaints to the City of Garland can reasonably be perceived as violations under the SWDA based on his work experience and his knowledge that chemicals were stored in the drums. Moreover, Complainant testified without contradiction, that the drums contained labels warning not to let the chemicals enter drains, sewers or waterways. Further, the City of Garland issued a citation on October 28, 2011, at 2:00 p.m., stating Respondent had violated F508 by discharging of a prohibited substance into storm water. Thus, I find that Complainant's reports of the dumping incident to the City of Garland were made in good faith and were reasonable and rational.

2. Respondent was Aware of the Conduct

It is undisputed that on October 27, 2011, Complainant told Bhavin Patel, his immediate supervisor, he had reported the dumping to the City of Garland. Further, Mr. Patel testified he was aware of Complainant's hours being changed, and he had instructed his sons to change Complainant's hours because Complainant had reported the dumping to the City of Garland. Therefore, I find that Respondent was aware of Complainant's conduct.

3. Respondent's Alleged Discriminatory Actions

The regulations provide that "no employer. . .may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in this section." 29 C.F.R. § 24.102(a). "It is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee." 29 C.F.R. § 24.102(b). Termination or discharge from employment is not required; rather demonstration of other retaliation by the employer is sufficient.

Adverse action closely following protected activity "is itself evidence of an illicit motive." Donovan v. Stafford Const. Co., 732 F.2d 954, 960 (D.C. Cir. 1984). The timing and abruptness of a discharge are persuasive evidence of an employer's motivation. NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983), citing NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 465 (2d Cir. 1973). See NLRB v. RainWare, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984).

Transferring an employee to a less desirable position can constitute an adverse employment action, even if no loss in salary is involved. DeFord v. Secretary of Labor, 700 F.2d 281, 283, 287 (6th Cir. 1983); Nathaniel v. Westinghouse Hanford Co., Case No. 1991-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 13-14 n.13.

The Secretary has held that a change in shift does not constitute adverse action "absent evidence that the switch in shifts caused difficulties" for the employee. Floyd v. Arizona Public Service Co., Case No. 1990-ERA-39, slip op. at 6-7 n.6 (Sec'y Sept. 23, 1994).

The instant case is distinguishable from the facts presented in Floyd. Complainant testified that he worked the 8:00 a.m. to 5:00 p.m. shift during his first week of employment with Respondent. However, Complainant switched to an early shift to avoid traffic during his hour and one-half drive to Respondent's facility. Complainant testified that when he was hired Ru Patel agreed to allow him to switch to an earlier shift after coming into the facility the first week and showing them what he could do. Further, Complainant testified that on October 28, 2011, Bhavin Patel confronted him, yelled at him for an extended period of time and asked him to return his key. He also testified Bhavin Patel began yelling at him before he refused to relinquish the key. Mr. Patel testified that both of his sons yelled at Complainant.

Based on the foregoing, I find that a change in shift constituted an adverse action because evidence was presented showing that the switch in shifts caused difficulties for Complainant. However, unless constructively discharged, a complainant is not eligible for post-resignation damages and back pay or for reinstatement. Nathaniel v. Westinghouse Hanford Company, Case No. 1991-SWD-2, slip op. at 6 (ARB Feb. 1, 1995).

A constructive discharge occurs where "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Held v. Gulf Oil Co., 684 F.2d 427, 434 (6th Cir. 1982); NLRB v. Haberman Construction Co., 641 F.2d 351 (5th Cir. 1981); Cartwright Hardware Co. v. NLRB, 600 F.2d 268 (10th Cir. 1979). The ARB has interpreted this to mean that the standard for finding a constructive discharge is a higher one than for finding a hostile work environment. Berkman v. U.S. Coast Guard Academy, Case No. 1997-CAA-2, slip op. at 22 (ARB Feb. 29, 2000). Thus, the adverse consequences flowing from an adverse employment action generally are insufficient to substantiate a finding of constructive discharge. Rather, the presence of "aggravating factors" is required. Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981). The Sixth Circuit has noted that a

constructive discharge analysis "depends upon the facts of each case and requires an inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct upon the employee." Held, supra at 434.

In the context of a Title VII claim, the Supreme Court has found that a complainant "must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response" to establish a constructive discharge claim. Pennsylvania State Police v. Suders, 542 U.S. 129, 134 (2004). The Court noted that a constructive discharge included "employer-sanctioned adverse action officially changing [the complainant's] employment status or situation" including a humiliating demotion, extreme pay cut or transfer to a position with unbearable working conditions. Id.

In Mandreger v. The Detroit Edison Co., Case No. 1988-ERA-17 (Sec'y Mar. 30, 1994), the Secretary found adverse action where the complainant was referred to the Employee Assistance Program, and as a result of the referral, a psychologist found that the complainant suffered from a mental disorder, the complainant was not permitted to return to work at the nuclear power plant where he had been employed, and after his sick leave and vacation days ran out, he was eventually placed in a position in which there was less opportunity to earn overtime pay and less opportunity for advancement.

In Nathaniel v. Westinghouse Hanford Co., Case No. 1991-SWD-2 (Sec'y Feb. 1, 1995), the Secretary held that the record did not show that the respondent took the requisite aggravating action to coerce the complainant's resignation because most of the stress the complainant experienced during her tenure at the respondent's facility predated the protected activity and adverse action.

In the instant case, Bhavin Patel, acting for Respondent, officially changed the terms of Complainant's employment. Further, Mr. Patel testified that he ordered Bhavin Patel to change Complainant's hours because they could not trust him after he reported Respondent's activities to the City of Garland. Mr. Patel believed Complainant could "do anything when he comes by himself." He changed Complainant's hours because he reported a perceived violation of City ordinances and OSHA regulations. He also testified that he knew these actions were a violation of the law. Mr. Patel's testimony clearly evidences

that the intent of Respondent was to discriminate against Complainant by changing his terms of employment because Complainant reported a perceived violation of City ordinances and OSHA regulations.

Complainant was verbally berated by Bhavin Patel and another employee on October 28, 2011. Mr. Patel testified that both Ru and Bhavin Patel yelled at Complainant. Complainant testified he called the police to escort him onto Respondent's facility to obtain his paycheck because he believed Bhavin Patel wanted to fight. In his written resignation, Complainant stated that he "was leaving [Respondent] due to hostile work conditions after reporting illegal dumping of chemicals." Complainant testified he did not want to quit working there because he "did a good job for the company" and was making $24.00 per hour.

Respondent admitted that Complainant suffered intentional discrimination because he reported Respondent to the City of Garland. Complainant admitted that he was only exposed to the hostile environment for one or two hours. However, I find the discrimination was pervasive and intentional in that Mr. Patel, the owner of Respondent, encouraged Bhavin Patel, Complainant's supervisor, to change Complainant's hours in response to his protected activity.

In view of the totality of the circumstances, I find that the working conditions on October 28, 2011, were arguably so difficult or unpleasant that a reasonable person in Complainant's position would have felt compelled to resign. Mr. Patel testified it was his intent to discriminate against Complainant because he reported Respondent to the City of Garland, and resignation was a reasonably foreseeable impact of Respondent's conduct toward Complainant. Therefore, Complainant has proven by a preponderance of the evidence that he was constructively discharged by Respondent.

4. The Protected Activity was a Motivating Factor in the Unfavorable Action and No Legitimate, Nondiscriminatory Reason for the Conduct was Alleged

Respondent has failed to allege any legitimate, nondiscriminatory reason for the conduct. Mr. Patel testified that he instructed his sons to change Complainant's hours because they "couldn't trust him anymore." He stated that he could not trust Complainant because he reported the incidents to OSHA and the City of Garland. He testified that he changed Complainant's hours because he reported a perceived violation of

City ordinances and OSHA regulations. Therefore, I find that Complainant suffered intentional discrimination because of his protected activity on October 28, 2011, and is entitled to remedies.

Based on the foregoing, I find and conclude that Complainant was engaged in protected activity under the Act, that Respondent knew of that activity and that the actions taken against him were motivated, at least in part, if not entirely, by Complainant's engagement in that activity.

D. Relief

Where a violation of the SWDA is found the Decision and Order shall require "the party committing such violation to take such affirmative action to abate the violation" as deemed appropriate, "including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation." 42 U.S.C. § 6971(b). In this instance, Complainant is seeking reinstatement and back pay as damages for his wrongful termination.

1. Reinstatement

Complainant is entitled to immediate reinstatement to his former position with the same pay and terms and privileges of employment, or if his former job no longer exists, Respondent shall unconditionally offer him reinstatement to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions and benefits. Respondent's back pay liability terminates upon the tendering of a **bona fide** offer of reinstatement even if Complainant rejects it.

Notwithstanding Respondent's argument that Complainant has indicated he did not desire to return to work for Respondent, the record is devoid of any evidence of a **bona fide** offer of reinstatement.

2. Back Pay

The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Blackburn v. Metric Constructors, Inc., Case No. 1986-ERA-4 (Sec'y Oct. 30, 1991). Therefore, the back pay award should be based on the earnings the complainant would have received but for the discrimination. Id. Back pay calculations must be reasonable

and supported by the evidence; they need not be rendered with "unrealistic exactitude." EEOC v. Enterprise Ass'n Steamfitters Local No. 638, 542 F.2d 579, 587 (2d Cir. 1976). Back pay is typically awarded from the date of a complainant's termination until reinstatement to his former employment. Any uncertainties in calculating back pay are resolved against the discriminating party. Gutierrez v. Regents of the University of California, Case No. 1998-ERA-19 (ARB Nov. 13, 2002).

The complainant bears the burden of establishing the amount of back pay that a respondent owes. Adams v. Coastal Production Operators, Inc., Case No. 1989-ERA-3 (Sec'y Aug. 5, 1992).

The respondent bears the burden of proving that the complainant did not mitigate damages by establishing that comparable jobs were available, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. Hobby v. Georgia Power Co., Case No. 1990-ERA-30 (ARB Feb. 9, 2001). Interim earnings at a replacement job are deducted from back pay awards. Williams v. TIW Fabrication & Machining, Inc., Case No. 1988-SWD-3 (Sec'y June 24, 1992). Unemployment benefits are not deductible from gross back pay. Keene v. Ebasco Constructors, Inc., Case No. 1995-ERA-4 (ARB Feb. 19, 1997), citing Artrip v. Ebasco Services, Inc., Case No. 1989-ERA-23, slip op. at 4-5 (ARB Sept. 27, 1996).

I find Complainant made reasonable efforts to mitigate damages. Complainant testified he sent out approximately 40 job applications following his resignation. He worked on a job through a temporary service for approximately six weeks, and one week before the formal hearing he began performing some remodeling work. He began receiving unemployment payments after appealing an unfavorable original decision. Respondent presented no evidence contradicting these assertions. Thus, Complainant is entitled to back pay from his last date of employment and continuing until his reinstatement or a **bona fide** offer of reinstatement is tendered by/with Respondent, with deductions based on the interim earnings he received.

Complainant testified that he earned $290.00 per week during six weeks of temporary employment or approximately $1,740.00, and he earned $340.00 in the week before the formal hearing while working on a remodeling job. He also testified that he made $960.00 per week while working for Respondent.

Refusal of an unconditional offer of reinstatement to a substantially equivalent position constitutes a breach of the obligation to mitigate damages. Thus, the complainant is entitled to back pay only until the date he declined to return to work following an unconditional offer of reinstatement. Williams v. TIW Fabrication & Machining, Inc., Case No. 1988-SWD-3 (Sec'y June 24, 1992).

In brief, Respondent asserts that Mr. Patel offered to rehire Complainant at the formal hearing, but Complainant indicated he did not want to work there. At the formal hearing, Complainant testified he did not believe it was feasible for him to return to work for Respondent because it was a family owned company. Mr. Patel testified he would re-hire Complainant to work from 8:00 a.m. to 5:00 p.m. However, I find that this did not constitute a valid unconditional offer of reinstatement by Respondent since it reinforced the change in terms and conditions of employment. Therefore, Complainant is entitled to back pay until such time as an unconditional offer of reinstatement is made.

Based on the foregoing, I find Complainant is entitled to $960.00 per week in back commencing on October 28, 2011 and continuing through a **bona fide** offer of reinstatement, with a deduction of $290.00 per week for six weeks or $1,740.00 and a deduction of $340.00 per week for one week.

E. Interest

Interest is due on back pay awards from the date of termination to the date of reinstatement. Prejudgment interest is to be paid for the period following Complainant's last day of employment on October 28, 2011, until the instant order of reinstatement. The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a) (2010) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621. Oliver v. Hydro-Vac Services, Inc., Case No. 1991-SWD-1 (ARB Jan. 6, 1998).

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Respondent shall offer Complainant reinstatement to his former position with the same pay, terms and privileges of

employment that he would have received had he continued working from October 28, 2011, through the date of the offer of reinstatement.

2. Respondent shall pay Complainant back pay at the weekly wage of $960.00 for the period of October 28, 2011 and continuing through a **bona fide** offer of reinstatement, less authorized payroll deductions and Complainant's earnings of $290.00 per week for six weeks or $1,740.00 and $340.00 per week for one week, with interest thereon calculated pursuant to 26 U.S.C. § 6621.

3. Respondent shall expunge from the employment records of Complainant any adverse or derogatory reference to his protected activities of October 26, 2011, and the discriminatory treatment on October 28, 2011.

ORDERED this 28th day of June, 2012, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

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.