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Issue Date: 07 January 2021

Case No.: 2018-SWD-00002

In the Matter of:

MICHAEL TYLER
Complainant

v.

USA DEBUSK, LLC
Respondents

APPEARANCES: Complainant, Pro Se
For Respondents, Ken Hughes, Esq.

BEFORE: Hon. Tracy A. Daly
Administrative Law Judge

DECISION AND ORDER

1. Jurisdiction and Procedural History. The case arises pursuant to a complaint alleging violations under the employee protective provisions of the Solid Waste Disposal Act ("SWDA" or "the Act"), 42 U.S.C. § 6971, and the regulations thereunder at 29 C.F.R. Part 24. The Act includes a whistleblower protection provision with a Department of Labor complaint procedure.

Complainant filed a retaliation complaint against Respondent that asserted violations of the employee protective provisions in the Act. The Secretary investigated the allegations and issued findings and an order dismissing the complaint because there was no cause to believe Respondent violated the Act. Complainant objected to the findings and order, and he filed a timely request for a formal hearing before an Administrative Law Judge (ALJ) with the Chief Administrative Law Judge, Office of Administrative Law Judges (OALJ), U.S. Department of Labor. The undersigned ALJ was assigned to preside over a formal hearing in this matter, and it was conducted on June 13, 2019 and January 7-8, 2020 in Houston, Texas. The parties were afforded a full opportunity to

adduce testimony and offer documentary evidence.[1] Consistent with filing deadlines ordered by the undersigned, Complainant and Respondent filed post-hearing briefs with legal analysis and factual arguments. Both parties also filed reply briefs[2] and sur-replies.[3]

2. <u>Statement of the Case.</u>

Complainant contends he suffered an adverse action under the SWDA when Respondent terminated his employment after he engaged in the protected activity of reporting safety violations. In particular, Complainant asserts he engaged in protected activity by reporting to his supervisor that Respondent: 1) was failing to properly handle waste catalyst; 2) was utilizing an insufficient waste wash station that allowed waste contaminated water to drain into the ground and a nearby creek; and, 3) failed to properly dispose of hoses that contained catalyst. Complainant maintains these reports were a motivating factor in Respondent's decision to terminate his employment. (CB-1)

In response, Respondent argues Complainant did not engage in protected activity under the SWDA. Respondent also contends, even if Complainant's actions were protected activity under the SWDA, such activity was not a motivating factor in Respondent's decision to terminate Complainant's employment. It asserts that Complainant's employment ended because: 1) he was a difficult employee who negatively impacted other employees; 2) he failed in his job performance by not reducing maintenance costs; and 3) he made comments that Respondent believed were threats of violence against other employees. Respondent further maintains that, even if Complainant's conduct constitutes protected activity that was a motivating factor in his employment termination, it can establish by a preponderance of the evidence that it would have taken the same unfavorable personnel action against Complainant absent his protected activity. (RB-1)

3. <u>Contested Issues of Fact and Law.</u> Based on the parties' prehearing statements, opening statements, stipulations, evidence presented during the hearing, the parties' Joint Statement of Contested Issues of Fact and Law[4] and the parties' post-hearing briefs, the undersigned identified the following contested legal issues in this matter:

a. Whether Complainant engaged in protected activity covered under the SWDA.

b. Whether, if Complainant had engaged in protected activity, Respondent violated the whistle blower protection provisions of SWDA by taking adverse action against him in the form

[1] Exhibits are marked as follows: JX for Joint Exhibits; CX for Complainant Exhibits; RX for Respondent Exhibits; and, AX for Appellate Exhibits. Reference to an individual exhibit is by party designator and page number (e.g. CX-1, p. 4). Reference to the hearing transcript is by designator Tr. and page number (e.g. Tr. p. 3).

[2] Complainant's post-hearing brief is marked CB-1. Respondents' post-hearing brief is marked RB-1. Complainant's reply brief is marked CB-2. Respondents' reply brief is marked RB-2.

[3] Pursuant to 29 C.F.R. § 18.91, the undersigned may grant the parties' time to file a post-hearing brief. The undersigned permitted the parties to file a post-hearing brief and a reply brief. However, neither party requested leave to file a sur-reply. Notably, Respondent's sur-reply contains an objection to Complainant's reply brief on the grounds that it was untimely. Complainant filed his reply brief two (2) days late. The undersigned recognizes the impact the Novel Coronavirus (COVID-19) pandemic has had on filings and Complainant's status as a *pro se* litigant, and concludes that neither party was prejudiced by the late submission. Respondent's objection to Complainant's reply brief is overruled, and neither sur-reply will be considered.

[4] The parties' joint statement of contested facts and law is marked as AX-41.

of terminating his employment.

c. Whether Complainant's alleged protected activity was a motivating factor in the decision to end Complainant's employment.

d. Whether the evidence establishes by preponderance of the evidence that Complainant's employment with Respondent would have been terminated in the absence of his alleged protected activity.

e. The appropriate remedies in this matter if Complainant proved that Respondent violated the whistleblower protections of the Act.

4. Relevant Evidence Considered. In making this decision, the undersigned reviewed and considered all reliable and material documentary and testimonial evidence presented by Complainant and Respondents. This decision is based upon the entire record.[5]

a. ***Stipulated Facts.*** The parties did not enter into any stipulation regarding uncontested facts in this case.

b. ***Exhibits Admitted Into Evidence.*** The undersigned fully considered the exhibits admitted at the hearing. However, as specifically provided in the undersigned's Notice of Case Assignment and Prehearing Order and as expressly articulated to the parties at the hearing, only exhibit content directly cited in a post-hearing brief by specific exhibit and page number was considered material and relevant evidence. All other information contained in the exhibits, but not specifically cited in the briefs, was regarded as non-relevant background information provided for chronological context to cited relevant evidence. (Tr. p. 523) However, given Complainant's status as a *pro se* litigant, the undersigned reviewed all admitted evidence. After the hearing, the undersigned afforded the parties the opportunity to submit objections pursuant to Subpart B. (Tr. pp. 18-19; AX-8)

1) Complainant's Exhibits. Complainant offered thirty-one (31) exhibits for identification; the undersigned admitted them into evidence and considered them as substantive evidence. However, many of these exhibits were withdrawn at the hearing and were instead replaced with blank pages by Complainant as placeholders. Specifically, Complainant's Exhibits 8, 10-16, and 19-26 were withdrawn. (Tr. pp. 12-18) Likewise, Complainant's Exhibit 13 was not accepted into evidence pursuant to a sustained objection.[6] (AX-8)

2) Respondent's Exhibits. Respondents offered fourteen (14) exhibits that the undersigned admitted into evidence. (Tr. p. 19)

c. ***Testimonial Evidence and Witness Credibility Determinations.*** The undersigned fully considered the entire testimony of every witness who appeared at the hearing. As the finder of fact in this matter, the undersigned is entitled to determine the credibility of witnesses, to weigh

[5] As the Administrative Review Board (ARB) stated its *Austin* decision, ALJs should tightly focus on making findings of fact and "a summary of the record is not necessary" because the ARB assumes the ALJ reviewed and considered the entire record. *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13, slip op. at 2, n.3 (ARB Mar. 11, 2019) (per curiam).

[6] For clarification, Complainant's Exhibit 13 was combined with CX-3 as pages two through fourteen. As such, those pages of CX-3 were excluded pursuant to a sustained objection.

evidence, to draw his own inferences from evidence and is not bound to accept the opinion or theory of any particular witness. An administrative law judge has the authority to address witness credibility and to draw his own inferences and conclusions from the evidence. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

In weighing testimony in this matter, the undersigned considered the relationship of the witnesses to the parties, the witnesses' interest in the outcome, demeanor while testifying, and opportunity to observe or acquire knowledge about the matter at issue. The ALJ also considered the extent to which the testimony of each witness was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). The undersigned makes the following credibility assessments of the witnesses who presented testimony in this case:

1) Complainant. (Tr. pp. 31-232)

In general, Complainant testified regarding the circumstances related to being hired as a maintenance manager by Respondents, the nature of his work duties, performance and relationships, his concern and reports about improper waste handling and disposal procedures that he considered to be safety violations.

Complainant's testimony was moderately credible. Although his testimony was subjectively sincere, his answers to a number of questions were inconsistent or contradictory. Much of Complainant's testimony relating to the material and relevant facts in this matter were directly contradicted by the testimony of other witnesses, and his assertions regarding the conduct of Respondents' employees were not corroborated in any significant manner by other witness testimony or documentary evidence presented by both parties. As an example, Complainant testified that Mr. Black refrained from terminating Complainant's employment although he was requested to do so by Mr. Leslie. Specifically, Complainant testified that Mr. Black "said he needed to go back his office to review the situation." The documentary evidence, as discussed in the below findings of facts, show that Mr. Black sent Mr. Leslie the termination paperwork by e-mail on May 26, 2016 with a request to discuss the matter further the next morning. Further, Mr. Black testified that he had already reviewed complaints in Complainant's personnel file prior to the termination meeting. (Tr. pp. 34, 340-341; RX-11; *See* Finding of Facts "v" and "w")

Complainant's testimony also demonstrated recurrent internal inconsistencies on both directly relevant and not relevant facts, and it was significantly and unequivocally contradicted by testimony of other witnesses or documentary evidence. For example, Complainant testified that his employment was not terminated on June 10, 2016; rather, he said was not fully aware that he was fired until the Monday following his June 10, 2016 meeting with Mr. Leslie and Mr. Black. However, Complainant sent an e-mail correspondence to Mr. Black and Mr. Andrew Debusk at 1:27 p.m. on June 10, 2016 demonstrating he understood his employment termination. Specifically, Complainant wrote, "I also stated to you that Mr. Leslie was terminating my employment due to my concerns. . ." and that ". . . the actions today in terminating my employment were retaliation for my concerns which [Mr. Leslie] obviously thinks he can cover up." Complainant further stated in the e-mail correspondence that he "hoped it was a misunderstanding

since Mr. Leslie as you stated failed to inform you of the true nature behind my termination." (Tr. pp. 34-35, 111-112, 114, 124, 203-204; CX-3)

On numerous occasions during his testimony, Complainant exhibited an evasive demeanor and provided non-responsive answers. As a representative example, Complainant answered one question by asserting that it was untrue he had received positive work evaluations but that he did receive good feedback from Mr. Leslie and other managers. (Tr. pp.164-165) Complainant also was evasive in answering whether he believed the waste Respondent allegedly mishandled was hazardous. (Tr. pp. 186-187) Additionally, Complainant was ambiguous regarding when he had first discussed any safety concerns with Mrs. Letia Smith. (Tr. pp. 55-56) Furthermore, on cross-examination, Complainant routinely responded to clear and direct questions with his own questions or objections. (Tr. pp. 155-156, 163-164, 208)

His testimonial conduct in this regard undermined the reliability of the details of his testimony. In total, the undersigned found Complainant's testimony regarding relevant contested facts to be only partially credible and minimally persuasive.

2) Letia Smith. (Tr. pp. 233-305)

Mrs. Smith testified regarding her employment as a Human Resources representative at the Highlands Park, Texas facility with USA Debusk as well as her observations regarding Complainant's job performance and interaction with subordinate employees, peers, and supervisors.

Mrs. Smith's testimony was generally persuasive. Her testimony was mostly consistent and contained only a few directly relevant inconsistencies or conflicts. Occasionally her testimony was contradicted by the testimony of Complainant. Specifically, Complainant testified that he did not have a dispute with Ms. Smith concerning the repair of a gate, nor did he have a conversation with Mr. and Mrs. Smith concerning access to the shop building. (Tr. pp. 184-185) Mrs. Smith testified that Complainant indicated he would change the locks to prevent her from accessing the shop, which led to a dispute between Complainant and Mr. Eric Smith. Mrs. Smith also recalled an incident relating to repairing a gate that had not been working properly. (Tr. pp. 256-259; RX-7, 8) Her demeanor indicated an objectively sincere effort to provide accurate testimony, but her answers were at times slightly confusing, or incomplete. For example, Mrs. Smith's initial testimony was that Mr. Brown's complaint had been submitted to her, but she then clarified that the written document was a summarization of a complaint she received by telephone. (Tr. pp. 240-242)

3) Thomas Kennedy. (Tr. pp. 325-333)

In pertinent part, Mr. Kennedy testified about his role as stock holder and general counsel for USA Debusk during the time of Complainant's employment with Respondent. His testimony described the manner in which the USA Debusk, LLC entity was formed via a number of corporate buyouts and restructuring.

Mr. Kennedy provided highly persuasive testimony. His testimony was succinct, focused

and demonstrated no inconsistent details. The subject of his testimony was in no way contradicted by testimonial or documentary evidence.

4) Brian Black. (Tr. pp. 333-363)

Mr. Black testified regarding his job duties as the Vice President of Human Resources for USA Debusk. In pertinent part, his testimony addressed the nature of his working relationship and direct interaction with Complainant. As part of his job duties at USA Debusk, Mr. Black served as the Vice President of Safety and then, at the time of Complainant's termination, the Vice President of Human Resources for Respondent. In this capacity, Mr. Black testified regarding his role in notifying Complainant of Respondent's decision to terminate Complainant's employment.

Mr. Black's testimony was largely credible. His testimony contained only minor variances in detail related to non-relevant facts, and he demonstrated a detailed, specific recollection of the events related to Complainant's work efforts and Respondents' decision to terminate Complainant's employment. His testimony was directly corroborated by other witnesses and displayed only some small, non-relevant inconsistencies or changes in testimony. Mr. Black's testimony contradicted that of other witnesses only in unimportant, non-material ways. Mr. Black's testimony about his work relationship with Complainant and Respondent was objective in nature, and he expressed no discernable bias or preference toward either party in this matter. His demeanor during the course of his testimony showed a sincere effort to present an accurate and detailed accounting of his recollection of the relevant events related to this case.

5) Michael Cybak. (Tr. pp. 365-388)

In general, Mr. Cybak provided testimony regarding his past professional relationship and friendship with Complainant. He described a work-place incident during which he and Complainant's engaged in a disagreement that led Mr. Cybak to file a written complaint against Complainant, which was corroborated by documentary evidence. He opined that Complainant was a difficult employee to work with and that Complainant would occasionally behave in an unprofessional manner with other USA Debusk employees.

Mr. Cybak's testimony was generally persuasive.

6) Eric Smith. (Tr. pp. 390-423)

Mr. Smith's testimony addressed his position and job duties as a Quality Auditor for USA Debusk. As a foundation for his testimony, he provided a description of his past employment history as a terminal manager. Of particular relevance, Mr. Smith described a work-place incident involving Complainant in which Mr. Smith felt Complainant had threatened him. He explained the reasons why he decided to file a formal written complaint against Complainant.

On the whole Mr. Smith's testimony was generally persuasive. His answers contained direct and specific details based on personal observation or knowledge. Mr. Smith's testimony was corroborated by Mr. Letia Smith, his wife, who also witnessed the incident which formed the basis of his complaint. Mr. Smith's testimony was not significantly or materially contradicted by other

witnesses with the exception of Complainant. Specifically, Mr. Smith testified that Complainant had identified "a pile or two" of catalyst that had spilled on the ground, which Mr. Smith cleaned. Mr. Smith testified that Complainant did not convey that this was a significant issue, nor did he later convey that he believed there was an ongoing problem with the handling of spent catalyst or any waste water. (Tr. pp. 399-400)

Mr. Smith's manner of answering questions and demeanor conveyed an earnest attempt to be factually accurate and responsive. His opinions were direct and well explained.

7) Colin Leslie. (Tr. pp. 426-519)

Mr. Leslie's testimony addressed his role as the President of USA Debusk. He explained the general nature of his job duties and responsibilities. In particular, Mr. Leslie described the circumstances under which he hired Complainant as a manager and the performance expectations he had for Complainant as an employee. Mr. Leslie provided his opinion about Complainant's progress and job performance. Of particular relevance, he described the factors and reasons he personally decided to terminate Complainant's employment with Respondents.

Overall Mr. Leslie's testimony was credible and reliable. His answers were directly responsive to the questions posed by counsel, Complainant and the undersigned. His answers were based on personal observation or knowledge. In relevant parts, Mr. Leslie's testimony was largely consistent with that of Mr. Black, Mrs. Smith, Mr. Smith and Mr. Cybak. In relation to the material and relevant facts in this case, his testimony was not significantly different from that of any other witness with the exception of Complainant. Overall, Mr. Leslie's answers conveyed a candid effort to accurately describe his observations and opinions, and he expressed no specific bias or partiality for any party in this matter.

5. Relevant and Material Findings of Facts. Based on the documentary exhibits and testimonial evidence presented, the undersigned makes the following relevant and material findings of fact in this case:

a. Respondent USA Debusk is an industrial service provider with ten service lines including hydro-blasting, hydro-cutting, chemical cleaning, and inter-catalyst handling and is subject to the requirements of the SWDA. (Tr. pp. 429-430)[7]

b. USA Debusk purchased USA Services, Inc. in January of 2015. USA Services, Inc. continued to operate under that name with respect to existing contracts, legacy documents, and other operations until the full transition to operation under the name USA Debusk, LLC. (Tr. pp. 331, 329, 427)

c. In February of 2015, Respondent hired Complainant as a maintenance manager. Initially, his primary job responsibilities related to developing an in-house vehicle maintenance program. Complainant was paid an annual salary of $78,000 plus a yearly performance bonus, which was

[7] Citations to stipulations, exhibits, or testimony upon which the undersigned made factual findings are not all-inclusive. They simply reference some of the most persuasive evidence among everything in the record that the undersigned considered when making the related finding.

based on length of time with the company. Complainant's qualifications and prior training are unclear. (Tr. p. 36, 130, 147, 190, 216, 436)

d. Complainant worked at the Respondent's Highland Park, Texas terminal facility. (Tr. p. 454)

e. During his employment, Complainant reported directly to Mr. Collin Leslie. (Tr. p. 434)

f. For the first six months of Complainant's employment Respondent was satisfied with Complainant's job performance (Tr. p. 515)

g. In approximately March of 2015, within sixty days of being hired, Complainant developed concerns regarding how Respondent managed waste catalyst the company transported. Initially, Complainant observed what he believed was catalyst power on the ground in the terminal yard. Specifically, Complainant believed he observed "piles of uncontained waste spillage" on the ground in various spots in the terminal yard. Complainant surmised that the vent filters on the waste material storage tanks were not functioning properly and allowing waste material to escape the tanks and accumulate on the ground. Complainant showed the waste spillage to Mr. Smith, the terminal manager, and contended that he also informed Mr. Leslie. Mr. Smith did not discuss the matter with senior management. (Tr. pp. 42-43, 52-53, 399, 400)

h. In approximately the fall of 2015, construction began on Respondent's maintenance repair shop. A container wash facility assembly was completed approximately the same time. (Tr. p. 441, 453, 461)

i. Soon after the container wash facility became operational, Complainant developed concerns about how effectively it worked. The facility was designed to be a "closed loop" system in which water used to clean waste material transfer containers was processed through a filtering system. (CX-1, Tr. p. 453, 490-495)

j. Complainant, however, observed water on the ground in areas outside the wash facility. He believed the water was effluent runoff from the wash facility, and he felt it was contaminated waste that was leaching into the ground. He also believed that, when these areas of water dried, the residue material would be transported into a nearby curb and creek when periods of rain caused water runoff from the yard. (CX-1, 27, Tr. pp. 87, 90, 107, 203)

k. Mr. Leslie developed concerns with the quality of Complainant's job performance beginning in January of 2016, at which time he began informal coaching sessions to improve performance. But Mr. Leslie set no deadline for Complainant to improve. Additionally, on January 25, 2016, he informed Complainant by e-mail that he was disappointed with the length of time for equipment readiness. (Tr. pp. 513-517; RX-12)

l. Between February and May of 2016 Complainant engaged in personal interactions with other employees that led to nine formal complaints being filed against him using a company complaint form. Specifically, Mrs. Smith, Mr. Cybak, Mr. Smith, Ms. Amber Patterson and Mr. Corrie Brown filed written complaints. (RX-1-9)

m. On February 17, 2016, Mrs. Smith, Mr. Cybak, and Ms. Patterson each filed a written complaint detailing an interaction between Mr. Cybak and Complainant in which Complainant criticized Mr. Cybak's job performance and warned Mr. Cybak not to pick up bad habits from Mr. Smith. This interaction occurred in the presence of other employees. Mr. Cybak considered this behavior unprofessional, and he also noted in his complaint that Complainant warned him to "watch what [he] says" to Mr. Leslie. (RX-2, 3, 4; Tr. p. 386)

n. On May 17, 2016, Mr. Brown, who worked in the Philadelphia, Pennsylvania terminal, made a telephonic complaint to Mrs. Smith against Complainant concerning an argument over vehicle decals and general unprofessional behavior. Mrs. Smith summarized Mr. Brown's complaint on the company form that she signed. (RX-1; Tr. pp. 240)

o. On May 19, 2016, Complainant directly conveyed concerns to Mr. Leslie about the rubber transfer hoses he had been tasked with disposing. Complainant believed the hoses contained waste material residue, and he considered it improper to continually dump the hose at Republic Services landfill, a facility at which Respondent did not have the required customer profile for disposal of controlled waste. Respondent did not previously establish a waste profile because the company is not a waste generator. Complainant procured forms necessary to establish a waste profile with Republic Services landfill to dispose of the hoses he believed to be contaminated. Mr. Leslie expected Complainant to handle the matter, but he did not follow up to ensure that the profile had been established. (CX-2; Tr. pp. 104, 106, 450-451, 470-472)

p. On May 23, 2016, Mrs. Smith filed a written complaint detailing an argument between Mr. Smith and Complainant regarding repairs to the main gate at Respondent's Highland, Texas facility. (RX-8)

q. On May 26, 2016, Mr. Cybak, Mr. Smith and Mrs. Smith each filed a written complaint detailing an incident in which Complainant told Mr. Smith that he was "pushing it" and that he would "get it." Mr. Cybak, Mr. Smith and Mrs. Smith considered Complainant's comments to be threatening. (RX-5-7; Tr. pp. 394-395)

r. On May 26, 2016, Mr. Brown made a second complaint to Mrs. Smith, which she wrote on the company form. Mr. Brown reported that his problems with Complainant were ongoing. Specifically, "Corrie expressed his concerns and stated he no longer wanted to deal with Mike" because he felt Complainant had been unprofessional and "was still giving him a hard time on decals and equipment maintenance." (RX-9)

s. It was Mrs. Smith's practice, as the Human Resources Representative, to submit these complaints directly to Mr. Leslie. Mr. Leslie acknowledged he learned of the complaints against Complainant after Mrs. Smith contacted Mr. Leslie directly and put the complaints on his desk for review. (Tr. pp. 254-255, 445).

t. Mr. Leslie first considered terminating Complainant's employment sometime in March of 2016 because of informal feedback from managers that Complainant was difficult to work with. (Tr. pp. 513-514)

u. On May 26, 2016, Mr. Leslie discussed Complainant's conduct and employment performance with Mr. Black, the Vice President of Human Resources. Mr. Leslie decided that he would terminate Complainant's employment after having spoken to Mr. Smith regarding the confrontation that occurred that day. However, Mr. Leslie informed Mr. Black that he wanted to "sleep on it." (Tr. pp. 335, 337-338, 446)

v. Later that day, Mr. Black sent Mr. Leslie the termination paperwork by e-mail with a request to discuss the matter further the next morning. (RX-11)

w. Mr. Black reviewed the complaints in Complainant's employee file and spoke with Eric Smith, Mike Cybak, Corrie Brown, and Amber Patterson regarding the complaints. He did not obtain Complainant's viewpoint because he believed "Mr. Leslie had already talked to Mr. Tyler about these complaints and the decision to terminate [Complainant] had already been made." (Tr. pp. 340-341)

x. On May 27, 2016, Mr. Leslie informed Mr. Black that he had decided to terminate Complainant's employment. He based this decision on the fact that Complainant had proved unable to cooperate with other employees, failed to reduce costs, and was perceived as threatening to other employees. (Tr. pp. 339-340, 439, 447)

y. Respondent hired Triangle Equipment to install a closed-loop tank wash filtration system. On June 1, 2016, Complainant surreptitiously used his phone to make an audio recording of a three-person conversation between himself, the owner of Triangle Equipment and a Triangle Equipment employee. During the conversation the Triangle Equipment employee stated that he was not aware the filtration system would be handling hazardous material and had been specifically informed of the contrary. Complainant responded that the material "[is] not classified right now by the environmental agency but they have been lobbying to try to get it done but the lobbyists for oil are keeping it down so they can keep the costs down for oil companies . . ." (CX-27, Part 1, at minute marker 9:50-10:00)

z. On June 1, 2016, Complainant also used his phone to make a video recording of liquid run-off from the tank wash apparatus into a nearby creek. (CX-27)

aa. Complainant believes he relayed his concerns regarding the tank wash system to Mr. Gary Leslie, who is Mr. Colin Leslie's father. Complainant believed Mr. Gary Leslie was Mr. Colin Leslie's superior manager. Complainant believed his conversation with the Triangle Equipment owner and employee demonstrated that Mr. Collin Leslie was aware of the run-off issues with the tank wash system. However, Mr. Collin Leslie cannot recall ever having a conversation with a representative of Triangle Equipment regarding releasing waste into the nearby creek. (Tr. pp. 78-80, 483)

bb. During the timeframe of April to June 2016, Mr. Leslie travelled extensively to other offices, and he spent approximately one day per week at his office in Highlands, Texas. Mr. Leslie chose June 10, 2016 as the date to inform Complainant of his employment termination because Mr. Leslie would be at the office that day; additionally, Mr. Black advised Mr. Leslie that Friday

was the optimal day to terminate an employee. (Tr. pp. 435, 448-449)

cc. On June 10, 2016, Complainant was called into Mr. Leslie's office for a meeting with Mr. Leslie and Mr. Black. Mr. Leslie informed Complainant that his employment was being terminated. Upon being told his employment had been terminated, Complainant said something to the effect that "this is a whistleblower complaint." (Tr. p. 341)

dd. After the meeting, Complainant was escorted from Respondent's facility by Mr. Black. This required the two men to walk through the terminal yards. During this walk, Complainant pointed out to Mr. Black certain areas where he believed there were examples of waste disposal problems. (Tr. pp. 41, 110-111, 345-346)

6. <u>Applicable Law and Analysis.</u>

a. ***The Parties' Arguments.*** Complainant alleges Respondent violated the employee protection provisions of the Act by terminating his employment after he reported concerns about what he believed were ineffective waste material handling and management processes by Respondent. In particular, Complainant contends he informed fellow managers and the company president that Respondent's waste management handling practices were causing solid waste catalyst spills, waste water run-off and improper hose disposal. Complainant argues the close temporal proximity of his reports and Respondent's termination of his employment show that his statements were a motivating factor in Respondent's decision to end his employment.

Respondent argues Complainant did not engage in protected activity because his reported concerns pertained to business practice for waste materials not regulated by the Act. Respondent also claims Complainant's reported concerns were not objectively reasonable and do not qualify as protected activity under the Act. Additionally, Respondent asserts Complainant's employment was terminated solely because of reasons unrelated to his concerns about waste material handling. As such, Respondent maintains Complainant's alleged protected activity was not a motivating factor in the adverse action he suffered. Lastly, Respondent contends it can demonstrate by a preponderance of the evidence that it would have taken the same unfavorable personnel action against Complainant in the absence of his alleged protected activity.

b. ***Elements of SWDA Claim.*** 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 an 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.*

To prevail on a claim, a complainant must show by a preponderance of the evidence (1) the complainant engaged in protected activity under the Act; (2) the respondent was aware of the protected activity; (3) the complainant suffered an adverse employment action; and (4) the protected activity was a motivating factor for the adverse action (i.e., there is a nexus between the

protected activity and the adverse action). 29 C.F.R. § 24.104(e)(2). "Evidence meets the preponderance of the evidence standard when it is more likely than not that a certain proposition is true." *Joyner v. Georgia Pacific Gypsum, LLC*, ARB No. 12-0028, ALJ No. 2010-SWD-00001, slip op. at 11 (ARB Apr. 25, 2014).

Additionally, a complaint under the Act will be dismissed if a respondent shows by a preponderance of the evidence that it would have taken the same adverse action in the absence of the complainant's protected activity. 29 C.F.R. § 24.104(e)(4).

1) Protected Activity.

To qualify as protected activity under the SWDA, Complainant must prove that he had a "reasonable belief" that Respondents violated waste disposal laws. *Sylvester v. Parexel Int'l, LLC.*, ARB No. 07-123, ALJ Nos. 2007-SOX-036, 2007-SOX-042, slip op. at 14 (ARB May 25, 2011). A reasonable belief must be both subjectively and objectively reasonable. *Id.* Subjective reasonableness requires Complainant to establish that he actually held a good faith belief that Respondent violated the law in light of Complainant's experience and training. *Id.* at 14-15. Objective reasonableness requires the undersigned to evaluate the nature of Complainant's complaint "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience" as Complainant. *Id.* at 15.

A complainant is not required to prove an actual violation of the underlying statute. *Yellow Freight Sys., Inc.*, 954 F.2d 353, 357 (6th Cir. 1992); *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 Nos. 1986-CAA-3, 1986-ERA-4, 1986-ERA-5 (Sec'y May 29, 1991). The Administrative Review Board (ARB) also ruled that:

> "A complainant does not need to express his reasonable belief when he engaged in protected activity so long as he reasonably believed, at the time he voiced his complaint or raised his concerns that a threat to the environment or to the public existed." The "reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities." The "subjective" component of the reasonable belief test is demonstrated by showing that the employee actually believed that the conduct of which he complained constituted a violation of relevant law.

Tomlinson v. EG&G Defense Materials, Inc., ARB Nos. 11-024, 11-027, ALJ No. 2009-CAA-008, slip op. at 13 (ARB Jan. 31, 2013)(citations omitted).

Moreover, the ARB has consistently held that "employees who report safety concerns that they reasonably believe are violations of [federal whistleblower statutes] are engaging in protected activity, regardless of their job duties." *Vinnett v. Mitsubishi Power Sys.*, ARB No. 08-104, ALJ No. 2006-ERA-029, slip op. at 11 (ARB July 27, 2010). Federal appellate courts agree. *See Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098 (10th Cir. 1999); *Stone & Webster Eng'g Corp. v.*

Herman, 115 F.3d 1568 (11th Cir. 1997); *Bartlik v. U.S. Dep't of Labor*, 73 F.3d 100 (6th Cir. 1996*); Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985).

At hearing, the parties contested whether Complainant engaged in protected activity when he informed Mr. Smith and Mr. Leslie that he believed the company was failing to properly manage waste material. In its post-hearing briefs, Respondent does not specifically argue that Complainant did not engage in protected activity, only that Complainant "has changed his story about when the alleged retaliation began, and what event triggered his termination." (RB-2, p. 5)

There are three ways in which Complainant alleges he engaged in protected activity: 1) notifying Respondent that it was failing to properly handle waste catalyst; 2) informing Respondent that it was utilizing an insufficient tank waste wash station that caused contaminated water to drain into the ground and a nearby creek; and 3) telling Respondent it was failing to properly dispose of transfer hoses that contained waste catalyst. Complainant maintains these reports were a motivating factor in Respondent's decision to terminate his employment.

First, with respect to the mishandling of waste catalyst, Complainant reported "one or two" piles of spillage on the ground to Mr. Smith, who promptly cleaned those spills. Mr. Smith did not believe it was a matter of significant concern, and the evidence does not establish that he discussed the issue with Respondent's senior managers. Nonetheless, Complainant established that he made a report to a fellow manager about waste catalyst spills that he clearly considered a waste material management failure by Respondent.

Second, Complainant's evidence regarding his concerns about Respondent's tank wash system seems to contradict whether he had a subjective belief that Respondent was violating the Act. During his conversation with the contractor and a contractor employee who built the system, Complainant directly expressed an opinion that the waste from the tank system was not classified as hazardous although he also opined that was due to extensive lobbying efforts on the part of the oil and gas companies. Overall, however, the evidence shows he demonstrated a concern that the tank wash runoff material - while not something he believed was explicitly characterized as hazardous by law - was potentially dangerous.

Third, Complainant directly contacted Republic Services landfill and obtained forms needed to establish a waste profile to properly dispose of transfer hoses. He clearly communicated his concern and his actions in this regard to Mr. Leslie. The facts show Complainant never specifically identified for Mr. Leslie a safety statute, regulation, or requirement that he believed Respondent had violated. Nor did Complainant specifically explain to Mr. Leslie the reasons why he believed the hoses constituted hazardous waste material. Even so, the facts demonstrate Complainant subjectively and sincerely believed Respondent's method of dumping the transfer hoses was improper waste disposal and some kind of regulatory violation.

Overall, especially in the absence of any specific persuasive arguments to the contrary from Respondent, Complainant established he possessed a subjective good faith belief that Respondent's business operations violated waste management safety regulations. As such, the undersigned shall evaluate whether Claimant's beliefs were objectively reasonable.

An objectively reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as complainant. *Tomlinson*, ARB Nos. 11-024, 11-027, slip op. at 14. The findings of facts do not clearly establish that Complainant holds any specific hazardous waste training or qualifications. Complainant maintains in his post-hearing brief that he "holds advanced degrees ranging from psychology to business management and certifications ranging from welding to diesel mechanics and from heavy equipment to aviation technology . . . [and] has been trained over the years in hazardous materials handling, both air and land transportation safety and related state and federal compliance including OSHA." (CB-1, p. 3) However, the evidence of record does not provide any corroborating material or specific support for these assertions. As a result, the undersigned concludes Complainant was an employee without specialized training or experience in waste management regulations or procedures. Nonetheless, Complainant persuasively argues that - even if he did not have such experience and expertise - "a layperson can correctly identify such controlled materials using industry standard Material Safety Data (MSD) information." (CB-2, p. 3)

In regard to Complainant's transfer hose disposal concerns, Mr. Leslie noted during testimony that Respondent did not have a waste profile for the landfill because it is not considered a waste generator and thus did not own the waste that was being disposed. Clearly, however, by directing Complainant to obtain such a profile, Mr. Leslie conveyed no such opinion to Complainant when he made his initial report to Mr. Leslie. Nothing in Mr. Leslie's initial response can be viewed as assuaging Complainant's concerns or explaining why they were unfounded. To the contrary, Mr. Leslie's response to Complainant's reports would normally be viewed by someone as agreement with Complainant's concerns and recommended corrective action. Indeed, Complainant - or anyone else in a similar situation - would be reasonably justified in concluding the concerns had merit when someone of Mr. Leslie's experience and position with Respondent had not noted why they were unfounded and unrelated to requirements under the Act. Consequently, given the nature of the material in question and its origin, the undersigned concludes it is objectively reasonable for a layperson to assume that a waste profile would need to be established in order to properly dispose of the transfer hoses.

As such, the facts in this case establish that Complainant engaged in a protected activity under the SWDA based on Complainant's subjective and objective belief that Respondent was improperly handling waste through the disposal of hoses at the landfill without first establishing a waste profile.

2) Knowledge of Alleged Protected Activity.

The undersigned concludes Respondent knew of Complainant's alleged protected activity. As reflected in the findings of facts, Complainant directly conveyed concerns to Mr. Leslie that rubber transfer hoses contained waste material residue. Complainant specifically told Mr. Leslie that he considered it improper to continually dump the hoses in a landfill at which Respondent had not established a customer profile to dispose of controlled waste. Mr. Leslie acknowledged that a customer profile was required for the disposal of controlled waste. Consequently, the undersigned concludes Complainant proved that Respondent had knowledge of Complainant's protected activity.

3) Unfavorable or Adverse Personnel Action.

The undersigned concluded that Complainant did engage in a protected activity under the SWDA and that Respondent had knowledge of such activity. The SWDA explicitly prohibits employers from discharging an employee or otherwise discriminating against an employee with respect to his compensation, terms, conditions or privileges of employment because the employee "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). *See also* 29 C.F.R. § 24.102(b) ("[i]t is a violation for any employer to . . . retaliate against any employee because the employee has" engaged in protected activity); 29 CFR § 24.102(c)(1)("[i]t is a violation for any employer to . . . retaliate against any employee because the employee has notified the employer of an alleged violation [of the SWDA.]").

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court's *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006) decision addresses what constitutes an adverse employment action and is applicable to the employee protection statutes enforced by the U.S. Department of Labor. *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (ARB Sept. 30, 2008). To be an unfavorable personnel action the action must be "materially adverse" meaning that it "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 57.

Moreover, "adverse actions" refer to unfavorable employment actions that are "more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015) (citing *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010)(holding that performance rating drop from "competent" to "needs development" was more than trivial and was adverse action as matter of law).

Complainant's employment with Respondent effectively ended on June 10, 2016. This caused Complainant to suffer the loss of full-time employment and an annual salary of $78,000.00. As such, Respondents' decision to terminate Complainant's employment clearly constitutes an adverse action.

4) Protected Activity as a Motivating Factor.

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." 29 C.F.R. § 24.109(b)(2). A motivating factor "is 'conduct [that is] . . . a 'substantial factor' in causing an adverse action." *Onysko v. Utah Dep't Envtl. Quality*, ARB No. 11-023; ALJ No. 2009-SWD-00004, slip op. at 10 (ARB Jan. 23, 2013) (quoting *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 286 (1977)); *see also Hulen v. Yates*, 322 F.3d 1229, 1237 (10th Cir. 2003). In making this showing, the "Complainants need only establish that th[e] protected activity was *a*

motivating factor, not *the* motivating factor, in the decision to discharge them." *Abdur-Rahman v. Dekalb County*, ARB Nos. 08-003, 10-074, ALJ Nos. 2006-WPC-2, 2006-WPC-3, slip op. at 10 n.24 (ARB May 18, 2010)(emphasis added).

Although Complainant demonstrated that he engaged in protected activity, the evidence clearly establishes the protected activity was not a motivating factor in his unfavorable personnel action.

As discussed in the findings of facts, Mr. Leslie began having concerns about Complainant's work performance in January of 2016. Complainant started reporting what he felt were Respondent's waste management shortcomings as early as March 2015, sixty days from the beginning of his employment and more than a year before his termination. Between January 2016 and June 10, 2016, Mr. Leslie received nine formal complaints concerning unprofessional behavior by Complainant; six of the complaints were reported in the weeks immediately prior to Mr. Leslie's May 27, 2016 decision to terminate Complainant. Respondent argues this temporal relationship between the complaints against Complainant and his termination demonstrates that its motivation for ending Complainant's employment arose directly from his conduct. Specifically, Respondent asserts:

> The evidence in this case shows a temporal proximity between Tyler complaining and USAD providing ***positive feedback***. Further, the temporal proximity between the "last straw" incident between Tyler and Eric Smith on May 26th, the termination discussion and email chain between Black and Leslie dated May 26th and 27th, and the May 27th decision by Leslie to terminate Tyler demonstrates that Tyler was terminated for his conduct with other employees and that termination had exactly nothing to do with environmental concerns he claims he began making 30 days after he started at USAD.

(RB-1, p. 16)(emphasis in original) This argument has merit. The events most temporal to Complainant's termination were the complaints Mr. Leslie received, not Complainant's protected activity. Prior to the complaints about Complainant, Complainant had reported concerns about Respondent's waste management conduct during the period of March 2015 through February 2016, and he suffered no adverse action because of those reports. Thus the distinguishing factor in Respondent's decision to terminate Complainant's employment is most directly tied to the other employee complaints about his unprofessional behavior.

Complainant asserts that, because some of the complaints were written by Mrs. Smith personally, they "support an unfair discharge regardless of the involvement of whistleblowing" and that they "strongly suggest 'pretext.'" (CB-2, p. 3).

Complainant's argument that he suffered an unfair discharge regardless of whistleblowing activities is based on concepts of general equity or fairness. Whether true or not, it does not establish a basis in the Act upon which the undersigned can grant Complainant relief. Stated another way, demonstrating that Complainant's involvement in whistleblowing was a basis for Respondent's adverse action is necessary for Complainant to be covered by the Act.

However, to the extent Complainant also argues the complaints were written as means to obscure his protected activity as a motivating factor in his termination, this position lacks any support. At the time he complained about Complainant's conduct, Mr. Brown worked in Philadelphia, Pennsylvania, and made his reports telephonically to Mrs. Smith who recorded them onto a written complaint reporting form. No evidence suggests Mr. Brown believed Mr. Leslie was unhappy about Complainant's reports of waste management mishandling. So an argument that Mr. Brown fabricated his complaints against Complainant in order to provide Respondent with a pretext basis for employment termination lacks credible support. The complaints Mrs. Smith authored were ones in which she was present during the incidents; thus she was giving her impressions as a witness. Additionally, no credible evidence suggests Mr. Smith or Mr. Cybak fabricated their reports to provide Mr. Leslie a pretext basis to end Complainant's employment. Given the nature and increase of complaints, the undersigned is unpersuaded that Complainant's former co-workers conspired against him to provide a pretext for the company to discharge him after engaging in protected activity. To the contrary, the complaints against Complainant by his former co-workers resulted solely from their personal concerns about his actions and comments.

Complainant also asserts that Respondent deviated from company protocol as an attempt to mask the fact that his protected activity was a motivating factor for his termination. "In similar thinking," Complainant contends, "why would a company take the time to create statements about an employee yet never reveal their existence to that employee until after a legal action is filed, especially someone in a human resource position? Possibly because they were only met for one purpose, to falsely accuse someone." (CB-2, p. 7)

Upon initial consideration, Respondent's inquiry into employee complaints against Complainant seemed somewhat ineffective. However, Mr. Black adequately explained his reasons for how he handled the complaints. He credibly testified why - after he investigated and, in his opinion, confirmed the veracity of the complaints - he did not discuss them with Complainant. Mr. Black clarified that he thought such action would be impractical because he believed Mr. Leslie had already considered and addressed the complaints with Complainant. The undersigned concludes Mr. Black reasonably justified his approach in notifying the Complainant about the co-worker complaints against him. Mr. Black felt Mr. Leslie had previously addressed performance problems with the Complainant. Also, the events that ultimately caused Mr. Leslie to decide to terminate Complainant's employment occurred quickly over a relatively short period of time. Accordingly, it was reasonable for Mr. Black to decide that discussing the complaints with Complainant would be unproductive and unnecessary given that the authority on how to resolve them rested with Mr. Leslie.

Additionally, Complainant argues that his "report to Mr. Collin Leslie based on the date of the Republic Waste email exhibit was just prior to the date of Mr. Leslie's emails with Mr. Brian Black regarding what Debusk claims was an employment decision involving [Complainant]." (CB-1, p. 1, referencing CX-2). Complainant asserts that this "matter would be a rather large concern for Debusk since removing controlled waste and reclamation may cost thousands or perhaps millions of dollars, so like numerous whistleblower incidents, it appears Debusk's management made the decision to cover it up." *Id*. In response, Respondent persuasively argues:

> [T]he credible evidence regarding Republic Waste contradicts Tyler's claim that this was a substantial factor in his termination. Instead, the evidence regarding Republic Waste is consistent with Colin Leslie's testimony that this was a routine event. Leslie candidly acknowledged asking Tyler to take rubber hoses for disposal to a landfill. (Tr. 450:11-18) There is nothing unusual about this. Leslie testified that when Tyler raised questions about the need for a waste profile, Leslie told Tyler "...okay, no problem, let's make that happen." (Tr. 450:8 to 451:6) Accordingly, the email from Republic to Tyler shows that they asked him to complete a waste profile form. (CX-2, p. 1) The form is a 2013 pre-printed Republic form suggesting that this wasn't an unusual event. (CX 2, pp. 2-3) Leslie's testimony was that this was a routine task that he expected Tyler to complete. (Tr. 471:20 to 472:13)

(RB-2, p. 6) Mr. Leslie readily admitted Complainant opined that Respondent should obtain a waste profile with Republic Services, that he understood a waste profile related to controlled waste, and that he expected Complainant to handle the matter. Mr. Leslie's conduct did not indicate he was concerned that Respondent had significantly or seriously violated the Act in a way that could have considerable ramifications. As such, the assertion that Mr. Leslie took action on Complainant's employment as a means to cover up waste disposal violations by Respondent lacks evidentiary support.

Lastly, Complainant contends "[t]he communications with Republic Waste and Triangle Equipment (third party outsiders) are proof that his whistleblower activities caused the companies to terminate his employment." (CB-1, p. 1) Specifically, Complainant avers:

> Mr. Tyler submitted to Mr. Collin Leslie Republic's waste profile forms and requested if he could inform Debusk's Safety Department on these findings which evidently upset Collin enough to have caused him to contact Mr. Black about firing a "guy" without any explanation behind it in an exchange of emails. It seemed Leslie was only interested, and Black as well, the best time of day to fire someone. That email which Mr. Hughes claims was the decision email to discharge Mr. Tyler, although the Leslies waited until June10 to act?

(CB-2, p. 5)

Respondent's decision to terminate Complainant came eight days after he conveyed concerns to Mr. Leslie about improperly disposing of rubber transfer hoses at the Republic Services landfill and the need to obtain a waste profile. But, more notably, it also came only one day after an incident that spawned three employee complaints, the ninth filed about Complainant. Both Mr. Black and Mr. Leslie testified the e-mail correspondence between them dated May 26, 2016 was about Complainant. Mr. Leslie decided to inform Complainant on June 10, 2016 that his employment was terminated because Mr. Leslie would be at the office that day, and, based on Mr. Black's recommendation in his role as Vice President of Human Resources, Friday was the optimal day to terminate an employee.

The preponderance of evidence in this case establishes significant and repeated incidents of employee misconduct that nullify the temporal relationship between Complainant's reports of

concern about hose disposal at the landfill and his employment termination. These incidents demonstrate that Complainant's unprofessional conduct and unsatisfactory performance - not his report that Respondent had disposed of transfer hoses without the required waste profile with Republic Services - were the motivating factors behind Mr. Leslie's decision to terminate Complainant. In particular, Mr. Leslie terminated Complainant's employment because he was unable to cooperate with other employees, failed to reduce costs, and was perceived as threatening other employees.

Accordingly, the undersigned concludes Complainant failed to meet his burden to demonstrate by a preponderance of the evidence that his asserted protected activity was a motivating factor in the ultimate personnel action taken by Respondent. Rather, the undersigned concludes the totality of the evidence demonstrates that Complainant's alleged protected activity played no factor in Respondent's decision to terminate Complainant's employment.

c. ***Preponderance of the Evidence that Respondents Would Have Ended Complainant's Employment Absent Protected Activity.***

When a complainant satisfies the burden of proving that protected activity contributed to adverse employment action - which Complainant did not do in this matter - a respondent can still demonstrate independent, non-retaliatory reasons for its adverse action. In this regard, the Code of Federal Regulations employs a burden-shifting analysis by which a respondent can defend an adverse action decision, to wit:

> If the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.

29 C.F.R. § 24.109(b)(2).

The evidence presented by Respondent in this matter satisfies the "preponderance of the evidence" evidentiary burden required for this defense. The protected activity alleged by Complainant was not a factor in Respondent's decision to ultimately take adverse employment action against Complainant. For the same reasons discussed above in the motivating factor analysis of this claim, the evidence also establishes that the Respondent would not have continued Complainant's employment any further.

The undersigned is completely convinced that Respondent would have taken the exact same action if Complainant had not voiced concerns regarding the discharge of spent catalyst, improper disposal of hoses, or the drainage of the tank wash facility liquid into a nearby creek. As described in the preceding section, the evidence demonstrates Respondent's termination of Complainant's employment was the culmination of repeated complaints by coworkers about Complainant's conduct, Complainant's failure to satisfactorily accomplish job objectives, and actions by Complainant perceived as threats against other employees.

Ultimately, Complainant's employment with Respondent ended when it did because Mr. Leslie had received a ninth complaint against Complainant for five separate incidents. Respondent found this to be yet another example of insufficient performance and unprofessional conduct by Complainant; and for those reasons alone, Respondent decided to terminate his employment.

7. Decision and Order. Based upon the above analysis of the contested issues of fact and applicable law in this matter, the undersigned makes the following decision and order:

a. Complainant failed to carry his burden to prove by a preponderance of the evidence that his protected activity of reporting violations related to waste material management was a motivating factor to the adverse personnel action he suffered.

b. Alternatively, even if Complainant's protected activity under the SWDA was a motivating factor to his employment termination, Respondent demonstrated by a preponderance of the evidence that it would have taken the same personnel action in regard to Complainant in the absence of his asserted protected activity.

c. Complainant's claim in this matter is denied.

SO ORDERED this day.

TRACY A. DALY
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 date of the postmark, facsimile transmittal, or e-filing 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 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.

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, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards.

If no timely petition for review is 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.

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the Board has implemented a new eFile/eServe system ("EFS") which is available at https://efile.dol.gov/. If you use the Board's prior website link, dol-appeals.entellitrak.com ("EFSR"), you will be directed to the new system. Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Filing Your Appeal Online

Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at login.gov (if they do not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their login.gov username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at https://efile.dol.gov/system/files/2020-11/file-new-appeal-arb.pdf and the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb.

Establishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

If you file your appeal online, no paper copies need be filed. **You are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address:

U.S. Department of Labor
Administrative Review Board
ATTN: Office of the Clerk of the Appellate Boards (OCAB)
200 Constitution Ave. NW
Washington, DC 20210–0001

Access to EFS for Non-Appealing Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at:
https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered users of EFS will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail. At this time, EFS will not electronically serve other parties. You are still responsible for serving the notice of appeal on the other parties to the case.