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Issue Date: 26 October 2021

Case Nos.: 2020-CER-00002
2020-SWD-00002

In the Matter of:

COLIN SPENCER,
Complainant,

v.

BLOSSOM PRAIRIE LANDFILL, INC.,[1]
Respondent.

Appearances:

John E. Wall Jr., Esq.
Law Offices of John E. Wall Jr.
Dallas, TX
For the Complainant

David B. Jordan, Esq.
Littler Mendelson, P.C.
Houston, TX
For the Respondent

Before: Jason A. Golden
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This proceeding arises from claims under the employee-protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610 (CERCLA), and the Solid Waste Disposal Act, 42 U.S.C. § 6971 (SWDA), and the regulations found at 29 C.F.R. Part 24. Complainant Colin Spencer alleges that Respondent Blossom Prairie Landfill, Inc. terminated his employment in retaliation for his protected activity under the CERCLA and SWDA. (Joint Exhibit (JX) 19; Tr. 6-9).[2] He alleges that the decision to terminate his employment was not communicated to him until July 9, 2019, which would make his claim timely. Respondent asserts that it informed Complainant of its termination decision on July 3, 2019, which would make his claim untimely and barred by the limitations period.

[1] The caption of this case has been amended to reflect that Blossom Prairie Landfill, Inc. is the proper respondent in this proceeding. (*See* May 25, 2021 hearing transcript (Tr.) 6-9).

[2] Although Complainant also alleged in his complaint that he received a negative performance evaluation, he has not pursued that allegation as a basis of his claim. (*See* Compl's Br. at 2).

On May 25, 2021, I held phase one of a bifurcated formal hearing in this proceeding by video conference. Phase one of the hearing was limited to the issue of whether Complainant timely filed his claim against Respondent with the Occupational Safety and Health Administration (OSHA). The parties and their counsel were present during the hearing. (*See* Tr. 5, 6, 64-65). I admitted JX 1-23 and Respondent's Exhibit (RX) 3 in evidence. (Tr. 14, 179). And, I heard sworn testimony from Complainant Colin Spencer, Adam Gooderham, Josh Bray, and Andy Antunez. (*See* Tr.) The parties agreed that I could refer to the transcript of the December 2, 2020 on-the-record prehearing telephone conference, in which Antunez testified regarding the requested forensic examination of Complainant's IPhone, for background information. (Tr. 188).

On July 1, 2021, I issued a Briefing Schedule Order, in which I held that Respondent bears the burden of proving by a preponderance of the evidence that Complainant did not timely file his complaint with OSHA. Also, I concluded that I would apply the decisional law of the United States Court of Appeals for the Fifth Circuit in this proceeding. The July 1, 2021 Briefing Schedule Order is incorporated by reference here.

On August 16, 2021, Respondent timely filed its closing brief. On September 7, 2021, Complainant timely filed his response. And, on September 21, 2021, Respondent timely filed a reply.[3]

In reaching my decision, unless noted otherwise herein, I have reviewed and considered all testimony and exhibits in evidence and the stipulations and arguments of the parties. I have also considered Antunez's testimony given on December 2, 2020, for the purpose of determining his expertise.

I. Applicable Statutory and Regulatory Limitations Periods

According to the CERCLA, "[a]ny employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination."[4] Similarly, the SWDA states: "[a]ny employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination."[5] 29 C.F.R. § 24.103(d)(1), which is applicable to both the CERCLA and SWDA, provides:

> Except as provided in paragraph (d)(2) of this section, within 30 days after an alleged violation of any of the statutes listed in §24.100(a) **occurs (*i.e.*, when the retaliatory decision has been both made and communicated to the complainant)**, an employee who believes that he or she has been retaliated against in violation of any of the statutes listed in §24.100(a) may file, or have filed by any

[3] July 1, 2021 Briefing Schedule Order.
[4] 42 U.S.C. § 9610(b).
[5] 42 U.S.C. § 6971(b).

person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, e-mail communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.[6]

"The 30-day limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action. The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation.[7]

II. Findings of Fact and Conclusions of Law

A. The Parties' Stipulations

The parties stipulated as follows:

1. Complainant filed a claim with OSHA on August 8, 2019.

2. Blossom Prairie Landfill, Inc. (Blossom Prairie) received notice of the claim that Complainant filed with OSHA, and of this proceeding before OSHA and before the Office of Administrative Law Judges (OALJ).

3. This tribunal has personal jurisdiction over Blossom Prairie.

4. Complainant was employed by Blossom Prairie.

5. Blossom Prairie is the proper respondent in this proceeding.

(Tr. 6-9, 51-52). The foregoing stipulations are accepted and hereby made findings of this tribunal.

B. Testimony Regarding Complainant's Termination

Complainant Colin Spencer testified as follows:

Complainant was the landfill manager for Blossom Prairie until June 1, 2019. Josh Bray owned Blossom Prairie. Bray sold Blossom Prairie to Waste Connections. After the sale, Complaint primarily dealt with district manager Joey Tedder from the new ownership. Tedder operated another landfill. On June 2, 2019, Tedder emailed

[6] (Emphasis added). Paragraph (d)(2) of Section 24.103 pertains to claims under the Energy Reorganization Act of 1974, 42 U.S.C. 5851 (ERA), and is not applicable to this proceeding. The statutes listed in Section 24.100(a) are the: Safe Drinking Water Act, 42 U.S.C. 300j-9(i) (SDWA); Federal Water Pollution Control Act, 33 U.S.C. 1367 (FWPCA); Toxic Substances Control Act, 15 U.S.C. 2622 (TSCA); SWDA; Clean Air Act, 42 U.S.C. 7622 (CAA); ERA; and CERCLA.

[7] *Kaufman v. Envt'l Prot. Agency*, ARB No. 10-018, ALJ No. 2002-CAA-22, 2011, PDF at 3 (ARB Nov. 30, 2011) (citing *Cante v. New York City Dept. of Educ.*, ARB No. 08-012, ALJ No. 2007-CAA-004 (ARB July 31, 2009)).

Complainant a performance memo and asked him to sign, date, and return it. (Tr. 16-19, 72; *see* Tr. 89). Complainant was confused and discombobulated by the memo because it did not contain true information. He was so mad that he reached out to Bray. Complainant does not remember telling Tedder that he would not sign the memo, but he did tell Bray. (Tr. 26-27; *see* JX 15). Prior to July 2, 2019, Complainant had conversations with Tedder about Complainant's perceived performance, but not with Gooderham. (Tr. 60-61).

On June 3, 2019, before lunch, Complainant met with Adam Gooderham in the landfill's parking lot. (Tr. 16-19). Complainant's "intentions going into the conversation was to explain the route that the landfill was headed on, the poor conditions of non-compliance that we were in. And [Gooderham's] response was that he did not want to talk about that. He only said that it was just something [sic] was not working out there and that we would speak about it next week." (Tr. 19, 55-56). The conversation did not last more than two minutes. (Tr. 20).

> Q Now, as I understand your testimony earlier, it was that you were only there for a few minutes. Didn't he tell you, Mr. Spencer, that it was not going to work out for you at Waste Connections?
> A That was not how it was worded.
>
> Q Didn't he tell you that you were no longer going to be employed in the long term at Waste Connections?
> A It was not how it was worded.
>
> Q Didn't he tell you should start looking for another job?
> A I don't recall the exact terms that he used. What I remember is that he said it was not currently working between me and Joey.
>
> Q And so I come back to the question I just asked you, Mr. Spencer. Did he tell you should start looking for another job?
> A That is not what I remember.
>
> Q Did you ask him about whether you'd be able to still get your bonus?
> A Not that I recall.
>
> Q After your meeting with Adam that morning, didn't you immediately reach out and start looking for a job?
> A I don't know my timeline of looking. I had been looking at other jobs prior to then and through that whole time period.

(Tr. 30-31).

On the morning of July 3, 2019, Complainant sent a message by Facebook messenger to Ms. Reese. (Tr. 34). The message states that "I wanted to shoot you a message because I'm **starting** to explore a few other career options, and I'm definitely

considering Kansas as a place that I might venture back to. . . . Would you happen to know of anyone up in that area that currently works in [the renewable energy] field that I could talk with?" (Tr. 35; *see* JX 14 (emphasis added)).[8] Despite being unsure of Waste Connections' approval policy, he asked for reimbursement for $14.15 for lunch from Schlotzsky's deli that day. (Tr. 35-36; JX 23).

On July 4, 2019, Complainant texted Bray and asked him whether he should attend the managers meeting on Friday, July 5, 2019. The meetings were held every Friday. They were mandatory unless something major was happening at a manager's site. (Tr. 36-37; *see* JX 15). Complainant did not know whether he should attend because approximately a week before his July 3, 2019 meeting with Gooderham, he met with Gooderham, Tedder, and lead equipment operator Timothy Soares. During the meeting Gooderham demoted him to operations manager and indicated that Tedder would be the landfill manager. (Tr. 37-40). Bray advised Complainant that he did not need to attend the meeting. Bray did not tell him that he did not need to attend the meeting because Complainant "no longer worked there." (Tr. 40). How the demotion would change Complainant's role and responsibilities was unclear. (Tr. 41).[9] Complainant's pay was not reduced by the demotion. (Tr. 56-67).

The next week, on July 9, 2019, Complainant attended a meeting in Bray's office in South Paris. (Tr. 20-21).[10] Bray and Gooderham were in the meeting. (Tr. 44). Complainant surreptitiously recorded the meeting on his phone because he "had a[n] eerie feeling going into it, it was something out of the ordinary." (Tr. 20, 43; *see* Tr. 100, 153). He "didn't feel like that it made a difference whether they knew or not. . . . [He] just was recording it so [he] would have it for [himself]." (Tr. 43-44). At the meeting, he was told he was terminated, but that Prairie Blossom wanted him to continue to work for a certain amount of time. Gooderham did not previously tell him that he would be terminated on July 9. Complainant continued to work for Prairie Blossom for about a month, but with very limited duties. He had previously operated the landfill for about two years. (Tr. 21-22). Complainant was surprised at the news he was terminated. (Tr. 50).

Complainant acknowledged that receiving his bonus was "a concern in anyone's head for the timeframe." (Tr. 51). Half of the bonus was to be paid at the time of acquisition and half 90 days later. "Ultimately, though, [he] did get that bonus paid, that $10,000.00 bonus . . . ." (*Id*.)

Adam Gooderham testified regarding the acquisition of Prairie Blossom, its operations and management structure, terminating Complainant, and corporate communications regarding the termination. He further testified as follows:

Gooderham is a division vice president for Groot Recycling and Waste Services, which is a subsidiary of Waste Connections, Inc. In 2019, he was a division vice

[8] The time stamp on the message is 10:59 a.m. (JX 14).
[9] Complainant is not alleging that he was demoted to operations manager for his alleged protective activity. (Tr. 42).
[10] The day before the July 9 meeting, Complainant texted Bray asking, "[c]an you shoot me a text whenever you find out when Adam wants to come out and talk about stuff?" (JX 16; Tr. 43).

president for Waste Connections Lone Star, Inc., which was a subsidiary of Waste Connections, Inc. Blossom Prairie Landfill is a Type 1 landfill that accepts municipal solid waste, which Waste Connections, Inc. acquired on June 1, 2019, for almost nine figures. His job was to help integrate the acquisition. (Tr. 66-68).

The last Wednesday before June 28, it was made clear to Complainant that he reports directly to Tedder. (Tr. 82-83; JX 6 at 1). This was the meeting referred to by Complainant in which he was allegedly demoted. He was not demoted. His title was changed for payroll purposes. (Tr. 83-84).

Gooderham believes Complainant's bonus was $20,000. (Tr. 85).

During the second week of June, it was becoming evident that Complainant "was not skilled for what we needed for the role." (Tr. 75). "Then we found out he was really just a scale attendant, just doing tickets, taking point from [Bray]." (Tr. 76-77).[11]

The plan was to terminate Complainant on Monday, July 1, 2019. But, the plan "changed because we wanted to ensure that we had proper coverage of the landfill, that we had a succession plan in place with a certain candidate. This was also around the time where my boss was on vacation. And so, in order to hopefully get the right pieces in place, we wanted to buy some time." (Tr. 86).

On July 2, 2019, Gooderham discussed terminating Complainant with Bray. (Tr. 94). Gooderham decided that he would communicate the termination to Complainant at the landfill on July 3. (Tr. 94).[12] Gooderham explained:

> JUDGE GOLDEN: . . . . Why did you have the meeting with Mr. Spencer on July 3rd without Mr. Tedder?
> THE WITNESS: Because there was such animosity from Colin Spencer and his feelings toward Joey Tedder. He had really tuned him out. He hadn't owned or taken accountability for his lack of performance or lack of follow-through of lack of adhering to our values and our policies. And so, as somebody who is working with the company on integration, I felt that

[11] Bray testified that it was never Complainant's responsibility to stand at the gate and take tickets. He testified that:

> So Colin and I would meet pretty well daily if not every other day and discuss the direction that we wanted to go throughout the course of the week and discuss what dirt needed to be moved, where we were going to put the trash. And then obviously he handled all the paperwork related to the daily tickets, the inbound volume that was described earlier in some of the other conversations.

(Tr. 138, 160). To the extent Gooderham's testimony regarding Complainant's responsibilities differs from Bray's testimony, I do not find the difference so great or important that it effects either's credibility.

[12] It is unclear from Gooderham's testimony whether Gooderham communicated his decision to terminate Complainant on July 3 to Bray during their conversation on July 2.

On line 3, page 92 of the hearing transcript, the speaker is identified as Mr. Jordan, but based on what is transcribed, it is evident that the transcript should have identified me as the speaker.

> it was appropriate at that point to get involved and to deliver the message to Colin that he would be terminated.
>
> JUDGE GOLDEN: Was there an earlier plan, though, that you and Mr. Tedder -- was there an earlier plan that you and Mr. Tedder would talk to Mr. Spencer together and deliver that message?
> THE WITNESS: We were going to visit with him to deliver the memo. And, yes, we had originally planned and decided to -- after Joey Tedder had communicated to me how combative and argumentative he was on the performance related -- or, failed performance, that I would get involved so that we could deliver the message appropriately and make sure he understood full well that the company was going in a different direction.
>
> * * *
>
> JUDGE GOLDEN: . . . . I'm just curious to know what the purpose of providing those memos to Mr. Spencer was, if you know.
> THE WITNESS: Yeah. So the thought was originally that we would document these performance and integrity concerns. Based on his reaction, failure to own and take accountability, it was determined that we weren't going to get the outcome of correcting the behavior. And so we determined that at that point we needed to part ways.

(Tr. 124-126).

Gooderham met with Complainant before noon (lunchtime) on July 3, in front of the office and informed him that he was going to be terminated and they wanted to work on a transition so he could land on his feet. Complainant seemed dejected and asked about his bonus. (Tr. 95-97). A subsequent meeting was needed to discuss Complainant's bonus and to work through some other details, such as Complainant's replacement. On July 3, Gooderham had no doubt that he communicated Complainant's termination to him and that Complainant understood he would no longer be working for the company. (Tr. 98-99, 102).

Gooderham decided to terminate Complainant without Tedder present because Complainant had such animosity for Tedder and Gooderham thought it was more appropriate for him to deliver the message. (Tr. 124).

Gooderham has fired people before. Usually there is a reaction like Complainant's on July 3. He has not had anyone react to news of being terminated the way Complainant reacted during the July 9 meeting. (Tr. 101).

Gooderham is told to document the type of conversation that occurred on July 3, but there is no such documentation for that meeting. (Tr. 113). The lack of documentation was an oversight by Gooderham. He thought the company was being more than fair with Complainant by paying him almost two months' worth of salary and a bonus. (Tr. 127).

The transcript of the July 9 meeting is accurate. Complainant was kept on the payroll after the July 9 meeting for his bonus. He was not kept in the same position and he was not often at the landfill after July 9. (Tr. 131-132, 134). Gooderham's statement that "yeah, and, again, you know, we talked about this last week," during the July 9 meeting referred to his earlier meeting with Complainant. (Tr. 100, 129).[13]

Gooderham testified that the statement "I'm going to respond to Joey and suggest that you two do it together," in an email from HR manager Eddie Hamner to Gooderham dated June 28, 2019, refers to terminating Complainant. (Tr. 72, 77-78).

Josh Bray testified as follows:

He is a special projects employee of Waste Connections. (Tr. 136-137).[14] After the acquisition of Prairie Blossom, Bray was no longer responsible for making decisions about Complainant's employment. (Tr. 143-144).

Bray spoke with Complainant on July 2 regarding the performance memo Complainant received. Complainant's reaction was confusion and surprise. (Tr. 144). After speaking with Complainant, Bray spoke with Gooderham and said "it doesn't sound like Colin took the write-up very well." (Tr. 147). Bray understood that Gooderham would meet with Complainant the following day. (*Id*.) Bray again spoke with Gooderham after Gooderham met with Complainant on July 3. Gooderham told Bray that they were going in a different direction; they were going to bring in a landfill manager to run the landfill and it would not be Complainant.

Q But was he told that he would be ending his employment at Waste Connections?
A I don't know they got into that specific of a detail, but that was my assumption.

(Tr. 148, 170). Bray told Complainant that he did not have to attend the Friday meeting.

Q And why did you tell him that?
A That Joey had taken that role.

Q And did you tell him that because you knew he was no longer working there?
A That would be my assumption that that was what came out of the

[13] There are objections to the questions eliciting this information on the grounds of leading on pages 100 and 129 of the transcript. I overruled the objection on page 100, but did not rule on the objection on page 129. Given my ruling on page 100 and the repetitiveness of the questions and answers, the lack of a ruling on the objection on page 129 is insignificant and does not require remedial action. Further, the objection on page 129 was stated after an answer had been given. Thus, the objection was untimely. To the extent the objection requires a ruling, the objection is overruled.

Complainant denies that the statement by Gooderham during the July 9 meeting referred to Complainant's meeting with Gooderham on July 3. (Tr. 49).

[14] However, Bray also referred to his employer as "Sanitation Solutions." (Tr. 157).

> conversation with Mr. Gooderham but – and that's what Mr. Gooderham had conveyed to me. But I don't have firsthand knowledge that Colin told me that.

(Tr. 151).

Bray has fired people before. Complainant did not react at the July 9 meeting as someone who has just been told he or she is terminated. He reacted "[p]retty numb. He did a lot more listening than talking." (Tr. 154, 172).

On July 2 or 3, Bray and Gooderham agreed to meet with Complainant on July 9. (Tr. 162). Bray was not involved in the email communications to terminate Complainant. (Tr. 164).

C. Certain Documentary Evidence

An email from Tedder to Eddie Hamner dated June 27, 2019, indicates that Tedder and Gooderham had decided to terminate Complainant by the time the email was sent. (JX 1). Gooderham and Hamner decided that Tedder and Gooderham would terminate Complainant on Monday, July 1, 2019. (*See* JX 2; JX 3; JX 4). On July 1, the plan changed. Gooderham stated in an email:

> I have a new plan for how to proceed. I'll wait for you both to get back in the office to explain. **We still will terminate in a few weeks, but we don't want to create a hole until we have an approved succession plan in place**. We will document with a formal write-up.

(JX 7 (emphasis added); *see* JX 8; JX 9). Tedder drafted a memo to provide to Complainant. After reviewing the draft memo, Hamner commented: "Good memo. I made a few tweaks, but the thoughts and concerns are clear as is the expectation for future performance." (JX 9). Tedder emailed the memo to Complainant on July 2, 2019, stating "[p]lease print and sign." (JX 11). Tedder documented additional, alleged performance concerns about Complainant in a second memo dated July 2. (*See* JX 12).

D. Witness Credibility and Analysis of the Evidence / Bases for Findings

Perhaps the greatest weakness in Respondent's case is the lack of any contemporaneous documentation of Complainant's alleged termination on July 3. Respondent took precautions against a wrongful discharge claim on July 1 and July 2 by preparing memoranda regarding Complainant's alleged poor performance. Emails among Respondent's managers document that it had a plan to terminate Complainant on July 1. Additional emails show that the plan changed; Respondent would terminate Complainant in a few weeks in order to find a replacement and give Complainant the memo. By comparison, there is not one email or other documentation on or before July 3 that Respondent would terminate Complainant on July 3. There is not one email or other documentation from prior to Complainant filing his claim that Respondent terminated his employment on July 3. However, Gooderham's explanation above for why there is no

documentation is not so flimsy that it should be dismissed out of hand. And, if I credit Gooderham's testimony on such point, the lack of documentation becomes inconsequential.

Gooderham testified that on July 2, he discussed terminating Complainant with Bray. But, Bray did not testify that Gooderham told him on July 2 that he was going to terminate Complainant on July 3. There is no clear testimony that Gooderham told anyone before he met with Complainant on July 3 that he was going to terminate him that date. Nonetheless, based on his conversation with Gooderham on July 3, Bray assumed that Gooderham had informed Complainant that he was being terminated; Gooderham conveyed to Bray that Complainant "was no longer working there."

It is difficult to reconcile the reason given for deciding to terminate Complainant on July 3 with the earlier communications about planning to terminate Complainant on July 1, and then the plan to terminate Complainant a few weeks later. I understand Gooderham's reasoning for allegedly terminating Complainant on July 3 as follows:

> Based on [Complainant's] reaction, failure to own and take accountability, it was determined that we weren't going to get the outcome of correcting the behavior. And so we determined that at that point we needed to part ways.

(Tr. 126). But, Gooderham testified that the reason for giving Complainant the performance memoranda on July 2 was to "document the[] performance and integrity concerns." (Tr. 125-126). There is no evidence that Respondent had decided to give Complainant an opportunity to correct his alleged performance issues after receiving the memoranda such that he could keep his job. This discrepancy weighs in favor of a finding that Employer's reason for terminating Complainant on July 3 instead of the following week is pretextual.

I conclude from the discrepancies that giving Complainant an opportunity to correct his behavior was not a reason why Respondent provided Complainant with the memoranda on July 2. And, Gooderham did not decide to terminate Complainant on July 3 because he realized Complainant was not going to change his behavior. I believe it is more likely that Respondent provided Complainant with the memoranda on July 2 because it wanted to protect itself from the termination decision it had already made, but not communicated to Complainant. I further believe that when Complainant responded poorly to the memoranda, Gooderham saw his opportunity to terminate Complainant sooner than later.

By comparison, the greatest weakness in Complainant's case is his audio recording of his meeting with Bray and Gooderham on July 9. I reviewed the audio recording of the meeting, JX 17, and the transcript of the recording, JX 18. I will not summarize the recording here. But, it is sufficient to say that the initial exchange during the meeting among Bray, Gooderham, and Complainant is entirely consistent with Complainant having been previously advised of his termination on July 3. The initial exchange is inconsistent with someone who was being told for the first time that he or she was being terminated. No one comes right out and tells Complainant that he is fired in the initial exchange or later during the meeting. No one discusses the performance issues documented in the previous memoranda. The meeting begins and continues as if Complainant had previously been informed he was being terminated.

And, Complainant's initial response is also consistent with someone who was previously informed of his termination:

> So for -- for the time being, I mean, you want me to cover the paperwork and stuff, and then -- I mean, give me a rough timeframe.

(JX 18 at 4). Both Bray and Gooderham testified that Complainant did not act like someone who had just been fired during the July 9 meeting and I credit such testimony. Complainant's response to the entire conversation is one of acquiescence, which I believe is consistent with Complainant previously knowing that he was terminated. At the July 9 meeting, everyone seemed to be trying to make the best of a bad situation.

At the beginning of Gooderham's opening remarks, he states "Yeah. And, again, you know, we talked about this last week." Complainant argues that this is a reference to a discussion between Gooderham and Bray, not Gooderham and Complainant. However, listening to the recording and viewing this statement in the context of what is said before and after the statement, I find that the statement refers to Gooderham's conversation with Complainant on July 3. This reference by Gooderham to his July 3 conversation with Complainant further supports my interpretation of the recording.

Further, Complainant's explanation for surreptitiously recording the meeting is a little too vague or uncandid: "I had a[n] eerie feeling going into it, it was something out of the ordinary," (Tr. 20, 43); "I just didn't feel like that it made a difference whether they knew or not. . . . I just was recording it so I would have it for myself," (Tr. 43-44). It is more reasonable that Complainant was surreptitiously recording this meeting because he had previously been informed that he was being terminated and he was concerned about receiving the second half of a rather substantial bonus.

Complainant argues that the recording does not support Respondent's allegation that it terminated him on July 3. In support of this argument, he points to Gooderham's purported inability to explain why Bray was the first speaker at the July 9 meeting; Gooderham's "ignorance and confusion" in explaining why Bray allegedly said it was Respondent's decision to terminate Complainant; and the conversation being the antithesis of a conversation held with a combative, insubordinate employee. (Compl's Br. at 6-7). None of these arguments are persuasive. Whether Bray spoke before Gooderham at the July 9 meeting is of no import. Gooderham had reasonable responses to Complainant's counsel's questions regarding this issue as well as what Bray allegedly said about Respondent's decision. And, given Bray's good relationship with Complainant and Gooderham's higher position in the company than Tedder, I do not find anything unusual about the tone of the July 9 meeting.

Another weakness in Complainant's case is the equivocal nature of his responses to certain cross examination questions about his meeting with Gooderham on July 3, 2019, which are quoted above. Rather than providing an unqualifiedly negative response to the question—"Didn't he tell you that you were no longer going to be employed in the long term at Waste Connections?"—Complainant testified that "[i]t was not how it was worded." (Tr. 30-31). Also,

Complainant testified that he did not recall asking Gooderham on July 3 whether he would still receive his bonus, or being told he should start looking for another job. Such a question by Complainant and a statement by Gooderham would be entirely consistent with Gooderham advising Complainant that he was being terminated, yet Complainant could not deny that either the question or statement were made.

The close temporal proximity between Complainant's Facebook message to Ms. Reese at 10:59 a.m. on July 3, about starting to look for a new job, and Complainant's meeting with Gooderham that morning weighs in favor of Respondent's case. I believe that taking steps to secure a new job immediately after being terminated could reasonably be expected.

Although I appreciate Respondent's theory that Complainant went out for lunch on July 3 and charged his lunch to Respondent because he had just been terminated, I give this theory no weight. It is too speculative.

Complainant's July 4 question to Bray about whether he should attend the managers meeting on July 5 weighs in favor of Respondent's case, unless I credit Complainant's explanation that he asked the question because he had been demoted the week before.

Weighing all of the evidence together, I give controlling weight to the audio recording. Based solely on the recording, I believe that Complainant was advised he was being terminated before July 9. The lack of documentation of Complainant's termination on July 3, and the discrepancy between Gooderham's explanation for terminating Complainant on July 3 and earlier communications regarding plans to terminate Complainant do not outweigh or change my interpretation of the recording. Having compared these pieces of evidence, the remaining evidence falls into place in favor of Respondent or at least do not weigh against Respondent.

I closely observed all the witnesses, including Complainant testify at the hearing. I was unable to discern any visible sign from any witness' body language or pattern of speech that any witness was lying. Accordingly, I judge the credibility of the witnesses based on my weighing of the other evidence.

I credit Gooderham's testimony that he advised Complainant on July 3 that Complainant was being terminated. I also credit his testimony regarding what transpired during the July 3 and 9 meetings. The discrepancy between Gooderham's explanation for terminating Complainant on July 3 and earlier communications regarding plans to terminate Complainant do not overcome the audio recording, Bray's testimony, Complainant's equivocal testimony about the July 3 meeting, and Complainant's text to Ms. Reese.

I do not credit Complainant's testimony that Gooderham did not advise him on July 3 that he was being terminated. The audio recording, Bray's testimony, Complainant's equivocal testimony about the July 3 meeting, and Complainant's text to Ms. Reese support this credibility determination. Such evidence also supports my ultimate finding that Respondent unambiguously communicated Complainant's termination to him on July 3, 2019. Moreover, since I have not credited Complainant's testimony on this point, his question to Bray on July 4 about whether he

should attend the managers meeting on July 5 also supports my finding that Gooderham communicated Complainant's termination to him on July 3.

I did consider the possibility that Gooderham believes that he clearly informed Complainant of his termination on July 3, but the message was so unclear that Complainant honestly did not understand what he was being told. I do not find this to be the case. The totality of the circumstances discussed above weigh in favor of finding that Complainant understood from Gooderham's communication on July 3, 2019 that he was being terminated.

E. Additional Findings and Conclusions

Based on all the evidence, I find or conclude the following:

1. There is no documentation that Respondent terminated Complainant on July 3, 2019, created before Complainant filed his claim on August 8, 2019. This was the result of an oversight by Adam Gooderham.

2. Gooderham, a vice president of a company related to Respondent, had the authority to terminate Complainant's employment.

3. Gooderham did not tell anyone before July 3, 2019, that he was going to terminate Complainant on July 3, 2019.

4. Gooderham met with Complainant on the morning of July 3, 2019, before lunch.

5. Complainant's testimony about his conversation with Gooderham on July 3, 2019, is equivocal.

6. There were discrepancies in the reasons given by Gooderham for deciding to terminate Complainant on July 3, 2019, instead of waiting a longer time. Such discrepancies undermine Gooderham's explanation for why he decided to terminate Complainant on July 3, 2019, instead of later. But, they have not caused me to otherwise discredit Gooderham's testimony.

7. Gooderham decided to terminate Complainant on July 3, 2019, because memoranda of Complainant's performance issue had been presented to Complainant; Complainant responded poorly to such memoranda; and Gooderham saw his opportunity to terminate Complainant sooner than later. Respondent never had any intention of giving Complainant an opportunity to improve his performance and retain his job after he was presented with the performance memoranda.

8. Based on his conversation with Gooderham on July 3, 2019, Josh Bray assumed that Gooderham had informed Complainant that he was being terminated; Gooderham conveyed to Bray that Complainant "was no longer working there."

9. Complainant sent Ms. Reese a Facebook message at 10:59 a.m. on July 3, 2019, about starting to look for a new job.

10. On July 4, 2019, Complainant asked Bray whether he should attend the managers meeting on July 5. Complainant most likely asked this question because Gooderham had informed him on July 3, 2019, that he was being terminated.

11. Complainant met with Gooderham and Bray on July 9, 2019, and surreptitiously recorded the meeting. The recording of the meeting is in evidence as JX 17. It is a true and accurate audio recording of the meeting.

12. The recording of Gooderham, Bray, and Complainant's meeting on July 9, 2019, is consistent with Gooderham having previously informed Complainant on July 3, 2019, that Complainant was being terminated. And, Complainant did not act like someone who had just been informed that he was being terminated at the July 9 meeting.

13. Gooderham's statement on the recording of the July 9, 2019 meeting, "Yeah. And, again, you know, we talked about this last week," refers to his meeting with Complainant on July 3, 2019.

14. Complainant's explanation for surreptitiously recording the July 9, 2019 meeting is vague or uncandid. He most likely recorded the meeting because he had been told he was being terminated and he was concerned about receiving the second half of his bonus, which was a substantial amount of money.

15. Bray's testimony is credible.

16. Gooderham's testimony that he advised Complainant on July 3, 2019, that Complainant was being terminated is credible. I generally credit the remainder of Gooderham's testimony regarding what happened during his July 3 meeting with Complainant and regarding his July 9, 2019 meeting with Complainant and Bray.

17. Complainant's testimony that Gooderham did not advise him on July 3 that he was being terminated is not credible. Further, Complainant's testimony is not credible to the extent it contradicts or is inconsistent with my findings.

18. Gooderham advised Complainant on July 3, 2019, that he was being terminated. Such communication was clear and unambiguous.

19. Complainant failed to file his claim with OSHA within 30 days after July 3, 2019. His claim is untimely.

20. There are no reasons warranted by applicable law to toll the 30-day limitations periods in this case.

21. Complainant's claim is barred by the limitations periods in 42 U.S.C. §§ 9610(b) and 6971(b), and 29 C.F.R. § 24.103(d)(1).

Also, provided below are findings regarding Respondent's spoliation of evidence allegation and request for an adverse inference.

F. Spoliation

Respondent claims that Complainant intentionally refused to preserve relevant evidence, specifically texts between July 3 and July 10, which likely were sent to his father. (Resp. Reply at 7-9). Respondent requests that because of such failure I sanction Complainant by inferring that the texts would have evinced Complainant's termination on July 3, 2019.

29 C.F.R. Parts 18 and 24 set forth the procedures governing this proceeding.[15] Part 18 contains the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges. The rules in Part 18 apply to the extent they are not inconsistent with a governing statute, regulation, or executive order.[16]

29 C.F.R. 18.57(e) provides:

> Absent exceptional circumstances, a judge may not impose sanctions under these rules on a party for failing to provide electronically stored information [(ESI)] lost as a result of the routine, good-faith operation of an electronic information system.

The remainder of Section 18.57 grants me the authority to impose sanctions for certain discovery abuses, including a failure to comply with a discover order. However, nothing in Section 18.57 expressly authorizes me to impose sanctions solely because a party destroys evidence intentionally or in bad faith. Rather, Section 18.57(e) arguably limits my authority to impose sanctions in certain situations. For example, if a party fails to comply with a discovery order because the subject of that order has been lost by routine, good-faith operation of an electronic information system and no exceptional circumstances exist meriting a sanction, Section 18.57(e) prohibits me from imposing a sanction.

Section 18.57(e) is modeled on prior Federal Rule of Civil Procedure 37(e), which was adopted in 2006.[17] Present Rule 37(e) provides:

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[15] 29 C.F.R. § 24.100(b).
[16] 29 C.F.R. § 18.10(a).
[17] *See* Excerpts from the Reports of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to 28 U.S.C. § 331 (Committee Note), p. 70, found at https://www.uscourts.gov/sites/default/files/civil_rules-114hdoc33_0.pdf; 575 U.S. 1055; Cong. Rec., vol. 161, pt. 5, p. 6139, Ex. Comm. 1373; H. Doc. 114-33; 80 Fed. Reg. 28770 (May 19, 2015). The 2006 version of Federal Rule of Civil Procedure 37(e) states:

> Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Committee Note, p. 70.

> FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.[18]

"The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by the[] rules [in Part 18], or a governing statute, regulation, or executive order."[19] The question is whether I may apply Rule 37(e) along with Section 18.57(e) or whether the existence of Section 18.57(e) prevents me from applying Rule 37(e). Section 18.57(e) does not expressly provide for or prohibit a sanction against a party who loses ESI through an act carried out with the intent to deprive another party of the information's use in the litigation. Stated another way, nothing in Section 18.57(e) prevents me from applying Rule 37(e)(2), if I find that Complainant destroyed or otherwise lost his texts from July 3 to 10, 2019, with the intent to deprive Respondent of their use in the litigation. And, no other section of Part 18 or any governing statute, regulation, or executive order provide for or control the situation where a party in this type of proceeding destroys or otherwise loses ESI with the intent of depriving another party of the use of such ESI in the litigation. Hence, 29 C.F.R. § 18.10(a) expressly authorizes me to apply Rule 37(e)(2) in this type of proceeding, if the situation merits.[20]

Moreover, an administrative law judge's authority to apply Rule 37(e)(2) is consistent with the Department of Labor's position regarding its judges' authority under the APA. The Department has taken the position in the commentary to 29 C.F.R. Part 18 that "the APA's grant of authority to 'regulate the course of the hearing,' 5 U.S.C. 556(c)(5), provides a judge with an independent basis to take such actions as are necessary to ensure parties a fair and impartial adjudication. Such authority includes the power to compel discovery and impose sanctions for

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[18] Section 18.57 was published on May 19, 2015, and became effective June 18, 2015. 80 Fed. Reg. 28768 (May 19, 2015). The Supreme Court transmitted amended Rule 37(e) to Congress on April 29, 2015. The amended Rule 37(e) became effective December 1, 2015, and is presently in effect. The Committee on the Judiciary House of Representatives, 116th Cong., 2d Session, Fed. R. Civ. P., Historical Note, XIII (Dec. 1, 2020), found at https://www.uscourts.gov/sites/default/files/federal_rules_of_civil_procedure_-_december_2020_0.pdf. Although the Department could have been aware of the amendment to Rule 37(e) before Section 18.57 was published and became effective, there is no indication in the commentary to Part 18 that this was the case. There certainly was no preference expressed in the commentary for adopting the 2006 version of Rule 37(e) over the present Rule 37(e). 80 Fed. Reg. 28767-28802 (May 19, 2015); 77 Fed. Reg. 72141-72193 (Dec. 4, 2012).

[19] 29 C.F.R. § 18.10(a).

[20] My analysis of the applicability of Rule 37(e) applies only to Rule 37(e)(2). Respondent has asked for an adverse inference against Complainant and no lesser remedy or sanction.

non-compliance pursuant to the OALJ rules of practice and procedure."[21] The Department has stated:

> [T]he APA empowers ALJs, '[s]ubject to published rules of the agency and within its powers . . . to regulate the course of a hearing.' 5 U.S.C. 556(a)(3), (c)(5). That authority is statutorily explicit. The appellate courts moreover have upheld orders that impose litigation sanctions on parties who violate an administrative agency's procedural rules. . . . As the court of appeals in *Atlantic Richfield Co.* [*v. U.S. Dep't of Energy*, 769 F.2d 771, 793 (D.C. Cir. 1984)] stated,
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> > It seems to us incongruous to grant an agency authority to adjudicate—which involves vitally the power to find the material facts—and yet deny authority to assure the soundness of the fact finding process. Without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and often times has every incentive to refuse to comply.
>
> 769 F.2d at 796. . . . It would be incongruous to deprive an ALJ of any procedural tools that assure the integrity and soundness of the adjudicative process. The tools include the authority to impose litigation sanctions that do not conflict with the substantive statute applicable to the proceeding for procedural violations that frustrate efficient administrative adjudication.[22]

Thus, if I find that the application of Rule 37(e)(2) is appropriate in this case, my application of the Rule would be consistent with the Department's view of my authority under the APA.

Complainant testified that he provided the phone he had in July 2019 to the forensics examiner. (Tr. 61). Complainant testified that he texts his father daily or every other day. (Tr. 62). In response to a question about what happened to the texts between Complainant and his father between July 2 and 9, 2019, Complainant responded: "To my knowledge, the settings of the standard iPhone that both me and my father have deletes text messages after a year. And that was unbeknownst to me, and it's just a standard setting in the phone, my understanding." (Tr. 62). Complainant testified that he has never attempted to save text messages. (Tr. 63). However, he also did not delete text messages from his IPhone for the relevant period. If he did change the settings on his IPhone, it was a long time ago to save storage space. (Tr. 190).

Respondent retained **Andy Antunez** to undertake a forensic analysis of Complainant's IPhone. (Tr. 176-177). Antunez described his qualifications during the December 2, 2020 on-the-record prehearing telephone conference. Based on such background information, I find that Antunez is qualified to provide expert testimony in this proceeding regarding his forensic examination of Complainant's IPhone and the conclusions he reached.

[21] 80 Fed. Reg. 28770 (May 19, 2015) (citing *Williams v. Consolidation Coal Co.*, BRB No. 04-0756 BLA, 2005 WL 6748152, *8 (BRB Aug. 8, 2005), *appeal denied*, 453 F.3d 609 (4th Cir. 2006), *cert. denied*, 549 U.S. 1278 (2007)).
[22] 80 Fed. Reg. 28771 (May 19, 2015).

In RX 3, Antunez identified 9 chats and describes what he found:

> So what we're looking at here is, I applied a date filter to the contents, and what we're looking at here are messages or fragments of messages that existed between July 3rd and July 10th of 2019. And what we're seeing here and why I have in that e-mail highlighted the source, which shows recent, what this shows is that there are those -- let me see, 1 through 7 are fragments of messages that existed on the phone at some point in time. What happens to messages are, when they are received and they get cached on the phone -- cached is like it makes a shadow copy of the message. Well, this database, the column that says source, if it was a fully intact message, it would say SMS.DB or MMS.DB or the database that holds that type of message.
>
> In this case, the source is referencing RECENT.DB, which means that the message itself doesn't exist on the phone, but it did exist on the phone at some point. And this is the only remaining fragment that we have of messages that were received on July 4th, it looks like July 6th, and July 10th.

(Tr. 180-181; *see* RX 3). Based on this information, Antunez concluded that either the texts were intentionally deleted or they were deleted as part of an automated system within the IPhone. (Tr. 181). Antunez testified that the texts were SMS, MMS, or IMESSAGES. (Tr. 186). Antunez testified that on February 4, 2021, the date he preserved Complainant's phone, it was set to one year, which means that texts older than one year would roll off and be deleted. The default setting is for "forever." The two alternative settings are 30 days and one year. Antunez opined that the setting had been changed from forever to one year. Once the setting is changed to one year, texts older than a year are immediately deleted. (Tr. 181-185).

I credit Antunez's conclusion that either the texts on Complainant's IPhone from July 3 through July 10 were intentionally deleted or they were deleted as part of an automated system within the IPhone. Although I have discredited Claimant's testimony about when Respondent initially communicated its termination decision to him, I see no reason to discredit his testimony about the texts on his IPhone. I find that Complainant failed to take any affirmative steps to preserve such texts. But, the evidence does not show that Complainant deleted the texts as opposed to them being automatically deleted. The evidence does not show that Complainant changed the setting on his IPhone for the purpose of automatically deleting the texts or that he personally changed the setting on his IPhone at all.

Complainant should have known that he had a duty to preserve the texts from at least the moment he filed his claim with OSHA. However, the evidence does not show that Complainant was actually aware that he had texts on his cell phone that should have been preserved and he failed to take any action to preserve them with the intent of depriving Respondent of their use in the litigation. I will not make a finding in this case of intent to lose or destroy evidence with the purpose of depriving another party of its use based on the constructive knowledge of a duty to preserve. Had Respondent sent a preservation letter to Complainant's counsel within the year before July 3, 2020, asking Complainant to preserve all of his electronic communications on his IPhone from July 2, 2019, my findings may have been different. Based on all the evidence, I find

that Complainant did not destroy or otherwise lose the texts with the intent to deprive Respondent of the use of the texts in this litigation. Thus, a sanction under Rule 37(e)(2) is not warranted.

III. Order

Based on the foregoing, it is ORDERED that Complainant Spencer Colin's claim is DENIED.

SO ORDERED.

Jason A. Golden
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 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.

IMPORTANT NOTICE ABOUT FILING APPEALS:
The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV.

Filing Your Appeal Online

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/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account 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 with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

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Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

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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 EFS account, and then following the written directions and/or via the video tutorial located at:

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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 e-filers 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.