In the Matter of:

JOEL BROOK KING, **ARB CASE NO. 05-149**

COMPLAINANT, **ALJ CASE NO. 2005-CAA-005**

v. **DATE: July 22, 2008**

BP PRODUCTS NORTH AMERICA, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Thomas B. Luck, Esq., Nashville, Tennessee

For the Respondent:
Debra L. Nahrstadt, Esq., *BP Products North America, Inc.*, Warrenville, Illinois

ORDER OF REMAND

This case arises under the Clean Air Act (CAA)[1] and its implementing regulations.[2] Joel Brook King alleges that his former employer, BP Products North

[1] 42 U.S.C.A. § 7622 (West 2003).

[2] 29 C.F.R. Part 24 (2006). These regulations have been amended since King filed his complaint, but the amended regulations are not implicated in this case. 72 Fed. Reg. 44,956 (Aug. 10, 2007).

America, Inc. (BP), violated the CAA by disciplining him and terminating his employment. The Administrative Law Judge (ALJ) below granted BP's Motion for Summary Decision and dismissed King's complaint. For the reasons discussed below, we conclude that summary decision is not appropriate on the record before us.

BACKGROUND

BP hired King on October 25, 1999, to work at its Nashville, Tennessee terminal as a Terminal Technician, with some driving responsibilities. His direct supervisor was Brenda Powell,[3] BP's Terminal Manager. As a Terminal Technician, King had a number of responsibilities related to equipment maintenance and storage tank management.

From the date BP hired him until July 15, 2003, King was subject to a progressive discipline policy described in BP's "Positive Workplace Relationships" guidebook.[4] Through this policy, specific discipline was determined by the severity of the offense as well as previous discipline. Pursuant to this process, an employee may receive a Verbal Agreement, Written Agreement, Decision Making Leave (DML), or discharge from employment.[5]

A Verbal Agreement consists of a formal discussion with the employee and remains active for one year after the date of discussion. A Written Agreement is initiated when the employee either fails to improve his performance during an active Verbal Agreement, or when the employee's behavior justifies a Written Agreement as the first step in the absence of prior disciplinary action. Written Agreements remain active for eighteen months. A DML is initiated when the employee fails to improve his performance during an active Written Agreement, but it can be initiated when an employee's performance justifies DML as the first step in the absence of prior disciplinary action. A DML also remains active for eighteen months. A serious

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[3] Throughout the record, Brenda Powell is also referred to as "Brenda Powell-Hill" and "Brenda Hill." We will refer to her, as BP does in its Memorandum of Law in Support of Its Motion for Summary Decision, as "Powell." *See, e.g.*, Affidavit of Brenda Powell (Powell Aff.)."

[4] Powell Aff., Exhibit (Ex.) A. On July 15, 2003, BP replaced the "Positive Workplace Relationships" program with one entitled "Workplace Performance Development." Powell Aff., Ex B. Although the newer program became effective prior to King's discharge, the differences between the two programs are irrelevant to this decision.

[5] Powell Aff., Ex. A. In their briefs and supporting documents, both parties use the term "verbal warning" in lieu of "Verbal Agreement," and the term "written warning" in lieu of "Written Agreement." We conclude, for purposes of this decision, that there is no dispute regarding these terms.

infraction related to performance, attendance, or conduct during the active period of a DML can result in the employee's immediate discharge. [6]

On June 6, 2002, BP received 30,000 barrels of regular grade gasoline when it was expecting 17,500 barrels. This almost resulted in a spill. As a result of this incident, BP required King to attend a meeting with Powell, William Moorman (another Terminal Technician), and Chris Maudlin (one of BP's Distribution Center Managers), to discuss the incident.[7]

King and Moorman were taking receipt of two different grades of gasoline on November 14, 2002. They failed to close a tank valve, which caused regular grade gasoline to mix with ultimate grade gasoline. BP states that it gave King a "written warning" and demoted him to the position of transport driver for his role in the incident.[8]

On or about May 2, 2003, a BP Retail Manager reported that King was unloading gasoline at a station when he left the area of his tanker truck to read a book and smoke a cigarette. BP states that King violated BP's safe work practices because he should not have left the unloading area unattended while a hose was connected to a receiving tank. As a result, BP placed King on DML.[9]

King exited a station on April 3, 2004, and struck the concrete base of a lamppost. BP conducted an investigation and concluded that King could have prevented the accident had he correctly exited the station.[10] Based upon the investigation and King's Decision Making Leave status, BP discharged King.[11]

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[6] Powell Aff., Ex. A at 153-55.

[7] Memorandum in Response to the Motion for Summary Decision (Response) at 2. BP does not indicate the exact date, but it appears to have taken place in June 2002. *See, e.g.*, Deposition of Joel Brook King (King Dep.) at 45.

[8] Response at 3.

[9] Powell Aff., Ex. E ("You work with hazardous materials….You have failed to perform your duties in a safe manner….This decision making leave administered on May 9, 2003 should serve as a warning that if corrective action is not taken immediately, you will be subject to disciplinary action up to and including termination.").

[10] Deposition of Brenda Powell-Hill (Powell Dep.), Ex. 2 at 0124; Affidavit of James LaBrie (LaBrie Aff.), ¶5, Ex. C.

[11] LaBrie Aff., Ex. C ("As a result of the findings in the Root Cause Analysis and based on your current DML discipline status, your employment with BP is terminated effective April 16, 2004.").

King filed his CAA complaint with the Occupational Safety and Health Administration (OSHA) on May 4, 2004. King alleged that BP subjected him to "harassment" and "probation," and discharged him after he "reported two [Environmental Protection Agency] violations which the management of BP had covered up…."[12] OSHA investigated the complaint and found that BP did not violate the CAA. King thereafter requested a hearing before the ALJ.

BP filed a Motion for Summary Decision (Motion), and a Memorandum of Law in Support of Its Motion for Summary Decision (Memorandum). BP argues that King's claims of retaliation regarding the May 2003 DML and any discipline prior to the DML are not actionable because they were not timely filed. BP also contends that there is no causal connection between King's discharge and his protected activity.[13] King submitted a Memorandum in Response to the Motion for Summary Decision (Response), in which he states that "all of [his] whistleblower claims against BP are timely," and that the discipline he received was in retaliation for CAA-protected activity.[14] In support of his Response, King submitted his own Affidavit and Deposition and the Depositions of Powell and Moorman.

The ALJ issued a Recommended Decision and Order (R. D. & O.) on August 15, 2005, in which he concluded that the only adverse action falling within the thirty-day CAA filing period was King's discharge.[15] The ALJ also concluded that King "introduced no evidence to create an issue of material fact that the reasons offered by [BP] for his discharge were not the true reasons."[16] King appealed.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's recommended decision.[17] We review an ALJ's recommended grant of summary decision de novo.[18] Pursuant to 29

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12 Complaint at 1. King does not describe the violations in his complaint.

13 Memorandum at 13.

14 Response at 9, 12 (emphasis omitted).

15 R. D. & O. at 4.

16 *Id.* at 6.

17 *See* 29 C.F.R. § 24.8 (2006); Sec'y Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.1(a), including the CAA's whistleblower protection provisions).

C.F.R. § 18.40(d), the ALJ may issue summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law.[19] Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.[20] At this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific facts on each issue, upon which he would bear the ultimate burden of proof.[21]

If the non-moving party fails to establish an element essential to his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."[22] Accordingly, the Board will affirm an ALJ's recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law.[23]

DISCUSSION

1. The Legal Standard

The CAA prohibits employers from retaliating against employees who engage in certain protected activities.[24] To prevail under the CAA, a complainant must prove by a

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[18] *Seetharaman v. Gen. Elec. Co.,* ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004); *Demski v. Ind. Mich. Power Co.*, ARB No. 02-084, ALJ No. 2001-ERA-036, slip op. at 3 (ARB Apr. 9, 2004).

[19] *Seetharaman,* slip op. at 4, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

[20] *Seetharaman,* slip op. at 4.

[21] *Id.,* citing *Anderson,* 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e).

[22] *Seetharaman,* slip op. at 4, quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

[23] *Seetharaman,* slip op. at 4; *Demski,* slip op. at 3. *See also Hasan v. Southern Co., Inc.,* ARB No. 04-040, ALJ No. 2003-ERA-032, slip op. at 3-4 (ARB Mar. 29, 2005).

[24] 42 U.S.C.A. § 7622(a) ("No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or

preponderance of the evidence that he engaged in protected activity, that the respondent was aware of the protected activity, that he suffered adverse employment action, and that the protected activity was a motivating factor in the adverse action, i.e., that a nexus existed between the protected activity and the adverse action.[25]

The issue we address in this decision is not whether King has proven that he should prevail on his complaint, but instead whether BP is entitled to summary decision as a matter of law. As stated above, a party moving for summary decision bears the burden of showing, through pleadings, affidavits, and other evidence, that there is no genuine issue as to any material fact and that it is entitled to prevail as a matter of law.

BP argues that the only timely adverse action King alleged is his discharge and that its discipline of King was consistent with its disciplinary policies.[26] We will therefore address these arguments to determine whether there is no genuine issue as to any material fact and BP is entitled to summary decision as a matter of law.

2. The Record Demonstrates that the Only Timely Adverse Action King Alleged Is His Discharge

BP argues that the only actionable adverse action King alleged is his discharge. We agree. To be actionable, an adverse action must have occurred within 30 days of the date a CAA complainant filed the complaint.[27] King filed his complaint on May 4, 2004, alleging that BP subjected him to harassment, probation, and discharge. His Response to the Motion refers to his discharge as well as specific actions BP took pursuant to its progressive discipline policy. The record demonstrates that King's discharge on April 16, 2004, is the only adverse action that occurred within 30 days of the filing of his complaint.[28] We therefore conclude that King's discharge is the only actionable adverse action.

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privileges of employment because the employee (or any person acting pursuant to a request of the employee) (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan, (2) testified or is about to testify in any such proceeding, or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.").

[25] *Seetharaman*, slip op. at 5.

[26] Memorandum at 13, 17, 19.

[27] 42 U.S.C.A. § 7622(b)(1).

[28] King does not provide the exact date for his discharge, but BP indicates that it terminated his employment on April 16, 2004. LaBrie Aff., Ex. C.

3. A Genuine Issue of Material Fact Exists as to Whether BP's Discipline of King Was Consistent With Its Disciplinary Policies

As noted, BP terminated King because he was involved in a preventable accident while on DML. BP states on the first page of its Memorandum that its "discipline of Mr. King was consistent with its disciplinary policies and its treatment of other employees." But King argues that BP's actions were not consistent with its disciplinary policy. In his Response, King states that he was subjected to disparate treatment "up to and through his termination," and that BP's stated reason for terminating his employment is a pretext. [29] King indicates that, because he did not receive a verbal warning, he should not have been placed on DML, and therefore he should not have been fired for committing an offense while on DML.[30]

The ALJ concluded that BP was entitled to summary decision because King did not establish a genuine issue of fact that BP's reason for firing him was a pretext.[31] In support of this conclusion, the ALJ found that BP gave King a verbal warning.[32] But the record before us contains evidence that King did not receive a verbal warning.

BP states that, on June 6, 2002, it was receiving regular grade gasoline when King failed to verify the amount of gasoline it was receiving. The parties agree that, as a result of this incident, BP required King, Moorman, and Powell to attend a safety procedures meeting. The meeting was conducted by Maudlin, who at the time was Powell's supervisor. King, Moorman, and Powell indicate that they did not consider the meeting itself to constitute disciplinary action.[33]

In Paragraph 7 of his affidavit, Maudlin describes the meeting by stating that he "reviewed the pipeline receipt process with the Terminal Technicians, Mr. King and Mr. Moorman, and with the Terminal Manager, Ms. Powell." In the next paragraph, he describes his conversation with King about the June 6 incident:

> I also spoke to Mr. King about the matter. Through the training I made sure he was clear on the proper procedure for receipt of product and I told him that following BP's

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29 Response at 7, 12.

30 *See, e.g.*, King Dep. at 117.

31 R. D. & O. at 6-7.

32 *Id.* at 5.

33 Powell Dep. at 23; Deposition of William Eugene Moorman at 25; Affidavit of Joel Brook King (King Aff.), ¶ 12.

> procedures for product receipt was a condition of employment. I stressed that if he failed to follow the procedure in the future it would result in further disciplinary action, up to and including termination from employment. I considered this to be a verbal warning.[34]

If Maudlin's words are read as describing a separate, informal meeting with King, they would not constitute a verbal warning because BP's progressive discipline policy describes a Verbal Agreement as a "formal discussion with the employee."[35]

On the other hand, if Maudlin's words are read as describing a separate formal meeting with King, such testimony is contradicted by King, who states that "there was only one meeting" and "at no time during the meeting did Mr. Maudlin indicate that the meeting constituted a verbal warning."[36] And if Maudlin is describing the meeting itself as a verbal warning, such a description is contradicted by the testimony of King, Powell, and Moorman, all of whom indicated that they did not think the meeting was a disciplinary action.

BP has not presented any documentation of a verbal warning issued to King.[37] BP states that, under the company policies in place at the time, it was not required to document verbal warnings. But the "Positive Workplace Relationships" materials BP submitted include a sample "Memo Confirming Verbal Agreement." The sample includes a space for providing the date of the warning, and it states that "[t]his Verbal Agreement initiates formal corrective action for the performance deficiencies we discussed."[38] And Powell, who was King's supervisor, testified that she made a habit of documenting verbal warnings.[39]

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34 Affidavit of Chris Maudlin (Maudlin Aff.), ¶ 8.

35 Powell Aff., Ex. A at 0153.

36 Response at 2; King Aff., ¶¶ 10-12.

37 BP argues that King acknowledged in a November 2002 e-mail to Larry Bucher that he had received a verbal warning. Affidavit of Larry Bucher, Ex. A. But King testified that he used the term "verbal warning" in the e-mail message because that was the term Maudlin used. King Dep. at 51. Because we view the evidence in the light most favorable to the non-movant, we will assume, for purposes of summary decision, that King did not intend to acknowledge that he had received a verbal warning.

38 Powell Aff., Ex. A at 0170.

39 Powell Dep. at 23.

We have held that "[a]n employer's failure to follow its normal procedures can, in an appropriate case, suggest deliberate retaliation."[40] Viewing the evidence in the light most favorable to King, as we must on summary decision, we find that an issue of fact exists as to whether King received a verbal warning. Therefore, an issue of fact exists as to whether BP followed its disciplinary procedures, and thus whether its reason for terminating King is a pretext. We therefore conclude that BP has failed to establish that it is entitled to summary decision as a matter of law.[41]

CONCLUSION

Adverse actions BP took more than thirty days before King filed his complaint are not actionable. But there is a genuine issue of fact regarding the discipline that led to King's discharge. For this reason, summary decision is not appropriate. We therefore **REVERSE** the ALJ's ruling, **DENY** BP's Motion for Summary Decision, and **REMAND** the case to the ALJ for further proceedings in accordance with this decision.

In remanding the case for hearing, we emphasize that we have reached no conclusion regarding the merits of King's complaint.

SO ORDERED.

DAVID G. DYE
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

Wayne C. Beyer, Administrative Appeals Judge, dissents separately.

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[40] *Johnson v. Old Dominion Sec.*, 1986-CAA-003, slip op. at 11 (Sec'y May 21, 1991), citing *DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983).

[41] *See, e.g., Lamer v. Metaldyne Co. LLC*, 240 Fed. Appx. 22, 33 (6th Cir. 2007)(respondent not entitled to summary judgment because plaintiff presented evidence that the progressive-discipline policy asserted as a rationale for his discharge was not uniformly applied).

Wayne C. Beyer, Administrative Appeals Judge, dissenting:

I dissent. Neither of the parties' filings are crisp or well defined, but I exercise my authority to review this case de novo, and would grant summary judgment to BP on an insubstantial claim. Here is why.

This is a case that lends itself to the *McDonnell Douglas* regime. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). BP is an employer and King was an employee within the meaning of the Clean Air Act, 42 U.S.C.A. § 7622. Solely for the purpose of summary judgment, BP concedes that King made a protected complaint to the Environmental Protection Agency (EPA) in April 2003. After that, BP fired him in May 2004. That satisfied King's modest burden of making out a prima facie case that BP fired him because of his protected activity.

BP moved for summary judgment based on legitimate, non-discriminatory reasons for firing King

The burden shifted to BP to show that BP fired King for legitimate, non-discriminatory reasons. They did. I draw from the factual summary in BP's memorandum in support of its motion for summary judgment and its citations to the substantial pre-trial record in this case (hereafter BP's Memorandum). Although technically the only alleged adverse action that King filed a timely complaint about was his actual firing, his disciplinary history has some relevance.

King was a technician at BP's Nashville terminal. The terminal received gas, diesel, and kerosene via pipeline; stored those products in above-ground tanks; and delivered them to gas stations and commercial accounts via transport trucks or pipeline. BP's Memorandum and record citations at 4. Moreover, the terminal received gas products in three grades: regular, super, and ultimate. There were three manifold valves representing the three grades and three inlet valves connected to the storage tank. The technician (King) had to verify that the storage tank could hold the quantity of product being shipped, assure that all the valves from a previous receipt of product were closed, and then open the appropriate manifold and inlet valves to accept the product into the storage tank. *Id.* at 4-5.

On June 6, 2002, King failed to follow this pipeline receipt procedure. Expecting 17,500 barrels of regular gasoline, King failed to verify the amount, which was actually 30,000 barrels. Without the quick action of the other terminal technician, William Moorman, there could have been a spill. *Id.* at 4-5. After this incident, BP management held a meeting to review pipeline receipt procedures (the verbal warning). King; Moorman; their immediate supervisor, Terminal Manager Brenda Powell; and her boss, Chris Maudlin, were there. *Id.* at 5.

On November 14, 2002, King again failed to follow pipeline receipt procedures. Moorman had left the manifold and inlet valves open for prior receipt of ultimate grade gasoline, but before taking receipt of 10,000 barrels of regular grade gasoline, King failed to check, and regular gasoline flowed into the ultimate grade tank, downgrading the ultimate grade gasoline, and costing the company about $10,000. King got a written warning and a transfer to his prior job as a BP truck driver. *Id.* at 5-6.

In an e-mail to Larry Bucher, Area Operations Manager, King acknowledged that he had previously received a verbal warning for failing to follow pipeline procedures, and accepted fault for the November 14 contamination incident, but asserted that Moorman should have been disciplined as well. But BP's position was that King was the one who failed to follow procedures by not assuring that all the valves were closed before he accepted the regular grade gasoline. *Id.* at 7-8.

In May 2003, King was in his reassigned job driving a BP tanker truck. A retail district manager reported that, while King was unloading gasoline at the BP station, he left the area of the tanker truck to read a book and smoke a cigarette. Because he had recently received a written warning, the next step in BP's progressive discipline procedures was decision making leave (DML). King did not challenge the DML, and knew that further infractions of BP policies and procedures would lead to termination. *Id.* at 10.

During late 2003, BP found out that King was selling dog food on BP premises and on company time, and using his tanker truck to transport it. Powell, his supervisor, counseled King and outlined what was allowed in a letter. He did not receive any discipline at that time. *Id.* at 10-11.

While still on DML in April 2004, King was involved in a preventable accident in his tanker truck. The "root cause team" included the Cincinnati Fleet Manager and one of BP's transportation safety advisors. Their independent investigation concluded that the exit King usually took from the station was blocked, so he took a hard right out of the station, across two lanes of traffic, and stuck the cement base of a lamppost. They did not accept King's version of events that he was trying to avoid another car. *Id.* at 11-12.

BP distinguished King's discipline from that of two other BP employees who had preventable accidents at the Nashville terminal. An employee who was on a verbal warning received a written warning. Another employee who had no pending discipline was issued a DML because of the severity of the accident. Because King was on DML when he was involved in a preventable accident, BP fired him. *Id.* at 12.

King failed to show the existence of a genuine issue of material fact to defeat summary judgment

Under *McDonnell Douglas*, King must prove that the accident that BP says was preventable was not the real reason he was fired. He has to prove that the real reason BP fired him was for his complaint to the EPA in April 2003. Under summary judgment procedure, it is not up to King to prove anything. But he must demonstrate a "genuine" issue of "material" fact over why BP fired him. To be "material," the disputed facts must be facts which, under the substantive law governing the issue, might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To be "genuine", the facts must be such that if they were proven at trial, a reasonable jury (here the ALJ as fact finder) could return a verdict for the non-moving party. *Id.* The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968). If King fails to demonstrate a "genuine" issue of "material" fact over why BP fired him, BP is entitled to judgment as a matter of law.

I have considered both King's Memorandum in Response to the Motion for Summary Decision Propounded by the Respondent BP Products North America, Inc. (hereafter King's Response), which he filed before the ALJ, and his Brief in Support of Petition for Review (hereafter King's Brief), which he filed before the ARB, and of course King's references to the substantial pre-trial record. The task of a reviewing official is made difficult because King's filings apply boilerplate statements of the law to conclusory statements of the facts. They present a statement of King's litigation position, but, in my judgment, fail to isolate genuinely contested facts on which this case could turn. Since the Response and the Brief are much the same, I will direct my analysis to King's Brief.

In King's Brief, he starts with a statement of facts. He acknowledges that the June 2002 meeting (to review pipeline receipt procedures) took place, but says that Maudlin did not indicate that the meeting constituted a verbal warning. King's Brief at 2 and citations to the record. He says that he did not believe the meeting constituted a verbal warning. *Id.* However, as I later discuss, that is not to say the meeting did not meet any obligation BP had to begin with a verbal warning in its progressive discipline policy.

In his Brief, King's first argument is titled "BP's Misrepresentations to the Court." *Id.* at 5. King did not raise this issue below and we are not required to consider it. Nevertheless, King evidently takes issue with whether BP notified the EPA of an incident in March 2002 (trucks leaving the terminal without the proper fuel additive). *Id.* at 5-6. Whether BP did or did not is not an issue material to the

outcome of this case, so it is not one that would defeat BP's motion for summary judgment.

King's second legal argument in his Brief is "All of Mr. King's Claims of Retaliation are Timely." *Id.* at 6. I agree with BP, the ALJ and my two colleagues that the personnel actions King complains of are discrete acts, each of which requires a separate, timely complaint. King's complaint to OSHA was filed within thirty days of his firing and was therefore timely. Even if prior adverse actions were actionable, they are not in this case, because King's complaint with regard to them was not filed within thirty days. BP is entitled to judgment as a matter of law. Embedded in his timeliness argument is his claim that BP subjected him to on-going disparate treatment, because of his alleged protected environmental complaints. *Id.* at 6-7. BP's motion for summary judgment adequately explains why King's co-workers received different levels of discipline. King's filings fail to counter with specific facts. *See, e.g.,* Affidavit of Joel Brook King.

King's third legal argument in his Brief is "Mr. King has Established a Prima Facie Case that there is a Nexus between his Report of BP to the EPA and BP's Subsequent Decision to Take Adversarial [sic] Action Against Him and Eventually Terminate Him." *Id.* at 8. I have assumed for the purposes of analysis that King made out a prima facie case as *McDonnell Douglas* defines it, so that is not at issue. In BP's motion for summary judgment, it adduced evidence of legitimate, non-discriminatory reasons for disciplining King, and explained the reasons for different levels of discipline for several other employees. King's memorandum cites to boilerplate law, and makes purely conclusory arguments about BP's alleged failure to discipline other employees. His arguments are not evidence. To avoid summary judgment, King must adduce evidence from which a fact finder could reasonably conclude that BP fired him for his complaint to the EPA. This argument fails to meet that burden.

King's fourth legal argument in his Brief is "At the Very Least, BP had a Dual Motive for its Discipline of Mr. King." *Id.* at 11. Again, King's memorandum cites to boilerplate law, and makes purely conclusory arguments about the temporal proximity between King's alleged complaint to the EPA and BP's discipline against him. While discipline against King after he engaged in alleged protected activity might be enough to create an inference of causation and so establish a prima facie case, it is not enough to create a triable issue of fact after intervening events that provided reasons for BP to put King on DML and then fire him. In addition, until King proffered evidence that his alleged complaint to the EPA was a factor in the discipline against him, the burden would not shift to BP to demonstrate that they would have disciplined King even if he had not engaged in protected activity, so the dual motive analysis is inapposite. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)

King's Rebuttal Brief (Rebuttal Brief) to the ARB repeats previous arguments in an effort to create a factual dispute. He argues that only he and not BP reported to the EPA BP's initial failure to add fuel additive to a shipment of gasoline. Rebuttal Brief at 2. That is not material to whether BP fired him for engaging in protected activity. He says whether King can recover for allegedly discriminatory discipline that occurred before his termination is a disputed fact. *Id.* 3. That is a disputed issue of law, not fact, since the law does not permit him to recover for alleged acts of retaliation that occurred more than thirty days prior to his complaint.

King's rebuttal brief re-argues unsuccessful points. For instance, BP explained why King was disciplined for specific acts and other named employees were not or received different discipline under other circumstances. King says only, "The proximity in time between Mr. King engaging in protected activity and receiving discipline creates a genuine, disputed issue of material fact . . .. Mr. King was receiving discipline while his co-employees, who were involved in the same incidents, were not receiving discipline." *Id.* 4. These statements summarize King's legal position, but are not admissible evidence. They do not create a genuine issue of material fact that overcomes BP's submission on summary judgment.

King's rebuttal brief says that whether BP gave King a verbal warning in June 2002 is a disputed fact. *Id.* at 5. However, that is not a "genuine" issue of "material" fact.

After King failed to follow pipeline receipt procedures in June 2002, nearly causing a spill, there was a management meeting attended by King; Moorman; their immediate supervisor, Powell; and her boss, Maudlin. The purpose of the meeting was to review pipeline receipt procedures. Maudlin had the attendees sign a copy of new procedures, King Deposition at 36; Powell Deposition at 23, 51, and warned that failure to follow the procedures could lead to discipline, including termination. Maudlin Affidavit ¶¶ 7-8; Powell Deposition at 51. Maudlin and Moorman regarded this as a verbal warning. Maudlin Affidavit ¶ 9; Moorman Deposition at 25.

King earlier acknowledged that as a result of the pipeline incident, he received a verbal warning. Boucher Affidavit, Exhibit A (King e-mail to Boucher). He later agreed that the meeting took place as described above, but says that Maudlin did not indicate that the meeting was a verbal warning. King Affidavit ¶ 12. King considered it to be a retraining session and a review of procedures, not a verbal warning. King Deposition at 47; King Affidavit ¶ 14.

The fact that King or other attendees did not consider the meeting to be "discipline" is not dispositive. Verbal warnings are not discipline, but corrective actions that do not affect terms, conditions, or privileges of employment. *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip

op. at 6-7 (ARB Mar. 14, 2008) (warning letters that do not affect terms, conditions, and privileges of employment not unfavorable employment actions). At most, verbal warnings are pre-discipline. *Id.*

King does not create a "genuine" issue of fact. Whether Maudlin used the phrase "verbal warning" or King in retrospect thinks the meeting was not a "verbal warning" is beside the point. The June meeting was in substance a verbal warning required under BP's personnel procedures. Because no reasonable fact finder could conclude otherwise, I do not regard the dispute to be "genuine."

Nor is fact of the warning "material." King accepted responsibility for another pipeline procedure violation on November 14, 2002, for which he received a written warning and reassignment. King Deposition at 60. After that, BP put him on DML in May 2003, when a retail district manager reported that, while unloading gasoline, King left the area of the tanker truck to read a book and smoke a cigarette. King did not challenge the DML, and knew that further violations would lead to termination. King Deposition at 159. BP fired him for a preventable accident in April 2004. BP complied with its disciplinary procedures when it fired King for a preventable accident while he was on DML. But whether they did or not is not "material." The material issue is not whether BP complied with its disciplinary procedures, *see, e.g., Ashcraft v. Univ. of Cincinnati*, No. 1983-ERA-007, slip op. at 19 (Sec'y, Feb. 2, 1995), but whether BP fired him because of his alleged complaint to the EPA and not because he caused a preventable accident.

King's rebuttal brief claims there is a disputed fact regarding whether the investigation of the April 2004 preventable accident was "independent" because the investigators were BP employees. Rebuttal Brief at 6. That is not material. King offers no evidence that the "root cause team" was aware of his alleged protected activity, or that BP employees who were involved in King's discipline had any influence over the finding, which failed to accept his version of events. Although King makes the argument, he fails to offer "some significant probative evidence" that the preventable accident finding was a pretext for unlawful retaliation.

King's rebuttal brief also argues that there is a disputed fact over whether King violated BP policy in selling dog food. *Id.* at 7. Since King was warned, but not disciplined, the disputed fact, if any, is not material. Finally, King argues that he has proved a prima facie case (which I have assumed for the purpose of my analysis), and that he has shown that his protected activity was at least a factor in BP's disciplining him (dual motive). But again, these are conclusory statements, not admissible evidence that would create a genuine issue of material fact.

Because BP offered legitimate, non-discriminatory reasons for firing King, and King failed to offer evidence from which a reasonable fact finder could conclude that he had actually been fired for engaging in protected activity (making a complaint to the EPA in April 2003), I would affirm the ALJ and grant summary judgment (summary decision) to BP.

WAYNE C. BEYER
Administrative Appeals Judge