U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

JOHN W. MARTIN, **ARB CASE NO. 96-131**

COMPLAINANT, **ALJ CASE NO. 93-SDW-1**

v. **DATE: July 30, 1999**

THE DEPARTMENT OF ARMY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
H. Wesley Kirkland, Esq., *Kirkland, Dodson, Rush & Riddle, Columbia, South Carolina*

For the Respondent:
L. Patricia Smith, Esq., *Department of the Army, Ft. Jackson, South Carolina*

DECISION AND ORDER

This complaint of unlawful discrimination arises under the employee protection (whistleblower) provision of the Safe Drinking Water Act (SDWA), 42 U.S.C. §300j-9(i) (1994). In a previous decision the Secretary of Labor ruled that Complainant John W. ("Billy") Martin had been retaliated against by his employer, Respondent Department of the Army (the Army), for engaging in activity protected by the SDWA. The Secretary remanded the case to the ALJ for findings on whether Martin had been constructively discharged and on remedy. In a recommended decision on remand, a different ALJ found that Martin had been constructively discharged and awarded back pay, front pay, and attorneys fees. We conclude that Martin was not constructively discharged. Therefore, we also conclude that Martin is not entitled to back pay or front pay. We discuss other elements of relief below.

BACKGROUND

Martin was hired by the Army in 1987 to work as a Plumbing Worker, WG-7, at Fort Jackson, South Carolina. As part of his job, in February 1991 Martin was assigned to test and repair certain backflow preventers. During the period that he worked on backflow prevention, Martin had a series of disputes with his superior, Charles Pittman. In September 1991, he filed a complaint with the Army's Assistant Inspector General (IG) at Fort Jackson. In early 1992 Martin reported his concerns to a representative of the South Carolina Department of Health and Environmental Control (DHEC).

Martin was removed from the backflow prevention assignment in May 1992, and was assigned other plumbing duties. The Army asserted that Martin's supervisor had reassigned him because he had not followed instructions and had gone outside the chain of command. Martin filed a complaint of unlawful discrimination with the Labor Department against the Army, alleging that he had been reassigned from testing and repairing backflow preventers, that he had been given a lower than "exceptional" performance appraisal, and that he had been subjected to other adverse action because he had made environmental and public health complaints. After unsuccessful conciliation efforts and an investigation, the Assistant Secretary for Employment Standards found Martin's charges to be unsubstantiated. Martin requested a hearing before an ALJ, which was convened in March 1993.[1/] Throughout the complaint investigation and hearing phases, Martin continued to be employed by the Army as a Plumbing Worker.

In a decision issued on December 22, 1993, the ALJ recommended that the complaint be dismissed. *Martin v. The Dep't of the Army,* No. 93-SDW-1, 1993 WL 831973, at *17 (DOL O.A.L.J.) (*Martin I* R. D. & O.). The ALJ found that Martin had engaged in protected activity, and that the Army had taken adverse action against Martin for both legitimate and illegal reasons. The ALJ concluded that the Army avoided liability because it would have taken the same adverse action against Martin even if he had not engaged in protected activity.

On review, the Secretary of Labor disagreed with the ALJ's recommendation. While agreeing with the ALJ that Martin had engaged in protected activity and had suffered adverse employment action in part because of that activity, the Secretary found that the Army had failed to prove by a preponderance of the evidence that it would have taken adverse action against Martin *even if* he had *not* engaged in protected activity. *Martin v. The Dep't of the Army,* No. 93-SDW-1, 1995 WL 848062, at *2, *3 (DOL Off.Adm.App. Jul. 13, 1995) (*Martin I* D. & O.). Therefore the Secretary ruled against the Army on the issue of liability. The Secretary ordered the Army to upgrade Martin's performance appraisal and to compensate Martin for costs and expenses, including attorneys fees, reasonably incurred in bringing the complaint. The Secretary denied Martin's request for compensatory damages for stress, ruling that "the evidence is insufficient to sustain such an award." *Martin I* D. & O. at *4.

[1/] The hearing transcript from the first ALJ hearing (*Martin I*) is cited as T. I. The hearing transcript from the second ALJ hearing (*Martin II*) is cited as T. II.

Noting that Martin reportedly had resigned his employment in May 1994, the Secretary remanded the case for a determination whether Martin had been constructively discharged, and "to assess any costs, expenses, and back pay due Complainant." *Id*.

The Hearing on Remand.

At the hearing on remand a different ALJ presided. Martin testified that after the hearing in *Martin I*, he had been subjected to harassment by his co-workers. According to Martin, his supervisor, Charles Pittman, gave him "dirty looks" on a daily basis. Martin testified that he felt ostracized by his co-workers. He also testified that he had received repeated harassing telephone calls over a period of months, and that someone had intentionally punctured the gas line on his work truck. Several witnesses, including Pittman, disputed Martin's testimony regarding harassment by Pittman and Martin's co-workers.

Much of Martin's testimony was devoted to describing his increasing emotional difficulties, his resultant sick leave usage and hospitalizations, and ultimate resignation. Martin received mental health counseling and treatment for work-related stress and was hospitalized for depression in June 1993. T. II at 50; Complainant's Exhibit (CX) 40, 41, 42. From June 24 through June 28, 1993, Martin was hospitalized at the Richland Springs Psychiatric Hospital (Richland Springs) "with complaints of increasingly severe depression, unable to function at work, and having suicidal ideations." CX 42, p. 53. On April 28, 1994, Martin was admitted to Richland Springs again. He was diagnosed with major depression and placed on medication. That day, when Martin requested that he be advanced sick leave, so that he could be paid during his hospitalization, Pittman refused.[2/] Martin resigned his employment on May 5. He listed as his reason for resigning Pittman's continuing retaliation and harassment, occasioned in particular by the *Martin I* complaint. RX 35. Martin testified: "I was to the point to where I could not work anymore, or function at that time. I couldn't concentrate my thoughts or anything." T. II at 45.

From May 17 through May 31, 1994, Martin was hospitalized at Richland Springs where he was diagnosed with major depression. From January 1 until January 25, 1995, Martin again was hospitalized at Richland Springs.

The *Martin II* Recommended Decision.

[2/] Pittman had not denied Martin's requests to be absent from work for extended periods for treatment. However, because Martin had exhausted his sick and annual leave, Martin was not paid for the periods he was absent. The advance of sick leave which Martin requested would have allowed Martin to take leave with pay, but would have resulted in a negative sick leave balance.

Martin had been warned about his sick leave usage. Pittman issued Martin a sick leave warning for the period January 1992 through October 1992, which cited sick leave usage totaling 12 percent of available work hours. Respondent's Exhibit (RX) 27. Pittman issued Martin a sick leave warning for the period November 1992 through June 1993, which cited sick leave usage totaling 20 percent of available work hours. RX 41.

On remand, the second ALJ reopened the record and conducted additional hearings in November, 1995. The ALJ found – based on the Secretary's findings in *Martin I* and the 1995 ALJ hearing – that Martin had been constructively discharged when he resigned his employment. Recommended Decision and Order on Remand, issued May 24, 1996 (*Martin II* R. D. & O.). In particular, the ALJ found that Martin's working conditions at Fort Jackson were rendered so difficult, unpleasant, unattractive or unsafe that a reasonable person would have felt compelled to resign, and that Martin's resignation thus constituted constructive discharge. The ALJ based his finding on four incidents, three of which occurred prior to the 1993 *Martin I* hearing: 1) Pittman's actions in removing Martin from testing backflow preventers in 1992; 2) Martin's lower than "exceptional" rating on his performance appraisal in 1992; 3) Martin's being supervised actively by three managers in 1992; and 4) Martin's ostracism by co-workers after the filing of the *Martin I* complaint and the *Martin I* hearing. *Martin II* R. D. & O., slip op. at 10-12.

The ALJ rejected Martin's claims regarding other instances of harassment. With regard to Martin's claim that he had been subjected to harassing telephone calls the ALJ found:

> Despite the fact that Complainant and his wife were living together with their little girl, Ms. Martin did not even mention the calls, which supposedly occurred three to four times a night over a four-to-five month period, in her testimony and was not asked about them. Complainant acknowledges that he did not report the calls to the phone company, the police, or his supervisors. . . . In fact, no witness confirmed the phone calls at all. . . . This being the case, I find that the harassing phone call allegation is unproved.

Id. at 12. With respect to Martin's testimony that the gas line on his work truck had been intentionally punctured, the ALJ found:

> [The gas leak incident is] also suspicious even though the report of the incident is confirmed (but only via the hearsay testimony of Complainant's wife) . . . . Respondent has offered two affidavits demonstrating the absence of any record in the Ft. Jackson fire Department log books that correspond to the incident described by Mr. Martin, who identified the incident as occurring at night in the summer of 1993 . . . . Complainant testified that the Fire Department responded and that this would be reflected in the Department's log . . . . Hence, as with the phone calls, I find that Complainant has not shown that the truck gas-leak incident actually occurred.

Id. at 12-13.

The ALJ also found that Pittman's "admonition about the telephone disconnection . . . , and the failure to advance sick leave" could not be attributed to "harassment or discrimination . . . ." *Id.* at 11 n.2.

The ALJ also made another, more general, credibility determination regarding the two individuals principally involved in the actions underlying the case, Martin and his supervisor, Pittman:

> Because of 1) mutual hard feelings, 2) lack of corroboration of their testimony, and 3) a history of dubious statements by both (i.e., testimony by Martin about the gas leak and statements by Pittman to DHEC that all Ft. Jackson backflows had passed tests (1993 hearing, Tr. at 250)), I find that neither Mr. Pittman nor Mr. Martin is a very credible witness.

Id.

After concluding that Martin had been constructively discharged, the ALJ recommended that Martin be awarded back pay, front pay, and attorneys fees, but disallowed claims for medical and bankruptcy costs. *Id.* at 14-15. His decision is before this Board pursuant to 29 C.F.R. §24.6 (1997) and a delegation of authority for issuance of final agency decisions under the SDWA, among other laws. 61 Fed. Reg. 19978-19979 (May 3, 1996).

DISCUSSION

I. *Burden of Proof and Standard of Review*

The regulations governing adjudications by the Department of Labor's Office of Administrative Law Judges provide that, "[u]nless otherwise required by statute or regulations, hearings shall be conducted in conformance with the Administrative Procedure Act, 5 U.S.C. 554." 29 C.F.R. §18.26. As the SDWA and the regulations implementing it are silent concerning the burden of proof to be applied in whistleblower cases, the burden of proof required by the APA governs this case.

The APA standard of proof "is the traditional preponderance-of-the-evidence standard." *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (construing the provision at Section 556(d) that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof"); *OFCCP v. Greenwich Collieries*, 512 U.S. 267 (1994) (reaffirming *Steadman* and repudiating assertion in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), that the proponent of the agency order has the burden of production and the respondent has the burden of persuasion). Evidence meets the "preponderance of the evidence" standard when it is more likely than not that a certain proposition is true. *Fischl v. Armitage*, 128 F.3d 50, 55 (2d Cir. 1997). This is the standard which is to be applied by the ALJ in his initial hearing.

In reviewing an ALJ recommended decision under the employee protection provision of the SDWA, this Board is also subject to the APA preponderance of the evidence standard. *Ewald v. Commonwealth of Virginia*, Case No. 89-SDW-1, Sec. Dec. and Rem. Ord., Apr. 20, 1995, slip op. at 11 (to prevail on complaint under environmental whistleblower provisions, complainant needs to prove proposition by a preponderance of the evidence). The Board is not bound by the ALJ recommended decision, but rather retains complete freedom of decision:

> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision, as though it had heard the evidence itself. This

> follows from the fact that a recommended decision is advisory in nature. . . . Similarly, the third sentence of section [557(b) of the APA] provides that "On appeal from or review of the initial decisions of such [hearing] officers, the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision."

Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII §8, pp. 83-84 (1947); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (same). With these standards in mind we evaluate this case.

II. *Liability*

In *Martin I* the Secretary decided that Pittman's reassignment of Martin to regular plumbing responsibilities and his rating Martin lower than "exceptional" on his performance appraisal constituted adverse action within the meaning of the SDWA. In *Martin II* the ALJ recommends that we rule that these two actions, taken together with Martin's having been supervised by three managers at the same time in1992, and Martin's ostracism by his co-workers, resulted in Martin's constructive discharge. Because we disagree with the ALJ's application of the facts to the law regarding constructive discharge, we reject this recommendation.

A. Legal Standard

The employee protection provision of the SDWA provides in part that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment" because the employee has engaged in activity protected under the SDWA. 42 U.S.C. §300j-9(i)(1). Because Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*., utilizes virtually the same language in describing prohibited discriminatory acts and shares a common statutory origin,[3/] the Board and the Secretary

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[3/] Title VII provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer –
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> (1) to fail or refuse to hire or to **discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin** . . . .

42 U.S.C. 2000e-2(a)(1998)(emphasis supplied). Title VII and the SDWA share a common legislative ancestry. Title VII is patterned in part on the NLRA, 29 U.S.C. §151 et seq. *Armbruster v. Quinn*, 711 F.2d 1332,1336 (6th Cir. 1983). The anti-retaliation provision of the SDWA is modeled on a similar provision in the Water Pollution Control Act (WPCA), 33 U.S.C. §1367(a). The legislative history of the WPCA, in turn, states that the employee protection provision is patterned after similar provisions in the NLRA and the Coal Mine Safety Act. S. Rep. No. 414, 92d

(continued...)

have looked to law developed under Title VII for guidance regarding the meaning of the phrase "otherwise discriminate . . . with respect to . . . compensation, terms, conditions, or privileges of employment." *See English v. Whitfield*, 858 F.2d 957,963-964 (4th Cir.1988) (directly analogizing "retaliatory harassment" claim under the employee protection provision of the Energy Reorganization Act, 42 U.S.C. §5851 (1994), to claims of gender- and race-based harassment under Title VII).

The theory of "constructive discharge" has evolved in the Title VII context to take account of situations in which an employer, "rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily." *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 87 (2d Cir. 1996) (internal citations omitted). To prevail on a claim of constructive discharge the complainant must prove that working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have found continued employment intolerable and would have been compelled to resign. *Bristow v. Daily Press*, 770 F.2d 1252, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). Thus, as the Sixth Circuit has held, "[t]he plaintiff must show more than a violation to prove constructive discharge, so the fact that the plaintiff may have proven a hostile work environment is not enough by itself to prove constructive discharge also." *Moore v. KUKA Welding Systems*, No. 97-1734, 1999 WL 162962 (6th Cir. Mar. 26, 1999), at * 5.

However, if the complainant establishes a claim of constructive discharge, he or she is entitled to relief even absent a formal discharge because the "resignation" is involuntary, *i.e.,* tantamount to discharge. *See Simpson v. Federal Mine Safety and Health Rev. Com'n,* 842 F.2d 453, 461 (D.C. Cir. 1988) ("[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly").

There are two schools of thought among the U.S. Courts of Appeals regarding the nature of the evidence necessary to establish a constructive discharge. The majority of circuits focuses exclusively on the manner in which an employee is affected by the employer's actions. This so-called "objective" standard asks only whether, in response to the employer's actions, a reasonable person in the employee's position would have felt compelled to resign.

The Fourth Circuit, in which this case arises, applies the minority "subjective" standard in deciding constructive discharge issues: A constructive discharge occurs when an employer *intentionally* renders an employee's working conditions intolerable, thus forcing the employee to quit. *Martin v. Cavalier Hotel Corp.,* 48 F.3d 1343, 1353-1357 (4th Cir. 1995); *Paroline v. Unisys. Corp.,* 879 F.2d 100, 114 (4th Cir. 1989) (Wilkinson, J., dissenting), *vacated in part,* 900 F.2d 27 (4th Cir. 1990) (*en banc*) (adopting panel dissenting opinion).[4/] However, courts – such as the

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[3/](...continued)
Cong., 2d Sess. 80-81 (1972) reprinted in 1972 U.S.C.C.A.N. 3668, 3748-49 (1972).

[4/] *See Johnson v. Shalala,* 991 F.2d 126, 131 (4th Cir. 1993), *cert. denied,* 513 U.S. 806 (1994); *EEOC v. Clay Printing Co.,* 955 F.2d 936, 944-946 (4th Cir. 1992). *See also Moore v. KUKA* (continued...)

Fourth Circuit – that apply the subjective standard have concluded that a complainant may prove an employer's "intent" by establishing either (1) that the employer *consciously intended* to coerce the employee's resignation, or (2) that resignation was the *reasonably foreseeable consequence* of the employer's actions. Thus, even under the subjective standard it ultimately is not necessary to prove specific intent. In light of this fact, the distinction between the objective and subjective standards is, in our judgment, minimal. In any event, the difference between the two standards is irrelevant where, as we discuss below, the complainant has failed to prove that working conditions were rendered so intolerable that the employee was compelled to resign.

The second element of the constructive discharge standard, intolerability of working conditions, is judged "objectively," *i.e.,* the conditions created by the employer must be sufficiently severe or pervasive that a reasonable person would find them intolerable. *See Bristow v. Daily Press*, 770 F.2d at 1255. Because we find that a reasonable person would not have found the conditions to which Martin was subjected intolerable, we conclude that Martin was not constructively discharged.

B. Application of the Facts to the Legal Standard.

As we stated above, the ALJ found that four developments combined to make Martin's working conditions so intolerable that he was constructively discharged. We disagree with this conclusion, because in our view these events were not so intolerable that a reasonable person in Martin's position would have been compelled to resign. We discuss the four events upon which the ALJ relied, as well as other evidence relevant to the constructive discharge issue.

1. Lowered performance evaluation -- As the Secretary found in *Martin I*, in September 1992 Pittman gave Martin a performance appraisal rating one level below his typical "exceptional" rating because Martin confronted a sewer cleaning equipment salesman and an Army Corps of Engineers construction representative about backflow prevention or cross connection problems that they were about to create or to permit to occur. However, no adverse consequences flowed from this lower appraisal,[5/] and although Martin was rated only "highly successful" in 1992, his evaluation returned to its previous "exceptional" level in 1993.

[4/](...continued)
Welding Systems, No. 97-1734, 1999 WL 162962 (6th Cir. Mar. 26, 1999), at *5 ("the employer must deliberately create intolerable working conditions, as perceived by a reasonable person, with the intention of forcing the employee to quit and the employee must actually quit"); *Bradford v. Norfolk So. Corp.,* 54 F.3d 1412, 1420 (8th Cir. 1995) (constructive discharge occurs "when an employer intentionally renders working conditions so intolerable that an employee is essentially forced to leave the employment"). *See also Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d at 87 (same).

[5/] A co-worker of Martin's testified that employees commonly received exceptional ratings and the lower rating increased the likelihood that Martin would be laid off. However, although at least one employee in the plumbing shop "definitely" was scheduled for separation during an upcoming Reduction In Force, Martin was not, in fact, laid off.

2. Assignment to regular plumbing tasks -- Pittman reassigned Martin from backflow prevention testing and repair, returning Martin to his regular plumbing duties. It is clear that Martin's work on backflow prevention required more initiative and imposed more responsibility than did his usual plumber worker duties. For example, in early 1991 Pittman directed Martin to test and repair 131 listed backflow preventers. In mid-1991, when Martin identified additional backflow preventers which needed testing and repair at Fort Jackson, Pittman authorized Martin to expand his efforts. After he received his inspector tester certificate in early 1992, Martin was directed by his second level supervisor, William Munn, to locate unprotected cross-connections and to compile a list of buildings which lacked requisite backflow preventers. T. I at 743-744 (Knight). On the other hand, Martin's regular plumber work involved repairing and replacing system components pursuant to service orders as assigned by supervisors. Thus, Martin lost some flexibility and independence when he was returned to regular plumber worker assignments. However, Martin suffered no loss in pay, and there was no evidence adduced that Martin suffered a loss of reputation as a result of that reassignment.

3. Reporting to multiple supervisors – The ALJ found it significant that Martin was required to answer directly to three supervisors for a period of unspecified duration in early 1992. Martin remained responsible for testing and repairing backflow preventers under Pittman; he provided Munn with information requested by the South Carolina Department of Health and Environmental Control (DHEC); and he was assigned by Munn to work for a brief period of time with James Knight, the Chief of the Environmental Management Branch in Fort Jackson's Department of Public Works, locating buildings with unprotected plumbing cross-connections so that Knight could prepare a contract for the installation of backflow preventers. Munn testified: "We had a project that installed backflow preventers in a couple of hundred buildings on [Fort] Jackson, and part of that information was provided by myself; a lot from Billy [Martin]; and the plumbing section . . . ." T. I at 629. The ALJ found: "Although it may not be unusual for a person in Martin's organization to have a number of supervisors, it was unusual that all of them suddenly began active supervision of him." *Martin II* R. D. & O., slip op. at 11. The ALJ also found that active supervision by three individuals must have increased the pressure on Martin, citing Martin's testimony that, following the IG complaint and DHEC involvement, Martin suddenly found himself "working for three supervisors all at the same time, an unusual situation." *Martin II* R. D. & O., slip op. at 3.

Although there is no dispute that Martin temporarily became directly accountable to several supervisors simultaneously, in considering whether this experience plausibly could give rise to a constructive discharge finding we need to determine whether it is so intolerable that it would cause someone to quit. In this regard, we find it significant that even Martin did not appear to be particularly perturbed by this situation. Martin testified:

> I kind of thought it was unusual, having three supervisors at one time, but it entered my mind that that was retaliation for going to the inspector general . . . at that time I was doing a pretty good job of keeping up with what all three of them was telling me to do. I tried my best doing what I could.

T. II at 26.

We find nothing retaliatory in the assignment of Martin to provide information to Munn and Knight while he continued to work on testing and repairing backflow preventers for his first line supervisor, Pittman. At the time these assignments were issued, Martin was the leading worker at Fort Jackson on issues regarding backflow prevention. It is not surprising that several people in Martin's chain of command looked to him for information and assistance.

4. Being ostracized by co-workers -- The ALJ found, based largely on the record in *Martin II,* that Martin was ostracized by his co-workers:

> . . . I find that Complainant was socially ostracized by his fellow employees as he and his wife allege (TR. 36-7, 43, 106-7). At least two co-workers, McDonald (Tr. 142) and Klingbeil (Tr. 149), confirm this.
>
> Testimony to the contrary by Pittman and others is not believable. Even Pittman acknowledges that Complainant kept to himself after the 1993 hearing (Tr. 191). Pittman simply fails to consider that this might have been a result of ostracism by his fellow employees. I find that Pittman's obvious bias in addition to his inability to observe all that went on render his contrary testimony less credible. A witness supporting Pittman, David Anderson, likewise had limited opportunities to observe Complainant (Tr. 154).

Martin II R. D. & O. at 10. Based on our review of the record in both *Martin I* and *Martin II*, it is our view that the evidence in support of this finding is relatively weak. Although we do not reject the ALJ's finding outright, we find that the few comments in the record regarding any possible harassing behavior by Martin's co-workers are so vague and conclusory that they do not rise to the level necessary to support a finding of constructive discharge. The few comments allegedly made by co-workers in connection with Martin's whistleblowing activities appear to have been sporadic and short-lived in duration, and do not come close to reaching the level of intensity needed to demonstrate that conditions were so intolerable that Martin was forced to quit.

We first address the limited evidence in *Martin I* relating to co-worker reaction to Martin's whistleblowing. It is highly significant that, although Martin filed his complaint with the Department of Labor on May 5, 1992, at the *Martin I* hearing in March 1993 he did not testify that he had been subjected to any kidding, much less ostracism by his co-workers. Indeed, the only testimony in the *Martin I* hearing which related to reactions by Martin's co-workers to his protected activity was given by co-worker Robert Jenkins:

> People in the shop are kidding Billy [Martin] about going to the penitentiary, saying, "How many months are your going to be out of there?"
>
> * * * *
>
> Yeah, this is a big joke in the shop. And these are some of the other things that I'm talking about. It's just shop talk, now. "Why, you whistle blower. You're going on – you're going to the penitentiary."
>
> Q. People been calling Billy a whistle blower?

A. Yes, that's happened in the shop. Yes.
Q. Who all's said that?
A. Well, I guess it's everybody in the shop.
Q. And they've stated he's going to the penitentiary for that? Where'd they get that?
A. Well, it's a joke in the shop. It's shop talk joke (sic).

* * * *

JUDGE VON BRAND: Let me ask you this: As [a] result of this case have there been hard feelings in the shop?
THE WITNESS: Very much so. Very much so.
JUDGE VON BRAND: Anything else?
THE WITNESS: It's hard to work under those circumstances.
JUDGE VON BRAND: You mean other people have been drawn into it?
THE WITNESS: No, I mean, it's just like we're sitting right here in the room, and five or six people come in, and we start talking about it, and then they start making little cracks here, and this and that and the other. And the whole shop's that way.

* * * *

BY MS. SMITH:
Q. What is the feeling in the shop about Billy and this case? How – does Billy talk about this case in the shop?
A. No.
Q. He's not said anything about this case in the shop?
A. No. He sits there and takes it. He sits there and takes what they say to him.
Q. Okay, and these are the other co-workers, is that right? That's not Mr. Pittman?
A. Some of the co-workers, not Mr. Pittman. He's – you know, he's just – he can hear them, he's right there in his office, right there next to it, more or less. And he knows that they're talking about, so the same as everybody else does (sic).
Q. Now, why do you think the people are – I don't know what the correct terms is. Why are they, how would you say it? How are they . . .?
A. Let me put it this way. Nobody likes a whistle blower.

T. I at 399-401 (Jenkins). Although this testimony indicates that Martin came in for some ribbing from his co-workers – ribbing that we do not here condone – Martin's failure to speak to this issue during his testimony and the absence of other testimony plainly suggests that Martin was not subjected to the kind of harassing behavior that would form the basis for a constructive discharge finding.

In the *Martin II* hearing more than 2-1/2 years later, Martin gave almost no testimony regarding ostracism by his co-workers. Martin testified that a fellow employee told him "to keep an eye over [his] shoulder." T. II at 36.[6/] Although Martin identified the person who allegedly made this statement (T. II at 82), that person did not testify, and Martin's wife was the only other witness to make reference to this allegation. She testified that Martin had "to look around his shoulder . . . ," and that "[p]eople were throwing things at" Martin. T. II at 107. Neither Martin nor any other witness corroborated the latter claim.

Several co-workers did testify regarding their attitude toward Martin after the hearing in *Martin I*. For example, Work Leader Richard McDonald (who was also the president of the union local which represented the plumbing employees) testified that most co-workers "thought that [Martin] was trying to get over, get something for nothing." T. II at 129. But the following exchange between McDonald and the ALJ indicates that although there may have been some bad feelings among Martin's co-workers, they were brief, and did not persist:

> JUDGE CAMPBELL: . . . Can you understand why Mr. Martin might have thought that there was a hostile atmosphere here after the hearing took place in early '93?
> THE WITNESS: I could probably understand it. But it's one of those things that probably within a week or two, you know, it would go away.

T. II at 142. When asked by Respondent's counsel whether Martin was treated differently by any co-workers after the hearing in *Martin I*, McDonald again indicated that any bad feeling was brief:

> A: Probably a few. But like I say, I think that after a short period of time it'd pretty well go away.
> Q. And what would you say would be a short period of time?
> A. Within a couple of weeks.

T. II at 143. Other co-workers testified that Martin was not treated any differently. *See* T. II at 151 (Klingbeil),[7/] T. II at 154 (Anderson).[8/]

[6/] Although the ALJ cites Martin's testimony at transcript page 43 in support of his ostracism finding, we find nothing on that page that is relevant to this issue.

[7/] The ALJ cited the testimony of George Klingbeil, one of Martin's fellow plumbers (T. II at 149), in support of his finding regarding ostracism. *Martin II* R. D. and O. at 10. However, that portion of Klingbeil's testimony was in response to a hypothetical question about how members of military units behave. Klingbeil explicitly denied that Martin in fact had been treated differently. T. II at 151.

[8/] The ALJ rejected Anderson's testimony explicitly denying that he treated Martin differently or saw anyone else do so because Anderson "had limited opportunities to observe Complainant . . . ." *Martin II* R. D. and O. at 10. In fact, the clear import of Anderson's testimony was that he saw Martin on nearly a daily basis. T. II at 154.

In short, there is almost no testimony by Martin himself, and only vague and uncorroborated testimony by Martin's wife, to support the claim that Martin was ostracized by his co-workers following the filing of his complaint and the hearing in *Martin I.* The only other testimony which arguably lends any support to the ALJ's conclusion is that of McDonald that Martin might have been treated differently by his colleagues for a very brief period of time after the *Martin I* hearing. On this record, we cannot conclude that Martin was treated in an intolerable manner that would have compelled him to quit his job because he was ostracized by his co-workers.[9/]

5. Other adverse treatment -- A far more significant issue, which seems to have been assumed, but was not directly addressed by the ALJ as an underpinning for his constructive discharge finding, is whether Pittman treated Martin in such an abusive manner that Martin would have had no alternative but to quit his job. The ALJ found that, "Pittman may believe that he did not treat Martin differently after Martin became a whistleblower, but the evidence, even apart from Claimant's testimony and that of Ms. Martin, indicates that he did . . . ." *Martin II* R. D. and O. at 10-11. We conclude that the great weight of the evidence does not support such a conclusion. In order to lay this issue to rest we discuss all of the evidence related to it.

Martin testified that Pittman abused him by harassing him, by making negative facial expressions, and by making sarcastic responses to Martin's requests for sick leave:

> I was being singled out. Mr. Pittman would call me out. There would be a group of people in the coffee – in our shop, drinking coffee. He would simply tell me to go back to work. He started harassing me about – about not staying on standby, by the phone, for call in, emergency call in.
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> * * * *
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> I'd had my phone taken out, and I wasn't available by the phone, and Mr. Pittman started harassing me pretty heavy about not having a phone at home. . . . I had the phone taken out because I was getting crank phone calls, that was – he was telling me I had to put it in. On two points, I thought he was invading my constitutional rights for privacy, telling me I had to listen to the crank phone calls by putting it back in, and at the same time telling me I had to put the phone back in for emergency call ins, which is an invasion of my privacy.
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> * * * *
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> A lot of times when I would call in he [Pittman] would say real sarcastically, what's wrong with you Billy . . . .
>
> * * * *

[9/] Because we find that any co-worker ostracism does not rise to the level necessary to support a constructive discharge finding, we need not address the issue whether and under what circumstances co-worker ostracism can be found to constitute retaliation by an *employer*.

> [I]t was a[n] every day thing to go in and work and see Mr. Pittman's dirty looks, sneer at me.[10/] And sometimes it seemed like I could read his expressions, what he wanted to say, but he didn't say it. And the continued – it got to be a pretty regular thing about the sick leave, and I got to where I couldn't handle calling in anymore, and I asked my wife to start calling in for me, just because of the harassment of calling in.[11/]
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> * * * *
>
> Well, originally when I went to court [in *Martin I*], and originally when I made some reports [to supervisors about Pittman], I thought something would change during the period of time, but I don't know – the only real thing that changed was Mr. Pittman had learned to close his mouth a little bit, and give more, stronger dirty looks every day. . . .

T. II at 38, 40, 43, 48.

None of these alleged instances of harassment by Pittman were confirmed by any other witnesses. McDonald denied that Martin was singled out by Pittman:

> Q. Have you ever witnessed any incident where Mr. Pittman came into a group of the men that he supervised and singled Mr. Martin out to go back to work and let the other men be on break or be on lunch or not work?
> A. No. Charlie [Pittman], if – most of the time, you know, he might just say, you know, okay, you know, it's five to ten, or ten minutes after a break's over and we're supposed to be out on the field. Hey, it's time to go guys, or you know, or whatever. But I've never seen him single anybody in particular out, you know out of a group. If there's a group there that's slack, he'll tell all of them.

T. II at 127. Co-worker David Anderson was also asked about Pittman's treatment of Martin:

> Q. During the time that the hearing went on and to the time that Mr. Martin left, did you ever witness Mr. Pittman harassing Mr. Martin in any way?
> A. No.
> Q. Did you notice him treating him differently than any of the other people that worked under him?
> A. No.

10/ Ms. Martin testified without elaboration that Martin would tell her about Pittman "giving him dirty looks." T. II at 106.

11/ However, McDonald testified that Martin routinely called in early, before Pittman arrived. Therefore, Martin's telephonic sick leave requests often were conveyed to his co-workers. T. II at 126.

T. II at 153-154. Pittman also flatly denied harassing Martin after the hearing in *Martin I*. *See* T. II at 189-191, 207-208, 224. Even without considering Pittman's testimony, however, the overwhelming weight of the evidence is to the effect that Pittman did not treat Martin in a pervasively abusive manner.

Additionally, the ALJ expressly found, and we agree, that Pittman did not retaliate against Martin in denying him advanced sick leave, which was the event that precipitated Martin's resignation. *Martin II* R. D. and O. at 11 n.2. Martin's sick leave record was poor even before he engaged in protected activity.[12/] From 1991 on Martin used so much leave that by 1994 he was taking large amounts of leave without pay, because he had no sick leave to use. Pittman's denial of advanced sick leave in May 1994 was made after consultation with Army personnel officials, was consistent with Army personnel policy, and, in the judgment of the Army personnel official who testified, was justified. T. II at 160-165 (Jeffcoat).

Finally, there are allegations by Martin of instances of retaliation which are completely unsupported in the record, and which the ALJ refused to credit. Martin testified that he had been subjected to months of frequent harassing telephone calls, which he linked to his protected activity. However, Martin presented no corroborating evidence, Martin's wife did not even mention the alleged calls in her testimony, and the ALJ did not credit Martin's testimony. *Martin II* R. D. and O. at 12. Similarly, although Martin testified that someone in the plumbing shop punctured the gas line on his work truck, and that he called the local fire department to handle the resulting hazardous spill, fire department records showed no such call, and no one corroborated Martin's assertions.[13/] Again, the ALJ did not credit Martin's testimony. *Martin II* R. D. and O. at 12-13. These two instances of exaggerated or fabricated testimony cast doubt on Martin's description of the level and type of harassment to which he was subjected by his colleagues (*i.e.*, ostracism) and Pittman ("dirty looks," sarcastic response to Martin's requests for sick leave).

This case is a troubling one. As the Secretary held in *Martin I*, it is clear that Martin was retaliated against by Pittman (removal from backflow prevention work, lowered performance evaluation) for engaging in protected activity, and Martin ended up quitting his job with many attendant severe personal consequences. However, we conclude that Martin failed to prove that he was constructively discharged, *i.e.*, that his working conditions were rendered so intolerable that a reasonable person in Martin's position would have been forced to resign. We have concluded that Martin was not actively supervised by three people in retaliation for his protected activity, that any negative reaction by Martin's co-workers was minimal, and that at most Pittman may have looked

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[12/] Franklin Cooper, Martin's third-line supervisor, testified that in 1990, when he took over the Division in which Martin worked, he noticed that Martin was one of a very few employees with very little sick leave considering their years of service. T. II at 237.

[13/] Although the ALJ found that the gas leak incident had not been proven, he did find that the incident was confirmed by Ms. Martin. *Martin II* R. D. & O. at 12. We do not think that Ms. Martin's testimony can be given weight. Ms. Martin's testimony on this issue was that "[Martin's] truck was – something happened about the truck, with the fire." Tr. 107. There was no testimony that the alleged gas leak caused a fire, and Ms. Martin offered no other explanation for her comment.

at Martin disapprovingly. Martin did not receive harassing telephone calls, and he failed to prove that his truck had been sabotaged. Even taken all together, we cannot conclude that the retaliation suffered by Martin was sufficiently abusive in nature to have forced a reasonable person in his position to quit. *Compare Moore v. KUKA Welding Systems,* No. 97-1734, 1999 WL 162962, at *5 ("[d]ay after day, week after week of isolation on the job and lack of communication would lead [a plaintiff] to believe that he was no longer wanted and would continue to receive the cold shoulder as long as he worked there") *with Munday v. Waste Management of North America, Inc.,* 126 F.3d 239, 244 (4th Cir. 1997) (requirement that employee cope throughout tenure with co-workers and top supervisor who ignored her was insufficient to establish adverse employment action much less constructive discharge).

III. *Remedy*

The SDWA employee protection provision provides that upon finding a violation the Secretary (now the Board) shall order the violator to take affirmative action to abate the violation and to reinstate the person retaliated against "to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment . . . ." 42 U.S.C. §300j-9(i)(2)(B)(ii). Compensatory damages and "where appropriate, exemplary damages" also are available, as are "costs and expenses (including attorneys' fees) reasonably incurred [in] bringing the complaint . . . ." *Id.* In *Martin I* the Secretary ordered that Martin's 1992 performance appraisal be upgraded, and that Martin be awarded costs and expenses reasonably incurred. The Secretary remanded in part for a recommendation regarding costs and expenses reasonably incurred by Martin.

The ALJ in *Martin II* recommended a finding of constructive discharge. In light of this finding, the ALJ recommended that Martin be awarded back pay and front pay computed at $11.82 an hour. With regard to damages for medical expenses, the ALJ found that the record did not permit an appropriate allocation between expenses related and unrelated to Martin's retaliation. The ALJ therefore declined to recommend an award of medical expenses. The ALJ found reasonable the proffered petition for attorneys fees and recommended that it be adopted. Fees were billed at an hourly rate of $125, for a total up to that stage of the proceeding of $5,050.

We have found that Martin failed to prove that he was constructively discharged, and we therefore decline to order the Army to offer Martin reinstatement, or to award back pay. However, we do conclude that Martin has established an entitlement to an award of compensatory damages for emotional distress, and we adopt the recommended award of attorneys fees. We first address the compensatory damages issue.

By permitting the recovery of compensatory damages for violation of its employee protection provision, the SDWA has created "a species of tort liability" in favor of discriminatees: Damages are designed to compensate for injury caused by a respondent's breach of duty and "may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . ., personal humiliation, and mental anguish and suffering.'" *Memphis Community Sch. Dist. v. Stachura,* 477 U.S. 299, 305-307 (1986), *quoting Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). Accordingly, compensatory damages contemplate restitution for non-pecuniary loss. *Rowlett v. Anheuser-Busch, Inc.,* 832 F.2d 194, 204-205 (1st Cir. 1987) (compensation for

injury caused by anxiety, stress and depression); *Hamilton v. Rodgers,* 791 F.2d 439, 444-445 (5th Cir. 1986) (embarrassment, humiliation and mental distress); *Foster v. MCI Telecommunications Corp.,* 773 F.2d 1116, 1120-1121 (10th Cir. 1985), *aff'g* 555 F. Supp. 330, 336-337 (D. Colo. 1983) (embarrassment, humiliation, anxiety and emotional suffering); *Carter v. Duncan-Huggins, Ltd.,* 727 F.2d 1225, 1238 (D.C. Cir. 1984) (humiliation); *Hayes v. Shelby Memorial Hosp.,* 726 F.2d 1543, 1554 (11th Cir. 1984), *aff'g* 546 F. Supp. 259, 267 (N.D. Ala. 1982) (embarrassment, humiliation and emotional distress); *Garner v. Giarrusso,* 571 F.2d 1330, 1339 (5th Cir. 1979) (suffering and humiliation); *Richardson v. Restaurant Marketing Assoc., Inc.,* 527 F. Supp. 690, 697 (N.D. Cal. 1981) (mental and emotional distress).

Awards generally require that a plaintiff demonstrate both (1) objective manifestation of distress, *e.g.,* sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress. Considerations include whether, as a consequence of the distress, the plaintiff lost the esteem of peers, suffered physical injury, received psychological counseling, required medication or suffered loss of income. *See Price v. City of Charlotte, N.C.,* 93 F.3d 1241, 1252-1254 (4th Cir. 1996) (and cases cited therein).

The conditions necessary for an award of damages for emotional distress have been met here. First, there can be no dispute that Martin suffered severe emotional distress.[14/] Beginning in 1992 Martin received psychological counseling of increasing intensity. In June 1993, Martin was hospitalized at Richland Springs Psychiatric Hospital for a five-day period. Martin had withdrawn from family and friends and had experienced a lack of concentration which adversely affected his ability to work and to function generally. Other symptoms included fatigue, malaise, depression, difficulty sleeping, bronchial irritation, suicidal thoughts and low self-esteem. In late April 1994, Martin again was hospitalized at Richland Springs, diagnosed with major depression. Martin reported, and the hospital documented, that he experienced suicidal thoughts due to stress. Martin subsequently was hospitalized at Richland Springs in May 1994 for a period of 15 days and in January 1995 for a period of 25 days.

Second, Martin has shown on this record that his severe emotional distress resulted at least in part from the Army's retaliation. We note that, in all instances of hospitalization, the associated medical records show contemporaneous reference to stress and anxiety resulting from Martin's protected activity as precipitating depressive symptoms. The Army has not adduced contravening evidence.

In these circumstances, we award compensatory damages for distress in the amount of $75,000. This amount is commensurate with damages awarded in cases of similar proof cited above, *see also Mathie v. Fries,* 121 F.3d 808, 813-814 (2d Cir. 1997), and with damages awarded previously by the Board. *Smith v. ESICORP, Inc.,* ARB Case No. 97-065, ALJ Case No. 93-ERA-16, ARB Dec., Aug. 27, 1998, slip op. at 2-4.

[14/] In *Martin I* the Secretary declined to award compensatory damages for stress because of insufficient evidence. 1995 WL 848062 at *4. The *Martin II* record has remedied that insufficiency.

Compensatory damages may also be awarded to compensate for pecuniary loss. *Williams v. Trans World Airlines, Inc.,* 660 F.2d 1267, 1273 (8th Cir. 1981) (recovery is permitted for out-of-pocket expenditures occasioned by discrimination); *DeFord v. Sec'y of Labor,* 700 F.2d 281, 288 (6th Cir. 1983) (under parallel employee protection provision, past and future medical expenses constitute recoverable compensatory damages). Although Martin presented bills indicating a total of $32,972.14 in medical expenses and requested reimbursement for medical expenses related to his emotional distress, the ALJ declined to make such an award on the ground that he had "no basis on which to attribute any of [Martin's] medical and hospitalization expenses . . . to the events giving rise to his constructive discharge." *Martin II* R. D. & O. at 14.

In light of the fact that we have determined that the only two acts of retaliation suffered by Martin were those addressed in *Martin I,* we concur that Martin has presented insufficient evidence upon which we could base a determination as to the amount of Martin's medical expenses which related to the *Martin I* retaliation. We therefore decline to order the reimbursement of medical expenses.

Because the litigation of *Martin II* established Martin's entitlement to compensatory damages, Martin is also entitled to an award of costs and expenses, including attorneys fees, reasonably incurred in litigating this action. We adopt the ALJ's recommended award of attorneys fees as reasonable. Because Martin has incurred further attorneys fees related to the proceeding before us, we will allow Martin time to request an additional amount of reasonable fees and costs related to this review.

CONCLUSION

The Secretary held in *Martin I* that the Department of the Army violated the employee protection provision of the Safe Drinking Water Act when it reassigned John W. Martin to duties other than testing and repairing backflow preventers, and when it gave him a lower than justified grade on his performance appraisal in 1992. However, we conclude that the Army did not constructively discharge Martin. Therefore, we order the following relief in addition to that ordered in *Martin I.* Respondent Department of the Army is **ORDERED** to:

1) Compensate Complainant Martin for emotional distress caused by the Army's retaliatory acts in the amount of $75,000.

2) Pay attorneys fees in the amount of $5,050.00.

It is further **ORDERED** that Complainant shall have 30 days from the date of this Decision and Order to submit an itemized petition for additional attorneys fees and costs reasonably related to litigation of *Martin II* before the Board. Complainant Martin shall serve the petition on

Respondent, which shall have 45 days after issuance of this Decision and Order to submit any response. The Board will issue a supplemental order setting forth the additional attorneys fees and related expenses to which Complainant Martin is entitled.[15/]

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

[15/] Because this decision resolves all issues with the exception of the collateral issue of attorneys fees and other litigation expenses, it is final and appealable. *See Fluor Constructors, Inc., v. Reich*, 111 F.3d 979 (11 Cir. 1997) (under the analogous employee protection provision of the Energy Reorganization Act, a decision that resolves all issues except attorneys fees is final).