Date:5/31/96

CASE NO. 95-SDW-1

IN THE MATTER OF

CHRIS WHITE
Complainant,

v.

THE OSAGE TRIBAL COUNCIL ON BEHALF OF THE OSAGE NATION,
Respondent.

RECOMMENDED DECISION AND ORDER

This proceeding arises out of a complaint of discrimination filed on behalf of complainant, Chris White, against his former employer, Osage Tribal Council. Complainant alleges that the Tribal Council discriminated against him by discharging him in violation of the employee protection provisions of the Safe Drinking Water Act ("SDWA") codified at 42 U.S.C. §300j-9(i) (1994). The essence of Complainant's allegation is that he was fired by the Tribal Council for filing environmental violation reports in the course of his job with the Environmental Protection Agency ("EPA") which could adversely affect oil production on the Osage mineral estate. Complainant further claims that the performance of his duties, which entailed reporting violations of regulations promulgated under the SDWA, constituted protected activities under the SDWA, and that as a result of his protected activities, the Tribal Council discriminated against him.

Prior to the scheduled hearing, the Tribal Council filed a Motion to Dismiss and Plea to Jurisdiction wherein it was argued that the Tribal Council was immune from this suit under the doctrine of sovereign immunity. The ruling on the motion was

deferred until hearing at which time the motion was denied. During the hearing, Complainant submitted exhibits 1, 3-11, 13-14, 16-31 into the record.[1] At the conclusion of the hearing, the parties were offered an opportunity to submit briefs in support of their respective positions, and both parties did so. The decision which follows is based upon a review of the entire record in this proceeding together with the arguments presented at the hearing and in the post hearing submissions.

FACTS

Under a contract agreement, the EPA, through a grant, funded the Tribal Council[2] to administer the underground injection control

---

[1] In citing the record evidence, the following abbreviations shall be used: Tr. - Hearing Transcript and CX - Complainant's exhibit.

[2] The Osage Tribal Council served as trustees for the Osage Mineral estate, and the Osage National Council administered all other programs for the tribe and governed the rest of the affairs. (Tr. 137, 244). The Osage Mineral estate is owned by shareholders who are members of the Osage Tribe including the members of the Tribal Council and receive royalty payments from all of the wells on the estate based on their percentage of ownership. These shareholders elect the members of the Tribal Council who in turn, have an interest in maximizing production in order to satisfy their constituency. (Tr. 219-220).

In fact, Mr. Clarence Edmondson, an environmental protection specialist with the EPA who coordinated the UIC program with the Tribal Council, testified that when the program was being developed in the mid 1980's, a major concern of the Tribal Council, was the effect of the environmental regulations on the oil production. Although the environmental conservation was, according to Mr. Edmondson, a concern, it was not a paramount concern of the Council. According to Mr. Edmondson, the paramount concern was the potential adverse effect these regulations might have on oil production. (Tr. 348-350, 372-373, 376, 384). The Bureau of Indian Affairs ("BIA") mineral branch assisted the Tribal Council in maintaining the production of oil and gas on the Osage Mineral estate and protecting the environment. (Tr. 269, 289, 351-352). Originally, all the field men with the BIA mineral branch, who inspected the leases for violations, were tribal employees and were compensated from the mineral profits but were later paid as federal employees. (Tr. 353-354).

program.[3] (CX 1). The funding was used to hire inspectors, office personnel, and equipment to conduct the operations of the program of inspecting UIC sites. Complainant was hired by the Tribal Council[4] on February 10, 1994 as a UIC field inspector which required inspecting UIC sites suggested by the EPA and performing mechanical integrity tests on the sites and filing reports on the inspection results. (Tr. 255-256, 344). He worked under the direct supervision of the EPA technical coordinator, Mr. Sanborn, and the indirect supervision of the Dallas regional EPA office. (Tr. 54-61, 168, 170, 178, 254, 392). Complainant filed his reports with the Dallas EPA regional office, except in the case of a violation, then the report would be given to Mr. Sanborn, who was also a member of the enforcement branch of the EPA. (Tr. 257).

---

[3] Underground injection is defined by the SDWA as the "subsurface emplacement of fluids by well injection" and is a potentially widespread hazardous waste disposal practice that poses serious threat to groundwater sources of drinking water. 42 U.S.C. §300h(d)(1). Congress was particularly aware of the potential adverse effects of oil and gas related injections. Phillips Petroleum Co. v. United States E.P.A., 803 F.2d 545, 547 n. 2 (10th Cir. 1986). When drafting the SDWA, the House Committee on Interstate and Foreign Commerce noted that "[e]nergy production companies are using injection techniques to increase production and dispose of unwanted brines brought to the surface during production...." H.R.Rep. No. 1185, 93d Cong., 2d Sess. 29 (1974), U.S. Code Cong. & Admin. News 1974, pp. 6454, 6481. Thus, the injection wells on the mineral reserve under the UIC program produced oil and gas supplies from which the shareholders received royalty payments.

[4] Because Complainant was hired by the Tribal Council, he was considered an employee of the Tribal Council and was paid by the Tribal Council. His immediate supervisor with the Tribal Council was Ms. Patricia Beasley, the Director of Federal Programs for the Osage Nation, who handled all personnel matters. However, Mr. Kent Sanborn, an EPA employee, stated that he interviewed Complainant and recommended him for employment. The EPA trained Complainant and issued his job assignments. (Tr. 255-257, 305).
It is clear from this record that while Ms. Beasley was Complainant's nominal supervisor, she had no substantive knowledge of Complainant's technical duties and deferred to Mr. Sanborn, Complaint's technical supervisor, to supervise Claimant's day to day work activities.

Complainant did not have any enforcement power per se, but the reports he issued could and did create enforcement actions executed by the enforcement branch in the Dallas EPA regional office. (Tr. 206-208, 255, 278-279). Complainant filed monthly inspection reports with the EPA pursuant to his job duties. (CX 3) (Tr. 65).

In an agreement between the EPA and the BIA, the BIA assumed primary responsibility to report surface pollution and problems with producing wells by the various operators in the underground injection control program on the Osage Mineral estate. Complainant and the other two UIC field inspectors were only involved in inspecting injection wells. (Tr. 178-179, 351-352, 366-367). Mr. Edmondson, an environmental specialist with the EPA, stated that the BIA mineral branch was somewhat defensive when the EPA approached them about surface problems because BIA was concerned about the impact of the problems on the oil production and payments to the mineral fund. (Tr. 352, 370). However, due to an increase in citizen complaints involving tank battery pits and spills, the EPA issued a policy statement in May or June of 1994 which instructed the UIC inspectors to observe the leases for potential spills or discharge of oilfield related fluids and to report violations to the BIA office in Pawhuska. (CX 25) (Tr. 98-99, 257). On August 18, 1994, Mr. Sanborn issued a memo instructing all UIC to fax a copy of their reports on pits and other surface problems to the BIA agency offices at Pawhuska and Muskogee because the Muskogee BIA office was responsible for tracking all surface related problems. (CX 24) (Tr. 94-97). Complainant testified that he followed these procedures, although the other two field inspectors did not follow the directions in the memo. (Tr. 98).

During Complainant’s employment with the Tribal Council, Complainant testified that he was never reprimanded or told that he was performing his job improperly. About the time that Complainant started sending his reports to the BIA, Ms. Beasley, Complainant’s

nominal supervisor, started receiving complaints about Complainant from BIA employees. (Tr. 397). Prior to the complaints, Ms. Beasley admitted that there had been no evaluation of Complainant's performance or no complaints about Complainant's performance, and she was satisfied with his work. (Tr. 392-393).

When compared to the other two field inspectors, Complainant meet his quota of inspecting 100 injection wells per month whereas Ms. Beverly LaCrone, the other field inspector who had the same quota, did not meet her quotas. (Tr. 131-133, 171, 213, 273). Further, he reported more potential violations than the other two inspectors. (Tr. 213, 286). During his employment, Complainant sent about 130 special inspection reports over to the BIA Muskogee office. (Tr. 236). Mr. Sanborn testified that in the past some of the EPA field inspectors did not report all the violations. (Tr. 270). However, Mr. Sanborn felt that Complainant was doing a good job and was the best inspector and advised Complainant to keep following the directives issued by Mr. Sanborn and the EPA. (Tr. 213-214, 260, 292). Mr. Edmondson, an EPA employee who supervised the field work, stated that he worked briefly with Complainant and found that his job performance was satisfactory in every way. In fact, Mr. Edmondson commented that Complainant was exceptional and was looked upon as an environmentalist; however, he asserted that the performance of the other two inspectors could have been better because they overlooked things. (Tr. 341-342, 347-348).

In February 1995, Ms. Beasley was contacted by Ms. Rosemary Wood, a member of the Tribal Council, and advised of the complaints about Complainant in the field from both BIA employees and operators. (Tr. 393). Shortly, after the telephone call, in February of 1995, the Tribal Council EPA committee had a meeting to discuss personnel issues including the complaints against Complainant. In addition to Ms. Beasley, the Tribal Council members who attended the meeting were Mr. George Carter, Mr. Charlie Tallchief, Mr. Kenny Bighorse, Sr., Ms. Rosemary Wood, and,

at times, Mr. Ed Red Eagle, Sr., the assistant chief. With regard to the complaints about Complainant, Ms. Beasley testified that the Council members had spoke to BIA employees and a Marmac Resources Company representative as well as with Mr. Neff of R&N Oil Company. During the meeting, the committee called Mr. Paul Yates, an employee of BIA, who reported the statements that Complainant had made in front of him concerning the National Council running all of the contract programs, and that the Tribal Council did not have any authority. (Tr. 452-456).

In March 1995, the Tribal Council EPA committee monthly meeting was held to discuss the overall EPA/UIC program which included discussion of the inadequate number of inspections in comparison to the quotas and about the complaints against Complainant. The meeting consisted of Ms. Beasley, Mr. Sanborn, Ms. Donna Bunn, an administrative person with the EPA in Dallas, and Mr. Kenny Bighorse, Sr. and Ms. Rosemary Wood, two Tribal Council members. Ms. Beasley stated that there was discussion about the harassment complaint filed by Ms. Beverly Lacrone against Complainant and the arguments between the two in the EPA office. (Tr. 458-459). Also, Ms. Beasley stated that they discussed the poor performance of Ms. Lacrone in the number of inspections she performed. (Tr. 459-460).

Mr. Sanborn testified that BIA employees: Mr. Newell Baker, the branch chief of the BIA mineral branch, Mr. Carl Core, a field supervisor for the BIA field men, and the BIA field men, Mr. Robert Harris, Mr. Raymond Lasley, and Mr. Van Bighorse, made routine complaints to him about Complainant being overzealous in performing EPA inspections even though it was part of BIA’s duties to assist Complainant in enforcing the regulations. (Tr. 263-264, 290, 312, 315-316). According to Mr. Sanborn, these complaints were never in writing. (Tr. 266). However, due to the constant comments about Complainant from BIA employees, Mr. Sanborn advised Complainant "to watch his back" because Mr. Sanborn sensed that "something was

building." (Tr. 297). Further, Mr. Edmondson, an EPA employee, testified that complaints from BIA employees about EPA inspectors running over pipes, causing leaks, leaving gates open, and destroying gauges, which they alleged adversely impacted oil production, had been ongoing since 1980. (Tr. 355, 358, 366).

On March 15, 1995, Ms. Beasley received a memorandum from the Tribal Council directing her to inform Complainant that the Tribal Council had fired him.[5] (CX 13) (Tr. 398-399). Ms. Beasley called Complainant to a meeting with her and Mr. Marti Bills, the personnel director for the Osage Nation, and informed Complainant that he was fired. Ms. Beasley testified that she had no choice in the matter because she was not asked to investigate the complaints. (Tr. 399). Later, she testified that she did not have to investigate because she attended several meetings where the Tribal Council investigated the complaints and determined that there was enough evidence to warrant the termination. (Tr. 399, 451-455, 461). However, later, she stated that there was no time to investigate once she received the termination memorandum. (Tr. 508). Complainant was given a termination report which provided that Complainant engaged in serious personal misconduct that brought disrepute to the organization and that he was disloyal to the organization. (CX 14). Ms. Beasley showed Complainant the Tribal Council's termination memorandum. The memorandum involved complaints from Mr. George Neff with R&N Oil Company, Mr. Paul Hopkins with Marmac Resources Company, Mr. Wakon RedCorn on behalf of Mr. Burl Goad, and Mr. Bill Lynn. (CX 13) (Tr. 133-136).

Ms. Beasley told Complainant about the grievance procedure,

---

[5] The memo was dated March 15, 1995, and Ms. Beasley stated that the Tribal Council has a meeting every third Wednesday of the month. (Tr. 418). Official notice is taken that March 15, 1995 was the third Wednesday of March, and that the memo was prepared the day the Tribal Council voted to terminate Complainant.

and that if he was not satisfied with the procedure, he could contact the appropriate administrative agency or appropriate state or federal courts. Subsequently, Complainant filed a notice of grievance with Ms. Beasley and underwent a grievance hearing on April 4, 1995 with Ms. Beasley and Mr. Bills. (Tr. 139-140).

After Complainant's termination, Ms. Beasley testified that she investigated the complaints by speaking to Mr. Hopkins and Mr. Sanborn as part of the grievance process.[6] She also spoke to Mr. Lynn, who stated that his only knowledge of the statements made by Complainant about him were from a BIA employee, Mr. Robert Harris, and that the memorandum was incorrect in its portrayal of the events. She also spoke to Ms. Norma Pinney, the office manager of the UIC program, Mr. Beverly Lacrone and Mr. Andrew Yates, two other field inspectors, and Mr. Wakon RedCorn, a BIA employee, about the complaint from Mr. Burl Goad. Mr. RedCorn indicated that Mr. Goad was intimidated by Complainant due to Complainant's threats of fines and penalties. However, Ms. Beasley admitted that

---

[6] According to Mr. Hopkins, owner of Marmac Resources Company, his company experienced broken gauges which he attributed to field inspectors of EPA Personnel. He had requested Mr. Sanborn give advance notice of inspections and complained that Complainant failed to give advance notice and refused to acknowledge company employees on the premises. Ms. Beasley talked to Mr. Sanborn who told her the inspectors were not required to give advance notice generally and especially not in an emergency situation. Ms. Beasley admitted that the first time Complaint entered the Marmac lease, an emergency situation existed which excused Complainant's failure to give any advance notice. She further conceded that Mr. Hopkins told her that Complainant had only broken one gauge on one occasion. However, later, Ms. Beasley testified that she did not recall her conversation with Mr. Hopkins about whether he alleged that Complainant broke the same gauge or different gauges. Although Mr. Sanborn told her that gauges were always a problem, Ms. Beasley discounted his explanation. (Tr. 473-474). Also, Mr. Hopkins did not give Ms. Beasley the name of any Marmac employees that complained about Complainant's alleged "rude" behavior. (Tr. 406-409, 472). However, Ms. Beasley also testified that she did not recall the specifics of her conversation with Mr. Hopkins. (Tr. 477).

she did not know if Mr. Goad made the statements relayed by Mr. RedCorn, and Mr. RedCorn would not disclose the name of the person who contacted him due to confidentiality. Further, Ms. Beasley stated that Complainant's statements about Mr. Goad's liability was a correct statement of law and was not improper for Complainant to make that statement. She added that she had previously spoken to Mr. Paul Yates about the statements Complainant made to him against the Tribal Council. However, Ms. Beasley did not speak to Mr. Goad or Mr. Neff about their complaints recited in the termination memorandum or question Complainant about his alleged statements. (Tr. 401-410, 414, 464-466, 506-507, 515, 526).

Based on her post termination investigation, Ms. Beasley determined that Complainant's termination was justified based on her discussions with Mr. Hopkins, Ms. Pinney, Ms. Lacrone, Mr. Yates, and Mr. RedCorn because the two reasons that resulted in Complainant's termination called for immediate termination. Further, she reasoned that Complainant could have been terminated on other grounds because she discovered other reasons for disciplinary action after she starting investigating; however, she stated that the disloyalty was the main basis for his termination. (Tr. 473, 475-477). Ms. Beasley later testified that she fired Complainant for additional reasons other than those provided for in the memorandum due to information she had obtained independently and such reasons are based on the statements by Ms. Lacrone and Mr. Yates.[7] (Tr. 488-489). Ms. Beasley stated that she took the

---

[7] When asked whether Complainant was made aware of the other reasons for terminating him for purposes of refuting those reasons in the grievance hearing, Ms. Beasley stated that Complainant was aware of Mr. Yates' statements and refuted the statements at an earlier meeting. (Tr. 524-525). However, when asked how an employee was suppose to disprove claims of being too political if he did not know all the reasons, Ms. Beasley admitted that it was unfair. (Tr. 526). Ms. Beasley did not recall advising Complainant about the complaints from Ms. Lacrone. (Tr. 527).

independent reasons into consideration along with the evidence provided by the Tribal Council in upholding the termination decision. (Tr. 525). Ms. Beasley sent a letter to Complainant dated April 6, 1995 in which she reported that she upheld Complainant's termination.

Ms. Beasley stated that Complainant was not fired for reporting too many EPA violations, and that neither the Tribal Council nor the BIA commented that Complainant was filing too many environmental reports. (Tr. 491-492, 499). Thus, she reasoned that his environmental reports were not a factor in the decision to terminate Complainant. (Tr. 499). Ms. Beasley suggested that Complainant could appeal to the Tribal Council EPA Committee if he desired.[8] (Tr. 143, 419) (CX 16). Ms. Beasley admitted that Complainant would have had to appeal to the same people on the EPA Committee that terminated him. After the letter from Ms. Beasley, Complainant asked the National Council to appoint a Grievance Committee but no committee was appointed.[9] Also, Complainant filed an action in the Osage Tribal Court, and the Tribal Council filed an action in the "CRF Court" to enjoin the Tribal Court from hearing the case. (Tr. 419-420, 425, 440).

The first complaint about Complainant's activities discussed

---

[8] Ms. Beasley stated that the next appeal process in the Personnel Manual was to appeal to the federal programs committee; however, because that committee no longer existed, and the only federal program administered by the Tribal Council now was the EPA/UIC program, Ms. Beasley interpreted the Manual as requiring an appeal to the Tribal Council EPA committee. (Tr. 480-482).

[9] Ms. Beasley asserted that the President of the Osage Nation refused to appoint a committee to hear the appeal because it would interfere with operations pertaining to the mineral estate which was under the jurisdiction of the Tribal Council. (Tr. 484).

in the Tribal Council's termination memorandum concerned a complaint from Mr. George Neff, a shareholder in the Osage Mineral estate and a producer as well as owner and operator of R&N Oil Company, who reported that Complainant's behavior was rude and disrespectful towards him and the Tribal Council. According to Mr. Neff, Complainant told him that "he felt the power of the mineral trust might be weakening, even to the degree of extinction" and insinuated that the demise of the mineral estate was due primarily to the ignorance of the people vested with the power to oversee the estate." (CX 13). Because Complainant was employed by the Tribal Council, "the people vested with the power to oversee the estate," the Tribal Council asserted that Complainant's statements were disloyal to his employer and to the organization for which he was employed. (CX 13).

Mr. Neff testified that in November of 1994 after an inspection by Complainant, he was talking to Complainant and Mr. Robert Harris, a field inspector for the BIA. Mr. Neff expressed opinions about the powers of the EPA and its future, and that the EPA was creating undue hardships and some of the regulations were unreasonable and incorrect. According to Mr. Neff, Complainant expressed opinions about what would happen to the Tribal Council and the mineral estate. Specifically, Complainant told him that the "EPA powers were probably going to increase and the powers of the mineral estate of the Osage Tribe were going to reach extinction," and that the "members of the Tribal Council did not have the intelligence to operate the mineral estate of the Osage people." (Tr. 554). However, Mr. Neff testified later that Complainant specifically stated that the "demise of the mineral estate was due primarily to the ignorance of the people vested with the power to oversee the estate." (Tr. 571). At the time of their conversation, Mr. Neff was under the impression that Complainant was an employee of the EPA. However, Mr. Neff did not report the incident to any member of the Tribal Council. Mr. Neff wrote the letter to the Tribal Council in response to a request from a couple

of members from the Tribal Council, Mr. Carter and Mr. Tallchief, who contacted him to discuss the incident because the Tribal Council told him they were trying to fire Complainant because he was no longer carrying out the intent and purpose of Tribal contract and was not being loyal to his employers. (Tr. 553-568, 571, 574) (CX 13).

According to Mr. Neff, the reference to Complainant's "reign of terror" contained in Mr. Neff's letter to the Tribal Council did not refer to Complainant's enforcement activities. (Tr. 569). Instead, it referred to Complainant's comments to Mr. Neff about the possible dismemberment of the Tribal Council's power and authority as the minerals contained in the Osage Mineral estate continued to deplete. Mr. Neff testified that he believed that Complainant should not tell people about the lessening of the Tribal Council's power because that was a "scary thought." (Tr. 569). Mr. Neff added that he never had any problems with Complainant's inspections other than the one incident referred to in the letter where he asserted that Complainant was "a little on edge or maybe rude" because he just jumped out of his pickup, put on his jacket, and began the inspection without saying hello or stating what he was inspecting. (Tr. 569). Mr. Neff interpreted this conduct as being rude because he started the inspection without introducing himself, but he stated that later Complainant did speak with him. He admitted that Complainant had never spoken rudely to him and did not have any "run in" with Complainant as suggested by the letter. (Tr. 572). Mr. Neff clarified that this incident of "rudeness" happened on another day from the day Complainant expressed his opinions about the Tribal Council. (Tr. 569-573).

Complainant testified that he inspected R&N Oil Company's leases at the request of the EPA because the wells on the leases had problems previously. (Tr. 65-67). A fact sheet was introduced into evidence which reveals all the violations committed by R&N Oil

Company. (CX 4, 9) (Tr. 91-93). Mr. Sanborn confirmed that R&N Oil Company did not operate its leases within the parameters established by the EPA, and a number of R&N Oil Company's violations were reported by Complainant. (Tr. 264-265, 281). When Complainant inspected Mr. Neff's wells, he stated that he saw Mr. Neff about four or five times in which they engaged in general conversation such as Complainant notifying him that he was on the site and notified Mr. Neff of any problems. (Tr. 72-73).

On November 8, 1994, Mr. Sanborn contacted Complainant and asked him to meet at a R&N Oil Company lease called the Hopper & Osage lease and to bring a video camera because he had an anonymous call that there was a oil spill at that lease. Complainant and Mr. Sanborn found a significant oil spill on the lease and subsequently performed a lease inspection. Complainant discovered an injection well on the site, but the BIA records indicated that there was only a producer well on the site. Thus, there was an illegal injection well that was operating on the lease. On November 9, 1994, Complainant returned to the lease to meet Mr. Sanborn, Mr. Neff, and Mr. Harris, a BIA field man. Complainant stated that Mr. Sanborn did all of the talking about the environmental violations and informed Mr. Neff of certain corrective actions that had to be taken. About two weeks later, Mr. Sanborn instructed Complainant to verify that the corrective actions had been taken on the lease by inspecting the lease. (Tr. 73-81).

Complainant contacted Mr. Neff and meet Mr. Neff the next day at the lease. Complainant testified that Mr. Neff appeared to be upset. During the course of Complainant's inspection, Mr. Neff started complaining about the EPA and questioned Complainant about the new Osage National Council. Complainant responded that he believed that the National Council would ultimately assume responsibility for the environmental program because of certain administrative changes. According to Complainant, he expressed his opinion to Mr. Neff that the new National Council may be taking

over the environmental program and that there may be new requirements and new personnel. However, Complainant asserted that he did not make any disparaging statements about the Tribal Council. As Complainant was about to the leave the lease, he testified that Mr. Neff told him that he did not have anything against Complainant or Ms. Pinney, the officer manager of the UIC program, because they were just doing their job, but he was upset with the EPA in Dallas and Washington. Complainant contended that he was glad to hear that because he was intimidated by Mr. Neff on that day especially. (Tr. 81-87, 195). Complainant further testified that he was never rude to Mr. Neff. (Tr. 179).

During the inspection Complainant found that R&N Oil Company had taken some corrective measures but not all the measures that were required. (Tr. 174-175). As a result of that inspection, an administrative order was issued on December 7, 1994 to cease injection and remove injection pipelines from the well site on the Hopper & Osage lease due to noncompliance with the previous administrative order. (CX 6). Further, on March 16, 1995, a public notice was issued for a violation on well 7 at the Hopper & Osage lease operated by R&N Oil Company. (CX 7) (Tr. 89). In addition, there were other violations concerning leases operated by R&N Oil Company. On April 27, 1995, a public notice was issued by the EPA regional office for alleged violations on well 80 concerning the operation of injection wells without mechanical integrity and failure to comply with the final administrative order. (CX 8) (Tr. 88).

The second complaint in the Tribal Council's termination memorandum was from Mr. Paul Hopkins, superintendent of operations for Marmac Resources Company. Mr. Hopkins complained to Mr. Sanborn[10] that the company and its employees had ongoing problems

---

[10] In a meeting with Mr. Paul Yates and Mr. Sanborn, Mr. Hopkins was complaining about not receiving advance notice from

with Complainant such as Complainant being rude to employees by refusing to acknowledge them when he entered the property, failing to notify the company in advance of his visits, failing to notify the company when he entered the property of the company, and failing to state the purpose of his visit. Further, Mr. Hopkins alleged that Complainant installed pressure gauges the wrong way and broke gauges on two occasions. (CX 13). Mr. Hopkins stated that he did not speak with any Tribal Council members about the problems, but he spoke to Mr. Sanborn, who stated that he would speak to Complainant about the problems. Mr. Hopkins sent a letter to Mr. Sanborn to document the problems. At that time, Mr. Hopkins testified that he thought Complainant was an EPA employee. (Tr. 588, 595). Also, Mr. Hopkins called Mr. Carl Core to notify the BIA about his problems and also sent a copy of the letter to the BIA. At the request of Mr. Core, he sent a copy of the letter to Ms. Rosemary Wood, a member of the Tribal Council, to document all correspondence. (Tr. 595-596).

According to Mr. Hopkins, the Marmac employees told him that the gauges on some of the injection wells were no longer operational and inaccurate and were turned around and attributed the problems to Complainant because they had seen him at the injection wells prior to detecting the problems. He reasoned that the gauges were broken because the pressure would be a different amount from the previous day, and that the gauges were new and expensive. He stated that an experienced oil man was able to install a gauge without breaking it. Mr. Hopkins stated that the company did not have problems with the other inspectors breaking gauges. However, Mr. Hopkins admitted that he nor any of Marmac's employees ever actually saw Complainant break a gauge. Further, he complained that he received reports from Mr. Sanborn's office that

---

the inspectors, and both Mr. Yates and Mr. Sanborn suggested that Mr. Hopkins put his complaint in writing. (Tr. 312-313). Mr. Sanborn explained that he encouraged all operators to file a complaint or concern in writing. (Tr. 265-266).

a gauge was not operational when in fact it was operational. Finally, he stated that Complainant would leave gauges facing the wrong direction, and the employees could not see the gauge from the road when they drove by to check them. (Tr. 580-584, 590, 594).

Complainant testified that he removed the existing gauges on the injection wells in order to measure the pressure of the well with his own gauges because the majority of gauges on the wells were defective. When he removed a gauge, he reasoned that he had to make sure all valves were closed so he could safely remove the gauge, and he would use a wrench to loosen the valve. He testified that he was told not to force any valves or connections because the EPA did not want him to break any equipment that belonged to an operator. Complainant stated that he discussed the gauge problem with Mr. Sanborn and Mr. Ron Van Wyke, an enforcement officer in Dallas, and told them that some of the gauges were broken after he screwed the gauge back on the valve due to pressure in the lines. When this occurred, he told the operators that the gauge was broken. In addition, Complainant added that some of the other inspectors had also broken gauges, and Mr. Edmondson, who was an inspector for the EPA, agreed that gauges do break due to the pressure in the lines. Mr. Sanborn confirmed Complainant's testimony that on occasion a gauge will break when it is replaced on the valve due to trapped fluid between the valve and the gauge. (Tr. 61-64, 180, 214-216, 261, 364).

Complainant further explained that after removing a gauge, the gauge did not always go back in the same direction. He explained that he had to tighten the gauge to prevent the gauge from being blown off by high pressure, but he could not tighten the gauge too much because he could strip the threads. Thus, he stated that he could not always turn the gauge to face the road. (Tr. 61-64, 180, 214-216). Complainant added that he never intentionally damaged any equipment. (Tr. 179). Further, Complainant testified that Mr. Van Wyke told Complainant that there was nothing in the EPA

policies that required the inspector to turn the gauge back in any particular direction. (Tr. 215).

Mr. Hopkins claimed that field inspectors were required to give notice of his presence upon entering the property, and that Complainant did not give notice of his entry except on December 20, 1994. Mr. Hopkins stated that he wanted notice of Complainant's presence so he could send an employee with Complainant during the inspection to prevent the gauges from being broken. (Tr. 584-587). However, when inspecting sites generally, Complainant stated that he identified himself to the people on the sites upon his arrival. He further testified that he was not required to give advance notice that he would be inspecting the site because the EPA did not want the operators to be able to alleviate potential problems or violations before the inspectors reached the site. Further, he asserted that the other inspectors did not give advance notice either. (Tr. 61-64, 180, 214-217). Mr. Sanborn explained that the law did not require advance notice, however, if an operator requested advance notice of an inspection, the EPA would try to comply with request unless there was an emergency spill or leak such as in the spill regarding the Pinney property. (Tr. 271-272).

Mr. Hopkins alleged that he met Complainant on the Perishing lease on December 20, 1994 concerning a leak that affected the Pinney Property. According to Mr. Hopkins, Complainant told him he had inspected the property the night before and located a leak on a Marmac pipeline. Complainant asked Mr. Hopkins if his employees were "deaf and blind" because he could hear the water spraying from the leak from a distance, and the leak was easily detectable in daylight. In response, Mr. Hopkins told Complainant that his employees were not deaf and blind, and that if they had heard the leak, they would have repaired it so the leak must have occurred after regular working hours. Mr. Hopkins admitted that he did not see or hear the leak. Next, Complainant told Mr. Hopkins that he was gong to perform some tests, and that was the last conversation

he had with Complainant. (Tr. 578-579, 589-590, 602-603). With regard to the allegations that Complainant was rude to Marmac employees, Mr. Hopkins asserted that Mr. Jim Snively, a Marmac employee, was present when Complainant made the deaf and blind remark. Also, Mr. Hopkins stated that Complainant spoke rudely to Mr. Orville Henley, another Marmac employee, and offended him when he inspected the property on December 19, 1994. (Tr. 597, 600-601).

Mr. Henley, a mechanic for Marmac, testified that he saw Mr. Dale Pinney on December 19, 1994 on the Perishing lease about four o'clock when he approached the tank battery that Mr. Henley and Mr. Snively were working on and informed them that they had an extremely bad saltwater leak which was affecting his property, and he asked them to alleviate the problem. Mr. Henley and Mr. Snively went to check on the leak about four thirty or five o'clock by tasting the water on Mr. Pinney's property and discovered salt in the water. He then went to the Perishing lease and tasted the water but did not detect salt; however, he told Mr. Pinney that they would take care of the problem. Mr. Pinney informed he had called the EPA office, and Complainant was coming to investigate the problem. After inspecting other areas, Mr. Henley met Complainant about seven o'clock at the Perishing tank battery and told Complainant that he checked the water but suggested that Complainant run tests on the water. Complainant told Mr. Henley that he was writing a report on the water pump seepage, and Mr. Henley told Complainant that Mr. Sanborn indicated that it was alright. Complainant indicated that it was not alright, and the seepage problem needed to be alleviated, and he would see that it was cured. Mr. Henley felt that Complainant was very rude when he indicated that he would make sure the problem was alleviated because he raised his voice, and Complainant should not have reported the problem to him but rather to Mr. Hopkins, his supervisor. (Tr. 606-611, 618-619, 624-625, 629).

Mr. Henley testified that Complainant and Mr. Pinney left to inspect the property. (Tr. 611-612). Mr. Henley went home and got a call later from Mr. Snively that Complainant had found a leak. Mr. Henley went to the lease and helped Mr. Snively repair the leak which he opined was not leaking into the creek on Mr. Pinney's property. Mr. Henley stated that he could hear the hissing sound from the leak in the line once he got close to the leak. Mr. Henley reasoned that sometimes it was difficult to hear the leaks because the windows were up in the Marmac employee's trucks. Further, he stated that the leak covered a pretty good area, but he stated that in order to see the leak, he had to get close to it, and it was only visible with a flashlight. (Tr. 611-614, 620-621, 631).

Mr. Henley told Mr. Hopkins about Complainant's rudeness the next day. Also, Mr. Henley told Mr. Carl Core, a BIA employee, about Complainant's rude behavior when Mr. Core called him to check on the leak. Mr. Yates, a BIA employee, and Mr. Kenneth Bighorse, Sr. and Ms. Rosemary Woods, two Tribal Council members, approached Mr. Henley about Complainant's behavior and inquired as to the details of the conversation. (Tr. 606-611, 618-619, 624-625, 629).

On December 19, 1994, Complainant testified that he inspected the Perishing lease operated by Marmac Resources Company for the first time at the request of Ms. Pinney, the UIC program Office Manager, because her husband had found some dead fish and frogs in a stream on their property which was located north of the Marmac Perishing lease. Complainant found several dead frogs and took salinity meter readings on the Pinney property, which was adjacent to the lease, and meet Mr. Henley, a Marmac employee. Complainant told Mr. Henley who he was and that he was there due to a complaint about the lease. Mr. Henley told Complainant that there was a leak but that it was not due to the Marmac lease. Complainant told Mr. Henley that he had to perform an inspection of the lease anyway. Complainant testified that he was suspicious because there had been

several complaints previously about the Marmac lease. He inspected the lease with Mr. Pinney and heard the noise of a high pressure leak from an injection line. He took pictures of the leak and took water samples, and Mr. Pinney took some video. (Tr. 99-103, 184).

The next morning, Complainant asked Mr. Sanborn to contact BIA about the leak, and Mr. Sanborn told him to go back to the Marmac lease and finish the inspection. Complainant meet Mr. Hopkins at the lease site and told him about the leak. Mr. Hopkins told Complainant that they found the pinhole leak and that there was not much water that had leaked, and it only went a few feet down the side of the hill. However, Complainant told Mr. Hopkins that it was a significant leak because he had oil and saltwater mix all over his truck from driving on the side of the hill the night before and that he had to finish the inspection by taking water samples from the stream that ran through the lease. Mr. Hopkins did not object to the inspection and, in fact, told Complainant about the other leaks they had on the lease site. (Tr. 103-108, 187-189).

Complainant sent the water samples to Oklahoma State University, and the results indicated that there was significant saltwater in the stream. Mr. Van Wyke, an enforcement officer with the regional EPA office, instructed Complainant to perform a lease inspection. As a result, Complainant inspected about 50 wells on the lease and did not have any problems with any of the Marmac employees. In fact, Complainant indicated that he saw Mr. Hopkins one more time, and Mr. Hopkins showed him how Marmac was cleaning up its operations. (Tr. 126-127). Complainant stated that he did not have any tense conversations with anyone from Marmac and was not rude to anyone, in fact, the only two Marmac employees that Complainant had conversations with were Mr. Hopkins and Mr. Henley. (Tr. 218-219). After the inspection of the Marmac lease, Complainant prepared a report dated December 21, 1994. (CX 11) (Tr. 106-108). As a result of the report, Marmac was under an

administrative order, and Mr. Sanborn testified that Marmac is still under investigation. (Tr. 283).

After receiving the complaint from Marmac, Mr. Sanborn called Mr. Hopkins to discuss the complaint, and Mr. Hopkins indicated that he had no proof that Complainant had performed any of the activities listed in the letter, and that the letter was based on assumptions. In fact, during the telephone conversation, Mr. Hopkins did not mention anything about Complainant's allegedly rude behavior toward Marmac employees. Because Mr. Sanborn had not heard any other complaints about Complainant being rude, and the complaint was out of character with Complainant, he thought the rude complaint was unsubstantiated. (Tr. 261-262, 295-296). Thus, Mr. Sanborn concluded that the complaint was not valid, and that the letter was in retaliation for Complainant's inspections on the lease which were conducted at the request of Mr. Sanborn. (Tr. 294, 297).

The third complaint in the Tribal Council's termination memorandum was from Mr. Wakon RedCorn, a BIA Land Operations Officer, regarding an anonymous call that he received from a "friend" of Mr. Burl Goad, a seventy nine year old who holds a lease on the Osage Land. The caller expressed his concern that Mr. Goad had been confronted and frightened by Complainant. According to the caller, Complainant told Mr. Goad that he was responsible for the trash dumped in a ditch on his land which would make him subject to fines and jail and losing his pasture lease. Mr. RedCorn contacted Mr. Goad by phone, and Mr. Goad told him that he did not want to go to jail because he did not have the money to pay fines. In the memorandum, the Tribal Council asserted that Complainant worked for the UIC program not a solid waste program, and that Mr. Goad did not generate the solid waste which is a factor to be considered by the EPA/Tribal representative. Thus, the Tribal Council asserted that Complainant's behavior was not appropriate or in keeping with the acceptable standards of behavior

generally associated with employment. Further, the definition of abusive language from any employee includes any language which frightens older citizens with threats of fines, jail, or discontinuation of pasture leases. Accordingly, the Tribal Council reasoned that Complainant's behavior was counterproductive to the Tribe's organizational and environmental goals. (CX 13).

With regard to the Mr. Goad incident, Complainant testified that he was asked by Mr. Kenny Bighorse, Jr., an employee with the land operations office of the BIA in Pawhuska, to investigate a dump in a surface lease near Barnsdall because there was some problems previously about illegal dumping in Osage County due to the lack of a solid waste program. Complainant spoke to Mr. Gus Chavarria, who is head of the UIC permits section in the Dallas regional EPA office, about the request, and Mr. Chavarria told Complainant to treat the request as a citizen's complaint and investigate the lease because the dump could eventually affect the groundwater. After examining the dump, Complainant was approached by an elderly man, Mr. Burl Goad. Complainant testified that he introduced himself and reported why he was on the property. Complainant asked Mr. Goad if it was his dump, and Mr. Goad indicated that he leased the land. Mr. Goad told Complainant that he did not allow anyone to dump on the land, but Complainant commented that some of the trash looked pretty fresh and suggested that Mr. Goad could be liable for other people dumping on his property. Complainant asserted that he did not make any comments to Mr. Goad about fines, and that his conversation was very short. (Tr. 127-131).

The last complaint recited in the Tribal Council's termination memorandum is the allegation that Complainant confronted Mr. Bill Lynn with the accusation that Mr. Lynn was "advocating running full out in production with no controls for protecting the environment" in front of another producer and a BIA field man. The Tribal Council construed this alleged conduct as not in keeping with the

acceptable standard of behavior associated with Complainant's employment which brought disrepute to the tribal organization. (CX 13).

Although Complainant admitted that he had conversations with Mr. Lynn, he denied making the statements listed in the memorandum. (Tr. 136-138). Further, Mr. Lynn testified that Complainant did not make the accusations to him personally; however, he was told by Mr. Harris, a BIA field man, that Complainant had made such statements to other people. Mr. Harris told Mr. Lynn that the former took up for Mr. Lynn because he did not like Complainant. Mr. Lynn spoke to Ms. Rosemary Wood, a Tribal Council member, about Complainant's accusations at a EPA meeting, and Ms. Wood asked Mr. Lynn if they could use his name. Mr. Lynn assumed that Ms. Wood intended to take action against Complainant, but he was never contacted again to verify the accusations. Further, he asserted that was the only conversation he had with anyone about the accusations. Mr. Lynn testified that he had no direct knowledge of whether the accusations were ever made by Complainant. (Tr. 245-253).

DISCUSSION

Initially, the complainant, in an environmental whistleblower case, bears the burden of establishing a prima facie case of discrimination by a preponderance of the evidence. A prima facie case is established when the complainant demonstrates four elements:

(1) the employer is governed by the applicable Act;
(2) the employee engaged in an protected activity as defined by the Act;
(3) the employer was aware of the conduct;
(4) the employer took some adverse action against the employee; and

(5) a nexus exists between the protected activity and the adverse action.

See Kahn v. United States Secretary of Labor, 64 F.3d 271 (7th Cir. 1995); Mangus v. Director, OWCP, 882 F.2d 1527 (10th Cir. 1989); West v. Systems Applications Int'l, 94-CAA-15 (Sec'y Decision and Order on Remand April 19, 1995); Sellers v. Tennessee Valley Authority, 90-ERA-14 (Sec'y April 18, 1991) Decisions of the OALJ and OAA, Vol. 5, No. 2, March-April 1991, p. 165-166. See generally Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-256 (1981).

Once the complainant has established his prima facie case, the employer has the burden of presenting evidence that the alleged adverse action was motivated by legitimate, nondiscriminatory reasons. Mangus v. Director, OWCP, 882 F.2d 1527 (10th Cir. 1989). See also Lockert v. United States Dept. of Labor, 867 F.2d 513, 519 n.2 (9th Cir. 1990). If the employer articulates a legitimate, nondiscriminatory reason for his action, the complainant must establish that the employer's proffered reason was not its true reason, but rather, a pretext. Mangus v. Director, OWCP, 882 F.2d 1527 (10th Cir. 1989).

First, Complainant must prove that the Act under which he seeks protection is applicable to the Tribal Council. In 1982, the underground injection control program regulation was established pursuant to the Safe Drinking Water Act of 1974. Section 1401, 42 U.S.C. §§300f-300j-10 (1982). Although the Act did not expressly state that it applied to Indian lands, the Tenth Circuit Court of Appeals determined that the Act did apply to Indian lands such as the Osage Indian Mineral Reserve. See Phillips Petroleum Co. v. Unites States E.P.A., 803 F.2d 545, 555-556 (10th Cir. 1986). The Court recognized that the application of the Act to Indian lands can be rescinded where a tribe raises a specific right under a treaty or statute which is in conflict with application of the Act;

however, the Court reasoned that no such right under a statue or treaty had been demonstrated, and in fact, the Osage Indian Tribe supported the EPA's adoption of the injection program on the reserve. Id. at 556.

Further, in 1986, Congress amended Part E of the Safe Water Drinking Act by adding Section 1451 which specifically authorizes the Administrator of the EPA to "treat Indian tribes as States under this title." Safe Drinking Water Amendments of 1986, Pub. L. No. 99-339, §302, 100 Stat. 642, 665-66 (1986). Thus, the Act now expressly states that the it applies to Indian lands. In addition, the Court in Phillips noted that the 1986 amendments provided detailed guidance as to the mechanics and application of the SDWA where Indian tribes were concerned which was the first time Indian tribes as distinguished from Indian lands were included in the Act. Id. at 557. Specifically, the Act provides that Indian tribes are to be treated as a municipality or a State for purposes of the Act. 42 U.S.C. § 300f-10 & 300j-11 (1986). As a result of the above, there is no question that the Act applies to Tribal Council as the Indian tribe that is responsible for the Indian lands. This is dispositive of the argument that the Council is immune from liability in this case due to the doctrine of sovereign immunity.[11]

---

[11] Respondent argued that requirements enunciated in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978), regarding sovereign immunity applied in this case. However, Santa Clara involves an Indian's tribe right to self government under the Indian Civil Rights Act. This case is distinguished on the basis that Complainant alleges that he was fired for reporting federal violations under a federal statute to which Indian Tribes and Indian lands are expressly subject to the same as any other citizens. Further, the federal statute, SDWA, specifically includes Indian tribes and lands unlike the Age Discrimination Employment Act discussed in Equal Employment Opportunity Comm'n. v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989), and the Occupational Safety and Health Act discussed in Donovan v. Navajo Forest Products Indus., 692 F.2d 709 (10th Cir. 1982).

Further, the Tribal Council expressly consented to allow Complainant to file suit and present his case before an administrative agency or the appropriate federal or state courts which waived the Tribal Council's right to claim protection under the doctrine of sovereign immunity. As argued by Complainant, when the Osage Tribe began contracting with the United States in 1979, the Tribal Council adopted the policies and procedures which are set out in the Osage National Federal Programs Policies and Procedures Manual which is still in force. (CX 30). The Tribal Council reported that the Manual was to assure compliance with the Equal Opportunity Act as well as State and Federal Employment laws. (CX 18, 30). The Tribal Council admitted that the Manual applied in this case in its memorandum to Ms. Beasley, Complainant's nominal supervisor, in which the Tribal Council recommended that Complainant be terminated. (CX 13). The Manual has a provision that allows employees to file a claim in the appropriate administrative agency or before the appropriate federal or state court. (CX 30 p. 31, 34). Therefore, the Tribal Council waived sovereign immunity by granting authority in the Manual for Complainant to file a claim with the appropriate administrative agency, in this case, the United States Department of Labor. Consequently, there is no question that the Act which includes that employee protection provision, applies to the Tribal Council.

Finally, in its post hearing brief, the Tribal Council asserts a primary jurisdiction argument that Complainant was required to exhaust all of his administrative remedies before filing a federal or state claim. This contention is without merit. In Greenwald v. City of North Miami Beach, Fla., 587 F.2d 779 (5th Cir. 1979), the United States Fifth Circuit Court of Appeals held that the Safe Drinking Water Act does not require exhaustion of state or local remedies prior to filing a complaint with the Secretary of Labor under the whistleblower provisions, and that the remedy provided by the Safe Drinking Water Act is entirely independent of any local remedies. As a result, Complainant was not required to exhaust all

of his administrative remedies before he filed a claim with the Department of Labor, and in fact, he had to file his claim with the Department of Labor thirty days after he was terminated according to the regulations. (Tr. 22-24).

Second, Complainant must establish that he engaged in protected activity. The primary purpose of the employee protection provisions are to ensure that violations of the act are reported. Marshall v. Intermountain Electric Co., 614 F.2d 260, 262 (10th Cir. 1980). To constitute protected activity, "the employee's complaints must be grounded on the conditions constituting reasonable perceived violations of the environmental laws. Minard v. Nerceo Delmar Co., 92-SDW-1 (Sec'y January 25, 1994 slip op. at 8). Although he was an employee of the Tribal Council, Complainant worked under the direction of the EPA. His job duties as an field inspector consisted of performing mechanical integrity inspections of sites associated with the Osage UIC program suggested by the EPA and making inspection reports concerning violations of the environmental regulations with the EPA. (Tr. 54-56, 60-61, 66, 207) (CX 3). Thus, Complainant's inspection reports were based on reasonable perceived violations of environmental laws in accordance with Minard. 92-SDW-1. The fact that an employee reports safety violations in the course of his regular duties does not remove that activity from categorization as protected activity. Japson v. Omega Nuclear Diagnostics, 93-ERA-54 (Sec'y Aug. 21, 1995). Accordingly, Complainant was engaged in protected activity as part of his job duties when he filed his inspection reports concerning violations of environmental regulations with the EPA, a federal agency, that could initiate enforcement activity against the oil operators on the Osage Mineral Reserve who violated the regulations.

Third, Complainant must establish that the Tribal Council knew that he had engaged in protected activity. The Tribal Council was aware of Complainant's contacts with the EPA and the filing of his

reports containing violations of the oil operators on the Osage Mineral Reserve because these activities were part of his job duties as a field inspector of the UIC program with the Tribal Council. Moreover, each of the incidents reported in the Tribal Council's termination memorandum related to one or more protected activities engaged in by Complainant. Thus, the Tribal Council clearly had knowledge that Complainant was engaged in protected activities.

Fourth, Complainant must prove that the Tribal Council took some adverse action against him as the result of his protected activities. Complainant alleges that the adverse action against him was his termination. This clearly constitutes adverse action. See Assistant Secretary & Brown v. Besco Steel Supply, 93-STA-30 (Sec'y January 24, 1995).

Finally, Complainant must establish that a nexus exists between his protected activities and the adverse action. Complainant may prove the causal link by producing evidence which raises a "reasonable inference" the adverse action was the result of his participation in protected activities. See Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir. 1993); Etachason v. Carry Companies of Illinois, 92-STA-12 (Sec'y Mar. 20, 1995).

Complainant contends that he was unlawfully discharged because of his protected activities of filing environmental violation reports on operators on the Osage Mineral Reserve which would adversely affect production of the tribal mineral estate and thereby reduce the royalty payments from the estate. Both Mr. Sanborn and Mr. Edmondson testified that the Tribal Council did not want the environmental regulations interfering with the oil production on the estate. Further, one of the primary functions of the Tribal Council was to protect and exploit the oil and gas productions for the tribal mineral reserve. Mr. Neff testified that the Tribal Council told him that Complaint's activities were

not consistent with the intent and purpose of the tribal contract.

The intent and purpose of the tribal contract was evidenced by the BIA mineral branch’s activities of not reporting all of the violations in an effort to maximize oil production. The violation reports for surface problems filed by Complainant and the other field inspectors were contrary to the surface reports filed by BIA employees who examined the same site shortly before the UIC field inspectors. Mr. Sanborn asserted that the BIA mineral branch was not performing up to their full potential because there was some laxity in reporting violations. Further, Mr. Barker, the head of the BIA mineral branch, told Mr. Edmondson told that the Tribal Council "threatened to run him off" if oil production was not maintained. (Tr. 377). In fact, Mr. Harris, a BIA field man, suggested to Complainant to look the other way and not to report activities that would stop production. (Tr. 201, 220). It appears that the BIA mineral branch and the Tribal Council had a very close working relationship and cooperated to insure mineral production was maximized.

The filing of reports by Complainant of violations of the regulations could and often did lead to initiation of enforcement activity by the EPA of oil operators on the mineral reserve. In some cases such as on the Marmac and R&N Oil leases, the mineral production and royalty payments from the mineral estate could be adversely affected by such reports in opposition to the goals of the Tribal Council. Further, Mr. Sanborn confirmed that Complainant’s reports of EPA violations could result in diminished oil production due to shutting down of production to correct EPA violations. Thus, there is a reasonable inference that Complainant’s protected activities were perceived by the Tribal Council as a threat to oil production of the mineral estate and resulted in his termination because if he was no longer working and issuing violation reports on the operators of the mineral reserve,

then the oil production on the mineral estate would not be affected, and the goals of the Tribal Council would remain intact.

Further, Complainant alleges that the adverse action was due to his protected activities because of the temporal proximity between the two activities. The causal connection may be proved circumstantially by proof that the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive. Rath v. Selection Research, Inc., 978 F.2d 1087, 1090 (8th Cir. 1992). A finding that adverse action closely followed the protected activity gives rise to a reasonable presumption that the protected activity caused the adverse action.

Complainant asserts that the temporal proximity between his protected activities and the adverse action is evidenced in the following facts. Although the BIA was primarily responsible for reporting surface pollution, in June and August of 1994, the EPA inspectors were directed to also inspect for surface problems and to report such problems to the Muskogee area office of the BIA. In November and December of 1994, Complainant inspected leases operated by R&N Oil Company and Marmac Resources where he found and reported violations of the EPA regulations in both leases. In February of 1995, Ms. Wood, a member of the Tribal Council, reported to Ms. Beasley, Complainant's nominal supervisor, that the Tribal Council had received complaints from two or three operators as well as from BIA employees about Complainant. Ms. Beasley testified that she did not start receiving complaints about Complainant until he was directed to send a copy of his reports to the BIA office. About the same time, Ms. Beasley told Complainant that she was receiving complaints from the Tribal Council that he was harassing the oil operators and performing unauthorized inspections. Ms. Beasley asked the Tribal Council to submit written complaints to her. Instead, she received the Tribal Council's termination memorandum. (Tr. 398) (CX 13).

Based on the above, the evidence establishes a temporal proximity between Complainant's reports being sent to the BIA office, the onset of complaints from the BIA and the later complaints from oil operators and other citizens about Complainant, and his subsequent termination all of which occurred over approximately a seven month period. Because the adverse action, the discharge, closely followed Complainant's protected activities of conscientiously reporting violations of SDWA, there is a reasonable presumption that the protected activities caused the adverse action. It is noteworthy that prior to Complainant sending his reports to the BIA office, there had been no complaints about him or his job duties in the previous six months that he worked as a field inspector for the UIC program. This circumstance alone establishes the inference of a retaliatory motive, especially in light of the fact that both Mr. Sanborn and Mr. Edmondson, the EPA personnel that worked with Complainant, both considered Complainant to be an excellent inspector who performed his job duties by the book. Indeed, they considered Complainant to be the best field inspector employed by the Tribal Council. Even Ms. Beasley stated that she was satisfied with Complaint's work performance. Thus, Complainant has shown a reasonable inference that the adverse action was the result of his protected activities.

Since Complainant has established a prima facie case of discrimination, the burden shifts to his employer, the Tribal Council, to present evidence that the alleged adverse action was motivated by legitimate, non discriminatory reasons. See Mangus v. Director, OWCP, 882 F.2d 1527 (10th Cir. 1989); Varnadore v. Oak Ridge Nat'l Lab., 92-CAA-2, 5 and 93-CAA-1 (Sec'y Jan. 26, 1996). The employer need not persuade the factfinder that it was actually motivated by the proffered reasons, but it is sufficient if the employer's evidence raises a genuine issue of fact as to whether it discriminated against the complainant. To accomplish this, the employer must clearly set forth, through the introduction of evidence, the reasons for their adverse employment action. Texas

Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-256 (1981).

It is first argued on behalf of the Tribal Council that the reasons for Complainant's termination are those contained in the Tribal Council's March 15, 1995 memorandum to Ms. Beasley directing her to inform Complainant of the Council's decision to terminate his employment immediately. (CX 13). It is next argued that the Council did not terminate Complainant but that, instead, he was terminated by Ms. Beasley for the reasons she described during her testimony at the hearing. Respondent's Brief at 24. These articulated reasons shall be addressed in the order presented in Respondent's Brief.

The Tribal Council contends that Complainant's termination had nothing to do with any of his reports he made of environmental violations. Instead, it is contended that Complainant was fired for the reasons of misconduct and disloyalty. (CX 13). The reasons for terminating Complainant proffered by the Tribal Council begins with the claim that Complainant exhibited disloyalty to the Osage Tribal Council by comments attributed to him by an operator, Mr. George F. Neff, in his March 5, 1995, letter attached to the Tribal Council's March 15, 1995 memorandum. (CX 13). The specific comments attributed to Complainant there are:

> [Complainant] informed me he felt the power of the mineral's trust might be weakening even to the degree of extinction. Also, insinuating the demise of the mineral estate was due primarily to the ignorance of the people vested with the power to oversee the estate.

(CX 13 at 4-5).

It is argued that these comments attributed to Complainant are grounds for his immediate termination under § XV (2) of the Tribal Personnel Policies and Procedures (CX 30 at 27), namely, that Complainant's actions constituted "disloyalty to the organization."

The Tribal Council also presented evidence of another incident which is claimed to also constitute acts of disloyalty to the Tribal Council by Complainant. According to a BIA employee, Mr. Kenneth Bighorse, Jr., a friend of Complainant's, Complainant made disparaging remarks to him concerning his father, Mr. Kenneth Bighorse, Sr., and Mr. Ed Red Eagle, Sr., both of whom were members of the Tribal Council. (Tr. 639, 641). These remarks were made to Mr. Bighorse during private telephone conversations with Complainant during office hours. (Tr. 639, 643).

Complainant acknowledged that he had a discussion with Mr. Neff during which Complainant indicated to Mr. Neff that the environmental program might be transferred from the Tribal Council to the National Council and that if such transferred occurred, operators such as Mr. Neff should be aware that the National Council would likely be more environmentally conscious than the Tribal Council. (Tr. 86). Complainant testified that he made these comments to Mr. Neff "in the line of advise" so that operators such as Mr. Neff would be aware that "things can change." (Tr. 86). This last quoted phrase obviously meant that the enforcement of the environmental laws would likely become more rigorous if the National Council took over the environmental program. (Tr. 568). Complainant further testified that during his conversation with Mr. Neff, he did not make any disparaging remarks about the Tribal Council nor did he refer to them as being ignorant. (Tr. 87).

It is unnecessary to enter factual findings as to which account of the conversation between Complainant and Mr. Neff is accurate. If Mr. Neff's account of that conversation is accepted, then all that Complainant did was speak out on an issue of public importance to the Osage Tribe. Under the circumstances presented here, such an expression of opinion by Complainant would be constitutionally protected as free speech and cannot serve as a

basis for his dismissal. See Pickering v. Board of Ed. of Township High School Dist. 205, Will County, Ill., 391 U.S. 563 (1968). If, on the other hand, Complainant's account of his statements to Mr. Neff are accepted, then Complainant's statements cannot reasonably be construed as expressions of disloyalty towards his employer.

Likewise, expressing derogatory opinions about Tribal Council members in a private conversation cannot serve as a basis for Complainant's termination. Complainant does not lose his first amendment rights of free speech merely because his free speech expressions were communicated in a private conversation. See Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1978). Indeed, it is clear that the critical comments Complainant made about the two Tribal Council members were made by Complainant in his capacity as a private citizen and not as an employee of the Tribal Council. Therefore, such expressions enjoyed the full protection under the first and fourteenth amendments. See Connick v. Myers, 461 U.S. 146 (1983). Thus, neither of the first two asserted reasons for terminating Complainant are legitimate.

It is also claimed, on behalf of the Tribal Council, that Complainant was terminated for the additional reason that his actions constituted serious personal misconduct that brought disrepute to the Tribal Council. In support of this argument, it is shown that such misconduct also constitutes grounds for terminating a Tribal Council employee. (CX 30 at 27). The actions proffered as serious personal misconduct fall into five categories. Four of these relate to the performance of Complainant's inspection duties. It is first claimed that Complainant broke pressure gauges on oil field equipment in the course of his inspections. Secondly, it is claimed that he reinstalled gauges improperly by facing them the wrong way.

Misconduct is defined in WEBSTER'S DICTIONARY, 9th Ed. as one 1: mismanagement especially of governmental or military

responsibilities, 2: intentional wrong doing specifically: deliberate violation of a law or standard especially by a government official.... Since it is personal misconduct which is at issue, it is the second definition which is relevant here. Under this definition, misconduct must include an element of intentional or deliberate action and also must be a violation or deviation from an applicable standard.

Neither of these elements are present here. Both Complainant and his technical supervisor, Mr. Sanborn, testified that it was impossible to remove the gauges on injection wells as field inspectors were frequently required to do during the course of their inspections without occasionally breaking one of the gauges. According to Mr. Sanborn, the breaking of gauges is attributable to fluid being trapped between the value and the gauge. It is further Complainant’s testimony that he did not deliberately break gauges and that any gauge he broke was accidental. It was further Complainant’s testimony that he was informed by Mr. Van Wyke, an EPA employee, that the regulations do not require field inspectors to turn the gauges back in any particular direction. Instead, the direction of the gauges were dictated by the necessity, on the one hand, to screw the gauge on tightly so that the pressure would not cause it to blow off while, on the other hand, not screw it on so tightly as to strip the threads.

It appears that Complainant removed and reinstalled the gauges in accordance with the training and instructions given to him by his EPA technical supervisors. No instructions were ever given to Complainant by the Tribal Council or Ms. Beasley on any aspect of how Complainant was to perform his inspections. It is further found that those standards, as distinguished from the standards the regulated operators might wish to impose, are the applicable standards. Finally, it is found that Complainant did not intentionally deviate from those applicable standards. Therefore, it is found that Complainant’s activities with respect to the

gauges did not constitute personal misconduct which could warrant his termination.

It is further claimed, on behalf of the Tribal Council, that another incident evidencing serious personal misconduct by Complainant is that he reported gauges as defective when they were operational. There is, however, no evidence supporting this claim. The origins of this claim is the February 9, 1995 letter from Mr. Hopkins which is attached to the Tribal Council's March 15, 1995 termination memorandum. (CX 13 at 6). The specific complaint related to gauges made in that letter is: "reports from [Mr. Sanborn's] office of bad values which turn out to be operational...." Id. The citation to Mr. Hopkins' testimony in support of the claim that Complainant reported bad gauges as operational, is misplaced. Mr. Hopkins testimony does not constitute evidence that it was Complainant rather than someone in Mr. Sanborn's office that reported bad gauges as operational. Mr. Hopkins' testimony shows that he misread his own complaint letter. He testified that the letter said "Chris White had reported bad values which turn out to be operational..." when the letter does not so state. (Compare Tr. 594 and CX 13 at 6).

Even if the evidence were to be construed as supporting the claim that Complainant reported bad gauges which were operational, there is no evidence that Complainant intentionally mislead anyone about the condition of gauges or that he deviated from any applicable performance standard. Thus, Complainant's actions cannot be construed as serious personal misconduct.

It is also claimed that Complainant failed to give advance notice of his field inspections and that this failure constituted serious personal misconduct. Again, the record shows that neither the Tribal Council nor Mrs. Beasley ever gave Complainant any instructions on this subject and that the only instructions he received were from his EPA technical supervisors. Mr. Sanborn was

aware of Complainant’s inspection activities and believed that Complainant complied with the instructions given to him. (Tr. 272, 305-306). Mr. Sanborn testified that there was no requirement that operators be given advance notice of an inspection. (Tr. 271). Indeed, the claim by Mr. Hopkins that field inspectors were required to give advance notice of their inspections is based on a misreading of the Marmac Area Injection Permit. That permit, which was read into the record, does not require advance notification. (Tr. 583-586). Thus, the evidence here shows that Complainant did not deviate from any requirement that he give advance notice of his field inspections because there was no such requirement.

The final reason ascribed by the Tribal Council for terminating Complainant was that he had "been rude, verbally threatening and confrontational with Marmac and Marmac employees." (CX 13 at 1). This ascribed reason for terminating Complainant is based on the letter from Mr. Hopkins attached to the Tribal Council’s termination memorandum wherein Mr. Hopkins complains Complainant "has spoken rudely to some of my employees and they have reported to me they were quite upset about it." (CX 13 at 6). The evidence shows that the Tribal Council accepted this complaint at face value and even embellished it without any investigation of its validity. The Tribal Council then ascribed this as one of the incidents of serious personal misconduct warranting Complainant’s termination.

Such precipitous action by the Tribal Council demonstrates the pretextual nature of this ascribed reason. There is a certain tension that exists between the regulators and the regulated in any industry. It is inconceivable that anyone would have terminated Complainant or any employee based on such a conclusory complaint emanating from a source whose motives are so obviously suspect without investigation and without affording the accused party an opportunity to respond to the charges. Accordingly, this ascribed reason is emphatically rejected as pretextual and not the real

reason for Complainant’s termination.

The evidence presented at the hearing which was not available to the Tribal Council when it terminated Complainant provided only marginal substantiation of Mr. Hopkins’ complaint. Moreover, this evidence shows that the remarks Complainant made to Mr. Hopkins’ employees did not rise to the level of offensive behavior warranting his termination. According to Mr. Henley, a Marmac employee, Complainant used a loud voice while specifying to Mr. Henley the compliance measures needed to correct an EPA violation which hurt Mr. Henley’s feelings. (Tr. 619). The other incident of claimed rudeness involved a remark made by Complainant during a conversation he had with Mr. Hopkins the morning of December 20, 1995. (Tr. 600-601, 603). During this conversation, Complainant asked Mr. Hopkins the question "are [your] employees deaf or blind or just don’t care." (Tr. 600). The only other person present during this conversation was Mr. Snively, a Marmac employee. (Tr. 600).

This remark appears to have been directed towards to another Marmac employee, Mr. Henley, who was not present when Complainant made the remark. Mr. Henley had misinformed Complainant the day before that the reported saltwater leak was not coming from the Marmac lease. (Tr. 101, 600). Since Complainant had subsequently located a high pressure leak on the Marmac lease after dark based on the loud noise levels made by the leak (Tr. 103), his remark to Mr. Hopkins the next morning seemed to have evidenced some annoyance and frustration with the false report he had previously received from Mr. Henley. Nevertheless, when the "death or blind" remark is viewed in context, it is clear that it was not directed to the Marmac employee who was present when the remark was made. Significantly, there is no testimony that Mr. Snively expressed any reaction to the remark. The remark was not intended to be offensive to anyone present when the remark was made, and Mr. Henley’s testimony does not suggest that he was even made aware of

Complainant’s remark. Under these circumstances, the remark cannot be construed as sufficiently offensive or hostile to constitute serious personal misconduct warranting Complainant’s termination.

There are two other incidents of misconduct asserted in the Tribal Council’s termination memorandum which are not mentioned in its brief. Since there is no merit in either and since they are not mentioned in Respondent’s brief, it is inferred that Respondent has withdrawn these allegations as a basis for terminating Complainant. One of these allegations involves the claim that Complainant confronted Mr. Bill Lynn and "accused him of advocating running full out in production with no controls for protecting the environment." (CX 13 at 1). The proof on this issue consisted of Mr. Lynn’s testimony wherein he denied that Complainant confronted him with this accusation. The other incident concerns an elderly gentlemen named Mr. Burl Goad. In the Tribal Council’s termination memorandum, Complainant is accused of frightening Mr. Goad with threats of fines, jail, and a discontinuation of pasture leases. (CX 13 at 2). The credible evidence on this issue consists of Complainant’s testimony that all he said to Mr. Goad was that he would be responsible for trash dumped on the pasture he was leasing. To the extent that the statements in the memorandum from BIA employee, Mr. RedCorn, (CX 13 at 7) suggest that Complainant’s remarks to Mr. Goad were improper, that evidence is rejected as unsubstantiated hearsay. (Tr. 464-466).

Finally, it is claimed on behalf of the Tribal Council that the Council did not fire Complainant and that he was fired instead by his nominal supervisor, Ms. Beasley, after she conducted her own investigation into Complainant’s misconduct. If Ms. Beasley’s testimony is to believed, she misinterpreted the instructions given to her in the Tribal Council’s termination memorandum which explicitly directs her to inform Complainant of the Council’s decision to terminate him and also inform him of his appeal rights. (CX 13 at 2). Notwithstanding these explicit directions, Ms.

Beasley apparently interpreted the memorandum as directing her to terminate Complainant which she did. (Tr. 390, 394, 399, 444, 505-506). The only explanation she gave to Complainant for his termination was to give him a copy of the Council's termination memorandum together with the attachments thereto. (Tr. 505-506). She did not have an opportunity to investigate any of the allegations contained in that memorandum or its attachments prior to terminating him, although she subsequently attempted to investigate some of the allegations as a part of the grievance process. (Tr. 399, 446).

According to Ms. Beasley's testimony, she reached an independent determination that Complainant should be terminated which was based, in part, upon the matters contained in the Council's termination memorandum and, in part, upon two additional incidents which she considered to be evidence of Complainant's disloyalty justifying his termination. (Tr. 488-489). The first incident involved a report made in a monthly meeting of the EPA committee of the Tribal Council by a BIA employee identified as Paul Yates. (Tr. 455-457). The second was the complaint made by one of Complainant's co-workers, Beverly LaCrone who reported to Ms. Beasley that Complainant harassed and intimidated her by making unspecified political statements to her. (Tr. 458, 462).

To the extent that Ms. Beasley accepted these two incidents as evidence of Complainant's disloyalty to the Tribal Council warranting any form of discipline, she violated the Council's Personnel Procedures Manual which specifies: "Supervisor must make a written report of each offense and disciplinary measure taken." (CX 30 at 28). The alleged acts of disloyalty reported by BIA employee, Mr. Yates, and Complainant's co-worker, Ms. LaCrone, were not memorialized in a written report. Indeed, Complainant was not informed of these additional asserted reasons for his termination until the hearing in this case. Thus, neither alleged instance of disloyalty which Ms. Beasley claims constitutes additional reasons

supporting her decision to terminate Complainant justifies any form of disciplinary action against Complainant under the Tribal Council's own personnel regulations. Accordingly, these additional reasons are rejected as constituting legitimate reasons for her action. To the extent that she relied upon the reasons ascribed in the Tribal Council's termination memorandum to support her action, those reasons are also rejected for the reasons stated above.

Complainant has established that he was unlawfully terminated based on his protected activities. The Tribal Council and Ms. Beasley have failed to establish that Complainant was fired for legitimate, nondiscriminatory reasons. Rather, the evidence establishes that the complaints were solicited by the Tribal Council from operators and others to justify the Tribal Council's desire to get rid of Complainant. These complaints were used as a pretext for terminating Complainant when the real reason for doing so was to eliminate Complainant's environmental violation reports that could result in the reduction of oil production from the mineral reserve. Further, it appears that both the Tribal Council and Ms. Beasley had shifting reasons for Complainant's termination which supports the conclusion made here that their reasons were pretextual. See Hobby v. Georgia Power Co., 90-ERA-30 (Sec'y Aug. 4, 1995) (citing Bechtel Const. Co. v. Secretary of Labor, 50 F.3d 926, 935) (11th Cir. 1995)). Furthermore, the evidence in this record compels the inference drawn here that the real reason for Complainant's termination was his protected activities. There is simply no other rational explanation for terminating what this record shows was the Tribal Council's best field inspector. It is, therefore, found that the Tribal Council unlawfully discriminated against Complainant in violation of the employee protection provisions of the SDWA.

Due to his unlawful termination, Complainant is entitled to reinstatement to his job as a field inspector, back pay, missed benefits he would have received had he still been employed, and an

expungement from his personnel record of any references to the prior unlawful termination. See Smith v. Littenburg, 92-ERA-52 (Sec'y Sept. 6, 1995). Complainant also requested compensatory and punitive damages. The SDWA authorizes the recovery of compensatory and exemplary damages. 42 U.S.C. §300j-9(i)(2)(B)(ii) (1994).

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of the retaliatory action; the testimony of medical or psychiatric experts is not necessary. See Thomas v. Arizona Public Serv. Co., 89-ERA-19 (Sec'y Sept. 17, 1993); Crow v. Noble Roman's, Inc., 95-CAA-8 (Sec'y Feb. 26, 1996). In Mosbaugh v. Georgia Power Co., 91-ERA-1, 11 (Sec'y Nov. 20, 1995), the Secretary stated that "the very fact of being discharged in violation of ...[an employee protection provision]...may have a serious emotional impact on a complainant."

Complainant testified that he was very upset after his termination and was unable to sleep for a significant period of time. He became depressed and would stay awake worrying about what he was going to do because he did not have a job. Complainant also testified that he suffered ridicule and embarrassment as a result of the termination. Also, his family suffered financial hardship because he has been unable to find other employment which added to his mental suffering. (Tr. 158-160). This evidence is unrefuted, credible and is hereby accepted. Thus, based on Complainant's mental suffering, Complainant is found to be entitled to $40,000 in compensatory damages.

Punitive damages may also be imposed to punish unlawful conduct and deter its repetition. The Supreme Court has held that the amount of punitive damages are measured against the reprehensible nature of the offense, the harm suffered by the plaintiff, and the legislative sanctions for comparable misconduct.

BMW of North America, Inc. v. Ira Gore, Jr., 1996 U.S. Lexis 3390, 64 U.S.L.W. 4335 (May 20, 1996).

Due to the blatant and obvious discrimination that has occurred in this case from Complainant's protected activities that stemmed from his conscientious performance of his job duties which is precisely the type of discrimination the statute intended to prohibit, punitive damages shall be awarded in the sum of $60,000. This award bears a reasonable relationship to Complainant's actual damages taking into account the amount of back pay to which Complainant is entitled as a result of the actual harm he sustained from his unlawful termination. Additionally, the punitive damages award is modest in comparison to the $13 million dollars in revenues received by the shareholders from the Osage Mineral Reserve (Tr. 416) but sufficient enough to act as a deterrent of future violations of SDWA by the Tribal Council.

While SDWA also provides for the payment of Complainant's costs and expenses (including attorney's fees), no claim for such relief has been made. 42 U.S.C. §300j-9(i)(2)B(ii). However, pursuant to the Act, once an order awarding reinstatement and back pay has been issued, the complainant may request the assessment of costs and expenses against the respondent. Furthermore, the Rules of Practice and Procedure before the Administrative Law Judge allow the administrative law judge to make part of the record any motion for attorney fees authorized by statute, any supporting documentation, and any determinations thereon. 29 C.F.R. §18.54(c) (1995). Accordingly, the record will be reopened for the limited purpose of permitting Complainant to make application for his costs and expenses and to permit Respondent an opportunity to respond thereto.

RECOMMENDED ORDER

IT IS THEREFORE ORDERED that the Osage Tribal Council shall

reinstate Complainant to his former position as a field inspector and shall pay Complainant compensation for back pay from the time of his termination until his reinstatement and shall provide him with such other benefits as he would have been entitled to had he not been terminated.

IT IS FURTHER ORDERED that the Osage Tribal Council shall pay Complainant compensatory damages in the amount of $40,000.00 and punitive damages in the additional amount of $60,000.00.

IT IS FURTHER ORDERED that the Osage Tribal Council shall expunge from Complainant's personnel records all references to his unlawful termination.

IT IS FURTHER ORDERED that Complainant is granted ten days from receipt of this Recommended Decision and Order in which to file and serve a fully supported application for costs and expenses including attorney's fees. Thereafter, Respondent shall have ten days from receipt of the application in which to file a response.

Entered this ____ day of _____, 1996, at Metairie, Louisiana.

_____

QUENTIN P. MCCOLGIN
Administrative Law Judge

QPM/tmd