



Issue Date: 24 March 2005

CASE NO. 2004-SOX-00073

In the Matter of:

MILORAD STOJICEVIC,
Complainant,

v.

ARIZONA-AMERICAN WATER CO.,
Respondent.

RECOMMENDED DECISION AND ORDER

Background

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, also known as Title VIII of the Sarbanes-Oxley Act (“SOX”), 18 U.S.C. §1514(A), enacted on July 30, 2002, and pursuant to the employee protection provisions of Section 1450 of the Safe Drinking Water Act of 1974 (“SDWA”), 42 U.S.C. § 300j-9(i), enacted on December 16, 1974. SOX prohibits retaliatory actions by publicly traded companies against their employees who provide information to their employers, a federal agency, or Congress that alleges violations of 18 U.S.C. §§ 1341, 1343, 1344, 1348, or any provision of Federal law related to fraud against shareholders. 18 U.S.C. § 1514(A). The SDWA is an environmental whistleblower statute, implemented by the regulations at 29 C.F.R. § 24. *Culligan v. American Shipping Heavy Lifting Company*, ARB Case No. 03-046 (June 30, 2004). The employee protection provisions of the SDWA prohibit an employer from taking discriminatory action against an employee if he or she is connected with “proceedings for the administration or enforcement of drinking water regulations” *Id.*

Arizona-American Water Company (“Respondent”) is a subsidiary of American Water Works Company, a public entity with a class of tradable stock. As such, it is a covered company and proper party under SOX. See *Morefield v. Exelon Serv., Inc.*, 2004-SOX-2 (ALJ Jan. 28, 2004). Milorad Stojicevic (“Complainant”) alleges that Respondent terminated him in retaliation for reporting accounting irregularities and/or reporting technical inadequacies relating to a water tank and well project site at Lake Havasu, Arizona. Respondent maintains that it terminated Complainant for legitimate business purposes.

On June 11, 2003, Complainant timely filed a complaint with the Occupational Safety and Health Administration (“OSHA”), claiming that he had been terminated for being a whistleblower. On August 25, 2004, OSHA found that Respondent terminated Complainant for legitimate, nondiscriminatory reasons, rather than for activities protected by SOX or the SDWA. OSHA therefore dismissed the complaint. On September 3, 2004, Complainant objected to OSHA’s Order and requested a hearing on the merits of his whistleblower claim. The hearing, originally set for October 20, 2004, was postponed at Respondent’s request based on unavailability of witnesses, to October 22, 2004. On October 22, 2004, the parties appeared before the undersigned for a hearing in Las Vegas, Nevada. Having been advised of his right to legal representation by the undersigned, Complainant knowingly and willingly elected to proceed with the hearing unrepresented. Administrative Law Judge Exhibits (“AX”) 1-3, Respondent’s Exhibits (“RX”) 1-17, and Complainant’s Exhibits (“CX”) 1-13 were admitted into the record. Complainant, Mark Clark, Paul Townsley, and Fred Schneider testified at the hearing.

Issues

1. Whether Complainant engaged in activity protected within the meaning of SOX and/or the SDWA;
2. Whether any adverse action taken against Complainant by Respondent was due to his engaging in protected activity.

Applicable Law

Applicable Law Under SOX

SOX states in pertinent part:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee --

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

18 U.S.C. § 1514A (a)(1) (2005); *see also* 29 C.F.R. § 1980.102(a), (b)(1) (2005).

In order to prevail in a whistleblower protection case based upon circumstantial evidence of retaliatory intent, it is necessary to prove that:

1. The complainant was an employee of a covered employer;
2. The complainant engaged in protected activity as defined by the Act;
3. The respondent had actual or constructive knowledge of the protected activity;
4. The respondent thereafter took some adverse action against the complainant; and
5. The protected activity of the complainant was the likely reason for the adverse action.

See Simon v. Simmons Foods, Inc., 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, slip op. at 11 n.9 (Sec’y Feb. 15, 1995), *aff’d sub nom.*, *Carroll v. United States Dept. of Labor*, 78 F.3d 352, 256 (8th Cir. 1996).

Here, there is no question as to Complainant’s employment status with Respondent, a corporation governed by Sections 12 and 15(d) of the Securities Exchange Act. There is also no dispute over his termination. The main issue under Complainant’s SOX claim is whether Complainant engaged in protected activity as defined by SOX.

Applicable Law Under the SDWA

The SDWA states in pertinent part:

No 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 (or any person acting pursuant to a request of an employee) has—

(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this title [42 USCS §§ 300f et seq.] or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,

(B) testified or is about to testify in any such proceeding, or

(C) assisted or participated or is about to participate in any manner in such proceeding or in any other action to carry out the purposes of this title [42 USCS §§ 300f et seq.].

42 U.S.C. § 300j-9(i)(1) (2005); *see also* 29 C.F.R. § 24.2 (2005).

In order to make a *prima facie* case of discriminatory treatment under an environmental whistleblower statute, such as the SDWA, the complainant must prove four elements:

- (1) The respondent is governed by the SDWA;
- (2) The complainant engaged in protected activity as defined by the SDWA;
- (3) The respondent had actual or constructive knowledge of the protected activity and took some adverse against the complainant; and
- (4) An inference is raised that the protected activity of the complainant was the likely reason for the adverse action.

See Hoffman v. Bossert, Case No. 94-CAA-4 at pp. 3-4 (Sec’y Sept. 19, 1995); *Macktal v. United States Dept. of Labor*, 171 F.3d 323, 327 (5th Cir. 1999); *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 933 (11th Cir. 1995); *Passaic Valley Sewerage Com’rs v. United States Dep’t. of Labor*, 992 F.2d 474, 480-481 (3d Cir. 1993); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995). If the complainant makes out a *prima facie* case of discrimination, the employer must prove that it took the adverse employment action for a legitimate, nondiscriminatory reason. *Saint Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506-507 (1993). If the employer carries this burden, then the complainant must show that the reason proffered by the employer was a pretext for a discriminatory motive. *Id.* at 507-508.

It is undisputed that Respondent, a water utility, is governed by the SDWA. *See* 42 U.S.C. § 300f(4). It is also undisputed that Respondent took adverse employment action against Complainant. The main issues in dispute are whether Complainant engaged in protected activity, Respondent’s knowledge of such activity, and whether such activity was the impetus for his suspension and discharge.

Findings of Fact and Conclusion of Law

I. Summary of the Evidence

Complainant was hired as a project engineer by Mark Clark of Citizens in January 2001. Transcript of Hearing, October 22, 2004 (“Tr.”) at 96-98, 188. Approximately one year later, Respondent purchased Citizens and Complainant became Respondent’s employee. Tr. at 96. At the time that Respondent purchased Citizens, Complainant was working out of the office in Bullhead City, Arizona. Tr. at 188. As a result of the purchase, Complainant became accountable to the management in Respondent’s Phoenix, Arizona office and came under the

direct supervision of Frederick Schneider. Tr. at 97. Mr. Clark, currently Respondent's Procurement Manager for the Western Region, became Complainant's "dotted line supervisor in the field." Tr. at 97.

Claimant's responsibilities included overseeing Respondent's development projects and engineering projects in Bullhead City and Lake Havasu. Tr. at 98. Mr. Clark characterized Claimant's job as providing low-level oversight by looking at technical issues that might arise in the project and reporting those issues to the project manager. Tr. at 98. The project manager at Lake Havasu was Tom Condit, who had the authority to make the final decisions on that project. Tr. at 99. Problems, however, arose in the relationship between Complainant and the Phoenix office management, particularly regarding the Lake Havasu project. Tr. at 100, 189. Complainant did not believe that Mr. Condit had the necessary expertise to supervise the project. Tr. at 189. Complainant also disagreed with a number of the management decisions from a technical and financial standpoint. Tr. at 189-191, 246-247; RX "3." These disagreements began to affect the communications between Complainant and his supervisors. Tr. at 100-101, 242-244. Mr. Clark and Mr. Schneider characterized Complainant's communications as progressively challenging, confrontational, and rude. Tr. at 101, 243-244. Mr. Schneider eventually informed Complainant that the tone and expressions in Complainant's communications were unacceptable. Tr. at 246.

Complainant's communications also raised issues regarding the appropriate company hierarchy for voicing complaints. Tr. at 245. During a meeting held at the end of 2002, Complainant vocally expressed his frustration in working for Mr. Condit. Tr. at 248. He also voiced his opinion that the management did not know what it was doing. Tr. at 210. At the meeting, Complainant asked to be taken off the Lake Havasu project and said he did not want to work with Mr. Condit. Tr. at 248. Mr. Schneider was disappointed by Complainant's attitude and told Complainant that his inability to work with the Lake Havasu project team would reflect poorly on his usefulness to Respondent. Tr. at 248-249. Another source of tension between Complainant and the Phoenix office management was Complainant's failure to procure contracts or purchase orders for work to be performed by outside contractors. *See* RX "2;" Tr. at 100-101. This issue was raised in October 2002 and in May 2003. RXs "2," "10."

A number of Complainant's complaints were based on his belief that some of the management decisions at the Lake Havasu site violated the law. Tr. at 191. For example, Complainant believed that the unprotected condition in which a well head at the site was left violated the law. Tr. at 278-280. He was also concerned that some of the Phoenix office's decisions were inappropriately based on financial considerations, and that some of its technical decisions were unnecessarily costing Respondent money. *See* RX "6;" Tr. at 229-230. Complainant's concerns evidently extended to the impact of these decisions on Respondent's shareholders and investors. Tr. at 233-234. On the other hand, Complainant also believed that some of Respondent's decisions were designed to save money by foregoing necessary operational costs. RX "3." For example, Complainant felt that the proposed well design would not provide adequate "fire flow" and would not work at maximum capacity. RX "3."

From late 2002 to early 2003, the seriousness of the disagreements escalated, as indicated by the e-mail correspondence between Complainant and Mr. Schneider. *See* RXs “3,” “4.” The project team attempted to work out the technical issues at an on-site meeting in February 2003. However, Complainant reopened a number of those issues by e-mail approximately two weeks later, which Mr. Schneider had believed were settled at the meeting. CX “3.” The e-mail stated that Complainant was “open to discuss all of the [technical issues] but . . . not on the base [sic] of company hierarchy.” RX “3.” Mr. Schneider responded to the e-mail by reminding Complainant of the corporate policy for voicing complaints and indicated that if Complainant could not work within the established hierarchy, he should look for other employment. RX “4.” Mr. Schneider also warned Complainant that the manner in which he communicated his disagreements was frustrating the project consultant and stalling the project. RX “4.”

At the end of March 2003, Complainant received an annual performance and development review that indicated he needed to improve his cooperation/team effectiveness and communication skills. RX “5.” In the review, Mr. Schneider wrote that Complainant “is an asset to the Mohave operations” but “needs to work on his writing and communication skills so that he can work effectively as a team with the staff in the Phoenix office.” Mr. Schneider rated Complainant overall as an employee who “meets expectations.” RX “5.” In April 2003, Complainant met with Paul Townsley, Respondent’s President for the Western Region. Tr. at 156. They discussed Complainant’s technical concerns, communication issues, and how the disagreements with Schneider would affect future references. Tr. at 156-161.

On April 29, 2003, Complainant sent Mr. Schneider an e-mail that Mr. Schneider found very troubling. RX “7;” Tr. at 255-256. Mr. Schneider described parts of the e-mail as offensive and threatening. Tr. at 256-257. At several points, the e-mail sounds as though it were written by Mr. Schneider. RX “7.” In it, Complainant said the project team members were hiding behind their professional registration titles and making decisions in order to save on office supplies. RX “7.” At the end, Complainant stated, “[n]ext time tell full story. I will very soon.” The next day, Complainant wrote a letter to Mr. Townsley regarding his concerns about the Lake Havasu’s site technical details, what he interpreted as a negative annual performance and development review, and the communication problems with his supervisors. *See* RX “6.”

After receiving Complainant’s latest e-mail, Mr. Schneider issued a counseling report listing how Complainant’s behavior violated the Employee’s Guide for Conduct. RX “9;” *see* RX “1.” The report stated that Complainant’s behavior over the past several months included “[i]nterfering or refusing to cooperate with the authorized supervisory associates in the performance of their duties,” “making or publishing of false, vicious, or malicious statements concerning any associate, supervisor, the company or its produces,” “[t]hreatening, intimidating, coercing, or interfering with other associates,” and “[i]nsubordination.” RX “9.” The report concluded by suspending Complainant from work for one day without pay. RX “9.” But on the day of his suspension, May 20, 2003, Complainant came into work. Tr. at 226. While there, Mr. Clark approached Complainant and told him that he should not be there and should go home. Tr. at 228. Mr. Clark then reported the incident to Mr. Schneider. Tr. at 260. Some time later, Mr. Clark called Mr. Schneider again to report that another employee had seen Complainant on the job site in a company vehicle. Tr. at 260-261. Mr. Schneider made the decision to terminate Complainant’s employment that day. Tr. at 261.

II. Discussion of the Law

Complainant's Prima Facie Case Under SOX

SOX protects employees who provide information to authorities in the executive branch, to Congress, or to the employer, that the employee reasonably believes show the employer violated federal laws against shareholder fraud. 29 C.F.R. § 1980.102(b)(1) (2005). The test does not measure the accuracy or falsity of a complainant's allegations; rather, the plain language of the regulations only requires an objectively reasonable belief that shareholders were being defrauded to trigger the Act's protections. See *Clement v. Milwaukee Transp. Serv. Inc.*, slip op. at 39, 2001-STA-6 (ALJ Nov. 29, 2001).

Complainant claims that Respondent fired him in retaliation for his complaints to his superiors, namely Mr. Schneider and Mr. Townsley. Complainant testified that he was concerned about the impact Respondent's project decisions would have on shareholders and investors. Tr. at 233-234. He also alleged that Respondent's considerable end-of-the-year earnings for 2003 were a result of its failure to invest the necessary capital in its operations, not because of good business management. Complainant's Pretrial Statement, October 4, 2004, p. 2. An allegation that Respondent made financially unsound choices, however, is quite distinct from an allegation that Respondent engaged in fraud. Regardless of Respondent's 2003 earnings statement, Complainant has not offered any proof that Respondent made false statements or misrepresentations to its shareholders and investors regarding its earnings, such that its conduct constituted fraud.

Complainant also points to comments made by Mr. Clark regarding the adequacy of water pressure following a fire for which the Lake Havasu City Fire Department had to use more than one fire hydrant. CX "1." Mr. Clark stated that Respondent had not received any customer complaints prior to the incident, and that Respondent's current and future plans should help the water pressure problem. CX "1." While this may indicate that the technical issues Complainant raised with the Phoenix office management were valid, it does not prove that Respondent made false or misleading statements. Due to the lack of evidence that Respondent defrauded, or attempted to defraud, its shareholders, Complainant has not shown that he engaged in activity protected under SOX. Therefore, Complainant's *prima facie* case for discriminatory treatment under SOX must fail.

Complainant's Prima Facie Case Under the SDWA

The SDWA also contains employee protection provisions that prohibit an employer subject to the SDWA from taking an adverse employment action against an employee as a result of the employee's protected activity. See 42 U.S.C. § 300j-9(i) (2005). The purpose of the SDWA is to ensure that water supply systems meet minimum national standards, in order to protect public health. Safe Drinking Water Act of 1974, P.L. No. 104-182. The purpose of the environmental whistleblower statutes in general is "to promote a working environment in which employees are free from threats of employment reprisals for publicly asserting company violations of statutes protecting the environment." *Bostwick v. Springer & Assocs., Inc.*, Case No. 2003-WPC-00009 (October 16, 2003). Given this purpose, a "protected activity" under the environmental whistleblower statutes has been broadly defined. *Id.* The term, therefore,

includes complaints of violations regarding safety or environmental impact concerns. *Id.* The first issue here is whether Complainant's activities were "protected activities" within the meaning of the SDWA. Complainant alleges that he raised concerns with management about the capacity of the projected well to support the water needs of the Lake Havasu community. *See* RX "13." This includes maintaining sufficient water pressure to put out fires. *See* CX "1;" RX "3." It is true that the SDWA is not itself specifically concerned with adequate water pressure to put out fires. *See* P.L. No. 104-182. However, the issue is relevant to public safety, which is a main concern of the environmental whistleblower statutes generally. Complainant's complaints to the Phoenix office about water safety therefore can be considered protected activity under the SDWA.

Second, there is an issue about whether Respondent was aware that Complainant engaged in protected activity. Respondent argues that Mr. Townsley was unaware of the existence of Complainant's letter until after Complainant had been fired. However, Complainant had raised technical concerns with Mr. Townsley at the meeting in April 2003. Mr. Townsley then conveyed those concerns to Mr. Schneider through Mr. Jones. Although Mr. Schneider testified at one point that he thought those concerns were raised by Mr. Clark, he later stated that he understood those to be "issues that [Complainant] had taken to [Mr. Clark] and [Mr. Clark] was presenting them to me" Tr. at 263, 266. Given Mr. Schneider's awareness that Complainant was the source of concerns brought to him by the company president, Respondent was aware of Complainant's protected activity prior to his suspension and termination.

The third issue is one of causation between the adverse employment actions Complainant suffered—first in the form of the counseling report, suspension, and termination on May 23, 2003—and the protected activity in which he engaged. Complainant argues that it was primarily his complaints to Mr. Townsley that triggered the adverse employment actions. Complainant spoke to Mr. Townsley in a meeting in early April about his problems with the Phoenix office management. At the end of April, following his annual employee evaluation and performance review, Complainant wrote Mr. Townsley a letter reiterating his concerns. It was little more than a month after communicating his concerns to Mr. Townsley that Complainant was suspended, and then fired. The fact that Complainant's suspension and termination were in close temporal proximity to his communications to Mr. Townsley is relevant to determining whether a causal link exists between Complainant's protected activity and the adverse employment actions taken by Respondent. *See Newkirk v. Cypress Trucking Lines, Inc.*, 88-STA-17, D&O of SOL at 8 (February 13, 1989) ("Adverse action closely following protected activity is itself evidence of an illicit motive.") "Unquestionably, the less time between an employer's learning that an employee engaged in protected activity and the implementation of an adverse action, the stronger the causal link." STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW 270 (2001). The burden of proof for a *prima facie* case of discrimination is not onerous, and the close proximity between the protected activity and the adverse employment actions here is sufficient to give rise to an inference of discriminatory treatment. *See McMahan v. California Water Quality Ctrl.Bd., San Diego Region*, 90-WPC-1 (Sec'y Jul. 16, 1993); *see Newkirk v. Cypress Trucking Lines, Inc.*, 88-STA-17, D&O of SOL at 8 (February 13, 1989). Based on these facts, Complainant has made a *prima facie* case of discrimination under the SDWA.

Respondent's Nondiscriminatory Justification for Adverse Action Against Complainant

Once a complainant establishes a *prima facie* case of discrimination, the burden of proof shifts to the employer to prove that it had a legitimate, nondiscriminatory reason for the adverse employment action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S.502, 506-507 (1993); *Lockert v. United States Dept. of Labor*, 867 F.2d 513 (9th Cir. 1989). Here, Respondent argues that despite the inference of discriminatory treatment, the adverse employment action against Complainant was strictly a response to his inappropriate behavior and, ultimately, insubordination. Respondent's Post-Hearing Brief, January 6, 2005, p. 17; Tr. at 254-261. The inappropriate behavior included the hostile and rude tone of his e-mails, and his unwillingness to follow Respondent's management hierarchy when making complaints. The first adverse employment action to which Complainant was subject was a one-day suspension. The Counseling Report listed the reasons for suspension as his inability to work with his supervisors, inappropriate comments, hostile attitude, and insubordination. The suspension was to be effective on May 20, 2003. That day, however, Complainant came into work anyway, citing meetings and other work to which he wanted to attend. Upon seeing him at work, Mr. Clark instructed Complainant that he should not be there and should go home. Instead, Complainant again disobeyed a direct order, continuing to work at the office and at the project site. According to Respondent's Employees' Guide for Conduct, the penalty for insubordination, even a first-time offense, is discharge. RX "1." Respondent points out that Complainant acted insubordinately twice in the same day, first by coming into work when he knew he was suspended, and second, by not leaving as soon as Mr. Clark told him to.

Based upon this evidence, the court finds that Complainant's hostile and inappropriate behavior, and his acts of insubordination were in fact the basis of Respondent's suspension and termination, respectively, of Complainant. Respondent has therefore overcome the inference of discriminatory treatment. In addition to the evidence of legitimate, nondiscriminatory reasons for suspending and terminating Complainant, Respondent has demonstrated that had it wanted to terminate Complainant for engaging in protected activity, it could have done so much earlier. Respondent's actions indicate that it sought to keep Complainant as a member of the Lake Havasu project team despite his difficulties in working with the other members. For example, when Complainant expressed his frustration at working with Mr. Condit and said he wanted to be taken off the project, Mr. Schneider told him that he wanted the team to work through its problems, instead of simply removing Complainant. Mr. Schneider also had an opportunity to discharge Complainant after Complainant sent the e-mail in which he wrote some parts as though he were Mr. Schneider and made offensive and hostile comments.

Furthermore, even after Complainant sent the letter to Mr. Townsley, the discipline to which he was subject was lenient compared to the recommendations in the Employees' Guide to Conduct. See RX "1." The Guide recommends that an employee who engages in the conduct listed on Complainant's Counseling Report be subject to suspension for five to 30 days without pay, or even termination. RX "1." The discipline to which Complainant was subjected was considerably shorter and more lenient. Complainant's argument that the close proximity in time between the letter he sent to Mr. Townsley and his suspension and discharge does not address the fact that Respondent's response to his insubordination was reasonable and within company policy. It is evident that Respondent followed a reasonable, progressive approach to disciplining Complainant for his conduct.

Respondent's Evidence that Respondent's Motive was Pretextual

Since Respondent has proved by a preponderance of the evidence that it had a legitimate, nondiscriminatory motive for suspending and then terminating Complainant, the burden shifts back to Complainant to prove that Respondent's asserted motive was pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-508 (1993). A pretextual motive is one that is "a sham in that the purported rule of circumstance advanced by the employer did not exist, or was not, in fact, relied upon." *Wright Line*, 251 NLRB 1083 (1980), *aff'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). In proving that the employer's asserted motive was pretextual, the complainant must not only show that the motive was false, but also that the real reason for the adverse employment action was discriminatory. *Clifton v. UPS*, 94-STA-16, D&O of SOL, at 13 (May 9, 1995). In this case, Complainant argues that the Counseling Report was fabricated. Complainant's Post-Hearing Brief, January 25, 2005, p. 5. He claims this is proved by the fact that his annual performance and development review was a far more favorable assessment of his work. The Counseling Report can be explained, Complainant argues, because it was written in retaliation for his communications with Mr. Townsley. However, Complainant has not explained why the Counseling report is not a legitimate response to the hostile and rude e-mail he sent to Mr. Schneider in April 2003. Given that Mr. Schneider could have disciplined Complainant much more severely for the e-mail, the Counseling Report indicates the opposite of what Complainant argues: a lack of retaliatory motive on Mr. Schneider's part against Complainant. If Mr. Schneider truly had a retaliatory motive, he could have used the e-mail as an excuse to discipline Complainant more severely than with a one-day suspension. Therefore, Complainant has not offered any evidence to counter Respondent's argument that the motive behind the adverse employment action was legitimate. Without proof that Respondent's nondiscriminatory motive for the adverse employment action was pretextual, Complainant's claim that Respondent violated the SDWA's employee protection provisions must fail.

ORDER

Based upon the foregoing Findings of Fact, Considerations of Law and upon the entire record, Complainant has not proven retaliation by Respondent and his complaint is hereby **DISMISSED**.

SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

NOTICE OF APPEAL RIGHTS UNDER SARBANES-OXLEY ACT: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).

NOTICE OF APPEAL RIGHTS UNDER SAFE DRINKING WATER ACT OF 1974: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law