

**U.S. Department of Labor**

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**Issue Date: 07 January 2011**

**CASE NO.: 2010-CAA-3**

**IN THE MATTER OF**

**VICTOR BROWN**

**Complainant**

**v.**

**ALCOA, INC.**

**Respondent**

**DECISION AND ORDER**

This proceeding arises under the employee protective provisions of the Clean Air Act of 1977, (herein CAA), 42 U.S.C. § 7622, et seq., Public Law 95-95, and regulations thereunder, brought by Victor Brown (Complainant) against Alcoa, Inc. (Respondent). These statutory provisions protect an employee from discharge or discrimination resulting from providing the employer or the Federal Government with information relating to any violation or alleged violation of orders, regulations, or standards of the Environmental Protection Agency (EPA) or any other provision of Federal law relating to ambient air quality.

**I. PROCEDURAL BACKGROUND**

Complainant filed a complaint with the Occupational Safety and Health Administration (herein OSHA) on or about January 23, 2009, alleging that Respondent discharged him because "management knew [he] was about to report the company's willful CAA violations to the appropriate governmental agencies." (ALJX-1, p. 2). The OSHA Regional Supervisory Investigator dismissed Complainant's complaint on October 12, 2009, after determining that it had no merit. Specifically, the Secretary's Findings indicated that although Complainant engaged in protected activity, a preponderance of the evidence supported Respondent's

position that the protected activity was not a contributing factor in Complainant's termination. OSHA's investigation revealed that the plant manager announced on December 9, 2008, that there would be a reduction in force due to an economic downturn, Complainant had a bad performance evaluation and was the only engineer without a degree, and Complainant and sixty other employees were informed they would be laid off effective February 1, 2009. (ALJX-2).

Based on Complainant's Request for Hearing, the matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a formal hearing, which commenced on July 30, 2010, in Dallas, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs.

The following exhibits were received into evidence: Administrative Law Judge Exhibit Numbers 1-9; Complainant Exhibit Number 1; and Respondent Exhibit Numbers 3-8, 11-B, 11-J, 11-N, 11-O, 13, 15, 20, 21, 22-A, 23, 24, 34-A, 36, 37, 39, 43, and 44.

Post hearing briefs were timely received from Complainant and Respondent.

Based on the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Order.

## **II. STIPULATIONS**

The record evidence is devoid of any stipulations. However, in its amended post-hearing brief, Respondent concedes Complainant engaged in protected activity and suffered an adverse employment action.<sup>1</sup>

## **III. ISSUES**

1. Whether Complainant's activity was a contributing factor in Respondent's alleged discrimination against Complainant.

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<sup>1</sup> See Respondent's Amended Post-Hearing Brief.

2. Whether Respondent has demonstrated by a preponderance of the evidence that it would have taken the same unfavorable personnel action irrespective of Complainant having engaged in protected activity.

#### **IV. SUMMARY OF THE EVIDENCE**

##### **The Testimonial Evidence**

##### **Complainant**

Complainant testified that he worked for Respondent for over twenty-three years. (Tr. 19). He started as a maintenance worker and was asked to move into the engineering department. (Tr. 19-20). He has no Engineering degree, but he has worked in various departments of the plant. (Tr. 20). He stated he had good ratings until he moved to the casting department. He permanently transferred to casting because it had environmental problems. Pat Campbell and Mike Miller were the supervisors over casting. Complainant found many violations and tried to resolve them because they impacted the safety of the employees. (Tr. 21). Problems continued to recur. He enlisted the help of the Environmental and Safety Department, which caused some discontent among the supervisors. (Tr. 21-22).

Complainant stated he "sustained a tremendous amount of harassment" from Mike Miller and Pat Campbell, but remained focused. (Tr. 22-23). Pat Campbell did not want to air the department's "dirty laundry" and wanted to keep it within their department. Complainant recalled three fatalities over silly, small mistakes. (Tr. 23). He stated he knows Respondent's values are employee and environmental safety. He further stated he knew the economy was causing Respondent to cut costs to please the stockholders. (Tr. 24).

Complainant testified he is one semester from receiving a BBA in Business Administration and has undergone environmental and safety training. (Tr. 185-186). He has worked at the Respondent's Texarkana, Texas plant since September 1985 when it was Alumex; he was subsequently employed by Respondent in 1998 as a maintenance planner scheduling maintenance and equipment. (Tr. 187). In 2000, he became a mechanical engineer without a degree under supervisor Rich Robinette. (Tr. 188). As a mechanical engineer formerly under supervisor David Chan, his duties included planning, justifying and securing appropriation for projects. He also worked on safety and environmental issues in the facility, which was a top priority. (Tr. 189, 191). He

worked on combustion to meet OSHA standards and was chairman of the contractor committee. (Tr. 190). Randall Rogers was his next supervisor. (Tr. 191). In 2006, he went to the casting department under the supervision of Pat Campbell and Mike Miller. (Tr. 192-193).

Complainant testified that in September and October 2008, scrap was piling up and creating safety problems. The scrap was purchased on contract, "and it was coming whether we liked it or not." Campbell asked him on four occasions why she could not put the purchased scrap in the well furnace. (Tr. 195). He told her the permit would have to be amended to melt the scrap. She told him the Lancaster Alcoa plant was doing it and he suggested she get a copy of their permit. (Tr. 196).

Complainant stated that on Friday, October 31, 2008, he observed the casting department melting scrap in violation of the permit. (Tr. 201). Complainant saw William Fitzgerald picking up scrap boxes and bringing them to Furnace number three. (Tr. 203-204). He asked Fitzgerald what he was doing, to which Fitzgerald replied Campbell had told him to burn the scrap. (Tr. 204). Fitzgerald told Complainant his foreman was unaware he was burning the scrap. (Tr. 205). Complainant stated he then told Fitzgerald it was against the permit, to which Fitzgerald responded he was putting small amounts in the furnace so there would be no smoke. (Tr. 205).

Complainant testified he told Rogers that the casting department was putting RODECS scrap in the furnaces and that he was going to call Clay McMasters, an environmental engineer, on his cell phone to report it; McMasters had already left the plant. (Tr. 206). Barbara Pitts, a co-worker, asked him not to report they were burning scrap in the furnace because they would all be in trouble. Complainant responded "we're all in trouble right now and I'm not going to add insult to injury by not reporting it." (Tr. 207). Brown could not contact McMasters, but left a message on his plant phone stating "please don't erase this message but I'm reporting a Clean Air Act violation in the cast house which includes them putting RODECS scrap that has not been processed, still with contaminants on it, putting it in the well furnaces, which is a direct violation of our permit, special conditions." (Tr. 208). On Monday, November 3, 2008, Environmental Health and Safety Manager Mark Salih and McMasters spoke with Campbell regarding the incident. (Tr. 209).

Complainant testified he did not actually report Campbell's permit violation to the EPA at any time before he was terminated, and only did so through an attorney after his termination. (Tr. 214-221).

Complainant testified Campbell escorted him to the plant manager's office on January 6, 2009. (Tr. 225). Mike Leherr (plant manager), Jeff Teague (human resources manager) and Complainant were present; Campbell did not stay. (Tr. 226). Teague handed Complainant a one-page reduction in force (RIF) sheet with his compensation/severance package. (Tr. 227). They asked for his credit card and keys, but he did not have a credit card. (Tr. 228). He was offered a severance package of two weeks for each year with the plant, but had to sign a release waiving any rights of legal action against Respondent, which he did not sign. Respondent also offered him outplacement job search assistance for a period of three months. (Tr. 228). Complainant recalled that Leherr informed exempt employees before Christmas 2008 that there would be a plant-wide reduction in force. (Tr. 230-231). He testified Leherr mentioned the economic downturn, but assured the employees that the plant would need the technical and maintenance employees in the future, so technical employees would be retained. (Tr. 232). Complainant stated he was the only technical engineer in the reduction in force of January 2009. (Tr. 233). There were 45-60 out of 275-300 employees also laid off with Complainant. (Tr. 233-234). Complainant was not told he was selected because he complained about Campbell putting scrap in the furnaces. (Tr. 234).

On cross-examination, Complainant acknowledged that his 2007 performance review was "below expectations." (Tr. 239).<sup>2</sup> Campbell had talked to him about attending morning meetings and commented that he needed to do so in his review. (Tr. 245-246). In 2008, he was also rated "below expectations" and failed to attend some morning meetings. (Tr. 249-251).<sup>3</sup>

Complainant testified that out of the seven engineers, he was the only one without a degree. (Tr. 252-253). Since his reduction in force, Complainant has worked part-time for two or three contractors and has sought full-time work at "200 or 300 places." A Louisiana company recently sent an initial offer and Complainant sent his resume, but they have not made a final offer of employment. (Tr. 255). He understands that if he had

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<sup>2</sup> See RX-37.

<sup>3</sup> See RX-23.

not been part of the reduction in force that occurred in January 2009, he would have still lost his job in May or June 2009 when the plant closed down. (Tr. 256).

Claimant testified he did not sign his "below expectations" evaluation on January 24, 2008. (Tr. 257).<sup>4</sup> On June 13, 2008, he received a detailed description of his performance. (Tr. 260).<sup>5</sup>

Complainant admitted he repeatedly claimed he was terminated because he was "about to report" a CAA violation to a government agency. (Tr. 269, 278-279).<sup>6</sup> He stated he first heard that Respondent would make a deviation report about the permit violation while he was still employed. (Tr. 271). Complainant stated his main issue with the deviation report was that the permit violation would not be reported as a willful violation but as an "honest mistake." (Tr. 272-276).

Complainant admits knowledge of the financial issues at the plant and the cut backs in the corporation. (Tr. 281). He admitted there had been discussions between himself, Salih and Rogers about reductions in force prior to December 2008. (Tr. 281-282).

### **Mark Salih**

Mark Salih, the Environmental Health and Safety Manager for Respondent, testified at the hearing. He began with Alcoa in May 1992 and was manager from May 2008 until he left Respondent's employ in August 2009. (Tr. 37). His duties included assuring Respondent's compliance with environmental and safety rules and regulations. He worked with Complainant in the engineering department. (Tr. 38).

Salih testified he was not contacted by OSHA during its investigation after Complainant reported the Clean Air Act (CAA) violation to the Environmental Protection Agency (EPA). (Tr. 39-41). He testified Complainant informed him that he believed metal was being charged in the furnace in violation of Respondent's current Prevention of Significant Deterioration (PSD) permit. He further testified he spoke with Pat Campbell about the situation; Campbell concurred that they were in fact charging metal into the furnace, and she stopped the process. Salih thereafter continued his investigation. (Tr. 42).

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<sup>4</sup> See RX-36.

<sup>5</sup> See RX-34A.

<sup>6</sup> See RX-13; RX-15.

Salih testified Clay McMasters and "a number of other people" were also involved in the investigation. Salih determined that there had been a violation of the special conditions of the PSD permit. (Tr. 43). His root cause analysis discussed in his investigative report revealed that scrap was taking up a lot of storage area, and Campbell thought it could be burned in the furnace. (Tr. 44-45).<sup>7</sup> Specifically, Salih reported Campbell thought "the special rule was meant to control material producing smoke. She did not represent the intent of the rule because she personally oversaw the charging material and it did not smoke overcoming the hood." (Tr. 45). Campbell was previously an environmental engineer. Salih stated, "I do believe that she knew that the rule would not allow her to charge it. But I thought -- I really do believe that she thought if it didn't overcome the hood it would be fine." (Tr. 45-46).

Salih testified he did not recall any policy which stated that an employee would be terminated if he or she violated the permit, but assumed it would be based on the employee's history, the severity of the violation and the employee's "thought process" behind it. (Tr. 46). Salih stated that during his investigation, Campbell informed him she was upset Brown had reported the violation and did not keep it within the department. (Tr. 47-48). He further stated Campbell told him she did not like employees reporting things outside of the casting department without giving the department an opportunity to fix things first. (Tr. 48). Salih told Campbell she needed to report violations so an investigation could be performed to find the root cause, and also for the benefit of the other departments; "[w]e need that knowledge in the other parts of the plant so we don't have the same issues within the facility." (Tr. 48-49).

Salih testified he recalled Complainant complained about the combustion safety system in 2007; the "jumper" was circumventing the system. (Tr. 51-53). Brown was in the casting department at that time. Salih spoke with Pat Campbell and told her the "jumper" was not acceptable. He thinks there may have been disciplinary action involved and Campbell was upset with

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<sup>7</sup> See RX-21.

Brown for complaining about the jumpers. (Tr. 54-55). Salih stated that any employee should report a violation of policy related to safety. (Tr. 56). Other than union employees who call him about unsafe conditions, no one else in casting made complaints. (Tr. 57).

Salih's performance reviews were all "competent or exceeds expectations." (Tr. 58).

Salih testified Complainant designed a smoke capturing hood in 2005 or 2006 to replace the old existing hoods. (Tr. 59). He stated he was personally not aware of any issues with Complainant's work, and he had no problems with Complainant. (Tr. 60-61). At times, the Environmental Health and Safety (EHS) Department requested Complainant's services as a content expert on engineering for ventilation and operation of equipment regarding safety. (Tr. 61-63). Salih stated Complainant also provided training to contractor employees and worked on safety, production and environmental issues. (Tr. 63).

Salih testified he was in charge of the company van, which was leased in his name. (Tr. 65). It needed to be used and driven to insure that the engine stayed in good shape. Brown asked if he could use the van for RODECS (top priority equipment) employees to go to lunch. He gave Complainant permission to use the van for that purpose. He was not aware of Complainant misusing the van. (Tr. 65). Other employees used the van to pick up lunch or parts and supplies or take employees to the doctor. (Tr. 66).

Salih stated that EHS met with all of the engineers, and Complainant had seventy percent of the ongoing projects. The other two engineers shared the remaining thirty percent of the projects. (Tr. 68).

Salih testified that after Complainant was terminated, he helped Campbell put Complainant's materials and data information from his office into a dumpster. (Tr. 70-71). He stated he was "a bit concerned about everything [they] were throwing away." (Tr. 72). He further stated that despite his concerns, he was "going to allow her to make the decision as to what got thrown away and what didn't." He further stated he was not aware of any other employees terminated by the reduction in force having



their offices cleaned out in that manner. (Tr. 73). "Most of the ones I'm familiar with, the contents was looked at, a box was made or two for the employee, and then they would come back and pick them up at an agreed-upon date." Complainant picked up personal items from security that he asked Salih to find and hold. (Tr. 74).

Salih stated he had a conversation with human resources concerning problems between Complainant, Pat Campbell and Complainant and Mike Miller. He thought Complainant's problems were more severe with Miller. (Tr. 75). Salih further stated human resources asked him to work with Campbell at the departmental level to resolve the problems under the award and recognition program for safety which recognized periods of time without recorded injuries. (Tr. 76-77). At the end of 2007, Salih was assigned to mentor and coach the casting department in an effort to improve their performance. (Tr. 77-78).

On cross-examination, Salih stated he interviewed Complainant, Pat Campbell, Barbara Pitts and William Fitzgerald in connection with his investigation. (Tr. 78-81).<sup>8</sup> The final report was prepared after November 6, 2008, and before mid-November 2008. (Tr. 81-82). He derived the date of the CAA violation from the interviews, including his interview with Complainant. (Tr. 82). Salih testified that on November 3, 2008, Complainant reported to him that Campbell put purchased painted scrap into the furnace. "[T]he permit language explicitly states that you can't do that." (Tr. 83). The scrap caused smoke emissions but did not exceed the smoke capacity of the hood. (Tr. 83-84). He testified there was no way for him to know whether the emissions exceeded EPA standards. (Tr. 84). Salih stated it would have been a "prudent act" for Complainant to have spoken with Campbell to stop the scrap from being placed in the furnace after he saw she was violating the PSD permit. (Tr. 85-86).

Salih testified Complainant first attempted to contact him regarding the violation on October 31, 2008. The first time he and Clay McMasters actually received notice of the violation was November 3, 2008. (Tr. 86-87). He stated he felt Campbell "thought the PSD was concerning overloading the hoods with smoke and not simply a hard fast rule against charging purchased painted scrap." (Tr. 91).

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<sup>8</sup> See RX-21, p. 8.

Salih further testified he spoke with the plant manager, Mike Leherr, who gave an "opinion of what needs to happen." Salih stated Campbell should be counseled and mentored on "how to deal with situations like this in a better fashion." (Tr. 93). Campbell also suffered some "monetary punishment." (Tr. 93-94). The plant manager did not mention to Salih that he was upset with Complainant for bringing the violation to his attention. (Tr. 94). Salih testified Alcoa was fined \$2,000 by the EPA and was given a Notice of Violation, which was worse than the fine because it is bad for the company's reputation. (Tr. 95-96).

Salih stated that when he was promoted to EHS, the plant manager wanted him to spend more time with the casting department because their safety record was poor compared to other departments. (Tr. 96). Salih did not know who decided which exempt employees were to be designated for the reduction in force effective in January or February 2009. (Tr. 97-98). The plant was curtailed in June 2009, and almost everyone was laid off. Only twelve maintenance, mechanics, electricians and supervisory employees were retained after June 2009. (Tr. 98).

Salih testified that when Complainant reported the combustion systems problems to the plant manager, he was upset with the events, but not with Complainant. (Tr. 106). The plant manager was more upset that the smoke capturing problems had not been fixed. (Tr. 106-107).

Salih further testified that while he and Campbell were cleaning out Complainant's office, they were not selective when throwing things in the dumpster, but Complainant's computer was not thrown away. (Tr. 107-108).

Salih testified that in late 2008, he was in management meetings where layoff selections were discussed. The "layoff was intended to be by department, not plant-wide seniority." (Tr. 114-115). He was unaware of any discussion about Complainant's selection for the layoff. (Tr. 115). The first list Salih was made aware of was a list of slots and not names; management "did not want the names to get out on the floor." (Tr. 116). By January 2009, names were put into the slots, and the layoffs came within days. (Tr. 116-117). He thinks Campbell would have made recommendations because "[e]very manager of the department had something to say about who would be laid off in their department." (Tr. 118). He does not know when Complainant was selected for termination as part of the reduction in force or by whom he was actually selected. (Tr. 118-119, 121). He

agreed, however, that "the charter from the plant manager to the department managers [was] to make recommendations for names to fill in those slots." Salih was not in any of the meetings where the finalized list of names was discussed. (Tr. 121).

Mr. Salih testified that one slot was for an engineer for casting. He does not recall if any senior electrical engineers in casting were laid off, and does not know the performance assessments of the engineers. (Tr. 123-124). He did recall there was an engineer named Tim that had some performance issues, and he was terminated earlier in 2008. Another engineer had been written up but not terminated, but he was not in the casting department. (Tr. 125).

### **Gregory Felling**

Gregory Felling testified at the formal hearing. He stated he transferred to the Texarkana facility in April 2004. He was previously the EHS manager. He worked with Complainant on health and safety issues, but did not supervise him or evaluate his performance. (Tr. 132).

Felling stated that in mid-2007, he worked in the San Antonio plant, which had requested Complainant's services. He considered Complainant's work to be the best of all the engineers. Felling retired in April 2009. (Tr. 133-134).

Felling testified OSHA did not contact him during its investigation. (Tr. 136). He reviewed the hood design devised by Complainant and it passed criteria. (Tr. 137). He was not at the plant in October 2008 and was not involved in the layoff decision, nor did he know who was involved. (Tr. 138-139).

### **Randall Rogers**

Randall Rogers testified at the formal hearing. He has known Complainant for eighteen or nineteen years. (Tr. 142). Rogers testified he was the Superintendent of Engineers in 2005-2006 and supervised Complainant before he moved to the casting department. (Tr. 143-144). He stated Complainant was one of the best field engineers, but could have used improvements in computer and organizational skills. (Tr. 144). He further stated he was not aware of Complainant having any problems with managers other than Campbell and Miller. (Tr. 145). Rogers testified he himself had problems with Campbell; she accused him of undermining her with Complainant working on the RODECS project. (Tr. 146).

Rogers further testified that contaminated materials were segregated from clean materials, and Respondent "planned a large warehouse to put the scrap in to keep it segregated." (Tr. 147-148). OSHA did not contact him about its investigation and no one asked his opinion of whether Complainant should be selected for layoff as part of the reduction in force. (Tr. 148-149). Rogers stated Complainant was a good employee upon whom he heavily relied. (Tr. 153). He testified Complainant put in a lot of long hours, worked weekends and holidays and had a good work ethic. (Tr. 154). He gave Brown positive contributor reviews, which was only one step below "Exceeded expectations." An "Exceeded expectations" rating was rare. (Tr. 160-161).

On cross-examination, Rogers affirmed that he was an electrical engineer with a degree from Texas A&M University. (Tr. 163). Rogers worked with Complainant for approximately one year, during which time plant manager Jack Clark had problems with Complainant and complained to Rogers. (Tr. 165). Rogers testified he may have rated Complainant as "Below Expectations" in 2008. (Tr. 175-176). Rogers explained that when the union first came into the plant, Complainant may have been operating equipment in violation of the union contract, but he was not the only employee doing so. (Tr. 177, 179).

Rogers testified he would hire Complainant today and he had, in the past, selected Complainant to handle emergencies because of his expertise. (Tr. 181-183).

### **Kelly Freeman**

Kelly Freeman testified at the formal hearing. She worked at the Texarkana plant before it closed, but now works in Lancaster, Pennsylvania. She was the Comptroller for Respondent from 2006-2009, until the finance and accounting employees were laid off in August 2009. (Tr. 293-294). In January and February 2009, other technical employees and quality assurance and lab employees were laid off. (Tr. 294-295). She testified she interacted with Complainant on financing projects, mostly during "CWIP" meetings where they went over the financial aspects of the current projects. (Tr. 295). She relied on the engineers for information that she would report to the corporate office. For the most part, Complainant was responsive to her needs to get the information, as were other engineers. She testified she had problems overall with the engineers getting her information ahead of time when they were not going to be at a meeting. (Tr. 297).

Freeman testified the performance reviews are done in October of every year. (Tr. 298). She recalled Pat Campbell visited her on November 3, 2008, about the CAA violation. (Tr. 300). Campbell stated to Freeman that "there had been a situation at the cast house where some painted material that was not [Respondent's] was charged into the furnace and [Campbell] was concerned because [Complainant] had turned it in to EHS and she didn't know if he had embellished it to the point where she would get terminated." (Tr. 300-301). Freeman told Campbell to tell the truth and if her violation was not willful she would not lose her job. (Tr. 301). Freeman testified she got the impression Campbell did not think she had done anything on purpose. (Tr. 302).

Freeman testified she was present in December 2008 when Mike Leherr read a statement to the employees about the layoffs. (Tr. 302).<sup>9</sup> She further testified Leherr stated only hourly maintenance employees will not be affected. (Tr. 304). She stated that although "below expectation" reviews have a heavy impact on whether an employee would be retained, they sometimes look at length of employment before termination. (Tr. 304-305).

Freeman further testified the factors considered for selection for reduction in force were whether the employee had a degree, along with that employee's past performance reviews. (Tr. 306). Mike Leherr was the individual whose responsibility it was to decide the number of employees who needed to be eliminated by department and position. (Tr. 307). Leherr also made the final decisions on the RIF selection of salaried employees because he was concerned over the backlash of the selections. (Tr. 307-308). Some exempt employees are not salaried. (Tr. 307). She stated she first saw the list of names of employees to be laid off before November 5, 2008. (Tr. 309-310). A legal review of the names had to be done to insure Respondent was not impacting a protected class, e.g., race, age, gender. (Tr. 310). She further stated Leherr did not complain to her that Complainant had reported the CAA violation. (Tr. 310-311). She testified the casting department engineers were Johnson, Brown and Rogers. (Tr. 314).

On cross-examination, Freeman testified she received the list of names by hand from Leherr, and had it before November 5, 2008, which was the date of the plan document she turned in. (Tr. 319).

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<sup>9</sup> See RX-22.

She further testified Mark Chenevy, the engineering supervisor, was also rated "below expectations" by Leherr, but his review was not in evidence. Freeman stated the list included ten names of salaried employees. (Tr. 321, 326). She stated that Campbell did not think the plant manager liked her because she felt he singled her out at meetings. (Tr. 329).

#### **Mike Leherr**

Mike Leherr testified at the formal hearing by video-conference. He is presently Director of Operations for Respondent in Lancaster, Pennsylvania. He has a mechanical engineering degree from Notre Dame, and began with Alcoa after graduation from college. He was the plant manager in Texarkana in 2006-2009. (Tr. 336-337).

Leherr testified the RIF was caused by monthly losses and business collapsing rapidly in 2008. (Tr. 337). In August or September 2008, he met with Roy Dirkmatt (his boss), Kelly Freeman, Jeff Teague and Debbie Smith (human resources generalist) to identify a potential structure that would allow the company to be profitable. (Tr. 337-338). He stated he created a plan and identified names to calculate the financial impact of severance packages for the employees that were to be part of the RIF. (Tr. 338). Respondent had approximately eighty-five salaried employees at the Texarkana plant, and he looked at redundancy of work or stop gaps measures in determining which positions to eliminate and/or employees to terminate. (Tr. 339). In late September or early October, he decided to lay off ten salaried and fifty hourly employees. The specific positions were identified and the names were added in mid-October 2008. (Tr. 339-340).

Leherr testified that he had three engineers in the casting department. The other two engineers held degrees. One of the engineers was Randall Rogers. (Tr. 340). In determining which employee to retain between Complainant and Rogers, Leherr stated he needed flexible skill sets; Rogers was more experienced and skilled, and was head of the RODECS project, handled more complex projects and his performance reviews were better. (Tr. 340-341). Leherr testified he asked the departments for a preliminary review of the structure before deciding on which employees to select for the RIF. (Tr. 341-342). Leherr further testified he was tasked with the duty to make the decision of who to select for RIF; department managers had no knowledge of the names. (Tr. 342). He stated he spoke with Pat Campbell only

about the loss of a mechanical engineer and how it would affect operations. He further stated Campbell did not ask him to get rid of Complainant. (Tr. 343).

Leherr testified Mark Salih told him of the CAA violation; he told Salih to treat the incident as major and to launch an investigation. (Tr. 343-344). He stated that based on Salih's investigation, Campbell mistakenly charged scrap. He withheld her incentive pay and gave her a "below expectations" review as reprimand measures. (Tr. 344). He stated Salih self-reported the incident to the EPA, per company policy. The plant was fined \$2,000 and received a notice of violation. Leherr testified he was not angry with Complainant for voicing his complaint. (Tr. 345). "I was more mad at Pat Campbell, to tell you the truth." He stated, however, that he wished Complainant had directly intervened and stopped the process from occurring in the first place, but Pat Campbell should still be held accountable. (Tr. 346).

Leherr testified he made the decision on the number of hourly employees to be laid off. The actual employees selected would be based on seniority, however, because they were represented by the union. (Tr. 347). Freeman had to prepare a "WARN notification," which legally notifies employees sixty days in advance that a RIF will take place. (Tr. 347). The WARN notice had to be approved by Respondent, which took approximately two weeks. (Tr. 348).

Leherr stated Complainant refused to sign a release for severance pay, which indicated to him that there was an issue. He did not get clarity until later when he received a letter from Complainant's attorney. (Tr. 348).

Leherr testified that RX-22, page 1, is the notice to employees, which is a prepared script; he read only the written script at the December 2008 meeting with the employees. (Tr. 349). He further testified that RX-22, page 2, is the script he read when he met with the ten salaried employees and formally laid them off with Teague present. (Tr. 350). Leherr testified he did not retaliate against Brown by selecting him for RIF because he made the CAA complaint. (Tr. 352). He stated he was unaware of the complaint at the time he was going through the process of selecting employees for the RIF. (Tr. 352). He thought casting only needed one electrical and one mechanical

engineer. The other mechanical engineer (Rogers) had more expertise, held a degree, and gave the plant "the best chance of survival." (Tr. 352). Leherr further stated Campbell did not know Brown was selected for RIF until late December or early January 2009. (Tr. 353).

On cross-examination, Leherr stated there was no specific dated document of names in late October or early November. (Tr. 354). He did not know if the list of ten names was dated, but stated the list only went to Freeman, Teague and Debbie Smith. (Tr. 355-356). Leherr testified he was concerned about the scrap being charged but did not talk to Complainant about it. (Tr. 356). He instead charged Salih to investigate the permit violation; he was unaware of the details of what could be done or not done with the scrap. (Tr. 356-357). He did not recall a specific date when the "name list" was created. (Tr. 357). He stated the department managers had no role in the selection of employees for RIF; they only provided feedback if they felt they could not operate without a specific position. (Tr. 358). He stated that under company policy, Salih was in charge of notifying EPA of violations. (Tr. 359-360). Leherr testified he met with Campbell after Salih's investigation had concluded. (Tr. 360).

Leherr testified that during the process of selecting employees for the RIF, he used a dry-erase board and reduced e-mails because of the sensitive, confidential nature of the process. (Tr. 362-363).

Leherr agreed Complainant followed company policy by reporting the incident, but he would have expected him to stop the process from happening or continuing after he noticed it had begun. (Tr. 364).

## **V. CONTENTIONS OF THE PARTIES**

Complainant contends he engaged in protected activity when he reported his department manager, Pat Campbell, had authorized the burning of untreated scrap in the furnace in violation of Respondent's PSD permit. Complainant additionally contends he suffered an unfavorable personnel action when his employment with Respondent was terminated; his protected activity was a contributing factor in the adverse job action; and the same unfavorable job action would not have resulted absent his protected activity.



Respondent, on the other hand, avers Complainant can point to no facts indicating that any protected activity he engaged in had anything to do with his termination. Respondent further contends Complainant's employment was terminated as a result of a reduction in force necessitated by an economic downturn; Complainant was the only engineer without a degree and he previously had negative performance reviews.

## **VI. ANALYSIS AND DISCUSSION**

### **A. Credibility**

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations

must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses. Here, I observed little to no inconsistency in any of the testimony and objective evidence. Therefore, I find all of the witnesses in this matter to be generally credible.

## **B. The Statutory Provisions**

The employee protective provision of the CAA is set forth at 42 U.S.C. § 7622. The CAA prohibits discharge or discrimination of an employee resulting from providing the employer or the Federal Government with information relating to any violation or alleged violation of orders, regulations, or standards of the Environmental Protection Agency (EPA) or any other provision of Federal law relating to ambient air quality.

42 U.S.C.A. § 7622(a) states:

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 the employee) -

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,

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

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C. § 7622(a).

### C. The Burden of Proof

To prevail in CAA adjudication, Complainant must demonstrate or prove his prima facie case by presenting evidence "sufficient to raise an inference, a rebuttable presumption, of discrimination." Morriss v. LG&E Power Services, LLC, ARB No. 05-047, ALJ No. 2004-CAA-14, (ARB February 28, 2007); see also Schlager v. Dow Corning Corp., ARB No. 02-092, ALJ No. 01-CER-1, slip op. @ 5 (ARB Apr. 30, 2004). The Complainant can satisfy this burden by showing: (1) the Respondent is subject to the CAA statutory provisions; (2) the Complainant engaged in protected activity; (3) that the Respondent was aware of his protected activity; (4) the Complainant suffered an adverse employment action; and (5) the protected activity was a contributing factor to the adverse employment action. Id.; See also Jenkins v. EPA, ARB No. 98-14, ALJ No. 1988-SWD-2, slip op. @ 17 (ARB Feb. 28, 2003).

After Complainant has established his prima facie case, the Respondent is then required to "simply produce evidence or articulate that it took adverse action for a legitimate, nondiscriminatory reason (a burden of production, as opposed to a burden of proof)." Morriss, supra @ 32. Respondent must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse employment action. The explanation provided must be legally sufficient to justify a judgment for Respondent. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981). However, the Respondent does not bear the burden of persuading the ALJ that it had convincing, objective reasons for the adverse employment action. Id.

If the Respondent successfully produces evidence of a legitimate nondiscriminatory reason for the Complainant's adverse employment action, the presumption "drops from the case" and the Complainant is then required to prove intentional discrimination by a **preponderance of the evidence**. Id. Once Respondent has produced evidence that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether Complainant presented a prima facie case. Instead, the relevant inquiry is whether Complainant prevailed by a **preponderance of the evidence** on the ultimate question of whether he was discriminated against because of his protected activity. See Williams v. Baltimore City Pub. Schools Sys., ARB No. 01-021, ALJ No. 2000-CAA-15, slip op. @ 2 n.7 (ARB May 30, 2003); Carroll v. Bechtel Power Corp., ARB No. 1991-ERA-46, slip

op. @ 11, n. 9 (Sec'y Feb. 15, 1995), aff'd sub nom. Betchel Power Corp. v. U.S. Department of Labor, 78 F.3d 352 (8<sup>th</sup> Cir. 1996); James v. Ketchikan Pulp Co., Case No. 1994-WPC-4 (Sec'y Mar. 15, 1996); Adjiri v. Emory University, Case No. 1997-ERA-36, slip op. @ 6 (ARB July 14, 1998); Schwartz v. Young's Commercial Transfer, Inc., ARB No. 02-122, ALJ No. 2001-STA-33, slip op. @ 9 n.9 (ARB Oct. 31, 2003); Kester v. Carolina Power & Light Co., ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. @ 6 n. 12 (ARB Sept. 30, 2003); Simpkins v. Rondy Co., Inc., ARB No. 02-097, ALJ No. 2001-STA-0059, slip op. @ 3 (ARB Sept. 24, 2003); Johnson v. Roadway Express, Inc., ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000).

**Preponderance of evidence** is the greater weight of evidence or superior evidence, weight that though not sufficient to free the mind wholly from all reasonable doubt is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-8, slip. op. @ 13 (ARB Jan. 31, 2006).

If Complainant is successful in proving his case by a **preponderance of the evidence** that the Complainant's protected activity played some part in or was a contributing factor to the adverse action, the burden of proof then shifts to the Respondent to prove by a **preponderance of the evidence** that the adverse action would have occurred regardless of the protected activity. Morriss, supra; Schlagel, supra.

#### **Complainant's Prima Facie Case**

Respondent's business is primarily production and management of aluminum and aluminum products, flat-rolled products, hard alloy extrusions, forgings, wheels, fastening systems, castings and building systems. The Secretary found Respondent to be a covered employer under the CAA, and I agree. (ALJX-2). Respondent did not contest its covered employer status. Accordingly, I find Respondent is a covered employer under the CAA and is thus subject to the statutory provisions thereunder, including the whistleblower provisions.

In its amended post-hearing brief, Respondent concedes Complainant "engaged in protected activity when he [internally] reported the melting incident to the appropriate managers and when he informed the managers of his intention to report the

incident to environmental authorities.”<sup>10</sup> Respondent additionally concedes Complainant was subjected to adverse employment action when he was selected for termination.<sup>11</sup>

However, Complainant alleges his protected activity was a contributing factor in Respondent’s ultimate adverse employment action, termination of employment. Respondent contends Complainant was terminated as part of the RIF caused by a significant economical downturn. Specifically, Respondent contends Complainant’s selection for the RIF was based on both his past performance reviews and the fact that he was the only engineer employed without a degree.

“A contributing factor is ‘any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.’” Klopfenstein v. Admin. Rev. Bd., 2010 WL 4746668, slip op. at 3 (5th Cir. Nov. 23, 2010), *citing Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476, n. 3 (5<sup>th</sup> Cir. 2008). Temporal proximity between the protected activity and adverse employment action, without more, is insufficient to establish that the protected activity was a contributing factor. Hendrix v. American Airlines, Inc., 2004 WL 3093326 (U.S. Dept. of Labor), 22 IER Cases 182 (Dec. 9, 2004).

Complainant testified he had knowledge of Respondent’s financial difficulties and that he had participated in discussions with Salih and Rogers about the possibility of a RIF. Respondent’s stated reason for Complainant’s selection was that he did not have a degree and he had past performance problems. Specifically, Mike Leherr, the plant manager responsible for making the decision of which employees were selected for the RIF, testified there were two mechanical engineers in the casting department and Respondent only needed one. The other mechanical engineer, Rogers, who had been Complainant’s former supervisor, possessed an engineering degree from Texas A&M University and had a higher degree of expertise than Complainant. Complainant additionally admitted to having “below expectations” performance evaluations in 2007 and 2008.

Moreover, Leherr testified that the only input Campbell had regarding selection for the RIF was to provide feedback on whether the casting department could survive without a specified position. He further stated Campbell had no knowledge of Complainant’s selection until only a few days prior to his

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<sup>10</sup> See Respondent’s Amended Brief, pp. 7-8.

<sup>11</sup> Id.

termination. He additionally credibly stated he was unaware Complainant had even made a complaint at the time of the process for the RIF selection, as he identified employees to be selected as part of the RIF in mid-October 2008. I also note that although Complainant internally reported violations, he never reported any violations to the EPA until after his employment was terminated. There is no record showing of any animus towards Complainant by Respondent or any nexus between Complainant's protected activity and his selection for RIF.

Finally, Leherr and Salih both testified Complainant was right in filing the complaint and followed company policy by reporting the violation. Accordingly, I find that Complainant failed to establish that his protected activity was a contributing factor in the determination to select him for layoff as part of the RIF.

Finally, assuming, **arguendo**, Complainant had shown his protected activity to be a contributing factor in the adverse employment action, Respondent has satisfied its burden of rebuttal by showing through **a preponderance of evidence** that it would have taken the same adverse employment action regardless of Complainant's engagement in protected activity. Freeman testified the factors considered when selecting employees for RIF were whether they had a degree and their past performance. Leherr testified that he chose to retain Rogers over Complainant because Rogers had an engineering degree and more expertise. Complainant was the only engineer without a degree in the casting department. Additionally, the record reflects Complainant had time management, organizational and performance issues in 2006.<sup>12</sup> In 2007, Claimant's performance was listed as "below expectations." Campbell noted in 2007, "You never know when [Complainant] will show up for work or if he will show up."<sup>13</sup> Claimant again scored "below expectations" in 2008, and it was noted he "tends to wait until the last minute to do what needs to be done."<sup>14</sup> Accordingly, I find and conclude that Respondent has shown by **a preponderance of the evidence** it would have taken the same adverse employment action regardless of Complainant's engagement in protected activity.

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<sup>12</sup> See RX-34-A; RX-39.

<sup>13</sup> See RX-36; RX-37.

<sup>14</sup> See RX-23.

## VII. CONCLUSION

Complainant has failed to show his protected activity in reporting the permit violation to either management or the EPA was a contributing factor to his selection for his RIF; even if he had, however, Respondent has successfully rebutted such a contention by showing a legitimate business reason for selecting Claimant for reduction in force.

## VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, Respondent did not unlawfully discriminate against Victor Brown because of his protected activity and, accordingly, Victor Brown's complaint is hereby **DISMISSED**.

**ORDERED** this 7<sup>th</sup> day of January, 2011, at Covington, Louisiana.

**A**

LEE J. ROMERO, JR.  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The 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. 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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: [ARB-Correspondence@dol.gov](mailto:ARB-Correspondence@dol.gov).

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.



