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Issue Date: 02 May 2017

CASE NO.: 2015-CAA-00001

In the Matter of:

PENNY WEYMILLER,
Complainant,

v.

IDAHO FALLS SCHOOL DISTRICT 91,
Respondent.

DECISION AND ORDER DENYING WHISTLEBLOWER COMPLAINT

This action arises under the employee protection provisions of the Clean Air Act ("CAA"), 42 U.S.C. § 7401-7671, found at 42 U.S.C. § 7622, and accompanying regulations found at 29 C.F.R. Part 24. The rules of evidence for administrative hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18, Subpart B, apply to this matter. 29 C.F.R. § 24.107(a). I conducted a hearing in Idaho Falls, Idaho from February 9 to February 12, 2016. Jonathan Harris, Attorney at Law, represented Complainant. Brian Julian, Attorney at Law, and Bret Walther, Attorney at Law, represented Respondent.

Penny Weymiller ("Complainant") alleges that Idaho Falls School District No. 91 ("Respondent") violated the whistleblower protection provisions of the CAA when it took a series of alleged adverse actions against her in retaliation for reporting safety concerns related to the handling of asbestos at Gale Junior High School, which is within Respondent's jurisdiction. On January 15, 2015, the Occupational Safety and Health Administration ("OSHA") issued a written finding that Respondent violated the whistleblower provisions of the CAA.[1] Respondent objected to the finding and the matter was received for hearing in this office on February 18, 2015.

As explained below, after a thorough review of the entire and substantial record, I find that Complainant has not proven her case by a preponderance of the evidence and deny her request for relief.

[1] The Department of Labor instituted a separate action in United States District Court for the District of Idaho related to violations of the Asbestos Hazard Emergency Response Act of 1986 ("AHERA"), which is currently pending. *See Perez v. Idaho Falls Sch. Dist. No. 91*, No. 4:15-cv-00019-BLW, 2017 U.S. Dist. LEXIS 26806 (D. Idaho Feb. 24, 2017).

EVIDENCE ADMITTED AT HEARING[2]

At the hearing, Respondent's exhibits ("RX") 1 through 25, 27 through 58, and 25-1[3] were admitted into evidence.[4] Hearing Transcript ("TR") at 9-10, 239, 357. Complainant objected to RX 25-A and 26, which I took under submission. TR at 10. Regarding RX 25-A, the objection is granted and it is not admitted into evidence.[5] Regarding RX 26, the objection is overruled and RX 26 is admitted into evidence.[6]

Complainant's exhibits ("CX") pages[7] 1000-1019, 1022-1120, 1148-1513, 1515-1612, 1669-1676, 1796-2901, 2960-2965, 2979-2995, 3016-3023, 3041-3064, 3075-3094, 3146-3147, 3243-3374, 3379-3536, 3540-3557, 3559-3564, 3567-3569, 3572-3578, 3581-3621, 3625-3635, 3643-3657, 3662-3672, 3679-3687, 3695-3760, 3766-3810, and 3813-3825 were admitted into evidence.[8] TR at 12-16, 238, 618, 620-626, 632-641. The list of stipulated facts agreed to by the parties was admitted as ALJX 1. TR at 358.

I allowed the post-trial deposition of Respondent's expert Nany Collins, which was filed on March 10, 2016, and is now admitted into evidence as RX 59. I also allowed the post-trial deposition of Dr. Gracie Hargraves, Complainant's therapist, which was filed on April 18, 2016, and is now admitted into evidence as CX 1.

Complainant and Respondent filed simultaneous closing briefs on May 23, 2016, which were marked as ALJX 2 and ALJX 3, respectively. Complainant and Respondent filed simultaneous reply

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[2] During the hearing, various statements came into evidence without objection that may constitute character or hearsay evidence. I noted these instances as I reviewed the record, and I did not base any findings on these statements alone.

[3] RX 25, the affidavit of Dana Wood, was admitted via written ruling dated February 3, 2016. At the hearing, exhibits were attached to the affidavit that were not part of the motion on which I ruled, and which were therefore marked RX 25-1 and admitted into evidence. Complainant did not object to the admission of the exhibits to Dana Wood's affidavit as RX 25-1. TR at 10-11.

[4] RX 32 consists of written narrative statements prepared by Complainant provided to OSHA. TR at 837-838. I excluded these statements from Complainant's exhibits, but they were admitted as part of Respondent's exhibits. These narrative statements were admitted as statements by a party-opponent, but I found them entitled to less weight than other evidence because they were prepared for OSHA in anticipation of litigation.

[5] Complainant objected to RX 25-A, the affidavit of Superintendent George Boland, as inadmissible hearsay, given that Mr. Boland testified at the hearing. TR at 8. Because RX 25-A was not used to rehabilitate Mr. Boland's testimony, it is hearsay and not admitted. 29 C.F.R. § 18.801(c)

[6] Complainant objected to RX 26, which was Complainant's transcribed interview with OSHA. TR at 9. Respondent asserted RX 26 was a statement of a party opponent, and could be used to impeach Complainant, and in fact did use RX 26 during cross examination of Complainant. TR at 9, 371. Because RX 26 is a statement of a party opponent, it is not hearsay and is admitted into evidence. 29 C.F.R. § 18.801(d)(2).

[7] In the prehearing order, I required the parties to individually number or letter each exhibit. Complainant's exhibits did not comply with this order, which I failed to appreciate at the hearing when I admitted them into evidence as marked by Complainant. Complainant's evidence was confusing and difficult to figure out, and I spent considerable time trying to organize and understand her evidence.

[8] CX pages 1020-1021, 1514, 1613-1668, 1677-1795, 3029-3040 were withdrawn. TR at 617, 621-622, 628. CX pages 1121-1147, 2902-2959, 2966-2978, 2996-3015, 3024-3028, 3065-3074, 3095-3145, 3148-3242, 3375-3378, 3537-3539, 3558-3558, 3565-3566, 3570-3571, 3579-3580, 3622-3624, 3636-3641, 3659-3661, 3673-3678, 3688-3694, 3761-3765, and 3811-3812, were not admitted. TR at 618, 625-626, 628-629, 631-640. CX 3642 and 3658, "title pages" that serve an organizational purpose, were overlooked at the hearing; these pages are now admitted as they are useful in delineating sections of the exhibits, although they provided no substantive information. In addition, the parties discussed seven audio recordings of interviews with OSHA that were not admitted into evidence and were never otherwise made a part of the record. TR at 619.

briefs on June 6, 2016, which were marked ALJX 4 and ALJX 5, respectfully. The record closed on June 6, 2016.

I. ISSUES IN DISPUTE

This matter presents the following disputed issues:

1. Did Complainant engage in protected activity within the meaning of the Clean Air Act ("CAA")?
2. Did Complainant suffer an adverse action?
3. Has Complainant shown by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged? 29 C.F.R. § 24.109(b)(2).
4. If Complainant establishes the elements of her claim by a preponderance of the evidence, then has Respondent established by a preponderance of the evidence that it would have taken the same adverse action in the absence of Complainant's protected activity? 29 C.F.R. § 24.109(b)(2).
5. If Complainant prevails, what compensatory damages, if any, should be awarded?
6. What other appropriate action should be taken to abate the violation, including reinstatement to her former position, compensation, back pay, front pay, terms, conditions, and privileges of that employment, and attorney's fees and costs? 29 C.F.R. § 24.109(d)(1).

II. STIPULATED FACTS

1. In August 2007 Complainant was hired by Respondent to act as Respondent's Environmental Safety and Health Director.
2. Complainant was hired and supervised by Dana Wood ("Wood"), the Director of Operations for Respondent during the time she was employed by District 91.
3. During Complainant's employment with Respondent, she received favorable performance reviews, except on her June 2010 performance review when Complainant received a "Needs Improvement" with respect to her punctuality and regular and predictable attendance.
4. On February 25, 2011, Complainant met with Superintendent George Boland ("Boland"). During that meeting, Complainant expressed some concerns regarding Wood and requested to be removed from Wood's supervision and to be able to report directly to Boland.
5. Boland informed Wood of his meeting with Complainant, but does not recall the exact day.
6. In early 2011, Wood decided to have the boiler pipes in Clair E. Gale Jr. High School ("Gale") tested to determine their usable life. To perform the testing Wood contracted with Materials Testing and Inspection ("MTI") who would attach a probe to bare metal pipes and measure the pipe thickness using ultra-sound technology. Based on MTI's review of plans Respondent submitted to MTI, MTI submitted a written proposal dated February 25, 2011, to test 65 locations on the boiler pipes.
7. Most of the boiler pipes in Gale were covered with asbestos-containing Thermal System Insulation ("TSI").

8. The parties dispute when Complainant learned of Wood's plan to have MTI do the testing and dispute the nature and extent of Complainant's involvement in the project.
9. The parties also dispute the extent to which Complainant verbally expressed concern to Wood about the project.
10. The parties agree that Complainant sent the March 9, 2011 email to Wood. The parties disagree as to the intent and purpose of the email. Otherwise the email is in evidence and its contents are not in dispute.
11. On March 10, 2011, Complainant and Wood had a meeting where the March 9 email was discussed. The parties do not agree as to what was said during that meeting.
12. MTI determined that it would sample 32 locations. However, there were only 28 points where the pipes could be accessed without removal of asbestos containing TSI. Wood determined that 28 sampling sites would be sufficient and thus no asbestos was removed for purposes of MTI sampling.
13. In April 2011, Complainant and Wood had two meetings with Boland.
14. On May 12, 2011, Complainant was placed on administrative leave.
15. Complainant filed grievances with District 91 on May 16, May 19 and June 7, 2011.
16. Complainant through her attorney attempted to negotiate a settlement.
17. Complainant was terminated from her employment on June 5, 2011.
18. After her termination, Complainant filed for and was awarded unemployment benefits.
19. Complainant remained unemployed until she was hired by the Shoshone Bannock Tribes as air quality manager on June 27, 2012.
20. The HVAC system at Gale was antiquated and needed to be renovated. Respondent tried in 2009 and 2010 to pass a bond to fund the Gale renovation as well as other projects. Those bonds did not pass.
21. In 2012, a $53,000,000.00 bond did pass. As a result, in the summer of 2012 Respondent began renovation of Gale, including the HVAC system in Gale. Renovation of the HVAC system in Gale included removal of the asbestos containing TSI covering the boiler pipes.
22. In December 2013, OSHA notified Respondent that Complainant's AHERA Whistleblower claim was also being investigated under CAA's Whistleblower provisions. A response from Respondent was not requested.
23. In October 2015, Complainant's employment with Shoshone Bannock Tribes ended when the Tribes accepted her resignation.

TR at 18-21, 357-358; ALJX 1.

III. FACTUAL FINDINGS

Complainant's Information

Background

1. Complainant received an associate's degree in liberal arts from Kentucky State University, a bachelor's degree in chemistry from Idaho State University, and a master's degree in environmental studies from the University of Idaho. TR at 24; CX 2899. She worked in Environmental Compliance at a series of jobs, mostly for site contractors and consulting firms. TR

at 25-27; RX 50 at 517; CX 2899-2901. Before she worked for Respondent, Complainant worked as a senior scientist and consultant for Portage Environmental doing mostly safety analysis and environmental assessments. TR at 27, 30; CX 2899. In these positions, Complainant handled hazardous waste materials and needed to know certain inspection requirements, such as the regulations under the National Emission Standards for Hazardous Air Pollutants ("NESHAP") and the Toxic Substances Control Act ("TSCA"). TR at 28-30.

2. In August 25, 2007, Respondent hired Complainant as its Environmental Health and Safety Engineer. TR at 33; CX 1148. Complainant decided to work for Respondent because she wanted to get into the safety field. TR at 30-31. Respondent provided a defined benefit pension plan with the acronym "PERSI,"[9] which Complainant described as a "huge factor" in deciding to apply for a job with Respondent. *Id.* at 31. Complainant also wanted to work with kids and serve her community, the hours allowed her to have most of the summer off, and she thought working for Respondent would offer greater security than her previous contract-based positions.[10] *Id.* at 31, 447. During her time working for Respondent, she observed that employees generally stayed at their jobs for a long time, until retirement. *Id.* at 447. Complainant stated she took a pay cut to work for Respondent, from approximately $43 or $45 per hour to $32 per hour. *Id.* at 32.

3. Complainant interviewed with Dana Wood, who would become her supervisor, and although they "knew of each other," this was the first time they met.[11] TR at 28, 32-33. Complainant's job duties as the Environmental Health and Safety Engineer included waste management, chemical management, operations waste, industrial safety training, electrical safety training, and asbestos awareness training. *Id.* at 35, 39-40. Complainant described the asbestos program as "huge" due to the old buildings in the school district which contained "a lot" of asbestos. *Id.* at 35-36. Mr. Wood wanted Complainant to run a more efficient asbestos program, use her skills to lay out a path forward for either the management or abatement of asbestos, and to let him know the scope of the asbestos problem. *Id.* at 38-39. She had experience with asbestos disposal but not asbestos-management plans, although she felt she was good at reading regulations. RX 26 at 271. Federal asbestos regulations require school districts to continue to manage asbestos in the schools by conducting inspections and surveillances, and Complainant stated that she was the only person in the school district trained as an inspector, manager, planner, and project designer under the Asbestos Hazardous Emergency Response Act ("AHERA"). TR at 36-37. Her job also included implementing lead regulations that came into effect in April 2010. *Id.* at 40-41.

4. Complainant's performance reviews until June 2010 were positive. TR at 42. In June 2010, Mr. Wood noted Complainant "needed improvement" with punctuality and regular and predictable attendance. TR at 44; RX 2 at 17. Complainant only discussed these comments briefly with Mr. Wood, because she thought Mr. Wood would not change his mind and she "didn't consider it too big a deal." TR at 44-45. Complainant "den[ied]…completely" that she was late to work, and noted she was on a flexible schedule and never late to meetings. TR at 45, 170-172.

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[9] "PERSI" stands for the Public Employee Retirement System of Idaho. TR at 31.

[10] In her deposition, Complainant stated she took the job with Respondent because they offered her the job, it was in Idaho Falls, and she thought it would be a challenge because she was getting bored with waste management. TR at 304-305.

[11] Mr. Wood and Complainant's husband were friends, and Mr. Wood served as the best man at Complainant's wedding, which occurred while she was working for Respondent. TR at 311. Mr. Wood alleged he did not know Complainant prior to hiring her, and only found out about the relationship after making the job offer. RX 25-1 at 38. Mr. Wood passed away in February of 2012. TR at 527.

Typically, she was at work by 8:00 a.m., but not always in the office because she would visit schools early in the morning. *Id.* at 172-173.

5. As for the regular and predictable attendance, Mr. Wood told her she used too much sick leave. TR at 45; RX 2 at 16. Complainant said she was sick "quite a bit one year," but still had approximately 60 hours of sick leave left. TR at 174. The same year, Complainant said the district warned people to stay home if they were sick due to concerns about the H1N1 flu. TR at 174-175. In addition to flu symptoms, Complainant claimed she had "a lot of medication problems," troubles with a virus, pneumonia, and back problems for which she saw a chiropractor. TR at 828-829. In June 2010, Mr. Wood requested Complainant provide a doctor's note if she was sick, which Complainant did not want to do because she is "a private person" and did not want Mr. Wood knowing what kind of doctor she was seeing. RX 2 at 16; TR at 176. She asked if she could give the documentation to the Human Resources manager, and moving forward provided documentation, although at one point she told Mr. Wood she felt like she was "back in Jr. High." TR at 309; CX 1321. She also stated in an email to the Human Resources manager that she "resent[ed]" the implied accusation that she was abusing sick leave. CX 3307. Complainant noted that other employees, such as Amy Rubio, also used a large amount of sick leave in 2011 and 2012. TR at 177; CX 3272. Complainant denied that Mr. Wood ever said that he believed she was taking advantage of the situation because of his friendship with her husband. TR at 312.

6. Complainant said she had a good working relationship with Mr. Wood up until March of 2011 and enjoyed working with him to resolve different problems. TR at 45. However, Complainant alleged Mr. Wood was "losing interest in safety," as demonstrated by several incidents. *Id.* First, in September 2010, there was an incident where custodians were refinishing gym floors using respirators, but that Complainant was never informed. *Id.* at 46-48. Complainant characterized this as placing staff at risk, as well as an OSHA violation and a violation of state law since a physician never cleared the custodians as healthy enough to use a respirator. *Id.* at 46, 48. Second, in January 2011, a chemistry teacher at Gale, Burke Smejkal,[12] spilled hydrochloric acid and did not appear to be properly trained in the chemical hygiene plan, which is a written document that explains how chemicals should be stored, labeled, and managed. TR at 49-50; CX 3591. Third, there was an issue about inadequate venting of a chemical storage room that was allegedly making a teacher sick, which was not adequately addressed for six months. TR 53-60; RX 1 at 12; CX 3594-3621. Complainant thought the issue should have been resolved more quickly, but she needed Mr. Wood to implement a solution and Complainant felt he did not adequately help. TR at 60-61. Fourth, Complainant stated the new lead regulations were not being followed and that Mr. Wood would not send her to training. TR at 61-62; CX 3627-3631.

February 25, 2011 Meeting with Superintendent Boland

7. Complainant decided to request a meeting with Superintendent George Boland about Mr. Wood, and arranged to speak with him on February 25, 2011. *Id.* at 66-67. At the meeting, Complainant told Mr. Boland she had some concerns about how Mr. Wood ran Maintenance and Operations and that Mr. Wood was "circumventing" her. *Id.* at 67. Complainant said Mr. Boland was surprised she wanted to talk about Mr. Wood because he thought she wanted to talk about an upcoming safety inspection. *Id.* at 68. She alleged she told Mr. Boland about the

[12] At the hearing, Mr. Smejkal's name was incorrectly recorded as being spelled "Smejkl." *See* TR at 10, and correct spelling at RX 56 at 2.

several safety incidents that had occurred over the previous six months.[13] *Id.* at 67. She told Mr. Boland she thought Mr. Wood mistreated and belittled other people, although she thought Mr. Wood treated her better than others because of her level of education.[14] *Id.* at 68-69. She asked Mr. Boland to move her out of Mr. Wood's supervision, since she believed "safety people should be autonomous." *Id.* at 68. She felt Mr. Wood often did not want to hear her advice because it would cost money, and that she thought Mr. Wood was "very vindictive." *Id.* Complainant asked Mr. Boland not to tell Mr. Wood about the meeting because she thought Mr. Wood would retaliate against her, and that she had seen Mr. Wood retaliate against other people who crossed him. *Id.* at 69. She described the situation with Mr. Wood as "intolerable," although she also felt her relationship with Mr. Wood was "fine." *Id.* at 317, 319. Complainant stressed at the hearing that she complained about the situation with Mr. Wood in general, not a personal situation with Mr. Wood. *Id.* at 317. Complainant also told Mr. Boland that the district was "one of the most dysfunctional places" she had worked, which she claimed she did not mean as a criticism, but as a commentary on the different interests at play in a school district. *Id.* at 833. She described Mr. Boland as very nice at the meeting, and noted that he "listened quite intensely." *Id.* at 318. However, she stated he later seemed to be "against [her]," presumably after he talked with Mr. Wood. RX 26 at 288.

8. Complainant met with Mr. Wood on March 7, 2011, and Mr. Wood told Complainant her normal work hours would be from 8:00 a.m. to 4:30 p.m.[15] TR at 323; RX 7 at 103; CX 1398. During her OSHA interview, Complainant could not remember when her hours were changed. RX 26 at 281. However, she stated that "nobody" worked 8:00 a.m. to 4:30 p.m., and that she was not given a reason for the change in her hours. *Id.* at 280-281. She alleged the policy on work hours was "all over the place," and that work hours were flexible. *Id.* at 281.

Plan for Boiler Pipe Testing

9. Complainant described Gale Junior High as "loaded with asbestos containing material" ("ACM") because "virtually all of the pipes" had asbestos in the joint fittings or insulation. CX 3381. In early February 2011, Complainant first learned that a company called Material Testing Inspection ("MTI") was going to be testing boiler pipes in Gale in order to determine their remaining usable life. TR at 96, 324; CX 1151. She was copied on an email from Mr. Wood to MTI about a walk-through that Complainant and Maintenance employee Mike McGuyer would be accompanying MTI on.[16] TR at 96. Complainant alleged she did not know why MTI was doing a walk-through, and emailed Mr. Wood on February 22 to ask when the walk-through was scheduled, to which Mr. Wood responded that he was waiting on MTI for a proposal. TR at 98; RX 4 at 82; CX 3390.

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[13] Mr. Boland did not recall her mentioning these specific incidents, only that she mentioned Mr. Wood "taking short cuts" and a "reference to [Mr. Wood's] ego, trying to save money." TR at 606.

[14] In a grievance dated May 16, 2011, Complainant stated she "discussed with Mr. Boland the punitive, demeaning and disrespectful manner in which Mr. Wood treated Operations personnel, myself included." CX 1149.

[15] In a grievance letter dated May 19, 2011, Complainant alleged Mr. Wood set her work hours to 8:00am to 4:30pm after the March 9, 2011 email. CX 1152. However, she did not dispute at the hearing that Mr. Wood changed her hours on March 7, 2011. TR at 323.

[16] Complainant first stated she was copied on the email from Mr. Wood to MTI on February 10, but later stated she was copied on the email on February 15. TR at 96, 324. This email is not part of either party's exhibits. TR at 96.

10. On February 25, Mr. Wood asked Complainant about the asbestos on the boiler pipes and Complainant told him "the place was loaded with asbestos." TR at 99. Maintenance employee Ferel McArthur was in Mr. Wood's office and noted that they could remove three square feet as a small-scale, short-duration activity, to which Complainant responded that the insulation was "really friable."[17] *Id.* The same day, Dan King of MTI emailed the proposal for the walk-through to Mr. Wood. RX 5 at 83-85. Complainant was copied on Mr. Wood's response to Dan King, although she stated she did not see MTI's proposal on February 25, 2011, but only during discovery. TR at 326-327. In Mr. Wood's reply to Dan King, also sent on February 25, he indicated he was aware of the asbestos issues, and that they wished to avoid having to remove asbestos if possible. TR at 327; RX 5 at 83; CX 3391. The same day, Complainant responded to Mr. Wood's reply to Dan King, and she asked about the minimum surface areas needed to perform the testing, and added that the ACM was "very friable." TR at 328; RX 6 at 100. Complainant felt that she should have been involved in the MTI project sooner, but denied being upset or feeling resentment about the issue. TR at 324-325.

11. Complainant met with Mr. Wood a couple of times between February 25 and March 9, where Complainant asked him about the asbestos plan and informed him there needed to be an abatement with a 10-day notification before the testing could be done. TR at 100-101. Mr. Wood wanted her and two of Respondent's asbestos workers to remove the asbestos insulation so that MTI could perform testing during spring break, which started around March 28. *Id.* at 101. Complainant found out from MTI that they intended to take 65 samples,[18] which Complainant described as "a lot of locations on boiler pipes to sample that are essentially covered with asbestos insulation." *Id.* at 101-102, 105-106. Complainant believed that if MTI took 65 samples, at least some asbestos would be removed because there were not "anywhere close" to 65 locations that were not asbestos-insulated, based on her walk-through with the abatement contractor in 2009. *Id.* at 106. Complainant told Mr. Wood verbally that they would need to have a "full-scale abatement" and could not do the work "in house," because they would need to shut down the HVAC system, which could not be done while school was in session. *Id.* at 107. Complainant alleges Mr. Wood's response was that Complainant and other district employees were trained and he did not want to hire an abatement contractor.[19] *Id.* at 108, 450. On March 7, 2011, Mr. Wood asked Complainant to email floor plans to Chris Park of MTI, which she did on March 8, 2011. TR at 108-109, 331-332; CX 3411-3413.

12. On March 8, 2011, Mr. Wood sent Complainant an email saying that the number of samples "will be dictated by how much can be removed," and that 65 samples "may be pushing it" for three reasons: 1) access, 2) the amount of asbestos to be removed, and 3) if there was a "qualified" worker. CX 3413; TR at 336; RX 8 at 111. However, Complainant claims that in "several meetings" with Mr. Wood, he was "pushing [her]" to remove the asbestos, and that he never said the number of samples would be limited or that they would not have to remove asbestos. TR at 450. Complainant alleges Mr. Wood refused to hire an abatement contractor and told her to "find a way to do it." *Id.* Complainant also noted that she and other district employees had only

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[17] "Friable" means that the asbestos would crumble at hand pressure. TR at 102-103; *see also* 40 C.F.R. § 61.141. Complainant explained that if asbestos is friable and crumbles, any kind of air movement will make it airborne. TR at 103.

[18] Complainant called MTI to find out how many samples they planned on taking. TR at 101.

[19] This statement is not hearsay because it is a statement by a party opponent.

done a "glove bag operation"[20] in training, and that the boiler pipe temperatures also had to be 150 degrees or below, and they normally ran between 180 to 200 degrees Fahrenheit, although Complainant was not certain. *Id.* at 118-119. She stated that Mr. Wood proposed they do the work while school was in session and while the HVAC system was running, which she stated meant there "would be no controlling" any asbestos that became airborne. *Id.* at 103.

13. On March 8, 2011, Mr. Wood sent Complainant another email asking if the asbestos workers were current on their respirator fit tests. RX 16 at 151. Complainant responded that they were not and that she was having trouble getting in touch with someone to do the fit testing. *Id.* Mr. Wood asked if this would present a problem "for the possible asbestos work to be done," and asked for Complainant's asbestos training plan. RX 16 at 151; CX 3667; TR at 333. Complainant responded that it would present a problem, but went on to add that she thought the "bigger problem" was the limit of three linear feet for a small scale activity and that she found out from MTI the proposed sample size was 65. RX 16 at 151. She said she was trying to determine if there were sections of the pipes that were fiberglass-insulated. RX 16 at 151; TR at 334-335. In her OSHA interview, she alleged that the individuals were fit-tested before the proposed work, when she found someone to do the testing during her asbestos training.[21] RX 26 at 276. She said she refused to conduct the fit testing because she did not feel qualified. *Id.* Complainant said she provided Mr. Wood with possible solutions to the fit test problem on February 22, 2011. TR at 193-194; CX 3662. However, in a follow-up email Mr. Wood asked about the prices of her suggested solutions, to which it appears Complainant never responded. CX 3662; RX 8 at 107. Complainant told OSHA that ultimately Respondent's employees were fit tested and could have done the work, although at the hearing she stated they were not fit tested until May 2011. RX 26 at 276; TR at 338.

14. On March 9, 2011, in response to Mr. Wood's March 8 request for her asbestos training plan, Complainant stated in an email, "You can review Section 9 of any of the online AMPs for training requirements and Section 7, the O&M Plan for a District policies [sic] on work involving the potential disturbance of ACM." RX 16 at 148; TR at 339-340; CX 3667. Mr. Wood responded on March 9, 2011 at 2:01 p.m.:

> Let me rephrase[.] I want you to develop, similar to what I asked for your own training plan – a simple plan that shows on a per person basis the job classification, training requirement, code requirement, frequency, length of class, location, cost, length of class [sic], either length and end of certification and/or next required class for all training/certs having to do with ES&H. This can all be kept in a neat little spreadsheet and, as the district's ES&H engineer, you are responsible for training and/or coordinating that training to make sure that employess [sic] are up to date, which includes fit testing. [T]hanks.

RX 16 at 148. Complainant described this email as "snarky," and responded by "add[ing] a couple of things to what [she] had already sent him, and sent it to him." TR at 340-341. Complainant claimed

[20] A "glove bag operation" is a method of containing friable asbestos. In this situation, it involves hanging an air-tight "glove bag" from the pipe and dropping asbestos into the bag. TR at 103-104.
[21] Although it is unclear, it appears from the record this was the asbestos training Complainant attended on March 11, 2011. RX 26 at 276.

the email requesting the spreadsheet on asbestos training did not bother her. *Id.* at 341. Complainant also contended that she had already sent him a training plan in December 2010. *Id.* at 339; CX 3573-3575. She denied being annoyed or angered by Mr. Wood's request. *Id.* at 339, 342.

Complainant's March 9, 2011 Email

15. On the evening of March 9, 2011, Complainant sent an email to Mr. Wood describing what she understood the boiler pipe testing project to be and listing her "significant concerns regarding the proposed work at [Gale] from both a safety and regulatory concern [sic]." TR at 110-111, 119; RX 9 at 117-118; CX 3416-3418. Part of the reason she sent the email was because she was not going to be there for the March 11 walkthrough because she would be at an asbestos training session in Salt Lake City. TR at 124, 451. The purpose of the walkthrough was to identify proposed sample locations, mark each pipe location with tape or pen, and evaluate for fiberglass insulation runs. CX 3420. She noted that the plan was to have MTI perform the testing for four days during spring break, and that she was not sure of when Mr. Wood planned on removing the asbestos insulation. CX 3416.

16. Complainant testified that she was concerned that there were requirements under AHERA, NESHAP, and OSHA that needed to be followed, although in her email she referenced only AHERA and OSHA.[22] TR at 111-112, 345. Under AHERA, Complainant noted that they could remove up to three linear feet as a small scale short duration activity, which meant they could remove 12 three-inch sections or 18 two-inch sections. CX 3416. If over this amount was removed, she stated that "it is considered a full-scale response action and requires clearance sampling, 10-day EPA notification, etc." CX 3416; TR at 111. Under OSHA, she noted that removal of TSI is considered a "Class I" activity, which dictates a number of requirements in supervision and safety protocols, and described the requirements for using glove bags to remove asbestos. CX 3416-3417. Complainant estimated that the removal of asbestos would take two to three hours[23] per sampling site, and that if MTI took 65 samples, the project would take three weeks.[24] CX 3417; TR at 112. She stated that she and the two other district asbestos workers were confident they could do the work safety and correctly, but would not be fast, hurried, or work unsafely. CX 3417. They would need the proper equipment and would have to dispose of the waste properly, but she stated at the hearing that they could have obtained the equipment online. TR at 113; CX 3417-3418. Complainant noted Mr. Wood's March 8 email in which he stated that while MTI proposed 65 samples, the actual number will depend on access, the amount of asbestos to be removed, and the presence of a "qualified" worker. CX 3417. She stated that if not enough samples were collected, they would not obtain statistically significant data, and she "question[ed] why we are doing the exercise in the first place." TR at 115-116, 347; CX 3417. She concluded her email by stating that she could not support the activity as planned because the schedule was "not reasonable and the risk of violating a regulation or have [sic] an asbestos release is too high," and that they should "step back and reevaluate." CX 3418; TR at 116.

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[22] At the hearing, Complainant stated that she mentioned the 10-day notification to the EPA which "is a required notification under the NESHAP[] regulation…." TR at 111. However, in her email, Complainant mentions the 10-day EPA notification under the heading of her first concern, which references AHERA. CX 1082.

[23] At the hearing, Complainant stated that this was "just an estimate" and that she actually believed they "never could have done a sampling site in two to three hours." TR at 112.

[24] This estimate assumes asbestos would be removed at all 65 sites. TR at 113.

17. Complainant stated her concerns were about Mr. Wood wanting the school asbestos workers to remove asbestos insulation in preparation for the MTI inspection. RX 26 at 272. In her interview with OSHA, she stated she believed that they would have to work too quickly, increasing the chance of an accident, that they would have to remove more than the three linear feet allowed under AHERA, and that they would also violate OSHA. *Id.* at 274-275. Complainant said she talked about these details with Mr. Wood in person, but the March 9 email was the first time she put it in writing.[25] TR at 342-343. She copied Mr. Boland on the email because she was "very concerned about retaliation" from Mr. Wood. *Id.* at 116-117. She stated that she did not think Mr. Wood wanted to violate the law, but that he wanted to find a way around the regulations to get things done. RX 26 at 275. In a written response to Respondent's allegations, Complainant stated she "had no choice but to express [her] concerns more formally in writing" after her earlier concerns "went unheard" and she realized Mr. Wood intended for employees to remove asbestos. RX 32 at 328; TR at 110. She stated she did not think that Mr. Wood would be upset or offended by the email and her explanation of why and how data is collected, although she knew that Mr. Wood had a master's degree in nuclear engineering. TR at 347-348.

18. On the morning of March 10, 2011, there was a meeting between Mr. Wood, Dan King from MTI and some MTI workers, Complainant, and Dan Wilcox, one of the district's abatement workers, in order to discuss how to mark the sample locations. TR at 120-121. Mr. Wood came into the meeting looking "extremely angry" and after the meeting everyone else left and Mr. Wood told Complainant, "I will deal with you later. I don't have time to deal with you now. I will deal with you later," about three times. TR at 121; RX 26 at 277. Complainant interpreted his statement, "I will deal with you later" as a threat because of his tone. TR at 121-122. She felt like Mr. Wood was mad about the March 9 email particularly because she had copied Mr. Boland, which she had never done previously regarding safety concerns. RX 26 at 289. She stopped by Mr. Boland's office and told him Mr. Wood threatened her, and Mr. Boland said Mr. Wood had stopped by that morning and was very angry. TR at 122; RX 26 at 278. She also informed Carrie Smith, the Human Resources employee for the district, that Mr. Wood had threatened her. TR at 123; RX 26 at 278.

19. On March 14, 2011, Mr. Wood received an email from MTI detailing the locations for the testing. TR at 352. Mr. Wood responded, and copied Complainant, asking Complainant and Kent Chaffee to review the plan for any concerns. *Id.* at 353-354. Complainant and Mr. Chaffee went to Gale to check the locations, and Complainant identified two locations with asbestos. *Id.* at 354. On March 23, 2011, Complainant sent an email suggesting that they collect and analyze data from the 26 other sampling points, and if the two with asbestos were absolutely required, to remove the insulation at the beginning of summer break. *Id.* After the walk-through, 32 sites were selected, but four would require asbestos removal, so Mr. Woods suggested only testing 28 sites, so no asbestos would be removed. TR at 453-454; ALJX 1.

20. Complainant reported the March 10 incident to OSHA around March 18, 2011. TR at 125, 362; RX 11 at 127. Mr. Wood was on vacation, but when he got back Complainant described things between them as "tense," "hostile," and that he was "picking at [her]." TR at 127. For example, Complainant claimed she was reprimanded for sending out an email to "all users" in the district about a new airline coming to Idaho Falls, when in the past she had sent out jokes via email within Operations and had not been reprimanded. *Id.* After she sent out the email on April

[25] Mr. Wood contradicted this statement in his affidavit. RX 25 at 250; *see* F.F. ¶ 74.

18, 2011, Mr. Wood sent her an email referencing Respondent's policy on sending "non-business related emails," and suggested she could ask for clarification if needed. CX 3782. Complainant responded by arguing that the news of a new airline "would have been of interest to many of [Respondent's] employees both professionally and personally" and pointed out that she sent out a notification about hazardous waste before and was not "reprimanded for it." CX 3782. Mr. Wood responded that "what you call a reprimand is maybe better defined as direction," and that if she had doubts in the future about the policy, she should ask him for guidance. *Id.* Complainant also referenced the number of alleged adverse actions taken against her as evidence of the tension between her and Mr. Wood, including his denial of her use of flex time, changes to her job description, and the increase in her hours. TR at 127-130, 134. OSHA sent Complainant a letter on March 28, 2011, referencing her "discrimination complaint" under AHERA. TR at 362-363; RX 13 at 141. The letter stated that she did not have enough information to make a whistleblower complaint at that time because Mr. Wood's statement that he would "deal with" Complainant later could be interpreted differently and was therefore not "actionable under the law." TR at 362-363; RX 13 at 141.

21. Complainant attended a meeting with Mr. Wood and Mr. Boland on April 5, 2011, where she claimed they "want[ed] to vent." TR at 136. She reiterated her safety concerns that she had reported to Mr. Boland on February 25, and she told them she had told OSHA that Mr. Wood had threatened her for bringing up health and safety concerns. *Id.* at 136-137. Complainant, Mr. Wood, and Mr. Boland met again on April 8, 2011, at which time Complainant asked for Mr. Wood to put his instructions to her in writing, and for written personnel policies on flex time and comp time for the Maintenance and Operations department. *Id.* at 138-139. Mr. Boland suggested Mr. Wood and Complainant review her job description and make sure it was accurate. RX 26 at 280. Complainant stated it seemed like Mr. Wood avoided her after the April 8, 2011 meeting, and although she claimed she tried to have a professional relationship with him and Mr. Wood "wasn't very receptive to it." TR at 139-141.

Alleged Adverse Actions

22. On April 11, 2011, Mr. Wood suggested changes to Complainant's job description and increased the number of days she was required to work, from 203 to 223 days per year.[26] TR at 130-131; CX 3246, 3251, 3727-3731. Complainant felt the change in her job description had the effect of diminishing her job responsibilities because "a lot of the changes"[27] took away responsibility. TR at 131. Specifically, Mr. Wood removed industrial safety and gave it to the Maintenance supervisor Kent Chafee, who Complainant considered very safety-conscious but lacking the background or education to "be a safety person." TR at 831; RX 26 at 280. Other changes included changing "*develops and directs* a district-wide safety program" to "*develops implementation plans* for a district-wide ES&H program," "*supervises the identification* of hazardous workplace conditions" to "*identifies, responds to and assists in mitigation* of hazardous workplace conditions," and "*implements and maintains* district policies" to "*drafts and proposes* district policies." CX

[26] Mr. Wood changed her days to 222 per year, but the record reflects that the change would have been to 223 days per year. Complainant testified that she was originally at 230 days per year, was dropped down to 210 days per year, and then budget shortfalls forced everyone in the district to work 7 fewer days per year. TR at 132. Therefore, Mr. Wood wanted to increase her schedule back to 230 days per year, minus the 7 days, for a total of 223.

[27] In her interview with OSHA, Complainant stated that the new job description "kept out industrial safety," and had minor changes in terminology. RX 26 at 280.

3729. Mr. Wood changed her working days per year to 223 after "reviewing the issues with the trial period" for the reduced work schedule with Mr. Boland. CX 3727. She stated Mr. Wood knew she enjoyed her time off, and she felt that Mr. Wood was punishing her or trying to get her to resign by reducing her responsibilities while increasing the number of days she worked. TR at 133; TR at 260. On April 14, 2011, Mr. Wood emailed the changes to Carrie Smith in Human Resources for final approval, indicating Complainant was fine with the changes to her job description, but not the increase in working days. CX 3732. Complainant emailed Ms. Smith on April 18, 2011, to let her know that she was not okay with her job description changes, and asked for a meeting with Ms. Smith and Mr. Boland, without Mr. Wood. TR at 144. In his notes, Mr. Wood stated that Complainant was fine with the changes to her job description, but that she resisted the change to the working days per year. RX 18 at 178; RX 18A at 209. He wrote in an email memorializing his meeting:

> [Complainant] fairly aggressively wanted to know if "George [Boland] approved this." Told her that I have the freedom to run the operations department as I felt I should, that George approves all changes I make to personnel. She disagreed that it needed to be a 230 day position and demanded I give her [a] reason – I told her that we have the CHP to revamp, the HazComm plan to finish, that we would be more aggressive in the future regarding abatements (she corrected me that they were just floor abatements) and that I would change to 250 days if I could.

RX 18 at 178.

23. On March 24, 2011, Complainant contacted Mr. Wood about approving six hours of "flex time" she believed was available to her from the week of March 7. CX 3769; RX 12 at 136. Mr. Wood responded that he did not know of any "emergent conditions" which required extra hours of work, and that in the future, Complainant should clear additional hours of work with him in advance. CX 3768-3769. Complainant responded that her extra hours were for travel time to trainings, but Mr. Wood stated that "hours in travel outside of normal working hours" do not qualify for flex time, and that he was fine with her leaving early to travel to training during regular hours. CX at 3768. Complainant also responded that she "preferred to work 7:00am to 3:30pm so she could visit schools while the custodian is present. *Id.* Complainant said in the past she would ask if she could come in late and make up the time by staying late and Mr. Wood would say okay. TR at 128.

24. Complainant alleged Mr. Wood refused to let her attend lead regulation training programs "again and again," and alleged he was just "kicking the can down the road" on implementing a lead program. TR at 64, 134; CX 3773, 3776. On February 24, 2011, she sent an email to Mr. Wood describing the EPA lead regulations and how all individuals disturbing any lead based paint needed training. CX 3627. She stated that the closest training was in Salt Lake City and attached a brochure about how to comply with the new regulations. *Id.* On March 7, 2011, Complainant and Mr. Wood discussed lead training, and Complainant was tasked with determining how the state and other districts were implementing the new regulations. CX 1398-1399. The record indicates Complainant asked twice about lead training – on April 8 and May 3, 2011, although Complainant stated she made "several" requests to go to training "through the years." CX 3773, 3776; TR at 62. Mr. Wood responded to the April 8 request by stating that "it is better that you not

go to this training as we touched on it when we discussed changes to your JD." CX 3777. In his notes after meeting with Complainant on April 14, 2011, Mr. Wood stated that he contacted the company Complainant discussed training with for the lead renovator training. RX 18 at 178. He stated that an employee with the company told him the training was "geared for the worker in the field…as opposed to an ES&H type that sits at a desk," and that lead inspector training may be more appropriate for Complainant. *Id.* Mr. Wood told Complainant he had "plenty of EPA sights that would provide her the necessary training and information – she said she already had it." *Id.*

25. On May 3, 2011, Complainant met with Ms. Smith from Human Resources and Mr. Boland, where she was presented with a settlement agreement and a separation agreement. TR at 144. She was surprised because she thought they were going to talk about her job description and how to move forward, and did not understand why Mr. Wood was not being separated too. *Id.* at 144-145. She refused to sign until she talked to her husband, and she was placed on administrative leave on May 12, 2011. TR at 145; CX 3766. She hired an attorney and attempted to negotiate a settlement, but was unsuccessful. TR at 146; CX at 1240-1241. Complainant had also filed a grievance with the school board and with Mr. Boland, but was told at one point that the grievances were untimely. TR at 146-147. Complainant claimed she never received a response to her grievances, but it appears the response was sent to her attorney. *See* CX 1236-1237; 2985.

26. Complainant claims Mr. Wood also retaliated against her by refusing to sign a reference form for Complainant to take the Certified Safety Professional exam. TR at 141-142; *see* RX 3 at 78. Mr. Wood filled out the form and sent it in prior to March 2011, but for some reason he did not sign it. RX 26 at 279. The Board of Certified Safety Professionals emailed him in May 2011 asking for his signature, but Mr. Wood did not reply. TR at 142-143; RX 26 at 279. Mr. Wood also refused to provide a reference for Complainant to sit for the Certified Industrial Hygienist exam, which she requested on April 15, 2011, claiming that he did not feel he could provide a qualified reference. TR at 143; RX 26 at 280. Complainant alleged that Mr. Boland stated if she signed the separation agreement, they would provide the Certified Industrial Hygienist reference. RX 26 at 280; *see also* CX 2985.

27. Complainant was terminated on June 5, 2011. TR at 148; ALJX 1; CX 3685.[28]

Respondent's Allegations and Complainant's Response

28. Respondent alleged that Complainant exhibited rude and unprofessional behavior. TR at 179. For example, in January and February 2011, an employee named Lisa Sherick claimed Complainant was unhelpful in helping with disposing used needles. TR at 179-180, 313; *see* CX 3643-3657. Complainant stated she was just telling Ms. Sherick that she did not feel qualified to designate what qualified as bio-waste and that Mr. Wood did not allow her to buy containers for used needles. TR at 181-183. In an email to Ms. Sherick, after multiple back-and-forth discussions of the issue, Complainant alluded to bio-waste being "mishandled" in the past, and stated that she did not understand why there was "such a disconnect in communication." CX 3656. Mr. Wood spoke to Complainant about how her behavior was inappropriate toward Ms. Sherick. TR at 313-314.

[28] The letter from Mr. Boland dated June 9, 2011, states Complainant's administrative leave ended June 6, 2011. CX 3685.

29. Another incident where Complainant was accused of being rude and unprofessional involved chemistry teacher Burke Smejkal and a hydrochloric acid spill. Complainant stated she was frustrated with Mr. Smejkal because he did not know or follow safety procedures and that her criticism was appropriate given that the safety of children was at stake.[29] TR at 183-184. Mr. Wood discussed Mr. Smejkal's complaints with Complainant, and he told her that the teachers did not work for her. TR at 314; RX 26 at 288. Complainant commented during her OSHA interview, "then, why are they calling me to help [them] with their spill?" RX 26 at 288. Complainant stated that she was "chewed out" for talking to Mr. Smejkal about not following the chemical hygiene plan, and that she felt she had "all the accountability and none of the control." RX 26 at 288.

30. Complainant sent out an "all users" email to district employees on February 2, 2011, regarding a safety checklist for the upcoming building safety inspection. TR at 184-185; CX 3704. In the email, Complainant wrote, "There's really no excuse for the district to be written up for anything that is included in a check list that is immediately fixable." CX 3704. Complainant stated she was trying to be proactive in reducing the amount of noncompliance findings in the annual safety inspection. TR at 186. Mr. Wood forwarded this email to Mr. Boland on March 11, 2011, and noted that while some people found it "a little offensive," others had no problem with the tone. CX 3704. Complainant alleges that only Mr. Wood found it rude, because she talked to one of the chemistry teachers and the director of secondary education who had no problem with the email. RX 26 at 283.

31. On June 16, 2009, Complainant sent an email to an outside contractor, Kent Craven, regarding sandblasting at the district football stadium that may have involved lead paint, which Mr. Wood forwarded to Mr. Boland on April 4, 2011. TR at 192; RX 16 at 169. She stated she needed the information on where they were going to be sandblasting at the football stadium "pronto" in order to determine if the paint had lead in it. TR at 189. Complainant told Mr. Craven that information about the area to be sandblasted "should have been provided a month ago" and asked for it the next day. RX 16 at 169. Mr. Craven replied, "I am not sure I understand your request or its tone," but promised to get her the information. *Id.* Complainant stated at her OSHA interview that she "was not happy with the school district," and the status of the lead renovation training. RX 26 at 283. She claimed she tried to be proactive, but was not told about the paint to be disturbed during the stadium renovation and "it became a crisis of which I was supposed to fix." *Id.* at 284.

32. Respondent alleged Complainant never provided an environmental assessment to Mike Clements of Bateman-Hall, but Complainant stated that the only environmental assessment she was assigned to perform was at Dora Erickson School. TR at 189-190. Complainant said her work at Dora Erickson was done because "all the samples were taken," and that she was never assigned to provide an assessment to Mr. Clements. RX 26 at 287; TR at 190.

33. Respondent alleged that Complainant did not fulfill her job responsibilities regarding the emergency light fixture program. TR at 202. Complainant responded that she "made more progress on the Emergency Light Fixture Program than anyone had in the past." *Id.* She devised a plan to inventory all the emergency lights, and then systematically repair any problems. *Id.* at 203. Complainant claimed the electricians did not do their job of labeling the electrical panels, so she could not fix the problem. RX 26 at 287. In an email to himself dated April 18, 2011, Mr. Wood

[29] Mr. Smejkal alleged there were no school children present when he spilled the hydrochloric acid, but Complainant stated he "absolutely" told her school children were present. TR at 184.

noted that Complainant "only provided a list of the schools that had performed the 90 minute test and not a report on where new ones are needed." RX 18 at 178.

34. Respondent alleged that Complainant failed to provide respirator fit testing for district employees. TR at 191; see RX 8 at 105-107. Complainant countered that Mr. Wood was "well aware [she] was having trouble finding someone to fit-test" the district asbestos workers, and that she provided him with solutions to the problem that he did not respond to. TR at 191, 194. Complainant claims that when Mr. Wood asked on March 8, 2011, if the asbestos workers were current in fit-testing, he should have known that they were not. *Id.* at 194-195. She also felt that there was previously never any urgency to get people fit-tested. *Id.* at 451. She stated that Mr. Wood "pushed extremely hard to the point of getting rather – demeaning, I guess towards me, I mean of blaming me for not having people fit-tested and saying I wasn't doing my job." *Id.*

35. Respondent alleged that Complainant failed to adequately update the asbestos management plans. TR at 196. Complainant claimed she "made amazing progress" given the volume of binders for the management plan that existed in September 2007. *Id.* Mr. Wood asked Complainant why abatement was not part of her management plan, although Complainant said that the management plans on Respondent's website has still not been updated, showing it was not "much of a priority." TR at 129-130; CX 3782. Respondent also alleged that Complainant did not fulfill her job duties regarding the hazard communication plan and the chemical hygiene plan. TR at 198-199. Complainant denied these allegations, claiming there was no deadline for the hazard communication plan and that the chemical hygiene plan was published online and a "living document." *Id.* Mr. Wood's notes of meeting with Complainant on April 14, 2011, indicate he told Complainant that according to Mr. Boland "and others," the chemical hygiene plan was "cumbersome and hard to follow."[30] RX 18 at 178. According to Mr. Wood, Complainant became defensive and "demanded names." *Id.*

36. Complainant testified that Mr. Wood never expressed to Complainant that he was dissatisfied with her job performance prior to March 9, 2011. TR at 190. The first time she heard the allegation that she was not performing her job adequately was from the OSHA investigator in 2012. *Id.* at 190-191. Complainant stated in her OSHA interview that Respondent told the unemployment office she was "fired for insubordination." RX 26 at 290. Complainant disagreed with the allegation that she was insubordinate or did not get along with Mr. Wood. TR at 206. Complainant alleged that Mr. Wood was rude in emails, and she appeared to take offense to his asking her to do things differently ("there was a lot of rude do-this, do-that kind of thing"), at one point during the OSHA interview calling Mr. Wood "hypocritical as hell." RX 26 at 284.

37. Mr. Wood composed two disciplinary letters, both dated April 5, 2011, regarding Complainant's interactions with other employees and her work schedule hours. CX 3710-3713. Complainant stated she never received these letters. TR at 259. On April 25, 2011, Mr. Wood composed an email alleging that Complainant failed to provide a formal procedure to implement the new lead regulations, which he sent to Respondent's attorney to review. CX 3714. In the email, Mr. Wood described Complainant's actions as "just identifying problems as opposed [to] providing solutions." *Id.* Complainant stated she never received this email. TR at 259-260.

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[30] Extensive emails were admitted into evidence without objection in this case, including emails such as this one where Mr. Wood emailed himself notes of a one-on-one meeting with Complainant. Although neither party objected, these and other similar emails are admissible as relevant according to 29 C.F.R. § 18.803 (a)(24).

38. Complainant provided evidence that she was complimented on her work in April 2011, and stated that Mr. Wood had "raved" about her performance at a meeting in August 2010. CX 3244; RX 26 at 288.

OSHA Complaint

39. After being placed on administrative leave, Complainant filed a complaint with OSHA on May 29, 2011, referencing AHERA. TR at 149; RX 22 at 219. She had contacted OSHA via email on May 27, 2011, referencing AHERA and OSHA. RX 21 at 218. Complainant testified she told the OSHA investigator, Paul McDevitt, that the CAA applied to her case "right from the beginning."[31] TR at 149. She claimed she asked the OSHA investigator if he was going to file the complaint under the CAA because she believed the work represented a NESHAP violation. *Id.* at 150. The first time she sent anything in writing to OSHA about her complaint being filed under the CAA specifically was on December 4, 2013. TR at 433; RX 33 at 346.

40. Complainant/OSHA filed a claim under AHERA in federal district court on December 2, 2011. RX 27. On April 13, 2013, Complainant asked the OSHA investigator if her complaint was filed under both the OSHA and the AHERA whistleblower statutes. RX 29 at 312, 314. The OSHA investigator responded that it was only filed under AHERA because OSHA did not have jurisdiction over public sector employees. RX 30 at 318. Complainant responded by referencing an EPA regulation, 40 C.F.R. Part 763 Subpart G, which Complainant contended applied the OSHA regulations to state workers. *Id.* at 315-316. In another email on April 25, 2013, Complainant stated, "I personally find the asbestos regulations complex anyway – since it is between AHERA, OSHA and EPA." RX 31 at 320. She goes on to say that she met with the tribal attorney at her new position, who told her the CAA "is the most complex regs [sic] she know[s] of – so as the relatively new head of an air program for a federally recognized indian [sic] tribe, I'm really in deep!" *Id.*

41. In her "response" to the affidavits of Mr. Boland and Mr. Wood, dated June 15, 2013, Complainant detailed the requirements under OSHA and AHERA.[32] RX 32 at 326-327. Although she did not mention the CAA, she did state that she had "serious concerns about a fiber release contaminating all or part of the school." RX 32 at 327. In an affidavit filed in this proceeding, Complainant alleges that when she wrote the March 9, 2011 email, she was "well aware of EPA's interpretation of how the 40 C.F.R. Part 61, Subpart M [NESHAP] regulations applied to asbestos removal for large projects, and small removals within a large project." RX 39 at 385-386.

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[31] At the hearing, Complainant testified that there were four reasons she thought CAA applied to her case. TR at 152. First, any renovation or demolition of a facility required a detailed inspection to determine the amount of asbestos to be removed. *Id.* at 153-155. Second, they were required to estimate how much asbestos would be removed in the calendar year to determine if it exceeded the threshold amount, and if the linear feet threshold would be exceeded, a 10-day notice needed to be provided to the EPA. *Id.* at 155-156. Third, the MTI testing was part of an HVAC upgrade project at Gale Junior High that was planned for years prior to the March 2011 testing. *Id.* at 156. At least since 2007, the entire time Complainant worked for Respondent, the district was making plans to renovate the Gale HVAC system, depending on the passing of a bond. *Id.* at 157. Complainant therefore alleged that the sampling to be done by MTI was part of an ongoing renovation project. *Id.* at 164-165. The fourth reason the CAA applied was that even a small amount of asbestos waste has to be handled under the NESHAP requirements. *Id.* at 169.

[32] This response is one of the narrative statements provided to OSHA, which I give less weight given that this is a de novo review. *See* FN 4.

She also alleges she was aware that "any removal of asbestos done in conjunction with the MTI testing would be a small part of the much larger project which was converting C.E. Gale into the Compass Academy." *Id.* at 386.

Subsequent Employment Search

42. After she was terminated, Complainant had a difficult time finding another position because of the recession. TR at 207-208. Complainant said she looked "very hard" for employment and applied for "job upon job," but that it took over a year to get a job. *Id.* at 208-209. She had three interviews before she was hired by the Shoshone-Bannock Tribes, and two of the three asked her what happened with Respondent and she had to respond she was fired. *Id.* at 208. The Shoshone-Bannock Tribes eventually hired her, although the job did not pay very much, so she kept looking for other employment while she was employed. *Id.* at 208-209. In the past, Complainant was able to get interviews or people contacted her, but now she could not get a response. *Id.* at 209. At Shoshone, Complainant made $24 an hour and had to commute approximately 100 miles round trip, compared with $33 an hour and a 16 to 20 mile commute while working for Respondent. *Id.* at 213. She worked 40 hours a week, and received sick leave but "very little vacation," and she had medical insurance, life insurance, and a retirement plan. *Id.* She went on short-term disability in July 2015 due to medical issues and then when she could not return to work, she was informed she would be terminated. *Id.* at 214, 274. She filed a grievance against Shoshone, and then in response they reached an agreement where Complainant would resign in return for a letter of recommendation, in early October 2015. TR at 264, 274-275; CX 2895. Part of the grievance was that Complainant thought her position was "under-spent too much." TR at 361.

43. She had applied for other jobs while still employed by Respondent, as early as February 2, 2011. TR 321-322; CX 2575-2894. Complainant claimed she had always applied for jobs to see what was available and if she might like some other position better. TR at 449.

<u>Complainant's Witness – David Roskelley</u>

44. David Roskelley is the owner of R & R Environmental, a consulting firm that provides consulting services on asbestos. TR at 378. Mr. Roskelley has over 25 years of private consulting experience, and has been involved in well over 50 to 100 abatements. TR at 378; CX 3813-3814. He has 18 years of experience as an adjunct faculty at the University of Utah teaching various EPA-approved training courses to help people work safely around asbestos. TR at 381. Complainant contacted Mr. Roskelley to ask for his opinion on her case. *Id.* at 379. She provided him with a number of documents, including her depositions, her March 9 email, and an Ohio EPA advisory letter, and asked him, among other things, to what extent the CAA would apply to her situation. *Id.* at 379-381. His firm also inspected Gale Junior High prior to an abatement and provided an asbestos inspection report for the school pursuant to AHERA regulations in January 2012. *Id.* at 381, 396. Mr. Roskelley stated that his firm often performed these inspections prior to any renovation or demolition. *Id.* at 397-398. He recalled that Respondent's prior AHERA surveys and management plans were online, and he thinks Respondent wanted a new inspection to "make sure they had identified things." *Id.* at 399-401.

45. Mr. Roskelley stated his opinion that under NESHAP and CAA regulations, Respondent is an owner or an operator, so they have a duty to inspect facilities to identify asbestos.[33] TR at 382-383. Using the correspondence between the Ohio EPA and the U.S. EPA as a reference, Mr. Roskelley described how the regulations prohibit completing larger projects in a piecemeal fashion in order to circumvent legal requirements like filing notifications.[34] *Id.* at 385-386. He stated the NESHAP and the CAA would only apply to the project referenced in Complainant's March 9 email if they were going to disturb asbestos. TR at 405-406. He also noted that "the tie-in between NESHAP and AHERA can get complicated from time-to-time." *Id.* at 410. In a letter to Complainant dated January 18, 2016, Mr. Roskelley described his understanding of the project. CX 3819. He stated that TSI was "anticipated to be disturbed and would need to be stripped (removed) prior to a planned upgrade (renovation) scheduled to be undertaken at the building." *Id.* He stated that failure to properly remove the asbestos "would have resulted in asbestos exposure to personnel in the area and asbestos contamination throughout various areas of the school." *Id.* Mr. Roskelley stated that the HVAC upgrade "was part of a much larger Districtwide project that took several years (2008 to 2012) to fully fund via the passage of bonding." *Id.*

46. He described Complainant's March 9, 2011 email as "very reasonable," and "thought it made perfect sense" when he read it, although he admitted he only knew the parameters of the project from Complainant. *Id.* at 392, 405. He thought what Respondent was asking Complainant to do was "beyond her scope" and beyond what other school districts he works with would ask someone in her position to do. *Id.* at 392. He "highly advise[d]" against doing an abatement while school is in session because asbestos is a carcinogen. *Id.* at 392-393. In order to do a glove bag operation on pipes that exceed 150 degrees in temperature, Mr. Roskelley stated that either the pipes should be cooled down, or a containment should be built. *Id.* at 394-395. However, he admitted he did not know if the temperature of the pipes exceeded 150 degrees in this situation. *Id.* at 407-408. Mr. Roskelley stated that he would not think it would be a problem for district personnel to handle a small-scale project, which would be under three square feet or three linear feet. *Id.* at 406-407. Mr. Roskelley also did not believe that Respondent was trying to circumvent the regulations "at all." *Id.* at 398.

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[33] Respondent's counsel objected to Mr. Roskelley's testimony regarding his opinion on the regulations, characterizing them as "legal conclusions." TR at 382. I overruled the objection and it is noted for the record.

[34] The Ohio EPA requested guidance from the U.S. EPA regarding demolishing residential structures as part of an "urban renewal" project and for a clearer understanding of the term "planning period." CX 2963. The U.S. EPA explained that the demolition of multiple residential units as part of one "urban project" is subject to the "thorough inspection requirements of the asbestos NESHAP." CX 2964. However, for a renovation operation, the U.S. EPA advised that:

> …a thorough inspection is required and a Notification must be submitted only if the amount of asbestos-containing material that is friable…exceeds the regulatory threshold. If the total amount added together from every house that is part of the "urban project" exceeds 260 linear feet of pipe or 160 square feet from any facility component, then the "urban project" is regulated under the asbestos NESHAP, and the demolition operations are subject to the asbestos emission control requirements (61.145(c)) and waste disposal requirements (61.150).

CX 2964 (emphasis added). The U.S. EPA noted that "demolition operations planned at the same time or as part of the same planning period or scheduling period are considered to be part of the same project, and that in the case of municipalities, a planning or scheduling period is often a fiscal or calendar year or the term of a contract," but that demolitions spread out over multiple fiscal or calendar years or multiple contracts may be part of the same planning period. CX 2965 (citing 60 FR 38725).

Complainant's Witness – Wayne Landers

47. Wayne Landers worked for Employer in Maintenance and Operations for 26 years as a journeyman electrician, which means he performed a variety of electrical maintenance, construction services, and building upkeep. TR at 72-73. Mr. Wood was Mr. Landers' supervisor for approximately two years, up until August 2010 when Mr. Landers was terminated. *Id.* at 74.

48. Mr. Landers described "numerous" negative experiences working with Mr. Wood. TR at 75. For example, Mr. Landers felt Mr. Wood wanted to handle an electrocution hazard in an unsafe manner. *Id.* at 86. Mr. Landers had concerns about code or safety violations, but "communication became very difficult" because Mr. Wood "somewhat removed himself" from direct communication and everything had to go through Mr. Landers' direct supervisor, Kent Chaffee. *Id.* at 87. When Mr. Landers mentioned a code or safety violation to Mr. Wood, Mr. Landers alleged that sometimes Mr. Wood would be infuriated, and sometimes they would engage in lengthy discussions. *Id.* In an incident that led to Mr. Landers' termination, Mr. Wood asked Mr. Landers to "jerry-rig" electrical equipment to make it work, which Mr. Landers declined to do, causing Mr. Wood to get upset and use profanity. *Id.* at 80-83. Mr. Landers later called Mr. Chaffee and left a message to let him know he was able to repair the equipment safely, but he had had a "few beers" and during the message he used some profanity. *Id.* at 83-85. Shortly after, Mr. Landers was terminated for the allegedly threatening phone call, but he believes that part of the reason he was fired was because he refused to jerry-rig the equipment like Mr. Wood requested. *Id.* at 85.

49. Mr. Landers described Complainant as "very professional" during the few projects he worked with her on, and that he had no concerns over how she treated him or anyone else in the school district. TR at 93-94.

Complainant's Witness – Kerry Martin

50. Kerry Martin worked for Portage Environmental for twelve years, where she served as Complainant's supervisor for five years, from 2002 to 2007. TR at 414-415. Because Portage Environmental was a consultant company, Ms. Martin did not direct Complainant's technical work, but managed her as an employee and found her positions. *Id.* at 415, 418.

51. She described Complainant as a good employee: smart, a hard worker, and "technically very competent." TR at 415. She never experienced any problems or insubordination from Complainant, and has provided her with job references. *Id.* at 415, 418-419. Ms. Martin also knew Mr. Wood because he was program manager for some of the contracts Portage Environmental had with Idaho Cleanup Project, although she never physically met him. *Id.* at 415-416. She described him as "pretty inflexible to the point of sometimes being damaging to his programs," and "very strong-willed." *Id.* at 416. She considers herself a friend of Complainant's, and other than meeting Mr. Wood at Complainant's wedding, she does not have knowledge of the relationship between Complainant and Mr. Wood. *Id.* at 419-420.

Complainant's Witness – Caroline Meagher

52. Caroline Meagher has worked at the Idaho National Laboratory since April 2015, and previously worked for Respondent for 13 or 14 years. TR at 440-441. She worked for Mr. Boland as an administrative assistant before taking a job in Operations working for Mr. Wood. *Id.* at

441. Ms. Meagher never observed Mr. Boland retaliate against anyone for reporting a violation of the law or a safety regulation. *Id.* at 444. Ms. Meagher stated there were times she "really enjoyed" working for Mr. Wood because he gave her good opportunities and respected her, and she felt she worked well with him. *Id.* at 442. However, she also described Mr. Wood as being "snappy" with everyone around him at times when he was in a bad mood. *Id.* She never considered leaving her job because of Mr. Wood, but later did feel like her job was threatened due to budget cuts. *Id.* at 443. Ms. Meagher enjoyed working with Complainant and remembered a meeting in 2010 where Mr. Wood praised his staff, including Complainant. *Id.* at 443-444.

Complainant's Witness – Ferel McArthur

53. Ferel McArthur retired in March 2011 after working for Respondent in the Maintenance department for 29 years. TR at 462. Mr. McArthur was the supervisor of Maintenance when he retired. *Id.* At one point, he took a slight demotion and pay cut because he was "having a fairly hard time with Mr. Wood." *Id.* at 463. Mr. McArthur stated that Mr. Wood was "constantly down on him" and treated him more poorly than he did any of the other managers. *Id.* For example, Mr. Wood always talked down to him during staff meetings and would not believe him at times. *Id.* at 464. Once, Mr. Wood wanted to use the circuit breakers in a manner that they were not designed for, and although Mr. McArthur and his electricians "confronted [Mr. Wood] a couple times," Mr. Wood would still not "do anything about it," so Mr. McArthur talked to Mr. Boland about the situation and Mr. Wood "got real irritated." *Id.* at 464-465. Mr. McArthur stated he feared losing his job because of the way Mr. Wood treated him, and because he knew Mr. Wood fired another supervisor, Gene Baird. *Id.* at 466. Mr. McArthur felt Mr. Boland treated him "very fairly." *Id.* at 469.

Respondent's Witness – Superintendent George Boland

Background

54. George Boland has worked for Respondent since 1991and has served as superintendent since 2006. TR at 514-515. As superintendent, he has a variety of responsibilities, including the maintenance of the district facilities and buildings. *Id.* at 515. When he became superintendent, Mr. Boland restructured the Maintenance and Operations department in order to make it more coordinated, effective, and efficient given the growing number of maintenance issues with the aging buildings in the district. *Id.* at 518. Around the same time, Respondent started looking into a bond initiative to fund the needed maintenance programs. *Id.* at 518-519. Mr. Boland felt that due to previous budget cuts, some people were in positions they were not qualified for and were asked to take on tasks outside of the scope of their expertise. *Id.* at 520. Therefore, he looked for a director of Maintenance and Operations who would be a "change agent" to make changes that would be necessary to address the issues in the department. *Id.* at 520-521. He knew that whoever became the director would "ruffle some feathers" because the director would be asked to change the culture of how things were done and what was expected of employees. *Id.* at 520.

55. Mr. Boland worked with Mr. Wood for approximately six years. TR at 527. Mr. Wood had previously worked for Respondent as a contracted energy manager and after applying for the position of director, was offered and accepted sometime in 2007. *Id.* at 521-522. Mr. Boland felt that safety was an extremely high priority for Mr. Wood, and noted that Mr. Wood would follow rules and procedures and seek out answers to questions about a rule or law. *Id.* at 528. Mr. Wood

"was inclined to commend people, rather than criticize," and Mr. Boland did not directly observe him in a confrontation with an employee. *Id.* at 529. He felt Mr. Wood participated in sometimes "passionate" or "emotional" discussions in the same way the other members of the district administrative team did. *Id.* at 529-530. Mr. Boland felt Mr. Wood worked very hard and was committed to improving the facilities within the district, and was clear in establishing priorities and plans. *Id.* at 530. Mr. Wood created the ES & H engineer position because he wanted someone who had the education and background to effectively deal with the scope of the work that was needed in the district. *Id.* at 533, 598. Mr. Boland explained that positions such as Complainant's were dependent on discretionary or supplemental levies. *Id.* at 601-602. In 2010 and 2013, Respondent had to cut many positions due to a reduction in its general fund. *Id.* at 603.

56. Mr. Boland was not surprised that some employees were critical of Mr. Wood because he knew he was asking Mr. Wood to change the way things were done. TR at 530-531. Regarding the termination of Mr. Landers, Mr. Wood related information to Mr. Boland about the incident that happened at Eagle Rock, and then Mr. Boland was able to listen to the "considerably inebriated" voice mails that Mr. Landers left for Kent Chaffee and Mr. Wood, from which he determined he needed to terminate Mr. Landers' employment. *Id.* at 526-527.

57. There was no plan in place in March 2011 to remove the HVAC system and abate the asbestos at Gale. TR at 692-693. Mr. Boland characterized the purpose of the boiler pipe testing as an "investigation" to determine how long the system would last because "[w]e knew that we were going to do something" with the system. *Id.* at 688, 693. In April 2011, new legislation allowed Respondent to consider a new way of structuring schools in the district. TR at 692, 696; RX 41 at 456. In November 2011, Respondent signed a contract to develop and open a magnet high school that was associated with the re-purposing of Gale from a junior high to a high school. TR at 697-698; RX 41 at 460. In February 2012, Respondent "started looking at facility design" for the new high school. TR at 698. In March 2012 the bond passed to fund renovation, and by June 2012 Respondent commenced the removal of actual asbestos. TR at 700-702; RX 45 at 493; RX 49 at 515.

February 25, 2011 Meeting with Complainant

58. On February 25, 2011, Complainant came to Mr. Boland to complain about Mr. Wood. TR at 604. Mr. Boland at first assumed she wanted to speak about a yearly state inspection, and was "a little taken aback" when she wanted to talk about Mr. Wood. *Id.* The meeting lasted approximately 10 minutes, and Mr. Boland primarily listened to Complainant, who referenced Mr. Wood taking short cuts to save money, being a bully, and having an ego. *Id.* at 605-606. Mr. Boland did not remember her mentioning anything specific regarding safety violations, but felt that she was upset with Mr. Wood in some way and was "providing information that was derogatory in nature to support her position that he was an ineffective supervisor." *Id.* at 606. She asked if she could be reassigned to a different supervisor, but Mr. Boland told her he did not know how that would work given how her position was structured. *Id.* at 605. Mr. Boland told Complainant he would have to talk to Mr. Wood about her complaints, as it was his practice and board policy to try to resolve any conflicts between individuals. *Id.* Mr. Boland recalled Complainant's comment about the district being "dysfunctional" as referring to the system "not being run properly" and that things that should have been done were not being done. *Id.* at 713.

59. Prior to the February 25, 2011 meeting, Mr. Boland said he had some information about the situation between Mr. Wood and Complainant. TR at 608. Mr. Wood had told Mr. Boland that he was going to talk to Complainant about her schedule and that she might not be very happy, so he wanted Mr. Boland to be aware of the issue. *Id.* Mr. Boland also knew that Lisa Sherick was frustrated with Complainant regarding the bio-waste, but he was not directly involved with that issue. *Id.* Mr. Boland told Mr. Wood that he felt they needed to "sit down and identify issues." *Id.* Mr. Boland discussed Complainant's concerns with Mr. Wood, although he does not remember verbatim what he told Mr. Wood or when the conversation happened. *Id.* at 607. Mr. Boland suggested that he may have spoken to Mr. Wood about Complainant's February 25 allegations "quite a while" later. *Id.* at 606.

March 9, 2011 Email

60. Mr. Wood contacted Mr. Boland after Complainant sent her March 9 email, and alleged that she sent it just to irritate him and that it was premature given the nature of the work on the boiler pipes. TR at 609. Mr. Boland felt it was one of a series of issues that had come up with Complainant since he had addressed the "schedule issue" with her and characterized Mr. Wood's displeasure with the March 9 email as "part of this ongoing conflict." *Id.* at 609, 710. Mr. Wood asked Mr. Boland for advice on how to talk to Complainant about her communication, and Mr. Boland advised Mr. Wood that they needed to sit down and let her know the impact of the way that she was communicating with people. TR at 609. Complainant also briefly stopped by after the March 9 email to tell Mr. Boland that Mr. Wood threatened her. *Id.* at 610. Mr. Boland evaluated the email in the context of why and how it bothered Mr. Wood, but did not spend much time evaluating the content. *Id.* at 688. Mr. Boland was not surprised that Mr. Wood was upset by the email, given the context of the "back-and-forth" conflict between Mr. Wood and Complainant. *Id.* at 724. Mr. Boland did not consider the March 9 email a legitimate effort by Complainant to lay out legitimate concerns with respect to the potential removal of asbestos, based on his understanding of the project, and because he had "no knowledge an abatement was imminent with regard to the testing of those pipes." TR at 724. However, Mr. Boland admitted that it was reasonable for Complainant to send the email since she was not going to be present for the walkthrough, given that it was part of her job responsibility to identify sample locations. *Id.* He also admitted that Complainant was the one who was most qualified in the district with regard to asbestos issues and regulations. *Id.*

61. On March 10, 2011, Mr. Wood forwarded some emails to Mr. Boland as evidence of Complainant's lack of professionalism. RX 16; CX 3700. Mr. Wood stated that Complainant's response to Ms. Sherick, Mr. Smejkal, and her February 2 "all users" email where she stated "there is really no excuse" for violations prompted Mr. Wood to speak to Complainant about "how she should address other professionals." RX 16 at 164. Mr. Wood wrote that he had tolerated Complainant's attitude because he "felt that the good she has done for the district outweighs her short comings when it comes to professionalism. I am having a little trouble reconciling that right now. The funny thing is that I had decided after talking with Lisa I was not going to pursue further as long as [Complainant] provided the required support to Lisa's group." CX 3700. Mr. Boland believed this statement could have been related to him finding out about the allegations about Mr. Wood's leadership Complainant made on February 25, 2011. TR at 735.

62. On March 11, 2011, Mr. Wood followed up on this forwarded email to Mr. Boland. Mr. Wood stated that he was "still reeling from [Complainant's] preemptive diatribe on a plan that

was not even on the table until we could determine the extent of what we needed to do." TR at 710;CX 3700; RX 16 at 164. He felt that Complainant's email "was confrontational and premature." RX 16 at 164. He stated when he previously spoke to Complainant about her professionalism in early February, he advised her to put herself in the reader's shoes before she sends emails to see if it would be "offensive, demeaning, chiding, etc." RX 16 at 163. Mr. Wood contended "there was no contrition on her part, only that someone had to hold people accountable for their actions." *Id.* Mr. Wood "reminded her that teachers and principals do not report to her and it is not her place to chide or direct, she is responsible to monitor, mitigate, and report." *Id.* Mr. Wood also stated that he had told Complainant on March 7 that he wanted her to work a "normal 8-4:30 shift" and that he had spoken with Ms. Sherick and "expected [Complainant] to work with her staff from an ES&H standpoint and that at this point I felt we should put the past in the past and go forward." *Id.* Mr. Wood "believed this incensed her" and resulted in the March 9 email. *Id.*

April 2011 Meetings

63. Around the first week in April 2011, Mr. Boland had two meetings with Complainant and Mr. Wood. TR at 610. In preparation for the first meeting, Mr. Wood sent Mr. Boland an email on April 2, 2011, detailing his responses to Complainant's allegations. RX 14 at 142; TR at 714. In this email, Mr. Wood listed Complainant's allegations as he understood them, described issues for which he believed there needed to be a "letter of direction," and detailed why he believed her working days per year needed to be returned to 227. RX 14 at 142-144. Mr. Wood stated he "held off on progressive discipline because of only finding out about her allegations when I went to you asking advice regarding her latest diatribe." *Id.* at 142. He recommended letters of direction regarding her "time off without notification," specifically regarding being late on March 7 without notification, her trouble maintaining her requested 7:00 a.m. to 3:30 p.m. shift, and the importance of treating people with respect. *Id.* He noted that the letter of direction regarding treating people with respect "should just reinforce her support role, not a supervisor/director role within the district. *Id.*

64. Mr. Wood then described how Complainant was not performing a number of her responsibilities adequately, and decided that the reduction of her amount of work days, which was "tentative" and was scheduled to be reevaluated in the summer, was not working. *Id.* at 143. Mr. Wood wrote, "At this time and after looking over the state of our ES&H program, I feel that we need to add back all 27 days to the ES&H engineer schedule," and went on to list 11 reasons, including: coordination of training; keeping asbestos workers current on training; finishing a hazard communication plan; revamping the chemical hygiene plan; implementing a lead safety plan ("I need someone who has the time to, rather than tell me there is a problem, to draft an implementation plan that keeps the district safe, complies with code and is agreeable to management"); oversee the emergency and exit light program; implementing an aggressive tile asbestos abatement plan; and complete an environmental impact study. *Id.* at 143-144. Mr. Wood concluded by stating that over the past year he found she needed "a lot of follow up," unlike other employees, and that he needed someone in her position who he could trust to keep the district safe and "readily bring solutions, not just identify problems." *Id.* at 144. Mr. Wood noted that Complainant "may be so upset with someone directing her to increase the number of work days is [sic] that she will resign or stay with an even less acceptable professional attitude," and went on to say that they could handle the workload until the position could be filled. *Id.*

65. On April 6, 2011, Mr. Wood forwarded Mr. Boland his emails with Complainant regarding the asbestos training plan he requested on March 9, 2011. RX 16 at 148. Mr. Wood observed, "I am sure [Complainant] will find what she feels is rude and offensive," and noted that workers apparently performed an "uncertified fit test," and that he asked for a training plan in a spreadsheet "so we don't end up in the boat we are in now – Can't perform any small scale short duration response to an unintentional disturbance of friable asbestos (worker bumps into and/or dislodges friable asbestos insulation." *Id.* Also on April 6, 2011, Mr. Wood sent Mr. Boland a series of emails which demonstrate back-and-forth exchanges regarding getting a phone number for a fit tester. *Id.* at 150-151.

66. At the first meeting, which took place on April 5, Mr. Boland's goal was to act as a mediator, something he has experience doing as superintendent, and allow both Complainant and Mr. Wood to air their grievances. TR at 613-614. They discussed how both Mr. Wood and Complainant treated people, with a lot of "back and forth about alleged grievances." *Id.* at 611, 615. Mr. Boland described the meeting as "contentious," and although it lasted two hours, he realized they needed to schedule a second meeting. *Id.* at 611-612. A second meeting took place on April 8 in Mr. Boland's office, during which Mr. Boland determined the problem was based on a lack of clear communication between Mr. Wood and Complainant: Mr. Wood discussed his expectations of work to be completed and timelines, and Complainant expressed frustration with regard to lack of clear expectations. *Id.* at 615, 669. Mr. Boland recalled that Complainant asked for clarification of her job duties and expectations, and they discussed Complainant' listed duties and responsibilities, and areas where her job description could be clarified. *Id.* at 669. Mr. Boland recalled that there was an understanding that Mr. Wood was going to "rework" the job description. *Id.* at 669-670. At the conclusion of the meeting, Mr. Boland felt there were still a number of issues to work out between Mr. Wood and Complainant. *Id.* at 670. Mr. Boland felt Mr. Wood needed to be clearer in his expectations, and Complainant needed to be less "argumentative, confrontational, those kinds of things, working within her responsibility." *Id.* Mr. Boland told them if they could not get along and be professional, he would have to terminate one of them. *Id.* at 670-671. Mr. Boland did not consider Complainant's allegation that Mr. Wood threatened her "substantive," in that it seemed to be a disagreement about what was said on the morning of March 10, 2011.[35] *Id.* at 672. The March 9 email may have been one of a number of issues discussed, but there was no particular focus on the email. *Id.* at 671. There was also a discussion at one of the April meetings about increasing Complainant's hours to get work accomplished in a timely manner. *Id.* at 674. The number of days for Complainant's former position is currently at 230 days, subject to any district-wide cut backs in days due to budget constraints. *Id.*

Investigation and Termination

67. Mr. Boland investigated some specific incidents Mr. Wood reported. TR at 675. He spoke with three or four people, including Ms. Sherick, Mr. Smejkal, and Mr. Chafee, and he reviewed emails. *Id.* at 675-676, 679. He wanted to corroborate whether or not what Mr. Wood was telling him was valid, firsthand from the individuals involved. *Id.* at 738. He confirmed that Ms. Sherick was frustrated with what she perceived as Complainant's lack of cooperation. *Id.* at 676. Mr. Smejkal confirmed the incident with Complainant and indicated he did not feel like Complainant treated him in a professional manner. *Id.* at 678. Mr. Boland did not specifically

[35] Complainant alleged Mr. Wood said "I will deal with you later," and Mr. Wood alleged he said "we will deal with this later." TR at 672.

investigate Complainant's claims because they were general in nature and she did not give him the names of anyone to talk to, and while she did tell him he could talk to anyone in the Maintenance & Operations department, Mr. Boland stated he did not have time to "do fishing expeditions." *Id.* at 679. Mr. Boland thought he had a good idea of how people felt about Mr. Wood, that it ran the spectrum, and he did not see how information from people in Maintenance and Operations would be helpful to resolving the conflict between Mr. Wood and Complainant, which he saw as the main issue. *Id.* at 679-680. Mr. Boland did not ask Complainant for more detail about her concerns, and did not attempt to corroborate her concerns. *Id.* at 718. Mr. Boland confirmed that directors were told to advise their staff that "all-user" emails were not to be sent out without supervisor approval due to some non-business emails being sent out. TR at 676. Mr. Boland also considered Complainant's email to all-users that there was no excuse for code violations as potentially inappropriate because people would find it "demeaning." *Id.* at 719.

68. Mr. Boland contacted Scott Marotz, Respondent's counsel, to seek advice on the options regarding the deteriorating relationship between Mr. Wood and Complainant. TR at 682. Mr. Boland was concerned that the conflict between Mr. Wood and Complainant was interfering with performing the work that needed to be done. *Id.* He stated the district was "at a critical point in time in terms of trying to get our facilities squared away, approaching a third bond attempt," and that there "needed to be a resolution sooner, rather than later." *Id.* Mr. Boland considered trying to assign Complainant to another supervisor "impractical" for a variety of reasons, and there were no other jobs in the district that "aligned with her set of qualifications" so he ultimately decided to terminate her employment. *Id.* at 683-684. He did not terminate Mr. Wood because he had "a great deal of confidence" in Mr. Wood's work, and Mr. Wood had "a deep commitment to the district," which was not evident with Complainant. *Id.* at 686. He felt Complainant had more of "a focus on time off, rather than getting the job done." *Id.* at 687. He also felt it did not make sense to reassign Mr. Wood because it had been difficult to find someone with his qualifications to be the Maintenance & Operations director. *Id.* at 684.

69. Mr. Boland felt there was some fault on both parties, but ultimately, that Mr. Wood's contributions to Respondent more critical than Complainant's. *Id.* at 684, 687. He did not consider the March 9 email more than anything else, in that "it was one example of something that contributed to an ongoing conflict, an escalating conflict." *Id.* at 687. Mr. Boland described the email as "an incident in a chain or sequence of incidents that, in my view, essentially began when [Mr. Wood] confronted [Complainant] about her absenteeism." *Id.* at 738. He described the relationship between Mr. Wood and Complainant as one that "had been positive and productive," but that it "began to fall apart" over a period of time. *Id.* at 689. While Mr. Wood had input because he was "not happy" with Complainant's performance, the decision to terminate her was "based on all the documentation" and it was ultimately Mr. Boland's decision because there was a "situation that [Mr. Boland] felt was irreconcilable" and the attempts at mediation had failed. *Id.* at 703-704.

70. Mr. Boland did not think Complainant could be reinstated because her former position is not available as it was filled, and he was not sure it was feasible given that Complainant questioned his leadership. TR at 690-691.

Affidavit of Dana Wood

71. Dana Wood's affidavit dated July 27, 2011, was admitted into evidence as he is deceased and thus unavailable as a witness. TR at 10-11; RX 25; *see* 29 C.F.R. § 18.804(b)(5). Mr. Wood was the Director of Operations for Respondent and served as Complainant's direct supervisor. RX 25 at 244. Part of Complainant's job was to inform Mr. Wood of any potential violation of state and federal health and safety regulations and standards. *Id.* at 245. Mr. Wood characterized Complainant's March 9 email as an example of "one of many dozens if not hundreds of correspondence" sent by Complainant regarding health and safety that was "not much different than the other emails she sends me in connection with her job duties," except for "the inappropriate circumstances of its delivery." *Id.* at 246.

72. In mid-to-late 2010, Mr. Wood and Complainant inspected the boiler system in Gale Junior High to estimate the cost of "total rip-out and replacement" of the school's HVAC system, including asbestos abatement. RX 25 at 246-247. However, the bond that would have funded the HVAC replacement did not pass and Mr. Wood "went to Plan B and decided to determine the school's boiler lines system useful safe life and to plan accordingly" for budget and maintenance. *Id.* at 247. To do this, Mr. Wood contracted with MTI to conduct non-destructive testing ("NDT"), a procedure that Mr. Wood was "thoroughly familiar with based on [his] education and training." *Id.* NDT uses ultrasound to determine that quality and thickness of the pipes, and by taking multiple samples, Mr. Wood would be able to determine the viability and useful safe life of the system. *Id.*

73. Complainant's role in the project was to identify the composition of the insulation material to determine whether and how much asbestos containing material ("ACM") would need to be removed. RX 25 at 247. If ACM needed to be removed, Complainant was responsible for identifying the procedure and providing the plan for removal, for making sure employees were adequately trained and equipped to abate any asbestos risk, and to ensure compliance with all applicable laws and regulations. *Id.* Because Mr. Wood and Complainant had already inspected the boiler lines approximately one year before the proposed NDT, she was familiar with the locations where the pipes had bare surfaces or only fiberglass insulation as a result of earlier asbestos abatements. *Id.* at 248.

74. Mr. Wood stated that throughout the project, Complainant's only concern was related to him on March 8, 2011, when she said there was a limit of three linear feet for a small scale, short duration activity and that only 18 samples could be taken if the sample were two inches in diameter.[36] RX 25 at 250. At 2:01 p.m. on March 9, 2011, Mr. Wood sent Complainant an email asking if the fact that Respondent's asbestos workers did not have current fit tests presented a problem and asked for a training plan for the asbestos workers. *Id.* at 249-251. Complainant responded by directing him to the district website. *Id.* He therefore asked again for a detailed training plan, specifying certain information he wanted included. *Id.* at 251-252; *see* F.F. ¶ 14. Mr. Wood asserted Complainant did not respond to this request, but instead sent him the March 9, 2011 email at 5:06 p.m. that is the subject of her complaint. RX 25 at 251.

75. Mr. Wood described Complainant's March 9 email as pre-textual and "not intended to provide information about a potential risk of harm, rather, it was intended to harass, vex, and

[36] Complainant denied this characterization during her interview with OSHA; she claimed she expressed concerns weeks earlier that the job was too big for district employees and required an asbestos abatement contractor. RX 26 at 272-273.

annoy me in retaliation of my prior criticism of [Complainant]." RX 25 at 251. He believed it was an "angry response" to his email regarding asbestos safety training and other issues where he criticized her for not following the rules, and was merely a "tit for tat" response without any legitimate health or safety concerns. *Id.* In addition, Mr. Wood believed it was pre-textual because as of March 9, 2011, the amount of asbestos that would be encountered during the NDT was unknown because the walkthrough to identify the amount of ACM to be encountered, if any, was to take place on March 11, 2011. *Id.* at 251-252. Ultimately, 32 areas were identified during the walkthrough for recommending sampling cites; four of the 32 included potential removal of ACM. *Id.* Mr. Wood determined that adequate data could be obtained from 28 samples, without the need to disturb ACM. *Id.* at 252-253.

76. After he received Complainant's March 9, 2011 email, Mr. Wood contacted Mr. Boland to ask how he should respond because of what he described as Complainant's "rude, unprofessional and disrespectful tone." RX 25 at 253. He told Mr. Boland he was "at his wit's end" and that Complainant was "frequently offensive and confrontational," both with himself and other employees. *Id.* Mr. Boland recommended that Mr. Wood speak with Complainant and "again counsel her about her practice of sending unprofessional e-mails when she was offended or upset." *Id.* Mr. Wood told Complainant on March 10 that her email was rude and unprofessional, but there was no time to discuss the matter in detail that day. *Id.* He told Complainant that "we will deal with this when we get back," and he likely repeated this to Complainant "so she would know that we had a serious communication problem which needed to be addressed at length at a later date." *Id.* at 254.

77. Mr. Wood denied that he ever criticized Complainant for reporting any violation of state or federal regulations, but that he instead focused on the tone of the March 9 email and her "disrespectful manner." RX 25 at 254. He alleged that she created confrontational situations and caused "increasing acrimony and discord between her and other…employees, including [himself]." *Id.* He provided Mr. Boland with documents and emails supporting his allegations, and Mr. Boland conducted his own investigation. *Id.* at 254-255. Mr. Wood declared he was dedicated to health and safety and to complying with all applicable state and federal laws and regulations. *Id.* at 255.

78. Mr. Wood stated that based on his personal knowledge, Complainant was terminated due to 1) her history of rude and unprofessional communication with other employees, 2) her history of unprofessional and insubordinate conduct in her dealings with Mr. Wood, 3) her history of poor attendance, and 4) her failure to perform her job functions, including asbestos training and compliance, in a timely and thorough manner. RX 25 at 255. Mr. Wood stated that he therefore agreed with Mr. Boland's decision to offer Complainant a separation agreement. *Id.* He concluded that the decision to offer her the separation agreement was based on "the fact that the relationship between [Complainant] and me had grown extremely acrimonious, to the point where the efficient functioning of the operations department was adversely affected, as well as [Complainant's] failure to complete several of her job functions." *Id.* at 256.

<u>Respondent's Witness – Lisa Sherick</u>

79. Lisa Sherick is currently the superintendent of Jefferson School District 261 and previously worked for Respondent in a variety of jobs, including student services director and assistant superintendent to Mr. Boland. TR at 534, 538-539. In mid-January of 2011, school nurses at multiple schools contacted Ms. Sherick about overflowing containers of used needles that needed

to be disposed of. *Id.* at 542-543. Ms. Sherick decided to contact Complainant because she saw on her job description that she was in charge of waste and environmental safety. *Id.* at 544. Ms. Sherick talked on the phone to Complainant, who informed her that the nurses could take care of it or that she should contact another district, but Ms. Sherick said the nurses were not trained in how to deal with bio-hazard waste. *Id.* at 544-545. Ms. Sherick felt that she did not get any help from Complainant and that Complainant appeared "very arrogant" over the couple of phone conversations they had.[37] *Id.* at 545. In late January 2011, Ms. Sherick spoke with Mr. Wood about her frustrations with Complainant and about how rude Complainant had been. *Id.* at 547-548. Mr. Wood responded that he was concerned as well and would talk to Complainant. *Id.* at 548. Ms. Sherick had a number of communications with Complainant over a series of weeks without resolving the issue, and ultimately her own department resolved the waste issue. *Id.* at 550-551. Ms. Sherick also discussed her frustrations with Mr. Boland. *Id.* at 551.

80. Ms. Sherick assumed Complainant would be able to order bio-hazard bags and containers, although Complainant told her that was something Operations would not do. TR at 554. Ms. Sherick also admitted that she was not sure what type of waste Complainant was dealing with, whether industrial waste or bio-waste. *Id.* at 556. She also admitted that Complainant offered to help with writing the blood-borne pathogens exposure control plan, and volunteered to pick up the bags of bio-waste on a routine basis. *Id.* at 558. Complainant also offered to sit in on the call to another district's health department to see how to resolve the problem, since it was not Complainant's area of expertise. *Id.* at 558-559.

Respondent's Witness – Michael Clements

81. Michael Clements is CEO of Bateman-Hall, a contracting and construction management company. TR at 564-565. Mr. Clements worked with Respondent on the bonds it tried to pass in 2008, 2010, and 2012, but primarily worked on the 2012 bond, which succeeded. *Id.* at 566. In January 2012, Bateman-Hall began to work on planning the remodel and abatement of Gale. *Id.* at 569. The scope of the planning in January 2012 was different from previous bond planning because there was a new plan to turn Gale into a high school. *Id.* at 570. The design was completed by April 2012 and ready to go to the board for approval. *Id.* at 575. Respondent signed an agreement with a contractor to do abatement at Gale on May 22, 2012, and on May 31, 2012, the abatement contractor sent a notice to the EPA of the planned renovation. *Id.* at 578-579. The renovation was scheduled to occur on June 6, 2012, and involved the removal of 2,768 linear feet of asbestos containing material to be removed from pipes. RX 49 at 515. As of March 2011, Mr. Clements stated that "information as far as hazards in each of the facilities that were either going to be renovated or demolished was being gathered," but that any plan to abate the asbestos insulating the pipes at Gale would have been "speculative." *Id.* at 580-581.

82. Mr. Clements worked with Mr. Wood a number of times and found him safety-conscious and detail-oriented, and felt he had a good working relationship with him. TR at 581-582. Mr. Clements felt Mr. Wood kept people on task, and kept things moving in the right direction. *Id.* at 582. Mr. Clements worked sporadically with Complainant and found that "information flowed

[37] Complainant stated she only had one phone conversation with Ms. Sherick, not "multiple." TR at 834. She also denied she was rude or arrogant on the phone, and denied that Ms. Sherick informed her that the bio-waste containers were "overflowing." TR at 835-837.

substantially better" when her replacement was hired, although he had no issues with Complainant personally.[38] *Id.* at 583-584.

Respondent's Witness – Scott Marotz

83. Scott Marotz is an attorney who represented Respondent for almost 20 years handling different issues, including employment and real estate issues.[39] TR at 482. Mr. Marotz worked with Mr. Wood on "many issues," and described him as someone who took his job very seriously and would often check with Mr. Marotz to see if an issue had legal ramifications. *Id.* at 488. Mr. Marotz first spoke with Mr. Wood about Complainant regarding her schedule because Mr. Wood was concerned about not treating Complainant differently due to his friendship with her husband. *Id.* at 488-489.

84. Mr. Marotz met with Mr. Boland in mid- to late-April of 2011, and discussed the issues between Mr. Wood and Complainant. TR at 492-493. Mr. Boland reported that Mr. Wood and Complainant were "at odds," and Mr. Marotz felt that what Mr. Boland reported was consistent with his understanding of Mr. Wood's concerns, and advised Mr. Boland on his options. *Id.* at 493-494. When Mr. Boland decided to terminate Complainant, Mr. Marotz was asked to draft a proposed separation agreement to submit to Complainant, which provided that Respondent would pay Complainant through the end of the fiscal year if she would promise not to bring a claim on her behalf against Respondent. *Id.* at 494. Mr. Marotz did not recall ever seeing Complainant's March 9, 2011 email. *Id.* at 494-495. Over the years working with Mr. Boland, Mr. Marotz observed that he would attempt to ascertain as much information as possible and seek counsel from whoever he thinks is appropriate before making a decision to terminate someone, and that he takes the decision very seriously. *Id.* at 498.

Respondent's Witness – Dan King

85. Dan King is vice president of Materials Testing Inspection ("MTI"), which is a company that does quality control for construction projects by collecting data and test results for others to evaluate and interpret. TR at 642-643. Mr. Wood contacted Mr. King about determining the thickness of the piping in the boiler areas at Gale. *Id.* at 643, 647. Based on information from Mr. Wood, Mr. King suggested that samples should be taken in 65 locations, although he stated that the number was variable. TR at 645, 658; CX 3395. Mr. King understood that the overall objective was to stay away from areas with asbestos, or that the asbestos would be gone by the time his team started testing. TR at 646. The instrument used on the pipe has three metal devices, one of which would need to touch the surface of the pipe. *Id.* at 648-649. The largest of the metal devices is about the size of a dime, and the smaller one is about three eighths of an inch in diameter.[40] *Id.* at 649-650. It would be "normal" to use the smaller size on the Gale project. *Id.* at 650. However, in an email to Complainant, Mr. King indicated they would need a space at least two inches by two inches to perform the testing. TR at 655; CX at 3392.

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[38] Complainant denied ever getting an assignment to provide environmental assessments to Mr. Clements. TR at 831. Complainant claims such an assignment would have been documented in some way. *Id.*

[39] Mr. Marotz has not worked on the case at hand, and his only involvement besides testifying at the hearing was providing some documents to Respondent's counsel. TR at 481.

[40] Although the transcript indicates there were three metal devices, Mr. King only described two in his testimony. *See* TR at 648-650.

86. Mr. King, along with another MTI employee and someone from Maintenance, performed the pre-job walk-through on March 11, 2011, which Mr. King described as "routine." TR at 651-652. They identified locations for testing and Mr. King did not remember having any concerns. *Id.* at 652. Two locations were identified as possibly containing asbestos, but Mr. King was unsure if those locations were actually tested. TR at 653, 663-664; RX 5 at 93. Based on the final report, Mr. King stated it appeared only 21 samples were taken. TR at 667. MTI has not performed a lot of testing where asbestos was an issue; typically, coverings have been removed once they do the testing. *Id.* at 657.

Respondent's Witness – Carrie Smith

87. Carrie Smith has worked for Respondent since July of 1990 and is currently the director of Human Resources and Finance. TR at 797, 799. Mr. Wood first contacted Ms. Smith about Complainant's use of sick leave, when he asked her to pull the records on Complainant's use of sick leave during the 2009-2010 school year. TR at 800; RX 2 at 26-30. Complainant had 27 occurrences of sick leave over that year, which Ms. Smith characterized as being "quite a bit" without a surgery or similar circumstance. TR at 802-803, 807; RX 2 at 16, 27-28. When Mr. Wood asked Complainant to start providing doctor's notes for her sick leave, Complainant called Ms. Smith and stated she did not think it was fair or legal. TR at 807. Ms. Smith informed Complainant that it was legal, and since Complainant then stated she did not want Mr. Wood to know what kind of doctor she saw, Ms. Smith offered to have the doctor's notes go through the HR office instead of to Mr. Wood. *Id.*

88. On March 10, 2011, Complainant spoke to Ms. Smith about the March 9 email and how she interpreted Mr. Wood's statement that "he would deal with her later" as a threat, and that she wanted Ms. Smith to note she had come to HR on that day. TR at 805-806. Ms. Smith felt like Complainant was "checking a box," or "trying to set up the district for something," which she conveyed to Mr. Boland. *Id.* at 806. Ms. Smith reviewed the updated job description that Mr. Wood prepared after the April mediation meetings with Mr. Boland. *Id.* at 809. The changes to the essential duties and responsibilities did not seem punitive, but more of a clarification of Complainant's duties. *Id.* at 809-810. There was also an increase in Complainant's hours from 203 to 222[41] because Mr. Wood indicated some duties that needed to be completed required additional time. *Id.* at 810-811. Complainant emailed Ms. Smith on April 18, stating that she had a number of concerns about the job description changes and wanted to meet with Ms. Smith and Mr. Boland without Mr. Wood present. *Id.* at 811. Ms. Smith was surprised the Complainant did not want to discuss the changes in the job description with Mr. Wood, and saw it as another example of Complainant not wanting to work with Mr. Wood. *Id.* at 811-812. Ms. Smith and Mr. Boland met with Complainant on May 3, where the settlement agreement was offered to Complainant. *Id.* at 812.

Respondent's Witness – Amy Rubio

89. Amy Rubio has worked for Respondent for eight years and was an administrative assistant under the supervision of Mr. Wood. TR at 822. Ms. Rubio described Mr. Wood as "challenging" to work with, but "fair." *Id.* at 823. Ms. Rubio described the relationship between

[41] The increase in days per year was listed as 222, but was actually 223 per year. *See* FN 21.

Mr. Wood and Complainant as friendly at first, but eventually more strained with "palpable" tension. *Id.* In the spring of 2011, Ms. Rubio was required to attend every meeting between Mr. Wood and Complainant and transcribe minutes. *Id.* at 824. Ms. Rubio took a total of four weeks of sick leave for two separate surgeries, which took place two years apart. *Id.* at 826-827.

Deposition of Burke Smejkal

90. Burke Smejkal gave a deposition on January 28, 2016, because he was unable to attend the hearing. RX 56 at 6. Mr. Smejkal previously worked for Respondent as a science teacher at Gale Junior High until approximately July 30, 2011. *Id.*at 7. In December 2010 or January 2011, Mr. Smejkal spilled a small amount of a solution of hydrochloric acid used for a basic science experiment on the carpeted floor.[42] *Id.* at 8-9. He described the spill as "minor," but contacted the operations department since hazardous materials were involved. *Id.*at 8. He stated that the spill happened in the morning before kids were in the room. *Id.* at 12. He believed he was wearing goggles and maybe gloves, but no apron, and he did not believe there was a spill kit in the room. *Id.* at 24-25, 29.

91. Complainant came to the school that afternoon, and Mr. Smejkal told her what happened and thought he was following protocol. RX 56 at 10. He asked her for help to "make sure we took care of the situation appropriately." *Id.* at 11. Mr. Smejkal stated Complainant helped him, but "in an aggressive kind of berating manner" and would not let him "get a word in edgewise." *Id.* at 11-12. He said he was "glad the situation was…in somebody else's hands" and that he was "following protocol." *Id.* at 12-13. Mr. Smejkal stated that Complainant did not remediate the spill while she was there because he had already poured a basic compound of baking soda and water on the spill to neutralize the reaction. *Id.* at 13.

92. Within a couple of weeks after the incident, Mr. Smejkal spoke with Mr. Wood when Mr. Wood stopped by the school.[43] RX at 13-14. Mr. Smejkal told Mr. Wood that Complainant was "professionally rude to [him] about the situation, and that [he] didn't feel that it warranted her analysis," and Mr. Smejkal wanted to know if that was what he should expect from someone in her position. *Id.* at 14. Mr. Boland later spoke with him about the incident, around "early spring." *Id.* at 15-17. Mr. Boland asked Mr. Smejkal what happened, the protocol followed, and the nature of the conversation between Mr. Smejkal and Complainant. *Id.* at 18. Mr. Smejkal told Mr. Boland that Complainant was unprofessional in the way she handled the situation, but that the incident was safely handled. *Id.*

Damages

Complainant's Testimony

93. Complainant claimed that her earnings with the school and earnings with the tribe would not accurately show her economic losses because she worked more hours with the tribe. TR

[42] Mr. Smejkal spilled a diluted solution of the hydrochloric acid; he was unsure if the undiluted solution was eight or six molar. RX 56 at 22-23.

[43] Mr. Smejkal stated that he and Mr. Wood were social to the extent that he went on a bike ride with a group of district employees that included Mr. Wood, and that he and his wife had attended a faculty party at Mr. Wood's house. RX 56 at 20.

at 218. She claimed she is owed back pay with interest for $174,251.39, which she calculated using a spreadsheet provided by the OSHA investigator.[44] TR at 217; CX 2521.

94. Complainant alleged she is entitled to $250,000 in damages for emotional distress because getting fired "destroyed [her] life as [she] knew it." TR at 248; CX 2523. She had to move out of her house into a camper because although she owned other houses, she could not afford the payments and had to rent them out. TR at 248-249. She was under "incredible" financial stress and eventually underwent a "complex divorce," which lasted from approximately March 2013 to August 2014. *Id.* at 248, 289. She "fell apart" and was diagnosed with depression and anxiety and ended up taking short-term disability leave. *Id.* at 249-250. She first visited a psychiatrist named Dr. Gracie Hargraves in April 2015. *Id.* at 289. Complainant takes medications for anxiety and depression, and although she is beginning to recover, she testified that the last five years were an "awful time in [her] life." *Id.* at 252-253.

95. Complaint claimed she is owed damages for various expenses and consequential damages in the amount of $212,903.74.[45] CX 2521-2523. Complainant stated that she would consider a bona fide offer of reinstatement in lieu of front pay, hoping that she and Respondent could move forward. TR at 254. However, she also calculated damages of front pay for 10 years and the purchase of annuity equivalent to PERSI retirement benefits in the amount of $733,127.27.[46] CX 2523. Complainant's total damages claimed are $1,370,322.40.[47]

Complainant's Witness – Dr. Gracie Hargraves

96. Dr. Gracie Hargraves testified at a deposition on April 5, 2016. CX 1. Dr. Hargraves has a master's degree in counseling, a doctorate degree in counseling and counselor education from Idaho State University, and has been counseling in the mental health field since roughly 1994. *Id.* at 6-7. Dr. Hargraves first saw Complainant on April 17, 2015. RX 53 at 551; CX 1 at 10. Dr. Hargraves used both cognitive behavioral therapy and insight oriented therapy with Complainant. CX 1 at 8. Dr. Hargraves noted that Complainant's stressors and areas of impairment included legal disputes and occupational problems. RX 53 at 551. The doctor's notes also record that Complainant had previous issues with "stress" from 1999-2009. *Id.* at 552. Complainant told Dr. Hargraves she was a whistleblower and had been quite stressed the previous four years, primarily because she was fired. CX 1 at 11. Dr. Hargraves diagnosed Complainant with major depression, posttraumatic stress disorder ("PTSD"), and generalized anxiety disorder. *Id.* at 14-15. Dr.

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[44] Complainant provided documentation to support her calculations, although her calculations were called into question by Respondent's expert witness Keith Pinkerton. *See* CX 2524-2539. At the time of the hearing, Complainant was receiving $2,300 per month in long-term disability benefits, but she did not include these payments in her calculations because she did not think that long-term disability is considered income for this type of case. TR at 263.

[45] These expenses include: stock Complainant said she was forced to sell to pay living expenses; the amount she would have earned if she had been able to pay off a PERSI 401k loan; IRA and 401k losses; the tax penalty for taking early distributions from her IRA and 401k; employer contribution of retirement pay losses; medical insurance premiums; medical costs and prescriptions; lost accrued sick and personal days; increased commuting costs; job hunting costs; interest paid on a home loan because she was "unable to take advantage of low interest rates and refinance;" credit card interest and fees, which she "had to use" to live and make her house livable so she could stop living in her camper; student loan interest (capitalized); interest on a real estate loan from her mother; and additional taxes. TR at 221-247; CX 2521-2523. She also claimed miscellaneous fees of $410 which incorrectly included $40 for a process server to serve papers on Mr. Boland. TR at 246. The $410 was reduced to $370 at trial. *Id.*

[46] Complainant admitted she was not yet vested in PERSI when she was terminated. TR at 226.

[47] $174,251.39 + $250,000 + $212,903.74 + $733, 127.27 = $1,370,282.40.

Hargraves testified that the combination of Complainant's three conditions can be debilitating and "create distress in various areas of…life" and Complainant had a difficult time functioning on a daily basis. *Id.* at 24. She also stated that Complainant experienced fatigue, flashbacks, inability to concentrate, and feeling overwhelmed, and that Complainant lacked a strong support system. *Id.* at 28-29; RX 53 at 554-562. She felt PTSD was an appropriate diagnosis under the DSM-5 even though there was no threatened death, serious injury, or sexual violence because an event can be severely traumatizing based on how a person experiences an event. CX 1 at 17-18. Dr. Hargraves stated "further research" is being done that suggests PTSD occurs in other circumstances than those listed in the DSM-5, and that she attends conferences and reads professional publications. *Id.* at 53-54. However, she also referred to the DSM as her "bible." *Id.* at 42.

97. Dr. Hargraves believed that Complainant's diagnoses and symptoms related back to her termination in 2011 because "that's what [Complainant] presented with," what they talked a "great deal about," and she had experienced symptoms from that time. CX 1 at 30. However, she admitted that Complainant's other stressors, including her house burning down in 2013, living in a trailer, financial issues, divorce, job stress with the Shoshone tribes, and preparing to sell her home, could cause anxiety and depression. *Id.* at 45-47. Dr. Hargraves has not conducted any psychological testing of Complainant. *Id.* at 49. She does not recall asking why Complainant did not seek treatment until 2015, but speculated that some people "are in denial about their symptoms until it reaches a crisis point." *Id.* at 32. She believed Complainant was suffering from symptoms before she sought therapy, based on the history she presented. *Id.* Dr. Hargraves last saw Complainant in September 2015. *Id.* at 35.

Respondent's Witness – Dr. Nancy Collins

98. Dr. Nancy Collins testified at a deposition on March 3, 2016. RX 59. She holds a master's degree in counseling, a Ph.D. in adult education with a cognate in vocational rehabilitation, and has taught graduate classes for the University of Idaho's vocational program. *Id.* at 5-6. She has had a vocational rehabilitation consulting practice for 25 years, for which she performs both primary counseling and forensic evaluation relative to disability, employability, and earning capacity. *Id.* at 6. She was asked to evaluate Complainant's employability and earning capacity following her termination, for which she interviewed Complainant and provided two vocational reports. RX 51 at 519. She based her assessment on national wage data and an evaluation of the local job market in eastern Idaho. RX 59 at 9, 11.

99. Dr. Collins opined that Complainant's earning capacity based on her labor market, skills, education, and experience, exceeds what she was earning with Respondent and what she was earning with the Shoshone tribe. RX 51 at 520. She did not feel that Complainant's age "was a big issue for her in this particular profession," given her skills and work history.[48] RX 59 at 15. Dr. Collins noted the average job search time in 2011 and 2012 was eight months. RX 51 at 524. In her preliminary report, Dr. Collins opined that Complainant's year-long job search was reasonable given the labor market at the time and her specific skills, although she noted that "some months

[48] Complainant's counsel sought to enter a New York Times article and a Washington Post article on the difficulty of older women returning to the labor market after the recession. RX 59 at 34-36. Respondent's counsel objected to the article as hearsay not within the "learned treatise" exception. RX 59 at 34. However, these articles are admissible under the learned treatises exception because they are statements in published periodicals, of which I take official notice as reliable authority. 29 C.F.R. § 18.803(a)(18). The objection is overruled.

[Complainant] did not apply for any work and seven months she applied for anywhere from one to five jobs." *Id.* at 520, 523-524. In November 2011, Complainant applied for 25 different positions, which Dr. Collins considered "more consistent with a good job search," which consists of "applying for work daily, or as often as jobs become available. *Id.* at 523. However, Dr. Collins admitted that any time there is more federal funding for projects in the area there would be an expected increase in the number of job opportunities for someone like Complainant. RX 59 at 31-32. She did not review Complainant's evidence demonstrating her job search because it was not provided to her, and she admitted to relying on relatively speculative data about job availability. RX 59 at 27-31, 38-39. Dr. Collins believed that had Complainant continued to search for a job, she would be earning as much, if not more, than she was earning working for Respondent. RX 51 at 524; RX 59 at 23.

Respondent's Witness – Keith Pinkerton

100. Keith Pinkerton is a partner in a business and consulting firm and does dispute analysis, which Mr. Pinkerton described as helping attorneys understand economic concepts and terminology involved in cases. TR at 746-747. Mr. Pinkerton has a bachelor's degree in economics from the University of South Florida, a master of business administration in finance from Baylor University, has been qualified as an expert in both state and federal courts, and has conducted analysis of alleged lost wages for the last 20 years. *Id.* at 748; RX 54 at 589. Mr. Pinkerton formed an opinion of the economic damages that would be applicable to Complainant, if liability were proven, based on a review of records produced in this case and his own supplemental research and analysis, and produced a report of his findings for Respondent. TR at 748-749; RX 54.

101. Mr. Pinkerton opined that if liability were proven, the maximum amount of damages Complainant suffered is $49,260. TR at 750; RX 54 at 580. Mr. Pinkerton based this estimate on a report and telephone conference with vocational expert Dr. Nancy Collins, who believed Complainant could have found replacement employment within 12 months. *Id.* Mr. Pinkerton stated he and Dr. Collins discussed any chilling effect that Complainant's termination and pending OSHA complaint could have on obtaining another job, and that Mr. Pinkerton did not believe it was a significant factor. *Id.* at 783-784. Mr. Pinkerton arrived at $49,260 by looking at Complainant's wage and fringe benefits earnings in the year prior to termination, estimating what her earnings would have been in the period after termination, and offsetting gains from unemployment compensation. *Id.* at 750-751. Mr. Pinkerton did not believe there was any damage to Complainant's earning capacity as a result of her termination by Respondent, and that she was not entitled to any future lost wages or benefits. *Id.* at 752; RX 54 at 580. Mr. Pinkerton believed that Complainant could have taken money from her retirement funds and "more than offset any wages that she lost over that 12-month period," which would have been a lower cost alternative to using a credit card, therefore negating her claim for credit card interest damages. TR at 753-754, 756, 765.

102. Mr. Pinkerton also reviewed Complainant's calculations that amounted to nearly $1.4 million in damages. TR at 757. He described these calculations as undocumented, based on "unwarranted assumptions based on speculations," and "faulty methodology." TR at 757-758; RX 54 at 577. He did not think her calculations could be relied on due to many, "overlapping" errors. TR at 758. He described her calculations as "triple dipping," in that she claimed her gross wages, the benefits that were not deducted from the wage, and the employer contribution to the benefits. *Id.* at 759. Mr. Pinkerton also felt that annual 2% raises for state workers was not in step with the recent past, as far as the economic downturn of 2007-2008. *Id.* at 761; RX 54 at 577. Complainant also did not reduce future damages to present value, and her claim for selling stock was "not

appropriate." *Id.* at 761-762, 764. He stated in his report that her methods used to determine future lost wages "do not comport with either sound economic methodology or generally-accepted financial practices…" RX 54 at 579. He claimed that her damages for lost accrued sick leave and personal days was not reasonably related to her termination. TR at 765-766; RX 54 at 581. In addition, her calculation of PERSI benefits was overstated by at least 22 percent, and was too speculative as a source of damages to be related to the case. TR at 765-766, 770; RX 54 at 579. Mr. Pinkerton also felt that the consequential damages related to not being able to obtain a loan were not reasonably related to her termination because Complainant may have been able to obtain the loan if she reduced her rental expenses on her rental properties. TR at 770-771.

IV. ANALYSIS AND CONCLUSIONS OF LAW

The following conclusions of law are based on analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. 5 U.S.C. § 556(d); 29 C.F.R. § 1978.109. In deciding this matter, the administrative law judge ("ALJ") is entitled to weigh the evidence, draw inferences from it, and assess the credibility of witnesses. 29 C.F.R. § 18.12; *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-15, slip op. at 8 (ARB Aug. 1, 2002).

A. Credibility

In arriving at a decision, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence, to draw inferences from such evidence, and is not bound to accept the opinion or theory of any particular witness. *Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968). An ALJ is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of it. *Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 16 n.5 (3rd Cir. 1975). An ALJ "should provide findings concerning witness demeanor in connection with resolution of conflicts in the pertinent controverted testimony." *Seater v. S. Cal. Edison Co.*, 95-ERA-13, slip op. at 17 (ARB Sept. 27, 1996). In resolving conflicts in testimony, "the ALJ may also rely on factors related to the content of the witnesses' testimony, *e.g.*, internal inconsistency, inherent improbability, important discrepancies, impeachment and witness self-interest." *Id.*; *see also Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir. 1963) (the credibility of witnesses "involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.").

1. Complainant

I find that while Complainant's testimony is generally consistent, there are certain parts of her testimony that negatively affect her credibility, and I therefore find her testimony entitled to limited weight.

First, I find her statement that she believed the CAA applied to her claim "from the beginning" to be not credible given Complainant's other statements and the evidence in the record. Complainant claimed she believed the CAA applied "from the beginning," and recited four distinct reasons based on the NESHAP regulations, yet she did not mention it in the context of her OSHA claim until December 2013. F.F. ¶ 39. She repeatedly corresponded with the OSHA investigator, and multiple times mentioned the OSH Act and AHERA by name, but not once mentioned NESHAP or the CAA. F.F. ¶ 40. She also only mentioned AHERA and OSHA in her initial

interview with the OSHA investigator in September 2011. F.F. ¶ 17. She mentioned the CAA in an email where she described learning about how complicated it was during her employment with the Shoshone-Bannock Tribe, but did not mention it in relation to her own complaint. F.F. ¶ 40. There is no corroborating evidence in the record that she believed the CAA applied to her claim until December 2013. She also stated in an affidavit that she was "well aware of EPA's interpretation of how the [NESHAP] regulations applied to asbestos removal for large projects, and small removals within a large project." F.F. ¶ 41. While I credit Complainant's statement that she was aware of the NESHAP regulations in general, I am skeptical that she was "well aware" of the EPA's interpretation of the NESHAP vis a vis the CAA. In April 2013, she emailed the OSHA investigator, referencing an EPA regulation that she interpreted as applying OSHA regulations to state workers. F.F. ¶ 40. Given her continued and regular correspondence with the OSHA investigator, her proclivity for citing regulations in support of her claims, and her confessed comfort with reading and interpreting regulations, I find it difficult to believe that she would not have referenced the CAA, the NESHAP, or the EPA's interpretation of the CAA NESHAP at some point prior to December 2013 if she truly believed the CAA applied "from the beginning."

Additionally, Complainant claimed that she knew "any removal of asbestos done in conjunction with the MTI testing would be a small part of the much larger project which was converting C.E. Gale into the Compass Academy." F.F. ¶ 41. Mr. Boland testified, however, that there was no renovation planned in March 2011, and that the conversion of Gale into a high school was not even contemplated, much less starting to be planned, until April 2011. F.F. ¶ 57. Mr. Clements supports this assessment, calling any plan to abate asbestos in Gale in March 2011 as "speculative." F.F. ¶ 81. The contract to plan for the conversion of Gale was not signed until November 2011. F.F. ¶ 57. I therefore find Complainant's statements that she was aware of the conversion of Gale to be incredible.

While it does not directly impact her claim whether or not she knew or believed the CAA applied to her claim through the NESHAP regulation, or whether she explained to OSHA that her complaint should be filed under the CAA,[49] her testimony that she had this belief "from the beginning" is self-serving and suggests Complainant tried to frame the issues in the light most favorable to her. It calls into question whether and to what extent she has tried to frame the other facts of the case in a light most favorable to her claim.

Second, Complainant made several statements that are inconsistent and contrary to common sense.[50] For example, she referred to the email Mr. Wood sent on March 8, 2011, requesting an asbestos training matrix to be "snarky," but then asserted that it did not bother her. F.F. ¶ 14. She also claimed she responded to this request by "add[ing] a couple of things to what [she] had already sent him, and sent it to him." F.F. 14. However, Mr. Wood contended that she never responded to his request, and the record does not show that she responded to his request. She also claimed that she had no problem with Mr. Wood and worked fine with him, while simultaneously describing

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[49] *See Jones v. EG & G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3, slip op. at 15 (ARB Sept. 29, 1998) ("the environmental acts do not require that a complaint articulate each statute or regulation that potentially could be violated because of a defect or safety issue."); *Tomlinson v. EG&G Defense Materials, Inc.*, ARB Nos. 11-024, 11-027; ALJ No. 2009-CAA-008, slip op. at 11 (ARB Jan. 31, 2013) ("a detailed knowledge of the substantive law" is not necessary for a complaint to be protected activity).

[50] Respondent argues Complainant's credibility is lacking due to her "grossly overstated claim for damages," and because she was impeached regarding the reason she left her job at Portage Bay. ALJX 3 at 3, 5. I do not find her damages claims or statements about why she left her job at Portage Bay detract from her credibility.

working conditions under him as "intolerable." F.F. ¶ 7. Complainant attempted to draw a distinction between her personal working relationship with Mr. Wood and those of her co-workers, but I do not find this explanation convincing. It appears she was attempting to disparage Mr. Wood's supervisory style while still maintaining that she had no personal problems with him. It is also at odds with her statement in her later grievance, in which she stated that she told Mr. Boland on February 25 Mr. Wood treated personnel badly, herself included. F.F. ¶ 7, n.10. She states she had a good working relationship with Mr. Wood prior to March 2011, but also claimed on February 25 that he was "circumventing" her, "very vindictive," and later described him to OSHA as rude and "hypocritical as hell." F.F. ¶¶ 7, 36. Complainant also testified that Mr. Wood never expressed to her she was dissatisfied with her job performance prior to March 9, 2011, and the first time she heard the allegation was from the OSHA investigator in 2012. F.F. ¶ 36. However, she stated that Mr. Wood blamed her for not having people fit-tested, "saying I wasn't doing my job." F.F. ¶ 34.

Third, Complainant exhibited an at times evasive and argumentative attitude during cross examination. While some resistance to questioning by opposing counsel may be expected, Complainant's behavior at times detracted from her credibility. For example, instead of answering a question directly, she answered a question as follows:

> Q (by Respondent's counsel): Okay. And so, on March 8th, he is expressing his concerns. Correct?
> A (by Complainant): He is sending me an email that is as it states.

TR at 335-336; see also TR at 316-217. In another instance, instead of responding to questions from memory, she asked why she could not just look at the documents, since they were there. TR at 313-314. While not a major detractor, I found Complainant's attitude and demeanor had a negative impact on her credibility.

For the above reasons, I find Complainant's testimony entitled to limited weight, except for the portions of her testimony that are corroborated by the record.

2. Mr. Boland

Mr. Boland's testimony was consistent with no significant credibility issues. Witnesses testified that Mr. Boland was fair, took the decision to terminate employees very seriously, and there is no evidence he holds any animosity toward or bias against Complainant. F.F. ¶¶ 53, 84. Mr. Boland testified that he valued Mr. Wood's contributions to the district over Complainant's, F.F. ¶ 68, but this opinion is rational based on the large amount of responsibility Mr. Boland gave Mr. Wood and Mr. Wood's track record in "changing the culture" of the Maintenance and Operations department. Mr. Boland relied on Mr. Wood's opinions and assessment of Complainant's job performance, but also conducted his own investigation by speaking with different employees about Complainant's behavior and reviewing emails. F.F. ¶ 67. He provided a rational explanation of why he did not conduct an investigation of Complainant's allegations that Mr. Wood was making working conditions "intolerable," given that he felt he had a good idea of how people perceived Mr. Wood and that Complainant's allegations were general in nature. F.F. ¶ 67. I therefore find Mr. Boland credible and his testimony entitled to substantial weight.

3. Mr. Wood

Mr. Wood was only able to provide an affidavit of his version of events. While I was not able to observe his demeanor or evaluate any testimony from him, I found that his affidavit was credible. His statements were based on his personal observations and concerned topics on which he was knowledgeable. His statements were also consistent with other evidence in the record, particularly multiple emails and Mr. Boland's testimony. Complainant asserts that Mr. Wood's affidavit is inaccurate because he stated they could obtain sufficient data from 28 samples, while Mr. King testified only 21 sites were tested. ALJX 4 at 4-5. I do not find these statements inconsistent. I therefore find Mr. Wood's affidavit is entitled to substantial weight, while keeping in mind the caveat that he was not available at the hearing or at a deposition.

4. Other witnesses

There were no major credibility issues with any of the other witnesses that testified at the trial or provided deposition testimony. However, Respondent terminated Wayne Landers, and Ferel McArthur testified to some personality conflicts with Mr. Wood. F.F. ¶¶ 47, 53. These factors affect these witnesses' credibility, although I note that their testimony had no significant impact on the issues to be decided. In addition, Mr. Smejkal testified that no children were present during the acid spill, while Complainant testified that Mr. Smejkal "absolutely" told her children were present. F.F. ¶ 29, n.24. This inconsistency was ultimately immaterial, and did not negatively detract from Mr. Smejkal's (or Complainant's testimony). Complainant makes much of the fact that Mr. Marotz testified that he did not review the March 9 email while it appears from the record he may have reviewed it. ALJX 2 at 5. I note the inconsistency, but it did not significantly detract from his credibility.

Complainant's expert Mr. Roskelley was knowledgeable, and provided evidence of his significant qualifications as well as a brief letter explaining his conclusions. F.F. ¶ 44. However, the description of the project in his letter to Complainant demonstrates that he based his opinions on a perceived total renovation of the HVAC system, not the limited testing that occurred in March 2011. F.F. 45. It is therefore unclear whether his opinions are based on an accurate assessment of the boiler pipe testing. I therefore only give his opinions limited weight, despite his qualifications and well-reasoned testimony.

Dr. Hargraves was generally credible, despite counsel asking leading questions during her deposition. She has extensive counseling experience and treated Complainant regularly for months. *See generally* RX 53. She explained her opinions well, although she only vaguely referred to "further research" she was aware of from conferences and professional journals about how the PTSD may be diagnosed despite the absence of a threatened death, serious injury, or sexual violence, as per the DSM, which she referred to as her "bible." F.F. ¶ 96. While her opinion on why Complainant could be diagnosed with PTSD despite not meeting all the criteria of the DSM-5 was vague, I overall find her credible and afford her opinion substantial weight.

Dr. Collins was a credible expert witness with substantial qualifications, well-reasoned opinions, and provided two thorough vocational reports. Complainant argues Dr. Collins' opinion is not credible because she did not review Complainant's documents reflecting her job search, did not consider the impact of Complainant's age and gender on her job search, and relied on speculative data about job availability and job requirements. ALJX 2 at 25-26. I find that Dr.

Collins did address the impact of Complainant's age and gender, but explained that she did not consider it a problem given Complainant's education and skills. F.F. ¶ 99. Just because Complainant does not agree with Dr. Collins' opinion does not make it less credible. However, Dr. Collins testified that she did not review Complainant's 300 pages of evidence demonstrating her job search, and she admitted to relying on relatively speculative data about job availability and job requirements. F.F. ¶ 99. I find these factors have a minor impact on her credibility, given that she also interviewed Complainant and relied on her extensive experience in reaching her conclusion. Overall, I found nothing that detracted from her credibility and gave her testimony substantial weight.

Mr. Pinkerton was likewise was credible, well-qualified, and offered well-reasoned opinions, and provided a thorough, detailed report. Complainant refers to several "problems" with Mr. Pinkerton's testimony, including errors in his calculations, and faulty premises, including the fact that he deducted unemployment from the back pay award and his criticism of using gross wages to calculate back pay. ALJX 4 at 8-10. I find that these factors only minimally detract from his credibility and still give his testimony substantial weight.

B. Analysis

The whistleblower protection provisions of the CAA are found at 42 U.S.C. § 7622. To prevail in a case arising under the CAA, the complainant must establish by a preponderance of the evidence that the adverse action taken by the respondent was motivated, at least in part, by his or her protected activity. *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 11 (ARB July 14, 2000); 29 C.F.R. § 24.109(b)(2).[51] "[T]he preponderance of the evidence standard requires that the employee's evidence persuades the ALJ that his version of events is more likely true than the employer's version. Evidence meets the preponderance of the evidence standard when it is more likely than not that a certain proposition is true." *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-1, slip op. at 11 (ARB Apr. 25, 2014) (internal citations omitted).

[51] In the order following the prehearing conference, I included as issues for the hearing four elements commonly cited as necessary to prevail under the CAA: (1) the complainant engaged in a protected activity under the CAA; (2) the employer was aware of the protected activity; (3) the employer took an adverse action against the complainant; and (4) the protected activity caused or was a motivating factor in the employer's decision to take adverse action. *See Knox v. U.S. Dep't of Interior*, ARB No. 07-105, ALJ No. 2001-CAA-3, slip op. at 3 (ARB Aug. 30, 2007); *Melendez*, ARB No. 96-051, slip op. at 12; *Sayre v. VECO Alaska, Inc.*, ARB No. 03-069, ALJ No. 2000-CAA-7 (May 31, 2005). However, in a recent decision the ARB noted that other whistleblower statutes do not include any explicit knowledge requirement, and although it might be implicit in the causation requirement, it is not necessary to prove at this point in the proceedings. *See Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-042, slip op. at 2, n.3 (Feb. 18, 2016) (discussing elements of a whistleblower claim under the Sarbanes-Oxley Act). Because there is also no explicit separate employer "knowledge" requirement in the statute or implementing regulations for the CAA whistleblower provision, *see* 42 U.S.C. § 7622 and 29 C.F.R. § 24.109(b)(2), there is no need to prove a separate employer "knowledge" element here. However, even if there were a separate knowledge requirement, there is no dispute that Mr. Boland knew of Complainant's alleged protected activity. F.F. ¶¶ 17, 60; ALJX2 at 5, ALJX 3 at 17.

1. Protected Activity under the CAA

i. *Scope of the CAA and Reasonableness Standard*

The CAA is "a complex and comprehensive environmental statute enacted to preserve and protect the nation's air and public health." *Tomlinson v. EG&G Defense Materials, Inc.*, ARB Nos. 11-024, 11-027; ALJ No. 2009-CAA-008, slip op. at 15 (ARB Jan. 31, 2013). Protected activities under the CAA include commencing or causing to commence, testifying or being about to testify, and assisting or participating in a proceeding under the CAA or for the administration or enforcement of any requirement imposed under the CAA or an applicable implementation plan, or "in any other action to carry out the purposes of the act." 42 U.S.C. § 7622(a). The term "proceeding" is construed broadly and encompasses all phases of a proceeding that relate to public health or the environment, including the raising of internal concerns to an employer of a violation. *Sasse v. Office of U.S. Attorney, U.S. Dep't of Justice*, ARB Nos. 02-077, 02-078 and 03-044; ALJ No. 98-CAA-7, slip op. at 11 (ARB Jan. 30, 2004); *Melendez*, ARB No. 96-051, slip op. at 16.

A safety and health complaint must at least be "grounded in conditions constituting reasonably perceived violations" of the CAA. *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-0012, slip op. at 3 (ARB Apr. 8, 1997). For example, a complaint reasonably related to the release of unsafe substances into the environment or the release of toxins into the ambient air is covered under the CAA. *Culligan v. Am. Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-020, 2001-CAA-009, -011; slip op. at 9-11 (ARB June 30, 2004). However, even a complaint "related to air quality that 'touch[es] on' concerns for public health and the environment can be sufficient." *Tomlinson*, ARB Nos. 11-024, 11-027, slip op. at 16 (citing *Melendez*, ARB No. 96-051, slip op. at 11). The Fourth Circuit has noted that besides emissions of hazardous substances into the ambient air, there are "several ways to violate the CAA and its implementing regulations," including violations of EPA work practice standards and the standards for disposal of asbestos waste (*see* discussion on the NESHAP regulations below). *Knox v. U.S. Dep't of Labor*, 434 F.3d 724, 724, n.3 (4th Cir. 2006).

Well-established precedent under the CAA and in whistleblower cases generally hold that "the environmental acts do not require that a complaint articulate each statute or regulation that potentially could be violated because of a defect or safety issue." *Jones v. EG & G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3, slip op. at 15 (ARB Sept. 29, 1998). Likewise, "a detailed knowledge of the substantive law" is not necessary for a complaint to be protected activity. *Tomlinson*, ARB Nos. 11-024, 11-027; slip op. at 11 (citing *Zinn v. Am. Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op at 61-62 (ARB Mar. 28, 2012)).

But, in order to be protected under the whistleblower provisions of the CAA, Complainant must have had "a reasonable good faith belief" that her complaints were "in furtherance of the purposes of the [CAA]." *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 9 (ARB Dec. 28, 2012). Her belief must be subjectively and objectively reasonable, "*i.e.* [s]he must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the employee's] circumstances having [her] training and experience." *Melendez*, ARB No. 96-051, slip op. at 28; *Tomlinson*, ARB Nos. 11-024, 11-027, slip op. at 13. An objectively reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant. *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123; ALJ Nos. 2007-SOX-039; 2007-SOX-

042 , slip op. at 14 (ARB May 25, 2011); *see Harp v. Charter Communs., Inc.*, 558 F.3d 722, 723 (7th Cir. 2009). While it is not necessary for the complainant to prove an actual violation of the CAA, a complaint based on "assumptions and speculation" is not sufficient. *Saporito v. Cent. Locating Servs., LTD*, ARB No. 05-004, ALJ No. 2001-CAA-00013, slip op. at 6 (ARB Feb. 28, 2006).

Complainant's March 9 email, in which she outlines her alleged safety concerns, contains two statements that may come within the scope of the CAA. She wrote that she could not support the boiler pipe testing as planned because of "the risk of violating a regulation" or having "an asbestos release." F.F. ¶ 16.

Initially, I find that, if reasonable, Complainant's concerns regarding the possibility of an "asbestos release," as expressed in her March 9 email, come within the scope of the CAA. F.F. ¶ 16. A warning about the release of asbestos in a public school is an action that would carry out the purpose of the CAA because it is related to air quality and directly concerns public health. It is specific enough to "touch on" the concerns for public health and the environment that are the purpose behind the CAA. *Tomlinson*, ARB Nos. 11-024, 11-027, slip op. at 16. I will address the reasonableness of this concern later in the decision.

ii. *The Role of the NESHAP Regulations*

Respondent argues that Complainant did not engage in protected activity because there was no asbestos abatement "project" covered by the CAA at the time of Complainant's March 9, 2011 email. ALJX 3 at 7-11. Respondent contends that MTI's testing was intended to determine the useful safe life of the HVAC system at Gale and that it would not have tested a system that was already slated as a project for abatement and removal. ALJX 3 at 7. The first step in converting Gale to the new magnet school did not take place until November 15, 2011, and the actual remodel did not commence until 15 months after Complainant's March 9 email. ALJX 3 at 8.

Complainant counters that the CAA is implicated for four reasons. First, Complainant contends that "a NESHAP required inspection needed to be done prior to removal of asbestos." ALJX 2 at 3, *citing* 40 C.F.R. 61.145. Second, Complainant alleges any asbestos waste must be managed according to NESHAP regulations, even if the statutory 260 linear feet threshold is not exceeded. ALJX 2 at 3. Third, MTI's testing of the boiler pipes was allegedly part of the larger, multi-year project to renovate or demolish multiple district buildings, for which Respondent was seeking a bond, thus bringing it within a "project" covered by the NESHAP regulations. ALJX 2 at 4. Fourth, there is a requirement to estimate the amount of asbestos to be removed in a calendar year to determine if the 260 linear feet threshold would be exceeded, and there was no way to know in March of 2011 how many linear feet of asbestos would be removed. ALJX 2 at 4-5.

Both parties misunderstand the issue of coverage under the CAA whistleblower provision. Coverage is not dependent on whether the CAA is actually implicated, but on whether it was reasonable for Complainant to believe that a relevant environmental statute was implicated when she made her alleged safety complaints. Even if the activity complained of would not violate the CAA, concerns communicated about that activity may come within the whistleblower provision of the statute, if reasonable. *See Minard v. Nerco Delamar Co.*, No. 92-SWD-1, 1994 SOL Sec Labor LEXIS 18 at *7-8 (Sec'y Dec., Jane 25, 1994). In *Minard*, the employee brought a whistleblower action under the Solid Waste Disposal Act ("SWDA"). The Secretary found that even though the complainant was concerned about the disposal of oil and antifreeze, two substances not covered

under the SWDA, given the "complexity and opacity" of the statute it was reasonable for an average lay person to believe these substances were covered. *Id.* at *9.

However, to determine the reasonableness of her warning of a risk of violating a regulation, and because the issue is before me, I first need to briefly examine the scope of the CAA as applied through the NESHAP regulations.

The Fifth Circuit has summarized the NESHAP regulations in *U.S. v. Ho*, 311 F.3d 589 (5th Cir. 2002). Briefly, Section 112 of the CAA authorizes the EPA to establish emission standards for hazardous air pollutants which are called "national emission standards for hazardous air pollutants," or NESHAP's. *Ho*, 311 F.3d at 594. Asbestos, as one of the listed hazardous air pollutants, is regulated by the NESHAP regulations. 42 U.S.C. § 7412(b). Because asbestos is often emitted at building demolition and renovation sites, Section 112(h)(1) of the CAA "authorizes the EPA to adopt work practice standards instead of emission standards." *Ho*, 311 F.3d at 594-95 (citations omitted). The EPA adopted work practice standards for handling asbestos during demolitions and renovations, which are found at 40 C.F.R. §§ 61.145, 61.150. These standards "do[] not apply generally to any building containing any asbestos, but only to buildings containing certain specific kinds and large amounts of asbestos." *Id.* at 595, *citing* 40 C.F.R. §§ 61.145(a), 61.150. These standards apply to renovations where the amount of regulated asbestos containing material ("RACM") to be stripped, removed, dislodged, cut, drilled, or similarly disturbed, is at least 260 linear feet on pipes or 160 square feet on other facility components. 40 C.F.R. § 61.145(a)(4).

First, Complainant claims that if any amount of asbestos will be disturbed or removed in a covered facility, the owner or operator must perform the thorough inspection required by the statute. ALJX 2 at 3. Respondent argues that "whether the CAA applies depends upon the number of linear feet to be removed" during the testing project. ALJX 5 at 3; ALJX 3 at 8, n.2. During the boiler pipe testing in March 2011, the most ACM that would have been removed ranged from 10.83 feet to 21.67 feet,[52] far from the 260 linear foot threshold.

Under "applicability" for the NESHAP standard for demolition and renovation, the statue reads: "To determine which requirements of paragraphs (a), (b), and (c) of this section apply to the owner or operator of a demolition or renovation activity and prior to the commencement of the demolition or renovation, thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos, including Category I and Category II nonfriable ACM." 40 C.F.R. § 61.145(a). A renovation means "altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component." 40 C.F.R. § 61.141.

From a plain reading of this statute, it appears that before any renovation activity, the NESHAP requires a thorough inspection, even if asbestos is not involved. This requirement is clearly stated in the EPA's comments to the asbestos NESHAP revision in 1990. In response to a comment suggesting the inspection requirement be made explicit, the EPA responded that it "currently requires that a facility be inspected for asbestos prior to demolition or renovation." *National Emission Standards for Hazardous Air Pollutants; Asbestos NESHAP Revision*, 55 FR 48406-01 at

[52] Based on 65 proposed testing sites and the removal of either two by two inches of insulation or four by four inches per testing site. F.F. ¶ 85; TR at 353; ALJX 3 at 8, n.2.

48409. This interpretation is also supported by nonbinding case law.[53] Therefore, given that neither party disputes Respondent was an owner/operator of a covered facility, Respondent was required to conduct a pre-renovation examination.

However, it appears the other requirements of the NESHAP statute, *i.e.* the notification, emission control, and waste disposal requirements, are only implicated if the amount of asbestos containing material to be removed or disturbed exceeds 260 linear feet (on pipes). The notification and emission control standards are contained in 40 C.F.R. § 61.145(b) and (c), which only apply if the RACM to be disturbed is at least 260 linear feet on pipes or 160 square feet on other facility components. 40 C.F.R. § 61.145(a)(4). The section regulating asbestos waste from demolitions or renovations states, "each owner or operator of *any source covered under the provisions* of §§ 61.144, 61.145, 61.146, and 61.147 shall comply with the following provisions…." 40 C.F.R. § 61.150 (emphasis added). A source is only "covered" under § 61.145 if it exceeds the aforementioned thresholds. This reading conforms with the EPA's guidance to the Ohio EPA, in which it noted that:

> …a thorough inspection is required and a Notification must be submitted **only if the amount of asbestos-containing material that is friable…exceeds the regulatory threshold**. If the total amount added together from every house that is part of the "urban project" exceeds 260 linear feet of pipe or 160 square feet from any facility component, then the "urban project" **is regulated under the asbestos NESHAP**, and the demolition operations are subject to the asbestos emission control requirements (61.145(c)) and waste disposal requirements (61.150).

CX 2964 (emphasis added). Therefore, Complainant's assertion that any amount of asbestos waste is covered under the NESHAP is incorrect, and the waste disposal requirements only apply if the threshold amount of asbestos is reached. The EPA's interpretive rule for roof removal operations under the NESHAP also supports this interpretation: "EPA also interprets the NESHAP to be **inapplicable to waste** resulting from roof removal operations that **do not meet or exceed the coverage thresholds described in section I above [160 square feet].** Of course, other State, local, or Federal regulations may apply." *Interpretive Rule for Roof Removal Operations Under the Asbestos NESHAP*, 59 FR 31157-01, also included as Appendix A to 40 C.F.R. § 61.145 (emphasis added). The management of asbestos waste under AHERA refers to the NESHAP waste disposal requirements, but this does not mean all asbestos waste disposal is regulated under the CAA. *See* 40 C.F.R. § 763.80(b) (under AHERA, education agencies must provide for disposal of asbestos in accordance with EPA's "Asbestos Waste Management Guidance," as well as disposal regulations

[53] In *Fried v. Sungard Recovery Servs., Inc.,* 925 F. Supp. 364, 372 (E.D. Pa. 1996), the court noted that "renovation is not limited to an activity that involves asbestos. For this reason, Defendant had a duty to inspect its facility regardless of the amount of asbestos it was aware of before the inspection." In *U.S. v. Farley*, 2015 WL 6956557, at *4 (M.D. Fla. Nov. 10, 2015), the court cited *Fried* in support of its finding that a "duty to thoroughly inspect exists before renovation commences, independent of an owner or operator's prior knowledge of the amount of asbestos in the facility to be renovated."

covered by the NESHAP at 40 CFR part 61, subpart M). This means only that AHERA incorporated the NESHAP standards, not that the CAA applies.[54]

Additionally, I find that the MTI testing was not part of a larger project that falls under the NESHAP regulations. The statute defines a "planned renovation operation" as "a renovation operation, or a number of such operations, in which some RACM will be removed or stripped within a given period of time and that can be predicted. Individual nonscheduled operations are included if a number of such operations can be predicted to occur during a given period of time based on operating experience." 40 C.F.R. § 61.141. The EPA noted that "demolition operations planned at the same time or as part of the same planning period or scheduling period are considered to be part of the same project, and that in the case of municipalities, a planning or scheduling period is often a fiscal or calendar year or the term of a contract," but that demolitions spread out over multiple fiscal or calendar years or multiple contracts may be part of the same planning period. CX 2965 (*citing* 60 FR 38725). This same logic can be applied to renovation operations.

Here, while there was a general and continuing goal of renovating Gale Junior High, in March 2011 there was no planned renovation project, and no way to predict how much RACM will be removed or stripped within a given period of time. Mr. Wood stated that the MTI testing was part of his "Plan B" when the bond to renovate the HVAC system did not pass. F.F. ¶ 72. Mr. Boland confirmed this assessment, stating that while the district knew it had to do "something" with the HVAC system at Gale at some point, at the time there was no project planned. F.F. ¶ 57. The MTI testing was part of a distinct project to determine the "useable life" of the system, which Complainant herself stated in a grievance letter. F.F. ¶ 9. It is irrelevant that Gale Junior High was ultimately renovated and that more than the 260 linear feet of ACM was eventually removed in 2012. F.F. ¶¶ 57, 81; ALJX 1 ¶ 21. There is no evidence that other renovations were planned at the same time, or scheduled as part of the same fiscal or calendar year. The fact that Respondent began to plan abatements later in 2011 does not change this assessment. The EPA's guidance that projects spread over multiple fiscal or calendar years may be part of the same "planning period" appears designed to prohibit contravention of the regulations, but there is no evidence that Respondent was attempting to contravene the regulations, a conclusion with which Complainant's expert agreed. F.F. ¶ 45; *see* 40 C.F.R. § 61.19 for the definition of "circumvention."

I also find that Respondent was not required to estimate the amount of asbestos to be removed in a calendar year in relation to the planned testing of the HVAC system. The regulations state that to determine if the NESHAP "applies to planned renovation operations involving individual nonscheduled operations, predict the combined additive amount of RACM to be removed or stripped during a calendar year of January 1 through December 31." 40 C.F.R. § 61.145(a)(4)(iii). "Nonscheduled renovation operations" are renovations "necessitated by the routine failure of equipment, which is expected to occur within a given period based on past operating experience, but for which an exact date cannot be predicted." 40 C.F.R. § 61.141. However, Complainant presented no evidence that there were potential individual nonscheduled operations involved in the planned testing of the HVAC system. Without more evidence, I find this section of the NESHAP does not bring the planned boiler pipe testing under the scope of the CAA.

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[54] This is in contrast with Mr. Roskelley's report, which states that asbestos waste disposal is covered under the CAA because the "EPA recognized that the CAA NESHAPS implemented AHERA as it pertained to waste management." CX 3822.

1. Objective and Subjective Reasonableness of a Potential NESHAP Violation

It is clear from the record and case law that the CAA is an intricate statute, and the NESHAP, as a subset of the CAA, is similarly complex. *See* F.F. ¶¶ 40, 45; *Tomlinson*, ARB Nos. 11-024, 11-027; slip op. at 15 (the CAA is "a complex and comprehensive environmental statute").[55] This complexity suggests that the scope of the CAA, when considering whistleblower protections, should be interpreted with some flexibility, while still considering the reasonableness of the alleged concerns. *See Minard*, No. 92-SWD-1, 1994 SOL Sec Labor LEXIS 18 at *7-8.

First, I find that it is reasonable that someone with Complainant's expertise and training would believe that the CAA, through the NESHAP regulations, required Respondent to conduct a thorough inspection before a renovation, especially since it is also the actual regulatory requirement. However, there is no indication that Respondent would have failed to conduct a thorough examination prior to the testing – a walkthrough was scheduled at the time Complainant sent her March 9 email, and Complainant, along with Kent Chafee, later examined each location selected. I find it was not plausible that a reasonable employee in Complainant's position would believe there was a possibility Respondent would not conduct the thorough inspection required by the NESHAP before the boiler pipe testing. There is also no evidence that Complainant subjectively believed there would not be an inspection before the renovation. She knew one was scheduled and allegedly sent her March 9 email to let others know what she wanted done during the inspection. There is no evidence this inspection would not have satisfied the NESHAP requirement.

Second, it is objectively reasonable to believe that any asbestos waste must be managed according to NESHAP regulations. While a thorough reading of the NESHAP and accompanying EPA guidance demonstrates that under the CAA, the waste disposal requirements in 40 C.F.R. § 61.150 do not apply to asbestos amounts under the regulatory threshold, even someone well-versed in the regulations may be confused, as evidenced by Mr. Roskelley's testimony. However, there is also no indication that any asbestos waste would be handled improperly in this instance. Complainant was thoroughly trained in handling asbestos waste, and merely pointing out that waste needed to be handled properly does not indicate she had valid concerns about asbestos waste disposal. Mere assumptions and speculations are not sufficient to support a belief of a potential violation of environmental statutes. *Saporito v. Cent. Locating Servs., LTD*, ARB No. 05-004, ALJ No. 2001-CAA-00013, slip op. at 6 (ARB Feb. 28, 2006).

Additionally, I find it was not reasonable to believe that the boiler pipe testing was part of a larger project, which would implicate the other "work standard" components of the NESHAP. The regulations are clear that the work standards apply only if the threshold amounts are met during a renovation. Any other reading would make the threshold requirements obsolete. A reasonable person with Complainant's level of training and education, with extensive experience reading and interpreting safety regulations, would reach the same conclusion.

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[55] *See U.S. v. San Diego Gas & Elec. Co.*, 2006 WL 3913457, at *12 (S.D. Cal. Nov. 21, 2006) for an accurate description of the difficulty in interpreting the NESHAP regulations: "…[regulated asbestos containing material ("RACM")] is a term of art defined in a dense regulatory scheme. The elements of RACM (and the work practice standards) emerge only by an expedition through the Clean Air Act and the NESHAP regulatory scheme, and a cobbling together of relevant regulatory provisions."

Mr. Roskelley testified that the testing was part of a larger project, bringing it under the NESHAP, but he stated asbestos was "anticipated to be disturbed and would need to be stripped (remove) prior to a planned upgrade (renovation) scheduled to be undertaken at the building." F.F. ¶ 45. However, there was no planned renovation scheduled, rendering his conclusion unhelpful in analyzing the objective reasonableness of Complainant's claims. As detailed above, there was a general goal of renovating Gale Junior High, but in March 2011 there was no planned renovation project, no way to predict how much RACM would be removed or stripped within a given period of time, and no bond to fund a larger project. The MTI testing was part of a distinct project to determine the "useable life" of the system.

Complainant alleges that because there is no clear definition of the term "planning period" under the NESHAP regulations, it was reasonable for her to take a "conservative approach" and interpret the testing as part of a larger planning period for general renovation. ALJX 2 at 4. However, her interpretation is not merely conservative, but could lead to absurd results. A bond may have not passed for years, as evidenced by the fact that Respondent tried to pass bonds unsuccessfully in 2008 and 2010. F.F. ¶ 81. The mere fact that Respondent knew the Gale HVAC system needed to be renovated does not mean the March 2011 testing to determine the system's usable life was part of a planning period for what was, at the time, a theoretical project.

While it may be reasonable to believe that Respondent was required to estimate the amount of RACM to be removed or stripped during the calendar year given the complexity of the regulations, I do not see how Complainant's email possibly implicated this portion of the NESHAP. There is no evidence this was a legitimate concern of her March 9 email, or any other communications about the testing project.

In sum, to the extent Complainant's March 9 email was based on a violation of the "work standard" components of the CAA found in the NESHAP regulations, I find her belief unreasonable, and therefore not protected activity. However, as stated below, even if it were protected activity, she has not shown by a preponderance of the evidence that her March 9 email in general, or any other alleged protected activity, was a motivating factor in any adverse action.

iii. *Warning of a Possible Asbestos Release*

As stated above, Complainant's concerns regarding the possibility of an asbestos release constitutes protected activity under the CAA, if objectively and subjectively reasonable.

Respondent argues that Complainant's March 9 email was a "pretext" designed to "embarrass and anger" Mr. Wood as a result of multiple "issues and disagreements" with Mr. Wood. ALJX 3 at 5. In addition, Respondent contends the alleged dangers Complainant warned of in the March 9 email "were never contemplated by the actual MTI project, and were never actually encountered during the course of the project." ALJX 3 at 5. Complainant notes that Mr. Roskelley testified that he found Complainant's March 9 email reasonable, and the "critical point" is that Complainant did not have to be correct about an actual violation if the testing had proceeded as planned.[56] ALJX 2 at 5. While Complainant is correct in her assertion that there did not have to be

[56] Complainant cited Mr. Roskelley's opinion that the email was reasonable as evidence of the reasonableness of her complaint, but his opinion appears to have been based on an understanding of the entire HVAC renovation, which is

an actual violation if the testing had proceeded as planned, she still must show that she had a subjectively and objectively reasonable belief that the testing presented the potential for an asbestos release.

1. Objectively Reasonable Belief

Certain factors suggest that as of March 9, 2011, a reasonable person with the same training and experience would have believed that the boiler pipe testing presented a potential for an asbestos release.

Complainant was trained in asbestos management and was aware of the extensive amount of asbestos insulation around the pipes. F.F. ¶¶ 3, 9. When she sent the March 9 email, the testing was scheduled to take place in less than 20 days, and MTI originally proposed to take 65 samples. F.F. ¶¶ 11, 75, 85. If all 65 samples were taken, at least some asbestos would have to be removed. F.F. ¶ 11. However, the selected testing locations were preliminarily located on March 11, 2011, and finalized on March 23, 2011, although the number of locations was apparently later reduced due to access. F.F. ¶¶ 19, 86. Mr. Wood emailed Complainant prior to her March 9 email and told her that the number of samples would be limited due to the asbestos, Complainant knew Mr. Wood was aware of the asbestos issue, and was copied on an email where Mr. Wood stated he wanted to avoid asbestos if possible. F.F. ¶¶ 10, 12. There were areas of pipe that had no insulation, as well as areas with fiberglass insulation, of which Complainant was aware due to the walk-through with the abatement contractor in 2009. F.F. ¶¶ 11, 73. Complainant had also made Mr. Wood aware of the limit of three linear feet for a small scale activity under AHERA. F.F. ¶ 13. In sum, although 65 samples were originally proposed, as of March 9, 2011, no sites had been selected and Complainant knew that Mr. Wood was aware of asbestos issues, and he had in fact indicated they were going to limit the number of testing sites due to asbestos. In addition, Mr. Boland believed there was no "imminent" abatement of asbestos. F.F. ¶ 60.

I do not credit Complainant's self-serving statements that Mr. Wood was "pushing her" to remove asbestos and that he never said the number of samples would be limited or that they would not have to remove asbestos. F.F. ¶ 12. Mr. Wood's emails indicate that he was aware of the asbestos issue, wished to avoid asbestos, and planned to limit the number of samples taken due to the presence of asbestos. F.F ¶¶ 10, 12. Complainant allegedly told Mr. Wood that a "full scale" abatement was needed, and he resisted. F.F. ¶¶ 11, 12. Considering Complainant's limited credibility, I find insufficient evidence to corroborate Complainant's characterization of her interactions with Mr. Wood as evidencing that Mr. Wood was pushing her and Respondent's employees to remove more asbestos than they could handle. To the extent there was contradictory evidence on this point, I gave greater weight to the email evidence from Mr. Wood.

Although Mr. Wood's statements about limiting the number of samples due to the asbestos and that they hoped to avoid asbestos altogether may make it less likely that asbestos would be disturbed, Mr. Wood was going forward with the testing project, and there was at least a possibility some asbestos would be disturbed. The record indicates that Mr. Wood intended for Complainant and other trained district workers to remove any asbestos containing material for the boiler pipe testing. F.F. ¶ 73. He had asked Complainant what impact of the lack of respirator fit-testing would

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not an accurate description of the parameters of the testing project. F.F. ¶ 45. Therefore, Mr. Roskelley's opinion was not considered in my determination of objective reasonableness.

have on "the possible asbestos work to be done," and Mr. Wood stated in his affidavit that Complainant's job was to determine whether and how much asbestos needed to be removed, and then plan for any removal. F.F. ¶¶ 13, 73. Complainant stated she was "confident" she and the other district asbestos workers could do the work safely and correctly, but that they would not be rushed. F.F. ¶ 16. The asbestos insulation was "very friable," and Respondent's asbestos workers, while trained, had never handled a glove bag operation outside of training. F.F. ¶¶ 10, 12. Additionally, it is not clear if Respondent's employees would have been "fit tested," as Complainant told OSHA that they could have been, but testified at the hearing that employees were not fit tested until May 2011. F.F. ¶ 13.

While the locations for testing had not been determined, it may have been objectively reasonable for a health and safety worker in Complainant's shoes to believe that asbestos would be removed, and that there was at least the potential of an asbestos release if the work not conducted properly. In addition, since Mr. Wood wanted MTI to begin testing on March 28, the beginning of spring break, it is not clear from the record whether the potential removal of asbestos would have had to been done when school was still in session. F.F. ¶ 11. This timing implicates the public health concerns that are part of the purpose behind the CAA.

Overall, I find this to be a close case about whether an objectively reasonable employee with Complainant's background and training, given the preliminary stage of the project and the fact that Mr. Wood was already aware of the asbestos issues, would have reasonably believed that there was a potential for an asbestos release. However, in order to prevent the chilling of "employee initiatives in bringing to light perceived discrepancies in the workings of their agency," the Administrative Review Board ("the Board") has stated that an employee's "non-frivolous complaint" should not have to withstand nit-picking in order to qualify as protected under the whistleblowing provisions. *Sylvester*, ARB No. 07-123 at 34 (Brown, J., concurring in part and dissenting in part) (citing *Passaic Valley Sewerage Comm'rs v. Dep't of Labor*, 992 F.2d 474, 478, 479 (3d Cir. 1993)). Good faith allegations under the environmental statutes are protected "even though the complaining employee may have been profoundly misguided or insufficiently informed in his assessment." *Id.*

Therefore, I find that the potential for disturbing asbestos during the project was not so theoretical as to make a concern about potentially violating an environmental statute objectively unreasonable. Complainant's March 9 email regarding the possibility of an asbestos release is thus objectively reasonable.

2. Complainant's Subjective Belief

The question of whether Complainant had a reasonable subjective belief that her March 9 email warned of a relevant statutory violation is a more complicated issue. While a "non-frivolous complaint" should not have to withstand nit-picking in order to qualify as protected, the reasonable subjective belief standard, as established in *Minard*, "addressed the concern that the protection under the whistleblower provisions cited at 29 C.F.R. § 24.1(a) not be extended to knowingly false reports…." *Melendez*, ARB No. 96-051, slip op. at 29. "[W]hether or not the term 'good faith' has been used, the whistleblower has been required to have actually held a belief that there were pertinent statutory violations at the time he or she engaged in the activity subject to whistleblower protection." *Id.* at 27. While Complainant does not need to cite or even know the relevant statute, she does need to show that she actually held a belief in the possibility of an asbestos release.

Where "the complainant has a reasonable belief that the respondent is violating the law, other motives he may have for engaging in protected activity are irrelevant." *Oliver v. Hydro-Vac Services, Inc.*, No. 91-SWD-1, slip op. at 9-13 (Sec'y Dec., Nov. 1, 1995). For example, in *Immanuel v. Wyoming Concrete Indus., Inc.*, 95-WPC-3, slip op. at 6 (ARB May 28, 1997), the complainant distributed leaflets at a company picnic warning of environmental concerns. The Board found the distribution of the leaflets protected activity even if the complainant was merely attempting to fabricate a claim for retaliatory discharge, already knowing that he was about to be terminated due to poor work performance and customer complaints. *Immanuel*, 95-WPC-3, slip op. at 6-7. The Board noted that "[t]he purpose of the whistleblower statutes is to encourage employees to come forward with complaints so that remedial action may be taken. If such a course of action also furthers an employee's own selfish agenda, so be it." *Id.* at 7 (citations omitted); *see also Guay v. Burford's Tree Surgeon's Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045, slip op. at 8 (ARB June 30, 2008) (reversing the ALJ's finding that the complainant's "allegations were neither reasonable nor in good faith" because they were motivated by revenge for disciplinary actions, noting that motivation is immaterial as long as there is a reasonable belief of a relevant violation.)

Similarly, in *Hasan v. Sargent & Lundy*, ALJ No. 2000-ERA-7, slip op. at 4 (ALJ Dec. 5, 2002), the employer argued that the complainant raised safety concerns with the expectation that he would be assigned to complete additional review work and thereby extend his employment. The employer argued that although the complainant's activity would typically be considered protected activity, it should not in the instant case because Complainant was not a good faith whistleblower. *Hasan*, ALJ No. 2000-ERA-7, slip op. at 4. However, the Nuclear Regulatory Commission found some of the safety concerns valid, and the ALJ therefore found that although the record raised questions about the complainant's motives, the complainant had nonetheless engaged in protected activity. *Id.*

Here, I find Complainant's motivation for writing the March 9 email was more likely than not to harass Mr. Wood as a result of their on-going personality conflict. I find this motive negatively impacts her subjective reasonableness, *i.e.*, whether she actually believed there was the potential for a violation of an environmental statute. *See Weist v. Lynch*, 710 F.3d 121, 132 (3rd Cir. 2013) ("a good faith belief goes to the employee's subjective belief that a violation occurred"). The Board has held that motivation is irrelevant *as long as there is a reasonable belief* of a violation. *Oliver*, No. 91-SWD-00001, slip op. at 9. Here, I find Complainant's subjective reasonable belief questionable because Complainant knew that the project was still in a preliminary "walkthrough" phase, in which the locations for possible testing had still not even been identified. Complainant was aware as early as February 25 that Mr. Wood wanted to avoid removing asbestos if possible, and on March 8, Mr. Wood stated in an email to Complainant that the number of samples would be dictated by how much asbestos could be removed and the presence of a "qualified" worker. F.F. ¶¶ 10, 12.

Complainant's educational background and sophistication is relevant in evaluating her subjective reasonableness. *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123; ALJ Nos. 2007-SOX-039; 2007-SOX-042 , slip op. at 13-14 (ARB May 25, 2011). I find it suspect that someone with as much training and sophistication as Complainant would have actually believed that she was presenting valid concerns at this stage of the project. From the record, it appears Complainant was more concerned about being "autonomous," and appeared resistant to comporting to the established parameters of her position. In addition, Complainant's unsupported contention that she believed "from the beginning" that there was a potential violation of the CAA calls into question her subjective belief of a violation at the time she sent her March 9 email. *See Caldwell v. EG&G Def.*

Materials, Inc., ARB No. 05-101, ALJ No. 2003-SDW-1, slip op. at 12 (ARB Oct. 31, 2008) (agreeing with ALJ that the complainant's false assertions undermine his reasonable belief of a violation).

The totality of the evidence here suggests Complainant's March 9 email was more likely frivolous. Complainant sent her March 9 email less than three hours after Mr. Wood sent his, in Complainant's words, "snarky" email asking for a training matrix. F.F. ¶ 14. Complainant had issues with Mr. Wood's "do-this, do-that" attitude, which is arguably how a supervisor is expected to act. However, Complainant found Mr. Wood "hypocritical as hell" in his attitude. F.F. ¶ 36. In addition, just two days before the March 9 email, Mr. Wood had told Complainant she should work a "normal" 8:00 a.m. to 4:30 p.m. schedule, which the record shows Complainant resisted. F.F. ¶ 8. Given the evidence, I find Mr. Wood's "tit for tat" characterization of the March 9 email is most plausible, and is bolstered by Mr. Boland's belief that it was part of the "back and forth" conflict between Mr. Wood and Complainant. F.F. ¶¶ 60, 75.

However, I found it objectively reasonable for a person examining the situation from the outside to anticipate a possible environmental violation, which may be likened to the ALJ's finding of valid safety concerns in *Hasan v. Sargent & Lundy*, ALJ No. 2000-ERA-7 (ALJ Dec. 5, 2002). Given the purposes behind the whistleblower statutes, namely encouraging employees to come forward with complaints so that remedial action may be taken, I find that despite the factors weighing against Complainant's subjective belief, the evidence is sufficient to find she engaged in protected activity when she warned of the risk of an asbestos release in the March 9 email. The evidence is not overwhelming, but merely sufficient to meet the minimal standard in light of the Board's guidance to liberally construe the statute.

iv. *Other Alleged Protected Activities*

Complainant also alleges she engaged in protected activity under the CAA when she "caused to be commenced a proceeding for enforcement of the provisions of the CAA" by reporting the incident to OSHA. ALJX 2 at 2. She notes she assisted and participated in the OSHA investigation, which is also protected activity under the CAA. *Id.* She also cites conversations she had with Mr. Wood leading up to the March 9 email as "actions taken to carry out the purposes of the CAA." ALJX 2 at 2.

Because I found her concerns about an asbestos release reasonably related to potential violations of the CAA, her complaint to OSHA and subsequent participation in the investigation also constitute protected activities.

Regarding her conversations with Mr. Wood leading up to the March 9 email, I only credit Complainant's testimony that she communicated her concerns to Mr. Wood to the extent that it is corroborated by other evidence in the record. Mr. Wood attested that the first time Complainant made him aware of any concerns was in her March 8 email where she referenced the limitations for a small scale activity under AHERA. F.F. ¶ 13, 74. Complainant also stated in an email on February 25 to Mr. Wood and Mr. King that she needed to know the minimum amount of bare surface area of pipe needed for the testing in order to know "how best to remove the ACM," noting it was "very friable." F.F. ¶ 10. The guidance about the limitations under AHERA does not represent a safety and health complaint "grounded in conditions constituting reasonably perceived violations" of the CAA. *Kesterson*, ARB No. 96-173, slip op. at 3. The only statement that could implicate the CAA is the statement that the ACM was "very friable." While not explicit, the statement regarding the "very

friable" ACM implicates the possibility of asbestos fibers being released in the air, and therefore the same analysis of Complainant's objective and subjective belief would apply as outlined above. Once again, although the evidence is sparse, given the Board's guidance to liberally construe the statute, I find this statement constitutes protected activity.

However, as addressed below, Complainant has failed to show any of these activities were motivating factors in any adverse action taken by Respondent.

2. Adverse Actions

No employer subject to the CAA "may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee…engaged in" protected activities. 29 C.F.R. § 24.102(a); 42 U.S.C. § 7622(a). Prohibited conduct is that which "intimidates, threatens, restrains, coerces, blacklists, discharges or in any other manner discriminates against any employee . . . ." 29 C.F.R. § 24.102(b). The environmental statutes' anti-retaliation provisions cover only employment actions that are "materially adverse" to a reasonable employee. *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2, slip op. at 16 (ARB Sept. 30, 2008) (adopting the "materially adverse" standard articulated in *Burlington N. & Santa Fe Ry Co. v. White*, 548 U.S. 53 (2006); *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 19 (ARB Feb. 28, 2003) ("not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action"); *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 1997-ERA-52, slip op. at 11 (ARB Feb. 29, 2000) ("personnel actions that cause the employee only temporary unhappiness do not have an adverse effect on the employee's 'compensation, terms, conditions or privileges of employment.'"). In order to be materially adverse, the action must be sufficiently harmful to dissuade a reasonable employee from making or supporting a charge of discrimination. *Burlington N.*, 548 U.S. at 57.

Without citing any legal authority, Complainant alleges eight "major and minor" adverse actions: 1) Mr. Wood no longer allowed Complainant flex hours; 2) Mr. Wood "reprimanded" Complainant for sending an email to "all users" about a new airline coming to Idaho Falls; 3) Mr. Wood "pestered" Complainant about the asbestos management plans, 4) Mr. Wood changed Complainant's job description with the "practical effect of diminishing [her] job responsibilities" and increased her working days per year from 203 to 222, 5) Mr. Wood asked Complainant for a training matrix which she had already completed, 6) Complainant was denied professional development opportunities because she was denied lead training, Mr. Wood never signed a reference for her to take the certified professional safety exam, and Mr. Wood refused to give her a reference for the certified industrial hygienist exam; 7) Complainant felt like Mr. Wood would assign her a task and when she completed the task, Mr. Wood would say she had not done what he had wanted, and 8) Complainant was placed on administrative leave on May 12, 2011, and on June 5, 2011, she was terminated. ALJX 2 at 7. Respondent did not address whether these actions were materially adverse.

I will address each alleged adverse action in turn.

i. *Denial of Flex Hours*

Complainant argues that Mr. Wood no longer allowed Complainant flex hours, however this is not entirely accurate. On March 24, 2011, Complainant contacted Mr. Wood about approving six

hours of flex time she believed was available to her from the week of March 7, but Mr. Wood told her she needed to ask in advance and that flex time hours were not available for travel time to trainings. F.F. ¶ 23. There is also evidence in the record that Complainant later followed this procedure and asked for flex time approval in advance, which Mr. Wood approved. RX 18 at 208. Therefore, I do not find that the denial of approval for flex hours in the instance described by Complainant constituted an adverse action in that it did not significantly affect the conditions or privileges of her employment, and would not dissuade a reasonable employee from making or supporting a charge of discrimination.

ii. *"Reprimand" for Sending Email About New Airline*

Complainant claimed that she had sent out emails before to all users in the district, as well as to the Maintenance and Operations department, and not been "reprimanded," as opposed to when she sent out the email regarding the new airline coming to Idaho Falls. F.F. ¶ 20. First, I find Mr. Wood's description of the email he sent to Complainant as more of a "direction" than a "reprimand" more convincing that Complainant's view. *See also Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-7, slip op. at 9 (ARB Nov. 27, 2002) (holding that a supervisor's criticism does not constitute an adverse action). Second, an adverse action is considered from the objective viewpoint of a reasonable employee. *Burlington N. & Santa Fe*, 548 U.S. at 68. Mr. Wood's email directing Complainant to the policies regarding the sending "all users" email does not qualify as an adverse action under this standard as no reasonable employee would view Mr. Wood's email as a tangible action affecting compensation, terms, conditions, or privileges of employment.

iii. *"Pestering" Complainant About the Asbestos Management Plans*

Similarly, I do not find that Mr. Wood's request that Complainant complete the asbestos management plans, which was part of her job for Respondent, to be an adverse action under an objective reasonableness standard. Complainant may have not agreed with Mr. Wood that she needed to complete the asbestos management plans in the manner Mr. Wood requested, F.F. ¶ 35, but that does not mean his request is an actionable adverse action.

iv. *Change to Job Description and Working Days Per Year*

On April 18, 2011, Mr. Wood suggested changes to Complainant's job description and increased her working days per year from 203 to 223. F.F. ¶¶ 22, 88. Complainant claims the changes to her job description diminished her responsibilities. F.F. ¶ 22. Ms. Smith characterized the changes as more of a "clarification" of Complainant's job duties. F.F. ¶ 88. Complainant stated in the OSHA interview that there were minor changes in terminology, in addition to putting occupational safety under someone else's purview. F.F. ¶ 22, n.22. There was no change to Complainant's title or salary, and the changes were suggestions made by Mr. Wood, although Mr. Wood had told Complainant that Mr. Boland approved his all personnel decisions. F.F. ¶ 22. There is no indication that the changes to Complainant's job description were accompanied by a change in her title, compensation, or benefits.

Transfer to a less desirable job may constitute adverse action, even if pay is not affected. *Martin v. The Dep't of the Army*, 93-SDW-1 (Sec'y July 13, 1995); *Scerbo v. Consolidated Edison Co. of N.Y., Inc.*, 89-CAA-2 (Sec'y Nov. 13, 1992) (transfer from a "relatively mobile," job to a "constrained, isolated warehouse position together with a loss of overtime opportunity" was adverse

action). In the Ninth Circuit, under whose jurisdiction this case arises, a lateral transfer or removal of job duties may constitute adverse action. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) ("Transfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions.'"; *St. John v. Employment Development Dept.*, 642 F.2d 273, 274 (9th Cir.1981) (finding a transfer to another job of the same pay and status may constitute an adverse employment action).

In *Ray v. Henderson*, the Ninth Circuit noted it defines adverse employment actions broadly, in line with the First, Seventh, Tenth, Eleventh, and D.C. Circuits. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). However, these circuits have generally held that an alteration of job responsibilities must be significant in order to qualify as an adverse employment action. The Seventh Circuit has held that "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993). Other circuit courts have agreed that "it's a rare case where a change in employment responsibilities qualifies as an adverse employment action." *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1204 n. 11 (11th Cir. 2013); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1557 (D.C. Cir. 1997) (agreeing with "other circuits [which] have held that changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (conduct is adverse employment action if it "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."). However, in "unusual instances the change may be so substantial and material that it does indeed alter the 'terms, conditions, or privileges' of employment." *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1245 (11th Cir. 2001).

Given the Ninth Circuit's guidance in *Ray v. Henderson*, and its citation to *Yartzoff* and *St. John*, I find that the changes to Complainant's job description were sufficient to constitute an adverse employment action. Here, "Division of Building Safety inspections" was removed as one of Complainant's six "essential duties and responsibilities." F.F. ¶ 22. While she retained her other essential duties, Mr. Wood also made suggested changes to various language. Complainant at one point called the other changes "minor," but when viewed together, they had the effect of reducing her responsibilities: she was previously tasked with *developing and directing* safety programs, which was changed to *developing implementation plans* for safety programs; instead of *supervising* the identification of hazardous workplace conditions, she now was to *identify, respond to, and assist* in the mitigation of hazardous workplace conditions; instead of *implementing and maintaining* district policies, she was to *draft and propose* district policies regarding safety regulations. The changes to this language describing Complainant's overall duties had the effect of reducing her responsibilities and control over the policies and programs in the district.[57]

Changing the number of working days per year from 203 to 223 qualifies as an adverse action because it directly implicates both the terms and privileges of Complainant's employment.

[57] Other responsibilities were added, such as hazard communication and spill control, and the lead renovation, repair and painting program. RX 18A at 210. However, this does not alter my analysis, given the changes that indicated reduced overall responsibility.

v. *Asking Complainant for a Training Matrix She Already Completed*

First, the fact that Complainant sent Mr. Wood a training matrix in November or December 2010, before Mr. Wood requested it on March 8, F.F. ¶ 14, does not make his March 8 request an adverse action. It is not clear that the document Complainant provided would have satisfied Mr. Wood's March 8 requests, and there is no evidence Complainant referred to the earlier document in her limited response to Mr. Wood's request. Second, requesting a training matrix from an employee in charge of training does not implicate the compensation, terms, conditions, or privileges of Complainant's employment.

vi. *Denied Professional Development Opportunities*

Complainant asserts that Mr. Wood denied her professional development opportunities when he denied her lead safety training, refused to sign the reference for the certified professional safety exam, and refused to provide the reference for the certified industrial hygienist exam.

Because lead safety was part of her essential duties, the refusal to send Complainant to lead safety training qualifies as an adverse action. *See McAlindin v. Cty. of San Diego*, 192 F.3d 1226, 1238 (9th Cir. 1999), *opinion amended on denial of reh'g*, 201 F.3d 1211 (9th Cir. 2000) (failure to provide necessary training qualifies as an adverse action); *Studer v. Flowers Baking Co.*, 1993-CAA-11, slip op. at 3 (Sec'y June 19, 1995) ("training and educational programs that advance an employee in his career or enable him to perform his work more efficiently are a privilege of employment"). Failure to send Complainant to this necessary training arguably had a material effect on the condition of her employment, since it affected her ability to perform her required job duties.

However, Complainant has not shown how the refusal to sign the reference for the certified professional safety exam and to provide the reference for the certified industrial hygienist exam was materially adverse. Complainant has not alleged that being able to sit for the certification exams would have resulted in a promotion or increased salary, or that these activities would have had a significant impact on her career. While having fewer training opportunities or being unable to take a certification exam may ultimately affect an employee's overall professional development, Complainant has not shown how, and I do not find that the denial of these opportunities was sufficiently harmful to dissuade a reasonable employee from making or supporting a charge of discrimination. *Burlington N. & Santa Fe Ry Co. v. White*, 548 U.S. 53, 57 (2006).

vii. *Mr. Wood's Unclear Assignment of Tasks*

Other than Complainant's self-serving testimony, there is no evidence in the record to determine that Mr. Wood ever gave Complainant an instruction and then contradicted himself after Complainant completed the task. Without further evidence, and in light of my finding Complainant's testimony entitled to limited credibility, I do not find that this alleged adverse action occurred. Further, even if there were evidence this occurred, it would have to have occurred with some frequency to rise to a level of an adverse action that interfered with complainant's job performance, which Complainant has not shown.

viii. *Administrative Leave and Termination*

Complainant was terminated on June 5, 2011. F.F. ¶ 27. Discharge is an "obviously material adverse action" and is actionable. *See Jenkins*, slip op. at 19.

Paid administrative leave, while imposing no monetary loss, can still constitute an adverse action. *Van der Meer v. W. Ky. Univ.*, ARB No. 97-078, ALJ No. 95-ERA-38, slip op. at 4-5 (ARB Apr. 20, 1998) (professor who was placed on involuntary administrative leave by the university suffered no loss of pay, but was publicly removed and escorted from his classroom by security guards and suffered public embarrassment and damage his professional reputation). Here, however, Complainant has not shown that she was subject to any embarrassment or damage to her professional reputation by being on paid administrative leave from May 12, 2011, until her termination on June 5, 2011. Therefore, placing Complainant on paid administrative leave did not constitute an adverse action.[58]

In the interest of thoroughness, even were Complainant's alleged "minor" actions viewed together as a hostile work environment claim, there is not enough evidence to find the "minor" actions add up to one adverse action. In order to qualify as a hostile work environment, the actions must have been severe, humiliating, or significantly interfered with her job performance. *Erickson v. EPA*, ARB No. 03-002, ALJ No. 1999-CAA-2, slip op. at 38 (ARB May 31, 2006); *see also Ray*, 217 F.3d at 1245 (hostile work environment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," and must be both objectively and subjectively offensive). Complainant has not made a sufficient showing to demonstrate she was subject to a hostile work environment, even considering the minor actions collectively.

In sum, I find the following actions were materially adverse: Complainant's termination, the change to her job description, the increase in her working days per year, and the denial of professional development opportunities.

3. Motivating Factor

Where a complainant proves that his actions were protected under the CAA, "he must then show 'by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint.'" *Tomlinson*, slip op. at 20 (citing 29 C.F.R. § 24.109(b)(2)). "A 'motivating factor' is 'conduct [that is] . . . a 'substantial factor' in causing an adverse action." *Onysko v. State of Utah, Dep't of Envtl. Quality*, ARB No. 11-023, ALJ No. 2009-SDW-4, slip op. at 10 (ARB Jan. 23, 2013) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). To meet this standard, complainants "need only establish that th[e] protected activity was *a* motivating factor, not *the* motivating factor…."' *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-1, slip op. at 14 (ARB Apr. 25, 2014) (quoting *Abdur-Rahman v. DeKalb County*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003, slip op. at 10, n.48 (ARB May 18, 2010)); *cf.*, *Cosa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) (discussing the

[58] Even were her placement on paid administrative leave materially adverse, her protected activity was not a motivating factor. The same analysis would apply to the decision to place her on paid administrative leave as applies to her termination.

definition of "motivating factor" as used in discrimination cases under Title VII, and codified at 42 U.S.C. § 2000e-2(m)).[59]

Linking the protected activity to the adverse action often requires inferences about the motivating factors for the adverse action because an employer rarely admits to retaliation. A complainant may show an inference of causation by a close temporal proximity between the protected activity and the employer's adverse action. 29 C.F.R. § 24.104(e)(3). However, temporal proximity is not dispositive in determining whether the adverse action was retaliatory. *Caldwell v. EG&G Def. Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-1, slip op. at 13 (ARB Oct. 31, 2008); *Jackson v. Arrow Critical Supply Solutions, Inc.*, ARB No. 08-109, ALJ No. 2007-STA-042, slip op. at 7 n.5 (ARB Sept. 24, 2010) ("temporal proximity is 'just one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.'" (quoting *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010)).

A complainant may also show that the respondent's proffered reasons for the adverse action are pretext for retaliation. *Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 12-002, ALJ No. 2006-WPC-001, slip op. at 6, n.4 (ARB Aug. 29, 2012). The complainant retains the ultimate burden of proof to show causation by a preponderance of the evidence. *Joyner*, ARB No. 12-028, slip op. at 11; *Jenkins*, ARB No. 98-146, slip op. at 17 (an ALJ's "rejection of an employer's proffered legitimate explanation for adverse action *permits* rather than compels a finding of intentional discrimination. Specifically, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." (citations omitted)). This means the employee must persuade the ALJ that "[his or her] version of events is more likely true than the employer's version." *Joyner*, ARB No. 12-028, slip op. at 11.

Complainant argues that the email written by Mr. Wood after the March 9 email shows that Complainant's March 9 email was the causal/and or motivating factor in the adverse actions. ALJX 2 at 8. Respondent counters that there was "an ongoing acrimonious relationship" between Complainant and Mr. Wood that "existed well before her March 2011 email." ALJX 3 at 15. Respondent argues that from June 2010 onward, there was an "eight month history of increasing acrimony" between Complainant and Mr. Wood, and it was Complainant's decision to report alleged "bad acts" to Mr. Boland in February 25 that "significantly increased the acrimony." ALJX 5 at 6. Respondent also claims it is irrelevant if she fulfilled her job duties since Mr. Boland terminated her for her failure to work with Mr. Wood in a civil and professional manner. ALJX 5 at 7.

[59] "A complainant must prove more when showing that protected activity was a 'motivating' factor than when showing that such activity was a 'contributing' factor.'" *Lopez v. Serbaco*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. at 4 n.6 (ARB Nov. 29, 2006) (citing *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 5–7 (ARB Sept. 30, 2003); *Vander Meer v. Western Ky. Univ.*, ARB No.97-078, ALJ No. 1995-ERA-38, slip op. at 3 (ARB Apr. 20, 1998)).

i. *Change to Job Description, Increase in Working Days Per Year, and Denial of Lead Safety Training*

The decision to change Complainant's job description, increase her working days per year, and deny lead safety training were made by Mr. Wood. Mr. Wood did not specifically address these decisions in his affidavit, but the record contains some evidence of his motivations.

Certain evidence suggests that Complainant's protected activity was a motivating factor for the adverse actions taken against her by Mr. Wood. First, in a March 10 email to Mr. Boland, Mr. Wood described Complainant's "short comings when it comes to professionalism," and how he had tolerated her attitude in the past, but that he was "having a little trouble reconciling that right now." F.F. ¶ 61. On March 11, Mr. Wood wrote to Mr. Boland that he was "still reeling from [Complainant's] preemptive diatribe." F.F. ¶ 62. These statements, made in the days after she sent her March 9 email, tend to show Mr. Wood was motivated by the email to act. He was also described as angry on the morning of March 10, after Complainant sent her email. F.F. ¶ 18. Second, there is a temporal proximity between Complainant's protected activity and the various adverse actions. Mr. Wood made the suggested changes to Complainant's job description on April 11 and sent them to both Complainant and Carrie Smith in Human Resources on April 14, a little over a month after Complainant sent her email. F.F. ¶ 22. Mr. Wood first suggested to Mr. Boland that Complainant's working days per year should be increased in an email on April 2, and incorporated this change in the revised job description sent to Ms. Smith on April 14. F.F. ¶ 64. Mr. Wood denied Complainant's request for lead safety training on April 8, and never responded to her second request for training on May 3. F.F. ¶ 24.

However, temporal proximity is not dispositive, and there are other, more plausible explanations for Mr. Wood's decisions.

Mr. Wood suggested changes to Complainant's job description after the April meetings with Mr. Boland, wherein Mr. Wood and Complainant were tasked with clarifying her job description. F.F. ¶ 66. Complainant contended that she did not agree to a change to her job description and only wanted written assignments from Mr. Wood so there would be no confusion over what he was asking her to do. F.F. ¶ 21. Mr. Boland's testimony contradicts Complainant's characterization, however, in that he stated they agreed that Mr. Wood was going to "rework" her job description. F.F. ¶ 66. Mr. Boland was more credible than Complainant and I credit his testimony over hers. Mr. Boland observed that there seemed to be significant communication issues between Mr. Wood and Complainant, F.F. ¶¶ 21, 66, suggesting it is more likely that there was a plan to make changes to the job description in order to clarify Complainant's responsibilities and make the job description more closely track with her actual duties. Ms. Smith's testimony supports this conclusion, in that she saw the changes as more of a clarification of job duties. F.F. ¶ 66. While the changes may have been made in close temporal proximity to the March 9 protected activity, they were made in even closer temporal proximity to the April meetings with Mr. Boland where he was attempting to mediate and repair their working relationship, and discussed clarifying her job duties.

Mr. Wood also wrote in an April 2 email to Mr. Boland that Complainant needed a letter of direction regarding the importance of treating people with respect. F.F. ¶ 63. In this email, he noted that the letter should "reinforce her support role, not a supervisor/director role within the district," which is reflected in the changes to the language in her job description. F.F. ¶ 63. Mr. Wood felt Complainant was "frequently offensive and confrontational" with himself and other employees.

F.F. ¶ 76. Mr. Smejkal felt Complainant assisted him with the acid spill "in an aggressive kind of berating manner," and treated him unprofessionally. F.F. ¶ 91, 92. Ms. Sherick reported to Mr. Wood that Complainant has rude to her, and at least some of Complainant's emails were perceived as unprofessional and confrontational. F.F. ¶¶ 30, 31, 79. In early February, Mr. Wood informed Complainant that the teachers and principals did not work for her, but Complainant's statements suggest she did not want to accept a more limited support role. F.F. ¶¶ 29, 62. Mr. Wood also advised her in early February to consider whether her emails were "offensive, demeaning, chiding, etc." before sending them, and alleged that "there was no contrition on her part, only that someone had to hold people accountable for their actions." F.F. ¶ 62. Mr. Wood told Complainant her role was to "monitor, mitigate, and report," not to "chide or direct." F.F. ¶ 62. Given the evidence, I find it more likely that Mr. Wood's revision of Complainant's job description was related to his frustrations over Complainant overstepping her role in the district. This is supported by Mr. Boland's observation that Complainant needed to work "within her responsibility." F.F. ¶ 66.

In addition, Mr. Wood's motivation for increasing her hours is laid out in the April 2 email he sent to Mr. Boland in anticipation of the mediation meeting with Complainant. F.F. ¶ 64. This email indicates that Mr. Wood's decision to increase her working days was not because of Complainant's protected activity, but because she failed to "readily bring solutions," which was part of her job as the ES&H Engineer. F.F. ¶ 64. Mr. Wood believed that Complainant's compressed schedule meant she did not have time to adequately perform her duties. Her identification of potential hazards and violations of statutes was not the issue; the issue was her failure to engage in meaningful solutions to address these potential hazards and violations. Mr. Wood also noted a number of reasons for wanting to end Complainant's "tentative" schedule of working at 203 days, which all dealt with the amount of work that needed to be done. F.F. ¶ 64. In addition, her compressed schedule was a temporary accommodation, due to be reviewed in the summer. F.F. ¶ 64. The position is currently still at 230 days, evidence that the position requires this time commitment. F.F. ¶ 66.

In the same email, Mr. Wood stated he believed Complainant needed a letter of direction to address Complainant's "time off without notification," her trouble maintaining her requested shift, and the importance of treating co-workers with respect. F.F. ¶ 63. He went on to say that he "held off on progressive discipline because of only finding out about her allegations when I went to you asking advice regarding her latest diatribe." F.F. ¶ 63. This suggests that it was not the March 9 email that motivated Mr. Wood to suggest discipline or a change to Complainant's schedule, but because Mr. Boland informed him of Complainant's allegations made on February 25 about how Mr. Wood ran the Operations Department.

Complainant argues that Mr. Wood's view of the March 9 email as a "tit for tat" response is not credible because it does not make sense that Complainant would write such a "lengthy and highly technical" email to go "tit for tat." ALJX 2 at 12. However, I find it makes perfect sense given the rest of the record and the ongoing, and escalating, conflict with Mr. Wood. Complainant also displayed her proclivity for writing lengthy and highly technical emails that contained subtle insults and jabs when she emailed Ms. Sherick, referencing how biowaste had been "mishandled" in the past and facetiously wondering why there was "such a disconnect in communication." F.F. ¶ 28.

I also find that Mr. Wood's statement to Complainant on March 10, "I'll deal with you later," or "we'll deal with this later," did not constitute a threat. Mr. Boland did not find Complainant's allegation that Mr. Wood threatened her "substantive." F.F. ¶ 66. It is impossible to

know exactly what was said, although Mr. Wood admitted he likely said it more than once. However, I find his statement is more logically understood within the context of the ongoing conflict between Mr. Wood and Complainant. Both Mr. Wood and Complainant were going out of town, and Mr. Wood wanted Complainant to understand there was a significant "communication problem" given that he viewed her email as "rude and unprofessional." F.F. ¶ 76.

The testimony of other District employees suggests that Mr. Wood had a reputation for being, at times, difficult to work for. He would talk down to people, could be "snappy" when he was in a bad mood, and was described as "inflexible," "strong-willed," and "challenging." F.F. ¶¶ 48, 51, 52, 53, 89. Complainant described him as "very vindictive," and thought the situation with Mr. Wood was "intolerable." F.F. ¶ 7. Mr. Landers referenced numerous" negative experiences with Mr. Wood and alleged that Mr. Wood wanted him to "jerry rig" electrical equipment. F.F. ¶ 48. As noted above, however, Mr. Landers was subsequently fired for leaving threatening voice mail messages and his testimony is entitled to little weight.

However, even if Mr. Wood were difficult to work with or inflexible, this does not mean he was motivated by Complainant's protected activity in taking adverse actions against her. Mr. Boland testified that safety was an extremely high priority for Mr. Wood, although he was "passionate" at times in discussions. F.F. ¶ 55. Ms. Meagher never saw Mr. Wood retaliate against anyone for reporting a violation of the law or a safety regulations. F.F. ¶ 52.[60] Mr. Clements also considered Mr. Wood safety-conscious and detail-oriented. F.F. ¶ 82. Mr. Wood also stated that the March 9 email was "one of many dozens if not hundreds of correspondence" Complainant sent regarding health and safety, and the only thing different about the March 9 email was the "inappropriate circumstances of its delivery." F.F. ¶ 71. The evidence showed Mr. Wood was passionate about and dedicated to his job, and that while he wanted to get things accomplished, he also valued safety. I find it unconvincing that he would receive information from Complainant for over three years regarding various safety issues, and then decide to retaliate against her for sending the March 9 email.

After considering all the evidence, I find that Mr. Wood's comments about "reeling" from Complainant's "diatribe" and that he could no longer tolerate Complainant's professional shortcomings are best understood within the larger context of the personality conflict between Mr. Wood and Complainant. Despite her denials of the allegations, Complainant had documented issues with absenteeism and a track record of unprofessional communication with co-workers. F.F. ¶¶ 28, 29, 30, 31, 87. Mr. Boland testified to an "ongoing conflict" between Mr. Wood and Complainant that began with her schedule issues. F.F. ¶ 60. The conflict continued with Complainant's unprofessional conduct, including her interactions with Ms. Sherick, Mr. Smejkal, and the February 2 "all users email." F.F. ¶ 60. On March 7, Mr. Wood decided, after Complainant was late to work, that he needed to change her shift to 8:00 a.m. to 4:30 p.m. F.F. ¶ 11. The evidence demonstrated that Complainant was resistant to any change in her schedule; specifically, she continued to state her preference to work from 7:00 a.m. to 3:30 p.m. weeks after Mr. Wood informed her that she should work 8:00 a.m. to 4:30 p.m. F.F. ¶ 23. Mr. Wood clarified his request for an asbestos training plan in an email on March 9 at 2:01 p.m., which Complainant termed "snarky." F.F. ¶ 14. Instead of responding to his email, at 5:06 p.m., she sent the email that is the

[60] Complainant argued in her closing brief that Ms. Meagher felt her job was threatened, but this is a mischaracterization of her testimony. ALJX 2 at 21. Ms. Meagher testified that she felt her job was threatened due to budget cuts, not Mr. Wood. F.F. ¶ 52.

subject of this case. F.F. ¶ 74. Mr. Wood was at his "wit's end" with Complainant's "frequently offensive and confrontational" attitude. F.F. ¶ 76. He found the March 9 email "confrontational," and focused not on its content but on its tone and "disrespectful manner." F.F. ¶ 77.

When he found out about Complainant's allegations of his poor leadership, he decided to bring Complainant's numerous shortcomings to the notice of Mr. Boland. His statement that Complainant may resign if her number of days were increased was simply an observation that she valued her time off more than her work for Respondent. Overall, I am not convinced the changes to Complainant's job description or the increase in her working days per year were motivated in any way by the protected activity. *See Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 28 (ARB Dec. 30, 2004) ("If the ALJ is doubtful about whether to believe the employee's evidence, he must resolve the doubt against the employee, not against the employer.").

I also find that Complainant has not shown by a preponderance of the evidence that the denial of lead safety training was motivated by her protected activity. The record demonstrates Mr. Wood denied her training on April 8, and never responded to her May 3 request. F.F. ¶ 24. Temporal proximity to her March 9 email supports an inference of causation. However, in denying her April 8 request for training, Mr. Wood stated that it was "better" that she not attend the training and referenced the changes to her job description. F.F. ¶ 24. Mr. Wood wrote in his notes that Complainant may need a different type of lead safety training and indicated that he told her he had "plenty of EPA sights that would provide her the necessary training and information" but "she said she already had it." F.F. ¶ 24. Further, Complainant testified that Mr. Wood had denied her lead training "through the years." F.F. ¶ 24. On February 24, 2011, Complainant sent Mr. Wood information about compliance with the lead renovation regulations, and at their meeting on March 7, 2011, she was tasked with determining how the state and other districts were implementing the regulations. F.F. ¶ 24. This suggests that the lead renovation training program was not fully developed, and that Complainant was "denied training" as part of an ongoing process of trying to figure out exactly what training was needed. That Mr. Wood may have been "kicking the can down the road" in developing a lead renovation program, F.F. ¶ 24, does not link Mr. Wood's denial of training to Complainant's protected activity.

I find Complainant has failed to prove by a preponderance of the evidence that any of the adverse actions taken by Mr. Wood were motivated by her protected activity.[61] Instead, I find that the record established that Mr. Wood was increasingly frustrated by Complainant's poor cooperation, lack of respect for co-workers, disrespectful communication, and an unwillingness to follow personnel policies. These frustrations motivated him to revise her work description and recommend and increase in her working days per year. Complainant's protected activity was not a substantial or motivating factor in his actions. His denial of the lead training was more likely than not motivated only by the fact that the lead renovation program was not properly in place and he was unsure what type of training Complainant needed.

[61] Complainant also failed demonstrate that Mr. Wood was motivated in any way by her complaint to OSHA, her subsequent participation in the OSHA investigation, or her warning on February 25, 2011, that the ACM was "very friable." The only link is temporal proximity, and I find the temporal proximity inference insufficient considering the totality of the evidence presented.

ii. *Termination*

Complainant has not shown by a preponderance of the evidence that the March 9 email, or any other alleged protected activities, were a motivating cause in her termination. Instead, the record demonstrates that Complainant and Mr. Wood had seemingly insurmountable personality conflicts. Mr. Boland's explanation of why he chose to terminate Complainant over Mr. Wood was persuasive: Mr. Wood was more essential to the district, and there was no alternative arrangement for Complainant's supervision. F.F. ¶ 68.

The evidence showed that Mr. Wood's and Complainant's professional relationship began to deteriorate in June 2010, when Mr. Wood noted on Complainant's performance review that she needed improvement with punctuality and regular and predictable attendance. F.F. ¶ 4; ALJX 1 at ¶ 3. The working relationship continued to deteriorate, as evidenced by Complainant's February 25 meeting with Mr. Boland about Mr. Wood's alleged incompetence, Mr. Wood's request for Complainant to work 8:00 a.m. to 4:30 p.m. and Complainant's resistance to that change, and Mr. Wood's detailed instructions sent on March 9, 2011, regarding the asbestos training plan. F.F. ¶¶ 8, 14, 23, 58.

Mr. Boland terminated Complainant because he was concerned that the conflict between Mr. Wood and Complainant was interfering with work that needed to be done. F.F. ¶ 68. The district was gearing up to its third bond attempt, and Mr. Boland felt there "needed to be a resolution sooner, rather than later" to the conflict between Mr. Wood and Complainant. F.F. ¶ 68. Mr. Boland's reasons for discounting reassignment or transfer were logical, in that there was no one else who could supervise Complainant and there were no other jobs in the district that met her qualifications. F.F. ¶ 68. Since Mr. Boland concluded that either Mr. Wood or Complainant had to be terminated, he made the reasonable decision to terminate Complainant due to his "great deal of confidence" in Mr. Wood's work, Mr. Wood's "deep commitment to the district," and Complainant's relative lack of commitment and "focus on time off, rather than getting the job done." F.F. ¶ 68. When the April mediation meetings failed to fix the "irreconcilable" situation between Mr. Wood and Complainant, Mr. Boland decided to terminate Complainant's employment. F.F. ¶ 69.

Mr. Boland confirmed Mr. Wood's reports of Complainant's lack of cooperation with co-workers and unprofessional behavior by speaking with three or four people, including Ms. Sherick and Mr. Smejkal. F.F. ¶ 67. He found that her "all users" email directing that there was no excuse for safety violations was inappropriate because it could be seen as demeaning. F.F. ¶ 67. Mr. Boland also noted that during the mediation meetings, he came to believe Complainant needed to be less argumentative, confrontational, and "work[] within her responsibilities." F.F. ¶ 66. That some former co-workers testified Complainant was professional does not negate the evidence that other co-workers found Complainant uncooperative and rude.

Mr. Boland stated that the March 9 email was one of a number of instances in which Complainant and Mr. Wood clashed, but even as "an incident in a chain or sequence" that began with Complainant's absenteeism, F.F. ¶ 68, the protected activity did not rise to the level of a "motivating" factor in her termination. Mr. Wood told Mr. Boland he found the email "confrontational and premature" and that he was "reeling" from the "preemptive diatribe." F.F. ¶ 62. Mr. Boland stated he did not spend much time evaluating the content of the March 9 email, but

looked at it in context of the conflict between Mr. Wood and Complainant, and was not surprised Mr. Wood was upset by the email. F.F. ¶¶ 60, 61.

In *Sayre v. Veco Alaska, Inc.*, the ARB found that the complainant was properly disciplined, in part, for her "discourteous and insubordinate manner" when she engaged in protected activity. ARB No. 03-069, ALJ No. 2000-CAA-7, 2005 DOL Ad. Rev. Bd. LEXIS 55, *37 (ARB May 31, 2005). The complainant expressed her safety concerns in emails that were "confrontational," and she was rude to her colleagues, created tense atmosphere at meetings, used inflammatory language, and was frequently uncooperative. *Sayre*, at *35. The ARB noted that "an employee's insubordination toward supervisors and coworkers, even when engaged in a protected activity, is justification for termination." *Id.* at *36, citing *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) (affirming Secretary's determination that auditor's abusive and inappropriate manner while making protected complaints was the legitimate, nondiscriminatory reason for his firing).

In *Kahn*, the Seventh Circuit noted that "It is well-settled in this circuit and other circuits that an employer may terminate an employee for any reason, good or bad, or for no reason at all, as long as the employer's reason is not proscribed by a Congressional statute." *Kahn*, 64 F.3d at 279 (referencing *NLRB v. Knuth Bros, Inc.*, 537 F.2d 950, 954 (7th Cir. 1976) and *Ad Art, Inc. v. NLRB*, 645 F.2d 669, 679 (9th Cir. 1981). The Ninth Circuit reached a similar conclusion in *Mackowiak v. Univ. Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). In *Mackowiak*, a quality control inspector brought an action against his employer alleging discrimination in violation of the whistleblower protections of the Energy Reorganization Act. 735 F.2d at 1160. The Ninth Circuit noted that whistleblower protection statutes do not require employers to "retain abrasive, insolent, and arrogant quality control inspectors if they comply technically with the requirements of the job," but only that such statutes "forbid[] discrimination based on competent and aggressive inspection work." *Id.* at 1163.

Here, Complainant's March 9 email was one of a series of examples of Complainant's confrontational and argumentative attitude, which include:

- Complainant's arguing that providing a sick leave note made her feel like she was "back in Jr. High." F.F. ¶ 5.
- Complainant's email to Kent Craven regarding lead paint. F.F. ¶ 31
- Complainant's "all users" email stating there was "no excuse" for violations that were immediately fixable, which at least some employees took offense to, and Mr. Boland noted could be seen as "demeaning." F.F. ¶¶ 30, 67.
- Complainant's chiding of Mr. Smejkal. F.F. ¶ 29.
- Complainant's interactions with Ms. Sherick. F.F. ¶¶ 28, 79.
- Her resistance to working the 8:00 a.m. to 4:30 p.m. schedule. F.F. ¶¶ 8, 23.
- Complainant's response to Mr. Wood's inquiries about the respirator fit tests. F.F. ¶¶ 14, 74.
- Complainant's argumentative response to Mr. Wood's direction to not send out inappropriate "all users" emails. F.F. ¶ 20.
- Her description of the mediation meetings as Mr. Boland and Mr. Wood "wanting to vent." F.F. ¶ 21.

Complainant contends that the evidence portraying her in a positive light "far outweighs the negative claims put forth by [Respondent.]" ALJX 2 at 13. She cites her positive performance reviews, Mr. Wood's public praise of her in August 2010, and the testimony of various witnesses. *Id.* at 13-14. She contends Ms. Sherick and Mr. Smejkal had very little contact with her, while Wayne Landers, Carrie Smith, Ferel McArthur, Kerry Martin, and Caroline Meagher had much more regular contact with her. *Id.* at 14.

However, Mr. Boland terminated Complainant for not being able to get along with Mr. Wood, not her allegedly unprofessional attitude, excessive absences, or failure to complete her assigned tasks. Further, there is substantial evidence showing that Complainant at times had an unprofessional attitude toward Mr. Wood and other employees, that she had excessive absences and resisted conforming to a regular schedule, and that she failed to complete a number of tasks. For example, it does not matter if Complainant believed she made "amazing progress" on the asbestos management plans, or made more progress on the Emergency Light Fixture Program than anyone else, F.F. ¶¶ 33, 35, if that progress was not what Mr. Wood expected or demanded. It is not my place to second-guess her supervisor's assignment of tasks and evaluation of her progress. *See Jenkins*, slip op. at 39, citing *Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000) ("[t]his court does not sit as a super-personnel department and will not second-guess an employer's decisions"). There is sufficient evidence to demonstrate that Mr. Wood's evaluations were not pretextual, and that his frustrations with Complainant's work were genuine.

Complainant also argues that although she took a large amount of sick leave one year, she had "health issues," and never exceeded her allowable sick leave. ALJX 2 at 15. She notes that two other employees in Maintenance and Operations, Amy Rubio and Bruce Moss, took a large amount of sick leave but were not reprimanded. *Id.* She then alleges that her "use of sick leave did not become important for [Respondent] until after her March 9 email. *Id.* I disagree and find that in this case it does not matter if Complainant had a valid reason to take sick leave or not.[62] Complainant's use of sick leave was clearly an issue before her March 9 email, in that Mr. Wood noted it on her June 2010 performance evaluation and required her to provide a doctor's note for any sick leave going forward. F.F. ¶¶ 4, 5. I do not find this evidence of disparate treatment, and note that any disparate treatment pre-dates the protected activity.

Complainant argues that "[Mr.] Boland's expectations of [Complainant] are unfair and unrealistic when compared to his expectations of [Mr.] Wood." ALJX 2 at 10. She essentially argues this is evidence of disparate treatment, that Mr. Wood had "free reign to treat subordinates and other personnel…in a demeaning fashion," while Complainant's behavior was "put under a microscope." *Id.* I disagree and find this characterization is inaccurate. Mr. Boland observed during two mediation meetings the acrimonious working relationship that had developed between Mr. Wood and Complainant, and eventually came to the logical conclusion that one of them would have to be terminated. F.F. ¶¶ 66, 68. He noted that Complainant called the district "dysfunctional," compared with Mr. Wood's "deep commitment to the district." F.F. ¶¶ 58, 68. There is nothing in the record that indicates Mr. Boland had "unfair and unrealistic" expectations of Complainant when

[62] Whistleblower statutes "do[] not prohibit an employer from imposing a wide range of requirements on employees," even irrational or unfair policies, as long as those requirements are not retaliatory and do not interfere with protected activity. *See Timmons v. Franklin Elec. Cooperative*, ARB No. 97-141, ARB No. 97-SWD-2, slip op. at 6 (ARB Dec. 1, 1998); *see also Kanj*, ARB No. 12-002, slip op. at 6 n.4 (an employer is not required to produce good reasons for an adverse action, but only required to show an adverse action was not motivated by protected activity).

compared to Mr. Wood. Instead, the record shows that he wanted both to do their jobs and resolve their conflict; when it became clear this was not going to happen, he was forced to terminate Complainant's employment. Additionally, Complainant and Mr. Wood are not comparators. Complainant testified she did not know why Mr. Wood was not being terminated as well. F.F. ¶ 25. However, he was her supervisor, and therefore arguably deserved greater leeway. *See Kahn*, 64 F.3d at 279 (an employee may be fired for any reason as long as the employer's reason is not proscribed by a Congressional statute).

Cat's Paw Theory

The Supreme Court has found that a "cat's paw" theory of causation can apply in whistleblower cases. *Staub v. Proctor Hosp.*, 562 U.S. 411, 419-22 (2011). A "cat's paw" theory of causation applies when the protected activity has no bearing on the decision-maker, but does bear on the actions of a lower-level supervisor, who in turns acts to bring the adverse action about. *Id.* at 415; *see also Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 16 (ARB June 24, 2011). The discriminatory actions of the lower level supervisor must still be the proximate cause of the final, adverse action. *Staub*, 562 U.S. at 421 ("Thus, if the employer's investigation results in an adverse action for reasons unrelated to the [lower level] supervisor's original biased action…then the employer will not be liable. But the [lower level] supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the [lower level] supervisor's recommendation, entirely justified.")

Here, even assuming Mr. Wood was motivated to act in response to Complainant's protected activity when he informed Mr. Boland of Complainant's insubordination and unprofessional behavior, which I have not found, there is substantial evidence that Mr. Boland determined on his own that Complainant needed to be terminated for reasons unrelated to Mr. Wood's proffered information.

Mr. Wood forwarded emails to Mr. Boland as evidence that Complainant acted unprofessionally, and with an oftentimes rude and confrontational demeanor. F.F. ¶¶ 63, 65. Mr. Boland examined these emails, but also spoke with at least three employees about Complainant's behavior in order to get an independent sense of Complainant's role. F.F. ¶ 67. He conducted two mediation meetings in April, during which he allowed both Mr. Wood and Complainant to air their grievances, and during which he was able to observe Complainant's behavior. F.F. ¶ 67. He also sought advice from Mr. Marotz on the deteriorating situation between Mr. Wood and Complainant and potential options. F.F. ¶ 68. When Complainant asked Ms. Smith to speak with her and Mr. Boland about the changes in her job description without Mr. Wood present, Mr. Boland realized Complainant could not work with Mr. Wood. His decision to terminate Complainant was based on the situation as a whole and the needs of the district, not on Mr. Wood's recommendation. While he took Mr. Wood's opinion into account, the record demonstrates that Mr. Boland determined Complainant's termination was entirely justified even absent Mr. Wood's proffered information.

Mr. Wood did state that he had the freedom to run his department as he saw fit and Mr. Boland approved all his personnel decisions. F.F. ¶ 22. However, the decision to terminate Complainant was not made by Mr. Wood, and this statement only evidences that Mr. Boland trusted Mr. Wood to manage the day-to-day aspects of his department. The evidence established Mr.

Boland took the decision to terminate an employee very seriously, and conducted thorough investigations. F.F. ¶ 84.

Additionally, the fact that he did not investigate Complainant's claims about Mr. Wood's supervisory shortcomings does not mean he did not conduct an independent review. He gave a satisfactory explanation of why he did not investigate her claims: Complainant did not identify anyone specific for him to talk to, he did not have time to go talk to everyone in the department about generalized grievances, and he believed he knew what people thought of Mr. Wood, given his role as a "change agent." F.F. ¶¶ 54, 67. He also viewed the conflict between Mr. Wood and Complainant as the main issue, and did not see how information from people in the department would fix this problem. F.F. ¶ 67.

Respondent Would Have Terminated Complainant Absent the Protected Activity

Once the complainant has proven discrimination, the respondent may demonstrate by a preponderance of evidence that it would have taken the same unfavorable personnel action in the absence of protected activity. *Evans v. Baby-Tenda*, ARB No. 03-001, ALJ No. 01-CAA-4, slip op. at 4, n.1 (ARB Jul. 30, 2004); 29 C.F.R. § 24.109(b)(2). In such "dual motive cases," the employer "bears the risk that the influence of legal and illegal motives cannot be separated . . . ." *Mackowiak*, 735 F.2d at 1164 (internal citations omitted).

Even if Complainant's protected activity was a motivating factor in any adverse action against her, Respondent has shown by a preponderance of the evidence they would have taken the same actions anyway. The evidence preponderates that Mr. Boland conducted an independent review and determined that the working relationship between Mr. Wood and Complainant had broken down. Mr. Boland was concerned the conflict between Mr. Wood and Complainant was negatively affecting the district, and he was "gearing up" for the third bond attempt and needed effective employees. There is no evidence that the acrimonious situation between Mr. Wood and Complainant was going to improve. More importantly, despite Complainant's attestations that she and Mr. Wood got along fine before the March 9 email, there is substantial evidence that the working relationship was strained well before March 9. Respondent has shown by a preponderance of the evidence that Complainant and Mr. Wood were incapable of getting along, efforts to resolve the conflict did not work, and an independent review by Mr. Boland supported Mr. Wood's concerns, and even absent her March 9 email, their personality conflicts would have necessitated corrective action by Mr. Boland.

4. If Respondent Were Liable, Complainant's Damages Are Limited

Assuming arguendo that Complainant had prevailed in this matter, I would have found that she was not entitled to the amount of damages she sought, and any recovery would have been substantially less.

Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e *et seq. Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36, slip op. at 5. (ARB June 30, 2005) (citation omitted). While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by the evidence. *Id.*

Reinstatement is the statutory remedy, although the ARB has held that circumstances may exist in which reinstatement is impossible or impractical and alternative remedies are necessary. *Ass't Sec'y & Bryant v. Bearden Trucking Co.*, ARB No. 04-014, ALJ No. 03-STA-36, slip op. at 8 (ARB June 30, 2005); *see Creekmore v. ABB Power Sys. Energy Servs., Inc.,* 93-ERA-24, slip op. at 9 (Sec'y Feb. 14, 1996) (front pay in lieu of reinstatement where the parties have demonstrated "the impossibility of a productive and amicable working relationship"). Here, Mr. Boland stated that Complainant's former position is filled, so it is not possible to order reinstatement. Therefore, had Complainant proven her case, she would be entitled to front pay.

However, Mr. Pinkerton persuasively established that Complainant's calculation of damages amounted to "triple dipping," and was based on "unwarranted assumptions based on speculations" and "faulty methodology." F.F. ¶ 102. I find his opinion entitled to significant weight, and note that Complainant's calculations overstated her damages had Respondent been found liable. Therefore, while I note that Complainant provided voluminous evidence in the form of tax records, credit card statements, and loan information, I do not find her calculations were reasonable or supported in light of the other more compelling information from Mr. Pinkerton.

Further, the evidence did not support the monetary amount that Complainant sought for compensatory damages. Compensatory damages are designed to compensate whistle-blowers for such harms as loss of reputation, personal humiliation, and mental anguish, and emotional distress. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 169, ALJ No. 90-ERA-30, slip op. at 33 (ARB Feb. 9, 2001) (citations omitted). To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 12 (ARB Nov. 13, 2002).

The evidence established that Complainant did not seek treatment until April 2015, nearly four years after her termination. F.F. ¶ 96. Dr. Hargraves testified that Complainant's depression, anxiety, and PTSD were caused by her termination. F.F. ¶ 96. However, there was substantial evidence that Complainant also endured a complex divorce, financial difficulties, her house burning down, and social isolation that she attempted to link to her termination, but the preponderance of the evidence did not establish that link. F.F. ¶ 97. While the testimony of a medical professional bolsters her claim, Complainant's own testimony is not credible. Additionally, the timing is suspicious: Complainant sought therapy well after her termination and what appears to be in anticipation of trial. She was in therapy for only six months, and Dr. Hargraves has not seen her since September of 2015. F.F. ¶ 97. Had she prevailed on her claim, I would have found that she did not establish the amount of compensatory damages she sought.

Overall, had Complainant prevailed, I would have found that she did not establish anywhere near the amount of damages she sought and that Respondent offered substantial and convincing evidence that would have substantially limited her recovery.

ORDER

1. Complainant established that she engaged in protected activity and suffered adverse actions by Respondent within the meaning of the CAA.

2. However, Complainant has not shown that her March 9, 2011 email, or any other alleged protected activity, caused or was a motivating factor in any adverse action, including her termination, taken by Respondent.

3. Even if she had proved her case, Respondent established by a preponderance of the evidence that it would have taken the same adverse actions, including terminating Complainant even in the absence of any protected activity.

4. Complainant's request for relief in this matter is denied.

SO ORDERED.

Digitally signed by Richard M.Clark
DN: CN=Richard M.Clark,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

RICHARD M. CLARK
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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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.

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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.