



Issue Date: 30 July 2015

CASE NO.: 2015-CPS-00004

IN THE MATTER OF

STEVEN SNYDER
Complainant

v.

BECHTEL INTERNATIONAL OIL, GAS & CHEMICAL
Respondent

ORDER OF DISMISSAL

This matter arises under the under the employee whistleblower provisions of the Consumer Product Safety Improvement Act (“CPSIA”), 15 U.S.C. § 2087, and its implementing regulations of the Secretary of Labor published at 29 C.F.R. Part 1983.

I. BACKGROUND

A. Procedural History

On November 13, 2014, Steven Snyder (“Complainant”) filed a complaint with the Secretary of Labor alleging that he was subject to retaliation by his former employer, Bechtel International Oil, Gas & Chemical (“Bechtel” or “Respondent”) after complaining about unsafe work practices. Complainant alleges his activities were protected under the employee whistleblower provisions of the Consumer Product Safety Improvement Act (“CPSIA”), 15 U.S.C. § 2087, and its implementing regulations at 29 C.F.R. Part 1983.

On November 24, 2014, the Occupational Safety and Health Administration, acting as the agent for the Secretary, found that neither Complainant nor Respondent is covered under the CPSIA and Complainant failed to assert activities relative to CPSIA-protected conduct. Thus, Complainant “failed to allege a prima facie complaint,” and the complaint was dismissed. (OSHA Ltr., p. 2).

The matter was referred to Office of Administrative Law Judges on February 19, 2015, and then to the undersigned on March 30, 2015.

On April 27, 2015, the Court held a conference call with the parties to discover more about Complainant’s basis for jurisdiction under the CPSIA’s whistleblower provisions and Employer’s contention that jurisdiction does not exist, as well as Complainant’s alleged CPSIA-protected conduct and his resignation on May 16, 2014.

The undersigned decided that the issues of jurisdiction and CPSIA-protected conduct would be determined before any further action was taken in this matter. An Order to Show Cause (“OTSC”) was issued on April 30, 2015.

On May 5, 2015, Complainant filed his response to the OTSC. On May 15, 2015, Respondent filed its answer to the OTSC. On May 28, 2015, Complainant filed a response to Respondent’s response to the OTSC.

B. Alleged Factual Background

1. Complainant’s Version

Complainant began working for Respondent on March 1, 2010 as a contract employee and was directly hired in June 2011. His first project for Respondent was known as the Queensland Curtis liquefied natural gas (“QC LNG”) project. (1st Comp. Br., p. 2). His direct supervisor was Steven Fleming. On the QC LNG project Claimant oversaw “the purchase and resale” of three LNG “BOG” (“boil-off gas”) compressors and two regeneration gas compressor packages. (*Id.* at p. 2).

It was during his work on the QC LNG project that Complainant noticed a reference to the Consumer Product Safety Act in a purchase order for the BOG compressor equipment.

At some unknown point in 2012, Complainant was transferred and assigned duties as the Human Factors Engineer (HFE) Coordinator representing the mechanical group at Bechtel. (1st Comp. Br., p. 2). HFE was a new group assigned to handle both the Chevron and Australia/New Zealand safety standards on Chevron’s Wheatstone LNG (“WS LNG”) project. (*Id.*). Complainant reported daily activities to Kasim Medhi Sayyed. (2nd Comp. Br., p. 1). Complainant’s new duties included defining all safety violations for the mechanical equipment on the WS LNG project, as well as notifications to Chevron for weekly risk assessment meetings. (1st Comp. Br., p. 2). All equipment for the project was required to meet Chevron’s “safety-in-design” (“SID”) standard, and Chevron required that equipment meet the Australia/New Zealand safety standards. (*Id.*). Thus, Complainant was responsible for all safety issues as related to the WS LNG project.

On March 10, 2014, Complainant was reassigned by the mechanical chief, Kenneth Won, to the Sabine Pass LNG (“SP LNG”) project in a different building than where Chevron and the HFE departments were located. Prior to leaving the HFE department, Complainant learned that another three years would be needed to effectively turn the project over to Chevron. Therefore, Complainant became suspicious of his “sudden transfer” to the SP LNG project. (1st Comp. Br., p. 3).

Complainant became aware of a 2013 performance review conducted by Won; Complainant stated that Respondent did not share the review with him. (1st Comp. Br., p. 3). Won informed Complainant that he was among the lowest two or three workers in the 134-person mechanical group. Won cited two incidents of “sleepiness” by Complainant and an

accusation that Complainant was falsifying his time records. (*Id.*). Complainant stated that the accusations regarding the time records were untrue. He also attempted to discuss his “disability,” sleep apnea, but Won stated he had been recently advised not to discuss the disability with Complainant. (*Id.*). Complainant was offered an “un-guaranteed short-term foreign reassignment,” but declined the offer. (*Id.*).

Complainant noted that in April 2014, “several additional people, including the HFE supervisor from the HFE group, had been laid off by Respondent. (1st Comp. Br., p. 3).

On August 29, 2014, Complainant’s doctor issued a letter stating that Complainant suffers from “severe daytime sleepiness due to multiple nighttime medical conditions” and “obstructive sleep apnea.” (Aug. 29 Ltr., p. 1)

On May 7, 2014, Complainant received a written warning regarding his performance. (2nd Comp. Br., p. 3). He signed the letter that day.

On May 16, 2014, Complainant submitted his resignation effective May 30, 2014 “in response to the constructive discharge of management.” (2nd Comp. Br., p. 1).

On May 30, 2014, Complainant worked his last day for Respondent. He attempted to speak to Won about staying employed with Bechtel, but Won refused to consider Complainant’s proposal. (2nd Comp. Br., p. 2).

2. Respondent’s Version

Respondent, Bechtel, is a global construction and engineering company, with its Oil, Gas and Chemicals organization based in Houston, Texas. (Resp. Br., p. 1-2). As relevant to this proceeding, Respondent “engineers” and “builds” LNG (liquefied natural gas) “facilities.” (*Id.*). In order to make it commercially viable to transport natural gas, its volume has to be greatly reduced. Respondent’s role in the LNG process is to engineer and construct on behalf of its customers the industrial plants that liquefy and prepare natural gas for transport. (*Id.*).

In March 2010, Complainant began his employment with Respondent as a Compressor Specialist. In this role, Complainant was responsible for the evaluation and selection of LNG gas compression equipment. (Resp. Br., p. 1-2).

On or about August 13, 2012, Complainant was assigned to the Wheatstone Chevron LNG project as an HFE Coordinator. The assignment was made, Respondent alleges, “because Complainant’s work performance was suffering and it was thought to be an easier role.” (Resp. Br., p. 2).

Respondent asserts that Rivadeneira, not Sayyed, was Complainant’s supervisor. (Resp. Br., p. 2). Beginning in 2013, Rivadeneira and other employees noticed Complainant falling asleep at his desk and during weekly meetings on Monday mornings. On the morning of November 18, 2013 (a Monday), Rivadeneira sent an email requesting that Complainant improve

his behavior because it was negatively affecting the weekly meetings. (Resp. Br., p. 2; EX-1). Complainant replied shortly after with a one-word email: “Certainly.” (*Id.*)

The issue remained unresolved, and on March 5, 2014, Rivadeneira was required to send Complainant a second email regarding sleeping at work. (Resp. Br., p. 2; EX-1). Respondent did not discuss the transfer on March 7, 2014 to the Sabine Pass LNG project.

On May 7, 2014, Respondent issued a warning letter to Complainant regarding his performance. (Emp. Resp., p. 4; RX-2). The warning letter states that Rivadeneira first noted Complainant’s “tendency to fall asleep in Mechanical meetings on the Wheatstone LNG Project” in November 2013, and he was asked to work on his behavior. (*Id.* at RX-1, RX-2). Also, Rivadeneira sent a second email regarding the tendency to fall asleep. (*Id.*). Thus, Respondent would be monitoring Complainant’s behavior for 30 days beginning May 7, 2014. Failure to show improvement would result in further disciplinary action. (*Id.* at RX-2). Also on May 7, 2014, Complainant acknowledged his receipt of the warning letter and signed it.

On May 16, 2014, Complainant submitted his resignation. (Resp. Br., RX-3). Complainant stated that he planned to retire effective June 1, 2014, and that the email was to be used as Respondent’s “customary 2 weeks notification.” (*Id.*)

On May 30, 2014, Complainant worked his last day for Respondent.

C. Alleged Protected Activity

Complainant alleges that Respondent retaliated against him due to “reporting safety violations to management,” i.e. protected activity. He does not specify what protected activities he undertook and when he undertook them in his response, although he attached emails as exhibits, which this Court infers is supposed to represent the protected activities.

1. Undated January 2013 email (est.)

An undated email, later clarified by Complainant as being written in approximately late January or early February 2013,¹ was sent to Matt Taher and Mustapha Chaker regarding “BOG [boil off gas] issues with the BOG vendor.” (CX-1). The email discusses a number of issues that are “significant” in Complainant’s opinion.

Paragraph 6 of the email contains the following statement:

This vendor has been supplying Bechtel a skid package that does not follow the guidelines in API 617 or API 614 and does not comply with AS Standard 4024 (machinery design), plus they flatly refused to furnish other [sic] that a duplicate scope to other LNG projects performed by Bechtel.

¹ See May 27, 2015 email from Complainant.

(1st Comp. Resp., CX-1). Complainant handwrote “safety,” and pointed an arrow to the paragraph.

“API” represents American Petroleum Institute standards² and “AS” represents “Australian Standards.”³

Paragraph 10 of the email contains the following statement:

On the QCLNG and also on the GLNG [sic] the BOG vendor does not perform any NDE [sic] on lifting lugs nor even stencil the lifting lugs with the weight rating, which is a safety issue IMHO [“in my humble opinion”]. This does not meet Australian Standards.

(1st Comp. Resp., CX-1). Complainant handwrote “safety,” and underlined contents of the paragraph.

2. January 16, 2013 email

Complainant points to protected activity as occurring on January 13, 2013 through another email addressed to Taher. In paragraph 22, Complainant referenced two API standards and handwrote “safety” on the document. (01/16/13 Email, p. 2). In paragraph 24, Complainant wrote that on the WS LNG project, the vendor is presently 11 months late and will “miss the promised date of 1/21for the completely NON SID compliant [sic],” and it contains a handwritten note: “No safety in design considered.” (*Id.*).

3. Undated exhibit

An undated exhibit, which does not show who it is written by or directed to, is attached to Complainant’s first response and contains the following handwritten notation:

From HFE mtg
Procurement Agreement with CBI
No safety compliance

² The American Petroleum Institute (“API”) is a “national trade association that represents all aspects of America’s oil and natural gas industry.” *About API*, American Petroleum Institute, *available at*: <http://www.api.org/globalitems/globalheaderpages/about-api>. *See also API Standard 617*, American Petroleum Institute, *available at*: http://www.api.org/publications-standards-and-statistics/standards/whatsnew/publication-updates/new-refining-publications/api_std_617 (last visited Jul. 8, 2015). API Standard 617 references “Axial and Centrifugal Compressors and Expander-compressors.” *Id.*

³ Standards Australia is a “not-for-profit, non-government” organization recognized by the Australian government as its “peak Standards body,” and it facilitates the development of “Australian Standards®” by working with the “Australian Government, industry and the community.” *Standards Australia*, International Organization for Standardization, *available at*: http://www.iso.org/iso/about/iso_members/iso_member_body.htm?member_id=1524 (last visited Jul. 8, 2015). “AS” means “Australian Standards.”

The following statement is found later in the document:

It seems reasonable that CB&I [sic] may have been forced to strategize non-compliance with an SID [sic] and Western AS Standards in order to maintain an overly aggressive schedule imposed by Bechtel's procurement group handling the purchase of these tanks.

If so, the responsibility for all safety violations clearly lies with procurement or project management with respect to these MTF5 tanks with regards to stairways, platforms and handrails. These violations were clearly commented on mechanical drawings and are not the responsibility of Bechtel's mechanical group or Bechtel's HFE group.

Complainant underlined "safety" and handwrote "safety" on this document as well.

4. August 10, 2013 document

Another document with no recipient listed references an August 10, 2013 HFE meeting and discusses "safety concerns and issues as shown in Chevron's SID SU 5106-A as well as safety concerns expressed in AS 1657, version 1992." (08/10/13 Email).

5. May 21, 2014 emails

On May 21, 2014 at 10:17 a.m., Complainant wrote an email directly to co-worker Elly Torabian and copied Suneet Bahl on the subject "Safety Issues with Pneumatic Testing." Complainant stated that he heard pneumatic hydrostatic testing referred to in a meeting the day before, and that "[t]his is totally unsafe." (05/21/14 Email, p. 1). If a hydro-test were to be performed, then Complainant suggested a "water hydro-test" should be used. (*Id.*). Although this type of test might take one to two weeks longer, as it did on the QC LNG, it would keep Torabian "out of trouble" and prevent "the loss of life" on the SP LNG project. (*Id.*). In an email at 10:27 a.m., Complainant wrote Michael Hearn about the same issue using the same language of preventing the loss of life regarding his concerns about the testing methods. (Emp. Resp., RX-6).

C. Alleged Adverse Actions

Complainant's descriptions of the alleged adverse actions taken against him by Respondent are vague and often hard to follow in relation to his briefs and exhibits. To facilitate our discussion, I will arrange the alleged adverse actions by date.

Complainant contends that the "harassment" started as a "subtle attempt" by Rivadeneira on November 28, 2013. Complainant does not state what this "harassment" or "attempt" consists of and the relationship to his alleged protected activities; however, it is likely that Complainant is

referring to the first email sent on **November 18, 2013** about falling asleep during meetings, as described in the written warning of May 7, 2014.

On March 7, 2014, Complainant asserts that he responded to Rivadeneira in writing regarding a “second attempt.” It is not known exactly what Complainant means by “attempt” as an adverse action, but it presumably relates to the second email on **March 5, 2014** discussing Rivadeneira’s latest concern about Complainant falling asleep during meetings.

Also on **March 7, 2014**, Complainant alleges Rivadeneira was responsible for having him reassigned by the mechanical chief, Won, to the Sabine Pass LNG project, and thus views this as an adverse action by Respondent.

As previously mentioned, Complainant was made aware of a poor performance review on an **unknown date in March 2014**.

The letter of reprimand was issued on **May 7, 2014**.

Complainant argues that all of these events, in tandem, made his working conditions unbearable and led to his constructive discharge on **May 16, 2014**. On that date, Complainant sent an email to Won giving a standard two-week notice of his resignation and announcing his “retirement.” However, he regards **May 30, 2014**, his last day of work, as the date of the “constructive discharge” and adverse action because he was, allegedly, in contact with Won about keeping his job, and Won refused to consider the proposal. (2nd Comp. Br., p. 2).

Complainant notes that he first became aware he was constructively discharged on October 17, 2014 based on information from Ross Van Wormer, a former Bechtel employee who identified himself as a supervisor of Complainant in 2013 and 2014. (Oct. 17 Ltr., p. 1). The statement was notarized at Complainant’s suggestion on November 17, 2014. (1st Comp. Br., p. 4). Van Wormer said in a statement that Complainant had received a satisfactory performance review from him, but he had received a poor review from Rivadeneira. (Oct. 17 Ltr., p. 1). Van Wormer also corroborated Complainant’s statement that he was in attendance at the 7 a.m. meetings and had not been charging extra time to the job when he was not really there. At Won’s request, he continued, the HFE group was instructed by Won to release Complainant to another group so that he could “prove his abilities or be discharged.” (Oct. 17 Ltr., p. 1). Van Wormer warned Complainant of his possible discharge. Notably, Van Wormer did not discuss Complainant’s safety complaints as a reason why he was being reassigned or placed on the path of discharge by Respondent.

D. Parties’ Contentions

1. Complainant

Complainant alleges this Court’s jurisdiction over this claim exists because activities on the QC LNG project prove that Respondent is indeed a covered “employer” and that the compressors are “consumer products” as defined by the Act. For instance, a Consumer Product Safety Commission document entitled “Instructions for completing the General Certificate of

Conformity” was “typically included on all other Bechtel LNG purchasing contracts, and was “required” on the QC LNG project.” (2nd Comp. Br., p. 2).

Regarding Respondent’s status as a “manufacturer,” Complainant acknowledged Bechtel is not a direct manufacturer of the BOG compressor and compressor packages. (1st Comp. Br., p. 5). But, he continued, “Bechtel should be considered the overall manufacturer of the LNG plant.” (*Id.*).

Further, Respondent acted as its own “private labeler” under the act because “the LNG BOG compressor did not include boxing by the sub-vendor...” (1st Comp. Br., p. 2). Additionally, Respondent included the price of the LNG BOG compressors into the plant price offered to the LNG plant end-user, thus making Respondent a “retailer” or reseller of these items. (*Id.*) Thus, Respondent is an “employer” covered under the Act and Complainant is an “employee” subject to the whistleblower protections afforded by the CPSIA. *See* 29 C.F.R. §§ 1983.101(h), (m).

Regarding timeliness, Complainant filed his claim on November 12, 2014, or 180 days after the date of his resignation. *See* 29 C.F.R. § 1983.103(d). Further, Complainant stated that he was in contact with Won as late as May 30, 2014, his official last day of work, requesting to keep his job. Since Won refused to consider the proposal on May 30, 2014, Complainant’s complaint is well within the period of filing timely.

Regarding protected activity, Complainant concedes that his two emails were dated May 21, 2014, after the date of the warning letter of May 7, 2014 and after his resignation on May 16, 2014. However, he reported previous safety violations to management, citing his emails to Taher and Mustapha in January 2013 for support.

2. Respondent

Respondent contends that the compressors at issue are not a “consumer product,” neither Complainant nor Respondent is covered by the CPSIA whistleblower provisions, Complainant failed to file a timely complaint, and Complainant fails to assert activities protected under the Act.

Respondent asserts that LNG plant equipment and compressor, are not “consumer products” under the CPSIA. *See* 29 C.F.R. § 1983.101(e). Respondent cites the Consumer Product Safety Commission’s “Rules Requiring a General Certificate of Conformity (GCC),” which lists the general use products (non-children’s products) subject to a federal consumer product safety requirement and have need of a Certificate of Conformity, and notes that none of these products listed include LNG plant equipment such as compressors. Therefore, the CPSIA does not apply to the product alleged to be the basis of Complainant’s alleged protected activity.

To be a covered employer under the Act, an entity must be a manufacturer, private labeler, distributor, or retailer. Respondent contends none of these titles apply. Respondent purchased the compressors at issue for installation at a number of LNG facilities but, contrary to Complainant’s allegations, Respondent does not “re-sell” compressors to customers. The

compressors are purchased for installation at LNG plant locations as part of the normal procurement process. After purchase, the equipment is shipped to the field and installed. Therefore, Respondent is not a covered entity.

Next, Respondent argues Complainant is not a protected employee under the Act for several reasons. First, Complainant's two emails dated May 21, 2014, where he raised concerns about pneumatic hydrostatic testing, occurred after the written warning issued by Respondent on May 7, 2014 and May 16, 2014 resignation. Therefore, the emails could not have been the basis for any alleged adverse action under the CPSIA. Second, Complainant had no reasonable basis for believing testing protocols relating to a non-consumer product could possibly be in violation of the CPSIA. Third, Complainant received a written warning due to a pattern of falling asleep at work, and Complainant does not deny falling asleep at work. Thus, the warning was reasonable and not pretext for some retaliatory motive.

Accordingly, Complainant has failed to demonstrate that he engaged in protected activity or that Respondent's actions were motivated by any such alleged conduct, and this whistleblower complaint should be dismissed.

II. DISCUSSION

A. Standards for Motion to Dismiss

1. 29 C.F.R. § 18.70(a): Subject Matter Jurisdiction

Respondent asserts a jurisdictional challenge and claims it is not subject to the whistleblower provisions of the CPSIA.

Under 29 C.F.R. § 18.70(a), the administrative law judge must dismiss the matter once he determines at any time that subject matter jurisdiction is lacking.

At this time, the case law in CPSIA whistleblower cases is limited. *See e.g., Saporito v. Publix Super Markets, Inc.*, ARB No. 10-073, ALJ No. 2010-CPS-1 (ARB Mar. 28, 2012); *Rock v. Lifeline Systems Co.*, No. 13-11833 (D. Mass. Apr. 22, 2014)(2014 WL 1652613). In addressing the standards to evaluate the complaint in *Saporito*, the Administrative Review Board followed standards articulated in *Sylvester v. Parexel Int'l, LLC*, ARB Case No. 07-123, ALJ Case Nos. 2007-SOX-39 and 2007-SOX-42 (ARB May 25, 2011), which was a case arising under SOX, and cases arising under long-standing whistleblower statutes such as SOX, FRSA, AIR 21, and the environmental whistleblower statutes (CAA, ERA, CERCLA, etc.).⁴ In the Final Rule issuing Procedures for the Handling of Retaliation Complaints Under Section 219 of the Consumer Product Safety Improvement Act of 2008, the DOL noted that “[t]he regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory

⁴ *Sylvester v. Parexel* was also cited in the Final Rule as the DOL issued Procedures for the Handling of Retaliation Complaints Under Section 219 of the Consumer Product Safety Improvement Act of 2008. 77 Fed. Reg. 44904, 44906 (July 10, 2012).

language of CPSIA.” 77 Fed. Reg. 44904, fn.1 (July 10, 2012). The undersigned will follow that guidance.

The ARB has discussed subject matter jurisdiction in whistleblower cases, notably in *Sylvester*, slip op. at 10-11:

Subject matter jurisdiction “refers to a tribunal’s power to hear a case.” *Morrison v. Nat’l Australian Bank*, 130 S. Ct. 2869, 2877 (2010) (citing *Union Pacific v. Bhd. Of Locomotive Eng’rs*, 130 S. Ct. 584, 596-97 (2009)). Subject matter jurisdiction “presents an issue quite separate from the question whether the allegations the plaintiff makes entitles him to relief,” *Morrison*, 130 S. Ct. at 2877, and thus under the whistleblower laws over which the Department of Labor has jurisdiction, should not be confused “with the wholly separate question whether [a complainant’s] actions might be covered as ‘protected activities.’” *Sasse v U.S. Dept. of Justice*, ARB No. 99-053, ALJ No. 1998- CAA-007, slip op. at 3 (ARB Aug. 31, 2000).

Similar to federal complaints based on federal question jurisdiction, the burden of establishing subject matter jurisdiction under Section 219 is not particularly onerous. *See, e.g., Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1317 (7th Cir. 1997); *Musson Theatrical*, 89 F.3d 1244, 1248 (6th Cir. 1996). As the Board explained in *Sasse*, the Department of Labor’s subject matter jurisdiction is invoked “when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court’s action is not obviously frivolous.” *Sasse*, slip op. at 3 (quoting *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 591 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954)).

2. Rule 12(b)(6): Failure to State a Claim

Respondent also contends that this complaint should be dismissed because Complainant has not shown a connection between his job, the alleged protected activity under the CPSIA, and his resignation on May 16, 2014.

Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not contain a section pertaining to such a motion to dismiss for failure to state a claim upon which relief can be granted, 29 C.F.R. § 18.10(a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure (FRCP) are applicable.

Under the FRCP’s Rule 12(b)(6), a pleading may be subject to dismissal for either of two reasons: “First, the law simply may not afford relief on the basis of the facts alleged in the complaint. ... Second, regardless of whether the plaintiff is entitled to relief, the pleadings may be so badly framed that the plaintiff is not entitled to a trial on the merits.” *Walker v. S. Cent. Bell Tel. Co.*, 904 F.2d 275, 277 (5th Cir. 1990). A complaint is deemed inadequate if it fails to “set forth sufficient information to outline the claim or permit inferences to be drawn that these

elements exist.” *Gen. Star Indem. Co. v. Vesta Fire Ins. Corp.*, 173 F.3d 946, 950 (5th Cir. 1999). “[C]onclusory allegations of legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Jones v. Alcoa, Inc.*, 339 F.3d 359, 362 (5th Cir. 2003) (quoting *Fernandez-Montez v. Allied Pilots Ass’n.*, 987 F.2d 278, 284 (5th Cir. 1993); see also *Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999) (“Mere conclusory allegations of retaliation will not be enough to withstand a proper motion for dismissal of the claim.”)).

Unlike a motion for summary decision filed after discovery, a facial challenge offered to a complaint through Rule 12(b)(6) points to a missing essential element (no protected activity or adverse action) or a legal bar to the claim (e.g., sovereign immunity, lack of coverage over the respondent, the statute of limitations). *Evans v. U.S. Environmental Protection Agency*, ARB Case No. 08-059, ALJ Case No. 2008-CAA-3, slip op. at p. 10 (ARB July 31, 2012). A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint, not the merits of the case. *Id.*

The court must address whether it has subject matter jurisdiction under 29 C.F.R. § 18.70(a) to hear Complainant’s CPSIA whistleblower action, as well as whether Complainant has stated a claim upon which relief can be granted under Rule 12(b)(6).

B. The CPSIA Whistleblower Provision

The “whistleblower protection” provisions of 15 U.S.C. § 2087 of the CPSIA were effective as of August 14, 2008 and provide, in pertinent part:

(a) No manufacturer, private labeler, distributor, or retailer, may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee’s initiative or in the ordinary course of employee’s duties (or any person acting pursuant to a request of the employee) –

(1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this chapter⁵ or any other Act enforced by the Commission,⁶ or any order, rule, regulation, standard, or ban under any such Acts;⁷

⁵ U.S. Code, Title 15, Chapter 47 (Consumer Product Safety chapter of the Commerce and Trade title).

⁶ Consumer Product Safety Commission, 15 U.S.C. § 2053. See also *Statutes*, Consumer Product Safety Commission, available at: <http://www.cpsc.gov/en/Regulations-Laws--Standards/Statutes/> (last visited Apr. 28, 2015); *Products Under the Jurisdiction of Other Federal Agencies and Federal Links*, Consumer Product Safety Commission, available at: <http://www.cpsc.gov/en/Regulations-Laws--Standards/Products-Outside-CPSCs-Jurisdiction/> (last visited Apr. 28, 2015).

⁷ See also *Regulations, Mandatory Standards and Bans*, Consumer Product Safety Commission, available at: <http://www.cpsc.gov/en/Regulations-Laws--Standards/Regulations-Mandatory-Standards-Bans/> (last visited Apr. 28, 2015).

(2) testified or is about to testify in a proceeding concerning such violation;

(3) assisted or participated or is about to assist or participate in such a proceeding; or,

(4) objected to, or refused to participate in any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this chapter or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under such Acts.”

29 C.F.R. §§ 1983.102.

As the ARB noted in *Saporito*, it is important to note the context in which the CPSIA, which contains the whistleblower provision relevant to this case, was enacted:

Pursuant to the Consumer Product Safety Act (CPSA), 15 U.S.C.A. § 2051 (Thomson Reuters/West 2009), as amended by the CPSIA, Congress found that “an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce” and that “the public should be protected from these unreasonable risks.” 15 U.S.C.A. § 2051(a)(1), (2). Logically, then, one of the CPSA’s expressed “purposes” is to “protect the public against unreasonable risks of injury associated with consumer products.” 15 U.S.C.A. § 2051(b).

The CPSA established a Consumer Product Safety Commission (the Commission) in furtherance of these goals. The CPSA, as amended by the CPSIA, empowers the Commission to enforce the CPSA and the CPSIA, along with any other federal act Congress has added to the Commission’s oversight authority, resulting in a labyrinth of enforcement power.

Saporito, ARB No. 10-073, slip op. at 4-5.

The purpose of Chapter 47 – Consumer Product Safety includes (1) protection of the public against unreasonable risks of injury associated with consumer products, (2) assisting consumers in evaluating the comparative safety of consumer products, (3) developing uniform safety standards for consumer products, and (4) promoting research and investigation into the cause and prevention of consumer product-related deaths, illness, and injuries. 15 U.S.C. § 2051(b).

In addition to Chapter 47, the Consumer Product Safety Commission (CPSC) also enforces the Children’s Gasoline Burn Prevention Act, the Federal Hazardous Substances Act, the Flammable Fabrics Act, the Poison Prevention Packaging Act, the Refrigerator Safety Act and the Virginia Graeme Baker Pool and Spa Safety Act. (See fn. 6, *supra*).

In order to establish a prima facie case under the whistleblower provisions of the CPSIA, the complainant must show, by a preponderance of the evidence when viewed in a light most favorable to him, that

- (1) he was an employee of a covered respondent at the time of the adverse employment action;
- (2) he engaged in “protected activity” by providing information or a complaint to a covered supervisor or other individual authorized to investigate and correct misconduct where such information or complaint regarded conduct that the complainant reasonably believed constituted a violation of the CPSIA or one of the other statutes enforced by the CPSC;
- (3) the covered respondent knew, or suspected, that the complainant engaged in “protected activity”;
- (4) the complainant suffered an “adverse action” at the hands of the covered respondent, such as discharge or another unfavorable personnel action; and
- (5) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action, i.e. a causal connection existed making it likely that the protected activity resulted in the alleged discrimination.

29 C.F.R. § 1983.104(e)(2); *Saporito v. Publix Super Markets, Inc.*, ALJ No. 2010-CPS-1, slip op. at 6 (ALJ Aug. 12, 2012) (Decision and Order following remand by the ARB) (hereinafter “*Saporito* ALJ II”).

If the employee establishes these elements, the employer may avoid liability if it can prove “by clear and convincing evidence” that it “would have taken the same unfavorable personnel action in the absence of that [protected] behavior.” 49 U.S.C. § 42121(b)(2)(B)(iv); *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, (ARB January 31, 2006); *Allen*, 514 F.3d at 476.

Thus, the aggrieved employee’s first responsibility is to show that the CPSIA covered his employer.

1. CPSIA Definitions

Generally, a **consumer product** under the CPSIA is defined as “any article, or component part thereof, produced or distributed” ... for sale to a consumer or for the personal use, consumption or enjoyment of a consumer “in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.” 29 C.F.R. § 1983.101(e)(1).

Specifically excluded from the definition of “consumer product” is “[a]ny article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer.” 29 C.F.R. § 1983.101(e)(2)(i). Generally, boats which could be subjected to safety regulation under 46 U.S.C. chapter 43, vessels, and appurtenances to vessels (other than such boats) and associated equipment are also excluded from the definition of “consumer product.” 29 C.F.R. § 1983.101(e)(2)(vii).

A **distributor** means “a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product. 29 C.F.R. § 1983.101(g).

A **manufacturer** under the CPSIA means “any person who manufactures or imports a consumer product;” a product is manufactured if it is manufactured, produced, or assembled. 29 C.F.R. § 1983.101(i).

A **retailer** means “a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer.” 29 C.F.R. § 1983.101(l).

A **private labeler** generally means an owner of a brand or trademark on the label of a consumer product which bears a private label. 29 C.F.R. § 1983.101(k).

An **employee** means an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by a manufacturer, private labeler, distributor, or retailer. 29 C.F.R. § 1983.101(h).

A **respondent** means the employer named in the complaint who is alleged to have violated CPSIA. 29 C.F.R. § 1983.101(m).

2. General Certificate of Conformity under 15 U.S.C. § 2063

The CPSC requires certain manufacturers to maintain product certification and labeling, and a “General Certificate of Conformity” (“GCC”) must accompany the product.

Under 15 U.S.C. § 2063, every manufacturer of a product which is subject to a consumer product safety rule or similar provision and which is imported for consumption or warehousing or distributed in commerce (and the private labeler of such product if such product bears a private label) must issue a certificate which certifies that the product, through testing, complies with the CPSA and CPSC-enforced acts, as well as the rules, bans, standards and regulations under those acts. The manufacturer must specify each such rule, ban, standard, or regulation applicable to the product.

Every certificate required under 15 U.S.C. § 2063 must identify the manufacturer or private labeler issuing the certificate and any third party conformity assessment body on whose testing the certificate depends. The certificate shall include, at a minimum, the date and place of manufacture, the date and place where the product was tested, each party's name, full mailing

address, telephone number, and contact information for the individual responsible for maintaining records of test results.

3. Statute of Limitations/Timeliness

The applicable statutory period in which an employee alleging retaliation against by a manufacturer, private labeler, distributor, or retailer in violation of the CPSIA must file a complaint is **180 days** after the alleged violation occurred. 29 C.F.R. §§ 1983.103(a),(d).

The time period for administrative filings begins on the date that the employee is given final and unequivocal notice of the respondent's employment decision. *Ross v. Florida Power & Light Co.*, Case No. 96-ERA-36 (Dec. 3, 1997). "Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change; "unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities. *Rollins v. American Airlines, Inc.*, ARB No. 04-140, Case No. 2004-AIR-9, slip op. at 2-3 (ARB Apr. 3, 2007). The United States Supreme Court has held that the proper focus is on the time of the discriminatory act, not on the point at which the consequences of the act became painful. *Chardon v. Fernandez*, 454 U.S. 6, 9, 102 S. Ct. 28 (1981); *Delaware State College v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498 (1980).

In a constructive discharge case, the date of resignation triggers the limitations period. *Connolly v. Remkes*, Case No. 5:14-CV-01344-LHK (N.D. Cal. Oct. 28, 2014) (SOX decision) (citing *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110 (9th Cir. 1998) (Title VII decision)).

Complainant's complaints for discrete adverse actions occurring before 180th day preceding his complaint, specifically 1) the "harassment" or "subtle attempt" by way of Rivadeneira's first email on **November 18, 2013**; 2) Rivadeneira's second email or "attempt" on **March 5, 2014**, the reassignment to the SP LNG project on **March 7, 2014**; 4) the poor performance review on an **unknown date in March 2014**; and the 5) the letter of reprimand issued on **May 7, 2014**, are therefore untimely under 29 C.F.R. § 1983.103(d).

However, Complainant's complaint on November 12, 2014 for the "constructive discharge" is timely because it was filed with the OSHA within 180 days after May 16, 2014, the date of his resignation. Although the consequences of the resignation did not become painful until May 30, 2014, his last day of work and after he allegedly spoke to Won about retaining his job but was unsuccessful, Complainant's complaint is still timely because it was filed on the 180th day after the May 16, 2014 constructive discharge.

Complainant's allegation of retaliation by Respondent in allegedly refusing to rescind his voluntary resignation and retirement effective May 30, 2014 is not actionable and will be discussed further, *infra*, under "Adverse Actions."

3. Compressors, LNG equipment, and the LNG “plant” are not “consumer products”

Complainant maintains he complained about safety violations in his role overseeing mechanical equipment on the Wheatstone LNG project and about the testing protocols on the Sabine Pass LNG project. Compressors, LNG mechanical equipment, and the LNG “plant” are not articles “customarily produced or distributed for sale to, or use or consumption by, or enjoyment of a consumer.” 29 C.F.R. §1983.101(e)(2)(i). In other words, compressors, LNG equipment, and the LNG “plant” are not consumer products in that they are made for industrial, not consumer, use.

4. Respondent is not private labeler, retailer, manufacturer, or distributor of a consumer product

By definition, without a consumer product at issue, Respondent is not a manufacturer, distributor, retailer, or private labeler under the Act as asserted by Complainant. Furthermore, Complainant’s conclusory statements about Respondent’s status do not correlate to the statutory definitions of these terms. For instance, the allegation of Respondent acting as its own “private labeler” based on what he observed on the QC LNG in the boxing or packaging of the compressor does not relate to Act’s statutory definition of “private labeler,” which discusses a brand or trademark. (1st Comp. Br., p. 2). Additionally, by including the price of the LNG BOG compressors into the plant price offered to the LNG plant end-user, as Complainant also asserts, Respondent does not meet the statutory definition of “retailer” under the Act in that the “end-user” is a “plant,” not a consumer.

Likewise, activities such as “the packing and boxing of compressors for export” do not confer “distributor” status, as a distributor buys or takes delivery of a consumer product for distribution in commerce. Respondent’s customers, as it relates to the activities on the WS LNG, SP LNG and QC LNG projects are not consumers and the products delivered, LNG plants, are not consumer products.

Complainant concedes that “Bechtel is not considered a direct manufacturer of the boil-off gas compressor.” Yet he makes the broad assertion that Respondent “*should be* considered the overall manufacturer of the LNG plant.” (1st Comp. Br., p. 5)(emphasis added). Respondent “engineers” and “builds” LNG facilities, but these facilities and corresponding equipment are not consumer products, and thus Respondent is not a “manufacturer” under the Act as well.

I credit Complainant’s statements that, at some point in 2012 while working on the Queensland Curtis LNG project, he viewed the CPSC’s Conformity document. Yet Complainant concedes that “the CPSC document may not have been applicable on the WS LNG project,” which is the project he was working on when he made his “safety” complaints. He also concedes that the GCC document was “typically included” in “Bechtel purchasing contracts,” which could encompass a number of products – industrial products, consumer products, or otherwise at a massive international corporation such as Bechtel. Also, the mere presence of a conformity document on “purchasing contracts” does not imply that the conformity document was required under 15 U.S.C. § 2063 so as to create CSPA, CPSIA, and CPSC enforcement for duties on the different LNG projects Complainant was directly apart of at Bechtel.

Complainant's viewing of the CPSC's GCC sample document on while working on an unrelated project in the past, assuming it is true, does not substantiate a "credible link" for his safety complaints regarding the AS, API, and Chevron standards on a later project, and it does not create jurisdiction under the CPSIA. The CPSIA's whistleblower protection, while broad, does not cover all employees on all activities at Bechtel for all products, equipment, and materials Bechtel encounters in commerce, and does not turn Bechtel into a covered respondent.

I find that Complainant is not a covered employee because he was not employed by a manufacturer, retailer, private labeler, or distributor of a consumer product, and Bechtel is not a covered respondent. Therefore, this complaint is **DISMISSED** for lack of subject matter jurisdiction under 29 C.F.R. § 18.70(a).

B. Protected Activity

In the alternative, I dismiss this claim under 29 C.F.R. § 18.10 and Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

1. Alleged protected activity

Under Section 219 of the CPSIA, a plaintiff's complaint must allege that he engaged in protected activity or conduct. 29 C.F.R. § 1983.103. Complainant asserts that he engaged in protected activity and cites his awareness of a CPSC statute, 15 U.S.C. § 2063(g), viewed while working on the Queensland Curtis LNG project in 2012 for support. Complainant included with his response to the OTSC emails to co-workers on later projects for support his of protected activity claim. He attached emails to coworkers during his time on the Wheatstone LNG project in 2013 which reference "safety" and "compliance" with industrial standards, along with meeting notes discussing his concerns. He also included emails dated May 21, 2014, after the constructive discharge, specifically expressing safety concerns about the pneumatic hydro-static testing while on the Sabine Pass LNG project. He contends these documents are evidence of protected activity to sustain a CPSIA whistleblower claim.

Complainant's primary basis for proving jurisdiction of Respondent and that he engaged in protected activity is the existence of Consumer Product Safety Commission-issued "Instructions for Completing the General Certification of Conformity," which he states was included in documentation for the QC LNG project. The document includes the following language:

This sample shows the information that is required for an acceptable certification required by section 14(g) of the Consumer Product Safety Act, 15 U.S.C. § 2063(g).

(1st Comp. Br., p. 4; CX-2). Complainant refers to this as a "Bechtel procurement document." Employer concludes this document is not a Bechtel document, but does not submit evidence, such as a website or affidavit, supporting that assertion.

However, none of Complainant's emails, meeting notes, handwritten notes, and documents, discuss a violation of the Consumer Product Safety Act statute in question: 15 U.S.C. § 2063(g). Moreover, Complainant's emails, notes, and documents do not discuss a violation of a chapter of other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts.

Instead, Complainant's complaints are about American Petroleum Institute ("API") standards, Australian Standards ("AS"),⁸ and Chevron's safety-in-design (SID) standards. Although a complainant is not required to cite an exact provision at the time of the protected activity in order to sustain a CPSIA whistleblower claim, the activity complained of must at least be based on, or relate to, a violation of an law, order, rule, regulation, standard, or ban **enforced by the CPSC**. The Australian, API, and Chevron standards are not standards governed by the CPSC. Complainant has not identified a consumer product or CPSC-enforced provision as being the source of his safety complaints.

2. Complainant's reasonable belief of protected activity

As the ARB held in *Saporito*, the inquiry into protected activity in a CPSIA whistleblower complaint does not end simply because there is no "consumer product" or CPSC-enforced provision at issue. The CPSIA broadly defines protected disclosures to include disclosures "relating" to employer conduct that the employee "*reasonably believes* to be a violation of any provision of [the CPSIA] or any Act enforced by the Commission" 15 U.S.C. § 2087(a)(1) (emphasis added). *Saporito*, ARB No. 10-073, slip op. at 6. The CPSIA's plain language allows the complainant to be wrong as long as he held a reasonable belief of a violation of the Act or other act enforced by the Commission. (*Id.*).

The disclosure only involves what is actually communicated to the employer prior to the unfavorable employment action. *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008); *Saporito* ALJ II, slip op. at 7.

The Act does not define "reasonable belief." Historically, the ARB has interpreted the concept of "reasonable belief" as requiring a subjective and objective component. Thus, in order to have a "reasonable belief" under the CPSIA, a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the listed categories of law. 77 Fed. Reg. 44904, 44906, (July 10, 2012) (citing *Sylvester*, ARB Case No. 07-123, and its discussion of the reasonable belief standard under analogous language in the Sarbanes-Oxley Act (SOX) whistleblower provision, 18 U.S.C. § 1514A).

a. Subjective reasonableness

A subjectively reasonable belief means that the employee actually believed that the conduct he complained of constituted a violation of relevant law. *See, e.g., Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009) (not a CPSIA case); *Sylvester*, ARB Case No. 07-123, slip op. at 14. The complainant need not specify which laws he thought were violated, but

⁸ See *supra*, fn. 2.

rather only which *specific conduct* he believed to be illegal. *Villanueva v. U.S. Dept. of Labor*, No. 12-60122, slip op. at 11 (5th Cir. Feb. 12, 2014) (citing *Welch*, 536 F.3d at 276).

Complainant asserts that, while on the Queensland Curtis LNG project in 2012, he viewed a document discussing testing standards under the Consumer Product Safety Commission. However, the specific conduct he complained of beginning in January 2013 while on the Wheatstone LNG project, more than a year prior to resigning in May 2014, did not discuss the CPSC's General Certificate of Conformity or any other CPSC-enforced rule. The subjects of his complaints were primarily the timeliness and "aggressive schedule" of the project, Chevron's safety-in-design standards, and Australian Standards. Indeed, "safety" was used in the text of some correspondence. Yet "safety" was handwritten by Complainant after the fact in a majority of the correspondence. While he complained about specific conduct measured by non-legal standards (AS, API, Chevron, etc.), no complaint was made about any specific conduct, act, or omission by Respondent being illegal under consumer product laws.

Although I find Complainant had a subjectively reasonable belief that "safety" violations had occurred, I do so while noting that none of his complaints regarding safety concerns about design and meeting project deadlines for later projects he worked on in 2013 and 2014 discuss the CPSC's GCC document he viewed on the QC LNG project in 2012, any CPSC-enforced provision, or consumer product safety.

b. Objective reasonableness

Nonetheless, Complainant has not demonstrated an objectively reasonable belief that the violations he complained of involved a law, order, rule, regulation, standard, or ban enforced by the CPSC.

An objectively reasonable belief means that a reasonable person would have held the same belief having the same information, knowledge, training, and experience as the complainant. *Saporito, supra*, citing *Harp*, 558 F.3d at 723. Often the issue of "objective reasonableness" involves factual issues and cannot be decided in the absence of an adjudicatory hearing. *See, e.g., Allen*, 514 F.3d at 477-478; *Sylvester*, ARB Case No. 07-123, slip op. at 15. However, objective reasonableness is subject to resolution as a matter of law "if the facts cannot support a verdict for the non-moving party." *Welch v. Chao*, 536 F.3d 269, 278 (4th Cir. 2008).

First, it is not objectively reasonable for Complainant to assert that compressors and industrial equipment that were the basis of his complaints beginning in 2013 were "consumer products" based his lengthy experience and employment tenure with Respondent. The documents submitted by Complainant in response to the OTSC discuss industrial products such as tanks and pipelines not designed for consumer use. "Natural gas," "liquid natural gas," and "compressors" are not among the items listed by the Commission as being among the "Rules that Require the Issuance of a General Certificate of Conformity"⁹; these rules are to be followed by "manufacturers of general use products," i.e. non-children's products. The aforementioned

⁹ Rules Requiring a General Certificate of Conformity (GCC), Consumer Product Safety Commission, *available at*: <http://www.cpsc.gov/Business--Manufacturing/Testing-Certification/Lab-Accreditation/Rules-Requiring-a-General-Certificate-of-Conformity/> (last visited Jul. 6, 2015)

phrases are also not listed among the CPSC's "Regulations, Mandatory Standards and Bans" list.¹⁰ Complainant has asserted that he saw the CPSC's conformity certificate sample document on the QC LNG project in 2012, but there was no mention of the GCC, 15 U.S.C. § 2063(g), or anything related to a CPSC-enforced provision in his complaints. Thus, the activity is not protected under the CPSIA.

Second, it is not objectively reasonable to consider LNG plants "consumer products" covered by the CPSIA, which would in turn make Bechtel a "manufacturer" based on its activities in building of LNG plants and a covered respondent. Again, Complainant refers to the end user as a "plant," not a person or consumer.

Third, use of the word "safety" or calling an activity "unsafe" in and of itself is not enough to demonstrate protected activity under the whistleblower provisions of the CPSIA. At minimum, the complainant must plead facts that could potentially constitute a violation of any provision of Chapter 47, an Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts. There is no connection between the CPSC's GCC document seen by Complainant in 2012 referencing 15 U.S.C. § 2063(g) to the "safety" issues Complainant raised sporadically prior to the date of constructive discharge.

Further, violations of foreign law or, in this case, foreign standards, do not have a sufficient connection to a violation of any provision of Chapter 47, an Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts. Section 219 does not contain a clear expression of congressional intent to offer whistleblower protection to complainants asserting violations of safety standards endorsed by the governments of Australia and New Zealand or standards recommended by industrial groups such as the API.

Therefore, because Complainant, at the time of his complaints, did not have a reasonable belief of a violation of any provision of Chapter 47, an Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts, his activity was not protected, and this claim is also **DISMISSED** under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Although Complainant's complaint is unlikely to survive a jurisdictional or Rule 12(b)(6) challenge, the Court will take the liberty of further evaluating this matter in case someone should decide otherwise.

D. Adverse Actions

The CPSIA whistleblower statute and implementing regulations list specific forms of retaliation that an employer is forbidden to take against an employee. Specifically, the CPSIA provides that an employer may not intimidate, threaten, restrain, coerce, blacklist, or discipline an employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in protected activity. 29 C.F.R. § 1983.102(a).

¹⁰ See also *Regulations, Mandatory Standards and Bans*, Consumer Product Safety Commission, available at: <http://www.cpsc.gov/en/Regulations-Laws--Standards/Regulations-Mandatory-Standards-Bans/> (last visited Apr. 28, 2015).

For purposes of the retaliation statutes that the Department of Labor adjudicates, the ARB has referred to the Title VII material-adversity standard enunciated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 548 U.S. 53 at 67-68 (2006) in defining an “adverse action.” *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008). In essence, for an employer’s action to be “materially adverse,” it must be such that it could dissuade a reasonable worker from engaging in protected activity. According to the Supreme Court, a “reasonable worker” is a “reasonable person in the plaintiff’s position.”

Also, in *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.2 (5th Cir. 2008), the Fifth Circuit noted that a SOX whistleblower claim requires an “adverse action” that meets *Burlington’s* definition of material adversity, *i.e.*, an action harmful enough that it well might have dissuaded a reasonable worker from engaging in statutorily protected whistleblowing.”

An adverse employment action may take the form of a discrete act such as termination, denial of a transfer, or refusal to hire. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-115 (2002).

Constructive discharge is also a type of adverse employment action. A constructive discharge occurs where “working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.” *Held v. Gulf Oil Co.*, 684 F.2d 427, 434 (6th Cir. 1982); *NLRB v. Haberman Construction Co.*, 641 F.2d 351 (5th Cir. 1981); *Cartwright Hardware Co. v. NLRB*, 600 F.2d 268 (10th Cir. 1979).

First, Complainant’s resignation on May 16, 2014 followed the letter of reprimand dated May 7, 2014 discussing his sleeping at work on multiple occasions and despite at least one warning not to do so. Complainant did not deny he was sleeping on the job and in fact related his actions to his disability (sleep apnea). Complainant did not then, and has not now, connected the viewing of the CPSC’s Conformity testing document and his “safety” complaints while working on the Wheatstone LNG project as not meeting AS, API and Chevron’s SID standards to his departure from Bechtel. Thus, Complainant has not shown that his working conditions were so difficult that he felt compelled to resign due to his alleged protected activities. Thus, no constructive discharge under the CPSIA occurred.

Second, the date of Complainant’s alleged constructive discharge is May 16, 2014. Thus, Complainant’s complaints about being retaliated against because of his opposition to pneumatic testing in the emails dated May 21, 2014 are not actionable because the adverse action cannot precede the protected activity.

Even if someone were to find this activity was protected, the failure by Won to reconsider and/or rescind Complainant’s resignation on May 30, 2014 is not actionable as retaliation under the CPSIA because it did not materially affect the condition of Complainant’s employment. Complainant had already announced, in an email on May 16, 2014, his intention to voluntarily resign and retire effective May 30, 2014. Also, Respondent’s alleged act of refusing to reconsider a voluntary resignation from an existing position is not the same as a failure to hire or

rehire, where an employee or former employee actually applies for an open position and is denied employment. Further, Complainant has not connected Won's alleged decision to his "safety" complaints in 2013 or even the emails regarding the pneumatic testing on May 21, 2014.

Since no adverse action exists to sustain a timely whistleblower complainant, Complainant's complaint would also be dismissed for the aforementioned reasons.

E. Causation – Contributing Factor to Unfavorable Personnel Action

Assuming, *arguendo*, that Complainant were to establish that he engaged in protected activity to meet the first requirement for a cause of action under CPSIA, and that the second (employer knowledge) and third (adverse employment action) requirements were also established, Complainant must still prove that reporting the protected activity was a contributing factor to the adverse employment action. *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42 (ARB May 25, 2011).

A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62 (ARB July 27, 2006). The contributing factor standard was "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *Id.* A contributing factor can be any factor which alone, or in connection with other factors, tends to affect in any way the outcome of the decision. *Collins v. Beazer Homes U.S.A., Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004). To prevail, the whistleblower must show this contributing factor by a preponderance of the evidence. *Allen, supra*.

Failure to show temporal proximity between the alleged protected activity and the adverse personnel action is fatal to a whistleblower claim. See *Heaney v. GBS Properties LLC*, 2004-SOX-72 (ALJ Dec. 2, 2004); *McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29, slip op. at 83-84 (ALJ Oct. 5, 2006) (stating that one year is too long to warrant an inference of causation, but one month is sufficient to warrant an inference). The ARB has held that "the probative value of temporal proximity decreases as the time gap lengthens, particularly when other precipitating events have occurred closer to the time of the unfavorable personnel action." *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-51 (ARB June 29, 2006), slip op. at 18.

The temporal proximity between the complaints regarding non-CPSC standards in early 2013 until approximately mid-August 2013 and 1) his transfer to the Sabine Pass LNG project in March 2014 (seven months after the last complaint) and 2) his resignation in May 2014 (nine months after the last complaint) are distant at best. The sleeping incidents were brought to Complainant's attention by email in November 2013 and March 2014, which led to the letter of reprimand on May 7, 2014, and they are precipitating events closer to the time of the unfavorable personnel action he alleges.

Thus, in the alternative, his argument fails to raise the possibility of his alleged protected activities being a contributing factor to Complainant's personnel decisions and his alleged constructive discharge, especially given the lack of temporal proximity between his complaints and the alleged retaliatory acts.

F. Clear and Convincing Evidence Respondent Would Have Taken the Same Adverse Action

Nonetheless, if the complainant shows by a preponderance of evidence that his plaintiff's protected activity was a contributing factor in the unfavorable action, the burden shifts to the employer to show by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected behavior. *Allen v. Admin Rev. Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008).

Complainant received repeated warnings dating back to November 2013 about sleeping at work. Again, Complainant does not dispute that he would fall asleep at work and provided a doctor's letter stating that he had sleep apnea. Respondent informed Complainant on May 7, 2014 in the letter of reprimand that he had 30 days to correct his behavior. The statement from Van Wormer and an email from Van Wormer discuss the Complainant's performance review as it related to his departure, not the safety complaints in 2013 and 2014. Respondent, which has a documented history of his sleep apnea, would have likely been able to prove the issuance of the reprimand letter and activities leading up to and including the acceptance of his resignation would have occurred even in the absence of Complainant's activities.

III. ORDER

Based on the foregoing:

IT IS HEREBY ORDERED that Respondent's Request for Relief is **GRANTED** and this matter is **DISMISSED** for lack of jurisdiction 29 C.F.R. § 18.70(a) and/or failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)).

SO ORDERED this 30th day of July, 2015, at Covington, Louisiana.

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's 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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1983.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1983.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1983.110(a).

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 no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1983.109(e) and 1983.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1983.110(b).