

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 10 January 2008**

**CASE NO. 2006-ERA-17**

**IN THE MATTER OF:**

**RODNEY VAL BENSON**

**Complainant**

**v.**

**NORTH ALABAMA RADIOPHARMACY, INC.**

**Respondent**

APPEARANCES:

RODNEY VAL BENSON, Pro Se

MICHAEL A. VERCHER, ESQ.

For the Respondent

BEFORE: LEE J. ROMERO, JR.  
Administrative Law Judge

**DECISION AND ORDER**

This case arises under the employee protection provision of the Energy Reorganization Act (herein the ERA or Act), 42 U.S.C. § 5851 and the pertinent regulations at 29 C.F.R. Part 24.

This claim is brought by Rodney Val Benson, Complainant, against his former employer, North Alabama Radiopharmacy, Inc. (Respondent or NARP). Benson alleges that Respondent has taken adverse employment actions against him, including termination, in retaliation for his engagement in protected activities. This matter was referred to the Office of Administrative Law Judges

for a formal hearing which was held on February 1, 2007, in Huntsville, Alabama. Both parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.

The following exhibits were received into evidence:<sup>1</sup>

Complainant's Exhibit Numbers 1-12 and 20-37.<sup>2</sup>

Respondent's Exhibit Numbers 1, 3-9, and 11-14.

Administrative Law Judge Exhibit Numbers 1-9.

Post-hearing arguments and briefs were received from Complainant and Respondent. Based upon the evidence introduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

## I. ISSUES

1. Whether Complainant engaged in protected activity within the meaning of the Act; and
2. Whether Respondent took adverse employment actions against Complainant, including termination, because of his alleged protected activity.

## II. SUMMARY OF THE EVIDENCE

### Testimonial Evidence

#### Complainant

Complainant testified at the formal hearing and was deposed by Respondent on August 18, 2006. (RX-14). Complainant began employment with Respondent on March 8, 2004, as a delivery

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<sup>1</sup> References to the record are as follows: Transcript: Tr.\_\_\_\_; Complainant's Exhibits: CX-\_\_\_\_; Respondent's Exhibits: RX-\_\_\_\_; and Administrative Law Judge Exhibits: ALJX-\_\_\_\_.

<sup>2</sup> On March 21, 2007, subsequent to the closure of the record, Complainant submitted an amended exhibit list with additional exhibits marked as exhibits 36 and 38-49, attached to his post-hearing brief. On September 17, 2007, Complainant again submitted additional exhibits marked as exhibits 50-51. On October 25, 2007, Complainant submitted a third amended exhibit list with an additional exhibit number 52 from the NRC concluding that Complainant's concerns could not be substantiated. The foregoing exhibits are not considered timely received and are hereby rejected.

driver. He delivered nuclear pharmaceuticals that were compounded by Respondent at its Huntsville, Alabama facility to various customers in the area. He was paid an hourly rate of \$8.49 while working a full-time schedule and received medical insurance, vacation and sick pay benefits. (Tr. 69). He was terminated from employment on February 9, 2006, by Nuclear Pharmacist Steve Justice. (Tr. 73). He stated in deposition that he has been looking for work since, but has been unsuccessful. (RX-14, pp. 27, 31-32).

Complainant urges a myriad of factors which purportedly form the basis of his alleged protected activity and resulting discriminatory discharge, including an alleged December 8, 2004 intentional contamination, "reports of safety violations, health violations, falsification of documents and reports and [employee] harassment." (Tr. 71; ALJX-4).

His formal complaint filed in this matter also alleges unlawful termination based on age discrimination. (ALJX-4). Many of his exhibits are exhaustive, running narratives of much length raising issues, many of which were never presented to Respondent during his employment and consequently cannot form the basis of protected activity. His rambling citation to various regulations in his opening statement has little or no meaning or relevancy since he never raised any statutory violations with Mr. Akin or Respondent before his termination.

He testified that on October 25, 2005, he met with Max Akin, the owner of NARP, where he voiced "safety violations of employees not taking radiation tests, background tests, not meter reading the boxes, falsifying documents, reports." (Tr. 75). He stated he prepared a September 12, 2005 memo to Mr. Akin wherein he raised "intentional contamination" by "high exposure" of employee Danny Miller and Complainant. He testified that there were no posted policy procedures on contamination and decontamination or emergency response. (Tr. 76).

On December 8, 2004, Complainant contends he received a "severe intentional radiation contamination" by Steve Justice, the Respondent's "Radiation Safety Officer." He asserts Justice did not follow NRC regulations in that he did not respond to, investigate or cause appropriate corrective action to be identified. Mr. Justice only shrugged his shoulders in response to Complainant's request for guidance. Mr. Justice did not

provide any instructions on decontamination, complete any forms or take any actions to perform wipe radiation tests of the spillage. Complainant claims there were no written contamination procedures posted or any written manuals to review. (Tr. 28).

Nevertheless, Complainant followed previous decontamination instructions from Mr. Akin and decontaminated the "pigs" and capsules three times before taking a radiation wipe test. He did not list the "severe" radiation reading because he was previously instructed by Mr. Akin and Mr. Justice not to do so, but recorded only the decontamination scale readings of packaging documents. He stated he showed Danny Miller the severe contamination reading on the scale counter upon the latter's arrival at the lab. (Tr. 29; RX-14, p. 90).

On December 8, 2004, Complainant contacted Oscar DeMiranda, a representative of the Nuclear Regulatory Commission (NRC) about his alleged "severe intentional contamination." He stated DeMiranda informed him that he had received a severe contamination and to report the incident to the Alabama Office of Radiation Control. (Tr. 30, 76). Complainant also reported the "severe contamination" to State Inspector David Turberville of the Alabama Office of Radiation Control who purportedly agreed with DeMiranda's assessment that the radiation reading was a severe contamination, but that Complainant would not be affected by the contamination. (Tr. 32; RX-14, p. 89). Although he informed the agency officials he would likely be fired for contacting the agencies, no one at Respondent had threatened to take any adverse action against him for reporting any complaints to the NRC or the Alabama Office of Radiation Control. (Tr. 78). No one instructed Complainant to seek medical treatment or assistance as a result of the "contamination," and he did not do so. (Tr. 32).

On December 31, 2004, Complainant asked Mr. Akin what constituted a severe contamination, to which Mr. Akin purportedly responded "3,000 or more" on the scale counter. Complainant then asked what he should do when a 45,000 contamination occurs. Mr. Akin informed him to leave the "pigs" alone and let them decontaminate on their own for one week. Complainant stated he then knew he should not have decontaminated the pigs and should have been instructed by Mr. Justice to leave the pigs alone. (Tr. 33). Immediately thereafter, Mr. Akin informed Complainant "this is all I have" referring to his business. Complainant testified that he then knew Mr. Akin would do anything to protect his business and that

he would be fired at some point in time. He also believed Mr. Akin knew that he was the individual who reported the severe intentional contamination by Steve Justice to NRC and to the Alabama Office of Radiation Control. (Tr. 33).

Complainant testified he feared reprisals based on the pattern of behavior of Respondent's officials uttering "false statements" at the beginning of his employment. (Tr. 78). Such statements included hiring him as a driver which he thought was delivering prescription medicines and not nuclear medicine; being told he would be on a 30-day probation, which he was; and the promise of the receipt of a \$.50 raise after passing probation, which he received subsequently. (Tr. 78-80). He stated he initially received medical insurance coverage, which was later terminated because he was hired as a part-time employee. He subsequently received medical insurance, vacation pay and sick pay when he became a full-time employee in September 2004. (Tr. 80-81; RX-14, pp. 24, 49).

He testified "the main thing that worried me the most is that it was a double standard," since two people were wearing lab coats and dosimeter badges and he was not during the period from March 8, 2004 to April 14, 2004, when he received a lab coat and dosimeter badge. (Tr. 23, 81). Newly hired employees were not given dosimeter badges, such as Danny Miller and Peter Gerstner. (Tr. 24, 26, 82). Complainant contends that the Landauer Radiation Dosimeter documents reveal that he was not monitored with a dosimeter badge during this time period. (Tr. 24). Complainant did not complain to any Respondent official about not being issued a dosimeter badge or lab coat. (Tr. 26).

At the formal hearing, Complainant presented a litany of issues for resolution. He contends that the Landauer safety instructions listed as an exhibit by Respondent were not the same instructions he received in 2004, 2005 and 2006. The instructions he received had fewer questions, less instruction and required no passing grade. (Tr. 27).

Complainant contends employee Danny Miller received a "severe radiation contamination exposure" of 21,000 on September 28, 2004. (Tr. 25; RX-14, p. 93).

Complainant also testified that he did not receive mandatory DOT/Hazmat training instructions on March 8 and 9, 2004, about handling and transporting nuclear medicine materials as required. Instead, he received two safety instructions on March 23, 2004, according to Respondent's records which he

disputes. He stated he received Landauer training and the Employee Training Program from Mr. Akin on March 24, 2004. (Tr. 21). He also recalled Mr. Akin instructing him to change the date from May to March as reflected on Respondent's training records. (Tr. 22). In deposition, Complainant testified that he received verbal training, but no written information. (RX-14, pp. 55-56). He apparently did not regard such verbal instruction as training within his definition of the term. (RX-14, p. 65).

Complainant complained to Mr. Justice about employee Andy Lewallen's behavioral conduct of ramming his fist or fingers up Complainant's buttocks or pinching his buttocks during the period from June 2005 to September 2005. Complainant had talked to Mr. Akin about the behavior and agreed to meet with Mr. Akin on September 8, 2005, to resolve his complaint. Mr. Akin did not meet with Complainant, but Lewallen later apologized. (Tr. 35). Complainant considered the problem resolved. (Tr. 36).

Complainant testified that on September 9, 2005, Steve Justice "used discrimination remarks" towards him when discussing Andy Lewallen's "behavior disorder." Mr. Justice informed Complainant that Mr. Akin told Mr. Justice to meet with Complainant to discuss and resolve the problem. Complainant informed Mr. Justice that Mr. Akin was coming to the Huntsville facility to resolve the problem. Steve Justice became "very angry, hostile and showed animosity towards" Complainant "because of the remarks or language I made to Justice on December 7, 2004, where Justice found my remarks or language to be offensive and insensitive." The December 7, 2004 remarks were not further explicated in the record. Mr. Justice stated that Complainant was "old, insignificant, low life, a jerk, inferior, and he would treat me as a non-person from here on out." (Tr. 34-36).

Complainant testified there were no written employee policies or procedures for filing written grievances, appeals for wrongful acts by employees or false statements by customers. (Tr. 37).

On September 12, 2005 and October 25, 2005, Complainant claims he reported to Mr. Akin that safety and health violations were occurring, such as employees not taking radiation readings and falsifying packaging documents and other reports. He also

reported the December 8, 2004 intentional contamination from Mr. Justice and the high radiation contamination of Danny Miller on September 28, 2004. He stated he reported "harassment and falsifying prescription order duplicates." (Tr. 38; RX-14, pp. 104, 120).

On October 4, 2005, Complainant spoke with Myron Riley, a state inspector for the Alabama Office of Radiation Control, and reported "safety and health violations occurring at the Huntsville facility, including [his] intentional severe radiation contamination" of December 8, 2004. He requested a meeting to discuss these issues which never occurred. (Tr. 50-51). He was aware that Riley met with Mr. Akin on October 26, 2005, but did not meet with Complainant. (Tr. 51, 53).

On October 25, 2005, Mr. Akin began an internal investigation regarding Complainant's allegations. Mr. Akin informed Complainant that the investigation report would be sent to the Alabama Office of Radiation Control and that state inspectors would interview Complainant. From October 25, 2005 to February 9, 2006, Mr. Akin never discussed the allegations, complaints or internal investigation with Complainant nor was he interviewed by state inspectors. (Tr. 38-39; RX-14, p. 130).

On November 29, 2005, Complainant spoke with David Turberville. He asked Turberville if he had received NARP's internal investigation report from Mr. Akin about his complaints, to which Turberville responded that he had not. (Tr. 51). Complainant testified that he believed Turberville misled him when he stated he had not received the report because Turberville somehow [inexplicably] knew of the investigation report and its contents on October 26, 2005. He further alleged, without any support, that Turberville and Riley stopped the internal investigation because all of his complaints were not addressed. (Tr. 52).

Complainant complained that he made several requests to Mr. Justice for information about the December 8, 2004 dosimeter badge radiation reading. Mr. Justice informed Complainant that the state inspectors would contact him if he had a high radiation reading. He did not receive any written information or documents from NARP or the state inspectors about the December 2004 dosimeter badge reading. (Tr. 40).

He acknowledged that he did not file any formal written complaints with the Nuclear Regulatory Commission or the Alabama Office of Radiation Control about any of the matters about which he allegedly complained until after his termination. (Tr. 72-73).

Complainant denied any insubordination during his employment with NARP toward Mr. Justice or Mr. Akin. He stated he never used abusive or disrespectful language towards Steve Justice on February 8, 2006. He claims that Mr. Justice confirmed at a Board of Appeals hearing in June 2006, that no argument took place between them despite an Employee Complaint form completed by Mr. Akin that an argument occurred. (Tr. 41).

Complainant complained that NARP relied upon the loss of a customer on his delivery route as a reason for reducing his hours, but NARP never identified the customer. (Tr. 41-42). He claims that the loss of Dr. Raymond Fernandez as a customer on February 8, 2006, is false, since Dr. Fernandez stopped using NARP services on August 18, 2005, because he received lower rates from another company, which did not result in a change in his schedule. (Tr. 42). He also claims that statements made by Mr. Justice and Mr. Akin about the loss of another customer on or about February 8, 2006, are false. (Tr. 43).

Complainant denied that he made the alleged statement that Mr. Justice did not have the authority to reduce his hours. (Tr. 43, 44). Complainant testified that Steve Justice fired him at 4:17 a.m. on February 9, 2006, because he had gone over Mr. Justice's head and spoke to Mr. Akin about his reduction in hours and benefits. He told Mr. Justice that Justice had given him permission to speak to Mr. Akin on February 8, 2006. Mr. Justice then rescinded the termination and agreed to set up a conference call with Mr. Akin. Steve Justice subsequently fired Complainant again, informing him that Mr. Akin had told him on February 8, 2006, to terminate Complainant. (Tr. 43, 73-74). There was no discussion between Mr. Justice and Complainant about his reduction of hours and benefits on February 9, 2006. (Tr. 44). Mr. Justice did not mention any safety and health complaints or the alleged intentional contamination complaint made by Complainant as a reason for his termination. (Tr. 74-75).

Complainant testified that on January 4, 2006, Mr. Justice informed him that the Pain Treatment Center had complained that he had been rude to staff and patients for the past seven to ten days. He informed Mr. Justice that this complaint was false because he had been on vacation from December 23, 2005 to January 2, 2006, and had made no deliveries on January 3, 2006. On January 4, 2006, he trained new employee Larry Moon on the procedures for deliveries to the Pain Treatment Center. Moon witnessed that he was not rude to the staff or patients. (Tr. 45). On January 5, 2006, Complainant telephoned Mr. Akin and told him the complaint from the Pain Treatment Center was false for the above reasons. He requested that Mr. Akin investigate the complaint which he indicated he would do. (Tr. 46). The Pain Treatment Center complaint was not discussed with Complainant again from January 5, 2006 to February 7, 2006. Mr. Justice did not reduce Complainant's hours from January 5, 2006 until February 8, 2006, but used the Pain Treatment Center complaints as a reason for doing so. (Tr. 46).

On cross-examination, Complainant acknowledged that he rode with Andy Lewallen on his first day of employment, but did not decontaminate any pigs or containers. (Tr. 85-86). He also confirmed that on his second day of employment Steve Justice took him through step-by-step the decontamination process to follow in taking wipe readings and "putting them in the background counter." (Tr. 86). He was instructed on how to do wipe radiation readings, background tests and "how to monitor or meter reading of the boxes." Nevertheless, Complainant denied that Mr. Justice instructed him on what to do when contamination occurs or what to do when a decontamination process is necessary. (Tr. 87).

Complainant acknowledged that he never made any allegation that he received a high or excessive level of radiation before receiving his dosimeter badge. (Tr. 86). Despite receiving a certificate of DOT/HazMat Training on March 23, 2004, Complainant could not "remember anything." (Tr. 90; RX-1, p. 1). Despite a Certificate of Recognition that Complainant had completed Landauer Radiation Safety Training on March 23, 2004, he insisted the employee training was conducted in May 2004 and that Mr. Akin instructed him to change the date to March 2004. (Tr. 91-92; RX-1, pp. 2-3). He acknowledged that Mr. Akin did not provide any reasons for changing the date. He further acknowledged receiving Landauer training in 2005, but could not

remember receiving employee training again in February 2005 despite his signature on a completion form. (Tr. 94; RX-1, pp. 4-5). Complainant denied the existence and availability of employee training manuals in the Huntsville office facility. (Tr. 94-95).

He affirmed that his signature appears on an employee training program certificate for January 10, 2006, but could not remember receiving the instruction. (Tr. 96; RX-1, pp. 6-7). He then testified there were no instructions or discussion, but only direction to check that he had completed the training and to sign the document. (Tr. 96-97). Complainant denied ever seeing the Radiation Safety Procedure Manual for NARP or the 2004 Emergency Response Guidebook. (Tr. 97-98; RX-1, pp. 8 and 18). He acknowledged receiving Landauer training again in 2006. (Tr. 100, 102).

Complainant testified that he was instructed to sign off on vehicle reports for each day, but did not take any meter readings after all deliveries were made as he was instructed to do. He affirmed that Mr. Akin told him that employees caught falsifying reports would be discharged. (Tr. 103). He stated that he, Priscilla Underwood, Andy Lewallen, Danny Miller, and Tony Cooper were instructed to falsify reports by Mr. Justice. (RX-14, p. 124). He reported to Mr. Akin on October 25, 2005, that reports were being falsified. (Tr. 104).

Complainant deposed that Danny Miller informed him that he was having stomach problems after his alleged intentional contamination. (Tr. 104; RX-14, p. 95). Complainant acknowledged that he has not seen a doctor about his alleged severe contamination and no doctor has told him that he received a harmful dose of radiation. (Tr. 105). In fact, no one, including DeMiranda or Turberville, has informed him that the 48,000 radiation contamination reading he allegedly received would cause a harmful physical affect. (Tr. 107).

Complainant also confirmed his deposition testimony that his sexual harassment complaints lodged against Andy Lewallen had been resolved to his satisfaction. (Tr. 107; RX-14). He confirmed his deposition testimony that in September 2004, before his alleged contamination in December 2004, Mr. Justice was allegedly going to terminate him because of his age. (Tr. 109-110; RX-14, pp. 114-116, 138-139).

**Max Akin**

Mr. Akin, a certified nuclear pharmacist, is the President and CEO of Respondent. (Tr. 117). He began operations in 1990 based upon an application for radioactive materials license from the Alabama Office of Radiation Control. (Tr. 118). The Office of Radiation Control inspects the operations annually to determine radiation safety involving employees, reviews employee training manuals and procedures and verifies that employees have received training through records maintained in the ordinary course of business. (Tr. 119). Respondent maintains two pharmacy locations in Muscle Shoals and Huntsville, Alabama. (Tr. 118-119).

Each pharmacy employs nuclear pharmacists, pharmacy techs and clerks and drivers. The pharmacists compound diagnostic doses of radioactive material which are used in medical testing and scanning. (Tr. 122). The drivers package and certify the prescriptions for DOT transportation. (Tr. 120). Mr. Akin testified that drivers are not exposed to unsealed sources of radiation. (Tr. 123).

Complainant was hired as a driver on March 8, 2004. (Tr. 120, 170). Mr. Akin testified that Respondent has 90 days within which to train a new driver. Training begins immediately on the day they start by "shadowing" an employee who instructs the new driver on instrumentation used and how to perform "wipes." Mr. Akin provides radiation safety training within the first 90 days of employment. (Tr. 121). He testified that he provided Complainant with DOT HazMat training on March 23, 2004. (Tr. 122; RX-1, p. 1).

He stated the compounded end product is placed in a "pig" which is a container with lead shielding and a plastic coating that screws together completely enclosing the material. (Tr. 123). A background reading by the well counter is taken which measures what is occurring in the ambient air as well as wiping down the outside of the "pig." (Tr. 124, 128). He described the process of disintegration which is measured by a well counter. (Tr. 126-127). Such is the process by which Complainant would have derived a 48,000 well-count reading. (Tr. 131). He stated that during the compounding process a small quantity of the radiation source may contaminate the outside of the "pig." Quality control procedures are followed on all compounds, but not by drivers. He testified that typically readings of 500,000 down to 25,000 are derived from compounds. (Tr. 131-133).

Mr. Akin concluded that Complainant's reading of a 48,000 well-count was not a harmful exposure to radiation because of the minute quantity of contamination. Since Respondent deals with diagnostic forms of radiation that are injected into a patient, any contamination resulting would be a small fraction of the diagnostic dose. (Tr. 133). Contamination must be wiped down to avoid a detriment to the imaging study being performed on the patient. (Tr. 134).

Mr. Akin disputed Complainant's testimony about the date of employee training in March 2004. He stated that Complainant was trained on March 24, 2004, but dated the training form in May rather than March until Mr. Akin corrected his transposition. (Tr. 135; RX-1, p. 3). Mr. Akin stated that the rules and regulations are maintained in the Huntsville office for accessibility by employees. (Tr. 136). Landauer radiation safety training was administered to Complainant in March 2004, February 18, 2005 and January 2006. (Tr. 138-139; RX-1, pp. 2, 4 and 6). The training course has not changed or been up-dated since Complainant began employment. (Tr. 138).

Mr. Akin also testified that dosimeter readings are maintained in a file cabinet to which employees have access. A dosimeter badge is a piece of x-ray film which absorbs radiation levels and are read periodically to determine exposure by employees for a given period of time. (Tr. 137).

He testified that the NARP radiation safety procedure manual is maintained in the Huntsville office to which employees have access and accompanies the drivers with the bills of lading in the event of emergencies. (Tr. 139-140). The manual discusses safety and safe handling of radioactive materials. (Tr. 141; RX-1, p. 18). Complainant never reported to Mr. Akin that the document was not maintained in the vehicles. (Tr. 140).

Mr. Akin testified that the first complaint made by Complainant was on September 6, 2005, at which time he complained about employee Andy Lewallen sexually harassing him. (Tr. 142-143; RX-2, p. 1). Complainant did not complain about an intentional contamination by Steve Justice. (Tr. 143).

On September 13, 2005, Complainant lodged a complaint about Mr. Justice's "out of control" behavior in a letter dated September 12, 2005. (Tr. 143; RX-2, pp. 2-5). Complainant references conduct by Steve Justice in December 2004 and also an undated intentional contamination. The letter also mentions an alleged contamination of Danny Miller and Mr. Justice's instruction to Miller to eliminate the contamination. Mr. Akin testified the letter was the first indication that Complainant was alleging intentional contamination. Mr. Akin was not aware of any reports of the incident to the Alabama Office of Radiation Control or to the NRC. (Tr. 144).

On September 15, 2005, Mr. Akin corresponded with Complainant informing him of his intended actions regarding Lewallen's conduct and the alleged intentional contamination. Mr. Akin informed Complainant that intentional contamination would be highly unethical and unprofessional, but that a small spill and contamination can occur at any time. He stated that radiation from diagnostic doses is so minute that no ill effects should occur. He informed Complainant that any alleged problems he may be having would only be coincidental. (Tr. 145; RX-2, p. 6).

On September 19, 2005, Complainant provided dates of readings of alleged contaminations from 2004 and 2005. (Tr. 147; RX-2, p. 9). On October 21, 2005, Mr. Akin received a certified letter from Complainant alleging intentional contamination by Mr. Justice on December 8, 2004. (Tr. 148; RX-2, p. 12). Mr. Akin decided that an investigation should be conducted. He reviewed all of the daily records maintained of wipe readings and the bills of lading of transported doses signed by Complainant on the dates alleged and found no indication of contamination. (Tr. 148-150, 153-154, 160; RX-3; RX-4). He also pulled and reviewed 11 bills of lading for the December 8, 2004 date of alleged intentional contamination and found no reason to believe there was any contamination. (Tr. 155-156; RX-4).

Mr. Akin also reviewed dosimeter badge readings for the dates alleged by Complainant which would indicate the amount of radiation a person had received. Complainant's badge readings for the most part were insignificant and not reportable with "minimum readings." (Tr. 157, 160; RX-5). Mr. Akin agreed that Complainant probably did not receive a dosimeter badge until April 2004 since he was not being exposed to sources of radiation and the regulations require a badge for persons

exposed to in excess of 100 milligrams in a year's time. (Tr. 157-158). He was never made aware of Complainant's concern about not receiving a dosimeter badge or lab coat. (Tr. 158).

Mr. Akin testified that he prepared an employee interview form to allow consistency in his questioning of employees. He interviewed employees in October 2005 who provided no evidence to substantiate Complainant's allegations of intentional contamination, sexual harassment or Mr. Justice "acting out of control." (Tr. 162-163; RX-2, pp. 15-21).

Mr. Akin testified that during his investigative efforts he was never made aware Complainant had made any allegations to the NRC or the Alabama Office of Radiation Control. (Tr. 163).

After completing his investigation, Mr. Akin informed Steve Justice of the allegations made by Complainant against him and asked Mr. Justice to prepare a statement of his recollection. Mr. Justice responded to Complainant's accusations of misconduct by Lewallen and the "out of control" allegations related to Mr. Justice. (Tr. 164; RX-2, pp. 13-14). Mr. Akin informed Complainant that he could find no evidence to corroborate his allegations and attempted to explain to Complainant that contamination is a normal process in nuclear pharmacies, which in no way could be harmful. He informed Complainant that if he felt he was being harmed in any way that a nuclear pharmacy probably is not the place in which he would need to continue to work. Mr. Akin denied threatening Complainant or telling him if he reported his allegations to anyone he would be fired or terminated. (Tr. 164).

Once the October 2005 investigation was completed, Mr. Akin contacted Mr. Riley of the Alabama Office of Radiation Control. Mr. Akin presented the investigation report to Mr. Riley for review. Mr. Riley informed Mr. Akin there were no further steps to be taken. (Tr. 165). Neither Mr. Riley nor Mr. Turberville informed Mr. Akin that Complainant had made allegations of intentional contamination. (Tr. 165).

Upon completion of the investigation, Mr. Akin did not take any adverse employment action against Complainant in October 2005. (Tr. 165).

In early 2006, Mr. Akin was covering the Huntsville pharmacy while Mr. Justice was on vacation. Tony Cooper, an employee, reported that the Pain Treatment Center nurses and receptionist were dissatisfied with Complainant's conduct when

delivering to the Center. He informed Cooper to tell Mr. Justice of the situation. (Tr. 166). On January 5, 2006, Mr. Justice telephoned Mr. Akin about a nurse from the Pain Treatment Center complaining about Complainant's rudeness to the receptionist and patients and requesting that he not make any further deliveries to the Pain Center. (RX-9, p. 1). Later on, the Pain Treatment Center made a complaint to Mr. Justice who stopped Complainant's deliveries to the Pain Center. Mr. Akin approved Mr. Justice's actions. (Tr. 167).

Mr. Akin testified Mr. Justice telephoned him on February 8, 2006, about reducing Complainant to part-time status since Respondent had previously lost an account on Complainant's delivery route and Complainant could no longer deliver to the Pain Center. Mr. Justice reported that Complainant had "a lot of idle time that he couldn't fill." Mr. Akin agreed that Complainant's hours should be reduced and gave Mr. Justice approval to do so. That afternoon, Complainant telephoned Mr. Akin asking if he was aware that Mr. Justice wanted to reduce his hours. Mr. Akin informed Complainant that he was and had "okayed his reduction in hours back to part-time." (Tr. 167; RX-9, pp. 3-4).

On February 9, 2006, Mr. Akin received a telephone call from Mr. Justice who related Complainant informed him that he had talked to Mr. Akin the day before and Mr. Akin knew nothing about his reduction in hours and that Mr. Justice did not have the authority to reduce his hours. Complainant also told Mr. Justice that any reduction in hours had to be across the board for all employees. Mr. Akin informed Mr. Justice "that's not the conversation I had with" Complainant. He considered Complainant was lying about their conversation and insubordinate for stating that Mr. Justice did not have the authority to reduce his hours and instructed Mr. Justice to terminate Complainant. (Tr. 169; RX-9, p. 5).

In February 2006, when he decided to terminate Complainant, Mr. Akin testified that he was not aware of any complaints made by Complainant with NRC or the Alabama Office of Radiation Control about any allegations of intentional contamination. (Tr. 170).

Upon being notified that Complainant had filed a complaint with OSHA after his termination, Respondent requested the Pain Treatment Center to provide a written statement indicating that it had in fact requested Respondent to discontinue Complainant's delivery of doses to the Pain Center. On April 25, 2006, the

Pain Center prepared a statement signed by two employees confirming the Pain Center's complaint to Mr. Justice about Complainant's "rude, disruptive and inconsiderate" conduct towards patients and staff members which "was repeated daily over several months." (Tr. 168; RX-9, p. 2).

Mr. Akin's sworn testimony before the State of Alabama Board of Appeals on June 7, 2006, regarding Complainant's unemployment compensation comports with his testimony at the instant formal hearing. (Tr. 254-255; See RX-13).

Mr. Akin identified a "Notice to Employees-Standards For Protection Against Radiation" which is posted on a bulletin board in the Huntsville facility. He stated Complainant was instructed on its contents during his initial training. (Tr. 179-180; RX-11).

Mr. Akin testified he did not inform Complainant that he had decided to terminate him on February 8, 2006, but rather had agreed only to his reduction in work hours. (Tr. 247-248). He was never made aware of any allegations by Complainant about Muscle Shoals employees not following safety procedures or any falsification of documents until the formal hearing. Complainant's letter dated September 12, 2005, was the first notice by Complainant of an intentional contamination allegation. (Tr. 248).

### **Steve Justice**

Mr. Justice is a certified nuclear pharmacist and has been practicing nuclear pharmacy with NARP for 10.5 years. (Tr. 221-222). He hired Complainant as a part-time driver. (Tr. 222).

He testified that Complainant's training commenced by initially following one of the employees on their routes during which time he would have been given hands-on training by Mr. Justice on how to package "pigs" and prepare doses for delivery. Complainant's formal training was performed by Mr. Akin, who was the radiation safety officer for Respondent, soon after Complainant began employment. (Tr. 223).

Mr. Justice explained the dosage preparation process to include, as a nuclear pharmacist, compounding the radiopharmaceuticals in a multi-dose container (a vial) which is shielded behind lead; the doses are placed in a syringe, which is the final dose container to be delivered to the facility and injected into a patient; the syringe is dropped into a "pig" and

passed to the driver for a wipe test and packaging. (Tr. 224). He further explained that, although he wears latex gloves, "parts of the dosage that's actually in the syringe" can get on his gloves by "leakage or spewage of the radioactive material outside of the vial." The material on the gloves would not be harmful to anyone who may touch the material because it is a miniscule dose. (Tr. 225).

Leakage does not happen every day or extremely often, but it does happen according to Mr. Justice. He handles materials in much more concentrated dosages than the drivers. His monthly dosimeter badge readings are higher than drivers, but he is well below the limit that would be considered harmful exposure. He has never seen a reading or been told of a reading that would be an excessive or harmful level of exposure. (Tr. 226).

Mr. Justice could not specifically recall a report by Danny Miller of a high well-count in September 2004, but explained that a well count of 21,000 or 48,000 is an abnormal number and a relative measure, "when you consider that that's such a small fraction of the actual dose that goes into the patient." He did not dispute that Danny Miller may have reported a 21,000 count in a well counter, since "it is absolutely possible," but that they would have immediately gone into the decontamination procedures. The process requires that everything stop and he and the driver are instructed to change gloves; the decontamination process begins by wiping the "pigs" down with a substance called radiac wash, a chelating agent that removes the contamination; the counting procedure begins anew and the process is repeated until the "count is less than twice background." (Tr. 228). He did not recall anyone mentioning that he had intentionally tried to contaminate Danny Miller. (Tr. 229).

Mr. Justice recalled a report by Complainant in December 2004 of a well-count reading of 48,000. He recalled that they went through the decontamination process; stopping, changing gloves and wiping the pigs with radiac wash and recounting. He recalled it took three cycles of washing to get the count down to an acceptable level. He denied that he shrugged his shoulders at Complainant's report. (Tr. 229). Complainant did not mention that he felt Mr. Justice had intentionally contaminated him. (Tr. 230). Mr. Justice did not know at any time before Complainant's termination that Complainant had made

any reports of the incident to the Office of Radiation Control or the NRC or to Mr. Akin. (Tr. 231). The next time Mr. Justice recalled hearing about the 48,000 well-count reading was in April or June 2006 when Mr. Riley and Mr. Turberville inspected the facility. (Tr. 230).

Mr. Justice denied that he instructed Complainant and other employees to falsify reports and documents nor did he ever witness employees falsifying any records. Complainant never brought to his attention that visiting Muscle Shoals employees were not following the regulations of the Huntsville pharmacy nor did he ever witness employees not following regulations. (Tr. 231-232).

Mr. Justice testified that in January 2006 he was informed by employee Tony Cooper that employees at the Tennessee Valley Pain Center were complaining about Complainant's rude and inconsiderate behavior towards the staff and patients. He called the Pain Center to confirm the complaints about Complainant. The Pain Center staff confirmed that Complainant had become a problem "to the point where they were willing to bring it to our attention." (Tr. 232, 234).

Mr. Justice testified he decided that Complainant would not be allowed to deliver to the Pain Center which in turn decreased his effective ability to perform his job. Complainant's full-time route initially included a three to four-hour driving route to three different locations. Two of the customers in Fort Payne and Boaz, Alabama had previously stopped using NARP which reduced Complainant's driving delivery route to one and one-half hours. (Tr. 233, 240). Mr. Justice testified that since Complainant could not deliver to the Pain Center, he was only effective for an hour and one-half of his seven hour shift. NARP did not need "that much staffing for the business [it] had." He discussed with Mr. Akin returning Complainant back to a part-time status for the foregoing reasons. (Tr. 234).

On February 8, 2006, Mr. Justice informed Complainant that for the foregoing reasons he was returning him to a part-time status. Complainant asked if other employees' hours would also be cut, to which Mr. Justice stated "no, that everyone else had other duties that they were able to perform and he was not currently engaged in any of those." He informed Complainant

that he would not be eligible for insurance as a part-time employee. He informed Complainant he had already discussed the issue with Mr. Akin who had approved the reduction to part-time status, but he was welcomed to call Mr. Akin to discuss the change. (Tr. 235).

On the morning of February 9, 2006, Complainant told Mr. Justice that he had talked to Mr. Akin who did not know anything about his reduction in hours and because Mr. Akin did not know anything about it, Mr. Justice did not have the authority to reduce his hours. Mr. Justice instructed Complainant to go on his delivery route and he would call Mr. Akin. Mr. Justice testified he called Mr. Akin and relayed Complainant comments and that Complainant had stated he did not have the authority to reduce his hours. Mr. Akin responded "Just go ahead and terminate him." When Complainant returned from his delivery, Mr. Justice terminated him. (Tr. 236).

Mr. Justice's sworn testimony before the Alabama State Board of Appeals on June 7, 2006, comports with his testimony in the instant formal hearing. (See RX-13, pp. 16-18).

Mr. Justice affirmed that before he terminated Complainant he had no knowledge of any allegations which Complainant made to the NRC or the Office of Radiation Control, or of any allegations relating to Muscle Shoals employees not following the same safety procedures, or allegations that he instructed Complainant or other employees to falsify reports, or that he had intentionally contaminated Complainant. (Tr. 237). His denial of knowledge of an intentional contamination of Complainant appears to be supported by his lack of comment thereon in his written response to Mr. Akin's investigation. (See RX-2, pp. 13-14).

On cross-examination, Mr. Justice confirmed that after Complainant reported a 48,000 well-count reading, they immediately went into the decontamination procedures. He also affirmed that he spoke with Complainant about Andy Lewallen's behavior, but did not recall throwing his gloves in frustration or using degrading language towards Complainant. (Tr. 238-239). Mr. Justice again denied instructing Complainant or any other employees to falsify prescription drug duplicates. (Tr. 242, 245). Mr. Justice denied that Mr. Akin informed him to terminate Complainant during their discussion on February 8, 2006, rather a reduction in hours was approved. (Tr. 241).

## David Turberville

Mr. Turberville, who testified at the formal hearing, is the Director of the Radioactive Materials Compliance Branch of the Office of Radiation Control for the State of Alabama. (Tr. 184).

He testified he first spoke with Complainant in December 2004 when Complainant inquired about what "he said was an excessive exposure" during a wipe sample. Complainant reported that the **pharmacist instructed him to wipe the sample or pig** and he did so. Mr. Turberville stated that Complainant was not making any allegations at the time, he was concerned about his exposure. (Tr. 183-184). Complainant did not report that he was intentionally contaminated. (Tr. 184).

Mr. Turberville stated a well sample count such as described by Complainant was not exposure to the person. He told Complainant to monitor his dosimeter badge results. Mr. Turberville was not concerned about the incident because it "sounded like they did the right thing." (Tr. 185). The decontamination procedure used by Complainant was the proper procedure to handle a 48,000 wipe reading. (Tr. 185). Mr. Turberville did not inform NARP or Mr. Akin of Complainant's alleged exposure to an excessive radioactive dose. (Tr. 185-186). Based on Mr. Turberville's knowledge of the alleged incident, it would not constitute a reportable contamination. (Tr. 190).

In December 2005, Complainant again telephoned Mr. Turberville making an allegation of intentional contamination as well as other allegations of Muscle Shoals employees not wearing gloves or doing proper surveys and falsifying documents. Complainant was told to put his complaints in writing which was the agency procedure/requirement to commence an investigation. At that time, Complainant did not want to file a written complaint. (Tr. 186). Mr. Turberville did not conduct an investigation since no formal complaint had been filed and did not inform NARP or Mr. Akin of the allegations. (Tr. 188).

However, on February 15, 2006, **after** his termination, Complainant filed a written complaint alleging similar allegations. Prior to his termination, Complainant never filed a written complaint with the agency. (Tr. 187).

Mr. Turberville confirmed that in October 2005 Mr. Akin communicated with Mr. Myron Riley of the Office of Radiation Control about his investigation of Complainant's complaints of intentional contamination, but did not provide a report of such investigation. Mr. Turberville's agency did not conduct an investigation of Complainant's allegations as related by Mr. Akin. (Tr. 188-189). Mr. Turberville informed Mr. Riley to instruct Mr. Akin to do an internal audit of the allegations for the next routine agency inspection since no formal written complaint had been filed by Complainant. (Tr. 190).

On October 25, 2005, Mr. Riley conducted a routine inspection of the NARP facilities and its organization and administrative controls, procurement and use of radioactive materials, waste disposal and employee radiation exposure records, area surveys and guidance to employees concerning radiation safety, to include training. It was concluded that the radioactive material program was in compliance with the State Radiation Control Code. (Tr. 192-193; CX-20; RX-7, p. 1).

In June 29, 2006, an investigation of Complainant's allegations was conducted by Mr. Riley who reviewed the various reports and determined that there was nothing to substantiate elevated radiation levels. (Tr. 191; CX-3; RX-7). On July 5, 2006, the Office of Radiation Control issued a formal summary of investigation in which a determination was made of Complainant's allegations of intentional contamination by Steve Justice of (1) Complainant and (2) Danny Miller; (3) falsification of vehicle reports, wipe readings and packaging documents, etc.; (4) Muscle Shoals employees failing to wear latex gloves or to wipe meter surveys; and (5) the termination of Complainant for reporting intentional contamination and falsified documents. Based on the interviews and review of documentation, the agency could not substantiate the allegations against NARP. (Tr. 193; RX-7, pp. 2-3). At no time before Complainant's termination had Mr. Turberville or his agency informed NARP or Mr. Akin about any of Complainant's various allegations. (Tr. 194).

Routine unannounced radioactive material inspections are conducted by the Alabama Office of Radiation Control of Respondent's pharmacy facilities. An inspection on September 28, 2004, revealed that all areas inspected were in compliance including training, personnel monitoring, proper postings and notices to employees concerning emergency procedures, radiations areas, and proper documentation for radioactive materials and its transportation. Similar results were achieved by inspection on October 24, 2005 and November 7, 2006. (CX-23).

**Tony Cooper**

Tony Cooper was employed by NARP as a driver in 2004 at the Muscle Shoals facility and in 2006 at the Huntsville pharmacy delivering pharmaceutical doses to various customers. (Tr. 198-199). When initially hired, he received training from Mr. Akin about handling radioactive materials. (Tr. 199).

Mr. Cooper testified that he received a complaint from a supervisor, Carol Weston, at the Tennessee Valley Pain Treatment Center about Complainant's rudeness to patients, which "had been going on for some time," who asked that Complainant not return to the Pain Center. (Tr. 200-201). Mr. Cooper reported the complaint to Mr. Justice. (Tr. 201).

Mr. Cooper testified that he did not witness Mr. Justice act in any manner toward Complainant that he would consider to be inappropriate, harassing or intimidating. (Tr. 201-202). He did not witness any employees from Muscle Shoals not wearing gloves or not performing wipe readings. When he worked at Muscle Shoals he wore gloves and performed wipe readings. He was never instructed by Mr. Justice or Mr. Akin or anyone at NARP to falsify prescriptions records, driver's reports or any other reports. (Tr. 202).

Mr. Cooper testified that, through his training, he was aware of his rights to contact the NRC or Office of Radiation Control about pharmacy issues/problems. (Tr. 202-203). Complainant never informed Mr. Cooper that he was intentionally contaminated at the pharmacy or instructed to falsify records/reports. (Tr. 203).

On cross-examination, Mr. Cooper confirmed that the deliveries to the Pain Center were walking deliveries that took 15-20 minutes and which varied in number daily from two to eight or more. (Tr. 205). He also confirmed that if an employee was not able to delivery to the Pain Center "there would not be much to do." (Tr. 208).

**Priscella Underwood**

Ms. Underwood is presently employed as a realtor and has no connection with NARP. (Tr. 211). She formerly was a registered pharmacy technician for NARP. She denied that she was

instructed by Mr. Justice, Mr. Akin or anyone at NARP to falsify documents. She did not observe any instances of Muscle Shoals employees not using procedures taught at the Huntsville pharmacy. (Tr. 210).

When she began at NARP, she received training on how to handle pigs and capsules from Mr. Akin and was aware of the safety procedure manual. (Tr. 212).

She testified that she did not witness any instances which she would consider out of line in Mr. Justice's actions towards Complainant or any violation of any rules. She stated she was unaware of a complaint made against Complainant by the Pain Center, but knew "some of the girls" did not prefer Complainant "coming over there," because of his rudeness to patients. (Tr. 213-214).

### **Andy Lewallen**

Mr. Lewallen began working for NARP in December 2003 as a driver. He had previously worked for another nuclear pharmacy. He received training upon being hired and "shadowed" another driver's route. (Tr. 215-216). He was instructed on decontamination procedures by Mr. Justice. (Tr. 216).

He testified that he did not witness any intentional contamination of Complainant by Mr. Justice or Mr. Akin or any conduct which he would consider inappropriate, out of line or harassing. (Tr. 216-217). He denied that he was instructed by Mr. Justice or anyone else at NARP to falsify reports or records. (Tr. 217). He did not witness any Muscle Shoals employees not following regulations or safety procedures and was not aware of Complainant's allegations that they were not following procedures. (Tr. 218).

Mr. Lewallen acknowledged that he apologized to Complainant for his behavior after Mr. Akin contacted him on September 8, 2005. He denied ever falsifying any documents, reports or packing slips at NARP. (Tr. 219-220).

### **Danny Miller**

Mr. Miller worked at the NARP Huntsville pharmacy in the Fall 2004 as a driver. (Tr. 277). Before he began handling radioactive materials he received training. He worked with Complainant at NARP. (Tr. 278).

Mr. Miller recalled a high reading from wiping down a pig, but could not recall the reading count. He did not believe that Mr. Justice had intentionally contaminated him with a high dosage of radiation. Complainant informed Mr. Miller that he thought Mr. Justice was trying to intentionally contaminate or poison them. To his knowledge, Complainant did not report his concern to Mr. Justice. (Tr. 279). Mr. Miller did not believe Mr. Justice was attempting to do so and thought it would be out of character for Mr. Justice. (Tr. 280).

Mr. Miller denied that he had stomach pain or problems after exposure to a high dosage of radiation and never informed Complainant that he believed he had been contaminated or poisoned with radiation. (Tr. 280). He never witnessed any harassment or behavior which he considered out of line by Mr. Justice toward Complainant at any time during his employment. He did not witness a 48,000 well-count reading received by Complainant. He was never instructed by Mr. Justice to falsify or alter any documents prepared during the course of his employment at NARP. (Tr. 281).

On cross-examination, Mr. Miller affirmed that when he received a high reading he was instructed by Mr. Justice about how to decontaminate the area. (Tr. 283). He could not recall whether there were any postings of decontamination procedures. (Tr. 283-284). Mr. Miller never observed any employees from the Muscle Shoals facility not following safety procedures or regulations when they worked at the Huntsville pharmacy. He did not recall Complainant making any complaints about Muscle Shoals employees not following procedures. (Tr. 285).

### **Gilbert F. Stone**

Mr. Stone is President and CEO of Muscle Shoals Rad Physics, Incorporated, which is a consulting company to medical facilities, imaging centers, hospitals and radiopharmacies. (Tr. 260). He earned a Master's degree from Harvard University in Industrial Hygiene and Radiological Health in 1968. (Tr. 258).

Mr. Stone's vocational history includes employment with the Oak Ridge National Laboratory as a physicist, Health Physicist and Hygiene Manager for the Tennessee Valley Authority (TVA) and as the Director of the Division of Occupational Health and Safety for the TVA. (Tr. 258-259).

As a consultant, he assisted NARP at the commencement of its business with licensing and working with the Alabama Office of Radiation Control. He had input into the instruction and training materials for drivers and nuclear pharmacists and other employees who would be handling radioactive materials. He would also periodically review such materials for NARP to assure compliance with applicable regulations. (Tr. 260-261). He visits the NARP pharmacies weekly and also reviews the dosimeter radiation badge and DOT badge program and records to insure that NARP is operating consistent with the conditions of its license. (Tr. 261).

Mr. Stone observed that NARP's training policies and procedures are excellent as is its records maintenance program. (Tr. 262). He reviewed and investigated Complainant's complaint allegations and provided OSHA with a summary of his findings and conclusions. (Tr. 262; RX-8). His investigation covered the safe use and handling of radioactive materials at both pharmacy facilities and confirmed NARP's proper licenses and requirements to operate its business. He opined that Complainant's allegation of exposure to a 48,000 well-count wipe reading would not have been harmful and was not a significant event, but is typical of operations in the pharmaceutical industry. (Tr. 263-264).

He calibrates all radiation detection survey meters and well-counters for NARP. (Tr. 264). He has never observed any unsafe operations of the kind described by Complainant. He reviewed Complainant's dosimeter badge readings and did not find any harmful or unhealthy exposure to radiation. He concluded that NARP's training program was excellent. (Tr. 266).

On cross-examination, Mr. Stone confirmed that it is very important to wear a dosimeter badge if an employee is working in a radiation environment. Packaging nuclear medicine would be a radioactive environment. However, wearing a lab coat is a matter of choice. He stated DOT and Landauer safety training should be received before an employee performs any duties involving handling radioactive materials. (Tr. 268). Mr. Stone testified that he would not expect any kind of illness from an exposure to a 48,000 well-count wipe reading because it "is so small in terms of magnitude it would not be considered harmful." (Tr. 269).

### III. DISCUSSION

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

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

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

442 F.2d at 52. It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

#### **A. Legal Analysis of a Whistleblower Complaint**

The employee protection provisions of the Energy Reorganization Act prohibit an employer from taking adverse employment action against an employee because the employee has engaged in protected activity. 42 U.S.C. § 5851. The

undersigned must determine whether Complainant has proven, by a preponderance of the evidence, he engaged in protected activity under the ERA, that Respondent knew about this activity and took adverse action against the Complainant, and that Complainant's ERA-protected activity was a contributing factor in the adverse personnel action that was taken. 42 U.S.C. § 5851(b)(3)(A); Kester v. Carolina Power & Light Co., Case No. 2000-ERA-31 (ARB Sept. 30, 2003); Paynes v. Gulf States Utilities Co., Case No. 1993-ERA-47 (ARB Aug. 31, 1999); Dysert v. Secretary of Labor, 105 F.3d 607 (11th Cir. 1997).

If Complainant meets this burden, Respondent must demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. Kester, supra. Examining Respondent's burden of proof is typically referred to as "dual motive" analysis, and it need only be reached if the complainant proves that Respondent fired him, in part, because of his protected activity. Id.

The undersigned must apply the framework of burdens developed for pretext analysis under Title VII of the Civil Rights Act of 1964 and other employment discrimination laws. See Overall v. TVA, Case No. 1997-ERA-53, slip op. @ 12 (ARB Apr. 30, 2001) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 450 U.S. 502 (1993); and Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000), rev'g 197 F.3d 688 (5th Cir. 1999)).

Under this framework, a complainant must first create an inference of unlawful discrimination by establishing a **prima facie** case of discrimination. Id. (citing Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926, 933-934 (11th Cir. 1995)). The burden then shifts to the employer to produce evidence such that a reasonable adjudicator would accept that it took adverse action for a legitimate, nondiscriminatory reason. Id. If the employer is successful, the inference of discrimination disappears and Complainant then assumes the burden of proving, by a preponderance of the evidence, that the employer's proffered reasons were not its true reason, but is a pretext for discrimination. Id. at 13; Overall, supra, slip op. @ 13, citing Reeves v. Sanderson Plumbing, 530 U.S. 133, 147-148 (2000).

Complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor; or that Respondent's reason, while true, is only one of the reasons for its conduct, and that another reason was Complainant's protected activity (see Klopfenstein v. PCC Flow Techs, Holdings, Inc., Case No. 2004-SOX-1, 2006 WL 1516650 @ 13 (ARB May 31, 2006), discussing contributing factor test under SOX and citing Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5<sup>th</sup> Cir. 2004); or by showing that the proffered explanation is not worthy of credence. 42 U.S.C. § 5851(b)(3)(C). The ultimate burden of persuasion that Respondent intentionally discriminated against Complainant remains at all times with Complainant. St. Mary's Honor Center v. Hicks, 509 U.S. at 502.

Since this case was fully tried on the merits, it is not necessary to determine whether Complainant presented a **prima facie** case. See Carroll v. Bechtel Power Corp., Case No. 1991-ERA-46, slip op. @ 11, n.9 (Sec'y Feb. 15, 1995), aff'd sub nom Bechtel Corp. v. U.S. Dep't. of Labor, 78 F.3d 352 (8th Cir. 1996); James v. Ketchikan Pulp Co., Case No. 1994-WPC-4 (Sec'y Mar. 15, 1996); Creekmore v. ARB Power Systems Energy Service, Inc., Case No. 1993-ERA-24 (Dep. Sec'y Feb. 14, 1996).

Once Respondent has produced evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, by burden of production, it no longer serves any analytical purpose to answer the question whether Complainant presented a **prima facie** case.<sup>3</sup>

Instead the relevant inquiry is whether Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. See Reynolds v. Northeast Nuclear Energy Co., Case No. 1994-ERA-47 @ 2 (ARB Mar. 31, 1997); Boschuk v. J&L Testing, Inc., Case No. 1996-ERA-16 @ 3, n.1 (ARB Sept. 23, 1997); Eiff v. Entergy Operations, Inc., Case No. 1996-ERA 42

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<sup>3</sup> Upon articulating some legitimate, nondiscriminatory reason for the adverse employment action or "explaining what it has done," Respondent satisfies its burden, which is only a burden of production, not persuasion. Texas Dept. of Community Affairs v. Burdine, supra at 253, 256-257. The Respondent must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse employment action. The explanation provided must be legally sufficient to justify a judgment for the defendant. Id. at 255, 1094. Respondent does not carry the burden of persuading the court that it had convincing, objective reasons for the adverse employment action. Id. at 257, 1095.

(ARB Oct. 3, 1997). If Complainant does not prevail by a preponderance of the evidence, it matters not at all whether he presented a **prima facie** case.

In the present case, the undersigned finds that Respondent has articulated a legitimate, nondiscriminatory reason for its actions, based on Mr. Akin's credible testimony that he ordered the termination of Complainant for his misrepresentation of their conversation on February 8, 2006, and Complainant's insubordinate comments uttered to Mr. Justice regarding the latter's lack of authority as pharmacy manager. Zinn v. University of Missouri, Case No. 1993-ERA-34 @ 4 (Sec'y, Jan. 18, 1996).

Nevertheless, since Complainant is proceeding without counsel, the undersigned will proceed to examine whether Complainant engaged in protected activity, known to Respondent, and whether his protected activity was a contributing factor to Respondent's adverse personnel action against him.

#### **B. Complainant's Protected Activity and Respondent's Knowledge**

As previously noted, Complainant asserts that he engaged in a myriad of activities which constitute protected activity. He claims various safety and health violations existed while he was employed by Respondent.

Complainant alleges that on December 8, **2004**, he was intentionally contaminated by Nuclear Pharmacist Justice. The manner in which an "intentional" act was committed against Complainant is not explicated in the record. Complainant contacted NRC representative DeMiranda and Mr. Turberville on December 8, 2004, concerning what he regarded as an exposure to contamination, but did not file an official complaint. Although he claims that both officials agreed that his alleged exposure was "severe," Mr. Turberville disputed the severity of the exposure.

Complainant also complains that on December 8, 2004, Mr. Justice did not follow NRC regulations and did not provide any instructions to him regarding decontamination. Mr. Justice disputes Complainant's testimony and recalls decontaminating the pigs and capsules with radiac wash. Complainant did not raise any issue of intentional contamination by or with Mr. Justice.

Complainant followed Mr. Akin's prior training and decontaminated the pigs. Although he did not record the "severe" radiation reading, it is noted no dosimeter reading confirms exposure to radiation at that level.

On December 31, 2004, Complainant claims Mr. Akin informed him that a "3,000" reading was severe and that a 48,000 well-count reading would require the pigs be left alone for a period of time to decontaminate on their own. Without further explanation, Complainant believed that Mr. Akin knew he had contacted the NRC and Mr. Turberville about his exposure and he would eventually be terminated.

However, Complainant did not report his alleged 48,000 well-count exposure to Mr. Akin until September 12, 2005. Mr. Akin conducted an internal investigation on October 25, 2005, and concluded that Complainant's allegations of intentional contamination were unsupported by any radiation readings or dosimeter readings. He informed Complainant on September 15, 2005, that any alleged exposure of 48,000 was not harmful since the pharmacy prepared diagnostic doses and that any spillage would only be a fraction of the dose and not harmful.

On October 4, 2005, Complainant contends he spoke with Mr. Riley about his intentional contamination, but acknowledges that he did not file a written complaint. Complainant also contacted Mr. Turberville on November 29, 2005, who could not confirm receipt of an investigative report from Mr. Akin. Without further explanation or foundation, Complainant testified that he believed Mr. Turberville "misled" him about the investigation and stopped the investigation into his allegations.

On September 12, 2005, Complainant also claims to have reported to Mr. Akin that employees were not taking radiation readings and were falsifying documents and reports. He reiterated these complaints on October 25, 2005, when he met with Mr. Akin. The internal investigation did not substantiate Complainant's allegations.

It is uncontradicted that Complainant did not report to Mr. Akin any allegations involving the Muscle Shoals employees failing to follow procedures. Although Complainant raised issues in his formal complaint or at formal hearing about a lack of written employee policies/procedures on contamination and decontamination, or for filing grievances or appeals or making available radiation safety manuals or procedures to employees, there is not record evidence that he ever complained to Mr. Akin

or Respondent of such alleged deficiencies while employed by Respondent. Mr. Akin acknowledged that Complainant may not have had a dosimeter badge for the first few weeks of his employment, because he was not being exposed to harmful radiation readings, he credibly denied that Complainant ever complained about not being issued a dosimeter badge from March 3, 2004 to April 14, 2004, or a lab coat.

Complainant's multiple complaints about a lack of training are belied by Respondent's training records and the testimony of co-employees and, therefore, cannot be construed to be reasonably based. Contrary to Complainant's allegations, employees Lewallen, Miller, Cooper and Underwood denied being instructed to falsify documents or reports by Mr. Justice and failed to corroborate any of Complainant's allegations about training, safety or health violations.

Employee Danny Miller credibly disagreed with and contradicted Complainant that Mr. Justice was trying to intentionally contaminate him and Complainant. He denied suffering any ill effects from any contamination episode and confirmed that he was instructed by Mr. Justice to decontaminate pigs when necessary.

Respondent contends that Complainant's concerns of intentional contamination and/or alleged safety violations were not reasonable or credible. Respondent argues that these alleged complaints do not constitute protected activity. Moreover, Respondent contends that it was not aware of any complaints allegedly made to any outside entity or agency prior to Complainant's termination from employment. In essence, Respondent argues that any complaints arguably made were too attenuated to constitute notice of a potential nuclear safety violation and that it was not aware of Complainant's contact with the NRC or the Alabama Office of Radiation Control.

The ERA protects activities that further the purpose of the statute, including notifying the employer of an alleged violation of the Act, refusing to engage in any practice made unlawful under the Act, testifying regarding any provision of the Act, commencing any proceeding under the Act, and testifying or participating in any such proceeding. 42 U.S.C. § 5851(a). The Administrative Review Board (herein the ARB) has stated that a safety concern may be expressed orally or in writing and may be in the form of an **internal** and informal complaint. Bechtel Construction, Inc., 50 F.3d at 931 (the U. S. Eleventh Circuit Court of Appeals joined the majority of other circuits holding

that **internal complaints may constitute protected activity under the ERA**); see also Willy v. Administrative Review Board, USDOL, Case No. 2003-SOX-9, No. 04-60347 (6<sup>th</sup> Cir. 2005). The **concern must be specific** to the extent that it relates to a practice, condition, directive or occurrence. Williams v. Mason & Hanger Corp., Case Nos. 1997-ERA-14, 1997-ERA-18, 1997-ERA-19, 1997-ERA-20, 1997-ERA-21 and 1997-ERA-22, slip op. @ 18 (ARB Nov. 13, 2002).

Furthermore, the whistleblower must **reasonably believe** that compliance with the applicable nuclear safety standard is in question. The whistleblower need not cite a particular statutory or regulatory provision or safety procedure to establish a violation of such standard. Id. However, the employee's complaints must implicate safety definitively and specifically. See Bechtel Construction, 50 F.3d 926 (finding that a carpenter's questioning of his foreman about the procedures for protecting radioactive tools was protected activity because he raised particular, repeated concerns about this safety procedure that were tantamount to a complaint); see also Am. Nuclear Resources v. U.S. Dept. of Labor, 134 F.3d 1292, 1295 (6th Cir. 1998). Additionally, a whistleblower must show that an employee with authority to take adverse action **knew** of the protected activity. See Mosley v. Carolina Power & Light Co., Case No. 1994-ERA-23, slip op. @ n.5 (ARB Aug. 23, 1996). An employee with knowledge who has "substantial input" into the decision to take adverse action against the complainant is sufficient to demonstrate that the employer was aware of the protected activity. Id. An employee with "substantial input" includes an employee who reports the alleged basis for the adverse action to the decision maker. Kester, supra, slip op. @ 4.

A complainant is not required to prove an actual violation of the underlying statute. Crosier v. Westinghouse Hanford, Case No. 1992-CAA-3 @ 4 (Sec'y Jan. 12, 1994). Instead, a complainant's complaint must be made in good faith and "grounded in conditions constituting reasonably perceived violations of the environmental acts." Crosier @ 4; Johnson v. Old Dominion Security, Case No. 86-CAA-3 (Sec'y May 29, 1991).

Initially, it must be noted that Complainant lodged no formal external complaints to the NRC or the Alabama Office of Radiation Control. Based on the credible testimony of Mr. Turberville, I find Respondent had no knowledge of any complaints, arguably constituting protected activity, which Complainant may have made with either agency before his

termination. Moreover, the record does not support a rational conclusion that Complainant could have espoused a reasonable belief that Mr. Akin had knowledge of his complaints to the NRC or the Alabama Office of Radiation Control.

However, I find and conclude that Complainant voiced internal complaints to Mr. Akin on September 12, 2005 and October 25, 2005. Nonetheless, I further find and conclude that such complaints did not rationally constitute protected activity since they were not reasonably perceived. My findings are based on the following analysis.

The credible record evidence does not support or substantiate a finding that Muscle Shoals employees failed to follow safety procedures while working in the Huntsville pharmacy; nor that specific employees were instructed to falsify documents and reports by Mr. Justice; nor that employees failed to take radiation readings; and that Complainant was not provided adequate or any training. Moreover, Complainant did not show that he made complaints while employed by Respondent about not having a dosimeter badge or a lab coat for a period of his employment or that no safety manuals or posted employee policies or procedures for decontamination or for filing grievances or appeals were available.

Furthermore, no specific nuclear safety violations were articulated by Complainant nor substantiated by the record. The employees' alleged failures to follow procedures, perform radiation wipe readings or wear gloves were all refuted by Respondent and Complainant's co-employees. Thus, Complainant's testimony in this regard, which was refuted by Mr. Justice, is uncorroborated.

Of all of the complaints advanced by Complainant to Respondent while employed and alleged in his formal complaint or at formal hearing, only his alleged contamination charge, in part, was substantiated. However, I find that the record does not support a conclusion that Complainant was intentionally contaminated by Mr. Justice. An intentional act is one by design that is calculated, deliberate, prearranged, predetermined, premeditated and purposeful. The record is completely devoid of any evidence that Mr. Justice engaged in any act to purposefully or intentionally contaminate Complainant and I so find. I further find that Complainant's belief that he was intentionally contaminated is not rationally or reasonably perceived.

Complainant may have been exposed to a well-count reading of 48,000 on December 8, 2004, however, his dosimeter badge does not reflect an abnormally high reading exposure, but rather only "minimal" readings during the time period in question. Despite his testimony to the contrary, he followed his training and decontaminated the pig and spillage area, which Mr. Turberville considered properly handled. Complainant was not instructed to seek medical assistance for his exposure, nor did he do so. He was informed by Mr. Turberville and Mr. Akin testified that Complainant's exposure was not harmful or severe. Given the foregoing, I find and conclude that Complainant could not have rationally perceived a reasonable belief that he was intentionally or coincidentally contaminated and for that reason his complaint does not constitute protected activity within the meaning of the ERA. Furthermore, the alleged contamination was properly contained and handled according to Mr. Turberville and thus would not constitute a nuclear safety violation.

In sum, Complainant has not established that he had a reasonable belief that safety and health violations existed at Respondent's pharmacy in Huntsville during his employment, that documents and reports were being falsified, that proper decontamination procedures were not being followed or that he was intentionally contaminated by nuclear pharmacist Justice. As such, Complainant has not met his burden to prove that he engaged in protected activity within the meaning of the ERA since his allegations were not reasonably based and/or supported by credible evidence.

### **C. Adverse employment action**

It is axiomatic that in the absence of a finding of ERA protected activity Complainant cannot establish that his activity was a contributing factor in any adverse action taken against him by Respondent.

Assuming, **arguendo**, that Complainant engaged in protected activity as alleged, which the record totally refutes, the burden then shifts to Respondent to produce evidence that it took adverse action against Complainant for a legitimate, nondiscriminatory reason. As previously noted, I find and conclude that Respondent produced evidence that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason based on the following analysis.

The record reflects Complainant first reported his alleged harmful exposure or contamination from radiation to Mr. Justice on December 8, 2004. Complainant did not report the incident as an intentional contamination, but as a high well-count reading. On September 12, 2005, almost one year later, he reported to Mr. Akin for the first time alleged safety and health violations and that Mr. Justice had intentionally contaminated him with radioactive materials in December 2004. Complainant was terminated from employment on February 9, 2006, over one year from the alleged contamination and five months after reporting alleged safety and health violations and the contamination incident as an intentional act by Mr. Justice.

The record reflects that Mr. Akin took Complainant's allegations seriously and conducted an internal investigation of the concerns in October 2005. He interviewed the Huntsville pharmacy employees, examined daily radiation wipe readings, bills of lading and delivery reports completed by Complainant and Complainant's dosimeter badge readings for the time period in question. He determined that no harmful exposure to Complainant could be documented in view of the minute quantity of contamination and that his investigation did not substantiate Complainant's safety and health allegations. Mr. Akin testified that he reported Complainant's allegations to Mr. Riley of the Alabama Office of Radiation Control and presented his investigative reports for review. Mr. Akin was informed by the Alabama Office of Radiation Control that no further steps needed to be taken. A subsequent inspection by Mr. Riley of NARP's pharmacy in Huntsville in October 2005 confirmed that its facilities, organization, administrative controls, procurement and use of radioactive materials, employee radiation exposure records and radiation safety and training were in compliance with the Alabama State code.

Notwithstanding the unsupported complaints and allegations, Respondent took no disciplinary action against Complainant in September or October 2005.

In January 2006, the Tennessee Pain Treatment Center lodged a complaint against Complainant that he was rude and exhibited inconsiderate behavior to staff and patients and the Center did not want him delivering to the Center. Mr. Justice informed Complainant that he would no longer be delivering to the Pain Center because of the complaints. The record establishes that in January 2006, Complainant was being paid for seven-hour daily shifts. However, his four-hour delivery route to three different customers had previously dwindled to only one customer

which consumed only one to one and one-half hours of delivery time. Complainant does not dispute the loss of driving time, but claims the loss of customers occurred earlier, which may be a fact, but creates a distinction without a difference. Needless to say, he does not dispute that he was driving for only one and one-half hours daily and delivering to the Pain Center when required in January 2006.

During the period from January 6, 2006 to February 8, 2006, Mr. Justice determined that Complainant was ineffective to the pharmacy operations if he could not deliver to the Pain Center, since he was only working one to one and one-half hours of his seven hour shift. He further determined that he did not need "that much staffing" and discussed returning Complainant to a part-time status with Mr. Akin who agreed with the assessment on February 8, 2006. Mr. Justice informed Complainant on February 8, 2006, that his hours would be reduced to part-time status. I find that Respondent's action in reducing Complainant's hours was based on a legitimate and non-discriminatory business decision.

What transpired thereafter is subject to some dispute, however I find the record supports the testimony of Mr. Justice, who is corroborated by Mr. Akin, that Complainant spoke with Mr. Akin about the hours-reduction decision and related to Mr. Justice that Mr. Akin knew nothing about the reduction and hence Mr. Justice did not have the authority to reduce his hours. Mr. Akin regarded Complainant's remarks to be a misrepresentation of his discussion with Complainant and insubordination to Mr. Justice as pharmacy manager. Mr. Akin instructed Mr. Justice to terminate Complainant. Complainant did not present any witnesses who corroborated his version of the events. I further find that Respondent articulated legitimate and non-discriminatory business reasons in support of its termination of Complainant, that is, his misrepresentation of his discussion with Mr. Akin and insubordination toward Mr. Justice, his pharmacy manager.<sup>4</sup>

Moreover, the Administrative Review Board has recognized that even an employee who engages in protected activity, but who is insubordinate or oversteps the bounds of his conduct, is not automatically absolved from the misbehavior and may be disciplined by the employer. See Sayre v. VECO Alaska, Inc.,

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<sup>4</sup> Contrary to Complainant's argument, I am not guided by a state unemployment board's decision regarding its concept of "insubordination" which is neither controlling nor persuasive.

Case No. 2000-CAA-7 (ARB May 31, 2005); Abraham v. Lawnwood Regional Medical Center, Case No. 1996-ERA-13 (ARB Nov. 25, 1997). Thus, Complainant's insubordinate remarks to Mr. Justice are not protected activity under the ERA Act.

As a matter of law, proximity in time between the alleged protected activity and the adverse employment action is persuasive evidence of causation sufficient to justify an inference of retaliatory motive. Bechtel, supra, at 934; Couty v. U.S. Dept. of Labor, Sec'y Dole, 886 F.2d 147, 148 (8th Cir. 1989) (Complainant was discharged approximately thirty days after he engaged in protected activity); White v. The Osage Tribal Council, Case No. 95-SDW-1 @ 4 (ARB Aug. 8, 1997). Conversely, a passage of time diminishes the inference of causation between protected activity and the alleged discrimination. Here, five months transpired from Complainant's report of alleged safety and health violations and an alleged intentional contamination by Mr. Justice, which I find detracts from a finding of causation supporting an inference of discriminatory motive. A passage of five months from the time of Complainant's alleged protected activity convinces the undersigned that the timing of the alleged retaliation and termination is too remote from Complainant's alleged protected activity to establish any causal connection between such activity and the adverse action. See Bonanno v. Stone & Webster Engineering Corp., Case Nos. 1995-ERA-54 and 1996-ERA-7 (ARB Dec.12, 1996).

Furthermore, in whistleblower cases, when an intervening event reasonably could have caused the adverse action, as here, the inference of causation is compromised. Tracanna v. Arctic Slope Inspection Service, Case No. 1997-WPC-1 (ARB July 31, 2001). I find that Complainant's misrepresentation of his conversation with Mr. Akin on February 8, 2006, and his insubordinate remark about Mr. Justice's authority were such intervening events of significant weight for which Respondent could have terminated Complainant for legitimate reasons. Thus, I find that a logical inference of a causal relationship between the alleged protected activity and the adverse action no longer exists. See Anderson v. Jaro Transportation Services and McGowan Excavating, Inc., Case Nos. 2004-STA-2 and 2004-STA-3 (ARB Nov. 30, 2005).

This conclusion is buttressed by the record evidence which is devoid of any animus on the part of Respondent's representatives towards Complainant. In fact, Respondent permitted Complainant to work one and one-half hours of his seven hour shifts for one month after the Pain Center complaint

before determining his hours should be reduced. The ARB has considered a supervisor's statement that he would prefer not to supervise an employee who had engaged in protected activities to be admitted animus against the employee. See Trimmer v. Los Alamos National Laboratory, Case Nos. 1993-CAA-9 and 1993-ERA-55 (ARB May 8, 1997). The U.S. Eleventh Circuit Court of Appeals supported a finding that a manager's remark that he wanted the complainant transferred because he was a "troublemaker" and was like "Moses standing at the Red Sea" was direct evidence of animus. Stone & Webster Engineering Co. v. Herman, 115 F.3d 1568, 1574 (11<sup>th</sup> Cir. 1997). In the foregoing cases, the employer made an explicit connection between the adverse action and the complainant's activities. In the present case, neither Mr. Akin nor Mr. Justice made a declaration showing they sought to retaliate against Complainant for his alleged protected activities.

Based on the evidence of record as a whole, I find that Complainant has not presented sufficient evidence to meet his burden of proving, by a preponderance of the evidence, that his alleged protected activity was a contributing factor in the adverse action taken against him by Respondent. The undersigned emphasizes that an employer may terminate an employee for a good or bad reason under federal law, so long as there is not discrimination on the employer's part. The undersigned is charged only with determining whether Respondent was motivated by discrimination, and not whether the action was prudent or fair. See Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1361 (11<sup>th</sup> Cir. 1999). In the present case, I find that Complainant did not present direct or circumstantial evidence of discrimination.<sup>5</sup>

Assuming, **arguendo**, that Complainant established his alleged protected activity was a contributing factor to his adverse action, which Respondent has rebutted by a showing of a legitimate, nondiscriminatory reason for its actions, Complainant must then assume the burden of proving, by a preponderance of the evidence, that Respondent's proffered reasons were not the true reason, but a pretext for discrimination. Complainant may demonstrate a pretext by

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<sup>5</sup> Complainant's complaints of alleged sexual and age discrimination are not protected by the ERA Act and are beyond my statutory jurisdiction to remedy and, accordingly, and not treated herein.

showing: (1) discrimination was more likely the motivating factor; (2) Respondent's reason, while true, is only one of the reasons for its conduct and another is his protected activity; or (3) by showing that the proffered explanation is not worthy of credence. Having evaluated the record as a whole, I find Complainant has failed to demonstrate, by a preponderance of the evidence, that Respondent's proffered reasons for his termination were a pretext.

#### **D. Conclusion and Recommended Order**

In conclusion, I find Complainant has not sustained his burden of persuasion by a preponderance of evidence that he engaged in protected activity for which Respondent had knowledge, and that Respondent terminated his employment in retaliation for Complainant's protected activity. Accordingly, I find and conclude that Complainant is not entitled to relief under the Act because no adverse employment action was taken by Respondent in retaliation for his alleged protected activity. Based on the foregoing, Complainant's complaint must be dismissed.

Accordingly, the undersigned finds and concludes that Complainant's complaint be **DISMISSED**.

**ORDERED** this 10th day of January 2008, at Covington, Louisiana.

**A**

LEE J. ROMERO, JR.  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:**

This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Ave., NW., Washington, DC 20210.

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 the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. 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, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).