



Issue Date: 03 March 2010

Case No. 2006-ERA-1

IN THE MATTER OF:

**LARRY DAN PRINCE,
Complainant**

vs.

**WESTINGHOUSE SAVANNAH RIVER COMPANY,
Respondent**

RECOMMENDED DECISION AND ORDER

PROCEDURAL STATUS

This proceeding arises under the “Whistleblower” employee protection provisions of the Energy Reorganization Act (ERA),¹ the Toxic Substances Control Act (TSCA),² The Clean Air Act (CAA),³ the Solid Waste Disposal Act (SWDA),⁴ and the regulations promulgated pursuant thereto.⁵ It has an extensive and complex procedural history.

The case involves a claim of unlawful discrimination made by Complainant, a former employee of Respondent. On 20 May 05, Complainant filed a timely complaint with the Occupational Health and Safety Administration (OSHA), alleging violations of the Energy Reorganization Act, the Clean Air Act, the Solid Waste Disposal Act and the Toxic Substances Control Act at Westinghouse Savannah River Company (WSRC). Complainant alleged that he was laid off by Respondent in retaliation for raising safety concerns while working as a quality engineer at the nuclear research facility. Specifically, Complainant alleged that after identifying and reporting deficiencies in the pressure protection program and gas storage cylinders, he began losing assignments and responsibilities, and ultimately was involuntarily separated from employment while the company was undergoing a reduction in force (RIF).

¹ 42 U.S.C. § 5851 (2010).

² 15 U.S.C. § 2622 (2010).

³ 42 U.S.C. § 7622 (2010).

⁴ 42 U.S.C. § 6971 (2010).

⁵ 25 C.F.R. Part 42.

On 8 Nov 05, OSHA completed its investigation, finding Complainant had engaged in protected activity and suffered adverse action. However, it found no evidence to support Complainant's allegations that the adverse action was in reprisal for raising safety concerns at the facility and therefore determined that the claim lacked merit. On 12 Nov 05, Complainant appealed the OSHA findings and on 17 Nov 05, the case was assigned to Administrative Law Judge Richard Mills, who set the matter for a formal hearing on 14 Feb 06 in Augusta, Georgia. Due to extensive evidentiary and discovery issues and at the request of the parties, the hearing was continued to 17 Jul 06. An additional continuance was granted to accommodate Complainant's counsel and the hearing was re-set for 18 Sept 06.

The case was reassigned to me and on 7 Aug 06 the parties participated in a conference call. The parties agreed to postpone the formal hearing again in order to allow for mediation. Complainant was directed to file a formal complaint for the purposes of identifying the issues for the formal hearing. He filed his complaint on 14 Dec 06.

The complaint initially explains that from 2002 to 2005, Complainant repeatedly reported public safety issues to his superiors. The complaint then specifically identifies communications he made to various superiors and other officials of Respondent about problems with the pressure protection control system and gas storage cylinders. The complaint further alleges that Complainant was denied various assignments and opportunities to make him more competitive for promotion. It states that Complainant was given low performance ratings, harassed, set up to fail, and ultimately terminated as a part of a reduction in force (RIF) because of his protected activities concerning the pressure control system, corroding gas cylinders and subsequent complaints about retaliation. Respondent's answer concedes that as a quality engineer, Complainant's job was to raise safety concerns and by definition included "whistleblower" activity. Its cornerstone defense is that Complainant's inclusion in the plant-wide reduction in force was unrelated to his protected activity.

On 15 Dec 06, Respondent filed a motion for summary judgment. The motion was 20 pages with 22 supporting exhibits of no more than 10 to 12 pages. Respondent conceded that as a quality engineer, Complainant routinely reported possible unsafe conditions to the organization's upper management and therefore engaged in protected activity. However, Respondent claimed Complainant was not terminated in retaliation for raising protected activity, but rather was laid off in accordance with his low performance scores during a company-wide force reduction. Therefore, Respondent concluded, the "adverse action" had no connection with the protected activity.

In response, Complainant filed a motion to amend his complaint on 16 Jan 07. The proposed amendment added the Clean Air and Clean Water Acts as statutory bases. It also added an allegation of supervisory interference with an environmental program to

prevent printer toner cartridges from being placed in landfills instead of being recycled and an allegation that Complainant had been prevented from performing surveillance and analysis of a gas system used for research on nuclear material. On 1 Jun 07, Respondent filed a memorandum opposed to Complainant's motion to amend the complaint, claiming that Complainant's motion was untimely and beyond the scope of the administrative investigation.

Complainant also requested and was granted multiple extensions to file a response to Respondent's summary decision motion. Extensions were granted until 23 Feb 07, 2 Mar 07, 9 Mar 07, 30 Mar 07, 20 Apr 07, 11 May 07, 8 Jun 07, 29 Jun 07, 13 Jul 07, 18 Jul 07, and 27 Jul 07, respectively. On 7 Aug 07, Complainant filed his brief in response to the Respondent's motion for summary judgment. The brief and supporting materials filled three binders and contained several hundred pages. Shortly thereafter, Respondent filed a motion to reduce Complainant's response to a reasonable length and I granted a provisional motion to reduce the brief to the "direct evidence" section.⁶

On 5 Sept 07, I issued an order denying the motion for summary decision, determining that there was a genuine issue of material fact as to motive for the adverse action. I also denied the motion to amend the complaint on the basis that Complainant's proposed amendments added a new set of unrelated facts. Following that ruling, counsel requested and were granted two continuances to file a response, which was submitted on 29 Oct 08. Eventually, the formal hearing was set for 10 Mar 08.

On 8 Nov 07, a teleconference was held between the parties to discuss bifurcating the trial between substantive issues and damages in order to streamline future adjudication. Over the objections of Complainant, the hearing was bifurcated.

Following that conference call, the parties agreed to attempt to mediate a satisfactory disposition. A settlement conference was held, but concluded without success. The parties subsequently agreed to set a new formal hearing on 29 Apr 08.

From 28 Apr 08 through 1 May 08, and again from 19 Jun 08 until 20 Jun 08, a formal hearing was held. At that time, both parties were afforded full opportunity to call and cross-examine witnesses, offer exhibits, make arguments and submit post hearing briefs. Both parties were represented by counsel during the formal hearing stage. At the resumption of the hearing on 19 Jun 08, Complainant's counsel filed a written motion to reconsider an earlier evidentiary ruling regarding exhibits. As neither the court nor Respondent had previously seen the motion, I agreed to take the matter under advisement and allow Respondent an opportunity to fully review it and submit a response in writing. The response was filed on 8 Jul 08. On 10 Jul 08, the motion for reconsideration was

⁶ Complainant's answer brief pp. 225-278.

denied on the grounds that there was no significant dispute whether the Complainant was engaged in protected activity.⁷

Although an initial briefing schedule was set, the parties requested multiple enlargements of time to file post hearing briefs. Complainant's counsel requested enlargements on 18 Aug 08, 28 Aug 08, 2 Sept 08, 7 Sept 08, 9 Sept 08, 25 Sept 08, 1 Oct 08, 8 Oct 08, and 21 Nov 08. Then, on 25 Nov 08, I received notice that Complainant's attorney no longer represented Complainant, who was going to proceed *pro se*. Complainant filed his brief on 22 Dec 08. Respondent requested and was granted an enlargement of time to file its brief, which was submitted on 6 April 09.

Complainant then requested and was granted an extension to file his reply. That 64-page brief, with an 18-page attachment, was submitted on 7 Aug 09. Employer objected to the length of the reply brief and the introduction of new, post-trial exhibits and on 21 Sept 09, filed a motion to strike, arguing that the record was closed and supplemental information submitted more than a year after the trial should not be allowed. Complainant initially indicated that he would oppose Respondent's motion to strike and requested time to file his response. However on 5 Nov 09, the parties participated in a telephonic conference and agreed to allow me to proceed with the decision and order by taking the post trial filings and the objections under advisement. Therefore, my decision is based upon the entire record, which consists of the following:⁸

Witness Testimony

Complainant
Fred Leach
Jim Powell
Dennis Taylor
Craig Baptiste
Keith Hays
George Todd Wright
Paul Deason

Exhibits⁹

Joint Exhibit (JX) 1
Respondent's Exhibits (RX): 1-22, 26
Respondent's Depositions (RD): 1-10
Complainant's Exhibits (CX)¹⁰

⁷ See 29 C.F.R. § 18.403.

⁸ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

⁹ Some exhibits appeared to be *in globo* collections of records. Counsel were cautioned that in the case of any such exhibit or any deposition of witness who also testifies at hearing only those pages specifically cited to would be considered a part of the record upon which the decision would be based.

Complainant's Depositions (CD): 1-16

My findings and conclusions are based on the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses and the arguments presented.

STIPULATIONS AND MATTERS NOT IN DISPUTE ¹¹

Although there were few formal stipulations in the case, based upon Respondent's answer to the complaint and the motion for summary decision, it was clear that there were a number of issues about which the parties did not disagree. There was no dispute that:

1. Respondent's place of business, WSRC, is a research facility where experiments are performed on radioactive material using compressed, toxic, flammable, explosive, oxygenizing and corrosive gasses through a piping system equipped with cylinders of compressed gas. Its operations involve hazardous processes and materials, which could, in the event of mismanagement or other mishap, lead to or result in catastrophic consequences.
2. Respondent was a quality engineer who routinely communicated information about possible unsafe conditions and therefore engaged in protected activity.
3. Complainant was released and discharged during a company layoff, resulting in an adverse action. His selection for the RIF was based on his ranking, which was a function, at least in part, of his assignment and performance history.

¹⁰ Complainant's initial organization of exhibits was by topic, but also by "DEP" number. Consistent with standard practice, I will refer to them as Complainant's Exhibits (CX) 4, 7, 9, 11, 13-14, 16-19, 21, 23, 26(1), 28-31, 33, 35-36, 39-41, 48(7), 50, 52-57, 58(2), 59-61, 64, 65(1), 68, 72, 75, 76(1-4, 7), 79-80, 88, 92, 95, 108, 110, 111(1-3), 112-16, 119, 121, 125, 129, 132 (1), 142, 145(1, 4-7), 146(1-14), 147, 149(1-2), 150-57, 159, 160-61, 169(4-7), 176-77, 178(2-5), 180 (6-7), 181, 183, 191(4), 202, 210, 212-13, 215(1-3), 216-18, 220-21, 225-27, 231(1), 233, 235-36, 238-40, 243, 245-47, 259, 261-64, 272, 275(2,3), 283, 298, 300, 302, 310-11, 324-26, 328, 330, 332, 333-35, 337, 342, 344(1,2,4), 348, 351(2), 353-55, 366, 369, 379, 381-97, 398(1), 399-400, 402-16, 418-20, 422-27, 429-32.

¹¹ TR 6, 16-18, 472, 676, 1297. The disputed element is whether or not the protected activity played a role in the adverse action or whether it was due to other non-discriminatory and legitimate purposes. Although these parameters were specifically and definitively noted in the opening minutes of the formal hearing, I repeatedly interrupted the proceedings to reiterate the futility of introducing extraneous or irrelevant testimony unrelated to the element in dispute.

FACTUAL BACKGROUND

On 2 Jul 1990, Complainant was hired by Employer¹² to work in its quality engineering department. In 1994, he complained to management that his former supervisor, John Connelly, was not responsive to his emails and ignored his requests for assistance in implementing necessary quality assurance programs, hampering his ability to effectively perform work responsibilities. He made his complaint to manager Fred Leach, who passed it along to Complainant's future boss, Jim Powell. From that point on, Complainant believed his bosses had a negative opinion of him and gave him low-priority assignments or largely ignored him. In 1999, he filed a complaint with the Employee Concern Program (ECP) alleging retaliation, reprisal, favoritism, partiality and harassment.

In 2001, Complainant was assigned to do a quality analysis of the facility's pressure protection program. He raised several safety concerns about both the pressure protection system and the storage of gas cylinders. Complainant was instructed to write a report outlining the deficiencies and did so. However, the report was subsequently edited over his objection, resulting in a significantly shorter document.

Complainant continued to experience friction in the workplace over the implementation and ownership of pressure protection safety measures. He had significant conflicts with the pressure protection coordinator, Keith Hays. Eventually, Complainant was downgraded on his performance evaluation and told to work on his interpersonal skills. Complainant reported his difficulties to the deputy director of the facility, Paul Deason. He then met with George Todd Wright, the lab director.

In the fall of 2004, Respondent implemented a forced ranking process that was used in a subsequent company-wide force reduction. Complainant was rated in the bottom 10-percent of employees and so informed. Thereafter, his assignments were changed and on 21 Apr 05, he was terminated as a part of the force reduction.

ISSUES & POSITIONS OF THE PARTIES

The initial pleading filed by the parties indicated, and the litigation during the motion for summary decision confirmed, that this is a single issue case. There is no dispute that Complainant, as a quality engineer conducting quality and safety inspections, was engaged in protected activity. Similarly, no one has suggested that Complainant's low rankings and eventual termination did not constitute adverse action. The sole issue is

¹² TR 143-44. Employer at the time of Complainant's hiring date was known as the Savannah River Laboratory (SRL). The facility has also been referred to as The Savannah River Technology Center (SRTC) and the Savannah River National Laboratories (SRNL). Henceforth, the facility will be referred to as Westinghouse Savannah River Company (WSRC).

whether that adverse action was a consequence or function of the substantive nature of Complainant's protected activity.

Complainant argues that as a result of his diligent efforts to investigate possible problems and implement quality control and safety measures, he was systematically and unfairly set up for professional failure and eventual dismissal. He alleges that his annual performance evaluation and eventual termination were adverse actions directly resulting from his whistleblower status.

Respondent counters that Complainant's dismissal was due to legitimate factors directly related to a company-wide force reduction caused by a change in the business focus of its primary customer, the Department of Energy. Respondent suggests that Complainant had a pattern of interpersonal disputes and a lack of teamwork skills that hindered his professional performance. It also notes that while employed, Complainant never alleged harassment or retaliation specifically because he raised safety issues, but only alleged that he was treated unfairly, not given satisfying work assignments, and ignored by his managers.

LAW

Complainant filed this action under the employee protection provisions of the Energy Reorganization Act (ERA),¹³ the Toxic Substances Control Act (TSCA),¹⁴ The Clean Air Act (CAA),¹⁵ and the Solid Waste Disposal Act (SWDA).¹⁶ Those statutes generally require a complainant to establish three distinct elements: 1) that the

¹³ 42 U.S.C. § 5851 (2010). The statute reads in pertinent part: "No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan. . ."

¹⁴ 15 U.S.C. § 2622 (2010). The statute reads in pertinent part: "No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter. . ."

¹⁵ 42 U.S.C. § 7622 (2010). The statute read in pertinent part: "No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan. . ."

¹⁶ 42 U.S.C. § 6971 (2010). The statute reads in pertinent part, "No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan."

complainant engaged in protected activity; 2) that the respondent took adverse action against the complainant; and 3) that the protected activity was a contributing factor in the adverse action that was taken.¹⁷ A temporal nexus between protected activity and adverse action is sufficient to create an inference of a contributing factor.¹⁸ That inference is “insufficient in the face of compelling evidence that the employer encouraged safety complaints.”¹⁹ A complainant is only required to present evidence sufficient to raise an inference of discriminatory motivation to establish a *prima facie* case.²⁰ However, once the respondent has produced evidence in an attempt to show that the complainant was subject to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a *prima facie* case.²¹ In that event, the burden remains on the complainant to establish by a preponderance of the evidence that the protected activity was a contributing²² or motivating²³ factor in the adverse action.²⁴

If he is able to do so, the respondent may still establish that it would have taken the same unfavorable personnel action in the absence of any protected activity. Under the ERA it must do so by clear and convincing evidence.²⁵ Under the remaining statutes, it must do so by a preponderance of the evidence.²⁶ The ultimate burden of persuasion as to the existence of intentional discrimination rests with the employee.²⁷ When there is a reduction in force, an employee discrimination litigant may face a more difficult task in carrying his burden of proof, because the RIF itself may be evidence of a legitimate reason for the discharge.²⁸

The mere fact that an employee clearly engaged in protected activity does not immunize him from discharge as long as the employer’s decision to discharge is not motivated by retaliatory animus.²⁹ The Acts do not address all unfair actions by employers and simply because an employee who engaged in protected activity feels or is in fact neglected or mismanaged does not mean he has a remedy under the employee

¹⁷ *Paynes v. Gulf States Util. Co.*, ARB No. 98-045, ALJ No. 1993-ERA-47 (ARB August 31, 1999).

¹⁸ *Caldwell v. EG&G Defense Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-1 (ARB Oct. 31, 2008).

¹⁹ *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

²⁰ *Adornetto v. Perry Nuclear Power Plant*, 1997-ERA-16 (ARB Mar. 31, 1999).

²¹ *Eltzroth v. Amersham Medi Physics, Inc.*, 1997-ERA-31 (ARB Apr. 15, 1999). *See also Williams v. Baltimore City Pub. Sch. Sys.*, ARB No. 01 021, ALJ No. 2000 CAA 15 (ARB May 30, 2003).

²² The ERA’s “contributing factor” standard is a lower hurdle for an employee to clear than the bar set by other employment statutes because it requires something less than a substantial or motivating factor. *Addis v. Dept. of Labor*, No. 08-1009 (7th Cir. Jul. 30, 2009).

²³ *See* TSCA, CAA, and SWDA.

²⁴ *Barry v. Specialty Materials, Inc.*, ARB No. 06-005, ALJ No. 2005-WPC-3 (ARB Nov. 30, 2007).

²⁵ 29 C.F.R. § 24.109(a-b).

²⁶ *Id.*

²⁷ *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).

²⁸ *Jones v. USDOL*, No. 04-3729 (6th Cir. Sept. 8, 2005).

²⁹ *Lockert v. USDOL*, 867 F2d 513, 519 (9th Cir. 1989).

protection provisions.³⁰ The complainant has the burden of showing that the real reason for the adverse action, even if unfair or based on mistakes, was discriminatory.³¹ It is not enough for the complainant to show that the reason for a job action is not just, or fair, or sensible. He must show that the explanation given is a “phony reason.”³² Where the respondent articulates a legitimate, *nondiscriminatory* reason for the adverse action, the complainant has the ultimate burden of persuading that the reasons articulated by the respondent were pretextual, either by showing that the unlawful reason more likely motivated the respondent or by showing that the proffered explanation is unworthy of credence.³³

EVIDENCE

*Complainant testified at trial in pertinent part that:*³⁴

He has approximately 27 or 28 years of experience in the quality assurance, quality control and engineering field. He also has a technology diploma from Atlanta Technical College and a BBA and an MBA from Augusta State University. He started working for Respondent in 1990 as a quality engineer in the Services and Verification Group. During his employment with Respondent, Complainant’s job description included, but was not limited to, identifying/defining specific problems; ensuing compliance with quality assurance requirements; conducting procedure reviews; and ensuring that appropriate performance programs were developed and implemented to resolve quality assurance problems.

He began to distrust his employer around 1994 when he first approached management to voice concerns about his immediate supervisor, John Connelly. He was frustrated that Connelly was not responsive to his emails and ignored his requests for assistance in implementing necessary quality assurance programs. He felt Connelly’s neglect was hampering the effective performance of his responsibilities and preventing him from being recognized as a valued member of the organization. Complainant reported his dissatisfaction with Connelly to Fred Leach, a manager in the organization. Leach told Jim Powell, who subsequently became his supervisor.

³⁰ See *Jones v. United States Enrichment Corp.*, ARB Nos. 02-093 and 03-010, ALJ No. 2001-ERA-21 (ARB Apr. 30, 2004). This court, however, makes no judgment on the management skills of Powell and Leach. It merely cites the case law as a guide to evaluating Complainant’s claims.

³¹ *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742 (1993).

³² *Kahn v U.S. Sec’y of Labor*, 64 F.3d 271, 277 (7th Cir. 1995), (citing *Pignato v. Am. Tras Air Inc.*, 14 F.3d 342, 349 (7th Cir. 1994)).

³³ *Nichols v. Bechtel Constr., Inc.*, 87-ERA-44 (Sec’y Oct. 26, 1992) (as corrected by Oct. 30, 1992 Errata Order).

³⁴ TR 140-529; 1413-1438; 1510-1530.

When that happened, he became convinced that Powell had a negative opinion of him because he had “ratted out” his former manager. Powell mostly ignored him, interfered with the process improvement programs he was trying to implement, undermined his authority as a quality engineer, and removed him from high-profile assignments. In 1999, he filed a complaint with the Employee Concern Program alleging retaliation, reprisal, favoritism, partiality and harassment. Specifically, he charged that his manager was unfairly awarding career-enhancing assignments to other co-workers while giving low-priority assignments to him. However his complaint was not formally investigated and not kept confidential. He followed the suggestion by the ECP that he see the Employee Assistance Program (EAP) counselor. Despite his efforts, his relationship with his managers continued to deteriorate.

In 2001, he was assigned to do a quality analysis of the facility’s pressure protection program. He was responsible for working with the pressure protection coordinators from each facility to perform walk-downs and inspect the pipes/valves for potential problems. If they found problems, a nonconformance report (NCR) could be filed. Everything he was doing with the pressure protection system revolved around nuclear safety, environmental safety and worker safety. Some of the instructions in the gas training were dangerous and following them could result in explosion and fire, which is very hazardous in a nuclear facility.

He had difficulty getting cooperation from some co-workers and at one point was circumvented by a manager who sent her own people out to do an inspection without him. The pressure protection assessment took significant time because Complainant was often pulled off the assignment to perform other duties. He was further frustrated when his supervisors told him in an intimidating way to write a short report on the problems he uncovered during the overall program assessment. He wrote an eight-to-ten page report. His immediate supervisor came to his office, closed the door, and said he would write the report because it was taking too long. His supervisors accused him of being an informant and bringing additional oversight into their area, making them look bad. They also prevented him from fully explaining his accomplishments and assessment findings by imposing a time limit when he tried to make his presentation and cancelling subsequent “next steps” meetings.

The special assessment took a long time because he kept getting pulled into other projects that Leach or Powell thought were more important. The Operations Council had also gotten more involved and was setting the schedule for preparations and walk downs. He was not dragging out the assessment or making a career of it. If management had objections to how the project was handled, they could have come and talked to him about it.

His supervisor finished writing the pressure protection program report in 2003. It consisted of a two page summary with an addendum of several pages. All the photographs he had placed in the report had been taken out, but he cannot recall whether the final report excluded any other significant sections of what he originally had included. He began urging management to implement suggested reforms and to allow him oversight over the project, his efforts were consistently rebuffed. He was worried that all walk-downs were not completed sufficiently to discover all safety-related deficiencies.

Throughout 2003, he continued to experience friction in the workplace while attempting to implement pressure protection improvements. He took his concerns to the director of the Savannah River National Labs, Dr. Paul Deason, described the troubles he was having with management, and complained that his efforts to complete the pressure protection improvements were being stymied. He told Deason about continuing and existing safety questions and that job interference was preventing the free flow of information in violation of 20 C.F.R. § 820. He also told Deason that the pressure protection assessment was stopped prematurely and that there were still many violations out in the field. The gas training was insufficient and employees did not appreciate the significance of the pressure protection hazard.

A new pressure protection facility coordinator, Keith Hays, took over and left him “demanding, hollering and screaming” voicemails and at least two emails ordering a quick turnover of the pressure protection cache. Hays also demanded that he stop participating in any cache-related pressure protection activities that infringed on Hays’ area of responsibility. Later, he went to a “step forward” meeting with Hays and several managers so they could divide duties regarding the cache. Although he was afraid to speak during the meeting for fear of reprisal, he did eventually tell the group that the plans outlined by Hays simply would not work and ignored broader business concerns. At that point, the meeting began to turn around. He was not told during or after this meeting that his conduct or words were out of line or that he had been removed from participating in the pressure protection program.

In February 2002, Complainant reported to his supervisors that WSRC was not in compliance with an industry-wide acetylene cylinder inspection program. During his walk-downs, Complainant discovered a shed containing severely corroded gas cylinders. He was worried because the explosion of one of the cylinders could create an extremely hazardous situation at the lab. He showed his managers and several co-workers the corroded cylinders and they simply shrugged off his concerns. His fears of the potential danger grew to the point that he asked the training manager if he could review the training package on compressed gasses. He and several colleagues agreed that the training needed to be updated and he

was asked to develop the training. However, he heard from the pressure protection manager, Keith Hays, that the proposed update was unnecessary. Fearing more confrontation, he bowed out of the training update, but later was asked to continue his efforts by the training manager.

In the fall of 2003, he received his annual employee performance evaluation. He was told that he had a tough time dealing with difficult people and management verbally reprimanded Complainant for his conduct during the 2003 “step forward” meeting with Hays. His performance rating was downgraded from “exceeds management expectations” to “meets management expectations.”

In the spring of 2004, employees were given notice that the company planned to lay off workers. Around that time, he noticed a significant cutback in the amount of work he was assigned. A colleague even approached him and asked for his participation on a project, but he was never given the new assignment. Around this time, management conducted a functional evaluation process, ranking pools of employees from several organizations. His name appeared toward the bottom of the rankings. He had received a director’s award for his work on the pressure protection program, so he did not believe the low ranking was justified.

In June 2004, he approached Dr. George Todd Wright, the lab director, hoping to address a number of continuing problems. He felt that there were still safety issues that needed to be addressed from the pressure protection program. He was still experiencing harassment, retaliation and interference from his supervisors and was concerned that Hays was continuing to block his implementation efforts.

In the fall of 2004, he was informed that he was rated in the bottom 10-percent of the employee rankings. It was a confrontational meeting where his managers threw out accusations without providing specifics. They were trying to get him to overreact. He believed that the low ranking had no basis in fact and was purely retaliatory. Frustrated with constantly being told that his complaints could not be substantiated, he created and sent a number of documents to higher management. He filed an 18-page rebuttal to his performance evaluation and sent a similar rebuttal document to Wright. He wrote and issued a memo alleging that the ECP was negligent in refusing to take corrective action to prevent the reprisal, harassment, intimidation and discrimination inflicted by his supervisors. He also provided another 25-page page document alleging management reprisal.

Around this same time, he was taken off his most significant remaining job assignment. He had been losing assignments for years and was now down to one assignment. It was clear that he was being removed from the quality engineer function altogether. He responded by sending a series of emails questioning the decision to remove him from that assignment. Later, his managers called him into

a meeting to tell him that he must meet with the EAP counselor to work out his problems. He met with the EAP counselor, who then ordered him to attend a fitness for duty evaluation.

In March 2005, he sent an email asking Dr. Wright about the status of his complaint. Wright eventually sent a response that stated this is not a new issue and the matter was still under investigation. Complainant was never given any follow up regarding his allegations. On 21 Apr 05, Complainant was terminated during a reduction in force.

He does not think that his 1994 and 1999 complaints failed to contain specific allegations that he was retaliated against for reporting safety concerns. The fact that his bosses were interfering with his job performance was implicitly safety-related and he had received no guidance on how to clearly state his whistleblower claim. Many of his emails shown to him during cross-examination contained no specific mention of safety issues. However, he was asked to limit his pressure protection report to two pages, his supervisor interfered with his identification of safety issues and refused to support his safety efforts, and his manager purposefully isolated him. All of that caused him to fail in performing his job duties and caused safety risks.

His unfair treatment and inability to get good assignments began sometime before 1999 and gradually escalated with the raising of each new protected activity. There were times when Respondent “pushed back” on his suggested safety reforms. On at least two occasions, he reported safety concerns that were “shrugged off,” but he can not recall any specific instances where management told him specifically that they would not fix a reported safety issue.

Fred Leach testified at trial in pertinent part that:³⁵

He is the Manager of Quality Assurance with Savannah Laboratory. He was brought into that position in 1993 after the previous manager and subordinate manager were relieved for cause. He has a Bachelor of Aeronautical Engineering degree from the University of Minnesota. As a United States Naval Officer he has been through U.S. Nuclear Power School and Submarine School. He has a Master’s Degree in Business Administration and in Hazardous Waste Material and has completed all the course work (less the dissertation) for a Ph.D. in Engineering Management. He is a licensed professional engineer in the state of South Carolina. He is a certified lead auditor and formerly managed the Quality Assurance Program at the Summer Nuclear Station.

³⁵ TR 530-658.

He said he became aware of Complainant's 1999 complaint when he was called into a meeting with Dr. Wright and Larry Atkinson, the lead investigator for the Employee Concerns Program. He was told that Complainant felt retaliated against because of a 1994 complaint made about his manager at that time, John Connelly. Complainant had told Leach about employment problems and Complainant believed that Leach had told his current supervisor, Jim Powell. Complainant feared he had gotten a reputation for "ratting out" management. He told Wright and Atkinson that he did not disclose Complainant's 1994 complaint about Connelly to Powell until many years later.

After the 1999 complaint, managers attempted to make Complainant feel more included by finding him more high profile assignments and inviting him to more meetings. He thought this had resolved many of Complainant's issues.

In 2001, he and Powell decided to give Complainant more high profile assignments and make him feel more valued and assigned him to the pressure protection assessment. There was some confusion over the length of the pressure protection report but Complainant was asked to reduce the length of the executive summary for the Operations Council and not the final report. A quality assurance report should always be complete, but he was perplexed by Complainant's objections to providing an executive summary to the Operations Council.

He became aware of a dispute between Complainant and Keith Hays over ownership of the pressure cache project when a member of the Operations Council stopped him in the hall and told him about it. He agreed with the Operations Council member that it was time to return custody of the pressure cache to the line organization, which included Hays. The line was responsible for implementing corrective actions, even though quality engineers would be responsible for signing off that those actions had been performed adequately.

Later, he stopped into Complainant's office and noticed that Complainant was visibly upset. Complainant played voicemails from Hays that Complainant said came out of the blue. He later learned that the voicemails had been left in response to a confrontation between Complainant and Hays the day before. The issue had become sensitive because Complainant did not agree with his supervisors and the Operations Council that the project should be returned to the line organization.

He later found out that that Complainant went to see Deason, who then called him and several other employees into a meeting. They discussed the fact that Complainant was upset, how to handle the pressure cache dispute, and what to do about Complainant's allegations of retaliation and harassment. He believed Complainant went to Deason because "we weren't doing what he wanted us to do

basically, which was to come down on Keith Hays, force the line to allow us . . . to continue sole custody and completion of the pressure cache effort.”³⁶

He didn't like the fact that the line organization customer wasn't happy with what his organization was doing and that senior management had become involved. He did not know what to do about Complainant's impression that he was being harassed and intimidated. From his perspective, Complainant was being treated like any other engineer. In fact, when Complainant was recommended for an award for his work on the pressure protection project, he and Powell both approved the submission because they thought it would be good for Complainant's morale. During the subsequent ranking and downsizing, however, the award was worth one point, which would not have changed Complainant's rating significantly enough to avoid the bottom ranking.

Even though they had already made the decision that the cache would be turned over to Hays because he was the pressure protection coordinator, they decided to hold a meeting to attempt to somehow define a cooperative path forward. Complainant did not want to turn over control of the project and grew red faced and incoherent at the “next steps” meeting. Leach thought the group had agreed that Hays would control the project and Complainant would support that, but the contentious exchanges between Complainant and Hays continued. He talked to Complainant about his inappropriate conduct following the “next steps” meeting with Hays but he does not remember specifically when.

In May 2002, he heard that Complainant had gotten into a shoving match with his former manager, John Connelly. Complainant felt Connelly had “stolen” his assignment as lead for the Hydrogen Technology section. Complainant had actually been taken off the project because the customer wanted to work with the team assigned previously, which included Connelly as lead. Changes like that are periodically made at the manager's discretion to accomplish the responsibilities of the group.

In July of 2003, Deason shared with him an email from Complainant in which Complainant again alleged workplace harassment, retaliation, and intimidation because management did not support him. Complainant alleged he was not allowed outside travel and that he received low pay raises. Under the Rank, Pay, Performance system, only one person in his department could be designated as an “A” performer and the rest were “Bs” or perhaps “Cs”. He gave annual raises to his people on a merit basis with top performers generally getting a little more, while keeping all raises within the company's pay guidelines. He made an effort

³⁶ TR 580.

to stop into Complainant's office to show him that his membership in the group was valued.

Complainant had the second-highest number of conference training trips. One of the reasons Complainant had not been promoted to a Level 35 was that Complainant did not have lead auditor status. The lead auditor status became a requirement for that level of promotion in 1996, and those 35's in the office without this status had benefitted from a grandfather clause.

He received a call in the fall of 2004 from a manager in the Defense Programs organization. The manager requested employee participation in a team, but he specifically requested that Complainant not be selected. He put a note in Complainant's file following that conversation. The note was not meant to be punitive or corrective, but rather to document what had become a series of problems related to Complainant. He believed Complainant had an extra sensitivity or fear that others were trying to take credit for his work.

He was with Complainant and Powell when Complainant learned he was ranked in the bottom 10-percent of his department. Complainant slammed his book down, pounded the table, threw himself back in his chair, and stated that he had the best lawyer in the country and he was not going to accept this. It was an extremely emotional and inappropriate reaction.

Complainant and his management had very different perceptions of how Complainant was treated. When Complainant was reassigned from the HTS project to the 17025 project, Complainant sent a strongly worded email to his supervisors pleading for fairness. The 17025 project was the most important and high profile assignments available at the time, but he couldn't get Complainant to understand that. It was the latest in a chain of emotional events and Complainant's actions were becoming increasingly inappropriate. Shortly thereafter, he referred Complainant to EAP. He knew Complainant was upset and he wanted to address that, but he never demanded or asked that Complainant be evaluated for fitness for duty.

He was consulted by Powell during the drafting of Complainant's 2004 performance evaluation. Powell suggested language stating that Complainant had problems with sharing ownership and confrontational interactions, but he agreed with it.

In 2005, the company began ranking employees to evaluate their potential for promotion and in anticipation of possible force reductions. He was involved in the Functional Evaluation Process (FEP). Complainant was the "bottom guy" for his team but he attempted to place Complainant higher in the overall ranking of

employees from the company's five business units. Complainant was eventually ranked seventh from the bottom. Since Complainant had been hired in 1999, there had been three headcount reductions and despite repeated disagreements with management, Complainant had not been terminated during any of these previous reductions.

Complainant's scores on teamwork placed him in a lower ranking overall. He and Powell conferred before giving Complainant a "does not meet expectations" score on teamwork, but agreed there were several incidents that justified that rating, including the run-in with Connelly, the inability to work with Hays, the emotional issues, the request from the Defense Programs manager that Complainant not be placed on his team, and several other incidents. Complainant was a good detective and was doing a good job, but had difficulty working with customers and individuals.

He recalled that Complainant reported a concern regarding corroded cylinders in a shed and that he went with Complainant and an operations manager to inspect the cylinders. There was some corrosion but he did not believe there was an imminent hazard and decided the cylinders were being handled appropriately. He consulted the operations manager and an industrial hygiene engineer who also opined that the cylinders were not imminently dangerous.

He believes the problems he experienced with Complainant were personal interaction difficulties and did not rise to the level of a constructive discipline problem. No one was saying that Complainant didn't do good work or that he was not a satisfactory employee, but rather that he had some issues that he needed to work on.

After Claimant filed his OSHA complaint, he prepared a memo to respond.³⁷ Not all of that information was used in the personnel evaluation of Complainant. If he were planning an adverse action, he would have started building a paper trail. The first time he thought that he would have to begin documenting problems was in 2004, when he received an email from Complainant saying that the favoritism must stop. If he had planned to eliminate Complainant for protected disclosures, he could have terminated him when they had a force reduction in late 2003, yet another employee was chosen.

He rewards employees for making protected disclosures because it makes him look good for protecting the lab. In 2002-03, his department had made a total of 139 disclosures—six of them initiated by Complainant and 25 initiated by the

³⁷ EX-210.

highest rated employee. Complainant was offered three opportunities to transfer and each was declined.

Jim Powell testified at trial in pertinent part that:³⁸

He is the manager of Quality Engineering and has been in that position since 1993. He was the manager when a customer requested that John Connelly be placed as the lead on an assignment instead of Complainant. He knew Complainant was unhappy and had a heated discussion with Connelly regarding the situation, but because the customer requested that the original team be reconstituted, it was appropriate to place Connelly as lead for the project.

In November of 2002, he told Complainant to create a summary report regarding the pressure protection program, but Complainant did not comply or use the proper format, so he reformatted the report. He may have removed photos but no significant content. He assumed that Complainant made the presentation to the Operations Council and took it from there.

He told Complainant to write a two-to-three-page, high-level summary but he did not discuss with Complainant the difference between a high-level summary and the full and final assessment. He did not tell Complainant that he could finish his walk downs or that employees were complaining that they were not getting requested information from Complainant. He took over the final pressure protection assessment report because he was the approving manager. He only changed the format, not the intent or content of the report. He did not make a note in Complainant's file saying that the report took too long.

He was getting feedback from the pressure protection coordinators and others that Complainant was not turning over information to them so that they could begin to correct the problems. There was a meeting to turn over the pressure protection cache but a co-worker had to finish the meeting because Complainant became incoherent and could not finish the discussion. He did not specifically document this meeting in Complainant's performance evaluation because Complainant had otherwise done a good job with the pressure protection program with research and identifying issues.

When he changed Complainant's lead assignment in 2005, Complainant was animated and unhappy. He told Complainant that changing assignments was a normal thing he and that he should have made some changes sooner. He later became aware that Complainant protested to Human Resources and upper management.

³⁸ TR 530-658.

He was advised by Leach that a co-worker in another division asked that Complainant not be assigned to his team. When Complainant asked if he could work with the training manager to develop a training module, he happily agreed because training was outside their normal line of responsibility. However, the training did not go well because of fights between Hays and Complainant.

He revised Complainant's 2005 performance evaluation after Complainant contested several items. After the changes were made, Complainant refused to sign it. He wrote in the evaluation that Complainant "has problems sharing ownership and confrontation interactions" because of the disagreements with Hays. He also wrote that Complainant "has not been proactive in involving himself in non-proliferation of the technology section" because employees of that division didn't know Complainant had been assigned to their section.

He told Complainant he was in the bottom 10-percent of his group because company policy required it. Complainant told him he better be able to substantiate that ranking because he had "the best lawyer in the country." Complainant issued a lengthy rebuttal to the performance evaluation. He read through it and forwarded it to Human Resources, but did not discuss it with Complainant.

When he ranked Complainant at the bottom of the FEP he knew that it had the potential to be used in a force reduction. He did not know whether there would be a lay off or how many people it could affect. He rated Complainant a "2" on customer focus because he did not think it was good customer focus not to turn over information to the line organization. The ranking also reflected Complainant's lack of involvement and non-proliferation of the technology section. Complainant scored a "1" in teamwork because he argued with Connelly, isolated himself from the group and took too long to issue the pressure protection reports.

He did not take away one of Complainant's lead assignments as punishment. He was thinking about assigning Complainant to the 17025 project instead. He believed Complainant did a good job on developing the compressed gas training and he was not downplaying Complainant's role by saying that Complainant "assisted" with developing the system rather than "developed" the system.

He did not respond back to Complainant's 2004 email requesting a clarification of his performance evaluation because he was advised not to.

Craig Baptiste testified at trial in pertinent part that:³⁹

He is a principal engineer responsible for several systems in the lab. He was the pressure protection facility coordinator from February 2000 until May 2003. He would expect a report on a field assessment such as the pressure protection program to last at most six months. It would take much longer than six months to complete a 100-percent walk down of the pressure protection systems. He did not see a final report for almost two years. He wanted to see the report so that he could address issues or deficiencies. When the project began, he was spending 45 minutes to an hour with Complainant every week and the assessment was dragging on. He initially gave Complainant much of his quality time to complete the pressure protection project but later began limiting Complainant's access and making it clear that he had other priorities so he could avoid having more long meetings with Complainant.

The pressure relief valve device that had been developed to put in that cache could not have been developed without his help because the relief device had to be registered, tested and tagged before it is assembled, and that was his responsibility. Safety was his main and primary job function.

Keith Hays testified at trial in pertinent part that:⁴⁰

He was the design authority engineer for the plant and instrument air systems in 2002. He became the pressure protection coordinator in 2003. Craig Baptiste was his predecessor. The first time he worked with Complainant was when Complainant was doing an assessment on the research and development (R&D) side of pressure protection and was specifically looking into efficiency issues. Complainant was also checking the Passport records used to maintain the relief valves and pressure protection equipment.

Complainant was not including him in the pressure protection review and was not giving him the opportunity to concur or comment on any of the actions Complainant was trying to implement. He wanted to be included because as pressure protection coordinator, it was his responsibility to be aware of problems and to set up the maintenance requirements for the pressure protection system. He had been told by his predecessor that the pressure protection process improvement was taking too long. The initiative had been underway for about two years. He never saw a document or directive by Complainant that stated how the improvement initiative would be implemented.

³⁹ TR 1095-1164.

⁴⁰ TR 1165-1239.

Around June 2003, he became frustrated because his requests to manage the pressure protection program cache were being ignored. He was getting complaints from his R&D customer about how long the assessment was taking, so his goal was to get the project done, get it online and improve the business of the lab so that researchers could get their jobs done. He left at least one “assertive” voicemail on Complainant’s phone line because his requests were meeting with resistance. After he left the “assertive” voicemail(s), his management told him he should be more tactful and control his emotions. They made communication skills part of his employee development plan. Over the years his performance evaluation had reflected a need for better interpersonal communication skills. He apologized for the voicemails(s) in a subsequent email.

When they finally held a “moving forward” meeting in June, it only took a few weeks to get the process improvement designed and implemented. He did not get cross-ways with Complainant over substantive issues or technical data-related safety standards. He was more concerned about completing the assessment in a timely manner, rolling it out and getting it done, while adhering to his responsibility to review and approve all process changes.

He thought he was getting pushback because Complainant did not want anyone to “steal his thunder.” He was protective of the pressure protection program because ignorance of the requirements can cause a huge safety issue. Relief valves cannot be handed out like “peanuts and candy.” Someone seeking a change would have to prove that the set point and flow capacity were correct for the system. His job was to police the system so he had to review the training and be in control of the cache. Once he got control of the cache program from Complainant, he was able to develop a pressure protection improvement initiative.

George Todd Wright testified at trial in pertinent part that:⁴¹

He is the laboratory director for Respondent and has held that position since January 2003. The Savannah River National Laboratory is a Department of Energy facility and one of 12 national laboratories in the United States. It focuses on applied science and engineering research and development. Fred Leach reports to him. Dr. Paul Deason is his deputy director. The laboratory deals with hazardous and nuclear materials, so safety is a major focus and has been since the lab opened in 1993. SRNL has led all Department of Energy laboratories in safety performance for the past 15 years.

⁴¹ TR 1240-1338.

Complainant came to see him in 2004 regarding issues with his management. Complainant met with him for 45 minutes and brought several examples and emails demonstrating that he was not getting proper credit for his work. He was upset that Powell and Leach did not give him the right kind of assignments. Complainant also had concerns with a previous investigation that had been done by Larry Atkinson, so Wright decided to have the complaint reviewed by an independent oversight organization. He specifically requested that Atkinson not be included in the independent evaluation.

During their meetings, Complainant did not mention any safety-related concerns. If safety was mentioned, Wright would have discussed the problem with the safety engineer with whom he meets frequently. Instead, he assigned the problem to the independent oversight group, which gave the review to Sharon Henderson.

The layoff from 2005 was necessitated by a change in focus by the Department of Energy. Historically, WSRC had been a production site. The Department of Energy revised the contract in 2003 and the new focus became cleanup and reduction of risks associated with legacy nuclear operations. Wright had no part in ranking regular employees for the force reduction. He ranked the senior managers.

Anyone who brought up a safety issue, even if it later is determined to be unfounded, would be thanked for creating an awareness. "Green eyes" bring awareness, which creates strength in the organization. Managers or quality engineers should not get downgraded in performance evaluations for attempting to stay involved in the implementation of process improvements. However, all employees should conduct themselves in a professional manner.

***Dennis Taylor testified at trial in pertinent part that:*⁴²**

He has worked at the Savannah River site just under 35 years. He has a Ph.D. in ceramics from the University of Leeds and an undergraduate degree from the University of Utah. He is an administrative advisor, which is like an ombudsman for the facility.

His first contact with Hays was when he went to him with a pressure protection question. Complainant came to him in 2002 asking for assistance with his pressure protection project. Complainant showed him a whole host of relief valves that were not in verification and had done a pretty thorough job of going around and identifying problems inside and outside the laboratories. He talked to a manager, Lori Chandler, who also confirmed that Complainant had found some

⁴² TR 1344-1406.

things in her laboratories that were not up to standard. Complainant's specific problem issue was that it was difficult to get pressure protection materials using the archaic process that was in place.

One of the facility's internationally-known scientists tried to get pressure relief valves for a special project, but it took the pressure protection group months to fulfill a request. The whole document would have to be recalculated to certify that pressure and the relief valve. The scientist ended up buying his own certification software, but the pressure protection group refused to use the new database. The scientist was happy when Complainant decided to deal with the pressure protection issue.

To facilitate the project, he and Complainant planned a training program so that researchers would stop setting up unsafe systems in their laboratories and there would be more experienced people who could help researchers design and acquire pressure protection systems for their experiments.

Later, he heard the voicemails that Hays left Complainant. They were commanding and demanding. The message to Complainant was to stop what he was doing and turn it all over. At one point, he wanted to turn the project entirely over to Complainant, because he felt that Complainant was well versed in all the pressure protection rules, knowledgeable about all equipment and vendors, familiar with the lab safety manual and fire requirements, and could solve the problems the researchers were having with the cache. Hays knew the calculations and was a better engineer, but Complainant had a broader understanding of the issue. Complainant had done his research by interviewing the vendors and procurement people.

He believed going into the June 2003 meeting with Hays that he and Complainant had the blessing of management and the Operations Council to stay involved in the process improvement. During the meeting, Complainant got agitated and he wished Complainant would stop talking because they were making progress and such intervention was counterproductive. He thought that Leach remained too quiet in the meeting. Over the next several weeks, the process became even more difficult because Hays overrode all their agreements. Leach asked him how he could more effectively work with Complainant. He was trying to act as a go-between to bring the sides together without destroying confidences.

He went on vacation and when he returned, Hays was still clamoring to have everything turned over to him. He wrote a memo outlining his understanding of their agreement⁴³ and took it to Leach, who said he would take it to Deason. He

⁴³ CX-61.

waited a week and then talked to Deason himself. Deason was still inclined to turn the project over to Hays because pressure protection was Hays' responsibility and Deason was afraid that Complainant would "go postal." The implication was that Complainant was not mentally stable and that the project needed to be taken away from him. He was shocked by that statement and did not tell Complainant. He continued to encourage management to allow him and Complainant to implement the process improvements in the pressure protection program.⁴⁴ He considered it a safety issue.

He was interviewed by Sharon Henderson about Complainant. She wanted to know if Complainant was trustworthy, a team player, competent, and good to work with. He told her that Complainant was conscientious and good to work with, but that he had not been treated well and it was grating on him. He was offended that Complainant was nominated for a director's award, but his managers would not submit it. He campaigned for it again in the next cycle and Complainant finally got the award.

Hays was unprofessional because he was not willing to listen, negotiate, to search for alternatives or be a team player. Hays was not trying to quash a safety issue and was safety oriented, but not interested in the "big" safety picture and did not want outsiders to address pressure protection safety issues. Hays was not trying to hide a safety problem, but did not realize that his actions were impeding safety.

Paul Deason testified at trial in pertinent part that:⁴⁵

He is currently employed by the Lawrence Livermore National Laboratories. In 2003, he was the deputy director of the Westinghouse Savannah River National Laboratories. At that time, Complainant came to him with concerns regarding the pressure protection assessments and the treatment he had received from his management. Complainant also said he never got a response to a complaint he had made in 1999. He pulled together a group of people, including Powell, Leach, Atkinson and others to discuss disposition of the complaint.⁴⁶ The group thought that Complainant could benefit from the Employee Assistance Program (EAP) to "talk out" his frustrations. A member of the EAP staff was in the meeting, but the group did not get into specifics regarding Complainant's EAP visits or issues. He did not think Complainant would commit physical violence, but he was concerned about future verbal attacks in the workplace.

⁴⁴ CX-80.

⁴⁵ TR 1439-1508.

⁴⁶ CX-72.

The pressure protection program was related to safety. Complainant was mostly worried about who would implement and manage the pressure cache system. Complainant was concerned that if he did not manage it to completion, he would not get credit for it. Complainant's pressure protection report⁴⁷ was in one of several typical formats. Complainant was never told that he could not write a more comprehensive follow up or issue deficiency reports on the things noted in his investigation. The Operations Council does not always respond to reports presented to them. Baptiste and Hays should have gotten the pressure protection report from the Operations Council once presented. He was not aware that Baptiste and Hays claimed they had not seen the report.

He believed that Hays was the proper person to own the pressure protection implementation phase because he is responsible for the process and equipment. He doesn't remember expressing concerns to Taylor that if the project remained with Complainant, workplace violence could result. He believed that Taylor and Complainant should be taken out of the implementation phase to allow the line to handle the pressure protection issues. When Complainant came to see him, the primary discussion was about management's treatment of Complainant and not pressure protection.

The root of the conflict between Hays and Complainant was that Complainant worried that losing control of the pressure protection project would mean he would not get his due credit. Conversely, Hays and the engineering organization believed that pressure protection was their responsibility.

He later asked Atkinson why there was no formal report closing out Complainant's 1999 grievance. Atkinson told him there were no specific incidents or documents that pointed to any violations.

He called the EAP counselor because he knew Complainant had seen her at least once before. He did not think it was a breach of confidence to talk to the counselor about Complainant in generalities. He investigated Complainant's allegations that he was mistreated by management, talking to Leach and Powell. Leach provided statistics that showed that Complainant had the second highest travel rate. He queried Powell and Leach about the assignments given to Complainant to determine if he was truly assigned "bad" jobs, but saw none of the assignments or reassignment as retaliatory or discriminatory. He did suggest to Powell and Leach that they give Complainant more high profile assignments. He considered the pressure protection and ISO 17025 projects that had been assigned to Complainant to be high profile projects.

⁴⁷ RX-26.

On 23 Jul 03, Complainant wrote him an email outlining his specific grievances, such as low pay raises and lack of opportunities.⁴⁸ He forwarded it to Leach, who responded to each point.⁴⁹

George Antaki testified at deposition in pertinent part that:⁵⁰

He is an engineering structure mechanic and chairs the piping and valve committee and the pressure protection committee. He has chaired the pressure protection committee for the past 12 years. He first had contact with Complainant when Complainant discovered a potential issue with the gas cylinders and wanted to create a training program to improve safety.

Larry Atkinson testified at deposition in pertinent part that:⁵¹

He is the lead investigator with the Employee Concerns Program. He has worked in Employee Concerns since 1996. He worked with Fred Leach for a brief time, maybe six months to a year.

Per standard protocol, he would have advised Complainant of his confidentiality rights in the initial meeting. In that initial meeting, Complainant was unfocused and said he thought he was being retaliated against. He asked whether Complainant had raised safety-related issues, protected activities or suffered adverse actions but Complainant did not provide any details about that. Complainant seemed very stressed out at the meeting. He referred Complainant to the EAP for apparent family issues.

Complainant raised no environmental, safety, health, quality, waste, fraud, abuse or reprisal issues. As a result, there was no basis to do an investigation and he did not do one. Complainant continued to say that he had retaliation issues and would provide materials to support the allegation, but the information was never provided. Complainant did give him an 8½-page statement but asked that they not work from it. He never made a representation that he had done a thorough investigation. He believed the Complainant had stress issues and a distorted sense of reality.

⁴⁸ CX-75.

⁴⁹ CX-76.

⁵⁰ CD-1.

⁵¹ CD-2.

Lynn Bertsch testified at deposition in pertinent part that:⁵²

She is a manager of Organizational Development. She performed an employee evaluation for the FEP at WSRC. Her evaluation was broken down into four components that included competencies, current job performance, prior job performance and recognition of deficiencies. The evaluation was for a three-year period from October 2001 through October 2004.

Sharon Henderson testified at deposition in pertinent part that:⁵³

She investigated Complainant's concerns as directed by Wright. Several people mentioned the word unstable when referring to Complainant, but she did not tell him that. She terminated an interview with Complainant early because of his emotional reaction. She reported that Complainant isolated himself, that his dissatisfaction created tension in the workplace, and that he was perceived as emotional, confrontational and unstable.

Elton Booth testified at deposition in pertinent part that:⁵⁴

Complainant did not communicate or work well with his co-workers and brought up inappropriate issues in staff meetings. The group did not particularly like Complainant and did not want to work with him. He had a running battle with Complainant regarding the thermostat at the office. He offered to compromise with Complainant regarding the temperature, but Complainant refused.

David Lee testified at deposition in pertinent part that:⁵⁵

Complainant was not a team player and didn't work within the group. He never confronted Complainant about his lack of teamwork, did not personally have a problem working with Complainant, and never complained to management about Complainant. However, several of his co-workers, such as John Connelly, Bill Dill, Pat Vaughn, Julio Pardo, Elton Booth, and Steve Loflin had problems with Complainant. Complainant had a reputation for not being a team player. Even before Complainant began working in that department, it was a troubled group. They had problems with Employee Concerns and management and managers had been fired or reassigned.

⁵² CD-3.

⁵³ CD-4.

⁵⁴ CD-5, RD-7.

⁵⁵ CD-6, RD-4.

At first, Craig Baptiste praised Complainant for the work he had done on the pressure protection program and that Complainant had found some very good things. Baptiste wanted to see the report so that he could begin corrective action.

He was a member of Complainant's car pool. One day Complainant was late and they left without him. Complainant confronted them in the employee parking lot and he thought the argument was going to get physical. Another time during carpool, Complainant got distraught, said his name is not "Danny Boy," and complained that people did not show him the respect he deserved. Complainant squeezed the steering wheel so hard he thought it was going to break.

***William (Bill) Dill testified at deposition in pertinent part that:*⁵⁶**

He was interviewed by Sharon Henderson. He does not recall saying in the interview that Complainant did not carry his weight, nor would he likely say that. Complainant talked to him about other members of the group. Complainant had little respect for the group and thought his abilities were superior to others. Complainant had a hard time letting go at a reasonable end to a process.

***Julio Pardo testified at deposition in pertinent part that:*⁵⁷**

Complainant's workload was the same as everyone else, yet Complainant was paid less and was in a lower pay grade. He said the Wednesday staff meetings were not a place where you could say what you wanted without fear of retribution. Complainant did not have a reputation for not being a team player. He worked with Complainant on three or four projects and he did not see Complainant ever "lose it" or get emotional in the office.

***James Pat Vaughn testified at deposition in pertinent part that:*⁵⁸**

He has never filed a complaint with Employee Concerns, but if he had he would have expected it to be confidential. He has never had an audit or surveillance where the customer has resisted correction. The first time he heard about a "teamwork issue" is when the employees had a meeting where they were informed they would be deposed. He did not tell anyone that he did not want to work with Complainant. Complainant is a loner, as are many of the people in the work group, but Complainant is more aloof or more off to the side.

⁵⁶ CD-8, RD-6.

⁵⁷ CD-9.

⁵⁸ CD-10, RD-4.

***Steven Loflin testified at deposition in pertinent part that:*⁵⁹**

He knew other quality engineers had been interviewed by Sharon Henderson but he had not.

***John Connelly testified at deposition in pertinent part that:*⁶⁰**

He was interviewed by Sharon Henderson. He believed that even if Leach and Powell lied and said Complainant was the best quality engineer in the organization, Complainant would still not be satisfied. He told Henderson that Complainant had a reputation for a very short fuse and could go from a calm demeanor to a very high rage in a very short period of time, so if she had something unpleasant to tell Complainant as a result of her investigation, it might be good to have someone nearby. He does not remember telling Henderson that Complainant did not do his share of the work. He did not ever request not to work with Complainant. He recalls an incident where Complainant got upset and used objectionable language.

When he was Complainant's supervisor, it was not readily apparent that Complainant had a short fuse but the situation seemed to get progressively worse over the years. Sometime prior to 2004, he was asked by a customer to undertake a program because he had worked on a similar project previously. He talked to Complainant about taking on the project and Complainant went from calm to a rage in a very short period of time. Complainant wouldn't listen to anything, called him a liar and yelled. It was common knowledge in the department that Complainant didn't think he had to become an auditor.

***Jim Gray testified at deposition in pertinent part that:*⁶¹**

He does not recall telling Sharon Henderson that Complainant had a problem with teamwork or that Complainant did not pull his weight. He may have told Henderson that he did not want to work with Complainant because Complainant could be very inflexible. Complainant isolated himself and was kind of withdrawn. He did not have a problem with working with Complainant. He has had other departments refuse to take requested corrective measures, but he simply told them they could talk to him or elevate it to his management. Complainant has anger problems. He observed Complainant get upset during a group meeting and become so angry that he was concerned whether Complainant would be okay or

⁵⁹ CD-11.

⁶⁰ CD-12, RD-1.

⁶¹ CD-13, RD-5.

get physical. He received extra assignments in 2002, 2003 and 2004 because Complainant didn't finish his assignments.

Steve Martin testified at deposition in pertinent part that:⁶²

He told Sharon Henderson that Complainant did not do as much work as all the other QA's because he was not assigned as much. He noticed management was trying to provide positive feedback to Complainant by telling him he was doing a good job. However, when Complainant was assigned a specific job, he did not know when to let go of it. The job of a quality engineer is to find problems, identify issues, let the appropriate people correct them or provide corrective action for them, and verify that the corrective action has been taken.

He was in a meeting where Complainant asked what it took to be an "A" performer. He did not think this was the place to ask the question and noticed that Complainant kept going on and on and was getting visibly upset. Complainant followed his managers into an office where the discussion got so heated that Martin could hear the yelling through the wall of his office. He didn't want to hear it anymore and got up and walked away.

Complainant had the pressure protection project for "months and months and months" and there wasn't a whole lot accomplished. Complainant held on to the project too long. Complainant came to his office every day for a week-and-a-half to say that the project was taking so long because he could not get anyone to work with him.

Pete Stevens testified at deposition in pertinent part that:⁶³

Complainant worked on developing a compressed gas cylinder training module for him. He wanted Hays to review the training but it became apparent that Complainant had interpersonal problems with Hays. Complainant got emotional about Hays' involvement and it impacted his ability to get the material completed. Complainant did not get the training materials done in a timely manner. It was apparent that Complainant had concerns that Hays would get credit for the training material. He had plenty of other work to do and emotions were causing him to delay some of the other projects he had going on.

⁶² CD-14, RD-2.

⁶³ CD-16, RD-10.

*Charlie Malarkey testified at deposition in pertinent part that:*⁶⁴

Going to EAP does not stigmatize employees. It is not part of the employee record and employees are encouraged to take advantage of that service.

*Tim Prince testified at deposition in pertinent part that:*⁶⁵

He made a request that Complainant not be placed on his team. He had spoken to Complainant in the past and those conversations were lengthy and rambled on. The audit would need to be fast-paced and he wanted someone more focused.

ANALYSIS

Respondent did not dispute that by the very nature of his job, Complainant was engaged in protected activity. Nor did Respondent dispute that Complainant's negative ratings and consequential termination were adverse actions. The only litigated issue is whether the protected activity was a contributing factor in the adverse action. Consequently, much of the extensive evidence offered by Complainant to illustrate the safety related nature of his job, underscore the potential danger in Respondent's operations, and demonstrate how poorly he was treated was of very limited probative value.

The real question is whether or not the decisions to assign, reward, pay, rate, evaluate, and ultimately terminate Complainant were a function, in whole or in part, of a desire to retaliate against or punish him for the substantive safety related aspects of his work. Complainant carries the initial burden of showing by a preponderance of the evidence that his protected activity was at least a contributing factor to those personnel actions. If he is able to do so, Respondent may still avoid liability if it shows by clear and convincing evidence that it would have taken such actions anyway, even absent the employee's participation in protected activity.⁶⁶

At the outset, I note that although Complainant's testimony was often rambling, unfocused, and clearly motivated by strong feelings of persecution and maltreatment, he impressed me as sincere, candid, and earnest. He was very credible to the extent that I have little doubt that Complainant firmly believes all the things that he said on the stand. He appeared certain that every action Respondent took with which he did not agree was

⁶⁴ RD-8.

⁶⁵ RD-9.

⁶⁶ For the purposes of this decision I have taken into account all four cited employee protection statutes, but will use the combination of standards most favorable to Complainant. Those are (1) the protected activity was a "contributing factor" to the adverse action and (2) "clear and convincing evidence" shows that Respondent would have taken the adverse action anyway as specified by the ERA.

based on a personal bias against him. He is convinced that he was wronged personally and professionally by his supervisors and by Respondent because of his activities at work. The conclusion that the personnel actions taken by Respondent were based on things related to his employment is rational. However, Complainant seamlessly makes the leap that Respondent must have been motivated by resistance to the technical, safety-related substance of his reports and recommendations. As deeply held as that belief may be, it is not corroborated by the preponderance of the evidence in the case. I found the other witnesses who testified to be equally credible and just as sincere in trying to tell the truth as they believed it to be.

Even though Complainant alleged in his complaint that he was mistreated because of his involvement in the pressure protection program and with gas cylinder storage, he testified that his troubles with his supervisors began long before either and were over an issue unrelated to safety violations. Seven years earlier, in 1994, he complained to Leach about a former supervisor. He was convinced that Leach told his future supervisor, Powell, and that as a result, he developed a reputation as a troublemaker. From then on, he believed that Powell ignored him, interfered with the process improvement programs he was trying to implement, undermined his authority as a quality engineer, and removed him from high-profile assignments.⁶⁷ In 1999, he filed a complaint with the ECP alleging retaliation, reprisal, favoritism, partiality, and harassment. Therefore, although Complainant alleged that his treatment grew increasingly harsh over the years due to his protected activity, his testimony was that the origin of the history of maltreatment was in a perception that he had “ratted out a supervisor,” which had nothing to do with safety or the reporting of plant deficiencies.

In any event, all of that took place before any of the alleged protected activities and is mostly relevant to the extent that it shows that Complainant was having difficulties with his supervisors unrelated to the substance of any safety related problems he may have identified or worked on. It is also consistent with the preponderance of the evidence, which is that the problems existing between Complainant and his supervisors and managers were a not result of a disagreement over the specific technical aspects of what he said was unsafe or how it should be fixed. Rather, it was a result of a perception that he was unwilling to give up control, responsibility, or credit for a program and at times did not work well with others.

⁶⁷ To any extent that Complainant’s suspicions that he had a reputation for being a “rat” are particularly relevant to the contested issues in the case, they are not corroborated by the evidence. Leach specifically denied going to Powell and said he would not have held that against Complainant. Leach also noted that he had other another employee make the same kind of end run complaints about his supervisor and eventually actually promoted that employee.

Complainant argues in his brief that he specifically related safety concerns in emails and other correspondence and was subsequently subjected to discrimination and retaliation by Respondent, which was attempting to minimize the hazardous conditions created by pressure relief valve deficiencies. He pointed to several emails and meetings with higher management (Deason and Wright) as evidence that he was explicitly complaining about safety-related issues.

However, the actual emails and other exhibits fail to provide any significant support to Complainant's argument. His memo to the WSRC Equal Employee Opportunity Group mentioned that "there was never any verbal or written praise or thank you or job well done" from his managers, and is a litany of complaints about managerial omissions and failures.⁶⁸ Complainant's 2004 performance evaluation rebuttal recited his accomplishments and provided explanations for his shortcomings.⁶⁹ It was driven by Complainant's performance evaluation and does not reflect a concern that Respondent is failing to take adequate steps to address safety issues.

Complainant's 25-page SRNL QE Management Reprisal report declares that he was "trying to do what is right for SRNL and to protect the safety of employees and property and to identify and resolve quality issues that affect the efficiency and operations of Savannah River National Laboratory."⁷⁰ However, the rest of the document addresses various instances of mistreatment, ranging from low pay to lack of promotion. To the extent that any specific safety concerns are mentioned, they are not a primary focus, but incidental only to establish the context of Complainant's dissatisfaction with his treatment. Again, Complainant's real point is not that Respondent refused to take appropriate safety actions as much as it is that his managers treated him unfairly.

Complainant and Deason differed in their characterization of the content of their meeting. That conflict is a consequence of the different perceptions of the witnesses rather than a motive to deceive. Complainant testified that he brought up his troubles regarding the pressure protection program. Deason testified that Complainant was worried that if he did not manage it to the end, he would not get credit for it and safety issues never came up. Deason's recollection is corroborated by Wright's testimony about similar meetings. In Wright's mind, Complainant was more worried about management and credit issues.

Complainant also testified that he experienced many frustrations, conflicts and disruptions in working on safety issues as a quality engineer. There was substantial testimony that Complainant's work on the pressure protection program took much longer than anticipated due to a number of different factors, but none of them were related to

⁶⁸ CX-235.

⁶⁹ CX-353.

⁷⁰ CX-355.

any organized delays or intentional obstructions. The record supports a conclusion that there were routine interdepartmental disputes and miscommunications that may have delayed the discovery of problems or implementation of remedial measures, but not that there was any intentional resistance to fixing any problems.

Complainant insists that he was not allowed to do a 100-percent walk down of the pressure protection system and that many of his efforts were hindered, either by other department managers who interfered with his authority or by his own managers who sent him on other assignments. However, the record reflects that the line customer did not expect a 100-percent walk down, because it would take too long. Moreover, Respondent did take an interest in the deficiencies noted by Complainant and never asked him to change any of his findings. He was asked repeatedly by pressure protection coordinators to provide information or reports on the problems he discovered so that the issues could be corrected.

There was clearly disagreement or confusion between Complainant and his managers on the length and purpose of the pressure protection report issued to the Operations Council. Leach remembered confusion over the page limit, but testified that the document was an executive summary for the council and not the final report. Powell testified that in the midst of the confusion, he took over the report, but only to reformat and condense the existing information. Complainant offered no specific evidence of any significant safety related information that was deleted or changed in the summary. In fact, Complainant was required to concur in the final assessment. The Operations Council was seeking only an executive summary and Complainant could have gone on to prepare a full-length, comprehensive document.

The preponderance of the evidence does not support a finding that Respondent was trying to suppress or was in significant disagreement with the substantive safety aspects of any of Complainant's work on the pressure protection program. It does support a finding that Respondent wanted Complainant to act more quickly, provide a summarized executive summary, and allow someone else to oversee the implementation of the remedial plan.

The record supports a similar finding as to the gas cylinders. When informed of Complainant's concerns about corroded cylinders, Leach went to the site to personally inspect them taking along an operations manager. Eventually, although not as quickly as Complainant wanted, Respondent implemented Complainant's recommendation.

Although the rest of the record indicates that Complainant's problems with his supervisors were not a function of a disagreement over what was or was not safe, he testified at trial and argued on brief that they were. However, that testimony and argument were general in nature. When pressed, Complainant was unable to define a

specific watershed moment where his protected activity led to a disagreement on the substance of a safety issue and prompted a retaliatory response.⁷¹

Respondent's actions were inconsistent with a motive to ignore reports of possible safety violations and punish employees who made them. The credible evidence was that Respondent had a consistent policy of encouraging employees to surface safety issues. There were numerous quality assurance employees at WSRC and even low-level employees had the authority to temporarily shut down operations if they discovered a serious violation. There was credible evidence that safety was "job one" at the facility and employees were encouraged to raise safety issues.

Because of a change in focus by its customer, the Department of Energy, Respondent was forced to lay employees off. That, among other things, prompted Respondent to lump employees from five departments together and stack them in "value order" in the FEP. There was a strict limit and some employees had to be rated lower than others. Complainant had been downgraded in recent performance evaluations and wound up seventh from the bottom in the FEP.

The testimony showed that there was a rational basis for the FEP and that it was non-discriminatory. Lynn Bertsch related at deposition that the evaluation was broken down into four components that included competencies, current job performance, prior job performance, and recognition of deficiencies over a three year period. All employees were subject to the same criteria.

Complainant clearly believes that his interpersonal disputes were overblown, he should have had better work assignments, and he deserved a higher rating. Whether or not that is true is relevant only to a limited extent. Similarly, whether or not Leach and Powell were good managers or even whether or not they were wrong in their assessment of Complainant is not of central relevance. The crucial issue is whether the problems cited by Respondent were a pretext and his assignments and low rating were in fact prompted, at least in part, by the substance of his safety reports and recommendations. The weight of the evidence is that they were not.

Fred Leach testified that in 2002-03 Complainant was responsible for only six of 139 safety disclosures in his department. The highest ranked employee had 25. Leach also noted that in the "next steps" meeting, Complainant was so angry over control of the pressure protection program that Complainant became incoherent. While stopping short of describing Complainant as incoherent, even the witness most favorable to Complainant, Dennis Taylor, testified that his interactions in the meeting were counterproductive.

⁷¹ TR 519.

Complainant clearly had a history of interpersonal disputes. In multiple depositions, co-workers identified areas of friction with Complainant, ranging from lack of teamwork, to inflexibility, to thermostat and carpool disputes. Had management wanted to find a way to get rid of Complainant (for any reason) it could have started to build a paper case upon which it could have based a discharge for cause. That it did not do so tends to show that it was the RIF and not any motive to punish or retaliate that was behind Complainant's rating and discharge. Indeed, the testimony indicates that there were a number of prior opportunities for Complainant's managers to discharge him without having to provide much justification, but they did not.

Complainant argues that the use of the term "lose cannon" by one of his co-workers associates him with being a whistleblower. However, the term can be equally used for an employee who is unpredictable in his emotions or actions. Complainant alleged that his rankings began to slip after protected disclosures to Deason in 2003. His low rankings continued in the fall of 2004 after allegedly making a protected disclosure to Wright. Complainant opined that he should have received higher marks on the Functional Evaluation, based on his projects and awards.

Complainant also asserts that Respondent conjured up phony interpersonal difficulties and that his managers ignored his requests for assistance, did not give him good assignments, and did not communicate with him about turning over the pressure protection program for implementation. However, the testimony and other evidence clearly demonstrate a pattern of conflict between Complainant and his co-workers and managers. Credible testimony from Complainant's managers revealed efforts to make Complainant feel more a part of the team. Leach testified that he gave Complainant a special project that could have directly impact Leach's performance evaluation. Complainant's managers approved the submission of the director's award for his work on the pressure protection, even if not as quickly as Complainant would have liked. It is unlikely that these management actions would be taken on behalf of an employee "being set up for failure."

There was extensive evidence concerning Complainant's interpersonal conflicts while assessing the pressure protection program and during the subsequent implementation. Although there is credible evidence that Hays was not particularly easy to deal with, the consensus of the witnesses was that Complainant was having difficulty letting go of the project and got unprofessionally agitated during the "next steps" meeting with Hays. Complainant testified that he handled the meeting appropriately based on Hays' personality type and denied being confrontational. However, Dennis Taylor indicated that Complainant got agitated and his intervention was counterproductive. Other testimony showed that Complainant continued to have difficulty working with Hays and attempted to drop out of a project due to Hays' involvement. Complainant would interrupt staff meeting with questions about his personal situation and advancement. The training manager specifically noted that Complainant's emotional

episodes were causing delays in implementing the training module. The manager of the defense programs organization stated that he needed a site-wide team assembled, but he did not want Complainant selected to participate because he was unfocused and garrulous.

Complainant and Respondent agree that Complainant tended to be a loner. The question is whether that isolation was by choice or imposed by management with punitive intent. Complainant argues that he was expected to be a team player at the expense of his protected activity. The evidence shows Sharon Henderson's investigation was comprehensive and nearly every employee in the department was interviewed. The report found that Complainant isolated himself, that his dissatisfaction created tension in the workplace, and that he was perceived as emotional, confrontational, and unstable. Moreover, there was no evidence that Complainant was being intimidated or pressured to "go along" with a WSRC team that was purposefully acting counter to good safety practices. To the contrary, it appears there was some disagreement over implementation oversight authority, but not over the overarching substance of safety issues at the facility.

The evidence is clear that Complainant was let go after a change in the business climate necessitated a layoff, which in turn forced an employee ranking. Complainant notes that he was not downgraded or counseled for shortcomings in his administrative and technical credibility. The evidence supports that contention. His managers testified that overall, Complainant was doing a good job of finding safety issues and would not have been let go absent the RIF. However, that is consistent with a finding that it was not the substantive safety aspects of Complainant's work that caused him to have a low ranking and be terminated.

Complainant seems to have concluded that since his job as a quality engineer was by definition to engage in protected activity, any adverse action based on his job performance would be actionable under the whistleblower statutes. That conclusion is overly broad and would give any employee who has a job that involves identifying or correcting safety problems immunity from adverse personnel actions. Employees are protected from retaliation for the substance of their safety related reports and recommendations, *i.e.*, what is wrong and whether or not a remedy will fix it. They are not totally protected from adverse personnel actions for the way they make those recommendations, *i.e.*, demanding continuing oversight and insisting on who should implement the corrective action.

In sum, the record shows that Complainant was a long time employee of Respondent who worked as a quality engineer regularly conducting reviews to identify safety issues and recommending solutions. Although the substantive quality of his technical work was acceptable, he had a chronic history of troubled relationships with his coworkers and managers. He felt that he was unfairly treated in matters of pay, promotion, assignments, and travel opportunities. He was concerned that he would not

receive appropriate credit for his work. Those concerns led to multiple complaints and meetings and his managers tried to provide him high profile assignments and recognition.

When Respondent was forced by market factors to reduce its workforce, it implemented a ranking system to identify employees and facilitate the RIF. The rank depended in part on ratings. Complainant's ratings were relatively poor, as a result of his problems working with others. The low rating led him to fall into the group being discharged.

Complainant believes he was mistreated and ignored and alleges that his treatment was harassment, intimidation or reprisal in response to his work, which by definition involved protected activity. However, the preponderance of the evidence in the record is that the substantive safety reports, positions, recommendations that were his protected activity played no role in Respondent's decision to take any personnel action concerning Complainant.⁷²

ORDER AND DECISION

The complaint is **DISMISSED**.

So **ORDERED** this 3rd day of March, 2010, at Covington, Louisiana.

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PATRICK M. ROSENOW
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.

⁷² Moreover, even if I had found that the record showed Complainant's protected activity was a contributing factor in Respondent's personnel decisions regarding Complainant, I would also find clear and convincing evidence that Respondent would have taken the same actions, even in the absence of that protected activity.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 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).