

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 February 2010

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In the Matter of:

MATTHEW GREEN,
Complainant,

Case No.: 2008 ERA 00010¹

v.

READY MIX USA,
Respondent.

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For Complainant:

Melissa Horwitz, Esq,
Richard E. Johnson, Esq.

For Respondent:

Howard A. Mavity, Esq.
E. Jewelle Johnson, Esq.
James E. Rollins, Esq.

Before: Stuart A. Levin
Administrative Law Judge

Decision and Order

This matter involves a complaint filed under the employee protection provisions of the Solid Waste Disposal Act, 42 U.S.C. 6971 (SWDA) and later amended to include charges of discrimination under the Toxic Substances Control Act, 15 U.S.C. 2622 (TSCA); and Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610 (CERCLA). Matthew Green, a former manager of Ready Mix USA's Mosley Street cement plant in Tallahassee, Florida, alleges that he was subjected to disciplinary warnings, demotion, a hostile work environment, and eventually a constructive termination because he complained to his supervisor about the disposal of soil excavated at the plant which he believed was contaminated with diesel fuel. Ready Mix counters that the Complainant did not engage in protected activity under any of the statutes at issue, and it insists that he received disciplinary warnings for good cause, was demoted for economic reasons, was not the target of any retaliation, and left his job for new, better paying work, not because he was constructively

¹ Although the Docket Number assigned to this matter indicates that it involves a complaint filed under the Energy Reorganization Act (ERA), the initial complaint was filed under the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971.

discharged. In reply, Complainant characterizes Employer's explanations as mere pretexts for the retaliation visited upon him for engaging in protected activity. Tr. 25. Following a period of discovery, a hearing convened on the merits of the complaint. The findings and conclusions which follow are based upon a careful consideration of the appearance and demeanor of the witnesses who testified at the hearing, the record evidence, the arguments presented by the parties, and the applicable case law.

Findings of Fact

Complainant, Mathew Green, joined the Ready Mix USA workforce on February 10, 2006, as the manager of its cement plant on Mosley Street in Tallahassee, Florida. Tr. 42. Green was hired at of salary \$48,000.00, annually and received 3% annual increases. As plant manager, he did not receive performance evaluations. Tr. 44-5.

Complainant's initial supervisor, Ralph Seaman, was later replaced by John Bivens, the batch plant manager/operations manager, Tallahassee Division. Rx 39 at 6, 9. Green was plant manager before Bivins was hired. Rx 39 at 16. Ryan Bagwell, the general manager, Ready Mix USA, Tallahassee Division, was Bivins' supervisor. Tr. 42-3; Tr. 254.

Respondent Ready Mix USA is a concrete manufacturing and distribution operation headquartered in Birmingham, Alabama. Tr. 511. It operates out of more than 180 facilities throughout the Southeastern U.S. In 2005, during a time of economic expansion on the panhandle of Florida's Gulf coast, it acquired two Tallahassee plants, on Weems Road and Mosley Street, respectively. Tr. 43, 361. Phillip Creel is the vice president of Ready Mix USA's Coastal Division. Tr. 462.

Nicki Youngstrom, is vice president, human resources, Ready Mix USA. Her office is located at corporate headquarters in Birmingham. Tr. 511.

Wiley Willoughby is the area production manager for Ready Mix. Tr. 406. His duties include environmental oversight for the Coastal Division, including Destin, Panama City, and Tallahassee. Tr. 406-07.

Erin Christie is the environmental director of Ready Mix. Tr. 385. Her supervisor is Bill Holden. Tr. 385. She earned a degree in concrete management and has an environmental certification through the National Ready Mix Concrete Association. She also attended training courses and seminars sponsored by state agencies. Tr. 385-86. Her experience includes work with soil contaminated with diesel fuel. Tr. 390. Willoughby is her contact in the Coastal Division. Tr. 386.

Ken Johns is operations manager for Respondent's Coastal Division. Tr. 358. He is certified by the National Ready Mix Association in environmental matters, Tr. 359, and has worked 27 years in the concrete business. He has extensive practical experience in handling vehicle accident fuel spills, underground tank removal, groundwater contamination with petroleum products, gasoline, and diesel fuels, hydraulic fluids, and oil cleanup and disposal. Tr. 359-60. He reports to Creel. Tr. 360.

Pedro McKelvin is the delivery manager, or dispatcher, Tallahassee Division. Tr. 423. His duties include scheduling deliveries, scheduling drivers, and making sure the concrete is delivered to customers on time. Tr. 423. His dispatching and scheduling responsibilities included both the Mosley Street and Weems Road plants. Tr. 425. He has no authority to hire, fire, or discipline employees. Tr. 423-4. If he has a problem with a driver, he reports it to the plant manager. Tr. 424. His supervisors included Bagwell and Bivins. Tr. 424.

C.D. Wilford was a loader operator at the Mosley Street plant. Tr. 239. James Bouie was a truck driver at the Mosley Street plant. Tr. 210.

Constructing a Weir

In 2007, the Florida Department of Environmental Protection (DEP) determined that water running off the aggregate and the sand piles at the Mosley Street plant was not going through a sediment trap, known as a weir, which prevents the direct flow of water into a holding pond. Tr. 198. As material is dumped into the weir, it settles to the bottom, causing the water level to rise until it spills over the weir into the pond. Clear water spills over the top and the sediment is scooped out with a loader, preventing the material from contaminating the retention pond. Tr. 198; Tr. 266; Cx 4,

To bring the site into compliance with Florida DEP requirements, Ready Mix employees, Johnny Redd, Bob Sieben, and C.D. Wilford were assigned to construct a weir at the Mosley Street plant in March, 2007. Tr. 199; Tr. 266; Tr. 387. On March 14, 2007, Redd and Wilford were digging into the soil next to the storm water retention pond. Tr. 95. Wilford was operating a front end loader when he uncovered soil that smelled like diesel fuel. He unloaded two scoops them stopped, reported the odor to Bob Sieben and told him he was not going to remove any more dirt. Tr. 241. He had no physical reaction to the soil. Tr. 245.

Odor of Diesel Fuel

Complainant, Green, testified that one of the mechanics working on the weir came to him, told him about the dirt, and advised him that he needed to call somebody because the dirt was contaminated. Tr. 45. According to Green, when he opened his office door to walk down to investigate the site, he detected the odor of diesel fuel. Tr. 46, 193. Complainant had no training or experience in identifying or dealing with hazardous materials. Tr. 95-6.

Green testified that Johnny Redd, Bob Sieben, and C.D. were at the site, standing around with him near the weir when he called Bivins on the Nextel. Tr. 46, 199-201. Green recalled standing close to the work site, but he did not pick up the soil or test it. Tr. 96. He did claim, however, that it caused his eyes to burn so he left. Tr. 200-01.

Bivins testified that he received a call about the dirt, not from Green, but from Bob Sieben. Rx 39 at 21, 62-3. Bivens went over to the site, noticed a musky smell and called Bagwell. Rx 39 at 21; Tr. 267-8. Bivins thought the odor in the soil was coming from decaying material like leaves and algae. Rx 39 at 28.

In response to Bivins' call, Bagwell inspected the site and smelled diesel fuel. Tr. 268. Bagwell then called Creel. Creel called Johns, Tr. 366, and Johns called Willoughby and

Christie. Tr. 367-8; Rx 39 at 22; Tr. 388. Johns, Willoughby, Christie, Bagwell, and Bivins met at the site later that morning. Tr. 46; Tr. 268. At the time, Green was around the plant but he was batching trucks. Tr. 273. Tr. 369; Tr. 389; Tr. 409-10.

Complainant did not hear any of the conversations that took place between Johns, Christie, Willoughby, Bivins, and Bagwell at the site on March 14, 2007, and he did not discuss the soil with any of these individuals at that time. Tr. 97.

Johns, Willoughby, and Christie got down into the hole and sampled handfuls of the sandy, grey, loamy soil. Tr. 369-71(Johns). They picked it up bare-handed, looked at it, and smelled it. Id.; Tr. 390, 396(Christie); Tr. 408-09 (Willoughby). They detected no petroleum smell in the soil, noticed no oil sheen on the water leaching from the material, Tr. 370; Tr. 397; Tr. 409-10, and it left no oily residue on their hands. Tr. 372; Tr. 409.

According to Johns, it smelled like a septic tank field of rotting decaying organic vegetation material and it was confined to a small area about 10' by 10' and about 18" in depth. Tr. 370-01, 375, 380-1; Tr. 396. In Johns' opinion, the smell of the soil was not petroleum based and it was not contamination, but rather was caused by organic material. Tr. 371. He acknowledged that oil is an organic material, but the organic material he was referring to was vegetation. Tr. 376, 379.

To Christie, the soil smelled like decomposing organic material from the pond which contained turtles, fish, and vegetation, all of which contributed to the murky, swampy, musky smell of the soil. Tr. 391. By organic material, she did not mean diesel fuel. Tr. 391-2. In her opinion, the soil was not contaminated with diesel fuel and could be removed through normal processes. Tr. 392, 404. To Willoughby, it smelled like rotting organic matter, such as leaves. Tr. 408-09. By "organic material," Willoughby did not mean petroleum products. Tr. 408.

The dirt in the hole was not sent out for lab tests, Tr. 371-2, Tr. 410; however, Johns, Christie, and Willoughby determined, through physical observation, that it showed no signs of diesel contamination, was not contaminated, Tr. 371-2; Rx 39 at 22, and, therefore, no reports were filed. Tr. 376; Tr. 395.

Johns, Christie, and Willoughby each detected the smell of diesel in the air. Johns, however, concluded that it was coming from a truck maintenance shop and a 10,000 gallon diesel fuel tank about 25 to 30 feet away and the equipment burning diesel fuel used by the mechanics constructing the weir. Tr. 371. When Christie arrived, she also smelled diesel in the air near the equipment. Tr. 391. She concluded that the smell of diesel detected by the mechanics digging the hole was coming from the equipment they were operating. Tr. 402-04. Willoughby concluded that the smell of diesel was coming from the equipment and the shop nearby. Tr. 409, 421.

Removing the Soil

As a result of their investigation, Johns, Willoughby, and Christie decided to remove several yards of soil, place it on plastic in the parking lot, and surround it with an earthen berm. Tr. 395; Tr. 372-3; Tr. 392-3. It was wet with water, and they decided to contain it to keep it from leaching back into the ground. Tr. 373, 377; Tr. 392-3. Christie explained that it was put on plastic and surrounded with earth as an extra precaution. Tr. 304. They then instructed Bagwell

and Bivins to leave it in the parking lot until it dried out, then reassess it away from the diesel equipment. Tr. 270-71.

Willoughby testified that Bivins was the on-site person who ultimately handled the disposition of the dirt. Tr. 419-20. It was to be rechecked as a precautionary measure to ensure that there was no smell before it was hauled away. Rx 39 at 23-5; Tr. 271; Tr. 377, 379; Tr. 393. If Bagwell or Bivins had any concerns after it dried out, or if it appeared to contain a petroleum product, they were to report their concerns and dispose of the soil as a hazardous waste. Tr. 373, 378, 380. Neither Bivins, Bagwell, nor anyone else ever mentioned to Willoughby or Christie that Green had refused to assign anyone to remove the dirt or that Green had any problem with the soil. Tr. 420-21; Tr. 393. After about a month, the soil was taken away with the rest of plant's waste material. Tr. 271-2; 377, 379, 393, 395.

After Johns, Willoughby, Christie, and Bagwell left that site, Green claims Bivins visited him to tell him how they wanted to handle the dirt. Tr. 46. Green maintains that Bivins advised him that they wanted him to instruct C.D. Wilford to load the dirt onto plastic, then load it, one or two scoops at a time, onto trucks for removal from the premises. Tr. 47. According to Green, he advised Bivins that: "was not the right thing to do." Complainant testified that he had spoken with Wilford earlier, Tr. 98-9, and Wilford told him he would not work with the soil that had been excavated from the weir. Tr. 47, Tr. 98-9.

At that point, Bivins, according to Green, invited him to come by his apartment that night to talk about the dirt and other things. Tr. 47. Green testified that he expressed reluctance to stop by Bivins' apartment but Bivins insisted so he complied. Tr. 47-8. The evening of March 14, 2007, after work, he allegedly stopped by Bivins' apartment, called him on the security phone by the mailboxes serving Bivins' apartment complex, and met Bivins by the mailboxes. Tr. 48, 99.

Green testified that Bivins approached him smiling and told him that he, Bivins, had been hired to replace Ryan Bagwell and he wanted Green to help him get rid of Bagwell. According to Green, Bivins stated: "Matt, I've seen you, as good as you are, he said, you do this, I'll be the first black general manager that this company has, and as good as you are I guarantee you my position as operation manager." Tr. 49. Bivins also told Green that he wanted him to keep quiet about the dirt issue, and he could expect to be promoted to Bivins' job as operations manager. Tr. 49.

Green testified that he told Bivins his proposal was wrong and that he would not ask Wilford to move the dirt. Tr. 50, 100. At that point, Bivins, according to Complainant, stated: "You just made a career-ending decision" and walked off. Tr. 50, 100. Green contends that Bivins threatened him because he would not keep quiet about the contaminated soil and would not help Bivins get rid of Bagwell. Tr. 100, 156.

Complainant did not report the threat to anyone until he mentioned it to Bagwell on May 23, 2007. Tr. 98, 101. Green alleges that Bivins was the only one who threatened him. Tr. 100.

Although Green testified that he spoke with Bivins about the soil on the day it was excavated, Bivins denied that he ever spoke with Green about the dirt. Rx 39 at 22-3. He later acknowledged that sometime after March 14, 2007, when the dirt was ready for disposal, he

advised Green what they were doing with the dirt. Rx 39 at 68-9. He further denied that he ever said to Green that he made a career-ending decision. Rx 39 at 28.

C.D. Wilford testified that he did not speak with Green about the soil at the time of the incident and did not see Green near the excavation on the morning of March 14, 2007, although he thought Green may have viewed the site later. Tr. 241, 246-7. About a month after the incident, Wilford was instructed by Bivins to load the soil onto a truck for disposal. Tr. 242, 246. Although Wilford indicated that he did not want to excavate any more soil when he first detected the odor of diesel fuel on March 14, 2007, there is no evidence that he objected to its removal after it had been assessed by Johns, Willoughby, and Christie, or that he objected when he was asked to load it onto the truck for disposal a month later. According to Wilford, he first spoke with Green about the soil several months later. Tr. 246.

Bagwell testified that he did not talk to Green about the dirt and Green did not say anything to him about the dirt on March 14, 2007, or at the time the soil was removed a month later. Tr. 272-73, 302. Bagwell did not know Green thought the dirt was contaminated and had received no report that Green has allegedly refused to assign an employee to remove the dirt. Tr. 303.

McKelvin testified that he learned that Green complained about the soil when he was interviewed by OSHA after Green filed his complaint in October, 2007. Tr. 453.

Creel testified that he was not aware that Green had any problems involving the dirt incident. Tr. 501. Creel never received any report, and was not aware of any complaint by Green about the way the soil was handled, Tr. 481, Tr. 501, and he was not aware of any discussion between Green and Bivens about the soil. Tr. 508.

No one mentioned to Youngstrom, and she was not aware of, any complaint by Green about the way the company handled the soil incident. Tr. 541-42.

After the alleged encounter at Bivin's apartment on March 14, 2007, Green claims that Bivins avoided him at work unless contact was necessary. Tr. 50. On May 24, 2007, however, Green was issued an Employee Warning Notice that charged him with insubordination. Cx 6.

May 24, 2007, Write-Up

In late May, 2007, Green had taken a day off and left C.D. Wilford in charge of the Mosley Street plant. Wilford was a loader operator, and he ran the plant when Green was off work. Tr. 201. Green learned that someone had ordered cement in his absence and that Bivins, Leon Brown, and Adam Wilson had visited the plant and would not let Wilford into the upstairs office. Tr. 56-9. Green testified that, in light of these events and Bivins' previous threat to his career, he felt that Bivins was: "putting his plan [to end Green's career] into field action;" and he called Bagwell. Tr. 59-60.

Upon hearing from Green, Bagwell asked Green to come to his office and he also invited Bivins. Tr. 60. Tr. 60, 109. Green testified that during the meeting on May 23, 2007, he provided a full report to Bagwell, including Bivins' request that he remain quiet about the dirt and Bivins' threat to his career when he refused. Tr. 56, 59. This was the first time Green

mentioned the incident to Bagwell. Tr. 98. According to Bagwell, during the May 23, 2007, meeting Green did say that Bivins was trying to get rid of him, Tr. 335, but he did not mention the soil incident. Tr. 335.

During the meeting, Bivins explained that on May 22, 2007, Green met him in the morning at the plant and was “very upset” and wanted to speak with him about his pay; and later that evening Green showed up at his apartment complaining about his pay and other matters. Cx 1; Rx 39 at 29. Bivins testified that Green called him at about 6:00 p.m., and said he wanted to meet with him. Bivins asked if it could wait until the next day, and Green said “no,” he was already outside his apartment, and Bivins agreed to meet him by the mailboxes. Rx 39 at 29.

According to Bivins, Green complained about his salary and the fact that Robert Heuring, the operator at the Weems Road plant, was getting paid by the hour and Green believed he could earn more if he were paid by the hour. Bivins advised him that he had nothing to do with Green’s pay. Rx 39 at 30. Green’s salary was determined before Bivins joined the company, Rx 39 at 29, and Bivins explained that any change in Green’s pay would have been taken up with Bagwell and approved by Creel. Rx 39 at 29-30. Green also complained that he was not being informed about company decisions involving planning and changes, generally, and decisions effecting pay raises and remote batching. Rx 39 at 30-1. Green had complained to Bivins many times about his pay, Rx 39 at 35, but on this occasion, Bivins described Green as acting aggressively and very belligerently toward him concerning his salary and Robert Heuring’s hourly pay. Cx 6; Tr. 332-3.

During the meeting on May 23, 2007, Bagwell explained to Green that he was in a salaried position. Green questioned why Heuring was being paid on an hourly basis, and Bagwell explained that Heuring was not a plant manager. Green had previously questioned Bagwell about his pay. Tr. 332-34.

After the discussion had calmed down, Bivins complained that Green had been verbally aggressive toward him at the apartment, and according to Bagwell, Green did not deny he had been to Bivins’ apartment. In Bivins’ opinion, Green did not respect him, did not approve of his authority and did not accept his suggestions. Rx 39 at 42. Green disagreed with Bivins’ assessment that he was aggressive, but according to Bagwell, Green stated: “if I’m insubordinate then please write me up.” Tr. 276-77, 333. Bagwell testified he believed Bivins’ version of the events, because he was “supporting his operations manager.” Tr. 277.

Bagwell issued Green a disciplinary warning for insubordination. The decision to issue it was his, Tr. 114-5; however, he did consult with Creel. Tr. 275, 278. Tr. 473, Cx 6. Creel observed that Green had admitted going to Bivins’ apartment after hours and was surprised that Green had gone to Bivins’ home and acted aggressively. He suggested that Bagwell write up Green for his action. Tr. 474-75.

The May 24, 2007, write up was Green’s first warning. Green objected to the warning; but in the “Employee Statement” section of the Warning Notice form, but he did not mention anything about the soil he believed was contaminated, did not express any objections to the way the soil was handled, and did not report Bivins’ alleged threats regarding the soil. Cx 6; Tr. 61, 123. He simply denied he was an aggressor or belligerent when he spoke with Bivins about his pay. Cx 6; Tr. 124.

Training

Complainant testified that he was supposed to attend management and Florida Department of Transportation (FDOT) training sessions before the dirt incident. Tr. 50-1. After the soil incident, he asked Bivins about the training and Bivins avoided his question and failed to schedule his training. Tr. 51. Green testified that the decision to deny him training was retaliatory. Tr. 141-2.

Bivins and Creel discussed getting “somebody in the area trained” because they expected an increase in FDOT work in the future. Tr. 143. Although Green understood that he was the one selected, Tr. 143-4, Bivins did not tell him Creel had approved him for the training. Tr. 145.

Creel generally discussed getting someone FDOT certified as a batch manager, Tr. 485, but he was not aware that Green was ever selected to get FDOT certified. Tr. 486. Bivins was FDOT certified and they were discussing the possible certification of others. Tr. 486.

Green had received an email regarding the FDOT certification of the plant, and he met with Bivins about it. He claims Bivins told him he would be sent for the training. Tr. 142-3. Bivins confirmed that he spoke with Green about getting FDOT certified and offered to assist him in getting certified. Rx 39 at 65. According to Bivins, Green did not receive the training because they were too busy to give him the time off. Rx 39 at 79. He denied Green’s allegation that the failure to schedule him for training was retaliatory. Rx 39 at 79.
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Green does not know whether anyone in Tallahassee was sent for formal training, Tr. 147-8, but he did not complain to Creel or to Human Resources that he did not receive training due to retaliation. Tr. 149.

Management Training

The record shows that Bagwell told Green they would like to send him to a management seminar for training. Tr. 273. Green had management problems before Bivins was hired, and Bagwell thought he would benefit from training. Tr. 330, 346. Bagwell testified he simply never got around to scheduling it. Tr. 346. Bagwell was unaware of any manager in the Tallahassee Division receiving management or FDOT training. Tr. 328-9.

Harassment and Retaliation Write-Up Authority

After the soil incident, Complainant attempted to discipline an employee, Troy Rowls, for an alleged offsite infraction allegedly in violation of a DEP directive. Green alleges that he was told by Bivins that Rowls had done nothing wrong and could not be written up. Tr. 52, 118-9. Bivins and Green disagreed about the proper procedure for pouring concrete into the weirs. Tr. 120. Green testified that he advised Bagwell of their disagreement. Tr. 120-1. Thereafter, Bivins allegedly required Green to get his approval before issuing any further warnings to employees. Tr. 121-2. Green did not complain to Ready Mix’s Human Resources Office that this was retaliatory. Tr. 122.

Bivins acknowledged that he did tell Green that Rowels should not be written up, but he could not recall telling Green that he had to have his permission before disciplining anyone else. Rx 39 at 47. Bivins thought Green may have thought his refusal to allow Green to write up Rowels was retaliatory, because Green was upset that he received a written warning. Rx 39 at 80-2.

Demotion

On September 6, 2007, Green was advised that he was being demoted to a truck driver. Tr. 62; Rx 33; Tr. 525. Green testified that Bivins demoted him because he opposed the disposal of the soil, and Bagwell supported Bivins because he was influenced by his boss, Phillip Creel. Tr. 139. Green acknowledged that he never told Creel about the soil or about Bivins' threat. Tr. 140. Respondent contends Green was demoted for business-related economic reasons.

The Coastal Division includes 18 plants from Tallahassee to Fort Walton Beach, Florida. Tr. 463. From 2005 to 2006, its production went from a half million cubic yards of cement annually to a million cubic yards. Tr. 361. Orders were backlogged and business was thriving. Tr. 362. In early 2006, however, Ready Mix's planners detected a blip in their forecast models. At the time, Ready Mix had on-going projects involving the construction of 20 to 25 condominiums from St. Joe/Mexico Beach to Fort Walton Beach. Tr.362.

Beginning with their massive foundations, these buildings had a construction cycle for concrete that took about 18 months. By early 2006, Ready Mix noticed that, while the condo construction business was still thriving in mid-cycle on existing projects, pouring 85,000 to 90,000 cubic yards a month, they were not pouring any new foundations. Tr. 362. As Johns testified, the Coastal Region noticed it first before other areas, and: "alarm bells started going off." Tr. 362-63.

As a result, Ready Mix planners examined in more depth the future need for concrete along the Gulf Coast of the Florida panhandle, consulting with customers, local officials, trade associations, architects, and engineers. Tr. 363; Tr. 465. Their study led them to conclude that they were overstaffed and had too many plants and trucks. Anticipating a business downturn, Creel ordered a consolidation when work dwindled from 90,000 yards to 45,000 yards. Tr. 465. Business was off, and it was decided that two plants were not needed in Tallahassee. Tr. 255.

In April, 2006, Ready Mix started to re-assign and transfer people, close facilities, dispose of rolling stock, and reduce the number of employees by attrition. Tr. 363.

Technology afforded other cost saving opportunities through a process called remote batching which allows one person to operate a cement plant with the help of a computer to load the bins that make the concrete. Tr. 301. Creel "strongly suggested" to Bagwell that he try remote batching in Tallahassee. Tr. 466-67, 472. At first, Bagwell was reluctant to implement remote batching, but Creel's suggestions ultimately persuaded him that remote batching was a process that had merit. Tr. 467.

Green confirmed that he was told at a safety meeting in early 2007 that the company was looking into a remote batching system in Tallahassee. Tr. 129-30. The transition to remote batching was later implemented, and, as a result, the Weems Road plant was converted to a

remote batching operation and the position of the Weems Road operator was consolidated with the Mosley Street plant manager. Tr. 468. As a result of the economic downturn, the organizational structure in Tallahassee changed, Tr. 300-01, and Green's position as plant manager was consolidated with the position of plant operator at Weems Road. Tr. 336. Creel, Bagwell, and Bivins then had to decide who would manage the combined operations.

Creel, Bagwell, and Bivins decided that Robert Heuring, who was not then a plant manager, would become the plant manager. Tr. 255-6; Tr. 335-36. On September 6, 2007, Green was notified that he would be demoted to the position of driver, and Heuring, who was previously a loader operator/acting plant manager, was made plant manager with authority over both Weems Road and the Mosley Street plants. Tr. 62, 130-31; Tr. 256-7; Tr. 297-8. At the time, Green was the only employee demoted in Tallahassee, Tr. 296; however, his was the first of nineteen similar positions that were either consolidated or eliminated, including Bivins' position which was eventually eliminated. Tr. 364-6. Had there not been an economic downturn, Green would not have been demoted. Tr. 490.

Creel, Bagwell, and Bivins discussed the strengths and weaknesses of Heuring and Green. Heuring had seniority, and, in their opinion, he appeared more versatile in more aspects of plant operations than Green. Tr. 469-70. Bagwell testified that Heuring was selected because he had seniority with the company, had operated the Weems Road facility, and had experience driving trucks, charging bins, and operating the loader. Tr. 257-60; Tr. 488. It was the overall opinion of these managers that Heuring had better mechanical ability, he dealt with employees better, was more respected, had been an employee longer than Green, and knew the business better. Rx 39 at 58. In addition, Bagwell noted that Green had received a Warning Notice, Tr. 257, and Creel recalled that dispatcher, McKelvin, had problems with Green. After due consideration of his strengths and weaknesses, Tr. 482, 490, Bagwell decided, in consultation with Bivins, and with Creel's concurrence, to give the job to Heuring. Tr. 257-60; Tr. 469-71. Creel then suggested that Green be offered a job as a driver. Tr. 483.

C.D. Wilford did not think it was fair that Green was demoted and he called Bagwell. He told Bagwell he: "hated to see a good man get blackballed," but Bagwell responded that it was a company decision. Tr. 244, 251. By "blackballed," Wilford explained that he meant by other truck drivers because Green expected them to follow the rules. Tr. 245, 253. According to Wilford, Green got along well with most of the employees but had problems with two drivers, Rowls and Robinson. Tr. 244.

As plant manager, Green made \$48,000.00 per year. In December, 2006, he also received a \$1,500.00 bonus. Tr. 44. Company policy was to provide a two-week Christmas bonus after a year of employment. Green was hired at \$850.00 per week. Employees who have worked less than a year receive a \$25.00 gift card. Tr. 261. Green's bonus was not a performance bonus. Tr. 262. He received it in less than a year because he insisted that Bagwell promised it to him. Tr. 262.

As a truck driver, Green made \$12.15 per hour. Tr. 62. According to Wilford, when Green was plant manager he had complained to Wilford about his pay, Tr. 246, and, according to Wilford, Green seemed happier driving the truck than being plant manager. Tr. 247. Green thought the hourly employees made more than he did, and Green told Wilford he wanted to convert to hourly pay. Tr. 248-9.

The record shows that Heuring was hired as plant manager at \$1000.00 per week, Tr. 344, which was more than Green had received as plant manager. He received more because of his seniority and to ensure he made no less than he earned as an hourly worker. Tr. 344. In addition, he had a harder job operating two plants. Tr. 490, 502-03.

The Tallahassee consolidation included not just the plant manager's job, but the Tallahassee production and distribution operations. Tr. 354. After Weems Road went to remote batching, all the drivers were assigned to Mosley Street. Tr. 352. Depending where a job was located, the concrete could be produced at Mosley street or batched remotely at Weems Road. Tr. 353, 354. Heuring operated both plants.

In 2007 and 2008, there was a downturn in business, Tr. 432, but Ready Mix still had several large jobs, including a Wal Mart foundation poured from August, 2007, through February, 2008, and jobs at FAMU and Florida State University, Tr. 378, but the bottom had fallen out of the residential market. Tr. 433. During the Wal Mart job, seven drivers were hired by Ready Mix in Tallahassee. Tr. 75; Tr. 489. Creel testified, however, that the workforce was not increased because the hired drivers replaced drivers who had left. Tr. 489.

Green testified that four or five people were hired after he was demoted, including four men to run the plant, a batch operator, and a plant manager, Tr. 76, and he was not considered for those positions. Tr. 76. According to Green, Alex Willington, Jeffrey Godwin, Jeffery Lawrence, and Charles Williams were brought in to run the plants. Tr. 131-2. Green testified that Bivins told him that Godwin was hired to run the Weems plant and run the loader, Tr. 132-3, and Willington, he believes, ran the Mosley Street plant. Tr. 134, 136. Green further testified that both the Mosley Street plant and the Weems Road plant were running with an operator at both plants after he was demoted. Tr. 135. He acknowledged, however, that he did not actually know whether Lawrence and Williams were managers. Tr. 136-8. Contrary to Green's testimony, however, Bagwell testified that after September, 2007, no one other than Heuring was a plant manager, not Godwin, Willington, Williams, or Lawrence. Tr. 342-3.

Since Heuring's pay increased to \$1000.00 per week, and Green's pay stayed about the same before and after his demotion to driver, the consolidation of the management positions in Tallahassee initially achieved no cost savings; however, the move to remote batching at Weems Road facilitated savings through attrition of drivers, and some overhead. Tr. 504-07. Heuring stayed in the position of plant manager for about 7 months, and he was eventually demoted to load operator for economic reasons. Tr. 336; Rx 39 at 77. Eventually, Bivins and Heuring were terminated at about the same time due to the economic slow down. Tr. 345; Tr. 497, 503.

September 11, 2007 Write-Up

Green received a second Employee Warning Notice on September 11, 2007, for two alleged infractions. Tr. 63-4; Cx 7. First, he allegedly advised workers at a safety meeting to bypass local management when they had problems and report them directly to Ready Mix headquarters in Birmingham, and second, he was written up for failing to take disciplinary action against an employee, James Bouie, who had allegedly threatened him. Tr. 64.

In an Employee Statement attached to the Warning Notice, Green denied that he instructed employees to bypass local management and explained that he did not write-up Bouie because Bivins had instructed him not to issue any warning notices without his approval and because Bouie did not threaten him. Cx 7; Tr. 64-65. In the last sentence of his statement, Green stated: "These statements [in the Warning Notice] are simply retaliation remarks and are just not true." Cx 7. Complainant's statement does not refer to the soil incident or to Bivins' alleged threat, and it does not explain who or why anyone would be retaliating against him. The incidents involving the write-up occurred while Green was plant manager but the warning was issued after the demotion. Rx 39 at 76.

Bypassing Local Management

The record shows that a former employee, Robert West, reported, during an exit interview after he was fired, that Green advised employees at a safety meeting to bypass local management and call corporate headquarters in Birmingham if they had a problem. Tr. 279-80, 295, 338. Bagwell did not ask Green if West's allegations were true, but instead he called Creel and told him what West had said, and Creel decided Green should be "written up." Tr. 281-2.

Green denied that he advised employees to bypass local management. Tr. 127. James Bouie, a truck driver, who worked at Ready Mix when Green was plant manager, Tr. 211, denied that he ever heard Green advise employees at a safety meeting to bypass local management. Tr. 212, 229. He did not know whether he attended every safety meeting Green conducted, but he attended most of them. Tr. 228. C.D. Wilford testified that he attended all of the safety meetings with Green, and he did not recall hearing Green tell employees to bypass local management if they had problems. Tr. 239-40.

Creel explained the context in which he suggested that Green be written-up. He had received a call from Nicki Youngstrom about an anonymous letter she had received concerning an incident involving one employee threatening another with a machete. Creel called Bagwell about it, and Bagwell determined that it was Robert West who had threatened another employee, and West was terminated. Tr. 477. In his exit interview, West reported that Green had advised employees to by-pass local management and report their concerns to Birmingham. Tr. 477. Creel reflected on West's comment and the anonymous letter sent to Birmingham and realized that if employees were being encouraged to report to Birmingham and bypass local management, a problem like the machete incident involving West would be delayed in being reported and it could cause real safety problems. Tr. 479, 492-4. Creel thought the anonymous complaint to Birmingham was a response to Green's suggestion that employees complain to Birmingham, Tr. 499, and he thought Green should be warned about recommending that employees bypass local management. He did not ask Bagwell or Bivins to get Green's side of the story before writing him up. Tr. 479, 494. Bivins did not talk to Green about West's comments, Rx 39 at 42-3, but testified that Eric Harris confirmed West's report. Rx 39 at 43-4.

Youngstrom also testified that in December, 2007, she received a call from an ex-employee, Rodney Bush, complaining about his termination. Tr. 522-3, 540. During their conversation, Bush told her that Green had advised him that if he had a problem he should bypass local management and go straight to Birmingham. Tr. 523. She did not discuss the matter with Green at the time because she thought it was an isolated incident. Tr. 524.

Failing to Write-Up Bouie

The September 11, 2007, warning notice also admonished Green for not disciplining Bouie for a previous incident of insubordination which occurred on August 28, 2007. Tr. 125. Ex 7; Cx 7; Tr. 126; Tr. 286, 292. According to Bivins, Bouie threatened to “whoop” Green, Rx 39 at 45-6, Rx 39 at 52-3, and Green failed to discipline Bouie for his action. Tr. 126. Bivins told Bagwell about the incident, Tr. 295-6, and advised Bagwell that he construed Bouie’s action toward Green as insubordination. Tr. 296.

Bouie denied he ever threatened Green and testified he was not aware that anyone alleged that he had threatened Green. Tr. 212. He admitted that he confronted Green about his paycheck, but Green explained that Bivins decided when he received his pay. Tr. 216-7, 236-7.

Bouie denied that management accused him of insubordination. Tr. 212. He later acknowledged that he did receive a warning for insubordination on the day he was fired, Tr. 215, and was fired for refusing to sign it. Tr. 218-19, 227, *but see* Tr. 212, 215. He denied he ever received Cx 2 or was shown Cx 2. Tr. 232-3. The write-up he was shown he thinks was written by Bivins and charged him with insubordination. Tr. 234.

According to Bagwell and Bivins, Bouie was not terminated for insubordination or for threatening Green. Tr. 292-3; Tr. 339. Bouie was written-up for being late and for absenteeism, and was asked him to sign the warning notice. Cx 2; Ex 7; Tr. 125; Tr. 283-4. When he refused he was terminated. Tr. 284; Tr. 342. According to Bagwell, the refusal to sign a write-up is grounds for termination. Tr. 284; Cx 7. Bivins testified that the original intent in writing up Bouie was not to fire him. Tr. 350.

Green’s Response to the September 11, 2007 Warning

Green testified that the warning he received was not justified because Bouie was not insubordinate and had not threatened him, Tr. 65, and because Bivins had previously directed him not to issue write-ups without his approval. Cx 7.

The record shows that Green’s Employee Statement, which is part of the September 11, 2007 warning, objected to the write-up as “retaliation.” Cx 7.

Respondent distributes to its employees a Code of Ethics which includes its policy prohibiting retaliation for reporting violations of its Code of Ethics. Rx 8, at 1-2. The Code of Ethics covers reporting of environmental mishaps, Rx 8 at 37-8, and, therefore, prohibits retaliation for complaints involving environmental problems. Tr. 514. Allegations of retaliation involving such matters may be reported directly to the Corporate Compliance Officer. Rx 8 at 3.

Creel noted that Green had claimed retaliation on the write-up form, Tr. 480; however, he thought Green’s comment as a reference to West retaliating against Green, and West had already been terminated. Tr. 481, 495-96. Creel explained that Green’s claim of retaliation was made in the context of an anonymous letter which had been sent to Birmingham complaining about West and West’s subsequent report that Green had recommended that drivers complain to

Birmingham. Tr. 492, 498-99. Creel thought West may have been angry at Green for getting him in trouble.

Green did not complain to Ready Mix's Human Resources Office about the September 11, 2007 write up, Tr. 128, and Youngstrom testified Green never complained to her about retaliation or about the way the soil was handled. Tr. 515.

Bagwell denied that Green's disciplinary warnings in May, 2007, and September, 2007, or his demotion were related, in any way, to his alleged complaint about the disposal of soil. Tr. 343.

Creel testified that the consequences of a first or second write-up could, if sufficiently serious, result in termination, but write-ups would not necessarily affect pay or working conditions. Tr. 508-09. As a result of the write-ups he received, Green lost no pay, received no time off, and lost no seniority. Tr. 338. The May 24, 2007 warnings, however, was issued before Green was demoted, and Bagwell mentioned that it was a factor considered when the relative merits of Green and Heuring were considered in deciding who would be the plant manager after the consolidation. Tr. 257.

Tardiness and Leaking Oil Containers

Green alleges that Bivins attempted to write him up for being late and for excessive time on the clock. Green protested the write-up and Bivins did not issue it. Tr. 68-9; Tr. 150-1. On the same day, Green reported that old containers were leaking oil. According to Green, Bivins responded that: "like your career, that container is a dead issue," because before he could tell anyone the container would be gone. Tr. 69. Green also complained about the leaking containers to the Florida DEP, and DEP advised him that the volume of the containers was not sufficient to file a complaint. Tr. 151-3.

In addition to contacting the DEP, Green called Youngstrom on December 3, 2007, to complain about the oil containers. She advised him she would look into it and get back to him. Tr. 70. She contacted Creel, and Creel advised her that an OSHA complaint had been filed and that Green was represented by counsel. Tr. 516. She later learned that the oil containers had nothing to do with the OSHA complaint, but, at the time, she thought they were related. As a result, she advised Green that she was not able to discuss the matter with him because he was represented by counsel. Tr. 153-56, Tr. 194-95. Green also raised with Youngstrom an issue about being written up for tardiness in violation of the 10-hour rule for drivers, and she advised him to report the problem through his chain of command. Tr. 519-21. During their telephone conversations about the oil containers and the 10-hour rule, Green did not mention anything about retaliation, harassment, or the March, 2007, soil incident. Tr. 520-21.

Hours of Work as a Driver

As a driver, Green testified that he was worked more than others, and that "they were on me constantly," Tr. 73-4, but that ended in April or May, 2008, when Bivins realized how much money he was making. He claims his hours were then cut when others were working. Tr. 74-75. Green believes his assignments as a driver were the result of retaliation.

According to Wilford, after the dirt incident, Green did work longer hours than eventually his hours were cut, Tr. 250, but Wilford testified that as plant manager, Green worked long hours because his job was to see that the plant ran smoothly, and the hours were based on the workload. Tr. 252-3.

The record shows that Pedro McKelvin is the delivery manager for Ready Mix. Tr. 423. His duties include scheduling deliveries, scheduling drivers, making sure the concrete gets to the customer on time, and organizing what was to be loaded and when to load. Tr. 158; Tr. 423. His dispatching and scheduling responsibilities included both the Mosley Street and Weems Road plants. Tr. 425.

McKelvin testified that unless a customer asked for a specific driver, he assigned drivers after checking the computerized driver availability sheet which showed the number of hours each driver worked each week and his availability. Tr. 426. The drivers called in each day after 5:00 p.m. to get their assignment the next day. Tr. 427. On occasion, McKelvin would call drivers to determine their availability. Tr. 427.

McKelvin had complete autonomy in scheduling drivers, but from the time Green arrived as plant manager, Green questioned him frequently about scheduling and dispatching. Tr. 101-2; Tr. 429-31. McKelvin had no supervisory authority over Green as plant manager, Tr. 159, 194, but they needed to work together to run the plant. Tr. 194-5. McKelvin explained that many commercial pours took place at 2:00 a.m. or 3:00 a.m. to avoid traffic. Tr. 431. He scheduled deliveries to satisfy customer requests. Tr. 432. Creel confirmed that the hours worked by the plant manager were dictated by the customers. Tr. 464.

Green's constant questions annoyed McKelvin and allegedly disrupted his operation. Tr. 431. McKelvin complained to Bagwell, Suggs, and Creel about Green's interference. Tr. 431-2. Bagwell confirmed that McKelvin complained about Green questioning him about his job, and McKelvin accused Green of second-guessing his decisions. Tr. 330-31. Wilford also observed that Green questioned McKelvin's decisions about dispatching and confirmed that there was tension between Green and McKelvin before the soil incident. Tr. 247. Wilford invited McKelvin and Green to lunch to see if they could work out their differences. Tr. 249.

The record shows that, on one occasion while Green was still plant manager, he and McKelvin had a verbal altercation. McKelvin testified that Green had been "riding him pretty hard" for a few days questioning his decisions, and, during a period when McKelvin was exceptionally busy, Green called him with more questions. This particular intrusion angered McKelvin to the point that he called Bagwell and told him if he did not do something about Green "pretty quick," he would quit. Tr. 437, 444.

After Green was demoted, McKelvin was responsible for scheduling Green's assignments as a driver. Tr. 433, 448.

Despite their prior disagreements, McKelvin scheduled Green and other drivers evenly. Tr. 434. The drivers were assigned to rear-discharge or front-discharge trucks. Tr. 427. The front-discharge trucks got more work, Tr. 428, and Green was assigned to truck 773, a front discharge truck. Tr. 428. Drivers were not scheduled based on seniority. Tr. 428. The drivers advised McKelvin when they were available to take a load, i.e., they called in a 10 code. Tr. 166.

McKelvin tried to balance out the hours for the drivers to avoid overtime and other costs. Tr. 428-9; Tr. 165. Bagwell confirmed that dispatch was directed to keep the drivers' hours as equal as possible. Tr. 290-1.

Bivins could access the computer report on the drivers' hours, Tr. 439-40, but Bivins never asked McKelvin about Green's time or talked to him about Green's hours. Tr. 440, 447, 449. Bagwell never told McKelvin how or when to schedule Green or to schedule him differently from other driver. Tr. 434.

As a truck driver earning an hourly wage, Green earned more at times than he earned as a salaried plant manager. Tr. 530; Tr. 527; Rx 33; Rx 34. He had fewer hours in 2007 and 2008, but all drivers had fewer hours. Tr. 434. Green's hours were not reduced in a manner different from other drivers in view of the economic downturn and the lack of business. Tr. 289. McKelvin gave the driver with the lowest hours priority on the assignments the next day. Tr. 435, 438. On occasion, he would call Green, and Green would decline to come in to work for personal reasons. Tr. 435, 439.

McKelvin learned that Green complained about the soil when he was interviewed by OSHA after Green's filed his complaint. Tr. 453. According to McKelvin, Green never complained to him about his schedule. Tr. 434. After the demotion, Green's hours varied, Rx 39 at 88, but they were not disproportionately increased or cut. Rx 39 at 87-8.

Bagwell was not aware of any performance problems with Green as a truck driver. Tr. 289. Green's performance as a driver he was evaluated. Tr. 44; Cx 1. His annual Driver's Review dated December 26, 2007, shows that he received a "Satisfactory" rating in all categories. Cx 1. He was never disciplined as a driver. Tr. 175-6.

Harassment by Other Employees

Respondent distributes to its employees a Personnel Manual which includes its policy prohibiting harassment in the workplace. Rx 1 at 65-6; Tr. 85-6. The policy provides an employee who believes he or she is the target of harassment with four steps up the chain of command, ultimately to a compliance officer, to resolve the problem.

Green claims Bivins harassed him because he opposed the soil disposal plan and would not help Bivins get rid of Bagwell. Tr. 156, 174-5. He also testified that McKelvin harassed him, and drivers Keith Robinson and Craig Sutton harassed him, and Charley Carty harassed him by making gestures and finger-pointing. Tr. 156-7, 162.

Green described Carty as gesturing four or five times by forming the image of a gun with his fingers and pointing at Green. Tr. 201-02. Green thought Carty harassed him because Green had sent an employee involved with Carty for a drug test and because Green had reported Carty for a delivery that angered a customer. Tr. 203-04. Green also testified that driver Rowls kept a gun in his car and threatened to shoot him, but Green did not report the incident to Human Resources or to the police. Tr. 165.

The record shows that Green received an email from driver, Keith Robinson, which described Green as a "retard." Green reported the incident to Wiley Willoughby. Tr. 159, 163.

Willoughby testified he received a complaint from Green in the spring of 2008, about harassment and he traveled to Tallahassee to meet with Green. Tr. 410. Green complained about two individuals, and Willoughby met with them. Tr. 410. Green complained that Craig Sutton was spreading rumors and gossip about him, and that Keith Robinson had sent him an inappropriate text message. Tr. 164; Tr. 411. As a result, Robinson received a warning, Tr. 161; Rx 24, Tr. 411-12, and Sutton received counseling. Rx 23; Tr. 413-14. Willoughby also convened a drivers' meeting to train the Tallahassee employees about the company's harassment policy. Tr. 415-17.

Green testified that when he reported the harassment to Willoughby, he also advised Willoughby that he had contacted the Sheriff's Department. Tr. 159, 163. Green assumed that Willoughby responded to him only because he complained to the sheriff, Tr. 160-1, an assumption which Willoughby expressly denied. Tr. 416.

Police Report of Vandalism

On July 17, 2008, someone broke into the Mosley Street plant and did significant damage to a silo containing sixty-eight tons of cement dust. The vandal tied a water hose to the top of the silo and turned it on, causing water to mix with the cement dust and harden. The damage was estimated to exceed \$90,000.00. The police report stated that the last employee to leave the plant the previous evening was Kevin Derrico, and Matthew Green and Nathan, two employees on Derrico's crew, left just before he did. The police report noted that Bivins and Sieben had a suspect in mind and described the suspect as a "disgruntled employee who was recently demoted," but the suspect was not named. Cx 31; Tr. 172, 174. The police did not contact Green. Tr.173.

Green testified that a coworker, Derek Gaines told him he was being blamed for the break-in, Tr. 70, and, as a result, Green went to the police and denied that he was the vandal. Tr. 71-73; 173. Green never heard Bivins accuse him of damaging the silo, Tr. 171, but Green inferred that Bivins had accused him because the police report stated it was damaged by a disgruntled employee who had recently been demoted. Tr. 171.

Green started looking for another job when he was demoted, Tr. 76, but stepped up his job search after he read the police report and concluded that: "Bivins put in the police report that [he] was the suspect for damaging the plant." Tr. 76; Tr. 175. After reviewing the police report, Cx 31, Green explained that he thought Bivins was referring to him where the report stated that the suspect was a: "disgruntled employee who had recently been demoted." Tr. 77. The record shows that Green was demoted on September 6, 2007, over ten months before this incident.

Resignation/ Alleged Constructive Discharge

Green alleges that his work environment became so hostile he was forced to resign. After he resigned, Willoughby conducted an exit interview with Green. Tr. 418. He did not recall Green mentioning the soil incident or complaining about retaliation related to the soil incident. Tr. 418; Tr. 182-4; Cx 8. Instead, Green stated that he was leaving Ready Mix for new employment, and complained about local management, but he did not claim harassment, retaliation, or constructive discharge. Cx 8, *see also*, Cx 9.

Green has had two jobs since leaving Ready Mix; the first with Cheney Brothers, and, a second, with Southern Wine and Spirits. Tr. 79-80. Green's ending salary at Ready Mix was \$12.80 per hour. His starting salary at Cheney Brothers was \$15.00 per hour. Tr. 187. He was terminated from Cheney Brothers for refusing a route, Tr. 188-90; Rx 36; however, Green denied that he refused a route. Id. Green started working at \$13.00 per hour for Southern Wine in November or December, 2008. Tr. 191-192.

Green believes he has suffered economic losses totaling \$28,000 to \$30,000 due to the demotion and constructive discharge from Ready Mix. Tr. 82. In addition, he claims he has suffered from sleepless nights and emotional distress. Tr. 82-4. He has not, however, sought medical advice or treatment for panic attacks, emotional distress, or anxiety. Tr. 192.

Conclusions of Law

Complainant, Matthew Green, alleges that his Employer, Ready Mix USA, violated the provisions of the Solid Waste Disposal Act, (SWDA), 42 U.S.C. § 6971, *et. seq.*, the Toxic Substances Control Act, (TSCA), 15 U.S.C. Sections 2621 (a), and the Comprehensive Environmental Response, Compensation and Liability Act, (CERCLA), 42 U.S.C. § 9610,² when it issued Employee Warning Notices, demoted him from plant manager to truck driver, created a hostile work environment, and eventually constructively discharged him because he complained to his supervisor about the way Respondent handled and disposed of soil he believed was contaminated with diesel fuel.³ In response, Ready Mix moved for partial summary decision contending, *inter alia*, that Green untimely challenged his demotion and the warning notices,⁴ and untimely amended his complaint to include TSCA and CERCLA violations.⁵ Ready Mix

² The SWDA governs the treatment, storage, transportation and disposal of dangerous waste (42 U.S.C.S. § 6902); CERCLA addresses hazardous waste cleanup (42 U.S.C. § 9601 et seq.); and the TSCA (15 U.S.C. §2605) governs that manufacture, processing, distribution, and disposal of chemical substances or mixtures that present an unreasonable risk of injury to health.

³ Employer objected to consideration of Complainant's constructive discharge claim on the ground that he did not allege it in his original complaint and did not challenge it by filing a new complaint. Complainant did, however, allege a hostile work environment, and a constructive discharge is simply an "aggravated" hostile work environment case. Pennsylvania State Police v. Suders, 542 U.S. 129 (2004). Although the precise chronology of all of the events Complainant challenged cannot be determined on this record, several incidents and conditions which gave rise to the alleged constructive discharge occurred after the complaint was filed and were not raised in the pleadings; however, Employer was afforded a full and fair opportunity to address the hostile work environment and constructive discharge allegations, and they were fully litigated at the hearing. 29 C.F.R. §18.3(e); *see*, Baker v. Buckeye Cellulose Corp., 856 F.2d 167 (11th Cir. 1988); *but see*, Sasse v. U.S. Attorney, 1998 CAA 07 (ARB, January 30, 2004).

⁴ The complaint was filed on October 8, 2007. Consequently, discrete adverse employment actions which occurred more than 30 days before that date are untimely challenged, including the May 24, 2007 Warning Notice. The September 6, 2007 demotion and the September 11, 2007 Warning Notice, however, were both timely challenged. The 30-day period for the demotion, in particular, began the day after the demotion and ended on October 6, 2007, a Saturday, which extended the deadline to Monday October 8, 2007. 29 C.F.R. §18.4(a); Melendez v. Exxon Chemicals Co., 1993 ERA 006, (ARB July 14, 2000).

⁵ In his Amended Complaint filed on May 30, 2008, Complainant alleged violations of CERCLA and TSCA based upon Warning Notices issued on May 24, 2007, and September 11, 2007, respectively, and his demotion from the position of plant manager to driver on September 6, 2007. CERCLA and TSCA provide complainants 30 days from

further denies that Green complained about the soil to his supervisor or that it created a hostile work environment or constructively discharged him. Alternatively, it insists that it had legitimate, non-discriminatory reasons for every adverse action Green challenges. According to Green, however, Respondent's explanations for the actions it seeks to defend are mere pretexts for his supervisor's retaliation which was motivated, at least in part, by his protected activity.

The SWDA § 6971(a) provides that:

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.

To invoke the protections afforded by the Act, the Secretary of Labor, the ARB, and the courts have determined that a complainant must show that he or she: (1) engaged in protected activity; (2) was subjected to adverse action; (3) by a supervisor who was aware of the protected activity at the time of the adverse action under circumstances which create; (4) an inference that the protected activity was the likely motivation for the adverse action. *See*, 29 C.F.R. § 24.102(b)(3); *see also*, Jenkins v. EPA, 1988 SWD 2 (ARB, Feb. 28, 2003); Dartey v. Zack Co., Case No. 80 ERA 2, (Sec'y, April 25, 1983); Kester v. Carolina Power & Light Co., 00 ERA 31, (ARB Sept. 30, 2003); Paynes v. Gulf States Utilities, 93 ERA 47, (ARB Aug. 31, 1999); Simon v. Simmons Foods, Inc., 49 F.3d 386 (8th Cir. 1995); Passaic Valley Sewerage Comm'rs v. Department of Labor, 992 F.2d 474 (3rd Cir. 1993). As these precedents amply demonstrate, a complainant must initially engage in protected activity to trigger the protections afforded by the statute.

The Problem Soil

In 2007, Florida DEP determined that water running off the aggregate and the sand piles into a holding pond at the Mosley Street plant was not flowing through a required sediment trap, known as a weir. To bring the plant into compliance, three employees, Johnny Redd, Bob Sieben, and C.D. Wilford were assigned to construct the weir. On March 14, 2007, Wilford was operating a front end loader, digging next to the storm water retention pond when he uncovered soil and detected the odor of diesel fuel. He dug two more scoops then stopped, reported the odor to Bob Sieben, and told him he was not going to remove any more earth.

the date of the alleged violation to file their complaints. Aside from the fact that Complainant failed to comply with the requirements of Rule 15(a) of the Federal Rules of Civil Procedure, as applied to this proceeding pursuant to 29 C.F.R. §18.1(a), he sought to challenge three discrete adverse employment actions which occurred more than 30 days prior to the date he filed his Amended Complaint. As such, the limitation periods for filing the CERCLA and TSCA claims were not enlarged, *see*, Sasse, *supra*, and these claims will be dismissed. It may further be noted that CERCLA and TSCA require protected activity to trigger their protective proscriptions, and Complainant in this proceeding has failed to satisfy that requirement.

According to Complainant Green, one of the mechanics came to his office, told him about the dirt, and advised him that he needed to call somebody because the dirt was contaminated. Green claims he decided to investigate the report and when he opened his office door to walk down to the site, he detected the odor of diesel fuel. Green testified that he walked over to the site where Redd, Sieben, and Wilford were standing to inspect the dirt. He had no training or experience in identifying or dealing with hazardous materials and did not pick up the soil, but Green recalled his eyes burning when he stood close to the site of the excavation. He testified that he then called his supervisor, John Bivins, on the Nextel to report the situation and left the site to return to his other duties. Bivins, in contrast, testified at his deposition that he received a call about the dirt, not from Green, but from Bob Sieben, and in response to the call, he went over to the site. Bivins noticed a musky smell and called his supervisor, Ryan Bagwell.

News of the problem quickly traveled up the chain of command. By late morning on March 14, 2007, three of Respondent's environmental responders, Ken Johns, Erin Christie, and Wiley Willoughby had arrived at the Mosley Street site, joining Bivins and Bagwell. Willoughby's duties included environmental oversight for Respondent's Coastal Division operations, including Tallahassee, and Christie and Johns were industry certified to deal with environmental matters. Both Johns and Christie had experience in handling soil contaminated with diesel fuel.

To assess the situation, Johns, Willoughby, and Christie got down into the hole and sampled handfuls of the sandy, grey, loamy soil. They picked it up bare-handed, looked at it, and smelled it. They detected no petroleum smell in the soil, noticed no oil sheen on the water leaching from the material, and it left no oily residue on their hands. Although the dirt in the hole was not sent out for testing, Johns, Christie, and Willoughby determined by physical examination that the soil was emitting the smell of decaying, non-petroleum based, organic material from plants and animals in the pond. All three detected the odor of diesel fuel in the ambient air but concluded that it was emanating from the digging equipment which ran on diesel fuel and from a nearby shop and diesel fuel storage tank. Each concluded that the earth in the weir showed no signs of diesel contamination.

As a result of their investigation, Willoughby, Johns, and Christie decided to remove several yards of soil, place it on plastic in the parking lot, and, as an added precaution, surround it with an earthen berm. They instructed Bagwell and Bivins to leave it in the parking lot until it dried out, then reassess it away from the diesel equipment. If the odor remained after it dried out or if it appeared to contain a petroleum product, Bivins was instructed to report his concerns and dispose of the soil as a hazardous waste.

At the time Johns, Willoughby, Christie, Bagwell, and Bivins evaluated the soil on March 14, 2007, Green was working around the Mosley Street plant, batching trucks. He did not hear any of the conversations that took place involving the soil, and he did not, at the time, engage in any discussion about the soil with the company officials at the excavation site.

Alleged Protected Activity

Later that day, after Johns, Willoughby, Christie, and Bagwell left the site, Green claims he and Bivins discussed how they wanted to dispose of the dirt. According to Green, Bivins advised him that they wanted him to instruct Wilford to load the dirt onto plastic, then load it, one or two scoops at a time, onto trucks for removal from the premises, and Green claims he

objected to that plan of action. He insists that he advised Bivins that: “was not the right thing to do,” and reported to Bivins that he had spoken with Wilford who told him he would refuse to move the dirt.

At that point, Bivins, according to Green, invited him to come by his apartment that night to talk about the dirt and other matters. Green testified that he expressed reluctance to stop by Bivins’ apartment but Bivins insisted so he complied. That evening, after work, he claims he stopped by Bivins’ apartment, and called him on the security phone by the mailboxes.

Alleged Threats of Retaliation

According to Green, Bivins met him by the mailboxes, approached him smiling, and told him that he, Bivins, had been hired to replace Ryan Bagwell, and he wanted to enlist Green’s help to get rid of Bagwell. As Green recounts the conversation, Bivins stated: “Matt, I’ve seen you, as good as you are, he said, you do this, I’ll be the first black general manager that this company has, and as good as you are I guarantee you my position as operation manager.” Tr. 49. Bivins also allegedly told Green that he wanted him to keep quiet about the dirt issue, and he could expect to be promoted to Bivins’ job as operations manager. Green testified that he again told Bivins that his proposal was wrong and that he would not ask Wilford to move the dirt. At that point, Bivins, according to Complainant, stated: “You just made a career-ending decision” and walked off. In Green’s opinion, Bivins threatened him because he would not go along with the plan to dispose of the contaminated soil and would not help Bivins get rid of Bagwell.

Internal Complaints

It should at this point be noted that an internal complaint involving potentially contaminated soil conveyed to a supervisor at Ready Mix could constitute protected activity. Thus, in Jenkins v. EPA, 1988 SWD 02 (ARB, Feb. 28, 2003), the Board held that an employee’s participation in a “proceeding,” as that term is used in the SWDA, encompasses all phases of a proceeding that relate to public health or the environment, including an internal or external complaint that may precipitate a proceeding. *See*, Guttman v. Passaic Valley Sewerage Commissioners, 1985 WPC 02, (Sec’y, March 13, 1992), Passaic Valley Sewerage Com’rs v. U.S. Dep’t of Labor, *supra*; Kansas Gas & Electric Co. v. Brock, 780 F.2d 1505, 1510-1512 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Cf.* Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1157, 1159 (9th Cir. 1984); *see, generally*, Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974); Donovan v. Stafford Construction Co., 732 F.2d 954, 959 (D.C. Cir. 1984) (Federal Mine Safety and Health Act); Williams v. TIW Fabrication & Machining, Inc., 1988 SDW 03 (Sec’y, June 24, 1992) (internal complaints about chemicals protected absent external SWDA complaint); Chavez v. Ebasco Services, Inc., 1991 ERA 24, (Sec’y Nov. 16, 1992); Monteer v. Casey’s General Stores, Inc., 1988 SWD 01, (Sec’y, Feb. 27, 1991).

Respondent insists, however, that the soil uncovered on March 14, 2007, was not contaminated; but assuming the contrary, it denies that Green ever complained to Bivins, Bagwell, or anyone else about the soil, how it was handled or the manner in which it was removed from the plant. Respondent thus challenges Complainant’s basic contention that he

engaged in any protected activity⁶ and it notes that his account of his communications regarding the excavated soil is contrary to the account provided by other witnesses in this proceeding. Since it is Complainant's burden to establish by a preponderance of the evidence that he engaged in protected activity, *see, Minard v. Nerco Delamar Co.*, 92 SWD 01, (Sec'y, July 25, 1995), an assessment of his credibility, in the context of the record considered in its entirety, is crucial in determining whether he actually engaged in protected conduct. To be sure, if Complainant reasonably believed that soil was contaminated with diesel fuel and expressed to Bivins, his supervisor, concerns about the decision to handle it and remove it from the plant as non-contaminated waste material, there would be ample reason to conclude that he had engaged in protected activity, *see, Passaic Valley Sewerage Commissioners, supra; Williams, supra*; however, several discrepancies in Claimant's account of his discussion with Bivins and several contradictions between Complainant's recollection of events and the recollection of other witnesses lead me to conclude that Complainant's testimony is not sufficiently reliable or credible to satisfy his burden of establishing that any protected activity actually occurred. *See, e.g., Moder v. Village of Jackson, Wisconsin*, 2000 WPC 05 (ARB June 30, 2003); *Phillips v. Stanley Smith Security, Inc.*, 1996 ERA 30 (ARB Jan. 31, 2001).

Events on March 14, 2007

The record contains significant discrepancies concerning the events that transpired on March 14, 2007, the day the soil was uncovered. By the time the hearing convened, Bivins no longer worked for Respondent, and he could not be compelled to appear at the hearing, but his testimony was preserved by deposition.⁷ Contrary to Green's account, Bivins denied that he spoke with Green about the soil on March 14, 2007, either at the plant or after work that day, and he denied that he ever threatened Green. Bivins claimed that Green stopped by his apartment, not in March to talk about the soil, but in May, 2007, to complain about his pay.

Now I am mindful that Bivins' demeanor could not be assessed and I note that his testimony is not entirely free from contradiction;⁸ however, in respect to the events on March 14, 2007, the burden rests with the Complainant to establish that he engaged in protected activity, and for the reasons which follow, I find he has not satisfied that burden.

⁶ Respondent argued, in the alternative, that otherwise protected activity becomes unprotected when: "the perceived hazard has been investigated by responsible management officials and if found safe, adequately explained to the employee." *See, Sutherland v. Spray Sys. Envirntl.* 1995 CAA 01 (Sec'y, Feb. 26, 1996). The record shows that Bivins advised Complainant sometime after March 14, 2007, of Respondent's plan to dispose of the soil; however, the officials who evaluated the soil testified that they did not discuss the matter with Green, and the record does not otherwise confirm that anyone provided him any explanation of their findings. Nevertheless, the absence of evidence affirmatively demonstrating that the safety of the soil was explained to Green does not conversely substantiate his assertion that he engaged in protected activity regarding the soil.

⁷ The whistleblower statutes generally contain no third-party subpoena power. *See, e.g., Malpass v. Gen. Elec. Co.*, 1985 ERA 38 & 39 (Sec'y Mar. 1, 1994); *Bobreski v. U.S. Environmental Protection Agency*, Civil Action No. 02-0732 (D.D.C., Sept. 30, 2003).

⁸ Bivins initially testified, for example, that he never spoke with Green about the soil; however, he later acknowledged that sometime after March 14, 2007, he informed Green about their plan to remove it from the Mosley Street plant. *Compare*, Rx 39 at 22-3 *with* Rx 39 at 68-9.

Witness Credibility

According to Green, he inspected the excavation before calling Bivins on the morning of March 14, 2007. Bivins, however, claimed that Sieben, not Green, called to alert him about the problem dirt. C.D. Wilford was one of the workmen digging the weir. Wilford's appearance and demeanor was observed at the hearing, and he was a highly credible witness. According to Wilford, Green was not at the excavation site in his presence on the morning the problem earth was uncovered, and Wilford, in fact, denied that Green stood near the excavation site with him, Redd, and Sieben. Indeed, Wilford's testimony indicates that Green did not visit the excavation site prior to the time it was assessed by Johns, Willoughby, and Christie. Wilford, therefore, corroborated Bivins' testimony that Green did not visit the site as he reported and he did not call Bivins on the Nextel while he was standing near the excavation site with the workers on the morning of March 14, 2007.

Green further claimed that Bivins initially approached him because he wanted Green to instruct Wilford to load the dirt onto plastic, and according to Green, Wilford had told him that he would not work with the dirt. According to Wilford, however, he did not discuss the excavated dirt with Green on the day it was uncovered or later when it was removed from the plant. The record shows that, while Wilford initially expressed reservations to Sieben about moving the soil when it was first uncovered, there is no evidence that he expressed any objection to moving it onto sheets of plastic on the parking lot after Johns, Christie, and Willoughby determined that it was not contaminated and there is no evidence he voiced any concern when it was loaded onto trucks for removal from the plant a month later. Indeed, Wilford testified that he did not discuss the soil with Green until several months after the incident. Although called to testify by Complainant, Wilford's recollection of the events on March 14, 2007, thus failed to confirm, and in fact contradicted, Green's assertion that he visited the excavation site and spoke with Wilford about the soil at anytime on March 14, 2007.

The Meeting at Bivins' Apartment

The record also casts serious doubt upon Green's testimony that he engaged in any discussions with Bivins about the soil on March 14, 2007, either at the plant or after work at Bivins' apartment. Green did visit with Bivins after work at Bivins' apartment complex, but the evidence indicating when the meeting actually took place and what was discussed is conflicting. Green claims he went to Bivins' apartment, at Bivins' request, after work on March 14, 2007, the day the problem soil was unearthed, and Bivins, at that time, threatened him for refusing to go along with Respondent's plan for disposing of the soil. Bivins, however, claimed that meeting took place on May 22, 2007, when Green visited him at his apartment uninvited after work to complain about his pay and not being consulted or kept informed about management decisions affecting the plant. The evidence indicates that Bivins' account of this meeting is more reliable and credible than Green's account both in respect to when it occurred and the subjects discussed.

Green's Complaint to Ryan Bagwell

The record shows that, on May 23, 2007, Green met with Bagwell to complain about Bivins, and, according to Green, he mentioned to Bagwell, for the first time more than two months after the soil incident had occurred, that he had complained to Bivins about the dirt and that Bivins had threatened his career for his refusal to agree with the soil removal plan. Bagwell

acknowledged that Green complained about his pay and expressed concern that Bivins wanted to get rid of him; however, he denied that Green ever mentioned anything about his objections to the way the soil was handled or that his dispute with Bivins had any connection with Green's alleged concerns about the soil. Thus, Wilford, Bivins, and Bagwell not only contradict Green's assertions that he was involved in the soil incident on March 14, 2007, they also deny that he expressed any concern about Respondent's plan to dispose of the soil, and for the reasons which follow, their testimony is more credible than Complainant's version of events.

The record shows that Green was not shy in voicing his concerns about problems he perceived in plant operations both before and after the soil incident. For example, he confronted the plant dispatcher on several occasions about plant operations and complained on numerous occasions to his supervisors about his pay. He reported an oil spill unrelated to the soil incident to Florida DEP, complained to Youngstrom about Bivins' inquiries concerning his time and attendance, complained to Willoughby about harassment by coworkers, and complained about Bivins to Bagwell. While Green claimed he waited until Bivins actually took steps to get rid of him, I am persuaded that, had Bivins actually threatened him, Green characteristically was not the type of manager who would have waited two months to report it. Indeed, he actively pursued issues far less serious than an alleged contaminated worksite and a threat to his job, and it is not likely he would have waited two months to report Bivins' alleged threat to his career over what he allegedly considered the improper handling of contaminated soil. Consequently, considering the record as a whole, including Complainant's appearance at the hearing, I conclude that it is more likely that the meeting at Bivins' apartment took place the evening of May 22, 2007, and that Green met with Bagwell to complain about Bivins the next day.

Employee Statement
May 24, 2007

While the record suggests that it would be uncharacteristic of Complainant to delay two months in reporting alleged protected activity and any resulting threat had such incidents actually occurred, contemporaneous documents further undermine his claim. Green was given a disciplinary warning for insubordination on May 24, 2007, as a result of his alleged aggressive and belligerent behavior during his May 22, 2007, meeting at Bivins' apartment with Bivins about his pay. He testified at the hearing that the warning was issued in retaliation for his objections to way Respondent handled the contaminated soil; however, he was afforded an opportunity to provide his version of the circumstances in the Employee Statement section of the Warning Notice. Significantly, this Employee Statement does not mention anything about the soil incident, does not express any objections about the way the soil was handled, does not report Bivins' alleged threats regarding the soil, and does not allege retaliation associated with the soil incident. Green simply objected to the write-up and denied he was aggressive or belligerent when he spoke with Bivins about his pay.

Consequently, while Complainant testified that he gave Bagwell a full, oral report about his communications with Bivins regarding the soil incident and Bivins' resulting threat, it seems inexplicable, if such a threat had been conveyed by Bivins, not only that Green would have waited two months to report it, but that he would have fail to mention it in an Employee Statement responding to a write-up he claims was motivated by the objections about the soil he allegedly voiced to Bivins. Thus, Green's written Employee Statement, by its silence, is inconsistent with his testimony that the reason he told Bagwell about the soil and Bivins' threat

was because he believed Bivins was actually implementing the retaliation he had threatened. Such silence is, to the contrary, actually consistent with Bagwell's testimony that Green did not mention the soil incident when Green complained to him about Bivins and consistent with Bivins' testimony that he did not threaten Green about the soil. Bivins and Bagwell claim Green's encounter with Bivins involved a discussion about Green's pay, and Green's contemporaneous Employee Statement concerning the matter confirms that he: "spoke with Mr. Bivins about pay."

Employee Statement
September 11, 2007

Green received a second Employee Warning Notice from Bivins and Bagwell on September 11, 2007. On this occasion, he was written up for two infractions; first for allegedly advising workers at a safety meeting to bypass local management and report their problems directly to Ready Mix headquarters in Birmingham, and the second for failing to take disciplinary action against an employee, James Bouie, who had allegedly threatened him. Green testified at the hearing that this warning, too, was issued in retaliation for his objections to way Respondent handled the contaminated soil; but again, the contaminated soil is not mentioned in his Employee Statement. Complainant articulated in considerable depth the reasons he opposed the write-up charges, and in the last sentence of his Statement, he vaguely described the Warning Notice as: "retaliation remarks and are just not true," but he does not explain who or why anyone would be retaliating against him.

It thus again seems inexplicable, in light of the detail provided in his Statement, that Complainant would fail to mention the soil incident had it actually occurred. In context of his Statement, the reference to "retaliation remarks" seems more likely addressed to matters discussed in the Statement, such as his pay and his authority to issue warnings, than related to an incident he completely fails to mention.

Thus, not only is Wilford's testimony consistent with Bivins' version of events, Complainant's written contemporaneous statements circumstantially confirm, by their silence regarding the soil incident, the testimony of Bivins and Bagwell that Complainant never communicated any objection or concern about the way the soil was handled or removed from the Mosley Street plant. *See, Minard v. Nerco Delamar Co.*, 1992 SWD 01 (ALJ March 3, 1995) *aff'd.*, (Sec'y, July 25, 1995) (A complainant's contemporary silence is a factor that may be considered). Nor are these the only instances in which Complainant contemporaneously failed to mention his alleged protected activity in the context of complaints he expressed about his job situation and his work environment.

Additional Failures to
Mention Protected Activity

The record shows, for example, that Green complained to Youngstrom that Bivins had wanted to discipline him in violation of DOT's 10-hour rule and he alleged at the hearing that this was retaliatory; however, Complainant never mentioned the soil incident or alleged to Youngstrom that the soil incident motivated Bivins to issue the warning when he complained to her. Consequently, Youngstrom simply advised Complainant to address his concerns about the 10-hour rule to local management. Later, Complainant complained to Willoughby that he was being harassed by other employees; but when he met with Willoughby, he did not identify Bivins as an individual who was harassing him and did not mention the soil incident as a reason his

coworkers were harassing him. Complainant further alleged that Bivins vindictively identified him to police as the suspect who vandalized the Mosley Street plant in May, 2008. Complainant went to the police to deny any involvement in the crime, but the record contains no evidence that he mentioned his protected activity as the reason Bivins would allegedly falsely identified him as the suspect. Later, after Green resigned, Willoughby conducted an exit interview with Green. At the hearing, Complainant alleged that a hostile work environment and retaliation compelled him to resign, but upon leaving Respondent's workforce, he complained about local management but he did not mention retaliation or harassment in his Exit Interview. He stated that he was leaving Ready Mix for new employment, not due to harassment, retaliation, or constructive discharge, and he did not mention the soil incident.

Further, Complainant was aware of Respondent's policies which prohibit threats or retaliation related to environmental mishaps, yet he did not report his concerns about the allegedly contaminated soil or Bivins' alleged threat relating to the soil incident to Creel, Willoughby, Johns, Christie, Youngstrom, Bagwell, McKelvin, or Wilford. Nor did he mention the soil incident in his contemporaneous responses to the May 24, 2007, Warning Notice, the demotion, the September 11, 2007, Warning Notice, or in his Exit Interview. Thus, Complainant's testimony is not only contradicted directly by Wilford, Bivins, and Bagwell, but circumstantially by his silence regarding the soil incident under circumstances in which he ordinarily could be expected to mention it. *See, Peters v. Renner Trucking and Excavating*, 2008-STA-30 (ARB Dec. 18, 2009) at 34; *see also, Minard, supra*. Complainant argues, however, that other circumstantial factors support his assertion that he engaged in protected activity and was targeted for retaliation as a result. His contentions are considered below.

Retaliation

Complainant alleges that numerous instances of adverse action and alleged retaliation against him demonstrate Respondent's reaction to his environmental complaint, and thus provide circumstantial evidence of his protected activity. Specifically, he alleges that his authority as manager was undercut, he was denied training, issued two warning notices, demoted from his position as plant manager to truck driver, had his hours manipulated to reduce his earnings, was subjected to harassment, was falsely accused of vandalizing the Mosley Street plant, and was forced to quit his job, all in retaliation for his protected activity. Although Complainant has otherwise failed to establish by his testimony that he engaged in protected activity regarding the handling and disposition of soil he allegedly believed was contaminated with diesel fuel, circumstantial evidence may, nevertheless, be sufficient to demonstrate that he was subjected to retaliatory action for engaging in protected activity. The examination of this aspect of Complainant's charges may take into account incidents, such as the May 24, 2007 Warning Notice, that would otherwise be untimely raised were they considered as discrete adverse actions, and circumstances which, alone, might not amount to adverse actions with tangible consequences but may be indicative of a supervisor's retaliatory mindset. *See, Melendez v. Exxon Chemicals of America*, 1993 ERA 0006 (ARB July 14, 2000).⁹

⁹ The Board in *Melendez* held that untimely challenged adverse actions cited by decision-makers as contributing to a timely challenged adverse action: "...are an integral part of the [timely challenged] decision and must be evaluated accordingly. Second, previous incidents cited by [the complainant] as evidence of retaliatory intent that were not cited by the decision-makers as contributing to the timely challenged [adverse action] must be evaluated in examining the mind-set of the decision-makers in reaching the decision." *Melendez* at 9.

Allegations of Harassment and Retaliation

Denial of Training

Green alleges that, following his complaint to Bivins about the soil, Bivins retaliated by denying him the opportunity as plant manager to attend management and Florida DOT training sessions. Training and educational programs that advance an employee in his or her career or enable the employee to perform work more efficiently are privileges of employment which, if denied on a discriminatory basis in retaliation for protected activity, is unlawful. Studer v. Flowers Baking Company of Tennessee, Inc., 93 CAA 11 (Sec'y June 19, 1995). Moreover, a proximity in time between protected activities which may displease an employer and a denial of training may be sufficient to infer a causal link between the two occurrences; *see generally*, LaTorre v. Coriell Institute For Medical Research, 97 ERA 46 (ALJ, Dec. 3, 1997), *aff'd. and remanded on other grounds*, 98 ARB 40 (February 26, 1999); Mandreger v. The Detroit Edison Co., 88 ERA 17 (Sec'y, March 30, 1994) (six month interval between whistleblower activity and adverse job transfer); White v. The Osage Tribal Council, 95 SDW 01 (ARB Aug. 8, 1997); however, the inference arising out of a temporal nexus may be dispelled by other evidence. *See*, Tracanna v. Artic Slope Inspection Service, 1997 WPC 01 (ARB July 31, 2001).

Respondent acknowledged that Bagwell considered sending Green for management training and Bivins discussed the possibility of sending him for Florida DOT (FDOT) training. Respondent further acknowledges that the training was never provided. Bagwell and Bivins, however, both denied that the soil incident or retaliation played any part in Green's failure to receive training.

Bivins testified that he was FDOT certified, and he and Creel discussed the need to have others certified as batch managers because they expected an increase in FDOT work. Bivins met with Green about FDOT certification, but denied he ever told Green that Creel had approved him for the training. Bivins offered to assist Green in getting certified, but according to Bivins, Green did not receive the training because they were, at the time, too busy to give him the time off.

The record shows that discussions about FDOT training between Creel and Bivins and between Bivins and Green, and the discussion about management training between Bagwell and Green, were preliminary in nature and never progressed beyond these initial conversations. Indeed, Green has produced no evidence that anyone made a commitment to schedule him for training. The record further shows that Green had management problems before Bivins was hired, and Bagwell thought he would benefit from training. Bagwell told Green that he would like to send him to a management seminar but testified he simply never got around to scheduling it.

Now Complainant does not contend that Bagwell was aware of his alleged protected activity prior to May 23, 2007, and, as a consequence, the failure to provide training before that date could not have been retaliatory. Beyond that, Complainant has adduced no evidence either that Bagwell discriminated against him after May 23, 2007, or that Respondent sent others for FDOT certification or management training in his place. Green, moreover, never complained to Creel or to Human Resources that he was denied training due to retaliation.

Complainant bears the burden of establishing that the Respondent's stated reasons he did not receive training were untrue, *see*, Bechtel Const. Coop., v. Secretary of Labor, 50 F.3d 926, (11th Cir. 1995); Timmons v. Franklin Electric Coop., 97 SWD 02 (ARB Dec. 1, 1998), and he has failed to make the required showing. To the contrary, the evidence shows that Respondent had legitimate, nondiscriminatory reasons which were not pretexts for its failure to schedule him either for management or FDOT training.

Write-Up Authority

After the soil incident, Complainant attempted to discipline driver Troy Rowls for an alleged offsite infraction allegedly involving a violation of a Florida DEP directive. Green alleges that Bivins told him that Rowls had done nothing wrong and could not be written up. According to Green, Bivins thereafter required Green to obtain his approval before issuing any further warnings to employees, and thereby diminished his management authority to discipline subordinates. Bivins admitted that he told Green that Rowls should not be written up, but he could not recall telling Green that he had to have his permission before writing up others. It is well settled that the removal of a manager's authority to perform duties that are otherwise customary to his position constitutes an adverse employment that affects the "terms, conditions [and] privileges of employment" *See*, Delaney v. Massachusetts Correctional Industries, 90-TSC-2 (Sec'y Mar. 17, 1995), Nathaniel v. Westinghouse Hanford Co., 91-SWD-2 (Sec'y Feb. 1, 1995). In this instance, however, it appears that Green's authority was overruled in one instance based upon his supervisor's conclusion that the warning he issued was unjustified.

Although Bivins and Green disagreed about the extent to which Bivins restricted Green's authority to issue Warning Notices, assuming he did require Green to obtain his approval, there is no evidence the directive was an adverse action predicated on discriminatory animus motivated by protected activity. The record shows that Bivins was reacting to what he considered an improper warning to Rowls, and even Green, when he later challenged the limitation of his write-up authority in his contemporaneous Employee Statement responding to the September 11, 2007, Warning Notice, did not claim that Bivins restricted his authority as a result of his protected activity. For these reasons, assuming Bivins did limit Green's authority, the evidence is sufficient to conclude that he had a legitimate, nondiscriminatory basis for his decision.

May 24, 2007 Warning

Complainant received two Warning Notices, one issued on May 24, 2007, and a second issued on September 11, 2007. He argues that both issued in retaliation for his protected activity and that the circumstances cited in the warnings were pretexts for discrimination. Respondent contends that each Warning Notice was issued for legitimate, nondiscriminatory reasons. Written warning notices that constitute adverse personnel actions are clearly improper when motivated by discriminatory animus predicated on protected activity. *See*, Daniel v. Timco Aviation, 2002 AIR 26 (ALJ, June 11, 2003); *see*, Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union, 2004 AIR 19 (ARB Aug. 31, 2007); Melton v. Yellow Transportation, Inc., 2005 STA 02 (ARB Sept. 30, 2008).

The Warning Notice dated May 24, 2007, issued after Bagwell, Bivins, and Green met to discuss Green's pay and his complaints about Bivins. During the meeting Bivins reported that Green had stopped by his apartment the previous evening and had acted in an aggressive, very

belligerent manner in complaining about his pay. According to Bagwell, Green did not deny he visited Bivins' apartment, but he denied that he had acted aggressively, stating: "if I'm insubordinate then please write me up." Bagwell testified he believed Bivins' version of the events because he was "supporting his operations manager," and he consulted with Creel who suggested that Bagwell issue Green a warning. Bagwell testified that the Warning Notice Complainant received was a factor considered when he, Creel, and Bivins were discussing whether, after the consolidation of the Weems Road and Mosley Street operations, to keep Green as the plant manager or give the job to Robert Heuring. This was, at the time, the only warning which had issued to Green, and, as a result, it clearly had a "tangible consequence" on Complainant's employment.¹⁰ Daniel, *supra*; Melton, *supra*.

Based upon the information available to him, I find Bagwell's decision to issue the Warning Notice at Creel's urging was predicated on legitimate, nondiscriminatory reasons unrelated to any protected activity. The record shows that Green felt that his salary did not fairly compensate him for the hours he worked, and he resented the fact that Heuring, who was paid by the hour, earned more than he earned. On more than one occasion, he lamented that he was not compensated on an hourly basis and complained about his pay to Bivins, Bagwell, and even Wilford. Thus, Complainant's Employee Statement responding to this warning confirmed that his discussion with Bivins involved his pay. Under these circumstances, Bagwell had a legitimate basis for believing that Green confronted Bivins about his pay, and there is no evidence Bagwell or Creel retaliated against Green in any way. Consequently, this warning may constitute an adverse employment action, but it was not discriminatory, *see*, Jenkins v. United States Environmental Protection Agency, 1988 SWD 02 (ARB Feb. 28, 2003); Self v. Carolina Freight Carriers Corp., 89-STA-9 (Sec'y Jan. 12, 1990); Helmstetter v. Pacific Gas & Electric Co., 86-SWD-2 (Sec'y Sept. 9, 1992); and, therefore, not circumstantially indicative of a response to protected activity.

Demotion

On September 6, 2007, Green received notice that he was being demoted from plant manager to a truck driver, and he testified that Bivins, supported by Bagwell and Phillip Creel, demoted him because he opposed the disposal of the soil. Respondent denies any retaliatory animus motivated the decision to demote Green. He was, it argues, demoted solely in response to business-related economic factors. In Green's view, however, the economy simply provided a pretext for a demotion which, in reality, was motivated by his protected activity. Clearly, a demotion motivated by discriminatory animus is an improper adverse employment action, *see*, *e.g.*, Deford v. Secretary of Labor, 700 F.2d 281, 287 (6th Cir. 1983); Jenkins v. United States Environmental Protection Agency, 1988 SWD 02 (ARB Feb. 28, 2003); Boudrie v. Commonwealth Edison Co., 95 ERA 15 (ARB Apr. 24, 1997), Martin v. Department of the Army, 93 SDW 01 (Sec'y July 13, 1995); Delaney v. Massachusetts Correctional Industries, 90 TSC 02 (Sec'y Mar. 17, 1995); Larry v. Detroit Edison Co., 86 ERA 32 (Sec'y June 28, 1991); Carter v. Electrical District No. 2 of Pinal County, 92 TSC 11 (Sec'y July 26, 1995), even when it results in no loss of pay. Nathaniel v. Westinghouse Hanford Co., 91 SWD 02 (Sec'y Feb. 1, 1995).

¹⁰ As previously noted, this Warning Notice was not timely challenged and is considered here only to the extent that it may provide circumstantial evidence of a retaliatory mind-set by Complainant's supervisors indicative of a response to protected activity.

Economic Downturn

In early 2006, Respondent's planners detected a blip in their forecast models that foreshadowed a significant downturn in the demand for concrete along the Gulf coast of Florida's panhandle. At the time, Respondent was supplying concrete to numerous condominium construction projects, and business was thriving. The construction cycle for concrete on these projects lasted about 18 months, and Respondent was pouring 85,000 to 90,000 cubic yards of cement a month; but Respondent noticed that while business on existing projects remained stable, they were not pouring any new foundations. Johns testified that the Coastal Region noticed the decline in new projects before other areas, and: "alarm bells started going off."

Prudently assessing the future demand for concrete along the Gulf coast, Respondent consulted with customers, local officials, trade associations, architects, and engineers, and concluded that it had excess plant capacity, was overstaffed, and had too many trucks. As a result, Ready Mix started to re-assign and transfer people, close facilities, dispose of rolling stock, and reduce the number of employees by attrition. At the time, Respondent had two plants in Tallahassee, one on Weems Road, operated by Robert Heuring, and one on Mosley Street, managed by Green. As part of its business contraction, Phillip Creel ordered the consolidation of these two facilities.

Consolidation of Tallahassee Operations

Industry technology permitted Respondent to transition to a process called remote batching which allowed one person to operate a plant with the help of a computer to load the bins that make the concrete. Creel urged Bagwell to try remote batching in Tallahassee, and Bagwell, sufficiently coaxed, finally agreed. The Weems Road plant was thus converted to a remote batching operation and the position of the Weems Road operator was consolidated with the Mosley Street plant manager. As a result, Respondent needed only one plant manager in Tallahassee, and Creel, Bagwell, and Bivins conferred to determine who would manage the consolidated operation. The candidates considered were Green and Heuring, and Heuring was selected.

As part of the selection process, Creel, Bagwell, and Bivins discussed the strengths and weaknesses of Heuring and Green. They noted that Heuring, although not technically a plant manager, had seniority, and, in their opinion, he appeared more versatile in more aspects of plant operations than Green. Bagwell observed that Heuring operated the Weems Road facility and had experience driving trucks, charging bins, and operating the loader. It was the overall opinion of these managers that Heuring had better mechanical ability, dealt with employees better, was more respected, had been an employee longer, and knew the business better than Green. In addition, Bagwell noted that Green had received a Warning Notice on May 24, 2007, and Creel recalled that dispatcher, McKelvin, had experienced problems with Green. After due consideration of his strengths and weaknesses, Bagwell decided, in consultation with Bivins, and with Creel's concurrence, to give the job to Heuring. Creel then suggested that Green be offered a job as a driver.

On September 6, 2007, Green was notified of his demotion, and Heuring was designated plant manager with authority over both Weems Road and the Mosley Street plants. While Green contends that the economic downturn served as a pretext for his demotion, the record shows that

economic conditions spurred the transition to remote batching at the Weems Road plant and prompted the consolidation of his job with the Weems Road operator, not any protected activity on his part. The factors used to determine that Heuring would be a better choice for plant manager of the consolidated operation than Green were legitimate, nondiscriminatory considerations of the strengths and weaknesses of each candidate. Green notes, however, that he was the only employee demoted in Tallahassee at the time; but the record shows that he was simply the first of many to follow. As a result of the economic slowdown, nineteen positions, including Bivins' position, were later eliminated or consolidated with other job duties.

Nor is it significant that Heuring was paid more as manager of the consolidated operation than Green was paid as manager of the Mosley Street plant. Creel testified, without contradiction, that Heuring was responsible two plants, not one, and the consolidation achieved operational efficiencies that warranted the organizational changes he encouraged. Heuring, moreover, occupied the position of plant manager for only about seven months, and he was eventually demoted to load operator.

Green testified that Respondent again discriminated against him after Heuring was demoted because Alex Willington, Jeffrey Godwin, Jeffery Lawrence, and Charles Williams were brought in, from time to time, to run the plants as managers, and he was not considered for the positions. Green acknowledged, however, that he did not actually know whether Lawrence and Williams were managers, and contrary to Green's testimony, Bagwell testified that after September, 2007, no one other than Heuring served in the position of plant manager, not Godwin, Willington, Williams, or Lawrence, and eventually, even Bivins and Heuring were terminated due to the decline in Respondent's business.

In summary, I find that the reorganization in Tallahassee was implemented in response to an economic downturn, and Respondent had legitimate, nondiscriminatory reasons for consolidating its operations in Tallahassee. It further employed legitimate, nondiscriminatory factors in selecting Heuring over Green for the job of manager of its Tallahassee facilities that can not appropriately be second-guessed in this proceeding, *see*, Prafke v. City of Fairmont, Minnesota, 83 SDW 1 (Sec'y Nov. 4, 1985); *see also*, Bettner v. Crete Carrier Corp., 2004 STA 018 (ARB May 24, 2007); Ransom v. CSC Consulting, Inc., 217 F.3d 467, (7th Cir. 2000); Bienkowski v. American Airlines, Inc., 851 F.2d 1503 (5th Cir. 1988), and it had legitimate, nondiscriminatory justifications for demoting Green to the position of driver. I, therefore, conclude that Green's demotion was neither a discrete retaliatory adverse action nor circumstantially indicative of a response to protected activity.

September 11, 2007 Warning

Discrete Adverse Action

The record shows that Complainant received a second Warning Notice on September 11, 2007. On this occasion he was charged with two infractions; first, he allegedly advised workers at a safety meeting to bypass local management when they had a problem and report directly to Respondent's headquarters in Birmingham, and second, he was written up for failing to take disciplinary action against an employee, James Bouie, who had allegedly threatened him.

While the May 24, 2007 Warning Notice issued more than 30 days before Green filed his complaint with OSHA, the September 11, 2007 Warning Notice was timely challenged as an adverse action. Yet, the evidence demonstrates that this Warning Notice had no tangible consequences on Green's employment nor did it discourage him from later engaging in protected activity. It is now settled doctrine that a "tangible consequence" is one which not only affects the terms and conditions of employment but would discourage a reasonable worker from engaging in protected activity. Daniel v. Timco Aviation, 2002 AIR 26 (ALJ, June 11, 2003); *see*, Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union, 2004 AIR 19 (ARB Aug. 31, 2007); Melton v. Yellow Transportation, Inc., 2005 STA 02 (ARB Sept. 30, 2008). By the time this Warning Notice issued, Green had already been demoted, and there is no evidence in the record that it, in any way, affected his pay or the terms and conditions of employment as a truck driver, and Complainant has not demonstrated otherwise. *See*, West v. Kasbar, Inc., 2004-STA-34, (ARB Nov. 30, 2005); Agee v. ABF Freight Systems, Inc., 2004-STA-40 (ARB Dec. 29, 2005),

To the contrary, Green's performance as a truck driver was subsequently rated as "satisfactory" in all categories on December 26, 2007. Further, the record shows that despite this warning, Complainant did not hesitate to report a leaking oil container to DEP and Respondent's Human Resources Office. Consequently, it would be difficult to conclude that this warning had the capacity to reasonably deter Complainant from engaging in protected activity. It clearly did not. Accordingly, this Warning Notice would not amount to an adverse employment action within the meaning of the Act. *See*, Daniel, *supra*; Melton, *supra*.

Circumstantial Evidence of Retaliatory Mind-set

Warning for Bypassing Local Management

The September 11, 2007 Warning contained two separate infractions; the first involved an incident in which Complainant allegedly recommended that workers bypass local management when reporting problems. The record shows that a former employee, Robert West, reported during an exit interview that Green advised employees at a safety meeting to bypass local management and call corporate headquarters in Birmingham if they had a problem. Upon learning of West's comments, Bagwell called Creel to report what West had said, and Creel decided Green should be "written up." Although Bagwell did not ask Green for an explanation before writing him up, in his Employee Statement Green denied that he advised employees to bypass local management, and later, at the hearing, two employees, James Bouie and Wilford, both denied ever hearing Green tell employees at a safety meeting to bypass local management.

Creel explained that he had received a call from Nicki Youngstrom, Respondent's human resources vice president, concerning an anonymous letter she had received about an incident in Tallahassee involving one employee threatening another with a machete. Creel called Bagwell about it, and Bagwell determined that it was Robert West who had threatened another employee. West was terminated as a result, and in his exit interview, West reported that Green had advised employees to bypass local management and report their concerns to Birmingham. Creel thought the anonymous complaint to Birmingham was a result to Green's suggestion, and he thought Green should be warned about advising employees to bypass local management because serious

and potentially dangerous problems, like the machete incident, might not timely be addressed by local management and the safety of the workers could be jeopardized as a consequence.

It should be noted that the warning regarding Green's alleged comments about bypassing local management was initiated by Creel before Green filed his complaint with OSHA and before Creel had any knowledge that Green had allegedly engaged in protected activity. As previously discussed in detail, Green's assertions that he complained about contaminated soil lack credibility, but even if credited, the record otherwise fails to demonstrate that Creel had any knowledge of Green's concerns about the soil, thus precluding a finding that he retaliated against him even if Creel was mistaken in his belief that Green urged workers to bypass local management. *See, Kester v. Carolina Power and Light Co.*, 2000 ERA 31 (ARB Sept. 20, 2003); *Dartey v. Zack Company of Chicago*, 82 ERA 2 (Sec'y April 25, 1983); *Sherrod v. AAA Tire & Wheel*, 85 CAA 3, (November 23, 1987. *See also, Lopez v. West Texas Utilities*, 86 ERA 25 (July 26, 1988); *Francis v. Bogen, Inc.*, 86 ERA 8 (Sec'y April 1, 1988); *Smith v. Papp Clinic, PA.*, 808 F.2d 1449 (11th Cir. 1987). Furthermore, rather than establishing retaliation indicative of a reaction to protected activity, this record confirms that Creel's decision was based upon a legitimate, nondiscriminatory belief that Green had compromised employee safety by suggesting that workers bypass local management when reporting their problems. Whether or not Creel's assessment of the situation was mistaken, there is no evidence protected activity influenced his decision.

Warning For Failing to Discipline Bouie

The September 11, 2007, warning also cited Green for his failure to discipline truck driver James Bouie as a result of an incident of alleged insubordination which occurred on August 28, 2007, while Green was still plant manager. By the time this warning issued, Green had already been demoted to truck driver. According to Bivins, Bouie threatened to "whoop" Green, and Green failed to discipline him for insubordination. Bivins advised Bagwell about the incident, and he and Bagwell met with Bouie who admitted that he confronted Green about his paycheck but he denied he threatened him. Green also denied that Bouie had threatened him, but Green received a warning nevertheless. In his Employee Statement, Green objected to the warning, claiming Bouie was not insubordinate and explaining that, even if he had been insubordinate, Bivins had previously instructed him not to issue any warning notices without his prior approval.

In view of Bivins' concession at his deposition that he could not recall the extent to which he limited Green's authority to issue disciplinary warnings, prudent management probably would have clarified Green's authority before admonishing him for failing to exercise authority he may have lacked. Nevertheless, considering this incident in the context of the record viewed in its entirety, I am unable to conclude that it demonstrates a retaliatory mind-set. It resulted in no adverse tangible consequences that had any affect on Complainant's employment, and there is no evidence that it was anything more than an ill-advised warning in a record otherwise devoid of evidence indicative of retaliation in response to protected activity.

Hours of Work as a Driver

Green testified that, as a driver, he initially worked more than others, and that "they were on me constantly." That allegedly ended in April or May, 2008, when Respondent realized how much money he was making. Green claims his hours were then cut when others were working,

and he believes his discriminatory assignments as a driver were the result of retaliation. Discriminatory adjustments in an employee's hours to overwork or under employ a worker in retaliation for protected activity may constitute an improper adverse employment action which changes the terms and conditions of employment. *See, e.g., Klein v. Indiana Univ. Trustees*, 766 F.2d 275, (7th Cir. 1985) (altering an employee's work schedule); *Melton, supra*.

The record shows that Pedro McKelvin is the delivery manager for Ready Mix. His duties include scheduling deliveries, scheduling drivers, making sure the concrete gets to the customer on time, organizing the loads, and determining when to load the trucks. His dispatching and scheduling responsibilities included both the Mosley Street and Weems Road plants. He has no authority to hire, fire, or discipline employees. If he had a problem with a driver, he reported it to the plant manager. His supervisors included Bagwell and Bivins, but McKelvin exercised considerable autonomy in matters relating to his duties as dispatcher.

McKelvin testified in this proceeding, and he was a highly credible witness. He impressed me as an honest, straightforward, no-nonsense individual who took his job seriously and answered questions directly. He candidly acknowledged the problems he had with Bagwell, Bivins, and particularly Green. He testified that, from the time Green arrived as plant manager, Green questioned him frequently about scheduling and dispatching. McKelvin explained that he scheduled deliveries to satisfy customer requests, and commercial pours often took place at 2:00 a.m. or 3:00 a.m. to avoid traffic, but Green persisted.

McKelvin acknowledged that Green's questioning annoyed him and disrupted his work. On one occasion, while Green was still plant manager, he and McKelvin had a verbal altercation. McKelvin testified that Green had been "riding him pretty hard" for a few days questioning his decisions, and, at a time when he was extremely busy, Green interrupted him with more questions. This particular intrusion angered McKelvin to the point that he called Bagwell and told him if he did not do something about Green "pretty quick," or he would quit. Bagwell confirmed that McKelvin complained that Green second-guessed his decisions and interfered with his operations. Wilford also confirmed that there was tension between Green and McKelvin before the soil incident on March 14, 2007.

After Green was demoted, McKelvin was responsible for scheduling Green's assignments as a driver. Although discrimination based upon a lingering resentment over Green's intrusive management style would not constitute a violation of the SWDA, the record is, nevertheless, devoid of any evidence that McKelvin discriminated against Green in scheduling his assignments. Whether or not McKelvin liked Green personally, he harbored no grudge against him. Once Green was no longer in a position to second-guess him, McKelvin treated him like any other driver.

Thus, drivers were assigned to rear-discharge or front-discharge trucks, and the front-discharge trucks experienced greater demand. Green was assigned to truck 773, a front discharge vehicle. McKelvin testified that, unless a customer asked for a specific driver, he assigned drivers after checking the computerized driver availability sheet which showed the number of hours each driver worked each week and his availability. Despite their prior disagreements, McKelvin, on occasion, would call Green to check his availability, and Green, occasionally, would decline to come in to work for personal reasons. McKelvin explained that he tried to

balance out the drivers work to avoid overtime and other costs and give the driver with the lowest hours priority on the assignments the next day.

McKelvin further testified that while Bivins could access the computer report on the drivers' hours, Bivins never asked him about Green's time or talked to him about Green's hours. McKelvin also denied that Bagwell ever told him how or when to schedule Green nor did anyone ask him to schedule Green differently from other driver, and I find McKelvin's denial highly credible. After the demotion, Green's hours varied, but it has not been shown that they were cut disproportionately, and, according to McKelvin's unchallenged testimony, Green never complained to him about his schedule.

The record shows that, as a truck driver earning an hourly wage, Green, at times, earned more on a weekly basis than he earned as a salaried plant manager, but on an annual basis he earned less. As a plant manager, his salary was \$48,000.00 per year. In 2007 and 2008, he earned less, but there is no evidence that his hours were reduced in a manner different from other drivers in view of the economic downturn and the lack of business. In summary, I conclude that McKelvin alone determined Green's work schedule in a manner consistent with customary dispatch procedures on a nondiscriminatory basis responsive to customer demands.

Late Arrival and Leaking Oil

After he was demoted to truck driver, Green alleges that Bivins attempted to discipline him up for being late and for excessive time on the clock. Green protested the write-up on the ground that he was complying with DOT's 10-hour driver rule, and Bivins did not issue it. I find nothing discriminatory or harassing in Bivins' action. As Complainant's supervisor, he inquired about Green's time and attendance, and when advised it was based on the 10-hour rule, he apparently realized he was mistaken and dropped the matter. Discriminatory animus is not manifested by such circumstances.

On the same day, Green reported that old containers were leaking oil onto the ground. According to Green, Bivins responded that: "like your career, that container is a dead issue," because before he could tell anyone the containers would be gone. Green also complained about the leaking containers to DEP and was advised the volume of the containers was not sufficient to file a complaint.¹¹

In addition to contacting DEP, Green called Youngstrom on December 3, 2007, to complain about the leaking containers. She advised him she would look into it and get back to him. She contacted Creel, and Creel advised her that an OSHA complaint had been filed and that Green was represented by counsel. She later learned that the containers had nothing to do with the OSHA complaint, but at the time she thought they were related. As a result, she advised Green that she was not able to discuss the matter with him because he was represented by counsel.

I find nothing discriminatory in Youngstrom's response to Green. She believed, in good faith, that the leaking oil containers were the subject of his OSHA complaint concerning which

¹¹ Complainant's reports internally and to DEP about the leaking containers clearly constitute protected activity, however, Complainant did not contend in this proceeding that Bivins' alleged retaliation or any of the alleged adverse employment actions were linked in any way to his reports about the leaking containers.

he was represented by counsel. She did not understand that he was addressing a current environmental concern unrelated to the soil incident or the OSHA complaint. As such, her decision not to discuss with Green what she believed was a pending legal matter was mistaken, but, under the circumstances, it was not discriminatory or retaliatory.

Green also complained to Youngstrom about Bivins. Although Bivins did not issue Green a warning about his time and attendance, Green nevertheless raised with Youngstrom the issue about being written up for tardiness in relation to the 10-hour rule for drivers. During their conversation, Green did not, however, mention anything about retaliation or harassment related to the March 14, 2007 soil incident, and, as a result, Youngstrom advised him to report his time and attendance concerns through his chain of command.

In contrast with precedents which deem it improper to deny access to established grievance procedures on a discriminatory basis, Complainant, in this instance, never suggested to Youngstrom that Bivins was acting in retaliation for the soil incident. As a result, it would be difficult to conclude that she deprived him of an opportunity to invoke in-house grievance procedures to address an instance of retaliation which Complainant failed to allege or disclose. Youngstrom's response to Complainant's concerns about the 10-hour rule was entirely appropriate under the circumstances.

Harassment by Other Employees

Respondent distributes to its employees a Personnel Manual which includes a policy prohibiting harassment in the workplace. The policy provides employees with four steps up the chain of command, ultimately to a compliance officer, to resolve the problem. In this proceeding, Green claims he was harassed by Bivins, Bagwell, McKelvin, and Bivins' "crew," including drivers Keith Robinson, Craig Sutton, and Charley Carty. Contemporaneously, however, his allegations of harassment were far less sweeping.

Thus, Complainant alleged that Carty harassed him by gesturing four or five times, forming the image of a gun with his fingers and pointing at Green. Green testified that Carty harassed him because he had sent an employee involved with Carty for a drug test and because Green had reported Carty for a delivery that angered a customer. According to Green, Carty's harassment was motivated by circumstances unrelated to his protected activity, and thus would not implicate the SWDA. Green also testified that driver Rowls kept a gun in his car and threatened to shoot him, but Green did not relate this incident to his alleged protected activity and did not report it to Human Resources or to the police.

The record shows that Green did complain to Willoughby that he was being harassed, but what he reported at the time was far less ubiquitous than he alleged at the hearing. He reported to Willoughby that he had received an insulting text message from driver, Keith Robinson, and allegedly told him that he had contacted the Sheriff's Department. Upon receiving the complaint from Green in the Spring, 2008, Willoughby traveled to Tallahassee to meet with Green. During their meeting, Green complained about Robinson and a second individual, Craig Sutton, who Green claimed was spreading rumors and gossip about him. There is no evidence that Green mentioned the soil incident to Willoughby or complained to Willoughby that Bivins, Bagwell, McKelvin, Rowls, or Carty harassed him.

In response to Green's expressed concerns, Willoughby met with Sutton and Robinson. He decided that Robinson should receive a warning and Sutton should receive counseling. In addition, Willoughby convened a drivers' meeting to go over the company's harassment policy. Still dissatisfied, however, Green insists that Willoughby acted only because he complained to the Sheriff's Department; an allegation which Willoughby vigorously denied.

I find no evidence in the record which supports Complainant's charge that Willoughby responded to his complaints about harassment only because Complainant involved the Sheriff's Department. To the contrary, from all that appears in the record, Willoughby took Green's complaint seriously and responded timely in compliance with Respondent's published anti-harassment policies. The workers who Green identified as having harassed him received appropriate discipline and the workforce received training. Willoughby's response was more than sufficient to demonstrate that Respondent neither tacitly encouraged harassment of Complainant by coworkers nor discriminated in the enforcement of its harassment policy as a means of retaliating against him. *See, Tierney v. Sun-Re Cheese, Inc.*, 2000 STA 12 (ARB Mar. 22, 2001); *Lewis v. United States Environmental Protection Agency*, 2003 CAA 05 and 06 (ARB June 30, 2008); *Nichols v. Bechtel Construction, Inc.*, 87 ERA 44 (Sec'y Oct. 26, 1992); *Erickson v. U.S. Environmental Protection Agency*, 1999 CAA 02 (ARB May 31, 2006). Under the circumstances, I find nothing in Willoughby's responses to Green's complaint of harassment indicative of retaliation for protected activity. To the contrary, the record demonstrates that Respondent's actions were legitimate, nondiscriminatory responses reasonably calculated to end the harassment. *Overall v. Tennessee Valley Authority*, 1999 ERA 25 (ARB July 16, 2007); *Madray v. Publix Supermarkets*, 208 F. 3d 1290 (11th Cir. 2000).

Police Report of Vandalism

On July 17, 2008, someone broke into the Mosley Street plant and damaged a silo containing sixty-eight tons of cement dust. The vandal tied a water hose to the top of the silo and turned it on, causing water to mix with the cement dust and harden. The damage was estimated to exceed \$90,000.00. The report stated that the last employee to leave the plant the previous evening was Kevin Derrico, and Matthew Green and Nathan, two employees on Derrico's crew, left just before he did. The police report noted that Bivins and Sieben had a suspect in mind and described the suspect as a "disgruntled employee who was recently demoted," but the suspect was not named.

Green testified that a coworker, Derek Gaines, told him he was being blamed for the break-in, and, as a result, Green went to the police and denied any responsibility for the break-in. Green never heard Bivins accuse him of damaging the silo, but Green inferred that Bivins had accused him because the police report stated the suspect was a disgruntled employee who had recently been demoted. Although the police report named no suspect, Green concluded that: "Bivins put in the police report that [I] was the suspect for damaging the plant." Apparently, Green saw himself reflected in the description of the suspect as a "disgruntled employee who had recently been demoted." Yet, the record shows that Green was demoted on September 6, 2007, over ten months before this incident, and there is evidence in the record that Heuring was demoted after Green. Complainant argues, however, that there is no evidence that Heuring was disgruntled.

A careful review of the police report provides no confirmation of Green's allegation that Bivins, in an act of retaliation, cast a shadow of suspicion over him as the vandal who sabotaged the plant. The police report mentions Green, among others, as members of the last crew to leave the plant the previous evening, nothing more. Consequently, while there may be no evidence that Heuring was disgruntled about his demotion, it is equally accurate to note that the police report does not identify Green as disgruntled or recently demoted. Green is accused of nothing in the report; and it would be difficult to conclude that those who gave the information to the police engaged in any discrimination against him in any respect.

Absence of Protected Activity

I have combed the record for evidence, direct and circumstantial, that might tend to support Complainant's allegation that he engaged in protected activity. His testimony describing both the circumstances and the content of his alleged communications with his supervisor concerning Respondent's disposition of soil he considered contaminated with diesel fuel lacks credibility, and circumstantial evidence does not otherwise substantiate his charges. In every instance of alleged harassment, including the May 24, 2007 warning, the failure to provide training, the limits placed on Complainant's authority to issue warnings, the demotion, the September 11, 2007 warning, the accusations concerning his time and attendance, instances of alleged harassment by Bivins, Bagwell, and coworkers, Respondent's response to his concerns about harassment, variations in Complainant's hours of work as a driver, and Respondent's alleged attempt to have him arrested for vandalism, Complainant's allegations of discrimination and retaliation lack merit and his suggestions of pretext are baseless. In the context of the record considered in its entirety, the evidence fails to demonstrate the existence of a retaliatory mind-set by anyone in Respondent's management, including Bivins. *See*, EEOC v. Total Systems Services, Inc., 221 F.3d 1171(11th Cir. 2000); Melendez, *supra*.

In conclusion, having considered the appearance and demeanor of the witnesses who testified at the hearing, and the inconsistencies, improbabilities, and important discrepancies reflected in this record, I conclude that Complainant's testimony lacked credibility. Moder v. Village of Jackson, Wisconsin, 2000 WPC 05 (ARB June 30, 2003); Phillips v. Stanley Smith Security, Inc., 1996 ERA 30 (ARB Jan. 31, 2001). In addition, I conclude, for all of the foregoing reasons, that the evidence, both direct and circumstantial, considered alone, and in combination, is insufficient to establish that Green engaged in any protected activity with respect to the soil excavated on March 14, 2007, during construction of the weir. His complaint challenging discrete, retaliatory adverse employment actions must, therefore, be dismissed. *See*, Minard v. Nerco Delamar Co., 1992 SWD 01 (Sec'y, July 25, 1995).

Hostile Work Environment and Constructive Discharge

Complainant also contended that after he protested the disposal of the dirt, Respondent created a hostile work environment that became so intolerable he was forced to resign. To succeed on a hostile work environment claim, a complainant must prove by a preponderance of the evidence that: 1) he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive to alter the conditions of his employment and to create an abusive working environment; and 4) the harassment would have affected a reasonable person detrimentally and specifically affected the

complainant detrimentally. Lewis, supra; Brune v. Horizon Air Industries, Inc., 2002 AIR 08 (ARB Jan. 31, 2006); Erickson v. EPA, 1999 CAA 2, 2001 CAA 08, 2002 CAA 03, (ARB May 31, 2006). A hostile work environment exists when supervisors or co-workers engage in hostile acts that do not tangibly alter the victim's conditions of employment, such as salary or promotion opportunity, but are "sufficiently severe or pervasive to alter the conditions of employment." Pennsylvania State Police v. Suders, 542 U.S. 129 (2004); *see also*, Meritor Savings Bank, FSB v. Vinson, 477 U. S. 57, 67 (1986); Lewis, supra; Hall v. United States Army Dugway Proving Ground, 1997 SDW 05 (ARB Dec. 30, 2004). A constructive discharge, in contrast: "can be regarded as an aggravated case of . . . hostile work environment." Suders, supra. It occurs when: "working conditions become so intolerable that a reasonable person would feel compelled to resign." Suders, supra; Akins v. Fulton County Ga., 420 F.3d 1293 (11th Cir. 2005); *see also*, Talbert v. Washington Public Power Supply System, 1993 ERA 35 (ARB Sept. 27, 1996).

Since Green has failed to establish that he engaged in protected activity, he cannot prevail on a claim of hostile work environment or constructive discharge. Such charges must, perforce, emanate from protected activity which triggers a workplace environment which turns hostile and eventually intolerable. Lewis, supra; Brune, supra; Erickson, supra. In this proceeding, Complainant has failed to establish that, with respect to the March 14, 2007 incident, he was an environmental whistleblower within the meaning of the SWDA. Accordingly, his complaint must be dismissed in its entirety. Therefore:

ORDER

IT IS ORDERED that the complaint filed by Matthew Green be, and it hereby is, dismissed.

A

Stuart A. Levin
Administrative Law Judge

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

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210.

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).