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Issue Date: 04 December 2008

CASE NO.: 2008-PSI-00001

In the Matter of

JOSEPH DONAHUE,
Complainant,

v.

EXELON,
d/b/a PECO ENERGY,
Respondent.

Complainant, Pro se

For Respondent: Jenny Shulbank, Esquire

Before: Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provision of Section 6 of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129 (“the Act” or “PSIA”)¹, as implemented by 29 C.F.R. part 1981. This statutory provision, in part, prohibits discrimination in employment against employees who provide information to the federal government about alleged violations of federal law regarding pipeline safety, or who refuse to participate in any practice made illegal relating to pipeline safety; or who assist or participate in any proceeding to carry out the purposes of pipeline safety legislation.

BACKGROUND

A. Procedural History

On or about November 5, 2007, Joseph Donahue (“Complainant”, hereinafter) filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (“OSHA”), alleging that Exelon Corporation, d/b/a PECO Energy Co. (“Respondent” or

¹ At the hearing, Respondent introduced evidence regarding its compliance with pipeline safety personnel qualifications, thereby demonstrating that it is covered by the PSIA. Tr. at 27-30; RX 5.

“PECO”, hereinafter) had engaged in adverse action against him in violation of the PSIA by terminating his employment for raising issues regarding safety. After conducting an investigation of the complaint, the Regional Administrator for OSHA issued a determination dated January 9, 2008 that concluded that Respondent had not violated the Act’s employee protection provisions. Through correspondence dated January 28, 2008, Complainant objected to the findings and requested a hearing before an Administrative Law Judge. The case was thereafter assigned to me.

By Notice issued March 14, 2008 I scheduled a hearing in Cherry Hill, New Jersey for June 3, 2008. At that time, the parties appeared before me and submitted evidence and produced witnesses who testified. I admitted to the record Complainant’s exhibits numbered CX 1 through CX 11. I admitted Respondent’s records identified as RX 1; and RX 5 through RX 20². I excluded Respondents exhibits RX 2 through 4 (Tr. at 26), as they did not constitute the total documentary evidence involving this issue. Tr. at 11-14; 26. I note that the information contained in those exhibits is in evidence in another form, and therefore Respondent is not prejudiced by the exclusion of the documents that did not comply with discovery requests. Complainant filed a written closing statement on August 29, 2008, and Employer filed a written closing statement on September 5, 2008.

My decision in this case is based on the sworn testimony presented at the hearing, the documentary evidence, and the arguments of the parties.

B. Complainant's Statement of the Case

Complainant alleges that his employment with Respondent was terminated because he raised issues involving safe practices and procedures using gas. Complainant had extensive experience working around natural gas, which he acquired during his many years of employment with the Philadelphia Gas Works. He alleged that his instructor during training resented that Complainant appeared to have more knowledge about gas. Complainant further stated that he was not given assignments to perform emergency work arising during his shift, which prolonged an emergency situation, and that an instructor directed trainees to use an unsafe method to loosen a bolt on a valve. Complainant argued that Respondent’s various reasons for terminating his employment were a pretext for discrimination.

C. Respondent's Statement of the Case

Respondent asserts that Complainant failed to demonstrate that he engaged in protected activity under the Act. Respondent maintains that even if Complainant had made complaints about safety, Complainant’s discharge was totally unrelated to such activity. Respondent cited a number of reasons for Complainant’s dismissal, including displaying inappropriate behavior during classroom training and poor attitude during communications with company officials, failing test scores during training, and repeatedly breaching safety regulations by wearing a gold chain.

² I reserved admitting RX 8 until the witness who authored the document testified. Tr. at 32-33.

ISSUES

1. Whether Complainant engaged in activity protected under the Act; and if so,
2. Whether Respondent was aware of this activity; and if so,
3. Whether the activity contributed to Respondent's decision to terminate Complainant's employment; and if so
4. Whether Respondent can demonstrate by clear and convincing evidence that it would have terminated Complainant even in the absence of the protected activity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

1. Testimony

Because he had called many fact witnesses, I directed³ Complainant to first elicit testimony from them, which is summarized as follows. Complainant was given the opportunity to testify about the facts that he believed supported his case after he presented his witnesses. That testimony is summarized below. In addition, many of the questions that Complainant posed constituted testimony of a kind. I have summarized relevant statements that Complainant made during his questioning of witnesses as well.

Joseph Donahue (Tr. at 323-337; 370-372; 459)

Mr. Donahue testified that he had been hired by Respondent contingent on successfully completing a probationary period, and he understood that he could be fired during the first six months of employment. Complainant believed the company was safety-oriented, but he testified that he was discharged from his job because he brought up safety related concerns. During the first five months of his employment Complainant had no problems. During that time, he was trained in electric procedures, and he did not raise any issues concerning safety during that period of time. In mid-October, 2007, he was trained in gas procedures, with which he was familiar from his prior employment. He felt comfortable pointing out procedures that he knew could hurt people. Days after raising safety concerns to supervisors, he was terminated. Complainant believed that the instruction provided in the gas segment of training was inadequate because the primary instructor did not have experience with gas. Complainant testified that he told Mr. Kershaw that someone could get hurt if they did not know the correct way to light heaters and work a shut off valve. Tr. at 106. Complainant testified that Mr. Ludwick was present for this conversation. Tr. at 113.

When Complainant asked Respondent's personnel representative why he was fired, Mr. O'Connell said that he did not have to give a reason. Complainant was later told by a Human Resource employee of the Respondent that he was fired because of his job performance. He later

³ 29 C.F.R. §18.* provides an administrative law judge with the authority to direct the conduct of a hearing.

learned through OSHA's investigation that he was fired because of his test scores and "arrogance". Tr. at 329. During his deposition, he was told that he was fired for wearing jewelry.

Complainant denied that he was arrogant, and pointed out that the testimony of the witnesses was inconsistent on this issue. Respondent's supervisory employees maintained that he was arrogant, but other employees and co-workers did not. Complainant testified that the instructor during electric training, Ron Sheppard, did not have complaints about his conduct. However, he felt animosity from Brian Focht from the beginning. Complainant did not believe that he knew everything, but he knew how to work with gas. He stated "...it wasn't arrogance it was talking to Paul about different scenarios..." Tr. at 332. Complainant did not believe that he had more knowledge about gas than Mr. Focht, but he believed that he had more experience working around gas. He related well to Mr. Grosseible because they had street knowledge about gas. Complainant testified that he was eager to learn and did not believe he knew everything. He had no previous background in electrical work, but did have background in gas. Tr. at 445.

Complainant agreed that he laughed in class, but did not think he was disruptive. He testified, "[i]f somebody said something everybody laughs. You've got grown men. It's not going to be third grade." Tr. at 332. Complainant believed everyone in the class "goofed around" to some degree. He noted that he was late only once, due to retrieving a tool that he was asked by an instructor to share with the class. Other trainees were also late on occasion. Complainant did not recall "goofing around" with pogo sticks. He agreed that Mr. Derosato had words with an instructor and acknowledged that the situation was serious. Complainant contended that he never confronted his instructors or belittled them. When he raised issues such as the need to determine that water was in the heater and the need to be cautious about carbon monoxide, Complainant did not intend to be confrontational. He believed that Mr. Derosato's behavior was different from other class members, and Complainant did not see his conduct as being much different from that of the rest of the trainees.

Complainant admitted that on occasion, he forgot to remove a gold chain that he usually wears. He was in the habit of wearing the chain all the time, and only removed it to go to work. He had no previous background in electric, and when reminded of the jewelry, he immediately removed it. He did not go out of his way to put the chain on, but rather, only wore it to work if he forgot to remove it. He did not wear the chain at work all the time. Complainant testified that if he had "...known it was related on my job issue, I would have thrown it out. I would never have wore [sic] it again. I would never see it again". Tr. at 337.

In discussions with Mr. Pugh, Complainant testified that he sat in the front of the class, and did not sit with Mr. Derosato, who sat in the back. Tr. at 287. Mr. Pugh conceded that his recollection about the sitting arrangement could have been wrong. Id.

Complainant asked Mr. Luby to confirm that Complainant had asked to take the test in the afternoon rather than in the morning. Tr. at 292. Mr. Luby agreed that he consulted Mr. Focht about Complainant's request, which the instructor denied. Id.

Complainant testified that he advised Ms. Levine that Mr. Monahan had instructed him to return to a work station rather than report to the site of a downed wire. Tr. at 391. Ms. Levine did not recall that conversation, but agreed that the detour directed by Mr. Monahan would concern her. Tr. at 399.

At the conclusion of the case, Complainant testified that he did ask for overtime, because when he was hired, he was told that he would work a lot of overtime. He acknowledged that he had been paid at one of the top rates. Tr. at 460. He further stated that he believed that his test scores were the reason he was fired. Tr. at 461. He referred to having a medical problem, but said that he did not bring it up to Respondent as he is “ashamed of it”. Nevertheless, he noted that he sought extra help for testing that was denied. Id. Complainant clarified that it was not only the test scores that were the basis for his termination. He argued:

No, excuse me, what I’m saying is that’s what the company is saying that they terminated me for. They came up with six different reasons to terminate me, you know, and it’s basically, I think, myself, it’s to cover up that I brought up the safety issues. They had to find something that’s going to stick with me and that’s how they did it. And every time I brought something up, it was, it was found something else they would come up with.

Tr. at 462. Complainant made a similar argument in his opening statement. Tr. at 59-60.

James Flanagan (Tr. at 67-81)

James Flanagan worked for PECO for twenty years, and has been a senior safety professional since 1996. His primary responsibility is to ensure the safety and health of employees and the general public, and one of his duties is to speak to new employees during their training. Mr. Flanagan recalled addressing Complainant’s training class and stressing that safety is PECO’s highest priority. Mr. Flanagan testified that PECO was recognized by the American Gas Association as the utility with the lowest injury rate in the nation.

Mr. Flanagan referred to a written company safety policy that emphasized the commitment of PECO to the health and safety of employees and the general public. He stated that new employees receive the safety rule book during their first week of training. Mr. Flanagan did not know whether Complainant was provided a copy of the book during his training, and he stated that it was the responsibility of the training instructor to verify that all employees were given a copy of the rule book. He testified that he provided the instructors who conducted Complainant’s electric training with enough books for all of the students. Mr. Flanagan recalled that he visited Complainant’s class several times, but he did not remember Complainant specifically.

Mr. Flanagan explained that every team of employees is directed to select a safety representative to whom safety issues can be raised. Supervisors are also expected to address safety-related concerns that employees may raise. Monthly meetings are held at which teams raise safety issues. Managers also attend monthly meetings at which safety representatives may raise safety issues. Employees who identify significant safety issues receive a gift certificate

from the vice president of their operating department. Mr. Flanagan could not recall an instance where an employee would be punished for raising a safety concern.

Mr. Flanagan was aware that employees who work in the field may not have access to their team's monthly safety meeting, but he explained that field employees could attend meetings held at various locations that were published in advance. These meetings generally were held at a service building. Mr. Flanagan testified that employees were expected to attend the monthly meetings, but he was not aware of whether their attendance was documented.

Mr. Flanagan is not responsible for qualifying instructors in safety issues. He said that instructors are given special training in PECO's safety programs and work rules, and need to demonstrate their knowledge of that material. However, there is no formal safety class for instructors, and no specific program to qualify instructors in safety related issues. Safety training is provided periodically at Respondent's training center and every time a safety program or procedure is changed.

Robert Kershaw (Tr. at 81-109)

Mr. Kershaw was a supervisor in the group that Complainant was hired to work with. Complainant did not directly report to Mr. Kershaw, but they interacted on occasion. Mr. Kershaw recalled a conversation he had with the Complainant in the field, wherein Complainant asked him if he thought it strange that his instructor Brian Focht did not know answers to questions that were raised by trainees. Mr. Kershaw did not recall Complainant talking to him about the proper way to loosen a bolt on a valve when lighting a heater.

Mr. Kershaw recalled that Complainant spoke with him about not wanting to work with another individual because he did not feel safe with him. Mr. Kershaw explained that he perceived this as a personality conflict between employees, and he did not think it appropriate to rectify the situation by allowing Complainant to use his own vehicle rather than accompanying the experienced ET. He recalled allowing Complainant to drive by himself in his personal vehicle because he had to leave early to attend to a sick relative. Mr. Kershaw assigned Complainant to work with a different employee the next day, because he believed that Complainant's training would be hampered if he wasn't comfortable with his assigned co-worker.

Mr. Kershaw testified about problems that Complainant encountered with accessing his voicemail. He explained that new employees are assigned temporary passwords to use to access the system and input an individual password. Complainant's temporary password did not work, and so Kershaw sought help from an administrative assistant in systems operation. The assistant advised Mr. Kershaw that Complainant had already accessed the system and changed his voicemail password. Complainant acknowledged to Mr. Kershaw that he had forgotten that he had reset his password. Mr. Kershaw observed that he would have saved time if he had known that, since it is easy to reset a password.

Mr. Kershaw reports to Nicole Levine. Ms. Levine meets with all of the supervisors every two weeks. During the period covering Complainant's training, the performance of the

newly hired probationary energy technicians was discussed at the meetings. Mr. Kershaw remembered that a supervisor “spoke about talking to Joe several times about wearing his jewelry. And having to have him to remove—or asking Joe to remove his jewelry.” Tr. at 93. He also discussed test scores, and recalled that Al Ludwick reported “...that Joe had participated in some horse play, was disrespectful in class.” Tr. at 94. Mr. Kershaw stated that no official record of the staff meetings was kept, although he sometimes kept personal notes of things that he needed to do.

At the meeting held on November 1, 2007, the supervisors recommended that Complainant and another individual, Pat Derosato, be let go. All of the supervisors present supported the recommendation. Vice President of Operations Mike Innocenzo attended that meeting, and he also approved the recommendation to discharge Complainant. Mr. Kershaw denied that the conversation he had with Complainant about the instructor’s lack of knowledge played any part in the decision to discharge Complainant.

Mr. Kershaw was not involved in Complainant’s electric training, as he came to the department in June, 2007. He first heard reports about Complainant’s conduct in class during the meeting of November 1, and was unaware of reports of other conduct issues. He could not recall whether he raised at the meeting the incident involving Complainant’s voicemail password. Mr. Kershaw acknowledged that the incident “demonstrated a behavior to me. That if Joe could have told me he forgot his password ... a phone call to the help desk and it would have been fixed, rather than the time I spent. And the time isn’t the question, it’s the upfront, the behavior of just not telling like Bob, I forgot my password.” Tr. at 102. Mr. Kershaw agreed that Complainant simply could have forgotten that he changed the password, but he believed that Complainant did not want to admit that he forgot his password. He could not recall whether Complainant expressed remorse or offered an explanation for forgetting that he had set his password.

Mr. Kershaw was asked to describe the specific behaviors that Complainant engaged in that constituted disrespect and horseplay. He testified:

there was a lot of stirring up of the class. And about pay. Pay the—rate getting, or when they were going to get out on their own. That type. The horseplay, as an example, and I don’t know that Joe was involved in the example of the horseplay—were using pogo sticks as swords in the classroom.

Tr. at 103. When asked to describe the horseplay that Complainant was involved in, Mr. Kershaw stated, “I don’t remember the specifics”. Mr. Kershaw admitted that he did not witness Complainant involved in horseplay. Id.

Mr. Kershaw testified that probationary employees could be discharged at any time within the probationary period. He acknowledged that Complainant’s six month probationary period was coming to an end and that the November, 2007 meeting entailed a final review of all participants.

Mr. Kershaw had no recollection of Complainant telling him that someone could get hurt if they did not properly operate a valve when lighting a heater. He believed that he would

remember a conversation in which he was told that people could get hurt. He stated that employees often tell him about safety issues, and he always tried to address the safety concerns. Mr. Kershaw described an instance where wires had been downed, and a trained screener was unaware of his need to stay on the phone until the hazardous condition could be properly assessed. Because the screener was not aware of proper procedure, Mr. Kershaw concluded that other screeners would have a similar gap in their knowledge, and he arranged to discuss the issue at the group's next safety meeting.

Al Ludwick (Tr. at 110-157)

Mr. Ludwick was the Delaware County supervisor for the trainees in Complainant's class. At the time of the hearing, Mr. Ludwick had been a supervisor for almost three years. Complainant's class was one of the first ET training classes that PECO had held "in a while" that included new employees with the company. Tr. at 119. The training course was newly developed and incorporated changes in company procedure since the program had last been presented. The course involved classroom training in electric and gas procedures and on-the-job training. Although some of the work that ETs had performed in the past was now performed by others, ETs still needed to know safety issues involved in activities such as shutting gas and electricity on and off. Mr. Ludwick testified that he was familiar with how to safely turn heaters on from his training. Mr. Ludwick was not certain whether the training that was provided to Complainant included instruction on turning appliances on and off.

Mr. Ludwick explained that the trainees spent most of the day in class with instructors, but supervisors saw them on occasion. Supervisors received feedback from the instructors and shared training responsibilities, but all supervisors did not "sign off on [Complainant's] credentials..." Tr. at 118. Classroom instructors were responsible to assure the trainees' knowledge of class content. Supervisors met at regularly scheduled staff meetings and discussed the progress of trainees. The meetings were also attended by the supervisors' manager, Nicole Levine. Occasionally, supervisors would visit the training center to observe the trainees. Mr. Ludwick also collected reports that documented trainees' on-the-job performance in the field. Trainees were assigned to work with permanent ETs, who completed a checklist of skills that the trainee was expected to master. Mr. Ludwick and George Monahan gathered the field reports, but Mr. Ludwick did not review them. He denied hearing complaints from any of the electrical technicians that worked with Complainant about his work ethic.

Mr. Ludwick recalled that Complainant complained about the methods used by his instructor Brian Focht during class room training. He counseled Complainant to be patient with Mr. Focht because it was his first training class and he needed to consult his books. He agreed with Complainant that Complainant had made sarcastic remarks about Mr. Focht's instruction method. Mr. Ludwick remembered discussing Complainant's tests with him, and how Mr. Focht advised trainees to take their written materials home to review. Mr. Ludwick testified that Complainant had said that he would not take books home and study on non-company time.

Mr. Ludwick heard information that caused him concern about whether Complainant would be good a employee. Mr. Ludwick testified that it was acknowledged that Complainant "is a good mechanic", but "had some behavior issues". Tr. at 136. He identified the behaviors

as “constantly being reminded of the chain he had to wear. Just chronic complaining about his salary and overtime and being signed off fast enough to get overtime”. Id. Mr. Ludwick explained that the trainees had to complete training in order to be assigned to jobs alone, which would allow them to receive overtime. He stated that there are fewer overtime opportunities for employees who have not “been signed off” as certified ETs. Tr. at 136. Mr. Ludwick testified that he personally raised a concern about Complainant wearing a chain in violation of company safety procedures. He stated: “almost every time he came in and had to be told to take it off”. Tr. at 137. The following exchange with Respondent’s counsel discusses the chain wearing:

Q: Did you ever tell Mr. Donahue that he should take off his chain?

A: Yes.

Q: And why—and can you explain—describe the context of that conversation and where it took place.

A: Well one time he came in the office with one of the guys and I would say yo, what’s with the chain? You can’t wear that. You have to take that off.

And then Nicole also had Tony—he’s still got that chain on. Will you tell him to take that chain off? I said Joe you’ve got to take that chain off.

Tr. at 137. Mr. Ludwick further testified that George Monahan told Complainant on more than one occasion to take the jewelry off. Tr. at 138.

Ms. Levine asked Mr. Ludwick to interview the instructors about the trainees’ conduct and make notes of the interviews. Although he did not keep regular notes at meetings, he felt that the instructors’ feedback was significant enough to document. His notes document that the gas instructors believed that the conduct of Complainant and Derosato “had the most influence in the class”. Tr. at 140. The discussion with the instructors played “very heavily” on the decision to discharge Complainant. Id. Mr. Ludwick explained that he relied upon the instructors’ impression: “Like I said, because they spent most of the day with these individuals. And I’ve only had brief moments with Joe. And most of the—the only one I actually spent some time was Mr. Yeorger*, who I was one of the supervisors who signed him off...my interaction with Joe and Mr. DeRosato were brief walk by’s, quick check ins, but not a lot of time”. Tr. at 140.

The instructors told Mr. Ludwick that Complainant did not take his books home to study material. Although trainees were not required to study at home, Mr. Ludwick noted that Complainant had failed some tests and yet continued to refuse to study at home. He explained that Complainant’s proficiency as a mechanic was not the only attribute that Respondent wanted in an ET. A large part of the job involves interaction with customers and ETs need to be positive and able to respond to emergencies. Respondent expects ETs to be polite and positive and able to handle customers.

Mr. Ludwick shared his notes of his interview with the instructors with the rest of the staff at the meeting held November 1, 2007. The discussion of the supervisors regarding the

performance of the probationary ETs focused on behavior issues. Ludwick recalled that the supervisors discussed Complainant's belief that the pay scale was wrong and his complaints about not having more overtime opportunities. The supervisors also discussed their opinion that Complainant "had an abrasive behavior". As a specific example, Mr. Ludwick testified that "...some of the techs would come in and say hey, this guy's a crack mechanic but—kind of rub them the wrong way. I didn't document anything, it was just feedback from the boots in the field". Tr. at 145-146.

Ludwick stated that he did not share his discussion with the instructors until everyone else spoke, as he did not want to influence anyone. He testified that he relied upon the instructors for his decision to discharge Complainant because:

These are PECO employees that have been here a very long time. They're instructors that—we've them instructors for a reason. [sic]. And their opinion my—I judge pretty much on that opinion and then like minor occurrences with Joe. Just verified what they had said on a full time basis.

Tr. at 146. Mr. Ludwick believed that the main problem with Mr. Derosato was that he was disrespectful to an instructor, and used profanity. The instructors had told Ludwick that DeRosato and Complainant "would wind the other troops up, and that they would have to settle them all back down". Tr. at 147. Ludwick also described an incident where he believed Complainant was arrogant in comparing himself superior to another employee who had worked for PECO for thirty years. Although Ludwick did not rely on that incident in reaching his decision to discharge Complainant, that incident reflected his perception of Complainant's attitude. Mr. Ludwick interviewed the instructors Brian Focht and Ray Pugh, but not other instructors who had been associated with the training class. He did not know how long any of the instructors had worked with the trainees. Ludwick testified that he had authorized overtime for Complainant.

Ludwick recalled that another individual, Art Finley, brought up the fact that Complainant had brought to the class' attention the proper way to check out an appliance. Ludwick stated that Finley believed that Complainant had raised a good point. Complainant's comment about water in heaters was not a factor in the decision to terminate him. He testified, "the decision was purely in the behaviors". Tr. at 149.

Mr. Ludwick remembered that after he was discharged, Complainant spoke with him and asked him to look for personal items that he left in the company truck in which he usually worked. Mr. Ludwick looked for the items, but did not find them. He agreed that he told Complainant that he would reimburse him for the value of the items. Mr. Ludwick could not state whether either of the trucks he examined was the truck that Complainant normally used.

Upon cross examination by Complainant, Ludwick stated that other ETs had complained about his "behaviors". Tr. at 152. Ludwick said that Complainant had been "riding with these people" but Ludwick did not identify the individuals who complained about Complainant. Id. In response to Complainant's question about how often Ludwick saw him wearing a chain, Ludwick stated that he saw the chain "just about" every time he saw Complainant. Tr. at 153.

Ludwick denied that the instructors he talked to had said that one of the trainees often slept during class. Ludwick defended Focht's instruction to the class to highlight information in training books as necessary. Ludwick was not familiar with the exact language in the manual that was used to instruct individuals on how to light a heater, and he agreed that he would not have told the class that they would learn those procedures in on-the-job training.

Mr. Ludwick explained that he would not have expected the ETs who accompanied Complainant during on-the-job training to have documented negative comments, as they were union employees. The check list documented mechanical skills, and not observations about personality.

Rafael Colon (Tr. at 160-171)

Mr. Colon is employed by PECO as a revenue protection technician. When Complainant was in training, he accompanied Mr. Colon for several weeks as his trainee during electric training. Mr. Colon testified that Complainant was very conscientious about safety, which was consistent with Respondent's policy. Complainant constantly wore his proper protective equipment, which impressed Mr. Colon. He stated that he was also impressed with Complainant's interaction with customers, and observed that Complainant took time to understand them and explain things to them. He believed that Complainant "was going to be a good employee". Tr. at 160. Mr. Colon testified that Complainant demonstrated familiarity with safe and proper procedures on occasions when Complainant consulted him in the field. Tr. at 161. He recalled that Complainant had called him to thank him for training him, which impressed Mr. Colon, as no other trainee had ever done that. Mr. Colon did not participate in the decision to discharge Complainant.

Mr. Colon estimated that Complainant accompanied him for almost one month. He rode with Complainant most of the time that Complainant was involved in on-the-job training. Complainant told him that he preferred to ride with Mr. Colon because he appreciated how Mr. Colon performed the job. He did not observe Complainant wearing inappropriate jewelry. The safety equipment that ETs used consists of proper shoes, and company issued uniform, safety glasses, face shield, hardhat, work gloves, and sometimes volt protective gloves. Mr. Colon provided feedback about Complainant's performance to supervisor George Monahan. He told Mr. Monahan that Complainant was a good worker who was not afraid to take on a task. He worked through some concerns using a ladder, and he had good relations with customers. Mr. Colon believed that Complainant's background with the gas company would be an asset to PECO. He was familiar with the city of Philadelphia and its surrounding counties. Mr. Colon shared his opinion about Complainant to co-workers. He did not recall any other ETs saying anything derogatory about Complainant.

Robert Rodriquez (Tr. at 172-175)

Mr. Rodriquez has worked for Respondent for twenty two years. He worked with Complainant during his electric training for approximately two weeks. Mr. Rodriquez observed that Complainant was a good worker, and he advised his supervisor, George Monahan, that he thought he was working out well.

George Monahan (Tr. at 175-195)

Mr. Monahan has worked for Respondent for twenty eight years and is currently employed as an energy technician supervisor. He was familiar with Complainant through his training. When Complainant completed his formal electrical classroom training, he reported to Mr. Monahan to work as an ET. Complainant did not receive work assignments for himself, but accompanied other ETs and worked on their assignments. Together with other supervisors, Mr. Monahan was responsible for assessing Complainant's performance. Every two weeks the front line managers would meet with their supervisor, Nicole Levine, and the performance of trainees was discussed at these meetings. Mr. Monahan testified that he observed Complainant at work, and believed that his work was technically "very sound". Tr. at 179. In addition, other employees commented on Complainant's technical skill. However, Mr. Monahan also testified that ETs told him that they believed that Complainant was "very domineering [and] condescending..." Tr. at 180. Mr. Monahan could not name the ETs who made such statements to him.

Mr. Monahan testified that he believed it was not the place of a probationary employee to comment on the skills or work ethic of other employees. He recalled one individual about whom Complainant had talked about. Mr. Monahan testified that he took the occasion to coach Complainant, advising him that teamwork was necessary. Mr. Monahan could not recall the details of the conversation, but he believed that Complainant should not have made derogatory comments about a seasoned employee. Monahan also recalled two occasions when he had to tell Complainant to remove a chain. As far as he knew, Complainant complied with the request.

Complainant spoke to Mr. Monahan about not receiving overtime, and Monahan told him that overtime was based on business needs, and that probationary employees could not work alone, and therefore, were not entitled to overtime. He believed that Complainant escalated the tone of the conversation. Monahan believed that two other probationary employees were present during this discussion.

Mr. Monahan participated in the decision to discharge Complainant, and he recalled discussion at a staff meeting on November 1, 2007 about whether to retain the probationary employees. Both Complainant and Mr. Derosato were identified as individuals that gave management concerns. Monahan discussed Complainant's "bad behaviors":

The fact that he was condescending at times, the fact that the overtime, and the jewelry. So that's where the conversation sort of initiated around Joe. And as the conversation when on, that's when Mr. Ludwick at the end of the round table, where other supervisors discussed some of the behaviors they're concerned about, that's when Mr. Ludwick presented a piece of paper, after his interview with the instructors in the gas training.

Tr. at 185. The instructors had described Complainant as disruptive in class. Although he believed that Complainant was a good mechanic, Monahan offered the following explanation for his discharge:

Well it was a culmination of the bad behaviors that I've already dis[cussed] and the fact that our energy technicians are—really are ambassadors to the public. They're the front—they're the people who are paying their high bills. They're usually the only people who have a face. So we were concerned that if you were this disrespectful and disruptive in a controlled environment, what would it be in an uncontrolled environment where energy technicians sort of run their own business if you will. They're given jobs and they go out and conduct business on their own, with very minimal supervision.

Tr. at 186.

Complainant asked Mr. Monahan to discuss a situation where the ET with whom he was working called Monahan to approve overtime so that the two ETs could take care of a downed wire. Monahan refused to authorize overtime for a probationary employee, and said that “if it's a safe condition, we're not having Joe stay”. Tr. at 188. When asked whether a downed wire in a storm represented a potential unsafe situation, Mr. Monahan responded:

Well, that's—if you listen to how I responded to you, if it was a safe condition. If there's wires down, the people who go out and assess it and say okay, it's not a primary wire down. I can raise it. I can make it safe and leave. I never told Dave to leave an unsafe condition.

Tr. at 188. Monahan agreed that he instructed the other ET to take Complainant back to the shop, and sent another ET from the other shift to the site of the downed wire. He noted, “[n]ow Dave Driscal was an experienced ET. Dave would never leave an unsafe condition, regardless of what I directed”. Id. Complainant pointed out that the job had just been dispatched to them and that they had not been able to assess whether the wire was safe or not. Mr. Monahan asserted that at the time, he believed that the detour entailed by Complainant returning to the shop would not have created an unsafe condition. Tr. at 189. Mr. Monahan could not recall hearing positive comments about Complainant's interaction with customers from training ETs.

Mr. Monahan clarified that he took exception to how Complainant asked about overtime, and not the fact that he asked for it. He explained, “You come to my office and demand it and elevate your behaviors, there's a difference there Your Honor, how that lands on a person”. Tr. at 191. He recalled that he interviewed Complainant for the job, but did not discuss hours and pay with him. Human Resources is responsible for that discussion.

Mr. Monahan did not personally speak with the instructors who were interviewed by Mr. Ludwick. He did not know how many instructors were involved in the training. He did not really recall when Complainant's behavior during class was first discussed among the supervisors. Mr. Monahan testified that wearing jewelry was a violation of PECO safety policy, and could constitute grounds for dismissal. He had observed other individuals wearing jewelry, but he never fired an employee for that infraction because they were not in his department.

Mr. Monahan summarized the inappropriate behaviors that Complainant engaged in as consisting of demanding overtime, violating safety rules by wearing jewelry, inappropriately discussing another employee's skills, and negative feedback from instructors.

Emilio Sanchez (Tr. at 195-213)

Mr. Sanchez started working for Respondent in June, 2007. He was in Complainant's training class and successfully completed the course. His job as an ET requires him to respond to emergency power outage calls, meter changes, downed wires, and anything involving loss of power. Training was conducted in a classroom, where the six trainees read materials and engaged in simulations of field work. The classroom training lasted several weeks. The instructors for gas training were Brian Focht, Paul Rossaro [sic], and Ray Pugh. In addition, other individuals would visit from other departments to discuss specific topics. The trainees were tested on the classroom materials, and then went to on-the-job training, where they accompanied experienced ETs on their assignments. Mr. Sanchez stated that he worked overtime as a trainee.

Before the trainees were given electric training, they attended an orientation at lineman school where they were told that they would be getting a lot of overtime, and would need to work different shifts. They were advised that they would be very busy, and would rarely see their families. They were told that electrical training would last for twelve weeks, and would be followed by gas training. Mr. Sanchez testified that Brian Focht was "in and out" of the classroom every day. Tr. at 199. Paul Grosseible conducted some of the gas training, and Dave Luby also presented at least one week of gas training. Mr. Grosseible was present during the majority of the gas training. Mr. Sanchez recalled that Brian was part of the training for perhaps one or two days, and an employee from revenue protection made a presentation, and the trainees spent a day at the fire school with an individual named Keith. Mr. Sanchez testified that the trainees spent one day with Ray Pugh.

Mr. Sanchez testified that sometime during class Paul told the trainees that Nicole Levine wanted to get rid of all of them because they complained. Mr. Sanchez observed that at times "there was some fooling around" by Complainant. Tr. at 200-201. Mr. Sanchez also testified that another trainee named Carl fell asleep almost everyday. Mr. Sanchez stated that when Mr. Focht did not know the answer to questions, he advised the trainees that he would get back to them with answers, which he did. The trainees were not required to take books home, but he took his home at times. Mr. Focht told the trainees that they could leave their books in the class because he locked the door at night. The class room work consisted mostly of the trainees reading, or listening to Dave read to them, and telling them to highlight information. The class went through two manuals in two weeks, in which they highlighted a lot of data. Mr. Sanchez recalled a hands on demonstration involving heaters, and he said that the class was not instructed on how to turn heaters on.

Mr. Sanchez remembered that Al Ludwick told the class that Complainant and Mr. Derosato had been discharged, but he did not recall a supervisor saying that someone should have intervened on behalf of the fired employees. Mr. Sanchez stated that he "could see the reason why Pat was fired...[he] thought that Pat got fired because he cursed at Ray Pugh. Tr. at

205. In addition, Mr. Derosato had complained about his wage to Human Resources. Mr. Sanchez did not recall Complainant saying anything about his hourly rate of pay. He agreed that Complainant and Derosato were not the only individuals who argued about overtime. Mr. Sanchez testified that things in class were more comfortable after Complainant and Mr. Derosato were fired.

Mr. Sanchez testified that Complainant appeared to participate in class, and brought in hardware that he used during his employment at PGW that he thought could be useful in gas work. In addition, Complainant had exchanges with the instructor in which they discussed scenarios involving working on gas. Mr. Sanchez did not recall Mr. Focht giving any demonstrations or discussing scenarios involving working with gas.

Leo Joerger (Tr. at 213-227)

Mr. Joerger has worked for Respondent as an ET since June 11, 2007. He was in Complainant's training class. He recalled being told at orientation that he would be working a lot of overtime. Mr. Joerger stated that he called Nicole Levine about overtime and wages. Mr. Joerger believed that Mr. Focht was in class with the trainees every day, and testified that if not Mr. Focht, then other instructors were in class. He did not recall how many days Dave was in class during the gas training. Mr. Joerger testified that Mr. Focht did not always know the answer to questions raised by trainees, but he did find answers and shared them with the class. Mr. Joerger understood that in order to successfully complete training, trainees needed an overall average of 80 on daily quizzes in gas training.

Mr. Joerger testified that there was horsing around during class. He recalled Mr. Derosato complaining about his rate of pay and Joe Hughes looking to transfer to other departments. He remembered being told that it would be okay to loosen a bolt when shutting off gas, but could not recall which instructor talked about that. Mr. Joerger also remembered someone discussing the safety precautions involved in lighting a gas heater, but could not recall whether Complainant raised the issue.

Joseph Hughes (Tr. at 227-242)

Mr. Hughes is employed by PECO as an ET. He transferred from another job to join Complainant's training class. He was a member of a union, and not a probationary employee when he started his ET training. Mr. Hughes testified that the training consisted of classroom instruction in electric and gas and on-the-job training. Mr. Hughes recalled that Mr. Focht was in and out of the class during gas training. Paul Grosseible conducted most of the gas instruction. Mr. Hughes testified that the focus of the classroom instruction was the fundamentals of electric and gas. The trainees learned how to perform tasks during on-the-job training. Although the trainees were not required to do so, Mr. Hughes took his books home to study because he was unfamiliar with gas.

Mr. Hughes recalled that when he was hired as an ET, he was told to be prepared to work a lot of overtime. He expected to be working on his own in a short time after starting the job. Mr. Hughes testified that Mr. Derosato and Carl complained about their rate of pay. He also was

unhappy that he was not getting the overtime he expected to earn. He never heard Complainant complain about his hourly rate. Mr. Hughes was surprised when he heard that Complainant was discharged. While he acknowledged that Complainant “horsed around” in class, Mr. Hughes testified that all of the trainees horsed around to some degree. In his opinion, Mr. Derosato was disruptive. In addition, he observed that the trainee Carl often fell asleep during training.

Mr. Hughes understood that he needed to score an average of 80 on combined tests, and did not need a score of 80 on each test. He remembered spending a lot of class time highlighting information. He recalled Complainant discussing scenarios with Mr. Grosseible during training. Mr. Hughes did not recall Complainant raising safety concerns about instruction regarding removing bolts under high pressure, or other safety concerns.

Brian Focht (Tr. at 242-279)

At the time of the hearing, Mr. Focht had been employed by PECO as a senior specialist for seven years. His primary job duties are to conduct training and classroom operations, and conduct fire investigations. Mr. Focht completed training in numerous fields, and holds certificates in various fire investigation techniques. He is a certified odor responder. He is qualified to respond to gas leaks and other emergencies. He has nineteen years of experience as an instructor. He is certified as a National Proboard Instructor and has a certificate in emergency vehicle operations. He is a trained driver safety instructor and conducts CPR and First Aid training, as well as roadway area protection.

Mr. Focht conducted Complainant’s training class together with other instructors. The instructors rotated assignments. Mr. Focht testified that during the early part of classroom instruction, he advised the trainees to highlight certain information that he thought was important. He acknowledged that he sometimes did not know the answer to questions, but he believed that he provided the class with answers after consulting more knowledgeable people. Mr. Focht denied that he relied upon on-the-job training for trainees to learn skills. He explained that “the training program is a mix of demonstrated skills, didactic skills, the operator qualification test and your on-the-job training. It all goes together”. Tr. at 250.

Trainees were provided with manuals containing training materials. Mr. Focht agreed with Complainant that the trainees were not required to take home class materials to study, but he observed that testing was given the day after a topic was covered in class. Some trainees took manuals home, and some did not. He confirmed that trainees needed to score an aggregate average of 80 on tests, and did not need to score at least 80 on each test. Mr. Focht administered daily quizzes on the material covered in class on the previous day. He wanted to be sure that the trainees retained the material from day to day. Mr. Focht testified that he did not change Complainant’s test score on a particular test where Complainant used a term that was not “within the PECO system”. Tr. at 253. Complainant held a 79 average when he was terminated.

In response to Complainant’s question about whether he had been disruptive in the classroom, Mr. Focht testified that he believed Complainant was obnoxious. When asked to clarify, Mr. Focht implied that he found Complainant to be a “know it all”. He characterized Complainant’s obnoxious behavior as “I know this, I know that”. Tr. at 250. He shared his

impressions about Complainant with Al Ludwick, who documented the conversation. When asked to recall Complainant's obnoxious behavior, Mr. Focht testified:

Across the hall some of the feedback regarding that meeting with that [sic] was that some horseplay that was –it wasn't just him alone. It was—they were using the wands for the meters to kind of like have an Arabian Knights [sic] type sword fight. Blurting out, I guess that's—and it seems to follow suit with a lot about pay. Some of the—that some of the students in the class were kind of disgruntled about the management and the pay that they were receiving. And it just—you know, it would just go on and on, until the point you had to get control of the classroom again.

Tr. at 256. When asked again to be specific about Complainant's behavior, Mr. Focht testified:

Blurting out, coming up with the demeanor that –when we tried to explain something that might have been new information or a PECO way, you know there was a reference to PGW. And kind of the answer we used to get was “right, right”. Like I know that, why are you bothering me type attitude, you know? Reminding him about wearing PPE. You know to ensure they have PP on. Our procedures call for safety glasses, eye protection, a hard hat. You know, having to remind people about that. That type of thing, disruption.

Tr. at 257.

Mr. Focht was asked to explain how Complainant's behavior disrupted class, and he stated, “you know, I guess just coming off as a know it all. It brought down the class. It was bringing—it was wearing on people”. When asked whether other trainees shared that belief with Mr. Focht, he stated that Mr. Joerger and Mr. Sanchez had told him that, but he clarified that they told him after Complainant was gone. Tr. at 267. Mr. Focht engaged in a colloquy with Judge Bullard:

Judge Bullard: Alright. So as far as you know, the only disruptive influence, as far as you knew—

Mr. Focht: Was what I observed, correct.

Judge Bullard: ---was your observation?

Mr. Focht: Yes ma'am.

Judge Bullard: And basically it's—I guess I'm having a hard time explain— understanding how it was disruptive. I can understand how you didn't like it, because you might have felt challenged. But I don't understand how it was disruptive. I mean did it interrupt the flow—

Mr. Focht: When you're –when someone interrupts when you're speaking or when someone, you know challenges it and, you know—I'll use the street leak. That's not a term that we could find anywhere in any of the national standard. But to continually challenge that and battle it out in the middle of training breaks it down. And I don't know that the intent was other than his—what—PGW isn't what PECO uses.

Tr. at 167-268.

When asked whether he tried to correct Complainant's behavior, Mr. Focht testified that he told Complainant that he worked for PECO now, not PGW. When asked whether PECO would have benefitted if Complainant had been given more explicit expectations of his behavior, Mr. Focht described how there were problems every day with the class. He recalled discussing the pay rate with every trainee except Joe Hughes. Mr. Focht testified that he would have felt the same way about Complainant even if he had scored straight 100's on quizzes. He believed that Complainant's behavior distracted the class.

Mr. Focht testified that Complainant's group of trainees was the first class of ETs that he had instructed, and he noted that there have been two other groups in the past seven years. Mr. Focht was under the impression from Complainant's reaction to mistakes on testing that Complainant was not taking the class seriously. Mr. Focht recalled trainee Carl sleeping on one occasion, but he testified that Carl, Leo Joerger and Emilio Sanchez were generally attentive in class. When asked to describe the role that Complainant played in discussions regarding compensation, Mr. Focht answered:

I mean sometimes it became a free for all. Everyone seemed to chime in because they were all-you know, I don't really have the hiring and firing. I'm more the training person. So I don't really know what they're told or not, but it seemed to be a point of contention to the entire class.

Tr. at 260.

Mr. Focht testified that Mr. Derosato was "very disruptive, very loud and outspoken". Tr. at 259. Mr. Focht shared that opinion with Al Ludwick close in time to the expiration of the six month probationary period. He also told Ludwick that he thought that the Complainant's behavior was problematic. He cited an incident where Complainant was late for class because he went to his former employer to retrieve a fitting that he wanted to show the class. Mr. Focht noted that the fitting was not something he had asked Complainant to bring, and that PECO required all new procedures and devices to undergo a review by engineering.

Mr. Focht denied using only fire-related scenarios when giving examples of emergencies that the trainees could expect to encounter. He admitted that he did not have training in all aspects of handling a gas procedure, and noted that another instructor was present to provide that instruction. Mr. Focht recalled that Complainant raised an issue about the safe handling of water heaters with instructor Paul Grosseible. He testified that the training manuals covered the point that Complainant made. Mr. Focht denied telling Complainant that safety issues would be learned in the field. He testified that every training day began with instruction to the trainees to consider safety when performing tasks. He explained that PECO encouraged employees to adopt the STAR system to procedures. STAR is an acronym for "start, think, act and review".

Mr. Focht recalled that Complainant had discussed the need to ascertain the presence of water in a heater before lighting it, although he disagreed with Complainant about the date that discussion took place. Tr. at 271-273.

Mr. Focht recalled that Complainant raised an issue regarding carbon monoxide and asserted that the trainees needed to be aware of the issue. Complainant asked Mr. Focht if he knew what happens if there is no water in a boiler, and Mr. Focht answered “you can have an explosion or fire”. Tr. at 273. Mr. Focht said the same thing could happen with carbon monoxide, which he noted “can kill people”. Id. Mr. Focht agreed that these were safety concerns. The following exchange with Complainant ensued:

Complainant: So it’s a safety concern...that I was correctly—[sic] to bring up? To point out that we should be looking for that? But you’re saying it’s in the textbook but was never brought up to us when we were doing—

Mr. Focht: Because that—we weren’t at that point in the training. We try to do things sequential. That’s kind of—

Complainant: Right. But if you’re lighting up a heater—if you’re teaching somebody to light up the heater, you just don’t wasn’t to go through that format, you want to go—if you’re—you want to touch base on what you should do. And then later on—

Mr. Focht: We were following the training plan. I mean that’s—

Tr. at 273-274. Mr. Focht testified that he did not think Complainant’s points on carbon monoxide were relevant because they raised at an inappropriate time in the training. He explained that the materials would cover the point in depth at a later time in training. Mr. Focht stated:

There’s an in depth that takes you through a door to door process in the training. There’s specific ranges to know. It’s more than just look—you need to be aware of carbon monoxide, but there’s more to it than just standing in the annex. We wanted an in depth. In depth versus just speaking two seconds about it, versus following the lesson plan and the training guide.

Tr. at 276. Although Mr. Focht did not find it helpful, he did not find Complainant’s discussion objectionable. He did not find these comments by Complainant to be examples of obnoxious behavior.

Ray Pugh (Tr. at 280-289)

Mr. Pugh has worked for Respondent for thirty seven years, most recently as a training senior specialist. He taught a segment of Complainant’s training that lasted for about four hours. Mr. Pugh recalled Mr. Ludwick eliciting his opinion about the trainees, and Mr. Pugh advising that he thought Mr. Derosato was disruptive. He used an expletive in an exchange with Mr. Pugh. Mr. Pugh’s discussion with Mr. Ludwick focused on Mr. Derosato and that conduct, although Mr. Pugh believed that Complainant “sort of went along with Pat...because Pat was disruptive and it—they were sitting there together”. Tr. at 286. Mr. Pugh admitted that his recollection about Complainant’s location could be wrong.

Mr. Pugh’s only interaction with Complainant as an instructor was the four hour session he conducted on map reading. Mr. Pugh reviewed Complainant’s test results with him, and he

testified that Complainant seemed concerned that he did not understand the material. Another instructor went over the material with Complainant. He could not recall having any other conversation with Complainant. Complainant did not challenge Mr. Pugh's authority, as had Mr. Derosato.

David Luby (Tr. at 290-299)

Mr. Luby works for Respondent in training as a senior specialist. He works with street distribution people and resolves problems with fittings. He also trains employees and administers mechanical and written tests. He knew Complainant from his training classes. He recalled teaching that class for a period of five days. Mr. Luby recalled explaining to the class how to loosen a nut on a valve by tapping it. He denied that he recommended turning the nut, because if the valve came off, then a dangerous situation could occur. He did not recall Complainant stating that his recommended procedure was unsafe. Mr. Luby was not present when Complainant brought up issues regarding hot water heaters or carbon monoxide.

Mr. Luby denied that Complainant was a problem in the class. He described Complainant as "a little bit of a class clown at times." Tr. at 295. Mr. Luby testified that as an instructor he appreciated some humor. Mr. Luby recalled that Complainant had some trouble with directions in a particular scenario, and Mr. Luby advised him to use a compass. Mr. Luby testified that he understood the value of demonstrative instruction, because he believed it helped trainees relate to the instructional material.

Paul Grosseible (Tr. at 299-318)

Mr. Grosseible has worked at PECO for more than twenty seven years as an ET. He is responsible for responding to all gas emergencies and all secondary electric emergencies. He also instructs trainees, along with other instructors in a cadre. He has conducted training in the last four classes of new hires. His role is to conduct demonstrations of the material contained in training textbooks. Mr. Grosseible was involved in Complainant's training for two weeks. He enjoyed discussing real life scenarios with Complainant. He did not believe that Complainant was arrogant, but testified that he thought he was "egged on" by Pat Derosato. Tr. at 308-309. He observed that Complainant and Derosato joked together several times a day. He recalled suggesting that Complainant bring in an instrument that he used in his work at PGW to show the class. Mr. Grosseible stated that he liked receiving suggestions and participation from class attendees.

Mr. Grosseible testified that most of Mr. Focht's expertise involves fire related emergencies. Mr. Grosseible did not recall Complainant raising the issue of having water in a heater before turning it on. He remembered that he once repaired a heater that was destroyed because a technician had failed to verify that it contained water. Mr. Grosseible recalled that Complainant asked him to tell the trainees about carbon monoxide, and assuring him that the topic would be covered later in the training course.

Mr. Grosseible remembered telling the class that management, including Nicole Levine, was unhappy with the trainees. He had heard enough rumors to believe that some action would

be taken, although he did not expect anyone to be fired. Mr. Grosseible's opinion about Complainant's performance was not solicited by other instructors or management.

Art Finley (Tr. at 343-370)

Mr. Finley had worked for PECO for thirty nine years and was a supervisor in emergency response. He supervises ETs, and was familiar with Complainant, who worked under him for a time after he started training in June, 2007. Mr. Finley is the supervisor in Delaware County, and he saw the trainees on a weekly basis. As supervisor, Mr. Finley was responsible for "signing off" that the new trainees were capable of working on their own on electrical cases. Mr. Finley signed off Complainant as qualified to do electric work.

Mr. Finley recalled a conversation with Complainant during his gas training in which Complainant told him that his training consisted of highlighting paragraphs in training books. Complainant also told Mr. Finley that he had asked an instructor to go over safe methods of lighting a heater. Mr. Finley thought that was a good comment, and agreed to pass the suggestion to training managers. The managers agreed to see that the correct procedures would be incorporated into training. He recalled that Al Ludwick was present during the conversation, and he believed he heard Complainant's comments. He and Mr. Ludwick have the same job with Respondent, and work together, though each is responsible for a team of about thirteen ETs.

Mr. Finley attends regular staff meetings that are held by his manager, Nicole Levine. He recalled attending a meeting held on November 1, 2007, in which decisions were made about the fate of the probationary employees currently in training to become ETs. Mr. Finley could not recall what the supervisors said, but he remembered that they spoke about Mr. Derosato and Complainant. Mr. Finley testified, "Specifically, it was probably around behaviors, but I, I don't remember". He recalled hearing about disruption in class and about having to tell Complainant to remove jewelry. He did not remember any other complaints, and Complainant's comments regarding safety were not discussed. Mr. Finley supported the decision to fire Complainant, and explained:

I believe the behaviors—let me start energy technicians more than any other group in the company directly are in contact with customers day in and day out, almost every job. And I felt, I felt very strong that if he's disruptive with employees in the company, and showing those negative behaviors, customers, you know, whether their, their [sic] electric is off because of a storm can be, it can be a very unpleasant situation to be put in. And I, I just felt very strong that if both Joe and Pat were to become full-time permanent employees, that they could get into a situation where a customer could be very angry, and if he, if he's fighting with trainers and being disruptive in class, what's he going to—how is he going to act with a customer. And I've always been told for thirty-nine years that I've been with the company that customers come first. If we don't have customers, we don't have a – there's no company.

Tr. at 351.

Mr. Finley was concerned about Complainant's complaints regarding how training class was being conducted. He thought that Complainant should have been more positive about training, and was concerned that a new hire would complain. Although Mr. Finley did not observe Complainant during training, Mr. Ludwick shared the instructors' opinions about the trainees' classroom conduct with the supervisors at the November 1, 2007 meeting. Mr. Finley reviewed the document that Mr. Ludwick prepared, and testified that it was influential in his decision to support Complainant's termination. Mr. Finley explained that the probationary period of employment allows management to terminate a probationary employee for cause at any time.

In response to questions from Complainant, Mr. Finley admitted that he had observed Complainant interact with a customer, and found him to be positive. Finley characterized Complainant's handling of the situation as "very good". Tr. at 352. He was not aware of any complaint about Complainant's attitude from customers or other ETs. His review of on-the-job training reports did not indicate any problems with Complainant's performance. None of the ETs who worked with Complainant reported inappropriate behavior. Mr. Finley also agreed that he had no negative opinion of Complainant's work ethics, but based on the discussion of the group at the meeting, he agreed to the decision to terminate Complainant's employment. Mr. Finley had observed Complainant wear jewelry on one occasion when Al Ludwick was also present. He agreed that Mr. Ludwick also commented on his jewelry, but Mr. Finley could not recall whether Complainant took it off.

Mr. Finley could not recall Complainant asking him for overtime, or otherwise complaining about his pay. Mr. Finley could not recall whether a safety meeting was held while Complainant was working under him.

Nicole Levine (Tr. at 372-410)

Ms. Levine had worked for Respondent for eight years at the time of the hearing, when she held the position of Manager of Field Operations for ETs. She started that job on July 30, 2007. She was familiar with Complainant because he was in a training class of ETs that began before she was made manager of Field Operations. Ms. Levine testified that the trainees were paid different levels of pay, ranging from \$15.00 per hour to \$25.00 per hour, depending on their experience. Newly hired employees are on probation for six months. There is no written process in place to review the performance of probationary trainees, but Ms. Levine discussed their performance with supervisors at her regular staff meetings. Respondent has put more formal procedures in place since Complainant's training group.

Staff meetings took place every two weeks and were attended by all supervisors under Ms. Levine, and a labor representative and human resources representative. Ms. Levine recalled that George Monahan expressed concern that Complainant had complained about not being assigned overtime. She testified that she could not "remember specific comments from the other supervisors, but I know there were some from other supervisors". Tr. at 377. Ms. Levine recalled that supervisors had observed that Complainant wore jewelry in violation of company policy. She testified that there were comments that Complainant had been late to class "on a couple of occasions" and had been disruptive in training. Tr. at 378. She also learned that

Complainant had failed some gas quizzes, which disappointed Ms. Levine because Complainant was being paid at a higher rate than most trainees because of his gas experience. Ms. Levine testified that another trainee named Carl had also complained about his rate of pay. Ms. Levine asked Mr. Ludwick to get feedback from the trainers about the trainees' behaviors.

Ms. Levine testified that she spoke with Complainant in person and on the phone "a couple of times". Tr. at 374. She stated that Complainant raised complaints about the amount of overtime that the trainees were assigned and about pay rates that some employees were paid. Complainant wanted to be authorized to work on his own so that he would qualify for more overtime. Ms. Levine believed that Complainant felt that he was entitled to work overtime, and he was aggressive and persistent about being assigned overtime work. She also heard that complaint from other trainees, but except for Mr. DeRosato, they were not as forceful. Ms. Levine did not tell Complainant that she thought he was aggressive in his request for overtime.

In addition to the regular attendees at staff meetings, Ms. Levine invited her direct supervisor to attend the meeting held on November 1, 2007. The performance of all of the probationary trainees was discussed at that meeting, because Ms. Levine considered it crucial to "weed out behavior issues...during the probationary period. And if you don't you're kind of stuck with them..." Tr. at 381. Complainant was one of the trainees that was regularly "flagged" by her staff as a problem. Id. Supervisors reported his complaints about overtime, a negative attitude, and his wearing of a chain. She concluded that neither Mr. Derosato nor Complainant was a good fit in her organization, and she decided to discharge them. She considered discharging Carl, but since a month remained in the probationary period, she deferred making that decision at the meeting of November 1, 2007. Ms. Levine explained that supervisors intentionally would not advise trainees that they were in danger of being fired, because "we want to make sure the employees behave how we believe they would behave, you know, six [months] or a year from now, two years from now, three years from now. We don't want them to mask what their true behaviors are, you know, within the first six months". Tr. at 384.

Ms. Levine repeated that her reasons for terminating Complainant were his aggressive and "continuous" complaints about overtime, "having to be constantly told about wearing the jewelry" and "disruptions in the gas training school". Tr. at 384. She testified about Complainant's disruptions during training:

That he would, you know, interrupt the trainer. That he would go back to the overtime issue. And also the fact that he was failing the class was one thing, but he would refuse to bring his books home to study. And Art told me that he had the discussion with Joe and Joe said you're not paying me to take books home and I'm not doing anything for PECO on my own time.

Tr. at 385.

Ms. Levine denied that any supervisor had told her that Complainant raised a safety concern to a supervisor. He had not raised any safety issues to her. She testified that the training instructors are not supervisory positions.

Ms. Levine acknowledged that Complainant began gas training on October 15, 2007 and was terminated on November 1, 2007. She acknowledged that she heard positive feedback about Complainant's mechanical competence. Ms. Levine did not recall a discussion with Complainant at a meeting in the field with ETs and supervisor Monahan. Complainant asked her if she recalled that he brought to her attention that Mr. Monahan did not direct him to go to the site of a downed wire, in order to avoid the incurrence of overtime. Ms. Levine did not recall expressing surprise that Mr. Monahan did not send him to the job. Ms. Levine testified that she would be concerned about that decision.

Ms. Levine denied stating that she wanted to get rid of the entire training class, although she agreed that she had expressed displeasure about the amount of complaining from the class. Ms. Levine testified that other trainees expressed concerns about their pay rate and overtime, but "they were a lot more respectful and it was more of a one and done concern". Tr. at 395-396. She believed that Complainant was aggressive in his complaints. She recalled seeing Complainant wear his chain when they were with Al Ludwick in his office.

Ms. Levine clarified her testimony about Complainant's complaints about overtime, and explained that he spoke directly to her once in August, 2007 about wanting overtime assignments, and in addition, supervisors provided feedback about his complaints. She recalled one occasion where Monahan had a disagreement with Complainant about overtime. She could not remember any other specific incidents.

With respect to information regarding Complainant's interruptions in class, Ms. Levine relied upon Mr. Ludwick's discussion with instructors in the gas training class. She did not know the content of Complainant's interruptions. She would have been concerned to know that the interruptions involved cautions regarding safety procedures. Although Ms. Levine relied in part upon Mr. Ludwick's documentation of the instructors' discussion with him about the class, she also noted that there was consistent discussion at staff meetings about whether to keep Complainant on board. Ms. Levine was not surprised to learn that one of the instructors had only spent four hours with the class, and she explained that Mr. Pugh knew that Complainant did not bring his books home because he came to class late. She was not aware that his lateness was due to him retrieving a tool that could be helpful on-the-job, or that Complainant thought he had been authorized to bring the tool. However, Ms. Levine did not consider Complainant's tardiness significant in her decision to fire him. She noted that she was disappointed that his test scores were 79. She had a spreadsheet of the trainees' scores, and she was concerned that Complainant was at the bottom of the class. Ms. Levine noted that he was hired at the highest rate because of his experience with gas.

Ms. Levine concluded that PECO would be better off terminating Complainant, despite Respondent's investment of time and money in training him. From her five years of experience managing employees, she believed that Complainant would present continuous problems and she saw him as a troublemaker. Even if she had known that Complainant had raised safety issues to his instructor, she would have fired him. As she explained it, Complainant's position at the bottom of the class on test scores "was truly a pivotal point for me based also on my personal interactions with Joe". Tr. at 409. She acknowledged that Complainant still had time to bring his scores up to meet the 80% average.

Daniel O'Connell (Tr. at 411-448)

Mr. O'Connell had worked for Respondent for thirty-two years, and at the time of the hearing held the position of Supervisor of Distribution Systems Operations. He supervises approximately 15 ETs located in Chester County, Pennsylvania. Mr. O'Connell was the initial sponsoring supervisor for Complainant's training class, and he met Complainant on the day that classes began. As a sponsoring supervisor, his role was to provide information about the company and its expectations for the trainees in their new jobs. George Monahan and Randy Kaiser took over that role when Mr. O'Connell transferred to Chester County. Mr. O'Connell did not recall seeing Complainant more than two times, at the first day of the training, and at the first day of gas training.

Mr. O'Connell recalled that the trainees at gas training were complaining about money, and that Complainant was one of the more vocal individuals. Mr. O'Connell testified that he observed Complainant wearing a necklace, which violated company safety standards.

Mr. O'Connell attended regular staff meetings with other supervisors and his manager, Nicole Levine. He stated that at the first meeting after seeing the trainees at gas training, he shared his feeling that the trainees were "crybabies". Tr. at 416. He did not single out Complainant, but he noted that Art Finley and Al Ludwick commented about Complainant wearing jewelry and being sarcastic and disruptive. He remembered a supervisor reporting that Complainant wanted to be selective about who he rode with. Mr. O'Connell attended the November 1, 2007 meeting at which the supervisors discussed the performance of the trainees. The supervisors restated their concerns about Complainant. No one stated that Complainant had raised safety concerns, and Complainant did not raise safety concerns to Mr. O'Connell.

Mr. O'Connell conducted the termination meetings with Complainant and Mr. Derosato. Ms. Levine was unavailable, and she asked Mr. O'Connell to conduct the meetings because he had prior experience discharging employees. Human Resources representative Seth Beardsley and Mike Innocenzo attended both meetings. He recalled raising the issue of the probationary period giving supervisors the right to terminate employment.

Mr. O'Connell did not know the specific reason why Complainant did not want to work with a particular individual, and thought it was a "personality conflict". Tr. at 417. He acknowledged that Complainant had complained that he thought the other employee was slow. Tr. at 422. He testified that Complainant's behavior and attitude was the main reason that he supported Complainant's discharge. When asked to relate what exactly Complainant was vocal about, Mr. O'Connell stated:

Again, things, this is things that I was hearing. Again, I did not see you out there other than that initial, the first day of the gas training. I'm going from information that I heard, talking about other ETs, not wanting to ride, say with Frank Glabiano, not wanting to be with one of my guys, and just going from statements of other supervisors who I trust and respect.

Tr. at 426. Mr. O'Connell agreed that it was inappropriate for Al Ludwick to agree with Complainant that one of the ETs was slow. Mr. O'Connell was not responsible for scheduling trainees to accompany experienced ETs. He noted that the electric phase of on-the-job training lasted about three months, and the new ETs were assigned to accompany different employees during that period of time.

Mr. O'Connell testified that he began to hear complaints about Complainant in August, 2007. He stated, "[a]t that time, it was just complaints about being out in the field, vocal with the guys he was riding with, supervisors stating he didn't want to ride with certain people or felt he was more knowledgeable than certain people". Tr. at 429. Mr. O'Connell observed that all of the trainees voiced complaints in the classroom, but he believed that Complainant was more vocal than others, and described him "almost like the ringleader of the group". Tr. at 430. The only other information about disruptive behavior came from Al Ludwick's report of his conversation with the instructors Mr. Pugh and Mr. Focht. Mr. O'Connell agreed that most of the comments reported about Complainant were made by Mr. Pugh, who was in the classroom for four hours. Mr. O'Connell never had a discussion with Mr. Focht about questions that Complainant may have raised in class.

When asked to describe the significance of Complainant's remarks about doing little in training but highlighting, Mr. O'Connell stated that he believed it to be derogatory towards the trainer. Mr. O'Connell was not familiar with the specific qualifications of the instructors, but he knew that they were trained and qualified to be instructors. Mr. O'Connell believed that highlighting important information was useful. He was not aware of whether the training class was instructed to highlight most of the training manuals. Mr. O'Connell did not know whether Mr. Focht was experienced with gas. Mr. O'Connell agreed that most of the documented concerns about Complainant occurred during gas, but he testified that supervisors had commented on his behavior during electric training also. He described the sum of the comments about Complainant as demonstrating that "he doesn't play well with others". Tr. at 443. Mr. O'Connell described an incident where Complainant was working with an ET and made a point of letting the other employee know that Complainant had found the problem first. Mr. O'Connell addressed the Complainant about this, stating, "And you know, the gentleman just not getting to that step, yeah it's good that you found it, but it's like you know, you always want to be that one step above the guy next to you." Tr. at 445. If Complainant's problem involved concerns about another ET's familiarity with safety, Mr. O'Connell would have expected Complainant to bring it up to a supervisor.

Mr. O'Connell testified that if a trainee had approached him and stated that he was not getting much out of the classroom training and did not believe that the instructor was relating information in a helpful way, then he would have talked to the instructor and his manager. Mr. O'Connell noted that the instruction to highlight information may have been useful to individuals who had less knowledge about the material than those who had familiarity with the topics. Mr. O'Connell agreed that the proper procedures for lighting a heater should be discussed, and he observed that the topic was covered during training. He agreed that it would not be rude or inappropriate to bring up the proper safety methods for lighting a heater even if the training course had not yet reached that point. Mr. O'Connell agreed that an instructor might perceive it disruptive if a trainee interrupted instruction to point out flaws in instruction.

Tony Lewis (Tr. at 449-459)

Mr. Lewis testified that after Complainant and Mr. Derosato were terminated, he went to the remaining trainees in the classroom and talked about their discharge. He testified, “I think my—I went a couple of times, but I guess one of the times I said to them, you know, we knew about this earlier, we probably could have stopped it in the bud”. Tr. at 450. Mr. Lewis explained that after the trainees were let go, the supervisors met and discussed how to avoid similar disruptions in class, and the need for more interaction with instructors. Mr. Lewis explained that he was referring to the disruption, and not the termination of the employees, when he testified that actions could have been prevented. His discussion with the class was focused on efforts to maintain class control.

Mr. Lewis participated in the decision to discharge Complainant, and he based his decision on “...the discussion of [his] peers”. Tr. at 451. He had no personal interaction with Complainant on which to base his decision, but did see Al Ludwick’s summary of his discussion with the instructors. Mr. Lewis did not second guess the statements reported on the document. He did not know how much time those instructors spent with the trainees. Upon review of the document, Mr. Lewis acknowledged that most of the comments were made by Ray Pugh. Mr. Lewis could not answer whether he believed four hours of involvement in the class was sufficient time to observe that people left books, and were late, and disruptive and not cooperative.

Mr. Lewis was familiar with discussions about Complainant wearing jewelry, and that did not influence his decision to support his discharge. He explained, “Because I was looking at the other point. I never saw him with the jewelry. He was not in my area...” Tr. at 455. Mr. Lewis did interact with Complainant five or six times. He recalled that Complainant had left a message for him, and then came to him in person to request being excused from accompanying ET Frank Glabiano on his rounds. Mr. Lewis denied the request, because he believed the trainees needed to see how everyone worked. Mr. Kershaw joined them, and Complainant repeated that he would find it difficult working with the other individual. Mr. Lewis explained, “...Now my assumption was we know, most of us know that Frank is a little eccentric, he’s a little different, the way he does his work, and that’s why we decided to trade him, because maybe they just weren’t a good fit.” Tr. at 457. Complainant’s objection to riding with Mr. Glabiano did not factor into Mr. Lewis’ decision to terminate Complainant’s employment. He did not find Complainant’s demeanor arrogant. Complainant’s disruptive behavior was the only factor that Mr. Lewis relied upon in supporting the decision to terminate his employment.

2. Documentary Evidence

Complainant’s Exhibits

- CX 1 Letter from OSHA dated November 6, 2007
- CX 2 Complainant’s supplemental statements to OSHA
- CX 3 Letter from OSHA dated December 11, 2007
- CX 4 Statement of Complainant dated December 6, 2007
- CX 5 December 21, 2007 letter from PECO’s counsel to Complainant

- Complainant's letters to Mr. O'Brian and Mr. Rowe of PECO
- CX 6 OSHA's findings issued January 9, 2008
 - CX 7 Complainant's objection to OALJ dated January 28, 2008
 - CX 8 Parking ticket issued October 12, 2007
 - CX 9 Test results and training documents
 - CX 10 Statement of Complainant's intended witnesses
 - CX 11 Copies of Brian Focht's training certificates

Respondent's Exhibits

- RX 1 Daily job briefing sheets for October 2007
- RX 5 Gas Operator Qualifications Program Compliance Documents
- RX 6 PUC 2004 Audit Findings
- RX 7 Collective Bargaining Agreement Between PECO and Local Union 614 IBEW
- RX 8 Document prepared by Supervisor Ludwick
- RX 9 Spreadsheet of ET trainees' quiz scores
- RX 10 Complainant's questionnaire answers of 11/9/07
- RX 11 OSHA's notification of 11/6/07
- RX 12 OSHA's notification of 12/11/07
- RX 13 PECO New Release regarding Award for Employee Safety
- RX 14 Exelon Energy Delivery Safety Rule Book
- RX 15 Exelon Corporate Safety Policy
- RX 16 through 19 Exelon Energy Procedure Book Training Manual
- RX 20 Instructor Brian Focht's training manual

B. Statement of the Law

Section 6 of the PSIA prohibits employers from retaliating against employees because they: provided information to the employer or the Federal government relating to violations or alleged violations of Federal law relating to pipeline safety; refused to engage in any practice made unlawful under Federal law relating to pipeline safety; filed, testified, assisted in a proceeding against the employer relating to any violation of any Federal law relating to pipeline safety; or are about to take any of these actions. 49 U.S.C. § 60129(a). The procedures for processing complainants of discrimination under the PSIA are set forth at 29 C.F.R. § 1981.100, et seq.

Pursuant to 29 C.F.R. § 1981.104(b), a complainant must make a prima facie showing that protected conduct was a contributing factor in the unfavorable personnel action taken against him. Complainant must establish that he engaged in protected activity; that Respondent knew or suspected, actually or constructively, that he engaged in the protected activity; that he suffered an unfavorable personnel action; and that the circumstances raise an inference that the protected activity was a contributing factor in the unfavorable action. 29 C.F.R. § 1981.104(b). If Complainant establishes a prima facie case, the burden shifts to Respondent to articulate a legitimate reason for its action. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). If such evidence is presented, then Complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is pretext for discrimination. Texas Department of

Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. Hicks, supra. at 2752-56. The Employer must present clear and convincing evidence that there was a nondiscriminatory justification for the adverse employment action. See, Yule v. Burns Int'l Security Service, Case No. 1993-ERA-12 (Sec'y May 24, 1995).

When a case is tried on the merits, it is not necessary to determine whether Complainant has established a prima facie case of discrimination. See, Burdine, 450 U.S. at 253, 256. Instead, Complainant must prove the same elements as required for the prima facie case, with the exception that Complainant must prove them by a preponderance of the evidence and not by mere inference. Brune v. Horizon Air Indus., Inc., ARB Case No. 04-037, ALJ Case No. 2002-AIR-8 (ARB Jan. 31, 2006); Dysert v. Sec'y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997). Until Complainant meets his burden of proof, Respondent need only articulate a legitimate business reason for its action. Clemmons v. Ameristar Airways, Inc., ARB Case Nos. 05-048, 05-096 at 9, ALJ Case No. 2004-AIR-11 (ARB June 29, 2007). The onus falls on Complainant to prove that the proffered legitimate reason is a pretext rather than the true reason for the challenged employment action.

The proper focus of the inquiry is whether Complainant has shown that the reason for the adverse action was his protected safety complaints. Pike v. Public Storage Companies Inc., ARB No. 99-071, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). As the Supreme Court noted in Hicks, supra., the rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. See also Blow v. City of San Antonio, 236 F.3d 293, 297 (5th Cir. 2001). However, "[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." Mitchell v. Link Trucking, Inc., ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001). Complainant is not entitled to relief under the PSIA if Respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action absent protected activity by Complainant. 49 U.S.C. § 60129(b)(2)(B)(iv); 29 C.F.R. § 1981.109(a).

Although the standard of "clear and convincing" evidence has not been defined with precision, courts have held that it requires a burden higher than "preponderance of the evidence" but lower than "beyond a reasonable doubt." Peck v. Safe Air Int'l Inc., ARB No. 02-028, ALJ No. 2001-AIR-3 (Jan. 30, 2004).

C. Analysis

1. Adverse Action

In Hirst v. Southeast Airlines, Inc., ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 (ARB Jan. 31, 2007), the ARB relied upon a decision by the United States Supreme Court in holding that the Complainant had not established that he suffered adverse employment action. See Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (June 22, 2006). The

ARB found that the Complainant must establish that a reasonable employee or job applicant would find the employer's action "materially adverse", which was described as "actions [that are] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." USDOL/OALJ Reporter at 10-11, quoting 126 S. Ct. at 2409.

It is uncontroverted that Complainant was terminated from his employment with Respondent. I find that his discharge constitutes a materially adverse action.

2. Protected Activity

Complainants who engage in actions set forth at Section 6 of the PSIA may be perceived to have engaged in protected activity. 49 U.S.C. § 60129(a). Complainant is not required to establish that the activity about which he complained actually violated Federal law relating to pipeline safety, but only that his complaints are based on a reasonable belief that they were related to an unlawful practice under Federal law relating to pipeline safety. The alleged act must implicate safety definitively and specifically and must at least "touch on" the subject matter of the related statute. Nathaniel v Westinghouse Hanford Co., 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, Dodd v. Polysar Latex, 88-SWD-4 (Sec'y Sept. 22, 1994).

Additionally, the subjective belief of the complainant is not sufficient, and the standard involves an objective assessment of whether the allegation constitutes protected activity. Kesterson v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997). "While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event." Leach v. Basin 3Western, Inc., ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003), citing Clean Harbors Env'tl. Serv. v. Herman, 146 F.3d 12, 19-21 (1st Cir. 1998). Internal complaints made to company supervisors concerning safety and quality control have been held to be protected activities. See Bassett v. Niagara Mohawk Power Corp., Case No. 1985-ERA-34 (Sec'y Sept. 28, 1993).

Pursuant to 49 U.S.C. § 60105, the safety standards and practices of intrastate pipeline facilities and transportation are regulated by State and municipal authorities that are required to meet certification standards established by the Secretary of the U.S. Department of Transportation. The utility must certify that the facilities and transportation comply with the statutory requirements of 49 U.S.C. §§ 60105(b) and (c). In addition, 49 U.S.C. § 60103(d) prescribes minimum operating and maintenance standards for a pipeline facility, including the establishment of maintenance procedures and equipment and the training of personnel. 49 U.S.C. § 60103(d)(4) and (5). In its brief, and in evidence at RX 5, Respondent asserts that its Gas Operator Qualification Program complies with State and Federal regulations. Respondent concedes that the training program at issue in the instant adjudication is subject to the PSIA. I find that the employee protection provisions of PSIA apply to individuals who raise concerns about whether training properly incorporated safe procedures. See, 49 U.S.C. § 60129(a)(1)(B).

Complainant alleged that he engaged in protected activity during the course of instruction in the gas segment of his training when he pointed out that technicians should check that heaters contain water before turning them on. He also alleged that he engaged in protected activity when

he pointed out that technicians should be aware of the dangers presented by carbon monoxide. I find that both of these comments raise issues regarding safety procedures during the training of individuals who are responsible for the maintenance and repair of pipeline facilities and equipment that are covered under the PSIA. I find that Complainant's discussions about the proper method to light a heater and the need to be aware of carbon monoxide may constitute protected activity under the Act so long as Complainant communicated his concerns to Respondent.

The Secretary has held that knowledge of a complainant's protected activity on the part of the alleged discriminatory entity is an essential element of a complainant's case. Martin v. Akzo Nobel Chemicals, Inc., 2001-CAA-00016 (ALJ December 20, 2001), aff'd, ARB 02-031 (July 31, 2003), citing Bartlick v. TVA, Case No. 88-ERA-15, Sec. Ord., Dec. 6, 1991, slip op at 7 n. 7 and Sec. Ord. Apr. 7, 1993, slip op. at 4 n.1, aff'd, 73 F.3d 100 (6th Cir. 1996). Complainant must prove by a preponderance of the evidence that those responsible for the adverse action were aware of the alleged protected activity. Mace v. Ona Delivery Systems, Inc., 91 STA-10 (Sec'y Jan. 27, 1992). Internal complaints to management are protected activity. Reed v. National Minerals Corp., Case No. 91-STA-34, Sec., Dec. and Order, slip op. at 4, July 24, 1992.

Complainant described an incident where he alleged that an instructor gave faulty instructions regarding loosening a bolt on a valve. David Luby recalled telling the training class how to loosen a nut on a valve. Tr. at 292-294; 297. Mr. Luby did not recall Complainant saying that this was an unsafe procedure. The record does not clearly establish that Complainant advised anyone during his employment with PECO that he believed that Mr. Luby's instructions presented a safety hazard. I find that Complainant did not engage in protected activity under the PSIA regarding his belief that instructions about loosening a nut on a valve violated safety practices.

Complainant alleged that a supervisor's failure to authorize him to report to the site of a downed wire involved violations of safety procedures. Complainant's exchange with the supervisor does not clearly reflect that at the time Complainant raised concerns about the safety involved in the supervisor's decision. Manager Nicole Levine did not recall having a conversation with Complainant about the subject. The evidence fails to establish that Complainant expressed concerns about these practices "in a manner that was 'specific' with respect to the 'practice, condition, directive or event' giving rise to the concern." Rougas v. Southwest Airlines, Inc., ARB No. 04-139, 14, ALJ No. 2004-AIR-3 (ARB July 31, 2006); Simpson v. United Parcel Service, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14 2008). Moreover, although a downed wire clearly presents a potential safety hazard, it involves an electrical hazard, and therefore, does not fall within the purview of the PSIA. Accordingly, I find that Complainant did not engage in protected activity under the PSIA with respect to the circumstances involved in the downed wire incident.

Complainant asserted that he raised two incidents concerning safe procedures around gas appliances to his instructors and supervisors. Complainant's primary instructor during the gas phase of classroom training was Brian Focht. Mr. Focht recalled that Complainant raised the issue of the need for trainees to be aware of the dangers of carbon monoxide. Tr. at 271-274.

Mr. Focht also recalled that Complainant brought up a concern that trainees were not being told the correct procedures to follow when lighting a gas heater. *Id.* Paul Grosseible provided instruction during the gas phase and recalled that Complainant asked him to tell trainees about the dangers of carbon monoxide. Tr. at 309. He agreed that the topic was important, and would be covered in detail later in the training. *Id.* Mr. Grosseible did not recall Complainant discussing the proper procedures to follow when lighting a gas heater, although he was personally aware of an incident where a heater was burned because the technician did not ascertain that it contained water. Tr. at 207-308.

Supervisor Art Finley recalled that Complainant had told him that he asked an instructor to review the safe method of lighting a heater. Tr. at 347. Mr. Finley testified, “And I said that’s a great point, I’ll certainly pass that on”. *Id.* Mr. Finley shared the information with one of the two managers of training, but could not recall which. He testified, “I said I got kind of like a safety piece from one of the...trainees and I said it was a very good point, that it’s a positive point that he brought up that you absolutely should make sure than there’s water in either a water heater or a boiler before you attempt to light, light a pilot, because you could ruin that appliance”. Tr. at 348. Mr. Finley testified that he discussed this with Supervisor Al Ludwick (Tr. at 348), and Mr. Ludwick confirmed that Finley had told him that Complainant had raised the concern. (Tr. at 149).

Complainant testified that he also told Mr. Kershaw and Mr. Ludwick that he believed that the trainees were not being told the correct way to light heaters and operate shut off valves, and that someone could be hurt. Tr. at 106, 113. Although neither supervisor recalled the conversation, Ludwick testified that he knew that Complainant had raised the issue about the heater. I accord substantial weight to Complainant’s testimony that he shared his safety concerns with Mr. Kershaw. Although Mr. Kershaw testified that he would have recalled a conversation that alleged individuals could be hurt, his testimony reflects a tendency to recall incidents that reflect poorly upon Complainant. I therefore discount his failure to recollect a conversation with Complainant about the safety-related conversation.

I find that Complainant has demonstrated by a preponderance of the evidence that Respondent had actual and constructive knowledge that he raised safety concerns at the time of Complainant’s discharge. See, Moseley v. Carolina Power & Light, 94-ERA-23 (ARB Aug. 23, 1996). Although Manager Nicole Levine denied any knowledge of Complainant’s discussions of safety-related issues, the evidence establishes that Complainant raised the issues to instructors and supervisors, who had the authority to take action to alleviate his concerns. Ford v. Northwest Airlines, Inc., 2002-AIR-21 (ALJ May 15, 2003). Indeed, Supervisor Finley credibly testified that he shared Complainant’s concerns with Managers responsible for developing and overseeing training. Although the record is uncontroverted that Respondent’s training covered Complainant’s concerns at a later date, there is no indication that Complainant knew that at the time he raised his issues. Mr. Finley and Mr. Ludwick both acknowledged Complainant’s safety discussions. I find that Complainant engaged in protected activity when he advised instructors and supervisors that trainees should be told the proper method to light heaters, and the dangers posed by carbon monoxide.

The record reflects that the decision to terminate Complainant's employment was made within the two week period following his participation in gas training. It was during that period that Complainant raised his concerns about whether the training included proper instruction regarding procedures involved in gas-related practices. The temporal proximity between the adverse action and Complainant's remarks is sufficient to draw an inference between the events. See, Barry v. Specialty Materials, Inc., ARB No 06-005, ALJ No. 2005-WPC-3 (ARB Nov. 30, 2007). Further, I find that the preponderance of the evidence demonstrates that Complainant's protected activity contributed to Respondent's adverse action.

Complainant testified, and the record corroborates, that it was not until he started gas training that he brought safety issues to the attention of instructors and supervisors. Mr. Kershaw testified that reports of Complainant's disruption in class contributed to his decision to fire Complainant, and he further testified that he first learned of Complainant's class conduct during the meeting of November 1, 2007, when Al Ludwick shared his documentation of his discussion with the instructors about the class. Mr. Ludwick had been dispatched to investigate reports of misbehavior in the class, and prepared a written summary of his interview with the instructors. That document is in evidence at RX 8.

Mr. Finley was influenced by the document in reaching his decision to recommend Complainant's discharge. Ms. Levine testified that she relied upon Mr. Ludwick's summary, and she alleged that she did not know the topic of Complainant's interruptions in class. Mr. Monahan did not know when Complainant's behavior during class became an issue among supervisors, and he did not personally speak with the instructors who Mr. Ludwick interviewed. Mr. O'Connell had observed all of the trainees complaining in class, and testified that the other information about Complainant's disruptive behavior was documented in Mr. Ludwick's report. Mr. Lewis relied entirely upon Mr. Ludwick's report in reaching his decision that Complainant's disruptive behavior merited his termination.

The report documents Mr. Focht's report of horseplay and lateness. Mr. Pugh was reported to state that Complainant and Pat Derosato "always wound up the troops". Mr. Pugh also stated that Complainant never took his books home, and had fallen below the passing ratio for the course. The report documents Complainant's remarks to Mr. Ludwick and Mr. Finley about not studying on his time, and about doing nothing but highlighting information in class. Mr. Focht advised that Complainant asked to take tests after instruction so the information would be fresh in trainees' minds. Two paragraphs of the report are devoted to Mr. Derosato's disrespectful interaction with Mr. Pugh. Mr. Focht's opinion "that Joe Donahue will clearly be a constant behavior issue" was reported. It was acknowledged that all employees complained about money, but the instructors believed that Derosato and Complainant "instigat[ed] the group in a negative way". RX 8.

When describing Complainant's documented disruptive behavior, the managers did not consider its content, nor did they express familiarity with its content. The best evidence regarding how Complainant disrupted the class as documented in Ludwick's report can be found in Mr. Focht's testimony. Mr. Focht made it clear that he found Complainant a "know it all" who blurted out information about his job with PGW. Mr. Focht described Complainant's discussions of his experiences with PGW as obnoxious. He acknowledged that Complainant

brought up safety related issues, but believed them to be insignificant because the training manuals covered the topics later in the training.

I find that the evidence demonstrates that Complainant and other trainees raised issues about pay and overtime in a way that could be perceived as disruptive. The supervisors generally agreed that all of the trainees were vocal and disruptive about those issues. Other than the supervisors' general discussion about Complainant's "arrogance" and "aggressiveness", the only distinctive "disruption" attributed to Complainant involves his interruptions to Mr. Focht's instruction to interject information about the correct handling of gas. Mr. Focht found these interruptions unwelcome and his admitted personal animus influenced his comments about Complainant in his interview with Mr. Ludwick. I find it significant that Respondent considered Complainant's behavior akin to Mr. Derosato's and find no basis for a comparison. Mr. Derosato's behavior was unquestionably insubordinate. The supervisors' testimony regarding Complainant's role as classroom instigator is inconsistent, while Derosato was considered uniformly the most disruptive figure in the class. Considering all of the evidence together, I find that the Complainant's discussions about gas safety constitute the "disruptive" behavior described in Mr. Ludwick's summary, and provide a causal connection between Complainant's protected activity and Respondent's adverse action.

I find that Complainant has met his burden of establishing by a preponderance of the evidence that his discharge was related to his protected activity.

3. Legitimate Business Reason for Adverse Action

The decision to discharge Complainant was made jointly by the ET supervisors under the direction of Manager Nicole Levine. Ms. Levine explained that it was in the company's interests to identify potential problems with employees during the probationary period, because such employees were not subject to the grievance and arbitration procedures required by the collective bargaining agreement between labor and management. The supervisors met regularly throughout the training period and discussed observations and "feedback" about trainees. The supervisors identified a variety of reasons for terminating Complainant's employment. Robert Kershaw identified Complainant's wearing of jewelry in violation of company policy; his reported "horseplay" in class; his complaints about overtime; his test scores; and Kershaw's perception that Complainant did not honestly explain that he had forgotten his voice mail password. Supervisor Al Ludwick testified that he had heard that Complainant had "behavior issues" (Tr. at 136) that he verified by interviewing two instructors who had conducted the gas phase of training. Ludwick identified Complainant's "behaviors" as including his wearing of a chain against company policy; his complaining about his salary and overtime; his refusal to take books home to study despite failing test scores; his reported "abrasive" and "arrogant" behavior (Tr. at 145, 147); and complaints from ETs about Complainant's "behaviors" (Tr. at 152).

George Monahan identified "bad behaviors" that Complainant had demonstrated, such as being condescending; complaints about overtime; wearing jewelry; being disruptive in class; and inappropriately discussing other employees' skills. Art Finley testified that he had heard at the regular supervisor meetings that Complainant was disruptive in class; wore jewelry; and complained about his classroom instructor. Daniel O'Connell recalled that supervisors had

reported that Complainant wore jewelry; was sarcastic about training methods; complained about who he was assigned to work with; disrupted the class; and denigrated training. He summed up his impression of the Complainant as an individual who didn't get along well with others. Tony Lewis based his decision on what he had heard from other supervisors about Complainant's conduct. He relied mostly on Al Ludwick's summary of his discussion with instructors that concluded that he was disruptive in class. Complainant's alleged disruptive behavior was the sole reason for Mr. Lewis' support of the decision to terminate Complainant's employment.

Nicole Levine testified that she found Complainant had been aggressive in his request for overtime; had been late to class; had worn jewelry; had interrupted his trainer; had exhibited a negative attitude; and had failed gas quizzes. She considered it appropriate to terminate Complainant during the probationary period because she believed he would present continuous problems and be more difficult to discharge as an union employee.

I find that Respondent has met its burden of articulating legitimate business purposes for its adverse action. Accordingly, Complainant must establish that the stated reason constitutes pretext for discrimination. Although Complainant was a probationary employee subject to discharge at Respondent's will, he cannot be discharged for specifically prohibited discrimination. Fischer v. Town of Steilacoom, 83-WPC-2 (ALJ May 2, 1983) (settled before the Secretary, Order of Dec. 1, 1983.).

4. Pretext for Discrimination

An employer may discharge an employee who has engaged in protected conduct as long as the employer's decision is not motivated by retaliatory animus and is based upon reasonable grounds. Lockert v. U.S. Dept. of Labor, 867 F.2d 513, 519 (9th Cir. 1989). Complainant may demonstrate that Employer's stated reasons for his termination were a pretext for discrimination by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not credible. St. Mary's Honor Center v. Hicks, supra. "The fact finder must both believe that Respondent's rationale for its action is not worthy of credence, and also believe the Complainant's explanation of intentional discrimination." Id. See also, Blow v. City of San Antonio, Texas, 236 F. 3d 293, 297 (5th Cir. 2001). Respondent offered shifting rationales for Complainant's termination, none of which were shared with Complainant at the time of his discharge. Although the articulation of shifting rationales for Complainant's discharge may support finding that the adverse action was motivated by retaliatory intent (Timmons v. Franklin Electric Coop., 1997-SWD-2 (ARB Dec. 1, 1998)), the burden remains on Complainant to establish pretext.

Respondent asserted that Complainant was fired in part for wearing a chain in violation of Respondent's safety rules. The record reflects that Complainant did at times wear a chain. He admitted as much, but also testified that he immediately removed the chain when reminded to do so. This statement was uncontradicted. Although the record is unclear about how often he wore a chain, it is certain that he did not wear it as often as alleged by some. Ms. Levine testified that Complainant had "to be constantly told about wearing the jewelry". Tr. at 384. Al Ludwick testified that Complainant was reminded "constantly" about his chain (Tr. at 135) and he reported seeing Complainant wear the chain "almost every time he came in". (Tr. at 137).

When asked to describe when he observed Complainant wearing the chain, Ludwick testified about one occasion where he saw the Complainant wearing it, and he also testified that supervisor George Monahan had talked about Complainant wearing it. Tr. at 137. Ms. Levine saw Complainant wear the chain at Al Ludwick's office. George Monahan described two occasions when he instructed Complainant to remove his chain, including one occasion when Al Ludwick was present. Mr. Finley saw Complainant wearing jewelry, also when Mr. Ludwick was present. Mr. O'Connell had observed Complainant wearing a chain on one occasion. None of the witnesses were able to state with certainty the dates on which Complainant was observed wearing jewelry. Mr. Colon worked with Complainant for several weeks during on-the-job training, and did not observe Complainant wear inappropriate jewelry. Mr. Colon testified that Complainant took special care to wear his safety equipment.

I find that the evidence does not establish that Complainant was discharged because he wore a chain. The record is insufficient to find that wearing a chain constituted insubordination or any other grounds for dismissal. I reject any implication that Complainant was fired because wearing a chain violated safety rules. If wearing jewelry constituted valid grounds for Respondent to terminate Complainant, then he would have been terminated when he was observed violating that safety rule. Respondent made it a point through testimony and documentary evidence to establish its commitment to safety. I find that Complainant's prohibited jewelry wearing was not a credible or significant factor in his discharge.

Respondent cited Complainant's "horseplay" as another reason for his discharge. The record fails to establish that Complainant engaged in horseplay. Mr. Kershaw testified that Al Ludwick had reported that Complainant had participated in horseplay, but Kershaw did not remember specifics about Complainant's involvement. Kershaw admitted that he did not really know whether Complainant was involved in an instance where some trainees were using sticks like swords. Mr. Ludwick testified about Complainant's arrogance and abrasive and disruptive behavior, but did not identify horseplay among Complainant's purported undesirable behaviors. Ms. Levine did not identify horseplay as a reason for Complainant's discharge. David Luby conducted part of the classroom training and denied that Complainant's classroom humor was a problem. The trainees who testified all admitted to "clowning around in class".

Complainant admitted to laughing and joking, but denied acting in an immature or disruptive way. I accord substantial weight to Complainant's testimony. During the fifteen hours or so of the hearing, Complainant showed himself to be guileless and sincere. He demonstrated no aggressive attitude towards Respondent's witnesses and was courteous and respectful to all. He accepted rulings without argument and conducted himself in a focused and collected manner, particularly considering the stress that a pro se litigant must operate under. Respondent failed to demonstrate that Complainant's class room behavior was as bad as the other trainee who was fired, or worse than any of the trainees who were not fired. The record does not demonstrate that Complainant's discharge was due to his participation in horseplay.

Complainant's purported "arrogance" and negative attitude were cited as additional reasons for his dismissal. Mr. Kershaw believed that Complainant was not truthful about his voice mail password, which he thought was a behavior problem. Al Ludwick testified that Complainant chronically complained about his salary and overtime and was sarcastic about Brian

Focht's teaching methods. Ludwick testified that Complainant was considered "abrasive" by supervisors and by other ETs. Ludwick found his criticism of a longtime PECO employee "arrogant". George Monahan also testified that other technicians characterized Complainant as domineering and condescending. Monahan found Complainant's complaints about overtime to be inappropriate, and he thought that Complainant's criticism of another employee demonstrated that he would not interact well with the public. Art Finley could not remember any discussion about Complainant's behavior except that he was disruptive. Finley was concerned that Complainant complained about how classes were conducted, but he did not recall Complainant complaining about overtime or pay. Nicole Levine thought that Complainant's "aggressive and continuous" complaints about overtime were signs of a bad attitude. Daniel O'Connell believed that Complainant was one of the more vocal trainees who complained about money. He also thought that Complainant should not have complained about work assignments. O'Connell found Complainant's remarks about Brian Focht's training methods were inappropriate.

I find little evidence showing that Complainant behaved in an arrogant and negative way. Mr. Kershaw's impression that Complainant was untruthful about his voice mail password is unsubstantiated and conclusory. Kershaw had no other first hand observations that demonstrated Complainant's negative attitude. Mr. Kershaw denied that he considered Complainant's comments about his instructor's lack of knowledge as grounds for his dismissal. Mr. Kershaw's recommendation to discharge Complainant was based upon the conclusions of other people, and is not reliable. Paul Grosseible participated in the gas training, and did not find that Complainant was arrogant, but rather thought that he was encouraged to joke with trainee Derosato. Ray Pugh, who participated in the classroom training identified Complainant with Derosato, who he described as disruptive. Pugh testified that he believed that Complainant "went along" with Derosato because they sat together. I accord little weight to this conclusion, as the record establishes that Complainant sat in the front of the class, while Derosato sat in the back. In addition, Pugh testified that Complainant had not challenged his authority as had Derosato. Pugh's testimony focused on Derosato's conduct, rather than Complainant's.

Ms. Levine characterized Complainant's overtime complaints as continuous and aggressive, but she was unable to relate her conversation with him in a manner that demonstrated that conclusion. She acknowledged that most of the trainees complained about their hours and pay, but she believed that Complainant was aggressive in his complaints. Ms. Levine stated that George Monahan had told her that Complainant complained to him about overtime, and she further stated that she could not "remember specific comments from the other supervisors, but [she] knew there were some from other supervisors". Tr. at 377. I find Ms. Levine's testimony too vague to credit as grounds for discharge, even considering Complainant's status as a probationary employee. In addition, I find that the evidence establishes that the trainees were advised to expect overtime, and in the circumstances, it was not unreasonable for them to ask for overtime assignments.

I decline to credit assertions that other technicians complained about Complainant's attitude. Monahan and Ludwick testified that Complainant was technically proficient, but said that other ETs complained about Complainant's attitude. Neither supervisor could identify the complaining technicians. I accord more weight to the testimony of Rafael Colon and Robert Rodriquez, who worked with Complainant in the field and who stated that they told Monahan

that Complainant was a good worker who worked well with customers. I note that Mr. Finley did not hear that other ETs had complained about Complainant. Finley testified that Complainant worked well with customers.

Complainant had complained about working with certain technicians, which bothered some supervisors, but not all. Complainant's request for reassignment was granted, which does not suggest that his complaint signified a bad attitude. Mr. Lewis, who accommodated the request, testified that Complainant's request to be assigned to work with a different ET was not a factor in his decision to support Complainant's discharge. Mr. O'Connell, who testified that he saw Complainant twice during his employment with Respondent, found it significant that Complainant did not want to ride with certain people. Mr. O'Connell felt that it showed that Complainant did not get along with other people. However, Mr. Finley admitted that he had found Complainant to be good with customers. I find it credible that the supervisors found Complainant's refusal to bring books home to study demonstrated a poor attitude about his new job. However, the preponderance of the testimony on this issue centered upon the opinion of the majority of supervisors that Complainant did not get along well with others. I find that this is not supported by the record.

I find support for Respondent's rationale that Complainant was discharged for his purported disruptive behavior during Mr. Focht's class. Supervisor Tony Lewis credibly testified that his decision to support Complainant's discharge was based entirely upon the hearsay report generated from Mr. Ludwick's interview with the two gas training instructors also was the sole supervisor to limit his reasons for supporting the decision to terminate Complainant. He did not find Complainant's request to work with others an offense, nor did he adopt the opinions of the other supervisors regarding reports of wearing jewelry or complaining about overtime. Complainant was observed wearing jewelry at different times in training and was not fired. Most of the trainees complained about their pay or overtime, but none was discharged for their complaints. Ms. Levine was disappointed in Complainant's test results, but he had time to bring those scores up before the probationary period expired. The decision to fire Complainant did not have to be made at the November 1, 2007 meeting, as demonstrated by Respondent's deferring a decision to fire another trainee.

Although the supervisors testified about sharing "feedback" about trainees during meetings, the record suggests that Complainant's purported disruptiveness was not consistently discussed at the meetings. Mr. O'Connell testified that he had heard about Complainant being vocal in the field in August, but his testimony is inconsistent with the preponderance of the evidence, which establishes that Complainant did well during his electric training. Nevertheless, it was not until November that Complainant's comments were perceived negative enough to merit termination. Mr. Kershaw started working in the department in June, 2007 and testified that he first became aware of Complainant's conduct issues at the November meeting that led to his discharge, when Ludwick's report was shared. The record demonstrates on the whole that Complainant's "behaviors" were tolerated up until the point that he challenged Brian Focht during gas training class.

The evidence establishes that the decision to terminate Complainant rested heavily upon Mr. Ludwick's summary of his conversation with Mr. Focht and Mr. Pugh. However, I find that Complainant's conduct is not reliably or credibly reported. I note that the summary was not limited to the observations of the instructors, but included some of Mr. Ludwick's own observations. In addition, Mr. Pugh's recorded observations are consistent with his testimony, which reflects that Pugh focused on Derosato's behavior. In any event, Mr. Pugh's observations from 4 hours of interaction with the class are not the most dependable measure of Complainant's conduct. Mr. Pugh was not in the position to make reliable observations about Complainant's punctuality or study habits. Although there is no evidence to support that Complainant was disrespectful to Pugh, Pugh associated him with Derosato on the mistaken impression that they sat together. I therefore discount Pugh's observations as providing a valid rationale for Complainant's discharge.

There is evidence that Complainant interrupted Brian Focht, which Focht characterized as disruptive behavior. It is significant that Complainant's interruptions involved his experience with gas, and his cautionary advice about handling gas. I further find it significant that the supervisors did not trouble to determine the nature of Complainant's interruptions, particularly since it was known that he had raised issues involving the safe handling of gas. The preponderance of the evidence establishes that Complainant was fired for disrupting his instructor by engaging in protected activity. There is little evidence that Complainant's other personality defects would have led to his discharge, absent his commentary during class. Complainant was admittedly sarcastic when discussing Mr. Focht's instruction, and such conduct could support an adverse action. See, Harrison v. Roadway Express Inc., ARB No. 00-048, ALJ No. 1999-STA-37, slip op. at 15 (ARB Dec. 31, 2002). However, not all of the supervisors referred to his sarcasm as a rationale for his dismissal. The only common conduct that supervisors cited as the reason for Complainant's termination was Mr. Focht's impressions of Complainant during gas training.

It is clear that Complainant had more experience working with gas than Mr. Focht. Mr. Focht's testimony establishes that he felt threatened by Complainant's discussion of gas-related procedures and practices. Mr. Focht considered Complainant to be a "know-it-all." Although supervisors Monahan and Ludwick stated that other ETs agreed with that assessment, no evidence corroborates their testimony. It is reasonable to conclude from the evidence that Complainant wanted to share his practical experience with trainees. He was encouraged by one of the trainers to bring a tool that he had used on his prior job to class to show the other trainees. His comments about gas procedures were timely and practical, although not appreciated by Mr. Focht, who noted that the procedures would be covered later in the training. I find that Mr. Focht's characterization of Complainant's behavior was pretextual. Because Mr. Focht's interview with Mr. Ludwick was the uniform rationale for the supervisors' recommendation to discharge Complainant, I find that Complainant has established pretext. Ludwick was aware that Complainant had brought safe gas practices to the class' attention (Tr. at 149), and therefore was on notice that Focht's remarks about Complainant's disruptive behavior encompassed protected activity. Nicole Levine testified that she was not aware that Complainant had raised safety issues, but would have been concerned to learn that his interruptions involved safety issues. She further testified that she would have fired Complainant even if she had been aware of his

protected activity. However, Ms. Levine relied heavily upon Mr. Ludwick's less than reliable report.

I find that Complainant has established by a preponderance of evidence that Respondent's stated reasons for his discharge are pretext for discrimination. Complainant was fired within the two weeks that he had first discussed safe gas practices, and I reject Respondent's proffered reasons for his discharge. I find that the evidence is sufficient to draw an inference that Complainant's termination was motivated by his protected activity. See, Hicks, supra. at 2749. In these circumstances, it is not necessary to conduct an inquiry about dual motive. See, McCuiston v. Tennessee Valley Auth., 89-ERA-6 (Sec'y Nov. 13, 1991).

D. Damages

29 C.F.R. § 1981.109(b) provides the Secretary of Labor with the authority to require affirmative action to abate the violation, to order payment of back wages and where appropriate compensatory damages as well as the expense of litigation including attorney's fees. In this instance Complainant is seeking reinstatement, back pay and a reasonable attorney's fee as damages for his wrongful termination.

Absent extraordinary circumstances, reinstatement is a basic remedy in this type of proceeding, and I find that Complainant is entitled to be fully reinstated with Respondent to the position and hourly wage which he enjoyed on the day of his termination, November 1, 2007⁴. In this regard, I also find that Complainant is entitled to have expunged from his personnel records any reference to his wrongful termination. In returning Complainant to his previous status he shall be credited with the time he previously worked with Respondent as it applies to completion of his six month probationary period, his eligibility to become a union member and his seniority status. Complainant is entitled to the restoration of any sick and vacation pay that he would have earned during the period from his discharge, November 1, 2007, until the date of his reinstatement.

With respect to back pay, I note that the record establishes that Complainant was paid \$25.00 per hour, and would likely have continued to receive this amount for some time, even after completing his probationary period. Manager Nicole Levine explained that he had been hired at a high rate of pay because of his past work experience. Had it not been for the unlawful termination, Complainant would have been paid that amount, and presumably, have earned overtime had he successfully completed his probationary period, and been assigned his own work duties. However, Complainant had a duty to mitigate his damages during this period of unemployment by using reasonable diligence to seek other suitable employment. Complainant testified at the hearing that he had hoped to return to his previous employment with Philadelphia Gas Works. In his closing written argument, Complainant advised that he returned to work in July, 2008. He had not worked since his discharge, and he did not provide any other evidence regarding his efforts to find work.

⁴ Complainant should be aware that he is reinstated to his status as a probationary employee, and must satisfactorily fulfill the conditions of training and probation.

I find that the record fails to demonstrate that Complainant exercised due diligence to mitigate his damages by finding alternative work. Considering that Complainant is a skilled technician, I find that with due diligence he could have found some kind of employment within two months of his discharge. Complainant has requested an award for overtime that he contended he would have earned. The record reflects that overtime would be occasioned by emergencies, and was authorized by managers. I decline to speculate how much overtime he might have earned, and therefore, I deny this request for damages.

Accordingly, I find that eight (8) weeks of back pay is a suitable remedy in these circumstances. I find that Complainant is entitled to \$1,000.00 per work week for eight (8) weeks, based upon a 40 hour work week at the hourly rate of pay of \$25.00.

I further find it appropriate that Respondent pay the costs of any benefits that it would have paid on Complainant's behalf during this two month period, upon proof from Complainant of how much he spent to replace those benefits. Complainant asserted that his wife paid approximately \$1,000.00 per month for their family's medical insurance during the period between November, 2007 and July, 2008, when he returned to a job. I find that Respondent is liable to reimburse the actual amount spent by Complainant or his wife for those benefits, upon remittance of evidence of the actual payment. Respondent shall be entitled to a credit for any portion of the premium that employees are required to pay for health insurance.

As Complainant represented himself, no attorney fee petition may be approved. Pursuant to 29 C.F.R. § 1981.109(c), a decision by an administrative law judge requiring reinstatement shall be effective immediately upon receipt of the decision by the named person, and will not be stayed by the filing of a timely petition for review. All other portions of the Order shall be effective 10 business days after the date of the decision unless a timely petition for review is filed. 29 C.F.R. § 1981.109(c).

ORDER

The relief sought by JOSEPH DONAHUE is AWARDED. Respondent shall reinstate Complainant to the position he held as of the date of his discharge, November 1, 2007. Respondent shall also pay back wages in the amount of \$8,000.00. Respondent shall reimburse Complainant for the cost of medical insurance that Complainant can demonstrate that he paid on his own behalf, minus the portion of premium, if any, that employees pay under Respondent's health insurance system.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. See 29 C.F.R. §§ 1981.109(c) and 1981.110(a) and (b). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. Your Petition must specifically identify the findings, conclusions or orders to which you object. A failure to object to specific findings and/or conclusions of the administrative law judge shall generally be considered waived. Once an appeal is filed, inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties and the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. Copies of the Petition and briefs must also be served on the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1981.110(a).

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1981.109(c) and 1981.110(b). Even if you do file a Petition, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1981.110(b).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1981.109(c) If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board, unless the Board grants a motion to stay the order. 29 C.F.R. § 1981.110(b).