U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 28 April 2010

Case No. 2008-PSI-2

In the Matter of:

STUART R. SNEED,

Complainant,

v.

ACUREN USA, INC.,[1]

Respondent.

APPEARANCES:

Stuart R. Sneed
Manistee, Michigan
Pro se

Kerry E. Notestine, Esq.
Alexis C. Knapp, Esq.
Littler Mendelson, P.C.
Houston, Texas
For the Respondent

BEFORE: LARRY S. MERCK
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a whistleblower retaliation complaint filed by Complainant, Stuart R. Sneed ("Sneed"). Sneed alleged that Respondent, Acuren USA,

[1] BP Exploration (Alaska), Inc. ("BPXA"), was formerly a respondent in this case. The parties agreed to the dismissal of BPXA with prejudice and by Order, issued January 15, 2009, BPXA was dismissed as a party.

Inc., ("Acuren") unlawfully retaliated against him in violation of the employee protection provisions of five acts: the Pipeline Safety Improvement Act ("PSIA"), 49 U.S.C. 60129; the Toxic Substances Control Act of 1976 ("TSCA"), 15 U.S.C. § 2622; the Clean Air Act ("CAA"), 42 U.S.C. § 7622; the Clean Water Act, also known as the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1367; and the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971. The PSIA is implemented by the regulations at 29 C.F.R. Part 1981; the TSCA, CAA, FWPCA, and SWDA, collectively referred to as the "environmental whistleblower statutes," are implemented by the regulations contained at 29 C.F.R. Part 24.

Statement of the Case

Sneed was employed with Acuren as a pipeline inspector in Alaska, and alleges that he was subjected to a hostile work environment after he raised concerns involving pipeline safety. An investigation commenced, and Sneed was sent home with pay for the duration of the investigation, approximately six months. After the investigators' findings were shared with Acuren management, the company made two formal attempts to return Sneed to work. Sneed did not return on either occasion. Acuren terminated Sneed's employment on the basis of job abandonment. Sneed argues that he was reasonable in failing to return because the company took inadequate steps to protect him from a hostile work environment.

Procedural History

On July 12, 2007, Sneed filed a complaint of unlawful retaliation with the Occupational Safety and Health Administration ("OSHA"). (ALJX 2).[2] After an investigation, the Regional Administrator for OSHA issued findings on March 18, 2008, dismissing the complaint. The Regional Administrator found that Sneed engaged in protected activity, but that his refusal to return to work was the deciding factor in his termination. *Id.* On April 17, 2008, Sneed timely requested a hearing before an administrative law judge ("ALJ").

At the time of his OSHA complaint and his request for hearing, Sneed was represented by counsel; on May 1, 2008, however, his counsel withdrew. (ALJX 5). The scheduling of the hearing was postponed for Sneed to search for new counsel, and it was later continued to accommodate settlement negotiations. (ALJX 6, 8, 11, 15-16, 18, 34). A formal hearing was ultimately held on August 5, 2009, in Traverse City,

[2] In this Decision and Order, "ALJX" refers to Administrative Law Judge Exhibits, "CX" refers to Complainant's Exhibit, "RX" refers to Respondent's Exhibits, and "TR" refers to the transcript of the hearing.

Michigan. Approximately two weeks prior, Sneed requested a continuance and change of venue to Alaska. (ALJX 47-48). His requests were denied by Order, issued July 28, 2009; however, both parties were afforded an opportunity to submit additional evidence post-hearing. (ALJX 55; TR at 476).

Evidence

The following exhibits were received into evidence at the hearing: ALJX 1-57; CX 1; and RX 1-33, 35. (TR at 11, 17, 19, 140).[3] Sneed submitted several documents post-hearing, which have been marked for identification as follows:

- CX 2 Acuren document summarizing audit of employee William Bishop, dated June 25, 2007 (4 pages)
- CX 3 Acuren memo from Marty Anderson regarding Acuren's Compliance Business Plan – 2007, dated April 30, 2007 (6 pages)
- CX 4 "Acuren Evaluation of M Anderson Document Transmittal Log Entries," dated February 5, 2008, selected pages (7 pages)
- CX 5 First page of Acuren letter to Billie Garde & Paul Flaherty, dated March 19, 2007 (1 page)
- CX 6 Letter from Sneed to Talman Pizzey, dated June 5, 2007 (2 pages)
- CX 7 E-mail from Sneed to Andrea Sieben, sent Wednesday April 25, 2007 (1 page)
- CX 8 Handwritten letter from Michael Theurich, dated September 11, 2009 (4 pages)
- CX 9 Article: Wesley Loy, *BP attempting to wrestle oil spills case away from court*, ANCHORAGE DAILY NEWS, Aug. 28, 2009 (3 pages)
- CX 10 Letter from Jeff Walters, dated August 31, 2009 (1 page)
- CX 11 Letter from Joseph A. Pease, undated (1 page)
- CX 12 Signed letter from Matthew Burmeister, undated (1 page)
- CX 13 Article: Elizabeth Bluemink, *BP cost cuts threaten Alaska's oil field contractors*, ANCHORAGE DAILY NEWS, Sept. 2, 2009 (3 pages)

[3] During the hearing, a deposition of Sneed was marked as RX 34 for identification, but was not admitted into evidence. (TR at 109).

CX 14 Sneed request for damages and explanation, original version ($1,000,000 for health, family pain, humiliation, mental anguish) and edited version (with $50,000 for aforementioned categories) (4 pages)

CX 15 CD – video segment of Billy Christensen in Alaska

CX 16 CD - audio recording of telephone conversation with Bill Oxford

CX 17 Letter from Sneed regarding damages, dated September 19, 2009 (2 pages)

CX 18 E-mail from Billy Christensen, sent September 19, 2009 (2 pages)

CX 19 Pages 26-29 of an undated, unlabeled deposition (1 page)

CX 20 Letter from Paul Flaherty to Sneed, dated May 18, 2008 (2 pages)

CX 21 Letter from D. L. Keck, BPXA Audit Team Leader, Re: Acuren Inspection Quality Audit, dated April 9, 2007 (3 pages)

CX 22 E-mail from Brent Rolph, sent July 5, 2007, attaching Acuren Internal Audit, number AI-Alaska-NS-07 (5 pages)

CX 23 Respondent Acuren, Inc.'s Responses and Objections to Complainant's First Request for Production of Documents, dated July 27, 2009 – two copies with handwritten notes (14 pages)

CX 24 Respondent Acuren, Inc.'s Responses and Objections to Complainant's First Request for Admissions, dated July 27, 2009 – with handwritten notes (7 pages)

CX 25 E-mail from Kim Harker to Andrea Sieben, sent April 19, 2007 (1 page)

CX 26 Page 3 of a letter signed by John Dingell & Bart Stupak (1 page)

CX 27 Documents related to FAST Concerns: Printout dated September 7, 2006, page 2 of 2, regarding FAST-0215 and FAST-0216; "GPB Employee HSE/FAST Committee Meeting Minutes for 6/7/2007" pages 1-2 of 3, with handwritten notes; Report from May 24, 2007, regarding FAST-0215 & FAST-0216, pages 6-7 of 9, with handwritten notes; Report from April 10, 2008, regarding FAST-0281 page 2 of 2 (6 pages)

CX 28 Page 6 from unidentified document with handwritten notes (1 page)

CX 29 E-mail from Paul Flaherty to Sneed, sent October 11, 2007 (2 pages)[4]

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[4] Sneed also submitted documents that are already contained in RX 4, 5, 6, 7, 33. To avoid duplication, those documents have not been re-admitted as Complainant's Exhibits. As explained in the Order Closing Record, issued November 16, 2009, two other documents were submitted after the deadline for

On October 30, 2009, Acuren filed several objections to Sneed's post-hearing submissions. Acuren argued that the submissions were untimely, that many of the documents are irrelevant and should be excluded under 29 C.F.R. § 18.402, and that Sneed should not be able to submit certain documents that were not disclosed during discovery. Acuren further argued that the letters from former colleagues are inadmissible hearsay pursuant to 29 C.F.R. § 18.802, that Sneed's list of damages lacks supporting documentation, and that Sneed inappropriately continued to testify post-hearing through his letters to the court.

The regulations implementing the PSIA and the environmental whistleblower statutes state that the formal rules of evidence do not apply to hearings in these matters, but that "rules or principles designed to assure production of the most probative evidence available will be applied." 29 C.F.R. §§ 24.107(d), 1981.107(d). The rules provide, however, that immaterial, irrelevant, or unduly repetitious evidence may be excluded. *Id.*

In his letters accompanying the evidence submissions, Sneed stated, *inter alia*, that the documents were relevant to the issue of Acuren's credibility and the company's sincerity in returning him to work. *See* letter entitled "Some Truth in my Defense and Acuren's 'Safety Culture,'" received September 30, 2009, and untitled letter received September 21, 2009. Based on Sneed's status as a *pro se* complainant and the general relevance of his submissions, I hereby admit CX 2 through CX 29. Factors such as hearsay, authenticity, and degree of relevance will be considered when assigning probative weight to the evidence of both parties. The record was closed on November 16, 2009, and both parties submitted post-hearing briefs.[5]

Issues

The issues in this case are:

1. Whether the statute of limitations bars Sneed's complaints under the PSIA, TSCA, CAA, FWPCA, or SWDA;

2. Whether Sneed engaged in protected activity; and,

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post-hearing evidence, and were not admitted into the record. The first document is titled Acuren Regional Internal Audit Checklist, completed by hand, and dated June 20-21, 2007. The second document consists of a series of presentation slides, the first of which reads "BP Review Meeting, March 3, 2008."

[5] Sneed submitted his final brief on December 2, 2009. Sneed also made arguments on the merits of his complaint in letters filed on September 21, 2009, and September 30, 2009. Based on Sneed's status as a *pro se* litigant, any legal arguments in these earlier letters will be considered along with those in Sneed's brief.

3. Whether he was discriminated or retaliated against because of the protected activity.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Parties

Acuren USA, Inc., is a company that provides non-destructive testing ("NDT") services for oil companies and other clients who require metal pipes and containers to be inspected without cutting into or destroying the material. (TR at 168-70).[6] Since 2002, Acuren has contracted with British Petroleum ("BP") to provide non-destructive testing services on its pipelines, tanks, and vessels located on the North Slope of Alaska. *Id.*[7] Acuren's contract with BP began in 2002 when Acuren performed an audit of the previous NDT company. (TR at 174). The audit revealed unfavorable results, and BP asked Acuren to assume the inspection work for two of its three inspection programs: the internal corrosion program and the tank and vessel integrity program. In 2004, Acuren won a bid for the external inspection program and became the NDT company for all aspects of BP's pipeline inspection on the North Slope. *Id.*

Stuart Sneed is a specialist in non-destructive examination, and has over 20 years of experience testing metals and iron for flaws and cracks, using a variety of non-destructive methods. (TR at 26-31). Sneed was born in Alaska and began working in the field of pipeline inspection in the 1970s. (TR at 30, 53). He was hired by Acuren in February 2004 as an Ultrasonic Technician Inspector. (TR at 31-32). In that position, Sneed inspected pipes and pressure vessels used to transport oil, gas, and water in Alaska. (TR at 32-34). Sneed, like most Acuren employees on the North Slope, worked in three-week rotations. (TR at 52, 173). He would be on duty for three weeks in Alaska, and would return to his current home in Michigan for three weeks before returning to the North Slope for another three-week period. *Id.*

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[6] Acuren was named Canspec at the time of Sneed's initial hire. For ease of reference, the company will be referred to as Acuren throughout this Decision and Order.

[7] As previously stated, BPXA was formerly a respondent in this proceeding. The witnesses and parties appear to use "BP" and "BPXA" somewhat interchangeably. As the distinction is not relevant to this particular lawsuit, the companies will be referred to as "BP" throughout this Decision and Order.

Witnesses

In addition to Sneed, the following individuals testified at the formal hearing: Shawn Luker, George Bryant, Paul Flaherty, Andrea Sieben, and Talman Pizzey.

Shawn Luker has worked for Acuren for 15 years; from 2004 to 2007, he was an NDT Supervisor in Prudhoe Bay, Alaska, responsible for dispatching Acuren technicians to perform inspections. (TR at 234-36).[8] During most of that period, Luker was Sneed's direct supervisor. (TR at 236-37). Luker testified about the work environment on the North Slope, Sneed's relationship with his co-workers, and his performance as an employee. (TR at 236-59, 275-89). Luker specifically testified about a stop work order issued by Sneed in August 2006 and his interactions with Sneed after that point. (TR at 260-74, 290-301).

George Bryant has worked for Acuren for over 20 years. (TR at 168). In 2004, he served as a supervisor for the tank and vessel program and the external program. Toward the end of 2004, he became a Project Manager, and served in that role until 2007. (TR at 176). Bryant first met Sneed in 2004, when Sneed was working as a technician in the external program; after becoming a project manager, Bryant interacted with Sneed during safety meetings, or regarding Sneed's performance issues. (TR at 177). Bryant testified generally about Acuren's work on the North Slope, the company's safety program, Sneed's work performance, and certain of Sneed's safety write-ups. (TR at 167-231). Bryant also testified about Acuren management's interactions with Sneed during his last two months on the Slope. *Id.*

Paul Flaherty has worked as a consultant for 27 years, and began working with BP in 1996 or 1997 as an "independent objective advisor." (TR at 370). Flaherty is the Managing Principal of Environ International Corporation, which, in 2002, contracted with BP to provide an "external avenue" for employees to raise issues of "operational integrity, health, safety, environment, or any other issues that they felt were important to the integrity of the field." (TR at 371; CX 1, 20). In this role, Flaherty would speak with employees confidentially and then take the issues to management to have them corrected. (TR at 372). Flaherty testified about the external complaints made by Sneed in 2004 and 2006 and Flaherty's related investigations. (TR at 372-400). After Sneed's complaints in August 2006, Flaherty investigated the matter with the help of Billie Garde, an employment attorney invited onto the project by Flaherty. (TR at 381-82).

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[8] At the time of the hearing, Luker was employed as the Advanced NDT Services Supervisor in Fort McMurray, Alberta. (TR at 234).

Flaherty testified about the investigation and his impressions of Acuren's attempts to return Sneed to work. (TR at 388-408).

Andrea Sieben has worked for Acuren for 22 years and has served in various corporate roles with the company. (TR at 305-06). In 2007, Sieben was the Director of Human Resources for Canada and Alaska. (TR at 306). Sieben first became aware of Sneed in January 2007 in connection with the investigation performed by Flaherty and Garde. (TR at 306, 315-67). Sieben testified about Acuren's steps to implement "respectful workplace practices" and the corrective actions that were taken as a result of the investigation report. (TR at 307-12). Sieben was closely involved in the process of attempting to return Sneed to work in April to June 2007, and she testified about her phone conversations and written correspondence with Sneed during this time. (TR at 316-336). She also discussed the decision-making process for the ultimate termination of Sneed's employment. (TR at 315, 322-23, 336-40).

Talman Pizzey is the General Manager for Canadian Operations of Acuren. (TR at 410). At the time of Sneed's termination, Pizzey was Managing Director for Canada and Alaska. (RX 6). Pizzey testified about Acuren's work on the North Slope, the transition from Canadian to American employees on the North Slope, and Acuren's relationship with BP. (TR at 410-16). He also testified about his understanding of Sneed's safety complaints, Sneed's treatment by managers, and the decision to send Sneed home with full pay during the investigation by Flaherty and Garde. (TR at 426-30). Pizzey discussed the results of the investigation and Acuren's plan to return Sneed to work. (TR at 433-40). He also testified about his conversations and correspondence with Sneed and the decision to terminate his employment when Sneed did not return to work. (TR at 442-53).

Early Employment with Acuren, 2004

Sneed's employment relationship with Acuren was discordant from the start. During his first days on the job in February 2004, Sneed was operating a pickup truck and backed into another vehicle, causing a small dent in the bumper. (TR at 58, 117-20, 420; RX 2; CX 1 at 5). Sneed reported the accident to "Safety," and upon learning of the incident, Sneed's manager at the time, Sheldon Eiffler, terminated his employment. *Id.*

After his termination, Sneed filed a complaint with an external safety hotline, and Paul Flaherty investigated the situation. (TR at 372-74). Flaherty determined that Sneed was fired because he reported the accident outside of the chain of command. (TR at 373-74; CX 1 at 5). In the process of the investigation and employee interviews, Flaherty encountered "substantial fear of retaliation by the workforce," and felt that there was a hostile work environment on the North Slope. *Id.* Acuren performed an

investigation as well and after communication between Flaherty, Acuren, and BP, it was determined that Sneed should be reinstated. (TR at 374-77; CX 1 at 6). Talman Pizzey played a role in the decision to reinstate Sneed; he testified that there was great pressure from Flaherty to have Sneed reinstated, and that an e-mail from the president of BPXA prior to Sneed's reinstatement suggested that maybe Acuren "isn't the kind of company we want working on the north slope." (TR at 424-25).

Sneed was reinstated in July 2004, approximately six months after his termination. (TR at 58). The witnesses disagreed as to the treatment of Sneed after his return. Sneed's supervisor, Shawn Luker, testified that he was instructed to be easier on Sneed after his reinstatement, that he was "untouchable." (TR at 237-38). The record contains an e-mail from Sheldon Eiffler, who stated that Sneed was receiving "preferred treatment." (RX 17). Pizzey also felt that Sneed was treated more carefully after his return because of his relationship with the investigator, Flaherty, and Flaherty's communication with BP executives. (TR at 426).

Sneed testified, however, that he was met with hostility from his supervisor, Luker, and the project manager, George Bryant, upon his return in 2004. (TR at 158-59). In his investigation report, Flaherty agreed that Sneed was not welcomed back "with open arms" after his reinstatement in 2004. (CX 1 at 5-6). Sneed said that he was observed closely and that Luker targeted him, trying to find safety violations. (TR at 60-61). The record reveals that Luker recorded safety violations in October 2004, after Sneed ran across a potentially slippery parking lot and entered his vehicle without first completing a 360 degree inspection. (RX 16; TR at 122; CX 1 at 5-6). Sneed was also written-up for working extra hours without permission to complete his inspections, oversleeping during a safety meeting, and carelessly tripping over a camera or toolbox that was in the entry door to a truck. (RX 18; TR at 138-39, 188-89, 243-47).

Bryant and Luker testified that the write-ups involved significant safety issues and they spoke to the importance of doing 360 degree inspections, walking slowly in icy parking lots, and working limited hours. (TR at 185-89, 243-47). They explained that extra care is required on the North Slope because of the extreme weather conditions and the great distance to the nearest hospital. *Id.* Sneed, on the other hand, felt that the "safety violations" were common occurrences and that other employees were not counseled for similar behavior. (TR at 96, 123, 135). In his investigation report, Flaherty noted "a flurry of activity in writing [Sneed] up for what appears to be minor issues" in 2004. (CX 1 at 6). "Based on interviews and the personnel files provided to the investigators, similar conduct does not appear to be the subject of write ups in the files of other inspectors." *Id.*

Sneed's Complaints & Acuren's Reactions, 2006

"Pencil Whipping"

At some point in 2006, Sneed made a complaint that a co-worker, William Bishop, was "pencil whipping" his investigation reports. (TR at 138, 380, 417, 454). Pencil whipping involves recording false inspection numbers without performing actual measurements. (TR at 138, 413-14). Pizzey gave the example of a corrosion-inspecting technician who, without measuring, would record 0.39 as the thickness of a pipe, based on the measurement of 0.4 from the year before. (TR at 413-14). The pencil whipping concerns are mentioned in Sneed's complaint, but he presented little evidence on this issue at the hearing. Post-hearing, Sneed submitted a report produced by Acuren on June 25, 2007, which discussed an audit of Bishop's inspections. (CX 2). The audit found insufficient evidence to conclude that Bishop was falsifying his reports; nevertheless, he was retested and recertified. *Id.* Sneed also submitted a letter, dated September 18, 2009, in which he discussed the incidents, claiming that his initial reports of the problem were ignored by Acuren management.

Stop Work Order

On August 25, 2006, while Sneed was inspecting an oil pipeline, he was approached by a member of a buffing and grinding crew. (TR at 37-38). Sneed testified that the man had identified a potential gouge in a pipe and was unsure whether to continue buffing. (TR at 39). Sneed inspected the pipe and saw a linear indication that looked to him like a crack; he believed that there could be gas leakage as a result. (TR at 39-40). Sneed felt that a conservative approach would be best, as safety and environmental issues were involved, and he instructed the crew member to stop the job. *Id.* Sneed called his supervisor, Shawn Luker. (TR at 40).

Sneed testified that Luker told him that it was "none of [Sneed's] business to stop their work." (TR at 40). Sneed recalled Luker telling him to leave the buffing crew alone and not stop the job. *Id.* Nevertheless, Sneed stopped the work and circled the area on the pipe, instructing the crew not to buff that area. (TR at 41).

Luker recalls the situation differently. (TR at 260-61). He testified that he asked Sneed to describe the area, and based on the description, Luker believed that it was a "scab" on the side of the pipe, caused when a foreign piece of metal was pressed onto the side of the pipe when it was rolled. *Id.* Luker thought it was a common problem, and recalled telling Sneed "you didn't have to stop the job because it was just a rolled scab on the pipe." (TR at 261). Luker testified that it was part of his job to let the pipeline integrity specialist, Randy DiNardi, know of the issue, which he did. He

testified that it was not unusual for a technician to stop a job if he felt it was needed. *Id.* Luker denies telling Sneed not to stop the job, or reprimanding him for doing so. (TR at 261, 290-91).

The investigation report by Flaherty and Garde states that during an interview, Luker acknowledged that he told Sneed it was "not his job to stop the work of another contractor." (CX 1 at 10-11). In the interview, Luker explained that based on Sneed's description, he thought the defect was a common manufacturing anomaly, not a safety issue. (CX 1 at 11). In a later interview, Luker claimed that Sneed misunderstood his statements, and that Luker did not mean that Sneed did not have authority or responsibility to stop an act that he thought was unsafe. *Id.*

After receiving a call from Luker, Randy DiNardi and another inspector arrived the same day to look at that section of pipe. (TR at 42). A BP Inspection Report, dated August 27, 2006, includes pictures of the defect and observations of the inspectors. (CX 1, Attachment B). The inspectors identified a "significant anomaly consistent with defects associated with the manufacturing process." Because the defect "has properties similar to a gouge," the inspectors determined that it required repair. *Id.*

Sneed testified that after the incident he hoped Luker would approach him and say that he was wrong for telling Sneed not to stop the job. (TR at 45, 48, 142). Sneed waited a few days, but Luker made no contact with him except when Luker asked Sneed to make a report on the gouged area of the pipe. (TR at 45-46). Sneed admitted that Luker did not write him up or threaten his job for disagreeing over the stop work incident, but he felt that Luker was avoiding him. (TR at 45-46, 142-43).

Complaints Filed with Field Action Safety Team

When Luker did not approach Sneed to discuss the stop work incident, Sneed chose to submit a complaint through a safety committee. (CX 27; RX 3; TR at 48). Sneed indicated that if Luker had spoken with him about the incident, he would not have done so. *Id.*

BP operates a Health Safety Environment ("HSE") Field Action Safety Team ("FAST"), to which employees can submit various complaints. (TR at 181, 198, 257). In addition to informing his or her own supervisor, an employee can raise a safety or environmental concern by phoning a hotline or by filing a "HSE/FAST Concern," which is then be sent to BP. (TR at 257). According to the investigation report by Flaherty and Garde, Sneed first phoned the hotline on August 26, 2006, to discuss the stop work issue. (CX 1 at 7). Flaherty advised Sneed that he should discuss the issue with

management and his Safety Advisor, and if there was not appropriate resolution, he could contact the FAST committee. *Id.*

On August 28, 2006, Sneed had a discussion with Bill Oxford, the Safety Advisor on the job. (CX 1 at 8; TR at 49-50). Sneed had drafted his concerns and asked Oxford to read them at the morning safety meeting. Oxford did not read the statements aloud; Sneed believed that he made the decision based on pressure from Luker and Bryant. (TR at 145-46). In an unsworn, recorded telephone conversation with Oxford, which Sneed submitted post-hearing, Oxford stated that it was common practice to investigate a concern and determine the appropriate forum instead of immediately reading it aloud at a safety meeting. (CX 16). Oxford denied receiving pressure from Luker or Bryant. *Id.*

When the concerns were not read aloud at the meeting, Sneed formally filed them with the FAST committee on August 31, 2006. (RX 3). The first concern, labeled FAST-0215, related to the job stoppage issue. (RX 3). It read as follows:

> A technician was visually inspecting a line and noticed some mechanical damage in the same area that buffing and grinding was taking place. Technician felt it was unsafe to continue this work and stopped the job. He informed his Supervisor that he stopped the job due to his concerns. Technician was told that it was not appropriate for him to stop the job. Technician is concerned and wants to know if there is a new policy that prevents anyone from stopping a job they feel is unsafe.

Id.

The second concern, labeled FAST-0216, related more generally to the balance between production and safety at Acuren. (RX 3). That concern stated:

> I have had concerns with my supervisor always harassing me and other fellow employees, intimidating us about our Production and numbers. The way I understand BP's position on this subject is Safety, Quality and lastly Production. I have been harassed on several occasions about my production from my supervisor. I feel that my integrity and work ethics are outstanding. I am tired of hearing conflicting communication from upper management about doing work with Safety, Quality and production being our focus and then one discussion at the end of the day being harassed about Production. I've talked to [t]his supervisor and have seen no results, only lip service. This is the opinion of several people on our crews and I strongly feel it is a safety issue with the stress it causes.

Id.

"Water Jumping Incident" & Sneed's Last Day of his Rotation, August 31, 2006

Sneed felt that Luker retaliated against him because of the FAST concerns, beginning with his treatment of Sneed on August 31, 2006, the last day of Sneed's three-week rotation. (TR at 61-62). Sneed explained that the last day on the job is particularly dangerous because the inspectors are tired and ready to go home. (TR at 63-65). Sneed and his partner, Billy Christiansen, were assigned two "packages" of inspections; one involved high ladder work, which Sneed felt was less safe for their last day. (TR at 64-65). Sneed and Christiansen therefore declined to perform that portion of the assignment and completed the lower-risk inspections instead. *Id.* At some point, Sneed informed Bill Oxford that he was not going to do the high ladder work and Oxford accepted their decision, telling them to "call it a hitch" and return to camp. (TR at 67).

While Sneed and Christiansen were returning to camp, Luker arrived at the high ladder site with a man named Bill Becker and told Sneed and Christiansen to join them. (TR at 67-68). Sneed testified that he did not want to go to the site but that Christiansen did not want to "go against Luker." Persuaded by Christiansen, Sneed decided to drive to the site to meet Becker and Luker. *Id.*

Upon their arrival, it turned out that the inspection did not require high ladder work as indicated on their assignment; however, the inspection area was very difficult to reach. (TR at 69). Sneed, Christiansen, Luker, and Becker crouched under pipes, walked over a concrete slab, and made a considerable jump to reach the inspection area. (TR at 69; CX 15). When deciding how to return to the trucks, Sneed took a different route than the rest of the group. (TR at 70-71). Sneed jumped over a stream-like area of standing water instead of returning the way they came. (TR at 71).

The witnesses presented somewhat different versions of this incident, particularly with respect to whether Luker told Sneed not to jump over the water before he did so. Luker testified that he told Sneed "let's just walk around and let's not jump the river," but that Sneed jumped anyway, in direct violation of his instructions. (TR at 268). Sneed testified that he thought Luker was setting him up by bringing him out to that inspection point. (TR at 65, 72). He testified that upon jumping, Luker said, "I'm going to write you up. . . . if you would have fallen in it, it would have been funny. But since you made it I'm going to write you up." (TR at 71). Billy Christiansen, via video recording, stated that Luker never told Sneed not to jump. (CX 15). He also claimed that he was asked to write a statement saying otherwise, but refused. *Id.*

Luker testified that he spoke with George Bryant about the incident when he returned from the job site. (TR at 270). Bryant and Luker felt that it was a significant issue that Sneed "blatantly disobeyed an order." (TR at 270-71, 203). Bryant testified that he, Luker, and Bryant's alternate,[9] Kevin Deutsch, were in Bryant's office after the water-jumping incident. (TR at 205). Bryant said when he and Deutsch heard that "Sneed had been told not to jump, and had jumped anyway, we both agreed at that point, that we did not want somebody on the slope who would consciously do something unsafe. And, we had decided that we were going to ask Kim Harker [the Managing Director for Acuren in Alaska] for Mr. Sneed's termination." (TR at 205; *see also* TR at 77, 85, 385).

It is unclear precisely when Bryant and Luker became aware of the FAST concerns and whether they were aware of the concerns when Bryant and Deutsch made the decision to begin the process of terminating Sneed's employment. Bryant and Luker testified that they were unaware of the FAST complaints at the time of that conversation. (TR at 271, 204). Bryant testified that he learned of the FAST complaint by e-mail on September 1, 2006. (TR at 204, 470). Sneed believed that Bill Oxford told Luker and Bryant about the FAST concerns on August 28, 2006, immediately after Sneed discussed them with Oxford. (TR at 145-46). Oxford told Sneed that he could not recall precisely when he informed Bryant and Luker about the complaints, but that it was probably before August 31, 2006. (CX 16). During the investigation, Flaherty and Garde concluded that Luker learned about the FAST concerns on August 28, 2006. (CX 1 at 8).

According to Bryant, a week or so after the water-jumping incident, he learned that Flaherty was investigating Sneed's FAST concerns, and "because of the history with Mr. Flaherty and Mr. Sneed, at that point, both Kevin [Deutsch] and I felt it was prudent just to stop that line completely, and allow the investigation to pursue." (TR at 205). Therefore, Bryant took no further action to terminate Sneed. (TR at 205; CX 1 at 10).

BP Independent Investigation & Sneed's Administrative Leave, 2006-2007

On September 7, 2006, Flaherty checked with Sneed to see if his FAST concerns had been resolved; when Sneed said they had not, Flaherty began investigating the issues. (CX 1 at 10-11). Flaherty realized that because of his past communication with Sneed, there was some view that he might be biased; therefore, with BP's consent, he invited an employment attorney, Billie Garde, to participate in the investigation. (TR at 382).

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[9] An "alternate" works the opposite three-week rotation in a particular position. Both Deutsch and Bryant were Project Managers. (TR at 132, 176)

The following day, September 8, 2006, BPXA President, Steve Marshall, sent a letter to all Acuren employees. (RX 8). The letter stated that Marshall had recently become aware that some workers do not feel comfortable raising health, safety, or environment concerns. He clarified that BP and Acuren want employees to stop any job that appears unsafe, and that the employees should feel free to express concerns without fear of retaliation. The letter encouraged Acuren employees to contact one of several individuals, including Marshall, if he or she had any concerns about retaliation. *Id.*

Based on the rotating schedule, Sneed's next three-week shift was from September 21, 2006, to October 12, 2006. Sneed reported for duty as scheduled. (TR at 79-80, 206-07). Flaherty and Garde requested that Luker not be on the Slope at that time. At some point in the beginning of Sneed's rotation, Flaherty requested that Sneed be moved from Prudhoe Bay to another area, Endicott, where he would encounter neither Bryant nor Luker. *Id.* Sneed's last rotation was largely without incident. During that time, however, Sneed had some disputes with Bryant over his personnel file. (TR at 80-85, 207-09). Bryant stated that he faxed a copy of the file, in its entirety, to the investigators. (TR at 208-09). Sneed then wanted a copy of his file, but Bryant refused. Bryant testified that at some point, the file went missing from his office. Eventually, Sneed obtained a faxed copy of the file through his attorney. *Id.*

Sneed returned to Michigan at the end of his three-week rotation. (TR at 53-54). Sneed's next rotation would have begun on November 2, 2006, but he was placed on administrative leave. (TR at 54-55). Apparently Flaherty and Garde felt that there was animosity toward Sneed on the North Slope; they and BP management arranged for Sneed to be on administrative leave and remain home during the investigation. (TR at 54-56, 430). Sneed was paid his regular salary by Acuren; however, BP reimbursed Acuren for Sneed's pay during that time. (TR at 430-31).

During the investigation, Flaherty and Garde interviewed 20 to 25 different individuals and reviewed personnel records for several employees. (TR at 382-83). Flaherty testified that the investigation revealed evidence that Luker and Bryant had solicited negative information about Sneed's safety record within hours of learning that he was going to submit his FAST concerns. (TR at 384; CX 1 at 8). Further, Flaherty testified that a number of people were pressured to write statements regarding the water-jumping incident. *Id.* The interviews led Flaherty and Garde to conclude that Luker's instruction not to jump over the water came after Sneed had already done so. (TR at 386). During the interviews, the "general take" was that everyone on the work force had jumped over water at some time. *Id.* Flaherty and Garde found that a majority of the people felt Sneed was treated differently than the other employees. (TR at 386-87).

Acuren's Reactions to the Report

Acuren received drafts of the investigation report in October and December 2006. (TR at 389-90; 402). In March 2007, Andrea Sieben met with Flaherty to discuss the findings. *Id.* Sieben testified that Acuren took issue with some of the wording of the report, and "opinions that were presented as if they were findings of fact." (TR at 308). She testified that Acuren had some concerns with the investigation, particularly that the company was not involved in the process. (TR at 307). Nevertheless, Sieben testified that the report was discussed with Acuren's client, BP, and Acuren responded with corrective actions. (TR at 308). The final version of the investigation report was issued in May 2007. (CX 1).

Regarding Acuren's corrective actions, Sieben testified about "respectful workplace" training for managers in the company. (TR at 308-13; RX 12-13). According to Sieben, Acuren started the training as early as March of 2007. (TR at 313). In addition she testified that Acuren put on a one-day "stock-up" training session in Alaska in early April. (TR at 311). Other more significant training was developed and was scheduled to be delivered during June and July 2007. (RX 13). Sieben testified that several training sessions have occurred, and it is ongoing with new employee orientations. (TR at 312-13).

Acuren contends that the jobs of Luker or Bryant were not changed as a result of the investigation; however, both men were in different positions by April 2007. (TR at 314, 472). During Sneed's administrative leave, Bryant was promoted to Managing Director and he moved to Anchorage. (TR at 210). In March 2007, Shawn Luker had begun working at Fort McMurray in Alberta, Canada. (TR at 314). Luker testified that the move was for financial reasons including airfare costs and the exchange rate between the American and Canadian dollars. (TR at 272-73). Months later, after Sneed was already terminated, Luker was placed on probation and required to undertake additional training and coaching related to his treatment of employees, including Sneed. (TR at 272-73; RX 9).

<u>Acuren's Attempts to Return Sneed to Work, March – June 2007</u>

After the March 2007 meeting with Acuren, Flaherty agreed to help Sieben get in touch with Sneed to begin the process of returning him to work and gave Sieben Sneed's telephone number. (TR at 390-91).

Sieben contacted Sneed by phone in March 2007. (TR at 316; RX 31). She phoned several times before she was able to make contact with Sneed. *Id.* Sneed stated that Sieben was nice, pleasant, and upbeat, and that they were making progress about his

return. (TR at 91). Sneed testified that he wanted to have a conference call with Flaherty, and that Sieben agreed to such a call. (TR at 91-92). It is unclear who was to arrange the conference call, but it did not take place. *Id.*

April 2007 Opportunity to Return to Work

On April 16, 2007, Sieben sent Sneed a letter, stating that he was to return to work on April 26, 2007. (RX 4). The letter began:

> Further to our conversations of March 23 and 27, 2007, subsequent attempts to contact you, and my voicemail of today, we are still endeavoring to arrive at a mutually agreeable return to work solution. In order to facilitate your continuing active employment with Acuren, we have scheduled a return to work date of April 26, 2007. This will commence the beginning a three week on, three week off dayshift rotation.

Id. The letter went on to instruct Sneed to make travel arrangements with a North Slope Project Manager who would book the flight from Anchorage to the Slope. Sieben also mentioned that Sneed's certifications had lapsed and he would be required to re-certify during the first few days of his rotation. The letter finally addressed Sneed's concerns about workplace harassment:

> With respect to the concerns that you have voiced during our discussions, I wish to state that we have undertaken corrective action to reinforce the principle of the right to stop unsafe work with all Acuren North Slope employees and, most recently, to train our supervisory and management staff in Respectful Workplace practices.

Id. Sieben stated if Sneed encountered any situation in the future which he felt is in violation of Acuren policy or procedure, he could contact her directly. *Id.*

Sneed testified that the "demand letter" was a "total change in tone." (TR at 93-94). Sneed felt it was impractical and unrealistic to obtain a plane ticket from Michigan to Alaska in nine days. Therefore, he did not return for the April 26, 2007, rotation. *Id.*

On April 25, 2007, the night before he was scheduled to arrive, Sneed sent an e-mail to Sieben, with a copy to BP executive Bruce Williams. (RX 5). Sneed stated that he was surprised by the letter of April 16, as he thought there would be further discussions to resolve Sneed's problems with Acuren management. He said that there was supposed to be a conference call, but it never took place. Sneed continued:

> The tone of and substance of your letter did not address any of the concerns I have about harassment, intimidation and retaliation from Acuren management or the work environment and culture have changed. I told you more than once that I do not trust [A]curen management. There are hard facts and plenty of first hand experience to support my beliefs... Until these issues have been resolved and satisfactorily addressed to assure me that this will not happen again I am cautiously reluctant to return to that work environment.

Id. Sneed asked that Sieben contact him to further discuss a resolution. It is unclear whether Sieben made any further contact with Sneed at that time.

June 2007 Opportunity to Return to Work

When Sneed did not return, he began receiving calls from Talman Pizzey, the Managing Director for Acuren in Alaska at the time. (TR at 94, 319, 444). Sneed testified that during the conversations, Pizzey discussed Sneed's safety file. (TR at 95). Sneed recalled Pizzey saying that Acuren was going to "continue keeping an eye on you and watching you. We can still fire you for safety." Sneed felt that nothing was going to change, and that the harassment would continue. *Id.*

Pizzey recalled that most of his conversation with Sneed was "quite favorable." (TR at 444). He said that the conversation became a bit sour at the end, though, because Sneed stated that his prior safety violations had been fabricated. (TR at 445). According to Pizzey, he commented that safety is important to Acuren, and that upon Sneed's return, Acuren would expect Sneed to work safely and help with the safety culture. Pizzey felt that the comment annoyed Sneed. Sneed asked whether the company would admit that the safety write-ups in his file were fabricated or exaggerated. *Id.*

On May 17, 2007, Pizzey sent Sneed a letter providing him written notice that he was to return to work three weeks later, on June 7, 2007. (RX 6). The letter noted the previous failure to return to work on April 26, 2007, and Sneed's lack of communication prior to that date. Pizzey wrote:

> it is Acuren's position that unless you make yourself available and return to work for your next scheduled work rotation on Thursday, June 7, 2007 you will have officially withdrawn your employment services and we will sever your employment on the grounds of job abandonment.

Id. Pizzey described the shift and rotation that Sneed would be working as well as the training and testing that would be expected upon his return, due to the length of time that he had been away. *Id.*

Pizzey also addressed the issues raised in Sneed's original FAST concerns and the actions taken in response:

> With respect to the concerns that you raised during our discussions, I wish to state that Acuren has undertaken corrective action to reinforce the principle of the right to stop unsafe work with all Acuren North Slope employees and we've provided training to our supervisory and management staff in Respectful Workplace practices. The supervisor you were referring to in both FAST concerns is no longer working for Acuren in Alaska. I'd like to emphasize that all employees have the right to raise any concerns they may have without fear of intimidation or retaliation. These practices are in keeping with Acuren's commitment to our values of Safety, Integrity, Respect, Performance and Teamwork. We will continue to take action wherever our values and standards are not upheld and we will ensure that all Acuren personnel are equally accountable to workplace rules.
>
> We will schedule a meeting between you, our North Slope Project Manager, our HR Director, and BP Management during your first few days on the slope. At this meeting we'd like to review the actions taken by Acuren to address the FAST concerns.
>
> Should you encounter any future situation that you feel is in violation of policy or procedure, you are encouraged to bring these concerns forward so that they may be handled in accordance with Acuren's policy and with our commitment to ensuring a Respectful Workplace.

(RX 6).

Sneed did not return as requested. On June 6, 2007, Sneed sent an e-mail to Pizzey, Sieben, and Bruce Williams of BP. (RX 33; CX 6). Sneed again expressed disappointment in the tone of the correspondence to him. He stated that he wanted to return to a workplace free of harassment and intimidation, but that that Pizzey and Acuren "have reaffirmed that you have not changed." Sneed expressed concern that George Bryant had been promoted to be the most senior person in Alaska, and that his re-certification test would be "clearly under the direct influence of the person that targeted me last year." Sneed also noted the conversation during which Pizzey had told

Sneed he was a safety concern on the Slope: "your statement shows you believe the lies perpetrated against me by your management team." Sneed stated that Pizzey had not addressed these issues or Sneed's questions regarding the content and disappearance of his personnel file. Sneed concluded his e-mail as follows:

> These facts indicate to any objective person that you are not sincere when you say that you want to create an environment that is open and respectful. . . . It seems all too clear that you are looking to set me up this time so that you can re-assert the allegation that I am the problem and that you and your management team were justified in your harassment and retaliation of me over the last three years.
>
> Once again, I am willing to return to work only when Acuren fully acknowledges their conduct, admits all of their lies about me and guilt of dishonorable behavior and is sincere in implementing corrective measures to ensure this conduct is not allowed to continue. But unfortunately I see no evidence that Acuren is committed to behaving differently than they did last summer, only now you will be more careful in your retaliatory actions because you have been exposed to BP.
>
> If you truly want to improve and can find it within your soul to accept responsibility for your actions and change your lack of culture and predatorial behavior, and I am thoroughly convinced this has transpired then and only then am I willing to talk with you, otherwise you are just wasting both of our time.

Id.

At the hearing, Sneed testified that his primary reason for not returning to work was that George Bryant continued to work for Acuren and had been promoted to a position where he could terminate Sneed's employment. Sneed testified that he would not have returned while George Bryant still worked for Acuren in Alaska. (TR at 97-98). Sneed discussed his communication with Pizzey and testified that, "I pretty much left him with the idea that I wasn't coming back with George Bryant there." *Id.* On cross-examination, Sneed confirmed "the reason I didn't want to return to work because George Bryant was still there. That's the main reason." (TR at 149). Sneed expressed that sitting down with Bryant would be unproductive, and that Bryant would not change. (TR at 150).

Sneed's Termination, June 13, 2007

On June 13, 2007, Sieben sent Sneed a letter titled "Termination of Employment from Acuren." (RX 7). In the letter, Sieben explained that Acuren had attempted to return Sneed to work on two occasions, to no avail. The letter stated,

> Acuren has substantively investigated and addressed your concerns, taken appropriate corrective action, and repeatedly undertaken to have you return to work; however, you have repeatedly refused to return to the workplace. In light of his refusal to return to work, we have no alternative but to sever your employment on the grounds of job abandonment. This letter serves as notice of immediate termination of your employment.

Id.

Sieben testified that if another employee did not show up for their shift without prior notification, they would be terminated just as Sneed was. (TR at 321). Both Sieben and Pizzey testified that the decision to terminate Sneed was based solely on Sneed's job abandonment, and that the decision was not impacted by Sneed's safety record or his FAST complaints. (TR at 315, 336-37, 452). They further testified that neither Bryant nor Luker had any input in the decision. *Id.*

Sieben and Pizzey stated that they tried to address all of the issues Sneed raised, and that they did not believe that there was anything more they could have done to bring Sneed back to work. (TR at 335, 451-42). Paul Flaherty, on the other hand, felt that it was not "in [Pizzey's] heart" to correct the situation and bring Sneed back to work. (TR at 404). He testified that if Acuren was sincere in bringing Sneed back to work, Sneed would be working there today. (TR at 399).

Other Documentary Evidence

Post-hearing, Sneed submitted several letters from co-workers. (CX 8, 10-12, 18). One letter gave examples of poor management by Bryant and Luker. (CX 12). Another stated that Sneed was justified in not returning to work in the summer of 2007, based on Bryant's new management position. (CX 8). Two of the letters supported Sneed's assertions of disproportionate safety write-ups starting in 2004. (CX 8, 10). The letters also contain positive assessments of Sneed's work ethic, integrity, safety, and attention to detail. (CX 10-12, 18). Finally, several of the authors opined that if Sneed were to return to work now, his experience would be better under the company's changed management. (CX 10, 12, 18).

Sneed also submitted several documents regarding the certification of Acuren's employees and associated issues. (CX 3-5, 21-22). As those matters are not directly relevant to the issues in this case, those documents will not be summarized herein.

Discussion

Applicable Law

Pipeline Safety Improvement Act

The PSIA was enacted in 2002 to "provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities." 49 U.S.C. § 60102(a). Section 6 of the PSIA prohibits employers from discharging or discriminating against employees because they have raised issues of pipeline safety to their employer or the Federal government. 49 U.S.C. § 60129(a); 29 C.F.R. §§ 1981.100(a); 1981.102.

To obtain relief under the PSIA, the complainant must demonstrate by a preponderance of the evidence that he or she engaged in protected activity, behavior or conduct, and that the protected activity was a *contributing factor* in an unfavorable personnel action. 29 C.F.R. § 1981.109(a). Relief may not be ordered if the employer demonstrates by *clear and convincing* evidence that it would have taken the same unfavorable action in the absence of any protected activity. *Id.*

The PSIA provides a 180 day statute of limitations from the time of the alleged discrimination.

> Within 180 days after an alleged violation of any the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file . . . a complaint alleging such discrimination.

29 C.F.R. § 1981.103(d).

Environmental Whistleblower Statutes

The Toxic Substances Control Act, Solid Waste Disposal Act, Clean Air Act, and Federal Water Pollution Control Act provide federal standards for the regulation of chemical substances and mixtures, solid and hazardous waste disposal practices, the protection and improvement of the Nation's air quality, and the maintenance and restoration of the Nation's waters. 15 U.S.C. § 2622; 33 U.S.C. § 1367; 42 U.S.C. §§ 6971, 7622; 29 C.F.R. Part 24. The statutes include employee protection provisions, which

prohibit an employer from discharging or retaliating against an employee who participates in a proceeding related to an alleged violation of the statutes.

To obtain relief under one of the environmental whistleblower statutes, a complainant must demonstrate by a preponderance of the evidence that he or she engaged in protected activity and that the protected activity was a *motivating factor* in an unfavorable personnel action. 29 C.F.R. § 24.109(a). Relief may not be ordered if the respondent demonstrates by a *preponderance of the evidence* that it would have taken the same unfavorable personnel action in the absence of any protected activity. 29 C.F.R. § 24.109(b).

Under the TSCA, SWDA, CAA, and FWPCA, a complainant must file his or her complaint within 30 days of the alleged retaliation. 29 C.F.R. § 24.103(d).

Statute of Limitations

Sneed was officially terminated from his employment with Acuren on June 13, 2007. (RX 7). Twenty-nine days later, on July 12, 2007, Sneed filed a complaint of unlawful retaliation with OSHA. (ALJX 1). Sneed does not allege that he was ultimately terminated in retaliation for his protected activity, but that Acuren created such a hostile work environment that he was reasonable in failing to return to work. *Id.*

Acuren argues that Sneed's complaints of unlawful harassment and a hostile work environment are untimely under the PSIA and the environmental whistleblower statutes. (Acuren Brief at 18). Specifically, Acuren argues that the alleged harassment of Sneed by Shawn Luker and George Bryant occurred more than 180 prior to his complaint, and that Sneed alleged no harassment after August 31, 2006. Acuren concludes, "As a result, Sneed cannot assert timely claims of unlawful harassment under any of the above-mentioned statutes because he failed to file a timely complaint, and therefore the only claim at issue in this lawsuit is his allegation of unlawful termination." *Id.* at 19.

Sneed contends that Acuren intentionally removed him from his position long enough for the statute of limitations to run. (Sneed letter filed September 30, 2009, at 3).

Hostile Work Environment & the Statute of Limitations

The Supreme Court has clarified that the statute of limitations applies differently to discrete discriminatory acts, such as termination or failure to promote, versus repeated conduct in a hostile work environment claim. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002). The Court held that a claim of retaliation under a hostile work environment theory is actionable if all of the allegedly hostile acts are part

of the same unlawful practice and at least one of the acts happened within the limitations period. *Id.* at 117; *Belt v. U.S. Enrichment Corp.*, ARB No. 02-117, ALJ No. 01-ERA-19, slip op. at 9 (ARB Feb. 26, 2004).

Although an act occurring within the limitations period need not be "legally sufficient" to support a claim, it must be an act of discrimination that contributes to the hostile work environment. *See Moody v. Tennessee Valley Authority*, 91-ERA-40, 92-ERA-49 (Sec'y Apr. 26, 1995). The United States Court of Appeals for the Sixth Circuit has held, however, that "the denial of a request for relief from discrimination does not itself constitute a discriminatory act that tolls the statute of limitations." *Kovacevich v. Kent State University*, 224 F.3d 806, 829 (6th Cir. 2000); *see also EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1237 (6th Cir. 1980) ("repeated requests for further relief from a prior act of discrimination will not set the time limitations running anew").

Sneed alleges that a hostile work environment was created by Shawn Luker and George Bryant during his employment with Acuren and particularly during the months of August to October 2006. Sneed testified that he had no further contact with either Luker or Bryant after October 2006. On November 2, 2007, Sneed was asked to return to his home in Michigan on paid administrative leave. He did not communicate with any Acuren management until March 2007.

In March 2007, Sneed was contacted by Andrea Sieben and Talman Pizzey. The communication from that point centered on Sneed's possible return to work. While Sneed expressed concern that he would be subjected to continued harassment upon his return, the evidence does not reveal any acts of discrimination after Sneed left the Slope in the fall of 2006 that would have contributed to a hostile or abusive environment.

As all of the allegedly discriminatory acts occurred more than 180 days prior to Sneed's complaint, his complaint of a hostile work environment does not fall within the statute of limitations. Therefore, unless an equitable modification of the statute of limitations is appropriate, Sneed's complaint would be untimely. *See Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982).

Equitable Modification

The Administrative Review Board ("Board") has held that the limitation periods under the whistleblower statutes are subject to equitable modification, *i.e.* equitable tolling or equitable estoppel, where fairness requires. *Hill v. TVA*, 87-ERA-23, -24 (Sec'y Apr. 21 1994), *aff'd sub nom. Hill v. U.S. Dep't of Labor*, 65 F.3d 1331 (6th Cir. 1995).

Equitable tolling is relevant where an employee is ignorant of the employer's discriminatory act, or where, despite due diligence, the employee is unable to secure information to support a claim of retaliation until after the limitations period has run. *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ No. 00-CAA-9, slip op. at 10 (ARB Apr. 23, 2003); *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991).

Equitable estoppel applies in cases where an employee is aware of his or her rights as a whistleblower, but does not timely file a complaint due to his or her reasonable reliance on the employer's misleading or confusing representations or conduct. *Hyman v. KD Resources, et al*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 6 (ARB Mar. 31, 2010) (citing *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 752 (1st Cir. 1988)).

The Board recently clarified that equitable estoppel does not require an employer to have intentionally misled the employee. *Hyman*, ARB No. 09-076, slip op. at 7. "The rule does not hinge on intentional misconduct on the defendant's part. Rather, the issue is whether the defendant's conduct, innocent or not, reasonably induced the plaintiff not to file suit within the limitations period." *Id.* (*quoting McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 865-66 (5th Cir. 1993)). In *Hyman*, the complainant claimed that after his termination, the employer led him to believe that he would be returned to his former employment, that he would be financially compensated for having been wrongfully terminated, and that the company would resolve the compliance issues that he raised. *Id.* at 8. Therefore, the employee did not immediately file a complaint of unlawful retaliation. Based on these assertions, the Board found sufficient ground to apply equitable estoppel to toll the limitations period. *Id. See also Bonham v. Dresser Indus.*, 569 F.3d 187, 193 (3d Cir. 1978) (equitable estoppel applied where the employee failed to file a timely complaint for wrongful termination due to positive signals during post-termination negotiations with his employer regarding possible alternative employment with the company).

In the present case, Sneed encountered allegedly hostile treatment from his managers in the summer of 2006. Almost immediately after he filed a formal FAST concern, Sneed was sent home to Michigan with full pay while BP performed an investigation into his complaints and any resulting retaliation. By the time that the investigation was complete, both the 30-day limitations period of the environmental whistleblower statutes and the 180-day limitations period of the PSIA had run.

Based on the facts of this case, I find that Sneed reasonably believed that Acuren was taking steps to address the possibility that he was encountering a hostile work environment. I also find that by placing Sneed on administrative leave for more than six months, Acuren "reasonably induced" Sneed not to file suit within the limitations

period, while he waited for the results of the investigation. Accordingly, I find it fair and appropriate to apply the principle of equitable estoppel in this case.

End of the Tolling Period

The next relevant issue is when the tolling period ended. In March 2007, Sneed received at least two phone calls from Acuren's HR Manager, Andrea Sieben. (RX 4). On April 16, 2007, Sneed received a letter from Sieben explaining that he was to return to work on April 26, 2007. The letter stated that corrective actions had been undertaken "to reinforce the principle of the right to stop unsafe work with all Acuren North Slope employees and, most recently, to train our supervisory and management staff in Respectful Workplace practices." Sieben wrote that if Sneed encountered any situation in the future which he felt was in violation of policy or procedure, he could contact her directly. *Id.*

Sneed responded by e-mail, stating that Sieben had not addressed his concerns about "harassment, intimidation and retaliation from Acuren management or the work environment and culture have changed." (RX 5). He informed her that, "Until these issues have been resolved and satisfactorily addressed to assure me that this will not happen again I am cautiously reluctant to return to that work environment." *Id.* By April 2007, Sneed was generally aware of the steps that Acuren management had taken to correct any retaliatory or harassing atmosphere. Sneed felt, however, that the measures were insufficient to address the problem. In May 2007, the final version of the investigation report was released.

On May 17, 2007, Talman Pizzey sent a letter to Sneed stating that "It is Acuren's position that unless you make yourself available and return to work for your next scheduled work rotation on Thursday, June 7, 2007, you will have officially withdrawn your employment services and we will sever your employment on the grounds of job abandonment." (RX 6).

By May 17, 2007, Sneed was more fully aware of the steps that Acuren had taken to improve the work environment, the results of the investigation, and the consequences for his failure to return to work. Because Acuren had made clear the terms of Sneed's return to work and that he would be terminated for his failure to do so, I find that the situation was no longer progressing in a manner that would reasonably prevent Sneed from filing suit. Therefore, I find that the tolling of the limitations period ended on or before May 17, 2007.

Because Sneed's complaint was not filed until July 12, 2007, it was not filed within 30 days of the adverse action as tolled during his administrative leave.

Therefore, I find that Sneed's complaint of unlawful retaliation based on a hostile work environment is not timely under the four environmental whistleblower statutes. The complaint is timely, however, under the 180-day limitations period of the PSIA. Accordingly, I will review the merits of Sneed's hostile work environment claim under the PSIA, alone.

Protected Activity

To establish entitlement to relief under the PSIA, Sneed must first prove that he engaged in protected activity. Protected activities include: providing information to the employer or Federal government regarding a violation or alleged violation of law relating to pipeline safety; refusing to engage in any practice made unlawful under Federal law relating to pipeline safety; or participating in a proceeding related to a violation of Federal pipeline safety laws. 29 C.F.R. § 1981.102.

Good faith, internal complaints about issues of pipeline safety are also protected under the Act. *See Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993). An employee need not prove that the employer's actions actually violated the law; however, protected complaints must be grounded in "reasonably perceived violations" of the Act. *See Johnson v. Oak Ridge Operations Office*, ARB No. 97-057, ALJ Nos. 95-CAA 20, 21 and 22, at 8 (ARB Sept. 30, 1999); Procedures for Handling of Discrimination Complaints under Section 6 of the Pipeline Safety Improvement Act of 2002, 70 Fed. Reg. 17,889, 17,890-91 (Apr. 8, 2005).

Refusing to engage in a task that an employee reasonably believes is a violation of pipeline safety laws is also protected. *Rocha v. AHR Utility Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-1,-2,-3,-4, slip op. at 10-11 (ARB June 25, 2009). In *Rocha*, the Board held that an experienced employee who refused to weld a segment of corroded and rusted pipe engaged in protected activity under the PSIA. *Id.*

Activity in August 2006

In his complaint, Sneed referred to several instances of protected activity in 2006. (ALJX 1). During the summer of 2006, Sneed reported that another employee was falsifying inspection reports or "pencil whipping." On August 25, 2006, Sneed issued a stop work order to a buffing and grinding crew, based on a defect in a pipeline segment. On August 31, 2006, Sneed filed two formal FAST concerns with BP's Health Safety Environment Committee, relating to the stop work order and Acuren's general policies on matters of production versus safety.

I find that Sneed's activities in 2006 are protected under the PSIA. His concerns about fraudulent inspections and physical defects on the pipes relate to pipeline safety and implicate "reasonably perceived" violations of the PSIA. Sneed's decision to stop buffing and grinding work on the area surrounding the possible defect is also protected as a reasonable refusal to violate the PSIA.

Vehicle Incident, 2004

Much of the evidence in this claim pertains to the beginning of Sneed's employment with Acuren in 2004. During his first week on the job, Sneed was terminated for self-reporting a minor accident where he backed a pickup truck into another vehicle. Sneed filed a complaint with an external safety hotline and was later reinstated. He argues frequently that he was harassed and retaliated against after his reinstatement.

Sneed's decision to report the accident and his subsequent complaint to the external safety hotline are not protected activities under the PSIA. 49 U.S.C. § 60129. Workplace safety complaints are not protected under the PSIA unless they relate to an alleged violation of Federal law relating to pipeline safety. *See Carpenter v. Bishop Well Services Corp.*, ARB No. 07-060, ALJ No. 2006-ERA-35 (ARB Sept. 16, 2009) (finding that complaints about high-pressure hoses and trucks without handrails were not protected under the PSIA); *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, slip op. at 7 (ARB June 30, 2004) (The Administrative Review Board has "long held [that] safety and health issues that pertain only to a complainant's workplace are not covered under whistleblower statutes.").

Sneed can only obtain relief for workplace harassment that is directly related to activity protected under the PSIA. Therefore, the treatment of Sneed by his supervisors after his reinstatement in 2004 and prior to his protected activity in 2006 is not actionable.

<u>Retaliation Due to Protected Activity</u>

Sneed alleges that in response to his protected activity in 2006, Acuren retaliated against him by creating a hostile work environment. (ALJX 1). Sneed also contends that he did not return to work in June 2007 because of his employer's refusal to provide adequate protections for him. His complaint specifically states that Acuren and BP unlawfully retaliated against Sneed "by subjecting [him] to a hostile work environment because of his protected activity and by causing his discharge while refusing to make adequate protections to the work environment." *Id.*

To establish that he was subjected to a hostile work environment, Sneed must prove, by a preponderance of the evidence, that:

1. He engaged in protected activity;

2. He suffered intentional harassment related to that activity;

3. The harassment was sufficiently severe or pervasive as to alter the conditions of employment and to create an abusive work environment; and

4. The harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant.

See Berkman v. U.S. Coast Guard Academy, ARB No. 98-056, ALJ Nos. 97-CAA-2, -9, slip op. at 16-17, 21-22 (ARB Feb. 29, 2000); *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (ARB Nov. 13, 2002); *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004).

In certain cases where workplace hostility is particularly severe, an employee can prevail on the theory of constructive discharge. To establish constructive discharge, the employee must establish that "the abusive working environment became so intolerable that . . . resignation qualified as a fitting response." *Overall v. Tennessee Valley Authority*, ARB No. 04-073, ALJ No. 99-ERA-25, slip op. at 22 (ALJ July 16, 2007) (quoting *Suders*, 542 U.S. at 134)). *See also Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

A company is not always liable for the harassing conduct of its employees. The company will be liable if it "knew, or in the exercise of reasonable care should have known, of the harassment and failed to take prompt remedial action." *Overall*, ARB No. 04-073, slip op. at 19 (citing *Sasse v. Office of the U.S. Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-7, slip op. at 35 (ARB Jan. 30, 2004); *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 97-ERA-14, slip op. at 48 (ARB Nov. 13, 2002)). To avoid liability, the company must take both preventative and remedial measures to address the work place harassment. Once an employer knows of the harassment, the issue becomes whether it addressed the problem adequately and effectively. *Id.*

Sneed has established that he engaged in protected activity. The relevant issues are: whether Sneed was subjected to intentional harassment related to that activity; whether the harassment was severe and pervasive; whether it detrimentally affected him; and whether Acuren took appropriate remedial and preventative action.

Harassment Due to Protected Activity

In his complaint and during testimony, Sneed gave several examples of behavior that he considers harassing retaliation for his whistleblower activities. In his complaint, Sneed alleged that he was retaliated against by the placement of unfair criticisms of him in his personnel file, that his direct supervisor, Shawn Luker, berated Sneed for stopping the job on August 25, 2006, and that Luker tried to have Sneed fired for the water-jumping incident. During his testimony, Sneed also discussed George Bryant's refusal to give Sneed a copy of his personnel file.

Through their investigation, Flaherty and Garde concluded that Sneed was harassed by his supervisors, including Luker and Bryant. There is evidence that some of the harassment was related to his FAST concerns; however, the majority of the evidence regarding petty write-ups and retaliatory behavior involves incidents that occurred *prior* to the protected activity at issue in this claim. Sneed repeatedly claims that his supervisors and managers at Acuren harassed him "for three years," since he was reinstated in 2004. (TR at 58, 60, 96; RX 6; Sneed Brief at 4; Sneed letter filed September 30, 2009, at 2). Flaherty and Garde also discussed harassment and ridicule that happened from 2004 through 2006, prior to the stop work order or FAST concerns.

While much of the conduct was not related to the protected activity in this claim, Bryant admits that his decision to terminate Sneed was made after Sneed stopped the job on August 25, 2006, and raised FAST concerns with the Safety Advisor, Bill Oxford. Therefore, I find that some of the retaliatory conduct is related to Sneed's protected activity in the summer of 2006.

Severe & Pervasive

The next issue is whether the harassment was severe and pervasive. In evaluating whether acts are sufficiently severe and pervasive to create a hostile work environment, courts look to the following factors: the frequency and severity of the discriminatory conduct; whether it was physically threatening or humiliating; whether it was a mere offensive utterance; and whether it unreasonably interfered with an employee's work performance. *Berkman*, ARB No. 98-056, slip op. at 17-18 (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)). Not all negative interactions with management are actionable under the theory of a hostile work environment. "Discourtesy or rudeness should not be confused with harassment; nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing, actionable." *Belt v. U.S. Enrichment Corp.*, ARB No. 02-117, ALJ No. 01-ERA-19, slip op. at 8 (ARB Feb. 26, 2004) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)).

Sneed had limited interaction with Luker and Bryant after his complaints about pipeline safety. Sneed testified that he had only one meeting with Luker after Sneed's decision to stop the work of the buffing and grinding crew. That interaction involved Sneed's jumping over a body of standing water and Luker's attempts to have Sneed terminated as a result. Similarly, Sneed had very limited interaction with George Bryant after the protected activity. Due to the limited contact, Bryant and Luker had little opportunity to create a "physically threatening or humiliating" environment or interfere with Sneed's work performance after he engaged in protected activity.

Remedial Actions by Acuren

Even if Sneed could establish that as a result of his protected activity, his supervisors created an abusive work environment that detrimentally affected him, Acuren may nevertheless avoid liability if it proves that it addressed the harassment with remedial and preventative action.

The water-jumping incident happened on the last day of a three-week rotation. When Sneed returned to the North Slope, Luker was not on duty, and Sneed was soon assigned to a work location where he would encounter neither Luker nor Bryant. Moreover, Acuren removed Sneed from any harassment at all when it placed him on paid administrative leave while an independent investigation took place. A week after Sneed's FAST concern was filed, a letter was sent to all Acuren workers from the BPXA President, Steve Marshall, clarifying that BP and Acuren want employees to stop any job that appears unsafe, and that the employees should feel free to express concerns without fear of retaliation. After the investigation findings were shared with Acuren, the company began developing training on respect in the workplace, and immediately delivered an interim one-day training session in Alaska.

Moreover, at the time of Sneed's potential return, Bryant and Luker were no longer working on the North Slope. Although both job changes were apparently unrelated to their conduct toward Sneed, neither individual was in a position to have direct contact with Sneed during his future work. Finally, in case of future harassment or retaliation, both Andrea Sieben and Talman Pizzey informed Sneed that he could contact them directly with any problems.

I find that Acuren took reasonable and appropriate steps to address any harassment to which Sneed had been subjected. I also find that Acuren was prepared to take additional action on Sneed's return, including a meeting with Sieben and Pizzey on Sneed's first day, and future in-depth training on respectful workplace practices for all employees.

It is impossible to know whether Acuren's steps would have been sufficient to end the disparate treatment of Sneed had he returned to the North Slope. However, because Acuren took Sneed's complaints of harassment seriously and took steps to improve the work environment for his return, I find that Acuren's efforts were sufficient to relieve the company of liability for a hostile work environment.

Constructive Discharge & Wrongful Termination

To establish constructive discharge, the employee must establish that "the abusive working environment became so intolerable that . . . resignation qualified as a fitting response." *Overall v. Tennessee Valley Authority*, ARB No. 04-073, ALJ No. 99-ERA-25, slip op. at 22 (ALJ July 16, 2007) (quoting *Suders*, 542 U.S. at 134)). *See also Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

The Board has held that where an employee who was placed on paid leave later set forth an ultimatum for his return to work, the employer justifiably terminated the employee based on job abandonment. *Smith v. Western Sales & Testing*, ARB No. 02-080, 2001-CAA-17 (ARB Mar. 31, 2004). In *Smith*, an employee engaged in protected activity and was placed on paid leave for a "cooling off period."[10] During a meeting regarding his return, Smith demanded that the terms of his employment be put in writing and that he be provided a written non-retaliation guarantee as conditions for his return to work. The ALJ found that the company properly construed Smith's position as an abandonment of his interest in the employment in the absence of his requested written guarantees. The Board agreed and affirmed the ALJ's determination that Smith's employer terminated his employment for legitimate business reasons. *Id.*

In his letter of June 7, 2007, Sneed stated that he would be willing to return to work "only when Acuren fully acknowledges their conduct, admits all of their lies about me and guilt of dishonorable behavior and is sincere in implementing corrective measures to ensure this conduct is not allowed to continue. . . . otherwise you are just wasting both of our time." At the hearing, Sneed testified that he would not return as long as George Bryant was still working for Acuren in a position where he had the ability to terminate Sneed's employment.

Given that Acuren took credible steps to facilitate Sneed's return to work in an improved environment, I find that Sneed's refusal to return was unreasonable. Conditioning his return on the termination of Bryant's employment was an extreme

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[10] The Board found that placing Smith on a "cooling off" period was retaliatory; however, Smith was paid his full salary and gave no other evidence of damages that resulted from the suspension. *Smith*, ARB No. 02-080, slip op. at 9.

request, and lends support to Acuren's argument that there was nothing more it could do to return Sneed to work. Accordingly, I find that Sneed was not constructively discharged, but that he abandoned his employment and was terminated as a direct result.

Blacklisting

In addition to the allegations in his complaint, Sneed alleged at the hearing and in his brief that he was blacklisted by Acuren. At the hearing, Sneed noted that many Acuren employees eventually work for BP. (TR at 102-03). He stated, "I'm not saying I would have gotten a job with [BP]. I'm just saying that [Acuren] pretty well destroyed any chances." (TR at 103). In his brief, Sneed stated that "The lies Acuren management told BP and others in the Alaskan inspection community blacklisted me from any further job opportunities at Prudhoe Bay." (Sneed Brief at 4). Sneed explained that jobs are obtained through word of mouth and stated, "Everyone that I knew in this employer group knew that I was a whistleblower and after this not one contact would even mention potential jobs to me." *Id.*

Sneed has presented no evidence to support his allegations. He has not shown any attempts to obtain employment from BP or any other employer in the area. Moreover, Sneed has provided no proof that the lack of opportunities was a result of Acuren's intentional efforts to blacklist Sneed from future employment. At the hearing, Sneed admitted that he has no evidence that Acuren spoke with any potential employers to keep Sneed from obtaining a job. (TR at 111-12). Accordingly, I find that he has not established a case of retaliatory blacklisting.

ORDER

In conclusion, Sneed has established that he engaged in protected activity during his employment with Acuren in 2006. However, Sneed has not proven that Acuren is liable for creating a hostile work environment, that his termination was a result of his protected activity, or that the company blacklisted him from future employment. Therefore,

IT IS HEREBY ORDERED that the complaint of Stuart R. Sneed is **DENIED**.

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LARRY S. MERCK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS:

To appeal, you must file a Petition for Review with the Administrative Review Board within 10 business days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. §§ 24.110(a)-(b); 1981.109(c); 1981.110(a)-(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. Any objections to specific findings or conclusions of the administrative law judge that are not raised in the petition will generally be considered waived. Once an appeal is filed, inquiries and correspondence should be directed to the Board.

At the time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If 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. §§ 24.110(b), 1981.109(c), 1981.110(b). Even if you do file a petition, the administrative law judge's decision will become the final order of the Secretary of Labor unless the Board issues an order within 30 days after the petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 24.110(b), 1981.110(b).