

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 24 June 2016

CASE NO.: 2015-WPC-00002

In the Matter of:

DAVID A. RICHARDS, JR.,
Complainant,

v.

TRADING PLACES INTERNATIONAL,
Respondent.

Before:

Colleen A. Geraghty, Administrative Law Judge

Appearances:

David A. Richards, Jr., *pro se*

Laurie J. Rust, Esq., Gordon & Rees, LLP, Denver, CO, for the Respondent

DECISION AND ORDER DISMISSING COMPLAINT

I. STATEMENT OF THE CASE

The instant case has been brought under the employee protection (whistleblower) provisions of the Solid Waste Disposal Act ("SWD"), 42 U.S.C. § 6971, and the Federal Water Pollution Control Act ("WPC"), 33 U.S.C. § 1367, and the procedural regulations found at 29 C.F.R. Part 24 (2013). David A. Richards ("Complainant") filed his whistleblower complaint against Trading Places International ("Respondent") under the WPC and SWD on August 27, 2012. On March 17, 2015, the Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA"), acting as agent for the Secretary of Labor ("Secretary"), issued Findings dismissing Complainant's claim. On May 26, 2015, Complainant filed objections to the Secretary's preliminary order with the Office of Administrative Law Judges ("OALJ") pursuant to 29 C.F.R. § 24.106.

A hearing was held before the undersigned administrative law judge on February 9, 2016 in Denver, CO. At the hearing, Joint Exhibits (“JX”) 1-5, Complainant’s Exhibits (“CX”) 1-3, and Respondent’s Exhibits (“RX”) 1-17 were admitted. Hearing Transcript (“TR”) 8-10, 167, 173, 180. Testimony was provided by Complainant, Daniel Hurd, and Scott Pacer. The record closed at the end of the hearing. After the hearing, I issued a Briefing Order, allowing the parties to file post-hearing briefs by April 13, 2016. I subsequently extended the deadline to April 20, 2016. Respondent’s brief (“Resp. Br.”) was timely filed on April 20, 2016 and Complainant’s brief (“Cl. Br.”) was timely filed on April 18, 2016.

II. STIPULATIONS AND ISSUES PRESENTED

The parties stipulated to the following facts in this proceeding: (1) Respondent hired Complainant as a maintenance technician on July 3, 2012; (2) Complainant’s immediate supervisor was maintenance supervisor Mr. Hurd; (3) Mr. Pacer was the General Manager of the resort; (4) Respondent terminated Complainant’s employment on August 3, 2012; (5) Maintenance employees were subject to work rules as set forth in the Employee Handbook and the Maintenance Manual; (6) Managers enforced those work rules in writing and by communicating with radio; (7) Complainant filed a Safety and Health Complaint with the Hawaii Occupational Safety and Health Division (“HIOSH”) on August 9, 2012; (8) Complainant filed a Safety and Health Complaint with OSHA on August 27, 2012; (9) HIOSH issued a Notice of Violation and Penalty to Respondent on December 5, 2012. TR 11-13.

The issues for adjudication are whether Complainant can establish by a preponderance of the evidence that he engaged in protected activity that was a motivating factor to the adverse employment action taken against him, and if he were to establish such a connection, whether Respondent can establish by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.

III. BACKGROUND

Complainant worked as a maintenance technician for Respondent on the Hanalei Bay Resort (“the resort”) in Kauai, Hawaii. RX 6; RX 17. Respondent managed the resort. *See* TR 160. Complainant described his job as a maintenance technician as involving “simply home repair type work,” such as finding a lost remote control or fixing a toilet that would not flush. *See* TR 20. He worked on the day shift (8am to 3 or 4pm) his first two weeks and the evening shift (1pm to 9pm) his second two weeks. TR 20-21. He was the only one scheduled to work the night shift. TR 24. He received assignments each day by radio. TR 21.

The first two weeks for new employees was a training period, during which maintenance technicians were sent out with other maintenance technicians who trained them. TR 163-164, 228. The first ninety days of employment was a probationary period. TR 163. According to Mr. Hurd, Complainant’s supervisor, the purpose of the probationary period was to “make sure that

we're a good fit for him and he's a good fit for us. That, you know, he can be counted on to do his job assignments and be a good person towards the guests." TR 163.

Complainant received an employee handbook setting forth Respondent's policies and procedures.¹ JX 1; RX 3; TR 54-55. The handbook provides that "All employees have the responsibility to immediately report the existence of any hazardous condition or practice to their supervisor or any member of management." JX 1 at 39. The employer's Attendance and Punctuality policy, contained within the employee handbook, requires, "If prior arrangements have not been made, an employee must discuss an absence or inability to be at work on time directly with their Supervisor or the General Manager no later than two (2) hours before their scheduled starting time on each day such situations occur." JX 1 at 27. Claimant was also provided a maintenance manual, which set forth additional expectations for employees. TR 161-162. The maintenance manual provides, inter alia, "whenever you do work in a unit make certain you do a complete and professional job and double check to make sure you have removed all old parts, trash, tools and have cleaned up the work area to the exact appearance it was before you started. Never leave a call unfinished or try passing it off to someone else, this will not be tolerated." RX 7 at 2.

Respondent's employee handbook includes a Counseling and Discipline policy, which provides that "Depending on the circumstances, disciplinary procedure generally includes verbal and written corrective disciplinary warnings. If the problem or problems are not corrected a final disciplinary warning may be provided and, ultimately, termination of employment can be expected." JX 1 at 38-39. Mr. Hurd explained that a verbal warning is the first step in the progressive discipline system. TR 165. The reason for a verbal warning is "you're hoping that he's learned and the next time out there will be a better result." TR 166-167.

Complainant testified that during his one month of employment he made several complaints to his supervisors about various occupational safety and health problems. TR 29-31. Some of these complaints related to electrical and scaffolding problems.² See TR 29-31. He also made complaints related to "discrimination and racial epithets and things like that. I thought some kind of multicultural training would work out" and the need for an "ADA bathroom." TR 30-31. He is "not really sure if [he] told Mr. Hurd that [he] was going to OSHA or HIOSH," it was never his intention to "write a long OSHA complaint and send it in while I was still employed," and he "never told Mr. Pacer that [he] was planning on writing [an] OSHA complaint." TR 41-42. He "was told if [he] wrote anything down [he] would get fired." TR 31. He stated that the complaints he made in writing were destroyed. TR 31. He only made complaints related to medical waste and sewage verbally; he "did not write those down." TR 31.

¹ Complainant testified that he did not receive a copy of the handbook until approximately July 29. However, he also admitted that he signed the handbook on July 3 and stated that he was handed a packet of papers, which he signed but did not read because he did not have the time. TR 54-57.

² Complainant testified that scaffolding came down on his first day of work. TR 24.

Mr. Hurd testified that while employees brought safety concerns, such as a “light broken somewhere on the path,” to his attention, no one complained of health or safety or hazardous conditions during Complainant’s employment. TR 150. Complainant never raised any concerns regarding safety or health with him during his employment nor was he aware of any such complaints. TR 148, 182. The only issue Complainant made complaints about pertained to a dispute between him and another employee, Ronald Jiminez:

Well, they were working together one night and they had a disagreement over how they were going to proceed with the call and what the remedy was. And Ronald, being as Ronald was in charge and [Complainant] was still in training, you know, Ronald wanted to take care of it his way, which turned out to be the right way to do it. So, [Complainant] was not very happy with that and he gave Ronald a hard time and also said some racial things toward Ronald.

TR 183-184. Complainant said about Mr. Jiminez “That’s how Filipinos are,” which Mr. Hurd felt was “very racial.” TR 184. Mr. Hurd did not discipline Complainant for the comment but “mentioned to him, that, you know, it’s not appreciated and, you know, something I’m not going to tolerate.” TR 185. Mr. Pacer testified that Complainant did not make any workplace safety or health complaints during his employment that he is aware of; as far he knows, “there was nothing -- there was no safety issues, whatsoever, everything was brought up after” Complainant was terminated. TR 190, 232-234.

Complainant testified that on July 14, 2012 he complained to supervisors about improper disposal of medical waste. A few weeks after he started working for Respondent, he noticed medical needles (“sharps”) in the garbage dumpster while taking out the trash. TR 25. He was concerned that employees compacting garbage from inside the dumpster could get stabbed by sharps. TR 26-27. He requested a meeting with Mr. Hurd to discuss the issue but Mr. Hurd “didn’t really want to deal with it. So, eventually, he set up a meeting with the assistant manager, Jim Braman.”³ TR 25. In a meeting with Mr. Braman in the maintenance office, Complainant raised the issue and the need for a safety plan and sharps containers. TR 25-26. Mr. Braman responded to Complainant’s concerns, stating “This isn’t Princeville Resort, this is the Hanalei Bay Resort.” TR 26. Complainant did not know what Mr. Braman meant by this, so he “just went about my job.” TR 26.

Mr. Hurd testified the resort had three dumpsters: two for trash and one for cardboard. TR 151, 158. Employees did not enter the trash dumpster but did enter the cardboard dumpster. TR 151. Syringes found in a room or in the trash are taken in plastic containers by housekeeping attendants to housekeeping for disposal. TR 151-152. They had the plastic containers when Complainant was employed by Respondent. TR 152. Complainant never made a complaint to him about the lack of a sharps disposal container. TR 182-183. Asked by Complainant if he was the only person who has filed a complaint about medical waste in the dumpster and needles, Mr. Hurd responded, “Well, what I’m trying to say . . . is you did not do that when you were here

³ Mr. Hurd testified that Mr. Braman is the Director of Daily Operations. TR 181.

working at the resort. You never made any kind of a commitment like that. But then, after you left, now in the past four years, you've done it repeatedly, and each one gets wilder and wilder." TR 157. Mr. Hurd testified that if sharps were improperly disposed, he would take prompt action to remedy it. *See* TR 183. Mr. Pacer testified that sharps containers were in place before he started working at Hanalei Bay Resort and were located in housekeeping. TR 210-211. All employees were trained to properly dispose of medical waste. TR 211.

On July 23, 2012, Mr. Hurd issued Complainant a warning for failing to finish installing a television in a hotel unit and leaving the old television and box in the unit. JX 2; TR 164-165. Mr. Hurd drafted a document titled "Verbal Warning," on which he described Complainant's policy violation and wrote "stressed to [Complainant] the importance of finishing jobs and removing old parts, tools, etc out of unit and leaving unit as you found it. Plus if you don't finish tell your manager." JX 2; TR 164. Mr. Hurd further wrote, "it is imperative to complete jobs to the expectations of our guests, nothing less is acceptable" and "Seek help in jobs if needed." *Id.* Mr. Pacer testified that he saw the warning prior to Mr. Hurd's issuing it. TR 228. Mr. Hurd testified that he discussed this warning with Complainant the next morning in his office, which is "why it's a verbal warning," and provided Complainant a copy of the warning. TR 165-166. Mr. Hurd signed the bottom of the document. JX 2. The document does not have a space for the employee's signature but does have a section for employee comments. JX 2. Complainant did not sign the document or write anything in the comments section. JX 2.

Mr. Hurd testified that his use of a verbal warning is consistent with Respondent's policy and he has disciplined other employees for the same or similar conduct; it "happens quite often." TR 166. He hoped that Complainant would learn from the warning. TR 166-167. Mr. Pacer testified that the verbal warning was appropriate for this type of infraction and is consistent with the disciplinary actions meted out to other employees for similar infractions. TR 229.

Complainant testified that he does not remember ever installing a new TV, failing to finish the job, and leaving the box in the unit. TR 35-36. He "pretty much" always finished the jobs he was assigned. TR 62. As far as he can tell, he followed all the employer's rules throughout his employment with Respondent. TR 62. He also stated that he did not receive a verbal warning on July 23, 2012. TR 35-36. He does remember Mr. Hurd "standing in the parking lot one day, saying that he needed someone to blame. And that's all I remember. I didn't know what he was going to do with it." TR 35. Based on what he observed, "it kind of looked like, from what I saw, if something happened, they would write down what happened and leave the name portion blank. When someone filed a safety complaint or had you know, some kind of grievance, they would just write the person's name there." TR 35. Mr. Hurd denied that Complainant was written up because he needed someone to blame and that he would write down a complaint, leave the name blank, and after an employee made a workplace safety and health complaint, fill in the name of the employee who made the complaint. TR 185-186.

Complainant testified that on July 25, 2012 he told Mr. Hurd, over the phone, that he would be out on July 27, 2012 for a doctor's appointment.⁴ TR 73, 91-92. During this conversation, he also made occupational safety and health complaints to Mr. Hurd. TR 91-92. He "let [Mr. Hurd] know that there was a lot of things wrong. And trying to solve the problem sometimes isn't about pointing out every single problem. But hiring an electrician or getting a sharps container, or something like that, would be the solution." TR 93. He told Mr. Hurd that he did not like getting inside the dumpster and "kind of told him that I wasn't going to be doing that. And I also told him . . . that Ron, one of the guys that was working there, was making – he was swearing at me and he was saying that I thought was inappropriate." TR 93.

On July 26, 2012 Complainant called off to work one hour prior to the start of his shift. TR 73-74. Mr. Hurd issued Complainant a Performance Coaching Report dated July 26, 2012 for failing to call off at least two hours before he was scheduled to work as required by the employer's policy. TR 168. Mr. Hurd wrote on the report that Complainant called off at 12:00pm and was supposed to be at work at 1pm and "this must be corrected right away, with small crew and David on night shift, it is hard to find someone to cover the shift." JX 3. He has disciplined another employee for failing to call in two hours before their shift. TR 170. Mr. Hurd showed the Performance Coaching Report to Mr. Pacer prior to issuing it. TR 229.

Complainant testified that he provided Mr. Hurd with a doctor's note upon returning to work. TR 37. The doctor's note, dated July 27, 2012, states "Please excuse [Complainant] from work on 7/26/12 for medical reasons. He was seen today in clinic and treated." RX 9. Complainant testified that he also "let [Mr. Hurd] know that there were a lot of dangerous conditions, and I thought we could work together to hire someone or get someone onboard that could solve these problems." TR 41. He told Mr. Hurd that he mentioned some of the dangers and hazardous conditions to his doctor. TR 41. In progress notes dated July 27, 2012, Dr. Charles A. Rogers notes that Complainant has job stress, says "Supervision either do not know and/or care about following OSHA regulations for safety" and his "boss likes to put people at risk." CX 2. Dr. Rogers further notes that Complainant stated a worker without safety ropes has been shocked different times. *Id.*

Mr. Hurd testified that Complainant's bringing a note indicating he was at the doctor's office on July 27 does not excuse his failure to timely call off on July 26. TR 169. Mr. Pacer testified that notwithstanding the doctor's note excusing Complainant's absence on July 26, the "Write-up is more for the calling off, not calling off in the allotted time-frame." TR 196-197.

⁴ Earlier at the hearing, Complainant testified that he called Mr. Hurd to tell him about the July 27, 2012 doctor's appointment on July 26, 2012. TR 37-38. He testified that on July 26, 2012 he notified Mr. Hurd over the phone that he had a doctor's appointment the next day and would not be coming in to work. TR 37-38. He further testified that Mr. Hurd instructed Complainant to call him the next day, but Complainant said, "I'm telling you now. So, I kind of just disregarded that." TR 37. Although he did fail to call off at least two hours prior to the start of his shift on July 26, "the way I saw it was I called, I let him know a day ahead of time." TR 38.

Complainant and Mr. Hurd had a meeting to discuss the Performance Coaching Report on July 29, 2012. TR 98, 169-170. Complainant signed the Performance Coaching Report and wrote, in a section titled "Employee comments," "will read the employee handbook. I was sick at the time and woke up and called." TR 169-170; JX 3. Complainant testified that he wrote on the back of the Performance Coaching Report that there were numerous OSHA violations, but he did not specify what they were. TR 31. He explained that he was thinking, "rather than, you know, specifying each and every problem that they had," he was thinking of "hiring an electrician" and "buying a sharps container to solve the problem, or hiring a general contractor to come in and sort of write down everything, so that we could have, you know, some game plan of how to get all this done." TR 31-32. Mr. Hurd testified Complainant did not write anything on the back of the report regarding OSHA violations and did not make any complaints regarding workplace safety or health during their meeting to discuss the Performance Coaching Report. TR 170.

Complainant testified that, around July 28 or 29, 2012, a hotel guest pointed out to him brown liquid flowing out of a force main down a hill. The liquid flowed "sputtering and trickily" all the way down into the parking lot "[s]o, as people were driving by or walking by, they were in contact with it." The liquid had tiny bits of toilet paper in it and smelled like sewage. Complainant explained, "it rained for about, I'd say, three or four days, so when that happens the sewage treatment plant gets overwhelmed and they start pumping. And it just ends up smelling really bad." Complainant brought the hotel guest to Mr. Pacer so she could tell Mr. Pacer about the sewage. TR 27-29. Complainant stated his manager later came to him and said "There isn't a problem and left it at that." TR 27.

Mr. Hurd denied that there was ever any sewage in the parking lot and maintained that no one has ever complained of brown water or toilet paper coming out of manholes at the resort. TR 145, 154. If there were raw sewage in the parking lot, "That would be a huge deal," as a licensed plumber, he "would be all over it, you know, trying to correct the problem." TR 182. It would have been logged at the front desk. TR 191. Mr. Pacer testified that Complainant never complained to him about brown liquid with bits of toilet paper in it draining towards the parking lot nor is he aware of this situation occurring during the time of his employment. TR 233.

Mr. Hurd issued Complainant a second Performance Coaching Report dated July 30, 2012 and signed it on July 31, 2012. TR 174; JX 4. Complainant went to a room to replace the battery in the smoke detector, did not take the battery or ladder with him, told the guest that he would return and fix it, and never returned. This was a violation of Respondent's policy because "there was no reason, whatsoever, that, you know, [Complainant] couldn't have took care of this, it's a real simple thing, you know, it's a five minute gig." TR 176-177. If an employee needs to complete a task at the end of the shift "You should go ahead and take care of it and if you have to stay a little bit overtime, you do." TR 177-178. Mr. Hurd wrote on the second Performance Coaching Report, "This is a question of lack of duty and unwillingness to finish a call. No excuses" and "this can never happen again if David intends to work here." JX 4. He explained that he wrote "this can't happen again" because Complainant had just been disciplined for a similar infraction a week earlier, adding "if I have no confidence that he can go in there, then I

knew he wasn't going to – this was probably going to be his last issue.” TR 178. He considered this infraction the last straw. TR 178. Use of another written warning for this infraction is consistent with Respondent's policy. TR 178. He has disciplined another employee for the same or similar conduct. TR 178.

Mr. Pacer testified that Mr. Hurd showed him the second Performance Coaching Report before issuing it to Complainant. TR 230. Mr. Hurd testified that he met with Complainant to discuss the incident. TR 178. Complainant did not make any complaint of workplace health or safety issues during the meeting. TR 178. Complainant did not sign the second Performance Coaching Report. JX 4. Mr. Hurd testified that employees, from time to time, refuse to sign counseling reports; if this occurs, “We usually then will just bring in a second observer.” TR 173. There is a signature and the date July 31, 2012 above “Witness (should employee refuse to sign)” on the document. TR 177; JX 4. Mr. Pacer testified that when Mr. Braman and Mr. Hurd went over the report with Complainant, Mr. Braman signed the document because, with Performance Coaching Reports, “you should have a witness handy with you, just so that way there's no he said/she said.” TR 230-231. Mr. Braman “probably” signed the document because Complainant refused to sign but he does not have “exact recollection on that.” TR 231.

Complainant testified that he was never given the second Performance Coaching Report nor did he have a discussion with Mr. Hurd about it. TR 82, 179. He also testified that he left without fixing the smoke detector because his shift was over and he was not authorized overtime. TR 79-80, 83-84. He did not leave a note in the handwritten log on a clipboard located in the office used by one shift to communicate with the next regarding repairs that needed to be completed. *See* TR 33-34; 84-85. However, he did let the front desk know that the task needed to be completed. TR 84. He admitted that a guest would not be very happy if there is a chirping smoke detector left on overnight. TR 81.

Complainant testified that on August 2, 2012, the day before he was terminated, he wrote in the handwritten log there were cracks in the catwalk. TR 33-35.

Complainant was terminated on August 3, 2012. Mr. Hurd testified that the decision to terminate Complainant was made by him, Mr. Pacer and Mr. Braman. TR 180-181. Mr. Hurd explained that they terminated Complainant because he had “three write-ups in that short a period of time, he's still on his probationary period, he's not getting better. We just felt like it was time to move on.” TR 181. Claimant “was just not very good as a maintenance person. He didn't take it seriously. He never followed through, he left things undone. You know, for all the other jobs or things that he's brought up, basically this is a matter of he just did not cut it as a maintenance man.” TR 163. The decision to terminate Complainant had nothing to do with any workplace health or safety complaint. TR 181.

Mr. Pacer testified that the decision to terminate Complainant “went through . . . Dan, Jim, me and then up to my boss, Ann Baron, who ultimately was the final decider.” TR 231-232. Mr. Pacer recommended Complainant's termination because “in the 90 days we'd had write-ups for these things right here, and we just -- we didn't see it as a fit.” TR 232. Mr. Pacer explained

that there was a delay between July 31, 2012, the date of Complainant's second Performance Coaching Report, and August 3, 2012, the date of Complainant's termination, because they were waiting for Complainant's final paycheck to be sent from Respondent's home office in California before they terminated Complainant. TR 232-233. Ann Baron signed Complainant's Employee Termination Report, dated August 3, 2012, which lists unsatisfactory job performance as the reason for termination. RX 13.

Mr. Hurd testified that he has disciplined employees for "Being late for work, not showing up for work, doing sub-par jobs, not finishing things that they were assigned to do, not wearing a proper uniform, not having a name tag, those are a few of the things," and he has terminated employees for these types of incidents "probably about 15 times." TR 156. Of these 15 employees, none reported hazardous conditions to him or safety concerns, including medical waste in the dumpster and sewage coming out of the force main in front of the parking lot. TR 156-157.

On the day he was terminated, Complainant had a meeting with Mr. Hurd and Mr. Braman. TR 42. Mr. Hurd testified that, in the termination meeting, he showed Complainant the two Performance Coaching Reports and the verbal warning and told him "it wasn't working." TR 181. Complainant did not complain of any occupational safety and health hazards during the termination meeting. TR 182.

According to Complainant, at the termination meeting, Mr. Braman had, in his hand, the second Performance Coaching Report, on the back of which Complainant had written about OSHA violations. *See* TR 42-43. In addition to telling Complainant he was terminated, Mr. Braman and Mr. Hurd asked Complainant if he had filed an occupational safety and health complaint yet. TR 43. Complainant told them that he had not yet filed a complaint but had taken some notes. TR 43.

Complainant testified that he did not find out about the three warnings he was issued until the OSHA investigation in October or November 2012. TR 36. After receiving the first Performance Coaching Report for failing to timely call off, Mr. Braman told him that "everything was fine, don't worry about it." TR 39. It was not until he "was on the phone with the OSHA investigator that it was an issue." TR 39. Asked by Respondent's counsel if Mr. Hurd, Mr. Pacer or Mr. Braman ever told him they were not pleased with his work, Complainant responded, "No. No, Dan never really said anything. I think the only thing that Dan was upset about was that I was raising some safety problems, I brought some issues up and was going over his head I think. But he wasn't happy with the fact that I was working in the evening shift." TR 39. The only concern Mr. Hurd expressed to him regarding rule violations or displeasure with job performance related to the failure to call off at least two hours before the start of his shift. *See* TR 40.

After he was terminated, Complainant filed a Safety and health complaint and discrimination ("HIOSH complaint") with HIOSH on August 9, 2012. RX 15. He did not mention improper disposal of sharps in the HIOSH complaint. TR 88. On August 27, 2012

Complainant filed a complaint with the OSHA. RX 16. There is no reference to sharps containers in the OSHA complaint but Complainant did refer to the absence of personal protective equipment. TR 101-102.

Subsequently, HIOSH conducted an inspection of the worksite and, on December 5, 2012, issued Respondent a Citation and Notification of Penalty for a “Serious” violation of a regulation requiring proper disposal of sharps because: “Contaminated sharps handled by housekeeping employees were placed in empty plastic bottles and not discarded into appropriate containers (ie. Approved sharps containers that are closable, puncture resistant, leakproof, and labeled or color coded).” CX 3. HIOSH also issued a citation for a “Serious” violation of a regulation requiring that employees who decline to accept hepatitis B vaccination sign a declination form. *Id.* Mr. Hurd testified that after receiving the citations Respondent immediately fixed the problems identified in the inspection. *See* TR 185. Respondent no longer manages the Hanalei Bay Resort. TR 160.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under the WPC and the SWD

No person shall fire, or in any other way discrimination against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter [or under any applicable implementation plan], or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter [or of any applicable implementation plan].

33 U.S.C.A. 1367(a); 42 U.S.C.A. 6971(a) (bracketed language only in the SWD). The regulations set forth the burdens of proof before the administrative law judge in cases arising under the WPC and SWD:

a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.

29 C.F.R. §24.109(b)(2).

A. Protected Activity

A “proceeding” includes all phases of a proceeding that relates to public health or the environment, including the initial internal or external statement or complaint of an employee that points out a violation. *Lee v. Parker-Hannifin Corp.*, ARB No. 10-021, ALJ No. 2009-SWD-003 (ARB Feb. 29, 2012). To be afforded protection, a complainant must show a reasonable belief, both subjectively and objectively, that his conduct furthered the WPC’s or SWD’s purposes. *Lee*, ARB No. 10-021, slip op. at 9.

The purpose of the SWD is to “promote the reduction of hazardous waste and the treatment, storage, or disposal of such waste so as to minimize threats to human health and the environment.” *Culligan v. Am. Heavy Lifting Shipping Co. et al.*, ARB No. 02-046, ALJ No. 00-CAA-20, 01-CAA-09, 01-CAA-11, PDF at 10 (ARB June 30, 2004); *see* 42 U.S.C. § 6902(b). The WPC is intended to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and eliminate “the discharge of pollutants into the navigable waters.” 33 U.S.C. § 1251(a). An employee’s safety and health complaints, including filing complaints under OSHA, are only considered protected activity under the environmental statutes “when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes.” *Melendez*, ARB No. 96-051, PDF at 17; *see also Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001-SWD-3, PDF at 13 (ARB Mar. 31, 2005). Complaints about “purely occupational hazards” are not protected under the statutes. *Evans*, ARB No. 08-059, PDF at 6; *see also Carpenter v. Bishop Well Servs. Corp.*, ARB No. 07-060, ALJ No. 2006-ERA-35, PDF at 8 (ARB Sept. 16, 2009) (“Such complaints, which describe hazards limited to a workplace but not endangering the public, are not protected under the environmental statutes.”); *Kemp v. Volunteers of Am. of Pa., Inc.*, ARB No. 00-069, ALJ No. 2000-CAA-6, PDF at 4-6 (ARB Dec. 18, 2000) (“[A] key threshold question . . . is whether he reasonably believed that the alleged asbestos hazard violated EPA regulations or posed a risk to the general public outside the building Concerns only about an occupational hazard [are] beyond this Board’s jurisdiction.”).

In his post-hearing brief, Complainant alleges that he was retaliated against by Respondent for making complaints about “electrical, structural, environmental problems, and discrimination” to management during his employment on July 10, 2012, July 14, 2012, July 26, 2012, July 28, 2012, August 2, 2012, and August 3, 2012. *See* Cl. Br. at 13. He elaborated on these complaints at the hearing, testifying that he made complaints to his supervisors regarding issues such as scaffolding coming down, “discrimination and racial epithets and things like that,” the need for an “ADA bathroom,” cracks in the concrete on the catwalk, improper disposal of sharps in the garbage, and sewage flowing into a parking lot. *See* TR 24-32. In his brief, Complainant does not specify which of these complaints fall under the WPC or the SWD.

The only complaints Complainant alleges he made that could conceivably fall under the WPC and SWD relate to improper disposal of sharps in the garbage and sewage flowing into a parking lot. Unlike the other complaints (for example, of falling scaffolding, cracks in the cat walk, and “racial epithets”), these complaints touch on the concerns for the environment and

public health and safety addressed in the WPC and the SWD. Complainant's complaint regarding improper disposal of sharps in the trash furthers the purpose of the SWD to promote the disposal of hazardous waste so as to minimize threats to human health and the environment and his complaint regarding sewage flowing into the parking lot of a resort in Hawaii furthers the WPC's purpose to maintain the chemical, physical, and biological integrity of the Nation's waters.

At the hearing, Complainant essentially conceded that these complaints were the only complaints he made that relate to the WPC and SWD. He admitted that some of the issues he raised were "outside the Solid Waste Disposal Act and the Clean Water Act" and the complaints regarding scaffolding, for example, "had nothing to do with the Solid Waste Disposal Act." TR 25-28. He also immediately discussed the complaints regarding sharps disposal and sewage after he was asked to state which complaints of his relate to the WPC and the SWD. *See* TR 25-28. Therefore, I find that the complaints regarding the other issues, whether or not Complainant actually made the complaints, do not constitute protected activity under the WPC or the SWD.

Complainant testified that he orally complained about improper disposal of sharps to Mr. Hurd and Mr. Braman on July 14, 2012 and to Mr. Hurd on July 25, 2012 and about sewage flowing into the parking lot to Mr. Pacer on July 28 or 29, 2012. *See* TR 25-29, 92-93. He also stated that he let Mr. Hurd "know that there were a lot of dangerous conditions" after returning to work following his July 27, 2012 doctor's appointment and wrote, on the back of the first Performance Coaching Report, dated July 29, 2012, in a general fashion about "numerous OSHA violations."⁵ TR 31, 41.

Respondent argues that there is "no credible evidence that [Complainant] complained about either sewage flowing in the parking lot or sharps in the dumpsters." Resp. Br. at 20. Mr. Hurd and Mr. Pacer denied that Complainant made any occupational safety or health-related complaints to them during his employment. TR 148, 182, 190, 232-234. Mr. Pacer testified that "there was nothing -- there was no safety issues, whatsoever, everything was brought up after" Complainant was terminated. TR 232.

I do not find Claimant's testimony, that he complained to his supervisors prior to his termination about improper disposal of sharps and sewage flowing in a parking lot, to be credible. Although Complainant states he documented complainants by writing on the back of the performance coaching report and in contemporaneous notes he kept while working, there is no documentation in the record supporting his claim that he made these complaints during his employment. In addition to writing on the front of the first Performance Coaching Report "I was sick at the time and woke up and called," Complainant testified that he wrote on the back of the document that there were numerous OSHA violations. He also testified that during his termination meeting, he could see Mr. Braman holding a copy of this document with his writing on the back of it. At the hearing, however, Complainant reviewed the original, saw

⁵ In his brief, Complainant states that he discussed lack of sharps containers and sewage in the parking lot in addition to other safety and health concerns in the July 29 meeting. Cl. Br. at 6, 9. At the hearing, Complainant did not explicitly state that the July 29 meeting included discussion of sharps containers and sewage.

no writing on the back of the document, and admitted he could not offer any explanation beyond suggesting that the document on which he wrote about safety violations might have been a different document. TR 75-76.

In addition, while Dr. Rogers, in his July 27, 2012 progress notes, notes that Complainant has job stress and says “Supervision either do not know and/or care about following OSHA regulations for safety,” his “feeling his boss likes to put people at risk,” and a worker without safety ropes has been shocked different times, there is no mention in the notes of sharps disposal and sewage or any complaints made by Complainant to his supervisors about these issues. *See* CX 2.

Complainant also testified that he remembers he had conversations on safety and health with his supervisors on the dates he testified to at the hearing because he took handwritten notes during his employment and tried to document as much as he could. TR 93-95. In his notes, Complainant documents his co-worker Ron’s insistence on teaching him how to fix a faucet, Ron’s attempt “control” him, Ron’s anger, and Ron’s “yelling swearing.” The notes document a discussion with Mr. Pacer and Mr. Hurd on July 29, 2012 in which Complainant complained of “racial domination and unfair racist distribution of labor,” Complainant used the word “Filipino,” and Mr. Hurd accused Complainant of being a racist. The notes include an entry dated July 30, 2012, in which Complainant states, “I believe we could all benefit with multicultural training.” RX 17 at 3, 6, 8, 15, 17, 23. The notes also include mention of cracks in the concrete and, in a note dated August 3, 2012, Complainant discussed his termination meeting, stating that he told Mr. Pacer about “institution racism,” cracks in the concrete and electrical problems, and “he spent too much time with racism issue.”⁶ RX 17 at 13, 25. While there is ample discussion in Complainant’s detailed notes about his conflict with his coworker as well as the meetings with supervisors on the dates he alleges he made safety and health complaints, there is no mention anywhere in the notes of improper disposal of sharps or sewage flowing in the parking lot or complaints related to these issues. This evidence supports the supervisors’ testimony that Complainant never made complaints to them regarding sharps disposal and sewage during his employment.

Respondent argues that during Complainant’s employment there never was any raw sewage flowing into the parking lot, employees were never asked to enter trash dumpsters to compact trash, and procedures for the proper disposal of sharps were already in place. Resp. Br. at 19-20. Complainant points out that HIOSH, after conducting an inspection, cited Respondent for failing to properly dispose of sharps. *See* Cl. Br. at 17. In any event, regardless of whether Complainant harbored an actual and reasonable belief that hazards involving improper disposal of sharps and sewage existed, I find that he has failed to prove he made complaints about these issues prior to his termination. Therefore, I find that Complainant has failed to establish that he engaged in protected activity under the WPC or SWD.

⁶ Complainant also wrote, in the notes, “protective equipment (gloves)” and “walkways roof rotting stairway.” RX 17 at 17. Complainant testified that he is not sure if he wrote this during his employment or after he was terminated. TR 118-119.

In an effort to be complete, assuming *arguendo* that Complainant had engaged in protected activity prior to his termination, I will proceed to analyze the remaining elements.

B. Adverse Action

The record demonstrates, and it is undisputed, that Respondent terminated Complainant on August 3, 2012. In its post-hearing brief, Respondent does not argue that there was no adverse action in this case. Therefore, I find that Complainant has demonstrated he suffered adverse action.

C. Motivating Factor

Under the WPC and the SWD, where a complainant proves that he engaged in protected activity, the complainant must next show that the activity “caused or was a motivating factor in the adverse action alleged in the complaint.” 29 C.F.R. § 24.109(b)(2). “A complainant must prove more when showing that protected activity was a ‘motivating’ factor than when showing that such activity was a ‘contributing’ factor. *Onysko v. State of Utah, Dep’t Env’t Quality*, ARB No. 11-023, ALJ No. 2009-SDW-004, slip op. at 10 (ARB Jan. 23, 2013) (quoting *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 2004-CAA-005, slip op. at 3 n.6 (ARB Nov. 29, 2006)). ‘A ‘motivating factor’ is ‘conduct [that is] . . . a ‘substantial factor’ in causing an adverse action.’ *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-1 (ARB Apr. 25, 2014) (quoting *Onysko*, ARB No. 11-023, slip op. at 10). In making this showing, the ‘Complainants need only establish that th[e] protected activity was a motivating factor, not the motivating factor, in the decision to discharge them.’ *Abdur-Rahman v. DeKalb County*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003, slip op. at 10, n.48 (ARB May 18, 2010).

Complainant states, in his post-hearing brief, that “there was no valid reason for [Respondent] to fire the [C]omplainant, and [] the basis for the firing, disciplinary action was . . . avoiding inspection, and avoiding review of evidence found during the inspection, and to prevent the [C]omplainant from being present during the inspection.” Cl. Br. at 13. He alleges that safety meetings with supervisors “turned into disciplinary meetings” and the “poor performance disciplinary documents . . . were specifically created in response in attempting to communicate hazards to managers.” *Id.* at 7-8.

Respondent argues that Complainant was terminated “only for his failure to satisfy performance expectations in the probationary period of his employment.” *See* Resp. Br. at 25. As it is Respondent’s position that Complainant never made complaints related to sharps disposal and sewage during his employment, Respondent also argues that the evidence fails to show that Respondent’s “employees were aware of any internal complaint of workplace health or safety under the FWPCA or SWDA during [Complainant’s] employment.” *See* Resp. Br. at 20, 24.

Complainant alleges that he made complaints related to sharps disposal and sewage to Mr. Hurd, Mr. Pacer and Mr. Braman during his employment. Mr. Hurd and Mr. Pacer stated that they, along with Mr. Braman, made the decision to terminate Complainant or recommended his termination to Ms. Baron. TR 180-181, 231-232. Mr. Pacer and Mr. Hurd testified that they were not aware of any complaints from Complainant related to these issues at the time they made their decision. TR 148, 182, 190, 232-234. For the reasons discussed below, I find that even if Complainant engaged in protected activity by making complaints to his supervisors regarding improper disposal of sharps and sewage flowing out of a force main, and even if his supervisors, who made the decision to terminate Complainant/recommended his termination, were aware of that protected activity, Complainant has failed to establish that his protected activity was a motivating factor in the adverse action.

Complainant has presented circumstantial evidence in attempting to prove that his protected activity was a motivating factor in his termination. First, he points out that he was terminated on August 3, 2012 “shortly after” writing in the maintenance logbook about cracks in the cat walk on August 2, 2012. Cl. Br. at 13. As discussed above, Complainant’s complaint regarding cracks in the cat walk, assuming he made it, is not protected by the WPC or the SWD. Nevertheless, I note that there is close temporal proximity between the dates Complainant allegedly made complaints about improper disposal of medical waste and sewage and his termination. Complainant was terminated only nine days after he alleges he orally complained about improper disposal of sharps to Mr. Hurd on July 25, 2012 and only five or six days after he alleges he orally complained to Mr. Pacer about sewage flowing out of a force main. This creates the possibility of an inference of causation.

However, Complainant was also disciplined three times for policy violations just before his termination, diminishing any inference of causation based upon temporal proximity. Complainant received a verbal warning on July 23 for failing to finish installing a television set in a guest’s room, a Performance Coaching Report on July 26 for failing to call off at least two hours prior to the start of his shift, and a second Performance Coaching Report on July 31 for failing to finish fixing a smoke alarm in a guest’s room. Mr. Pacer and Mr. Hurd testified that these three “write-ups” related to poor performance during Complainant’s probationary period were the sole reason for Complainant’s termination. *See* TR 181; TR 232.

Complainant alleges that he never received the verbal warning and the second Performance Coaching Report, which he first learned of during the OSHA investigation. These disciplinary documents, he avers, were created in response to his occupational safety and health-related complaints, which were the true reason for his termination.⁷ Cl. Br. at 8, 13.

I do not find Complaint’s theory of causation persuasive. Complainant’s allegation, that he observed Mr. Hurd state he “needed someone to blame,” leading him to believe Mr. Hurd’s practice was to create a disciplinary document and fill in the name of an employee who made a

⁷ While “pretext” evidence may be used as circumstantial evidence of true motives, the complainant is not required to show pretext but merely prove that “the protected activity caused or was a motivating factor in the adverse action,” even if it was only one of several motivating factors. *See* 29 C.F.R. § 24.109(b)(2).

safety complaint, is speculative and unsubstantiated. In addition, Complainant's testimony disputing that he was properly disciplined for poor performance is contradictory and confusing. He testified that he never failed to finish assignments during his employment but also admitted that he failed to finish replacing the smoke alarm on July 31 because his shift was over (for which he received his second Performance Coaching Report). TR 62, 79-80, 83-84. He admitted that he failed to call off at least two hours prior to the start of his shift on July 26 but at the same time seemed to insist that he called off a day early. *See* TR 37-38. Moreover, he stated that he informed Mr. Hurd on July 25 of his doctor's appointment on July 27 and, at another point, he stated that he informed Mr. Hurd of this appointment on July 26, the day he failed to call off in time. TR 37-38, 73-74. Given Complainant's admission that he failed to finish fixing the smoke alarm and failed to timely call off on July 26, Complainant's contention, that he was not properly disciplined for poor performance, is not supported by the record.

I also do not find credible Complainant's testimony that Mr. Braman and Mr. Hurd asked him in the termination meeting if he planned on filing any occupational safety and health complaints with OSHA while Mr. Braman held the first Performance Coaching Report with Complainant's writing about "numerous OSHA violations." Complainant acknowledged at the hearing that there is, in fact, no handwriting on the back of the document, and while he wrote in the comments section on the front of the document, he did not mention anything therein about occupational safety and health violations.

In sum, to establish that his protected activity was a motivating or substantial factor in his termination, Complainant relies on his unsupported, confusing, and at times contradictory testimony that his supervisors were unhappy with his complaints regarding occupational hazards and that they fabricated false grounds for getting rid of him. Therefore, I find that Complainant has failed to present sufficient evidence to sustain his burden.

In the alternative, even if I find Complainant demonstrated that his protected activity was a motivating factor in his termination, I find that Respondent has met its burden to establish that it would have terminated him in the absence of his protected activity.

D. Respondent's Affirmative Defense

Where a complainant meets his or her burden of proof, the employer may avoid liability if it proves by a preponderance of the evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior. *See* 29 C.F.R. § 24.109(b)(2).

I find that Mr. Hurd and Mr. Pacer credibly testified that Complainant's alleged safety and health complaints played no role at all in his termination. Rather, they terminated Complainant because he accrued three policy violations within a short period of time during his probationary period. The evidence supports their statements. It is undisputed that Complainant violated Respondent's rules during his probationary period. The employee handbook and maintenance manual explicitly provide that employees must complete assigned tasks and must

call off at least two hours prior to the start of their shift if they are planning to be absent. JX 1 at 27; RX 7 at 2. While he denied failing to finish installing a television set in a guest's unit, Complainant admitted that he failed to call off within two hours prior to the start of his shift on July 26 and failed to finish fixing a smoke alarm in a guest's unit.

Respondent argues that it followed the company's progressive discipline policy in disciplining and ultimately terminating Complainant for these violations. Resp. Br. at 27. In response to Complainant's first violation, for failing to finish installing a television set in a guest's unit, Mr. Hurd started with a verbal warning to give Complainant an opportunity to improve his performance. *See* TR 166-167. Complainant's performance, however, did not improve. After failing to call off at least two hours prior to the start of his shift, Complainant received a Performance Coaching Report. After again failing to finish an assignment only days later, Complainant received a Second Performance Coaching Report. To Mr. Hurd, the failure to finish repairing the smoke detector in the guest's unit was the last straw, resulting in him losing confidence in Complainant as an employee. TR 178.

Additionally, Mr. Hurd and Mr. Pacer testified that the discipline meted out to Complainant for each of his policy violations were consistent with the disciplinary actions meted out to other employees for similar infractions. *See* TR 156, 166, 170, 178, 229. Mr. Hurd also testified that he terminated about fifteen employees for these types of incidents, and none reported hazardous conditions or safety concerns. TR 156-157. Their testimony is uncontradicted.

As I find that Mr. Hurd and Mr. Pacer were credible with regard to the reasons they terminated Complainant—his three policy violations within a short period of time during his probationary period—I find that Respondent has met its burden to establish that it would have terminated complainant in the absence of his protected activity.

For the foregoing reasons, Complainant's complaint is dismissed.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.