



Issue Date: 07 March 2018

Case No.: 2016-WPC-00002

In the Matter of:

ALVIN GARZA
Complainant

v.

SAULSBURY INDUSTRIES
Respondent

DECISION AND ORDER

1. Jurisdiction and Procedural History. This case arises under the Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367, and its implementing regulations, 29 C.F.R. Part 24, and the Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971, and its implementing regulations, 29 C.F.R. Part 24, brought by Complainant against Respondent (Saulsbury Industries). Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent violated the FWPCA and SWDA when it terminated Complainant's employment. OSHA investigated, concluded Respondent did not violate either statute, and dismissed the complaint. Complainant objected and requested a hearing before the Office of Administrative Law Judges (OALJ). The formal hearing in this case was conducted from December 19-20, 2016 in Midland, Texas. The parties were afforded a full opportunity to adduce testimony and offer documentary evidence.¹ Complainant and Respondent filed post-hearing briefs with legal analysis and factual arguments on June 6, 2017 and June 5, 2017.² Complainant and Respondent filed supplemental reply briefs on July 3, 2017 and June 26, 2017.³

2. Statement of the Case. Complainant contends he suffered an adverse action under the FWPCA and SWDA when Respondent terminated his employment under the guise of a Reduction in Force (RIF) after he internally reported health, safety, and environmental concerns at a Respondent-owned fabrication site to his supervisor. Specifically, Complainant alleges his protected activity was a motivating factor in Respondent's decision to terminate his employment. In response, Respondent argues Complainant did not engage in any protected activity and it

¹ Exhibits are marked as follows: JX for Joint Exhibits. CX for Complainant Exhibits. RX for Respondent Exhibits. Reference to an individual exhibit is by party designator and page number (e.g. CX-1, p. 4). Reference to the hearing transcript is by designator Tr. and page number (e.g. Tr. p. 3).

² Complainant's post-hearing brief is marked CB-1. Respondent's post-hearing brief is marked RB-1.

³ Complainant's reply brief is marked CB-2. Respondent's reply brief is marked RB-2.

terminated Complainant's employment as part of a RIF due to the economic downturn in the oil and gas industry. Due to Complainant's lack of tenure and construction experience, Respondent contends it would have taken the same adverse action in the absence of any protected activity.

3. Stipulated Facts and Issues. The parties stipulated to a number of uncontested matters in this case. As a result, the undersigned makes the following specific findings of fact and conclusions of law:

- a. Complainant is a resident of Texas.
- b. Complainant worked for Respondent as a Manager of Field Safety Services from November 17, 2014 to May 15, 2015.
- c. Complainant worked out of Respondent's Odessa, Texas office.
- d. Mr. Eddie Gonzales, Respondent's Director of Corporate Health, Safety, and Environmental (HSE) Department directly supervised Complainant.
- e. One of Respondent's four corporate HSE professionals, Mr. Ibis Ley, resigned in January 2015 and was not replaced.
- f. Corporate HSE professionals rotated leading Friday morning safety meetings.
- g. The Henderson site is owned and operated by Respondent.
- h. On April 1, 2015, Complainant met the Henderson site's Plant Manager, Mr. Raymond Miller.
- i. On April 1, 2015, Complainant made a telephone report about the Henderson facility to Mr. Gonzales.
- j. Respondent notified Complainant he was being laid off on May 8, 2015.
- k. Complainant's last day of employment with Respondent was May 15, 2015.
- l. On June 6, 2015, Complainant timely filed his complaint with OSHA.
- m. On June 25, 2015, OSHA issued a letter acknowledging receipt of the complaint.
- n. Following Complainant's termination, Respondent hired Mr. James Bloodworth as an HSE lead at the Henderson site on August 24, 2015.

4. Contested Facts and Issues. At the hearing, in the prehearing statements, and in the post-hearing briefs, the parties identified the following contested facts and legal issues in this case:

- a. Whether Complainant engaged in protected activity under the FWPCA and SWDA.
- b. Whether Respondent had actual or constructive knowledge of Complainant's protected activity.
- c. Whether Respondent took an adverse action against Complainant.
- d. Whether the protected activity was a motivating factor in the adverse action.

5. Summary of Proffered Evidence. In making this decision, the undersigned reviewed and considered all reliable and material documentary and testimonial evidence presented by Complainant and Respondent. The undersigned made all reasonable references to be drawn therefrom and resolved all issues of credibility. This decision is based upon the entire record.

a. *Exhibits Admitted Into Evidence.* The undersigned fully considered the exhibits

admitted at the hearing. However, as specifically provided in the Notice of Case Assignment and Prehearing Order issued on February 4, 2016 and as expressly articulated to the parties at the hearing, only exhibit content directly cited in a post-hearing brief by specific exhibit and page number was considered material and relevant evidence. All other information contained in the exhibits, but not specifically cited in the briefs, was regarded as non-relevant background information for chronological context to cited relevant evidence. (Tr. pp. 10-12)

1) Joint Exhibits. The parties jointly offered 10 exhibits, which the undersigned admitted into evidence without objection by either party. As explained at the hearing, the undersigned considered the cited portion of the following deposition transcripts in the post-hearing briefs as substantive evidence. (Tr. pp. 676-681)

(A) Deposition of Mr. Charles R. "Bubba" Saulsbury, Jr.

Mr. Saulsbury is Respondent's Senior Vice President of Business Development. He has held this position for the past four to six years. He is responsible for business development, which includes finding corporate opportunities, looking at markets, developing strategies, and building client relationships. (JX-6, pp. 7-8)

He is Respondent's only employee who handles public relations. Mr. Saulsbury stated he had no knowledge of Respondent's corporate personnel plans in 2015. Mr. Saulsbury stated Respondent's Chief Executive Officer (CEO) and Chief Financial Officer (CFO) instructed him to reduce his department's budget in 2015. (JX-6, pp. 8-10)

Mr. Saulsbury acknowledged he stated to the press that Respondent could weather the economic downturn better than companies that focused only on drilling. (JX-6, pp. 14, 18) He did not recall stating there had been no downsizing of full-time employees, as he had been quoted in a media publication. (JX-6, pp. 18-19) In 2015, Mr. Saulsbury did not recall stating there had been no layoffs due to the oil and gas downturn. (JX-6, pp. 26, 30) Mr. Saulsbury stated Respondent's project revenue from 2015 would be equal to or greater than its project revenue of 2014, the latter of which was the greatest in the company's history. Mr. Saulsbury claimed he never lied or misrepresented facts to a reporter. (JX-6, pp. 32-33)

(B) Deposition of Mr. Ronald Gosnell.

Mr. Gosnell worked as Respondent's HSE Manager of Fabrication Services.⁴ He began working for Respondent in an HSE field position in September 2013. (JX-7, pp. 13-14) Mr. Gosnell has not attended college or university, nor does he have a high school education or General Equivalency Diploma (GED). (JX-7, pp. 11-12)

For almost all of Mr. Gosnell's positions with Respondent, he was not required to apply or complete any paperwork until arriving on site to work in a new position. To obtain his first position, he sent Mr. Gonzales a copy of his resume and the two spoke on the telephone. He explained there was no formal application process. (JX-7, pp. 14-15)

⁴ Respondent terminated Mr. Gosnell's employment in October 2016 for a violation of Respondent's sexual harassment and discrimination policy. (Tr. pp. 61-62)

Mr. Gonzales called Mr. Gosnell to let him know a position was available at Respondent's Henderson site. In March 2016, without asking for or seeking a promotion, Mr. John Andrews offered Mr. Gosnell a full-time salaried position at the Henderson site because he believed Mr. Gosnell desired a permanent position and no longer wanted to travel from job site to job site. (JX-7, pp. 38-40)

Regarding the Henderson site, Mr. Gosnell agreed with Complainant's assessment that the on-site above-ground gas and diesel tanks had a capacity of 1,500 gallons. (JX-7, p. 102) Mr. Gosnell stated it was not possible for there to be "process water" in the fabrication shop. He explained "process water" is water created during an oil and gas extraction that becomes cross-contaminated with fuels, solvents, and corrosives. (JX-7, pp. 105-106)

Mr. Gosnell stated Mr. Gonzales was viewed as Respondent's "resident environmental expert" and others relied on him for his expertise in federal regulations and environmental compliance. (JX-7, p. 140)

(C) Deposition of Mr. William Yargo.

Mr. Yargo is a corporate HSE Manager in Respondent's corporate office. He explained that HSE employees participate in weekly meetings to discuss injuries and incidents that occur at each of Respondent's sites. (JX-8, pp. 50-52) Mr. Yargo assumed Complainant was laid off because the economy was slowing and all departments were required to reduce personnel; however, Mr. Gonzales did not specifically tell Mr. Yargo a reason for Complainant's termination. After Complainant was terminated, his job-sites were reassigned to Mr. Andrews and Mr. Yargo. (JX-8, pp. 62-63)

(D) Deposition of Mr. Michael Cothran.

Mr. Cothran is an HSE lead employee for Respondent. Mr. Gonzales hired him to his current position at Respondent's job site in Cayanosa, Texas. He was not interviewed nor did he complete an employment application for his current position. Rather, the project superintendent asked him to work at his current job site after concluding his work on another project. (JX-9, pp. 8-11)

Mr. Cothran recalled an employee's November 2014 foot injury at the Respondent's Zia facility. Mr. Cothran confirmed this employee was absent from the job site after the incident. Upon the employee's return to work, he was transferred from the construction site to an office. He did not recall if Mr. Gosnell created an incident report, but believed an incident report would be required. Mr. Cothran did not believe this incident was reported in the OSHA 300 log. (JX-9, pp. 65-67)

(E) Deposition of Mr. Erasmo ("Eddie") Gonzales.

Mr. Gonzales formerly worked as Respondent's HSE Director.⁵ (JX-10, p. 12) He explained all HSE employees are required to complete an incident report if they have a health, safety, or environment concern. (JX-10, p. 15) As part of their normal job duties, all HSE Managers are required to conduct periodic audits of the facilities for which they are responsible. During these audits, the assigned HSE Manager is required to review a Respondent-created checklist of health, safety, and environmental concerns. (JX-10, pp. 19-20)

Respondent extended a job offer to Mr. James Bloodworth to fill the HSE Manager position at the Henderson facility. Mr. Bloodworth held this position for approximately six months and was terminated in February 2016. The position was converted to a salaried position for Mr. Gosnell. (JX-10, p. 63)

Complainant reported directly to Mr. Gonzales throughout his employment with Respondent. Mr. Gonzales reported directly to Mr. Higgins, who oversaw the entire Human Resources (HR) Department. Mr. Higgins reported directly to Respondent's CEO, Mr. Rick Graves. (JX-10, p. 66)

Mr. Gonzales was tasked with maintaining and completing the OSHA 300 log and OSHA 300A form. Mr. Gonzales did not recall Complainant telling him there was a problem with Mr. Gonzales, as HSE Director, signing the OSHA forms and, rather, a corporate executive must sign the OSHA forms and logs. Later in his deposition, he recalled that he thought it was Complainant that brought this issue to his attention. Before that time, Mr. Gonzales "assumed" it was acceptable for him to sign the OSHA forms on Respondent's behalf. Mr. Gonzales then stated he did not become aware that applicable regulations required a corporate officer to sign the OSHA 300 log detailing reportable injuries until the filing of Complainant's whistleblower claim. (JX-10, pp. 74-78)

On April 29, 2015, Mr. Gonzales recalled discussing a needle stick injury with Complainant on a conference call with Mr. Andrews. After this discussion, Mr. Gonzales told Complainant it seemed he was not happy with his job. He explained he made this statement because Mr. Andrews told him "[Complainant] is really upset." (JX-10, pp. 122-123)

Mr. Gonzales explained Respondent's payroll change form has a box indicating a minimum time frame for rehire eligibility. He was not aware of any specific guidance regarding how to complete this section of the payroll change form. Mr. Gonzales marked the 90-day box for Complainant's rehire eligibility because, due to the RIF he assumed he would not be given permission to rehire an HSE Manager for at least that amount of time. (JX-10, pp. 132-133)

On May 8, 2015, Mr. Gonzales informed Complainant he was being laid off due to a RIF. Initially, Mr. Gonzales stated that Mr. Higgins told him that Respondent would have to lay off at least one HSE Manager from the corporate HSE Department. Mr. Higgins told Mr. Gonzales he was "going to base it on your decision, and I'll probably give you my feedback." In response, Mr. Gonzales stated "[w]ell, I've only got three, and John Andrews and Billy Yargo have been here the longest, and I hate this for [Complainant], so [Complainant] would have to be the one."

⁵ At the time of the hearing, Respondent had terminated Mr. Gonzales's employment for reasons unrelated to this claim or Complainant. (Tr. pp. 257, 664)

Complainant was the only HSE corporate employee that was laid off due to the RIF. (JX-10, pp. 139-141) Mr. Gonzales recalled that Complainant was well-liked and the corporate HSE employees held a farewell lunch for him. (JX-10, pp. 142-143)

Later in his deposition, Mr. Gonzales stated the only RIF request came when “[Mr. Higgins] called me to let me know that we were going to have a reduction of force and that [Complainant] was going to be the one that was let go.” Mr. Gonzales then stated Mr. Higgins made the decision to terminate Complainant’s employment. (JX-10, pp. 221-222)

All calls made to the company’s “Employee hotline” regarding reporting safety issues were forwarded directly to Mr. Gonzales or another member of the corporate management team. (JX-10, pp. 210-211)

Complainant speaks Spanish; however, Mr. Andrews and Mr. Yargo do not speak Spanish. (JX-10, p. 152) Mr. Gonzales admitted he did not know of any environmental knowledge that Mr. Andrews possesses. (JX-10, p. 176)

2) Complainant Exhibits. Complainant offered 271 exhibits into evidence. In a written motion filed prior to the formal hearing, Employer objected to CX 4, 6, 10, 13, 14, 17, 18, 19, 27, 28, 34, 62, and 268. At the hearing, the undersigned sustained those objections and they were not considered as substantive evidence in this decision. However, they remain marked and identified in the record. In addition, Complainant withdrew CX 32 and 35 from evidence at the hearing. (Tr. pp. 6-9)

(A) Respondent’s Separation of Employment Policy and Procedures.

As of May 7, 2015, Respondent’s HR Department had a formal policy regarding RIFs and factors that should be considered when evaluating which employee to be selected for reduction or elimination. The factors to be considered included:

- (1) skills and qualifications – the specific skills required in the position, education, licensure, certification;
- (2) performance and productivity – analysis of performance, appraisals, exceptional performance; disciplinary actions, attendance, interaction and teamwork with others; and
- (3) length of employment and length of service may be considered but may receive less weight in the determination.

(CX-5, pp. 1-3)

(B) Complainant’s Resume.

In relevant part, Complainant’s resume provides that he has over 20 years of experience with HSE work, including petro-chemicals and oil and gas construction and consulting. (CX-7)

(C) Respondent’s Internal Reporting Process.

Respondent uses an internal incident reporting process “after any unwanted event.” The completed reports are submitted to a project’s assigned HSE Manager and Project Manager. This form has a category for 10 types of incident classifications, but there is no specific “environmental” incident classification. (CX-128, pp. 1-3)

(D) Respondent’s Shareholders Statement.

Respondent’s Safety Policy and Procedural Manual includes a “Shareholders Statement,” which states that Respondent “considers safety a core value” and “[l]ooking out for the safety of each other contributes and promotes a culture of awareness so highly valued within our organization.” (CX-160, pp. 1-2)

(E) Personal Performance and Development Appraisal for Mr. John Andrews.

Mr. Higgins completed a performance appraisal for Mr. Andrews’s work performance ranging from January 2011 to November 2011. According to the appraisal, Mr. Andrews’s work performance “falls short” in the following categories: quality of work; planning; communication; and leadership. (CX-199, pp. 1-3; CX-223, pp. 1-3)

(F) Disciplinary Action Taken Against Mr. Gonzales by Respondent.

On May 29, 2015, Mr. Higgins and Mr. Schultz met with Mr. Gonzales to discuss complaints brought against him concerning “his sometimes argumentative, overbearing demeanor and an overview of claims for inappropriate sexual comments” and “gestures.” This information was provided as early as May 15, 2015 to Respondent. On August 26, 2015, Respondent produced a summary of harassment claims lodged against Mr. Gonzales by other Respondent-employees. Mr. Gonzales acknowledged receipt of the summary of harassment claims and was suspended from his employment for three days. The reason provided for Mr. Gonzales’s suspension was “unacceptable behavior in the workplace” and “company policy violation.” (CX-221, pp. 1-4)

3) Respondent Exhibits. Respondent offered 32 exhibits into evidence, which were admitted into evidence without objection at the hearing. (Tr. p. 10)

(A) Email Correspondence from Respondent’s CFO Regarding Reductions in Department Budgets.

On February 13, 2015, Respondent’s CFO, Mr. Chat York, sent an email to department heads to discuss budget concerns. The email explained the CFO would arrange meetings with department heads to review the 2015 budgets “in light of the potential impacts of the economic downturn.” The email directed the department heads to be prepared to discuss any increase in expenses from the previous year, open positions, potential savings, discretionary spending, and other general ideas for savings. (RX-1, p. 1)

On March 24, 2015, the CFO sent an email to Mr. Higgins stating a budget reduction of approximately \$600,000 was required for the HSE Department. This email explained this would include “headcount reductions” of the six budgeted positions, five of which were currently filled. (RX-2, p. 1)

On April 28, 2015, the CFO sent an additional email to department heads. This email explained the Board of Directors had required the company to reduce spending by approximately \$7 or \$8 million. In turn, this would require each department head to reduce its budget by 30 percent. (RX-4, p. 1; *see also* RX-6)

*(B) Complainant’s Payroll Change Notice Form.*⁶

On May 5, 2015, Mr. Gonzales approved a “Payroll Change Notice” form for Complainant. It provided that Complainant, an HSE Manager of Field Safety Services, would be removed from Respondent’s payroll effective May 15, 2015. The reason for Complainant’s termination was “Laid Off (ROF).” Complainant received “excellent” marks for his safety skills and attendance; he received “good” marks for his conduct, technical ability, quality of work, initiative, and leadership. The form also denoted that Complainant was eligible for re-employment in 90 days. A box checked “yes” provided Mr. Gonzales would re-employ Complainant. (RX-10, p. 1)

(C) Number of Respondent Employees from 2014-2016.

The following reflects the total number of employees employed by Respondent as of these specific dates:

January 5, 2014	1,744
July 27, 2014	1,928
November 30, 2014	2,580
March 8, 2015	3,605
April 5, 2015	3,376
May 3, 2015	3,088
June 7, 2015	2,681
July 5, 2015	2,382
August 2, 2015	2,421
September 6, 2015	2,495
October 4, 2015	2,658
November 1, 2015	2,538
December 6, 2015	2,193
February 7, 2016	2,490
May 8, 2016	2,557
July 3, 2016	2,276

(RX-12, pp. 1-5)

⁶ This form is also included in the records as CX-42. A blank version of this form is included in the record as CX-25.

(D) Respondent Layoffs in 2015 and 2016.

Respondent laid off 24 corporate positions in 2015 in various corporate departments. Twelve corporate employees were laid off in 2015 prior to Complainant's termination on May 15, 2015. Respondent laid off 17 corporate positions in 2016.

(RX-13, pp. 1-2; RB-1, p. 23)

(E) Letter from Complainant to Other Potential Employers.

On May 13, 2015, Complainant drafted a letter to "To Whom It May Concern." He wrote that "due to the low price of crude oil," his employer decided to lay him off. He further noted that the two remaining corporate HSE Managers had been in their current positions for six and four years, while he had only held his position with Respondent since November 2014. (RX-15, p. 1)

(F) Email Correspondence from Complainant to Mr. Gonzales Regarding the Henderson Site.

On April 1, 2015, Complainant sent Mr. Gonzales an email following his review of the Henderson site with an Industrial Hygienist (IH). Specifically, Complainant's email provided that he desired to speak with Mr. Gonzales about the site's air circulation and vent system elevation. (RX-16, p. 1)

On March 26, 2015, Mr. Gonzales sent Mr. Higgins an email in which he stated that he preferred to send a corporate HSE Manager to the Henderson site during the IH's survey. In response, Mr. Higgins only stated "don't we have an HSE representative on this." (RX-21, p. 1)

(G) Email Correspondence Between Mr. Raymond Miller and Mr. Gonzales Regarding Complainant's Work Performance.

On April 1, 2015, following Complainant's review of the Henderson site, Mr. Miller, the Director of Fabrication Services, sent Mr. Gonzales an email stating he would like to bring Complainant back to the site to assist with standard HSE items as well as environmental issues. Mr. Miller stated Complainant was "very well versed on the subject and a lot of what he has brought to my attention is valid for our manufacturing/fabrication plant." (RX-32, pp. 1-2)

b. Testimonial Evidence.

1) Complainant.

Complainant received his Bachelor of Science in Geology and Math from Texas A&M University-Kingsville. He worked for Respondent as a Manager of Field Safety Services from November 17, 2014 to May 15, 2015 in Respondent's Odessa, Texas office. Mr. Gonzales, Respondent's HSE Director, directly supervised Complainant. (JX-5)

Complainant testified he has obtained numerous health, safety, and environmental certificates. Complainant joined the Army for four years as an Officer and then entered the private sector, but remained in the National Guard. In the Army, Complainant had a top-secret security clearance, performed work overseas, and led numerous training exercises for his platoon. He also worked as a maintenance officer and ensured equipment was kept mission-ready. He advanced his position to Battalion Intelligence Officer and was responsible for approximately 800 people. While in the National Guard, he served on a Joint Task force on the Texas-Mexico border and in Panama. In total, Complainant served seven years of active duty. Since that time, Complainant has exclusively worked in the private sector. (Tr. pp. 504-509)

Prior to working for Respondent, Complainant filed an Equal Employment Opportunity Commission (EEOC) charge against a prior employer, Intergulf, for a hostile work environment. Eventually, Complainant voluntarily resigned his employment with Intergulf. In addition, in 2014, Complainant filed an EEOC charge against Savage Services for discrimination prior to working for Respondent. Complainant did not voluntarily resign his employment from Savage Services; rather, Savage Services terminated his employment. (Tr. pp. 512-516)

Complaint identified a position with Respondent on Indeed.com, a job search website. He applied for an advertised job and a recruiter called him and recommended he apply for an open HSE Manager position. Complainant applied and was interviewed for the HSE Manager position. Mr. Gonzales, Ms. Melanie Tavaréz, and Mr. Ibis Ley were present during the interview; Mr. Andrews and Mr. Yargo were not present. Complainant testified his Spanish-speaking ability was viewed favorably during the application process. Respondent hired Complainant for the HSE Manager position on November 17, 2014 and Complainant moved to Odessa after accepting the job. Complainant completed the new employee orientation and passed the entrance exam. Complainant's salary was \$120,000 per year, but he never received bonus pay. Complainant testified the HSE Manager position was a permanent position and he was never informed it may be limited in duration. (Tr. pp. 516-521)

Complainant did not recall being informed about Respondent's "open-door" policy regarding internal reporting of concerns of any type. Complainant never read a portion of the employee manual that discussed the "open-door" policy regarding internal reporting. In the early part of his employment, Complainant had a "very good relationship" with all other corporate HSE Managers and employees; he testified it was a "strong team" and Complainant enjoyed working with his co-workers. (Tr. p. 525) At one point during his employment, Complainant recalled Mr. Gonzales was out of the office for several weeks recovering from an assault and Mr. Andrews supervised him and the other HSE Managers during this time. (Tr. p. 527)

Complainant recalled telling Mr. Andrews he was concerned that some employees at a job site were not being evaluated by a proper medical professional for "respirator fit testing." Complainant believed this evaluation had to be performed by a physician, but after reviewing applicable regulations, he determined a nurse could perform the medical evaluations. After Mr. Andrews told Complainant the evaluator was a physician, he did not raise the issue again. Complainant also recalled an incident from December 2014 at the Mivada-Barstow facility in which an employee pinched his thumb and passed out. The employee also hit his back against a

crane and began complaining of back and rib pain. He was sent to a physician, but the physician did not take X-rays. Complainant testified that Mr. Andrews determined the injury only involved a pinched thumb and, therefore, it was not OSHA reportable. When the employee returned to work several days later, he complained of chest pains and called 911. It was later determined the employee had broken ribs from the incident, but the incident report was never updated to reflect the employee suffered broken ribs. (Tr. pp. 527-530)

In early 2015, Mr. Gonzales returned to work. Complainant told Mr. Gonzales that Mr. Gonzales was not authorized to sign the OSHA 300 logs. Mr. Gonzales told Complainant the executives had authorized him to sign the logs. Complainant recalled Mr. Gonzales “rushed off” after this conversation and “was not too pleased with [this] questioning.” Complainant did not make any further reports about this issue. Around this time, Complainant recalled another incident where he learned an employee fractured his finger, but Mr. Gonzales told Complainant “we’ll just keep this [incident] to ourselves.” Complainant complied because he was “scared” of Mr. Gonzales. (Tr. pp. 530-533)

Complainant performed a “Phase One” review of the Henderson site to assist Respondent in determining whether it should purchase the site. (Tr. pp. 533-534) At Mr. Gonzales’s directive, Complainant also visited the Henderson site to meet with an IH who would perform an industrial hygiene audit of the facility. (Tr. pp. 534-535) Complainant also told Mr. Gonzales that he was going to check the site for possible “environmental issues.” In response, Mr. Gonzales laughed and said Complainant would not find anything. Mr. Gonzales believed the IH was “trying to generate work for himself.” (Tr. p. 535) While at the Henderson site, Complainant identified a plasma cutting table, which was a concern. He noticed the water under the table was approaching the top of the reservoir. The employees on site told Complainant the water is drained via a hose approximately 100 feet from the building, which created a “white spot” outside. (Tr. pp. 535-537) In addition, Complainant believed the existence of three above ground storage tanks for oil products required the implementation of a Spill Prevention Control and Countermeasures Plan (SPCCP). (Tr. p. 538) Complainant also believed the above ground oil storage tanks had to be registered with the Texas Commission on Environmental Quality (TCEQ). Because of his concerns, Complainant spoke with Mr. Raymond Miller, the Henderson site Plant Manager. (Tr. p. 599) According to Complainant, Mr. Miller agreed with his assessment and Complainant’s environmental concerns needed to be addressed. Next, Complainant called Mr. Gonzales to discuss his findings and told him he discussed his concerns with Mr. Miller. (Tr. p. 539) Mr. Gonzales told Complainant “don’t document anything, let’s just keep it to ourselves.” Complainant had also planned to discuss his concerns with Mr. Miller’s supervisor, Mr. Bill McVickers; however, Mr. Gonzales instructed Complainant “don’t tell Bill anything. Just wait ‘till you get back here and we’ll discuss it.” (Tr. pp. 539-540) Specifically, Complainant believed the Henderson site was required to have a SPCCP and Storm Water Pollution Prevention Plan (SWPPP). To develop a SWPPP, Complainant believed Respondent was required to file a Notice of Intent with applicable regulatory agencies. To develop a SPCCP, Complainant believed a professional engineer would have to “sign off on [the SPCCP’s] design.” Complainant testified he had experience with SPCCPs and SWPPPs during his prior employment. (Tr. p. 540)

On April 8, 2015, Complainant and Mr. Gonzales met in the corporate office to discuss his concerns about the Henderson site. Complainant also told Mr. Gonzales the same concerns about lacking a SWPPP were applicable to Respondent's Andrews facility because it was a similar fabrication site. (Tr. p. 617) During this conversation, Complainant testified Mr. Gonzales said "I don't know what any of this is, but it doesn't apply to us." Then, "he just stormed, that time, he pretty much just stormed out of my cubicle." (Tr. p. 541) Complainant did not specifically mention the FWPCA; rather, Complainant only stated these were "regulatory requirements." (Tr. pp. 541-542) In addition, Complainant testified he also told Mr. Andrews and Mr. Yargo about his findings from the Henderson site. Mr. Andrews told Complainant "I don't know anything about this stuff, but, you know, it sounds like you know what you're talking about." Mr. Gonzales never told Complainant he would reach out to TCEQ. (Tr. pp. 542, 596) Complainant did not make any reports about the Henderson site to Mr. Higgins or anyone else. (Tr. p. 597) Mr. Gonzales never followed-up with Complainant after he reported his concerns. (Tr. p. 618)

Complainant also recalled the circumstances around a client's site "shutdown." Complainant testified he was scheduled to attend a training session regarding hazardous waste operations on the day of the scheduled shutdown, but Mr. Andrews told Complainant that he must go to the shutdown. Complainant complied and attended the shutdown. The training session was ultimately cancelled. (Tr. pp. 543-545)

Complainant also recalled the occurrence of a needle stick injury occurring on approximately April 28, 2015, but not at one of the facilities he supervised. However, Complainant received the initial incident report. Complainant believed that it must be determined whether the needle was clean or dirty because, per OSHA regulations, different steps must be taken. Complainant asked if the needle was clean or dirty, but never received a response. A few minutes later, Complainant received an email from Mr. Gonzales instructing him to participate in a teleconference with Mr. Gonzales and Mr. Andrews and discuss pending injury reports. Mr. Gonzales began "attacking" Complainant and stated "I don't think you're very happy here." Mr. Gonzales offered to find Complainant a job in Houston. Mr. Gonzales told Complainant the needle stick injury reporting requirement did not apply to Respondent; however, Complainant disagreed. (Tr. pp. 545-552, 620) Complainant interpreted Mr. Gonzales's statements as a threat to his job. Mr. Gonzales told Complainant he could document this injury and "we'll just see where it goes from here." (Tr. p. 552)

On May 8, 2015, Mr. Gonzales told Complainant that Respondent would terminate his employment. Mr. Gonzales explained that "we're going to have to cut back and you're the one we're cutting back on." Mr. Gonzales gave Complainant the option to leave that day or work one more week. Complainant decided to work one additional week because he needed work. During Complainant's final week of employment with Respondent, he opted not to attend a scheduled training; rather, he took calls in the corporate office. (Tr. pp. 555-557) After Complainant learned of his termination, but prior to his last work day, Complainant told Mr. Gonzales that he would be interested in a field position with Respondent. In response, Mr. Gonzales told Complainant "you don't want to be a field guy or a field safety guy . . . because you're a corporate safety guy." (Tr. pp. 560, 612) Initially, Mr. Gonzales verbally told Complainant that Respondent could not rehire him for at least 30 days, but then stated that Respondent could not

rehire him for at least 60 days. Complainant testified this change from 30 to 60 days did not make sense to him because that was not Respondent's policy. (Tr. pp. 560-561, 624) Complainant later learned he would have to wait 90 days to apply for other positions with Respondent; however, Complainant testified a 90-day waiting period is applicable only for employees discharged for disciplinary reasons. (Tr. pp. 624, 628)

Complainant believed field positions would become open with Respondent. Complainant testified he is qualified for a field position because he has worked in the field and has participated in all necessary training sessions. Complainant has work experience in the following areas: blinding; lockout/tagout; confined space entry; electrical safety; distillation; hot tap; and molten sulfur. (Tr. pp. 561-562)

Prior to Complainant's termination, he spoke with Mr. Andrews who told him about a position at another company, Dixie Electric. Complainant interviewed with Dixie Electric, but never received an offer of employment. Mr. Andrews also told Complainant he would keep an eye out for other positions with Respondent. (Tr. pp. 565-566)

Mr. Jeff Schultz, Respondent's HR Director, conducted an exit interview with Complainant on the day before or the last day of Complainant's employment. (Tr. pp. 568-569) During the exit interview, Complainant did not want to answer Mr. Schultz's questions about any problems between Complainant and Mr. Gonzales. (Tr. p. 570)

Complainant testified the OSHA investigator told him that Respondent terminated his employment because he was "not tied to any jobs." (Tr. p. 574)

Complainant testified an HSE manager position became open for the Henderson site following his termination. Complainant told Mr. Jeff Cedar he was interested in the position, but never received a call from Respondent about the available position. (Tr. p. 579) Complainant explained he was not eligible for this position because 60 days had not elapsed since his termination. (Tr. p. 589) Complainant never applied online or called any employee with Respondent about any available position following his termination in May 2015. (Tr. p. 590)

Complainant does not have any knowledge of who made the decision to terminate his employment with Respondent. During his employment with Respondent as a corporate HSE Manager, he had no responsibility over anything related to preparing the budget and had no specific knowledge about Respondent's financial condition. Complainant recalled Mr. Gonzales telling employees there would be no layoffs in the HSE Department because Mr. Ley's position remained vacant. (Tr. pp. 581-583)

Complainant testified that in February and March of 2015, he noticed jobs were being completed and others were being initiated. However, in Complainant's deposition testimony, Complainant stated he had noticed there was a downturn in Respondent's business. He recalled business began to slow because of the price of oil and gas. (Tr. pp. 584-585)

Complainant testified a Respondent employee never ordered Complainant not to report a concern to OSHA, the Environmental Protection Agency (EPA), or TCEQ. During Complainant's employment, he was unaware of the "employee helpline." (Tr. pp. 600-602)

2) Mr. James Moore.

Mr. Moore has worked as a Safety Professional for approximately the last 15 years and is certified by the Board of Certified Safety Professionals. He began working for Respondent in June 2014. When he first began working for Respondent, he was assigned as the "Lead Safety" for the construction of a power plant in North Dakota. He completed his work on this project in December 2014. Subsequently, Mr. Gonzales called him and told him to report to work at a soap plant in Pasadena, California in January 2015. Mr. Moore did not apply for this position or submit any paperwork to show an interest in this position. Mr. Moore completed his work on this project in September 2015 and his employment with Respondent was terminated. While working on the Pasadena (Solvay) project, Mr. Moore initially reported to Complainant; he reported to Mr. Andrews on the North Dakota project. After Complainant's termination, Mr. Moore reported to Mr. Yargo. (Tr. pp. 37-41)

While working on the North Dakota project, an employee suffered a shoulder injury. Mr. Moore initially completed a report of the injury. A few days later, the employee needed medical treatment; as a result, the injury became elevated and recordable on an OSHA 300 form. Mr. Moore later noticed that the shoulder injury report had been omitted from the OSHA 300 form. As the HSE professional, Mr. Moore was required to post the log on injuries at the site. Mr. Moore testified he called Mr. Andrews to report the omission. Mr. Moore also noticed the form was signed by Mr. Gonzales. This was an issue because the form was required to be signed by an executive rather than a department director. Mr. Moore also reported this problem to Mr. Andrews. In response, Mr. Andrews said he "would take care of it" and work with Mr. Gonzales to resolve these issues. Mr. Moore testified a corrected log was never issued. Later, Mr. Moore informed Complainant about these errors. (Tr. pp. 44-47)

During safety meetings, Mr. Moore recalled Mr. Andrews telling employees that if they requested vacation time, he implied they may not be able to return to their job following their leave due to downsizing and economic conditions. Mr. Moore believed this was inappropriate because employees may have to work away from their home for three to six months. (Tr. pp. 48, 53)

Mr. Moore reported to Complainant while working on the Solvay project. Mr. Moore believed Complainant was "knowledgeable" about company policies and practices, available when he needed support, and much more helpful than Mr. Andrews. (Tr. pp. 50-52)

3) Mr. John Higgins.

Mr. Higgins is employed as Vice President of Safety and Quality by Respondent. Prior to this position, Mr. Higgins served as the Vice Present Chief Human Resources Officer until October 2016. In both of these positions, Mr. Higgins had responsibility for HR and HSE for Respondent. He has held this position and has had these responsibilities since 2011. Prior to

2011, he was employed as the HR and HSE Director for Respondent. Mr. Gonzales, the HSE Director during Complainant's employment, reported directly to Mr. Higgins. Mr. Higgins is tasked with preparing the budget for the HR and HSE departments. (JX-1) Respondent's CEO, Mr. Rick Graves, has been Mr. Higgins's supervisor since November 2012. (Tr. p. 78)

Mr. Higgins explained Respondent provides engineering, construction, fabrication, and other services to heavy industrial clients. Mr. Higgins hired Complainant to work as an HSE Manager and agreed he is well-qualified for HSE work. Complainant held the same position as Mr. Andrews, Mr. Yargo, and Mr. Ley. These individuals reported directly to Mr. Gonzales. (Tr. pp. 57-58)

Mr. Higgins recalled that Respondent terminated Mr. Gosnell in October 2016 for violating company policy concerning sexual harassment and discrimination. Mr. Gosnell had previously been disciplined, which resulted in a three day suspension and a written warning. (Tr. pp. 61-62)

Respondent's bonus structure includes a safety component. In early 2015, Respondent stopped using vehicle leases and fuel cards due to potential liability concerns and required employees to use their personal vehicles for travel and reimbursed them based on mileage. (Tr. pp. 62-63)

Bonuses for HSE Managers are based on Respondent's profitability in a year. Respondent paid its HSE Managers bonuses in 2015 and 2014. Respondent has not decreased the salaries of Mr. Andrews or Mr. Yargo since the beginning of 2015. (Tr. pp. 64-65)

Mr. Higgins explained that a "HSE Manager" is a managerial or administrative position. In contrast, a "HSE Lead" is assigned to a field role on a specific project. HSE Leads are charged with HSE responsibilities at a specific project site. HSE Leads report to HSE Managers. HSE Leads are paid at an hourly rate and receive per diem rates of approximately \$70 to \$100. They work 40 hours per week and can be paid overtime. When hired, HSE Leads receive specific training, mostly related to safety. (Tr. pp. 65-67)

In Respondent's Safety Policy and Procedures Manual section titled Safety Organization and Responsibilities, there are no specific topics on environmental issues. Employees receive training yearly. (Tr. pp. 74-75)

Respondent employs reemployment policies that require employees to wait a certain amount of time before being eligible for rehire. For example, if an employee has a substance abuse issue, then the employee must wait 45 days before being eligible to be rehired. Respondent uses a payroll change notice form for changes in payroll, which reflects when an employee is laid off, receives a change in pay, or is eligible for rehire. (Tr. pp. 78-80)

Respondent is subject to various federal and state regulations regarding safety and environmental issues. Respondent does not have the capability to determine whether its projects comply with the FWPCA or the SWDA; instead, Respondent defers to a third party to determine whether or not Respondent is in compliance with applicable laws and regulations. (Tr. p. 81)

Respondent has an environmental policy, but Mr. Higgins could not specifically recall when it was last issued or revised. Mr. Higgins personally participated in the review and revision of the environmental policy, which provides guidance on spill prevention. Employees receive training on spill prevention, participate in safety meetings, and receive safety alerts. (Tr. pp. 81-82)

Mr. Higgins was not aware of any specific incidents where Respondent had informed its employees of a specific environmental harm. Mr. Higgins was also not aware of Respondent ever making available to the public any operations at its Henderson site that could cause environmental harm. Respondent does not issue its own SPCCP; rather, it uses a third party to develop such a plan. (Tr. pp. 83-84)

Respondent's policy requires HSE concerns to be internally reported first. Then, when a supervisor receives a report, the supervisor takes appropriate action. Respondent also has an employee helpline and "open door policy" to report HSE concerns. Supervisors are required to act on any report that is received; he explained it would be improper to suppress an HSE concern. (Tr. p. 86) Mr. Higgins has never personally discouraged someone from reporting HSE issues. Mr. Higgins believed that HSE matters must be reported to OSHA, EPA, or TCEQ depending on the type of issue that arises. (Tr. p. 89) Mr. Higgins believed that Respondent is compliant with its notices provided to those agencies. (Tr. p. 90)

Respondent has received notices of violations regarding HSE matters from MSHA (Mine Safety and Health Administration) and OSHA. Mr. Higgins believed that Respondent has received approximately four to six violations from MSHA. (Tr. pp. 90-91) Mr. Higgins believes that HSE citations affect Respondent's ability to obtain and retain business. (Tr. p. 100)

Mr. Higgins was not aware of any specific individualized state or federal reports that he would use to report an environmental hazard or incident. (Tr. p. 95)

Respondent's National American Industrial Classification Code is 16, which is an industrial construction code. Respondent performs fabrication services at the Henderson site. OSHA is aware these services are performed at the Henderson facility. Respondent acquired the Henderson facility in August 2014. (Tr. pp. 96-98)

Mr. Higgins did not believe the Henderson site has ever had a SWPPP or SPCCP. The Henderson site only provides fabrication services. Mr. Higgins has personally visited this site on at least two occasions and participated in an audit report. After Respondent acquired the Henderson site, it spent over \$1 million for facility upgrades and remediation. (Tr. pp. 101-103)

Mr. Higgins testified there have been multiple versions of Respondent's payroll change notices for a variety of reasons; however, Mr. Higgins did not know the reasons for the revisions. The payroll change notices are now more complex and supervisors have received formal training for using the revised notices. There is a box on the payroll change notice that denotes if an employee is laid off. Mr. Higgins explained that Respondent's project-based employees ordinarily expect to receive a layoff notice at some point during their employment. When

Respondent lays off an employee, the employee does not receive a “pink slip.” When projects are completed, project-based employees are removed from Respondent’s payroll system, even if they are later rehired to work on a different project. Employees are verbally notified that work is no longer available to them at a specific project site; formal notifications or documents are not issued to employees. Project-based employees can be rehired to work at a different site as long as an up-to-date application remains on file. The HR Department advises employees if their applications are up-to-date. (Tr. pp. 103-109)

Mr. Higgins explained that the burden of corporate expenses is “applied equally to all projects.” (Tr. pp. 109-110)

Mr. Justin Young was employed by Respondent as the Henderson HSE Manager, but he was terminated. Mr. James Bloodworth was later hired for this position. Then, Mr. Gosnell became the HSE Manager of the Henderson site. Mr. Higgins believed the HSE Manager is currently a salaried, rather than an hourly, position. Mr. Higgins did not participate in the hiring process for these positions; however, he was advised of the employment decisions which were made by either Mr. Matt Saulsbury or Mr. Eddie Gonzales. Mr. Higgins did not recall if Complainant was considered for this position after his separation. Mr. Higgins did not call and inform Complainant about this position when it became available. (Tr. pp. 110-113)

Mr. Raymond Miller was the facility manager at the Henderson site during part of Complainant’s employment with Respondent. Mr. Higgins did not recall if Mr. Miller raised concerns about the Henderson site operations. Mr. Higgins testified that “due diligence” was completed for the site by a third party before Respondent acquired the facility. (Tr. p. 114) Mr. Higgins reviewed all concerns, including environmental and safety concerns, raised in the report in an effort to identify any financial implications of acquiring the Henderson site. After reviewing the “due diligence” document for the Henderson site, Mr. Higgins explained there was a “tremendous amount of work that had to be undertaken with the acquisition of this facility.” However, Mr. Higgins could not recall any specific environmental concerns about the Henderson site other than the concerns identified in the due diligence report. (Tr. pp. 118-120)

Other than the “due diligence” and site inspections with Mr. Yargo, Mr. Higgins testified he was not aware of other reviews or audits of the Henderson site detailing environmental concerns until after Complainant filed this claim. Mr. Higgins also did not become aware of any environmental concerns at the Andrews site until after Complainant filed this claim. For example, the Andrews Highway site did not have a SWPPP or a SPCCP. (Tr. pp. 122-124)

Mr. Higgins was aware that Complainant raised concerns about a plasma cutting table, which caused steel pieces to fall into a cooling liquid, which were improperly discharged to the ground. However, Mr. Higgins did not become aware of this concern until after Complainant filed this claim. Mr. Higgins believed that Mr. Andrews spoke to Complainant regarding the plasma he observed being discharged from the site. (Tr. pp. 125-126)

Mr. Higgins explained that if Complainant identified an environmental concerns at a facility owned or operated by Respondent, he was required to report such a concern to his supervisor, Mr. Gonzales. Then, Mr. Gonzales would report the concern to Mr. Higgins. Mr.

Higgins also testified that the employee handbook and training materials instructs employees who report environmental or safety concerns that are not corrected to use Respondent's "employee helpline" and "open-door policy." The amount of time an employee should wait for Respondent to correct an identified concern depends on the severity of the alleged problem. (Tr. pp. 127-128)

In addition to the concerns Complainant raised about the Henderson facility, Complainant also raised concerns that the OSHA 300 log must be signed by a company officer. Mr. Higgins amended the OSHA 300 log to reflect that it was signed by Mr. Higgins, rather than Mr. Gonzales. Mr. Higgins testified he was not aware of this requirement. Mr. Higgins testified that Respondent investigated every allegation made by Complainant. (Tr. pp. 128-129)

In December 2014 or January 2015, Mr. Higgins met with the Executive Leadership Team (ELT) and CFO and was instructed to prepare a "contingency budget" reflecting a 10, 20, and 30 percent budget reduction. Mr. Higgins explained the budget was initially developed in August 2014 and submitted to the Board in October 2014 for approval. In January 2015, Mr. Higgins testified he sent an email to the managers and supervisors addressing the downturn in the economy and the need to eliminate unnecessary discretionary spending. (Tr. pp. 130-131)

Mr. Higgins recalled that he first discussed potential budget cuts with Mr. Gonzales in December 2014 or sometime in early 2015. During this time, Mr. Higgins supervised and was in frequent contact with Mr. Gonzales. Mr. Higgins explained that Respondent has a diversified portfolio of construction and it has advertised its growth in press releases. (Tr. pp. 134-135)

Mr. Higgins did not recall if he signed Complainant's payroll change notice for his separation. Mr. Higgins explained there is a box on the payroll change form that indicates the number of days that an employee must be off work before they are eligible to be rehired. This is known as the "rehire eligibility box." This box is used as a result of either an employee being terminated for poor performance or other reason such as substance abuse or sexual harassment. If an employee is terminated for budgetary reasons, then the box should not be checked. (Tr. pp. 136-138)

Mr. Higgins testified that he personally decided that Complainant would be selected for lay off and Complainant was terminated as part of a RIF. To reduce the budget by ten percent, Mr. Higgins decided to eliminate discretionary spending. Second, Mr. Higgins planned to eliminate or freeze current vacancies. Next, Mr. Higgins had to devise a plan to reduce the budget by 30 percent. During this time in the HSE Department, there were four HSE Managers, an analyst, and an assistant. He explained the only way to reach the 30 percent target was to eliminate an HSE Manager with "a very significant salary." Mr. Higgins explained he decided to lay off Complainant simply because he had the least amount of construction experience. To make this decision, Mr. Higgins solicited advice from other HR Department employees; he did not solicit advice from any other employee working in the HSE Department. In April 2015, Mr. Higgins was instructed to implement the 30 percent budget reductions that resulted in Complainant's termination. Complainant was advised he would be laid off on May 8, 2015. (Tr. pp. 139-143) Complainant's last day of employment was May 15, 2015. (Tr. p. 146) Mr. Higgins was not given a written directive that required him to implement the 30 percent budget reduction;

rather, the CEO and CFO directed Mr. Higgins to implement the budget reductions. (Tr. pp. 144-145) From all divisions of the company, Mr. Higgins believed that approximately eight to fifteen employees were released due to the RIF. (Tr. p. 148) Mr. Higgins reported to the CEO which specific individuals would be terminated due to the RIF and their termination dates. Mr. Higgins communicated the names of the individuals orally; he did not use Respondent's RIF form titled "H.R.D. 0212.1 FRMA." Mr. Higgins testified the CEO and CFO reviewed the budgetary effect of the selected individuals for termination and approved the terminations. (Tr. pp. 150-151)

Although there was no "formal process," Mr. Higgins testified he conducted an individual assessment of Complainant when considering him for termination and compared him to other HSE Managers. Mr. Higgins did not review any documents because there were only three employees who could be considered for termination and he was very familiar with each of them and their capabilities. (Tr. p. 153) When selecting an employee for the RIF, Mr. Higgins first considered an employee's salary in relation to the amount of expenses that had to be reduced. Then, Mr. Higgins considered the employees' overall contribution to Respondent, tenure, and familiarity with construction. (Tr. p. 155)

Mr. Higgins testified that Mr. Gonzales informed him that Complainant requested the opportunity to be placed a field position prior to his effective termination date. Mr. Higgins explained that Complainant was eligible to be considered for a field position, like all other employees. Mr. Higgins never made a telephone call to Complainant about an open position, nor did Mr. Gonzales. Mr. Higgins estimated that approximately one or two dozen field positions have become available since Complainant's termination and the RIF. Mr. Higgins only evaluates potential employees for corporate positions; he does not make hiring decisions or evaluate potential employees for field positions. Mr. Gonzales makes hiring decisions for the field positions. Complainant has not been hired for a field position since his termination. Since Complainant's termination and the RIF, an HSE Manager position for the Henderson facility became available. Complainant was not selected for that position; rather, Mr. Gosnell was selected for that position. (Tr. pp. 159-164)

Mr. Higgins believed that he told Mr. Gonzales, after Mr. Gonzales informed him that Complainant was interested in a field position, that Complainant should be hired for a position if Complainant was qualified. However, Mr. Gonzales never proposed or discussed rehiring Complainant following the RIF. Complainant never violated Respondent's drug abuse or substance abuse policy while employed by Respondent. (Tr. p. 167)

Mr. Higgins explained he received the HSE budget from the Finance and Accounting Department. Initially, the yearly budget for 2015 was \$4.8 million. It subsequently reduced to \$3.9 million and further reduced to \$3.3 million. Mr. Higgins used an accounting program to assess potential reductions and reduce the budget 30 percent. (Tr. pp. 170-175)

Mr. Higgins testified XL Group is XL Catlin, which provides insurance coverage to Respondent and assists Mr. Higgins in preventing the filing of claims, including environmental claims. (Tr. pp. 184-185) All of Respondent's construction projects are for other customers or clients. For example, some of Respondent's clients are Kinder Morgan, Oxy, and Shell. (Tr. pp. 200-201)

Mr. Higgins explained the bonus structure paid to upper managers, which included Mr. Higgins and Mr. Gonzales, was based on a safety component. This amounted for two to seven percent of the total bonus. Respondent refers to this as the “short-term incentive bonus.” In 2015, upper managers, including Mr. Higgins and Mr. Gonzales, were not awarded a short-term incentive bonus because Respondent did not meet financial targets. However, HSE Managers and other employees were awarded bonuses. (Tr. pp. 185-186)

Mr. Higgins explained an HSE Manager at the Henderson site and an HSE Manager in the corporate office are separate and distinct positions. For example, the cost associated with the employment of the HSE Manager at the Henderson site is reimbursed based on projects run through the fabrication facility; it is not based on corporate overhead. This is very similar to an HSE field position, except this position is based at a permanent facility. Mr. Gosnell, the HSE Manager of the Henderson site, does not have responsibilities encompassing other projects other than Henderson location. In contrast, corporate HSE Managers Andrews and Yargo oversee several sites and projects. (Tr. pp. 187-188)

Mr. Higgins testified Respondent is an engineering, procurement, and construction contractor. They primarily provide construction services for oil, gas, and power related projects. As of 2014 and 2015, approximately 80 percent of Respondent’s business was directly tied to the oil and gas industry. Primarily, Respondent constructs facilities that process raw gas and pull out various hydrocarbons and separates them for individual sale. He explained the oil and gas industry is cyclical based on price. In 2013, conditions in the oil and gas industry were favorable and had been that way for years. Conditions remained positive until 2014 when oil was approximately \$120 a barrel. (Tr. pp. 189-193) In October 2014, Mr. Higgins recalled that oil was trading at \$75 or \$80 per barrel. In January and February 2015, the price per barrel declined to approximately \$50 or \$40, and continued declining. Mr. Higgins explained that in October 2014, the budget for 2015 had already been submitted and approved. (Tr. pp. 194-195) At the time the 2014 budget was created, Respondent expected growth of approximately 20 to 30 percent. In November 2014, Respondent began having concerns about the projected growth incorporated into its budgets. (Tr. p. 195) Respondent uses external consultants to project its business for the following years. (Tr. p. 198)

In describing Respondent’s corporate structure, Mr. Higgins explained there is a Board of Directors and ELT. The ELT comprises the following individuals: Mr. Rick Graves, CEO; Mr. Chat York, CFO; Ms. Tracy Frazier, Chief Technology Officer (CTO); Mr. Bubba Saulsbury, Senior Vice President for Business Development; Mr. Frank Hunold, General Counsel; and Mr. Higgins, Chief Human Resources Officer. The ELT is responsible for Respondent’s day to day operations. The CEO makes the final decisions about layoffs with significant input from the CFO. In early December 2014, Mr. Higgins recalled the ELT began discussing the declining price of oil and its effect on Respondent’s business operations. (Tr. pp. 195-198)

Mr. Higgins explained the differences between HSE corporate and HSE field positions. An HSE field position is assigned to a specific project. A corporate HSE employee works in the corporate office. (Tr. pp. 199-200) The corporate HSE positions are located in Odessa, Texas. (Tr. p. 206) Field positions are available as long as a specific project is continuing. When the

project is completed, a field position for the project is eliminated and the employee is laid off. (Tr. p. 201)

All employees complete an application before beginning work for the first time. If a field position is open, an employee does not have to complete a new application. The employee can simply go online to submit his or her interest for a position or verbally convey an interest to someone at the company. Respondent's corporate positions support the field and operations employees. Corporate employees are paid from the "corporate overhead budget," which is not allocated to any specific project for reimbursement by a customer. Expenses for field positions are charged to a customer for a specific project and are reimbursed to Respondent. (Tr. pp. 202-205)

In February 2015, Mr. Higgins received specific instructions from the CFO to make contingency budget plans due to the economic downturn. The ELT met on a weekly basis to develop a 10, 20, and 30 percent budget reduction that could either be implemented all at once or in sequence. The CFO issued these instructions to each corporate department, not only the HSE Department. (Tr. pp. 207-208)

Mr. Higgins recalled deciding Complainant would be laid off from his position as a corporate HSE Manager in April 2015. Mr. Higgins did not speak or consult with anyone before making this decision. Mr. Higgins informed Mr. Gonzales that he had selected Complainant for the RIF on approximately May 8, 2015. Mr. Higgins did not ask for any input from Mr. Gonzales in making this decision. (Tr. pp. 211-212)

Prior to making the decision to terminate Complainant, Mr. Higgins testified he had not received any reports that Complainant had made complaints about environmental issues at Respondent's facilities. The first time Mr. Higgins became aware that Complainant had allegedly raised environmental concerns was after he was laid off. When Complainant was laid off, there were no other open corporate HSE positions. (Tr. pp. 213-214)

When Complainant was hired, another corporate HSE Manager, Mr. Ibis Ley, was also employed by Respondent. Prior to Complainant's termination, Mr. Ley voluntarily resigned. Mr. Ley's position was never filled due to the economic downturn. There were no HSE positions open when Complainant was laid off. However, an HSE lead position at the Henderson site subsequently became open. Mr. Higgins explained the position was filled locally to reduce costs. (Tr. pp. 214-215)

Respondent employees are advised of the employee hotline during new employee orientation. The hotline provides employees a way to report an unsafe conditions or company policy violations. Employees can also use the hotline to seek employment opportunities. Mr. Higgins did not know if Complainant used the hotline to search for other job opportunities. Respondent also has an "open door policy," which means any employee can speak with a member of upper management to resolve an issue. (Tr. pp. 216-217)

After Complainant was laid off in May 2015, Respondent has had additional scattered corporate RIFs and another significant corporate RIF in February 2016. However, there have

been no additional RIFs from the HSE Department since Complainant's termination. (Tr. pp. 218, 232-233)

In January 2015, Respondent employed 3,600 total employees. By the end of 2015, Respondent employed 2,100 total employees. Approximately 80 percent of Respondent's employees are employed for specific projects. (Tr. pp. 224-225)

After Mr. Higgins made the decision to terminate Complainant, Mr. Higgins did not speak with Complainant; rather, Mr. Gonzales told Complainant he was being terminated. Mr. Higgins did not tell Complainant because Complainant directly reported to Mr. Gonzales. (Tr. pp. 231-232)

Mr. Higgins testified corporate HSE Managers must be able to manage multiple projects; field HSE positions are only required to manage a single project. The field HSE Manager for the Henderson facility is currently Mr. Gosnell. At the time of the hearing, there were approximately 16 field HSE positions filled. Only one or two of these employees have the qualifications to work as a corporate HSE manager. (Tr. pp. 234-235)

Mr. Ibis Ley was a corporate HSE Manager for one year before voluntarily resigning his employment. He was subsequently rehired as a field HSE Manager. Mr. Higgins also believes Mr. Raymond Leal, a current HSE field employee, is qualified to be a corporate HSE Manager. (Tr. pp. 236-237)

Mr. Higgins estimated that Complainant's annual salary was \$120,000. (Tr. p. 239)

Since Complainant's termination, there have not been any hires to the corporate HSE Department. However, Respondent has hired approximately five or six corporate managers in other departments since Complainant's termination. (Tr. pp. 240-242)

Mr. Gonzales never reported any adverse opinions about Complainant's work performance to Mr. Higgins. Mr. Higgins testified that Complainant was a "model employee" and he did not hold any negative views about Complainant. Mr. Higgins believed Complainant was professional and a good employee. The decision to terminate his employment was simply based on his lack of tenure and the least amount of experience in the construction industry. (Tr. pp. 255-257)

At the time of the hearing, Respondent had terminated Mr. Gonzales's employment for reasons unrelated to this claim or Complainant. The current corporate HSE employees are Mr. John Andrews and Mr. Billy Yargo. The HSE Director, Mr. Gonzales's prior position, has been filled since Complainant's termination. Respondent hired Mr. Russell Battles as HSE Director. (Tr. p. 257)

4) Mr. William ("Billy") Yargo.

Mr. Yargo entered the Army after obtaining his GED. After his military service, he completed ten hours of college courses and approximately 100 or 150 hours of continuing education courses related to safety. (Tr. pp. 259-260)

In 2014, Mr. Yargo recalled receiving a bonus of approximately \$7,000 or \$8,000. In 2015, his bonus was approximately one-half of the 2014 bonus. Throughout most of 2015, Mr. Yargo believed he would not receive a bonus due to the company's performance and economic downturn. (Tr. pp. 261-262)

Mr. Yargo was employed as a corporate HSE Manager when Mr. Ley left his position with Respondent in January 2015. Mr. Yargo believed Mr. Ley accepted a position with another company. Approximately three weeks before the hearing, Respondent rehired Mr. Ley for a field position in New Mexico. Mr. Yargo was not involved in the hiring process. Mr. Ley reports to Mr. John Andrews. Mr. Yargo also recalled that Mr. Raymond Leal left his employment with Respondent at some point in 2013, but was recently rehired by Respondent as an HSE specialist in New Mexico. (Tr. pp. 263-264)

Mr. Yargo completed an audit of the Henderson site during Respondent's acquisition of the facility and initially assessed the existence of and need for any personal protective equipment (PPE). Prior to Respondent's acquisition of the Henderson site, he recalled that a third party conducted a "Phase One" assessment which involved taking soil samples to ensure there was no contamination to the facility. However, Mr. Yargo did not review the Phase One report. When Respondent acquired the Henderson site, Mr. Yargo recalled there were three plasma tables in use and two that were not in use. He believed there are still at least two plasma tables located at the facility. The cuttings from a plasma table are normally cooled by water in the table. Mr. Yargo explained it would never be appropriate to transfer any water from the table to the ground outside because the water should be lost by evaporation. Eventually, after the water evaporates, additional water must be added to the table. (Tr. pp. 266-271)

When Mr. Yargo first completed his audit of the Henderson site, there was one 500-gallon above ground fuel storage tank. There was also a second tank for "secondary containment." Mr. Yargo did not know if the first elevated tank was ever used. (Tr. p. 272)

Based on Mr. Yargo's personal audit of the Henderson site, he identified some pre-existing environmental concerns. He reported his concerns to Mr. Gonzales and Mr. Matthews. Mr. Yargo testified that Respondent addressed all of his reported environmental concerns; however, none of his concerns required notice to regulatory entities. (Tr. pp. 273-274)

Mr. Yargo worked in the HSE Department prior to Complainant's employment with Respondent. Mr. Yargo continued working for Respondent until Complainant's employment ended. Although Mr. Yargo was working out of the office on projects approximately 12-15 days each month, he observed Complainant and Mr. Gonzales interact. The HSE Department employees work together in a relatively small office space. (Tr. pp. 276-277)

Mr. Yargo did not recall Complainant reporting to anyone in the HSE Department what he identified at the Henderson site after he met with the IH (Tr. p. 278) Complainant never

discussed his concerns about the plasma cutters or other violations of environmental or safety regulations with Mr. Yargo. (Tr. pp. 288-290)

To Mr. Yargo's knowledge, Complainant and Mr. Gonzales had a "fine" working relationship. Mr. Yargo did not know Complainant would be terminated until approximately five minutes before it happened. Mr. Yargo recalled there were discussions about layoffs as early as November or December because of the economic downturn. Mr. Yargo recalled that Complainant and Mr. Gonzales had a disagreement about a needle stick injury in April 2015; however, Mr. Yargo was working on a particular site at that time and did not know any details about the disagreement. Mr. Yargo was not aware of any occasion in which Complainant believed he had identified an environmental concern or safety violation that needed to be reported and Mr. Gonzales disagreed with Complainant's assessment. (Tr. pp. 278-280)

Mr. Yargo had a meeting with Mr. Gonzales, Mr. Andrews, and a few other individuals approximately five or ten minutes before Complainant was terminated. He explained his role in this meeting was to act as a "workplace violation prevention specialist" in case a problem developed during the termination. (Tr. pp. 282-283) Otherwise, unless an employee was working under Mr. Yargo, he had no reason to know about a specific employee's termination. Mr. Yargo was not informed of the reason for Complainant's termination; however, he believed it was due to a RIF based on conversations in the preceding months about budget concerns and the economic downturn. (Tr. pp. 283-286)

5) Mr. John Andrews.

Mr. Andrews began working for Respondent in 2009 as an HSE Manager and reported to Mr. Gonzales, the HSE Director. Mr. Andrews reported to Mr. Gonzales until October 2016 and currently reports to Mr. Battles. His current base salary is \$135,000 or \$140,000. 2014, Mr. Andrews received a bonus of approximately \$8,000 to \$10,000. In 2015, he received a \$10,000 bonus. He has received a bonus in every year of his employment with Respondent. (Tr. pp. 292-295)

In his current corporate HSE position, field positions such as HSE specialists, technicians, and leads report to Mr. Andrews. No corporate employees report to Mr. Andrews. When Complainant was hired, Mr. Andrews was an HSE Manager, along with Mr. Yargo and Mr. Ley. (Tr. pp. 295-296)

Mr. Andrews testified that HSE field representatives work in the field at all times on specific job sites. These employees perform audits and other duties to ensure safety and assist the clients on site with HSE needs. HSE Managers in the corporate office serve as a resource to the HSE field representatives and act as client liaisons. On occasion, Mr. Andrews reports issues he identifies in the field to Mr. Higgins. (Tr. pp. 296-297)

Mr. Andrews testified he is "somewhat" familiar with Respondent's environmental policy, which does not include a SWPPP or SPCCP. (Tr. pp. 297, 301) Generally, if Respondent has an environmental issue, Respondent defers to a third party. (Tr. p. 298)

Mr. Andrews explained Respondent has an employee hotline for employees to use if they have a concern. Employees can also speak with their supervisor or anyone in the corporate office. He further explained Respondent has an “open-door” policy. Mr. Andrews has personally received internal complaints from employees. After receiving an internal complaint, Mr. Andrews is required to investigate the issue and then report to Mr. Higgins. In the past, some employees have made “bogus” complaints. (Tr. pp. 303-304)

Mr. Andrews recalled a needle stick injury that occurred in April 2015. His involvement in the incident was minor and recalled it involved “horseplay” between two employees. In describing the incident, another employee was about to take his daily insulin and accidentally stuck another employee with a needle. Mr. Andrews learned about this incident from Complainant. (Tr. p. 306)

On this same day or the next day as the needle stick injury conversation, Mr. Andrews testified that he, Mr. Gonzales, and Complainant participated in a conference call to discuss what Complainant needed to do at a particular job site. A client needed an HSE representative to assist during a shutdown and outage at an existing facility. (Tr. pp. 366, 371) Mr. Gonzales instructed Complainant to assist the client with the outage and shutdown. (Tr. p. 368) Complainant initially refused to go to the job site because Complainant believed his presence at a training session in a different office was more important than going to the job site. (Tr. pp. 308-309, 366) He explained that shutdowns must be given priority because when a client’s facility is non-operational, the client is not making money. (Tr. p. 373) For this shutdown, approximately 12 or 20 individuals, including Respondent employees, client employees, and subcontractors, had to be on site and coordinating to complete the work. (Tr. p. 374) He explained he has never heard of an HSE field representative asking a client to reschedule a shutdown. (Tr. p. 390) Mr. Andrews believed Complainant was avoiding performing field work at the site and acting insubordinately. Mr. Andrews told Mr. Gonzales about Complainant’s insubordination; however, this was the only time Mr. Andrews believed Complainant behaved in this manner and this was their only conflict throughout Complainant’s employment. (Tr. pp. 350-351, 369) Later, Mr. Andrews told Mr. Higgins about the conference call because a conflict had arisen about where Complainant should be working and about Complainant’s reporting of the needle stick injury that needed investigation. (Tr. p. 369)

Mr. Andrews testified that Complainant believed the needle stick injury was not being handled correctly by his superiors. (Tr. p. 309) Mr. Andrews told Complainant he had handled a similar situation approximately 20 years ago for another company and would investigate how to address the incident. Mr. Andrews believed the incident was handled properly and he recalled Mr. Gonzales agreeing with his assessment. (Tr. p. 310) Complainant still believed the incident was not handled properly. (Tr. p. 383) Mr. Andrews thought Complainant became angry and frustrated about the way the incident was being handled. (Tr. p. 383) Mr. Andrews could not recall exactly what Complainant believed needed to be done, but thought it involved an employee not receiving proper medical care. (Tr. p. 385) Complainant presented Mr. Andrews with an OSHA “fact card” that explained how needle stick injuries should be addressed, but this card did not change Mr. Andrew’s opinion. (Tr. p. 311) On the day Complainant made his initial report about the needle stick injury, Mr. Andrews was “in charge of the office” because no other employees, other than Complainant, were in the office working that day. (Tr. p. 312) Mr.

Andrews reported the needle stick injury and Complainant's concerns about it to Mr. Higgins. (Tr. p. 313) Mr. Higgins did not express any anger towards Complainant for reporting his concerns about the needle stick injury and wanted to ensure the situation was being handled properly. (Tr. p. 386)

Complainant never told Mr. Andrews that he was unhappy working for Respondent. Mr. Andrews never heard Mr. Gonzales say that it appeared to him that Complainant was unhappy working for Respondent. (Tr. p. 314)

Mr. Andrews is familiar with the Henderson facility and has visited it three to five times during his employment with Respondent. He completed an audit of the Henderson facility during the acquisition process. He did not recommend Respondent develop a SPCCP or SWPPP for the Henderson site. Further, Mr. Andrews did not make any reports to Mr. Gonzales about the Henderson site that would require reporting to a regulatory authority. Mr. Andrews was not involved with Complainant's review or audit of the Henderson site; however, he was aware that Complainant met with an insurance representative at the site who performed some testing. Andrews has had supervisory authority over HSE functions at the Henderson site. He explained the Henderson site is not a construction site; rather, it is a fabrication site for pipes. Mr. Andrews has observed a plasma table at the Henderson site. He explained the water reservoir that catches the plasma cuttings does not leave the table and water is gradually refilled to cool the cuttings. Mr. Andrews believed there is no reason to use a remediation company to remove the water or liquid from the plasma table. (Tr. pp. 316-321)

Following Complainant's termination, Mr. Andrews performed an audit or review of the Henderson site in July 2015. Mr. Gonzales told him to perform this review; he was not sure if Mr. Gonzales instructed him to perform this review as a result of the report that Complainant made. (Tr. pp. 326, 359-360) Mr. Gonzales told Mr. Andrews to review the entire site, and to specifically inspect the plasma cutting table. (Tr. pp. 326-327, 360) Mr. Andrews did not ask Mr. Gonzales why he should specifically review the plasma table because he was so busy at the time. Subsequently, Mr. Andrews reported his findings from the Henderson site, which included reports about the plasma table. The employees working at the Henderson site reported to Mr. Andrews that they did not discharge the water from the plasma table into the ground. (Tr. pp. 327-328)

Mr. Gonzales informed Mr. Andrews that Respondent terminated Complainant's employment. (Tr. p. 332) Mr. Gonzales did not specifically state the reason for Complainant's termination, but implied it was related to the economic downturn and decreasing oil prices. (Tr. pp. 333-334) Mr. Andrews told Complainant he would keep him apprised of available jobs, and specifically told him about a job available with another company. He informed Complainant about a safety position at Dixie Electric, which would be similar to an HSE field position with Respondent. (Tr. p. 338) Following Complainant's termination, Mr. Andrews never informed Complainant about jobs available with Respondent. (Tr. p. 334)

Mr. Andrews explained that Respondent secured and engaged in new projects following Complainant's termination, and additional employees were hired or rehired to fill new positions. Mr. Andrews estimated that from the date of Complainant's termination to the present day, there

have been approximately seven to ten HSE field positions that have become available. Three of those positions were filled by new employees, rather than a Respondent employee. Mr. Andrews did not inform Complainant about these positions because he believed Complainant was not qualified for an HSE field position, although he believed he was qualified for a corporate HSE Manager position. (Tr. pp. 335-337)

Mr. Andrews has been involved in hiring additional HSE field employees since Complainant's termination, including conducting interviews. (Tr. pp. 338-339) When hiring for HSE field positions, Respondent considers an applicant's knowledge and past performance. Mr. Andrews believed the three employees that have been hired for HSE field positions since Complainant's termination are more qualified for the position than Complainant because they possess field experience. These three individuals, all of which are former Respondent-employees, include: Mr. Ley, Mr. Michael Everett, and Mr. Gosnell. (Tr. p. 339) Mr. Ley, however, had also worked as a corporate HSE Manager in the past, the same position as Complainant. Mr. Andrews believed Mr. Ley was better qualified for an HSE field position than Complainant because he had ten years of experience working in a refinery-type facility, and Complainant did not have this type of work experience. (Tr. p. 340) Mr. Andrews also identified a field position and rehired Mr. Ley approximately three to five weeks before the hearing for a job expected to last three or four weeks. Respondent does not have an additional field position available for Mr. Ley after the current project is completed. (Tr. pp. 379-380)

Mr. Andrews testified actual field experience is vital for an HSE field representative position in the construction industry because one incorrect decision could affect the ability of a facility to operate. There are also significant safety risks because employees are working with natural gas and other hazardous chemicals. (Tr. pp. 376-378)

Mr. Andrews explained that, on occasion, corporate HSE Managers perform the duties of an HSE field employee in conjunction with each other. A corporate HSE Manager may substitute for an HSE field representative for a short time if an HSE field representative is unable to work. (Tr. p. 365) Mr. Andrews recalled Complainant worked in the field for a particular client on one occasion for two or three days. (Tr. p. 342) Later, Mr. Andrews testified that he could not recall if Complainant ever substituted for an HSE field representative at a specific job site. (Tr. p. 365)

Mr. Andrews testified Mr. Gonzales was a very competent manager because he knew the business, understood the relevant regulations, and had experience working in the field. When dealing with employees, Mr. Gonzales was "straight and to the point." (Tr. pp. 394-395) Mr. Andrews stated he had a good working relationship with Mr. Gonzales. He also believed Mr. Gonzales and Complainant had a good working relationship. (Tr. p. 396) Mr. Andrews never heard Mr. Gonzales state that he was displeased with Complainant's job performance or believed Complainant was underperforming. (Tr. pp. 351, 396)

6) Mr. Jeffrey Schultz.

Mr. Schultz is employed as Respondent's Director of HR. Mr. Higgins is Mr. Schultz's direct supervisor. Mr. Schultz explained that Mr. Higgins has overall responsibility for the entire

HR Department, and Mr. Schultz only has “functional or departmental responsibility.” (Tr. pp. 631-632)

Mr. Schultz testified he was employed by Respondent at the time of Complainant’s termination. Mr. Schultz recalled having a couple of in-person conversations with Mr. Higgins about potential layoffs during April 2015. During the first conversation, Mr. Higgins told Mr. Schultz that, as an attempt to reduce overhead costs, Respondent was considering a layoff of some employees in the HR Department, but not the HSE Department. Mr. Higgins sought Mr. Schultz’s input in deciding which HR Department employees should be laid off. Mr. Schultz did not have any direct supervisory authority over the HSE Department. Mr. Schultz and Mr. Higgins identified two clerks in the HR Department that would be laid off. During the second conversation, which occurred on approximately April 30, 2015, Mr. Schultz testified that Mr. Higgins told him that he had decided that Complainant would be laid off. Mr. Schultz was not present when Complainant was told he would be laid off. Mr. Schultz conducted an exit interview of Complainant on May 15, 2015. At the time of this exit interview, Mr. Schultz was unaware of Respondent’s standard exit interview process; Respondent implemented the standard exit interview processes in June or July 2015. (Tr. pp. 632-637)

During the exit interview, Mr. Schultz recalled telling Complainant the reason for his termination was a layoff or RIF. Mr. Schultz asked Complainant if he had any issues or concerns that he wanted to discuss. In response, Complainant said no, but suggested Mr. Schultz speak with his other co-employees. Mr. Schultz asked Complainant about his “supervision,” but Complainant said he did not want to discuss it. (Tr. pp. 638-639) Complainant did not complain to Mr. Schultz that he was being retaliated or discriminated against. However, Complainant suggested that the HR Department “investigate” Mr. Gonzales. (Tr. p. 639) In response, Mr. Schultz did not recall if he asked Complainant any follow-up questions about Mr. Gonzales. (Tr. p. 650) However, Mr. Schultz wrote a memo detailing Complainant’s suggestion that Mr. Gonzales be investigated and forwarded it to Mr. Higgins. (Tr. p. 663) Another HR Department employee, Ms. Susan Kinberger, conducted an investigation of Mr. Gonzales, and this investigation resulted in Mr. Gonzales’s termination due to sexual harassment. (Tr. p. 664) Mr. Schultz did not provide Complainant with any written document notifying him of his layoff or a payroll change form or pink slip. Complainant did not inquire about a time-frame during which he might be eligible to be rehired or ask about other work opportunities with Respondent. After the exit interview, Mr. Schultz offered to help Complainant find another job. (Tr. pp. 640-641) Mr. Schultz then clarified that he offered to help Complainant find another job a couple of days before the exit interview at another specific company. Complainant requested that Mr. Schultz make a call on his behalf and Mr. Schultz agreed. (Tr. p. 641) Mr. Schultz believed another company might have had a need for HSE employees. Mr. Schultz did not agree to be a reference for Complainant. (Tr. p. 662)

Mr. Schultz testified he did not hire any new employees to the HR Department in January, February, or March 2015. Mr. Schultz recalled that two clerks in the HR Department were laid off in late April 2015. Mr. Schultz does not usually participate in the hiring process for corporate or field HSE positions. (Tr. pp. 642-643)

Mr. Schultz explained that Mr. Higgins was tasked to implement standardized human resources policies for Respondent in February 2015. In addition to the human resources policies, Respondent was also implementing and updating all company policies, not only the separation policy. (Tr. p. 651) When deciding to eliminate a position, Respondent's policy requires consideration of the need for the position, the amount of employees with the position, and the tenure of the employees with the position. (Tr. pp. 643-645) Mr. Schultz further explained that Respondent has a policy that sets forth considerations for an employee's eligibility for rehire. (Tr. p. 648)

Mr. Schultz explained that Complainant's payroll change form indicated Complainant was laid off based on a RIF and was eligible for rehire. The 30 or 90 day box on the payroll change form is "typically" used when an employee is terminated rather than laid off. He further explained that many managers check the 30 or 90 day box without understanding what the designation means. (Tr. p. 649) Marking the 90 day box means an employee is terminated for violation of company policy. (Tr. p. 673) Respondent does not have a formal policy that provides when an employee is eligible for rehire for either 30 or 90 days. (Tr. pp. 649-650) Mr. Gonzales personally marked on the payroll change form that Complainant was not eligible for rehire for 90 days. (Tr. p. 660) However, the payroll change form no longer has boxes for 30 or 90 days for rehire eligibility; this option was removed following the revision of corporate policy. (Tr. pp. 661, 673) Currently, all employees must wait a minimum of 45 days to be rehired regardless of the reason for separation. (Tr. pp. 673-674)

When conducting interviews, Mr. Schultz provides the employee with the payroll change form if it is available to him at the time of the interview. The form is not always available at the time of the exit interview. (Tr. pp. 658-659)

7) Dr. Chrisann Schiro-Geist.

Dr. Schiro-Geist received her Ph.D. in Counseling Psychology from Northwestern University in 1974. She received her Master's in Education in Counseling and Guidance from Loyola University in 1970. She received her Bachelor's in Science in Biology with a minor in education from Loyola University in 1967. (JX-2; Tr. pp. 404-433)

8) Dr. Richard Edelman.

Dr. Edelman received his Doctor of Business Administration in 1975 from the University of Maryland. His major area of study was financial economics and his dissertation topic was public utility financial economics. He received a Master's of Business Administration in 1970 from the University of Maryland. He received a Bachelor's of Science with high honors in 1968 from the University of Maryland with a major in business administration and finance. (JX-3; Tr. pp. 434-502)

9) Dr. Helen Reynolds.

Dr. Reynolds is a consulting economist located in Dallas, retained by Respondent. She earned her Ph.D. in economics from Southern Methodist University in 1976 and her M.A. in

economics from Southern Methodist University in 1970. She earned her B.A. in economics from Connecticut College for Women in 1968. (JX-4; Tr. pp. 454-504)

6. Credibility and Relevant Findings of Fact.

a. Witness Credibility.

1) Complainant.

The undersigned found Complainant generally credible. As such, his testimony was persuasive at times and unconvincing at other times. He occasionally provided inconsistent or unspecific testimony on both directly relevant and non-relevant facts. Complainant credibly testified that he reported his concerns about the lack of a SWPPP and SPCCP and possible improper water discharge from the plasma cutting tables at the Henderson site to Mr. Gonzales and Mr. Miller. The totality of the evidence presented by the parties supports his testimony on these issues. He presented his testimony in a subjectively sincere manner. However, his demeanor during testimony displayed uncertainty in his recall of several different events relevant to this matter – particularly as it related to Respondent’s decision to terminate his employment. Additionally, as discussed in more detail below, several areas of Complainant’s testimony contained speculative conclusions about the intent or motivation of Respondent and some of its employees. These conclusions were not corroborated by independent testimonial or documentary evidence.

2) Mr. Charles Saulsbury.

The undersigned found Mr. Saulsbury’s deposition statements minimally credible. He demonstrated a poor recollection of factual details related to his role as the sole employee that handles Respondent’s public relations. During his deposition, Mr. Saulsbury stated that “he did not recall” stating Respondent had not laid off any full-time employees as a result of the downturn in the oil and gas industry, which had been reported in a media publication. However, the fact that Respondent did engage in significant layoffs of full-time employees is well-documented by undisputed evidence of record. Accordingly, the undersigned accords minimal weight to his deposition statements.

3) Mr. Eddie Gonzales.

The undersigned found Mr. Gonzales’s deposition only partially persuasive. Mr. Gonzales was Respondent’s HSE Director and Complainant’s direct supervisor during the course of his employment with Respondent. There were a couple direct internal inconsistencies in his deposition, and his statements were contradicted by more reliable and credible witness testimony. For example, Mr. Gonzales stated he did not recall Complainant telling him that he was improperly signing the OSHA logs. Later in his deposition, Mr. Gonzales recalled that Complainant did, in fact, bring this issue to his attention. Further, during his deposition, Mr. Gonzales initially stated that Mr. Higgins told him that a corporate HSE Manager would be laid off due to budget reductions in the HSE Department. Mr. Gonzales stated that Mr. Higgins told him that he would “base it on [Mr. Gonzales’s] decision.” Mr. Gonzales provided very specific

details about this conversation with Mr. Higgins. In particular, Mr. Gonzales recalled stating that he selected Complainant as the corporate HSE Manager for termination, although he “hated it” for him, and specifically cited Complainant’s lack of tenure in the position as compared to Mr. Andrews and Mr. Yargo. In contrast, later in his deposition, Mr. Gonzales stated that Mr. Higgins called and informed him of the RIF and that Mr. Higgins made the decision to terminate Complainant’s employment. Accordingly, these inconsistent statements cast significant doubt on Complainant’s assertion that Mr. Gonzales made the decision to terminate Complainant’s employment. (CB-2, pp. 4-5) Conversely, Mr. Gonzales denied reporting Complainant’s environmental concerns to his direct supervisor or any member of Respondent’s senior management team. This portion of his testimony is strongly corroborated by other witnesses and documentary evidence. Consequently, the undersigned finds it to be reliable.

4) Mr. James Moore.

The undersigned found Mr. Moore generally credible. His testimony was straightforward and forthright. There were no apparent inconsistencies in his testimony. There is no indication in the record that he expressed any animus towards Complainant. In fact, he agreed that Complainant was knowledgeable and more helpful than Mr. Andrews as a corporate HSE Manager. However, Mr. Moore’s testimony was largely irrelevant to any contested issue of fact or law in this case.

5) Mr. John Higgins.

The undersigned found Mr. Higgins particularly persuasive. He provided specific, detailed testimony about his interaction with Respondent’s senior management team regarding personnel decisions. He demonstrated clear and concise recall of the time frames and events that preceded his decision - on behalf of Respondent - to terminate Complainant’s employment. His explanation of the factors he considered when making this decision was thorough and persuasive. There were no apparent inconsistencies in his testimony and his testimony was corroborated by testimony of other witnesses and documentary evidence. His demeanor during testimony was straightforward and forthright, and he provided unequivocal responses. He displayed no animus towards Complainant and appeared to have no interest in the outcome of this claim.

6) Mr. William Yargo.

The undersigned found Mr. Yargo generally credible. His testimony was straightforward and forthright. There were no apparent inconsistencies in his testimony. There is no indication in the record that he expressed any animus towards Complainant. Mr. Yargo was employed as a corporate HSE Manager during the entire period of Complainant’s employment with Respondent. He was not involved in the decision to terminate Complainant’s employment, nor did he specifically know the reason for Complainant’s termination. He also never had any discussions with Complainant about Complainant’s belief that he had identified an environmental concern or safety violation that needed to be reported. As a result, a significant portion of his testimony was irrelevant to any contested issue of fact or law in this case.

7) Mr. John Andrews.

The undersigned found Mr. Andrews generally credible. His testimony was straightforward and forthright. There were no apparent inconsistencies in his testimony. There is no indication in the record that he expressed any animus towards Complainant. Mr. Andrews only recalled one incident during Complainant's employment in which he believed Complainant acted insubordinately. Mr. Andrews was employed as a corporate HSE Manager during the entire period of Complainant's employment with Respondent. He was not involved in the decision to terminate Complainant's employment, nor did he specifically know the reason for Complainant's termination. As a result, a significant portion of his testimony was not directly applicable to any contested issue of fact or law in this case.

8) Mr. Jeffrey Schultz.

The undersigned found Mr. Schultz generally credible. His testimony was straightforward and forthright. There were no apparent inconsistencies in his testimony. There is no indication in the record that he expressed any animus towards Complainant. In fact, he offered to assist Complainant in finding a position at another company. Although he conducted an exit interview of Complainant, he lacked substantial decision-making authority and did not make the decision to terminate his employment or implement the RIF. Consequently, a significant portion of his testimony was irrelevant to any contested issue of fact or law in this case.

b. Contested Factual Issues.

1) Respondent's Decision to Select Complainant for the RIF.

Complainant argues that Mr. Gonzales made the decision to terminate Complainant's employment. The only evidence cited in support of Complainant's position is Mr. Gonzales's deposition statement in which he initially stated that he made the decision to select Complainant for termination due to a corporate RIF. (CB-1, pp. 17-18; CB-2, pp. 4-5) Notably, Complainant testified he has no personal knowledge about who specifically made the decision to terminate his employment. However, due to Mr. Gonzales's inconsistent statements about who made the decision to terminate Complainant's employment, the undersigned found Mr. Gonzales's contradictory deposition statements unreliable and unpersuasive.

In contrast, Mr. Higgins persuasively and credibly testified that he selected Complainant as the corporate HSE Manager in the HSE Department to be terminated pursuant to the RIF. Mr. Higgins extensively testified about the reasons he chose Complainant for the RIF. Mr. Higgins explained that Complainant had the least amount of tenure and construction experience in comparison to other corporate HSE Managers in the HSE Department. Contrary to Mr. Gonzales's deposition statements, Mr. Higgins testified he did not seek Mr. Gonzales's input on which HSE Manager to select for the RIF; rather, Mr. Higgins solicited advice from other HR employees after being directed by the CEO and CFO to implement the required budget reductions.

Of particular note, Mr. Higgins's testimony is directly corroborated by Mr. Schultz's reliable and uncontroverted testimony. Specifically, Mr. Schultz recalled having a conversation

on approximately April 30, 2015 with Mr. Higgins in which Mr. Higgins stated that he made the decision to lay off Complainant as part of the RIF. Therefore, the undersigned finds Mr. Higgins made the decision, without the assistance of Mr. Gonzales, to terminate Complainant's employment as part of the RIF. The undersigned specifically rejects Complainant's contention that Mr. Gonzales decided to terminate Complainant's employment.

2) Respondent's Awareness of Complainant's HSE Concerns About Henderson Site.

Complainant argues "management had knowledge of [his] protected conduct." Specifically, Complainant contends Mr. Higgins personally had knowledge about Complainant's protected conduct because, as Mr. Gonzales's direct supervisor, he should have been made aware of Complainant's HSE concerns and because Mr. Higgins approved Complainant's travel to the Henderson site. (CB-1, pp. 23-24; CB-2, p. 2) However, the undersigned finds this to be a speculative assertion unsupported by direct or circumstantial evidence.

Complainant specifically testified he told Mr. Miller, Mr. Gonzales, Mr. Yargo, and Mr. Andrews about his HSE concerns about the Henderson site. Complainant conceded he did not directly speak with Mr. Higgins about his HSE concerns. Additionally, the totality of the evidence presented by the parties does not persuasively establish circumstances upon which it would be reasonable to find Mr. Higgins knew of any environmental concerns voiced by Complainant.

First, Mr. Gonzales did not state or imply in his deposition that he told Mr. Higgins about Complainant's concerns with the Henderson site. Although Mr. Gonzales clearly had knowledge about Complainant's concerns, he specifically rejected them by stating "this doesn't apply to us." Mr. Gonzales also, according to Complainant, asked Complainant not to discuss these concerns with Mr. McVicar, Respondent's Director of Construction Services. This evidence plainly illustrates that Mr. Gonzales desired to limit dissemination of Complainant's environmental concerns. Additionally, no witness testimony or exhibits indicate that Complainant's concerns about the Henderson site were conveyed to anyone other than the three employees in the HSE department. Thus, a more reasonable inference is that Mr. Gonzales did not pass on Complainant's concerns about the Henderson site to Mr. Higgins, his direct supervisor, about issues he believed were inapplicable to the HSE department.

Secondly, although Complainant argues that the emails cited in his post-hearing brief represent that Mr. Higgins had to approve Complainant's travel to the Henderson site, this does not ipso facto establish that Mr. Higgins had any detailed knowledge about Complainant's purpose for the travel or his resulting specific HSE concerns.⁷ To the contrary, Mr. Higgins persuasively testified that, other than the "due diligence" and site inspections with Mr. Yargo, he was not aware of other reviews or audits of the Henderson or Andrews sites detailing environmental concerns until after Complainant filed this claim. In addition, Mr. Higgins testified he had no knowledge that Complainant raised concerns about the water from plasma cutting allegedly being improperly discharged into the ground from the Henderson site until after Complainant filed this claim.

⁷ In addition, the undersigned is not convinced that these emails affirmatively establish that Mr. Higgins specifically approved and authorized Complainant's travel to the Henderson site.

In sum, there is no direct or persuasive circumstantial evidence that establishes Mr. Higgins was told or became aware that Complainant expressed HSE concerns about the Henderson site prior to Complainant's termination. Therefore, the undersigned finds Mr. Higgins had no knowledge of Complainant's asserted protected activity until after Mr. Higgins selected Complainant as one of the individuals whose employment would be terminated as part of Respondent's RIF plan.

7. Application of Law to Findings of Facts.

a. Elements of Claim. The FWPCA's objective is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C.A. § 1251(a). The SWDA governs solid waste management, providing "a comprehensive framework" for the regulation of the treatment, transportation, storage, and disposal of hazardous waste. 42 U.S.C.A. § 6902(a). The purpose of the SWDA is to promote the reduction of hazardous waste and minimize the present and future threats of solid waste to human health and the environment. 42 U.S.C.A. § 6902(b); *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 4 (ARB Dec. 30, 2004).

To prevail on a complaint of unlawful discrimination under the environmental whistleblower protection provisions, a complainant must establish that he or she:

- 1) engaged in protected activity;
- 2) suffered adverse employment action;
- 3) and, the protected activity caused or was a motivating factor for the adverse action, i.e., that a nexus existed between the protected activity and the adverse action.

Beaumont v. Sam's East, ARB. No. 15-025; ALJ No. 2014-SWD-001 (ARB Jan. 12, 2017) (citations omitted).

When a complainant makes this showing, an employer can avoid liability by "demonstrat[ing] by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity." *Id.*; see also *Tomlinson v. EG&G Defense Materials*, ARB Nos. 11-024, 11-027; ALJ No. 2009-CAA-008, slip op. at 8 (ARB Jan. 31, 2013).

b. Protected Activity. Under the whistleblower protection provisions of the FWPCA and SWDA, employers are prohibited from firing or in any other way discriminating against an employee "by reason of the fact that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter." 33 U.S.C.A. § 1367; 42 U.S.C.A. § 6971. "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." *Abdur-Rahman v. DeKalb Cnty.*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003 (ARB May 18, 2010). "[E]mployees who report safety or environmental concerns as a part of their job responsibilities engage in protected activity." *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028; ALJ No. 2010-SWD-1 (ARB Apr. 25, 2014) (citations omitted).

Complainant argues he engaged in protected activity when he raised concerns about potential HSE violations at Respondent's facilities. (CB-1, pp. 22-23) After conducting an audit or Phase One review of the Henderson site from March 31 to April 1, 2015, Complainant testified he believed the facility was required to develop and have a SWPPP and SPCCP. Complainant believed these plans were required to be implemented due to the amount and size of oil storage tanks located on the facility. He also reported his concerns that wastewater from a plasma cutting table was not being disposed of properly. Specifically, based on his discussion with employees at the site, Complainant believed that the wastewater from plasma cutting tables was being drained by a hose approximately 100 feet away from the building when the reservoir became filled to capacity. He relayed these concerns to the Henderson site's Manager, Mr. Miller, and also Respondent's HSE Director and his direct supervisor, Mr. Gonzales. Complainant's testimony is supported by an email Mr. Miller sent to Mr. Gonzales following Complainant's visit to the Henderson site. Mr. Miller told Mr. Gonzales that Complainant brought several issues to his attention about the Henderson site and requested that Complainant return to the site to assist him with other standard HSE issues. In addition, Complainant testified he called Mr. Gonzales shortly after completing the audit to discuss these environmental concerns. Respondent does not dispute that Complainant orally reported his concerns about the lack of a SWPPP or SPCCP for the Henderson site to Mr. Gonzales. However, Respondent contends that Complainant did not engage in a protected activity "as a matter of law because this was a simple oral report to Gonzales about what he saw at Henderson in response to a specific assignment he performed for the company at the facility." (RB-1, p. 15)

However, contrary to Respondent's position, the Administrative Review Board (ARB) has established that employees who report safety or environmental concerns as part of their job responsibilities engage in protected activity. *See, e.g., Warren v. Custom Organics*, ARB No. 10-092; ALJ No. 2009-STA-030 (ARB Feb. 28, 2012). As the ARB noted in *Lee v. Parker-Hannifin Corp.*, ARB No. 10-021; ALJ No. 2009-SWD-003 (ARB Feb. 29, 2012), the SWDA has been interpreted to extend whistleblower protection to include internal complaints made to supervisors. Moreover, the ARB has consistently held that "employees who report safety concerns that they reasonably believe are violations of [federal whistleblower statutes] are engaging in protected activity, regardless of their job duties." *Vinnett v. Mitsubishi Power Sys.*, ARB No. 08-104; ALJ No. 2006-ERA-029, slip op. at 11 (ARB July 27, 2010) (emphasis added). Federal appellate courts agree. *See Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098 (10th Cir. 1999).

Therefore, the undersigned concludes Complainant carried his burden to establish that his internal complaints, made as a part of his job responsibilities, qualify as a protected activity. Because the undisputed evidence of record establishes that Complainant relayed his concerns about the improper disposal of water from the plasma cutting table and the lack of a SWPPP and SPCCP at Respondent's Henderson site to his direct supervisor, Mr. Gonzales, the undersigned concludes Complainant engaged in a protected activity under the FWCPA and SWDA.

In his post-hearing brief, Complainant argues that, in addition to reporting HSE concerns at the Henderson site, he also engaged in protected conduct by making "a number of other disclosures to management regarding HSE non-compliance within the corporate HSE structure."

For example, Complainant asserts he engaged in protected activity when he alerted Mr. Gonzales “to the regulation that prohibited [Mr. Gonzales] from signing off on the company’s OSHA 300A logs, which [Mr. Gonzales] ignored. (CB-1, pp. 23)

A complainant’s actions constitute protected activity to the extent they advance the purposes of FWPCA or SWDA. *See Hall*, ARB Nos. 02-108, 03-131, slip op. at 5, citing *Jenkins v. EPA*, ARB No. 98-146; ALJ No. 88-SWD-2, slip op. at 17 (ARB Feb. 28, 2003). An employee engages in protected activity when he reports actions that he reasonably believes constitute environmental hazards, irrespective of whether it is ultimately determined that the employer’s actions violate a particular environmental statute. *Oliver v. Hydro-Vac Services, Inc.*, No. 91-SWD-00001, slip op. at 9 (Sec’y Nov. 1, 1995). Complainant has not argued, nor has he set forth any evidence, to establish how his internal complaint or report that Mr. Gonzales improperly signed Respondent’s OSHA injury reporting forms implicates or advances the purposes of the FWPCA or SWDA. *See In the Matter of B. David Mourfield*, ARB Nos. 00-055, 00-056; ALJ No. 99-CAA-13 (ARB Dec. 6, 2002) (rejecting the complainant’s arguments that possible OSHA violations, such as employer’s failure to properly train employees and other unsafe work practices, amounts to protected activity). Therefore, the undersigned concludes Complainant’s internal reports of Mr. Gonzales improperly signing Respondent’s OSHA 300A logs does not constitute protected activity.

c. Adverse Action. The Acts prohibit an employer from firing, or in any other way discriminating against an employee by reason of the employee’s protected activity. 33 U.S.C.A. § 1367(a); 42 U.S.C.A. § 6971(a). The parties stipulated that Respondent terminated Complainant’s employment on May 15, 2015. Thus, the undersigned concludes Complainant suffered an adverse action when Mr. Higgins selected Complainant for the RIF and thereby terminated his employment.

d. Motivating Factor. To establish discrimination under the FWPCA and SWDA, the complainant must prove by a preponderance of the evidence that the protected activity was a “motivating factor” in the employer’s decision to take adverse action. *Dixon v. U.S. Dep’t of Interior, Bureau of Land Mgmt.*, ARB Nos. 06-147, -160; ALJ No. 2005-SDW-008, slip op. at 8 (ARB Aug. 28, 2008); *Seetharaman v. Stone & Webster, Inc.*, ARB No. 06-024; ALJ No. 2003-CAA-004, slip op. at 5 (ARB Aug. 31, 2007); *Morriss v. LG&E Power Servs., LLC*, ARB No. 05-047; ALJ No. 2004-CAA-014, slip op. at 31-32 (ARB Feb. 28, 2007); accord 29 C.F.R. § 24.100(a), 24.109(a), 29 C.F.R. § 24.109(b)(2). “A ‘motivating factor’ is ‘conduct [that is] . . . a ‘substantial factor’ in causing an adverse action.” *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 *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 286 (1977)); see also *Hulen v. Yates*, 322 F.3d 1229, 1237 (10th Cir. 2003). 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*, ARB Nos. 08-003, 10-074, slip op. at 10, n.48. While temporal proximity does not necessarily establish retaliatory intent, it is “evidence for the trier of fact to weigh in deciding the ultimate question whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.” *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101; ALJ No. 1996-ERA-034, -036; slip op. at 6 (ARB Mar. 30, 2001).

As discussed, the undersigned found that Mr. Higgins alone made the decision to terminate Complainant's employment. The undersigned further found that Mr. Higgins had no knowledge of Complainant's protected activity prior to making the decision to select Complainant for the RIF. Consequently, the undersigned concludes Complainant's protected conduct could not have been a motivating factor in Mr. Higgins's decision to terminate Complainant's employment. *See Hall*, ARB Nos. 02-108, 03-131, slip op. at 6 (discussing relevance of the employer's knowledge of protected activity in SWDA cases); *In the Matter of B. David Mourfield*, ARB Nos. 00-055, 00-056 (employer required to have knowledge of the complainant's protected activity).

In concluding that Complainant's protected activity was not a motivating factor in Respondent's decision to terminate his employment, the undersigned carefully considered the issue of the temporal proximity between the time Complainant reported his environmental concerns about the Henderson site and his employment termination. For the reasons discussed in more detail immediately below, the undersigned concludes the close temporal proximity between the two events was entirely coincidental and occurred as an unintended result of the manner in which Respondent implemented its earlier decision to use a RIF in response to economic downturn and resulting budget challenges.

e. Same Adverse Action in Absence of Protected Activity. When this showing is made, an employer can avoid liability by "demonstrat[ing] by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity." *Id*; *see also Tomlinson*, ARB Nos. 11-024, 11-027, slip op. at 8. "[T]he preponderance of the evidence standard requires that the employee's evidence persuades the ALJ that his version of events is more likely true than the employer's version. Evidence meets the 'preponderance of the evidence' standard when it is more likely than not that a certain proposition is true." *Hall*, ARB Nos. 02-108, 03-013, slip op. at 28 (citing *Masek v. The Cadle Co.*, ARB No. 97-069; ALJ No. 1995-WPC-001, slip op. at 7 (ARB Apr. 28, 2000)).

As previously discussed, the undersigned concluded that Complainant's protected conduct was not a motivating factor in Mr. Higgins's decision to terminate Complainant's employment. However, in the alternative, even if Mr. Higgins had been aware of Complainant's protected activity prior to the decision to select Complainant for the RIF, the undersigned concludes Respondent would be able to establish by a preponderance of the evidence it would have taken the same adverse action in the absence of the protected activity. Undisputed evidence of record establishes that Respondent was considering implementing a corporate RIF prior to Complainant's report of HSE concerns at the Henderson site. As previously noted, Respondent hired Complainant in November 2014 and terminated his employment in May 2015. As stipulated by the parties, Complainant raised his environmental concerns about the Henderson site to Mr. Gonzales on April 1, 2015.

Mr. Salusbury recalled in his deposition that the CEO and CFO instructed him to reduce his department's budget in 2015. This suggests that Respondent was implementing budget reductions in multiple corporate divisions, and not merely the HSE Department. Mr. Higgins offered extensive testimony about plans for corporate budget reductions. Mr. Higgins recalled that in late 2014 and early 2015, the ELT and CFO ordered him to prepare a contingency budget

reflecting a 10, 20, and 30 percent reduction. Mr. Higgins further testified he recalled discussing budget concerns with Mr. Gonzales in late 2014 or early 2015. In addition, although not a senior corporate executive, Mr. Gonzales recalled being told that due to the economic downturn in the oil and gas industry, Respondent would implement corporate budget reductions and initiate the RIF. Mr. Schultz also confirmed having conversations with Mr. Higgins about corporate layoffs in April 2015.

This undisputed testimony is further corroborated by documentary evidence in the record. For example, in February 2015, Respondent's CFO sent an email to all department heads conveying budget concerns in light of the potential effects of the economic downturn on Respondent. In March 2015, the CFO sent an email to Mr. Higgins stating a \$600,000 budget reduction was necessary for the HSE Department and this would have to include a "headcount reduction." Notably, this occurred prior to Complainant's protected activity. In April 2015, the CFO again sent an email to all department heads and instructed them to reduce budgets by 30 percent. Other documentary evidence also establishes that Respondent began significantly decreasing its full-time employees beginning in April 2015. Specifically, Respondent employed 3,376 employees as of April 5, 2015, 3,308 employees as of May 3, 2015, 2,681 employees as of June 7, 2015, and 2,382 employees as of July 5, 2015. This steep decline in full-time employees over a relatively brief period is consistent with Respondent's position and other uncontroverted documentary evidence that it considered implementing budget reductions and the RIF prior to Complainant's engagement in protected activity in April 2015. Mr. Higgins persuasively testified that, after knowing the amount of budget reduction, he considered the corporate HSE employees' salaries and determined that Complainant would be selected for the RIF due to his lack of tenure and construction experience. Notably, as Complainant began working for Respondent in November 2014, Complainant had only worked for Respondent for approximately two months when the decision was made to create contingency budget plans.

Complainant argues Respondent's asserted reason for Complainant's termination, a RIF, is a pretext for retaliation. Specifically, Complainant contends he should not have been terminated as part of a RIF because he was the most qualified member of the HSE team. Complainant cites to his "decades of experience, formal education, and on the job training" as well as his ability to speak Spanish. Complainant cites Respondent's "Separation of Employment Policy and Procedures" that, according to Complainant, provides "tenure carries the least amount of weight of all factors to be considered." (CB-1, pp. 26-27) Complainant notes that Mr. Higgins testified that "he would retain a more qualified person over a tenured person in any situation" and suggests Respondent cannot reasonably argue that Complainant was not qualified for the position or less qualified than Mr. Andrews and Mr. Yargo. (CB-2, p. 5)

Respondent argues Complainant was the most recent hire and had the least amount of construction experience. As a result, Respondent asserts Complainant "was the natural choice to be laid off under these circumstances." (RB-1, p. 24) However, a review of Respondent's separation policy establishes that in addition to skills, qualifications, performance and productivity, the length of an employee's employment and service "may be considered, but *may* receive less weight in the determination." (CX-5, pp. 1-3) (emphasis added). Consistent with its written policy, Respondent is not prohibited from deviating from its general separation policy and relying more heavily on tenure status than other enumerated factors in determining which

employees to lay off. More importantly, it does not establish that the basis for Complainant's termination is pretext for retaliation. It is undisputed that Complainant worked for Respondent for a period of approximately six months, while Mr. Yargo and Mr. Andrews had years of service with Respondent. Although Complainant may subjectively believe he was the "most qualified" HSE employee, Respondent's decision to retain employees who possessed more experience with the company is a reasonable business practice commonly followed by many employers during RIF periods. Complainant's position is further rebutted by the fact that Respondent laid off at least 12 other corporate employees outside the HSE Department in 2015 prior to Complainant's termination.

Besides his superior qualifications, Complainant also asserts Respondent's failure to offer him an alternate position as a field HSE employee illustrates it is using the RIF as a pretext for retaliation. This argument is also unpersuasive. The evidence clearly establishes that Respondent's corporate HSE positions are separate and distinct from field HSE positions. Contrary to field positions, salaries for corporate positions are paid out of the corporate overhead budget and are not reimbursable from specific projects. Complainant was laid off from his corporate position, and this position has not been filled to date. Although Respondent has hired a small number of field HSE managers since the RIF that resulted in Complainant's termination, such hiring is consistent with the temporary nature of Respondent's field contract work. The evidence indicates that the nature of field and corporate HSE job duties is different and the few new field HSE positions that Respondent filled since implementing the RIF were offered to employees who had more direct HSE field experience than Complainant. It is reasonable for Respondent to offer these few positions to individuals with either more tenure or direct field experience than Complainant. Respondent has no obligation under either the FWPCA or the SWDA to rehire Complainant for a different position or notify him of all later available jobs for which he might notionally be qualified to apply.

Along similar lines, Complainant maintains that his employment termination documentation illustrates Respondent's intent to retaliate against him for his protected activities. In specific, he highlights the fact that the payroll change form executed upon his employment termination denoted he was eligible for rehire in 90 days; he maintains that this designation - pursuant to Respondent's human resource policy - was designed to be utilized only for employees who were terminated for poor performance or misconduct. According to Complainant, the assignment of this designation to him by Respondent demonstrates a clear intent to retaliate against him. The undersigned finds this position unpersuasive.

The testimony of Mr. Higgins and the exhibits show that Respondent's payroll paperwork form was poorly structured. As a result, it created confusion with regard to how it should be completed. Mr. Higgins acknowledged this during his testimony and clarified that the designation should not have been used in Complainant's case. Additionally Mr. Gonzales's deposition statements clearly established that he did not adequately understand the proper procedure for executing the form and that he checked the 90-day rehire qualification box because he believed that Complainant, as a subject of a RIF, was ineligible to be rehired for at least 90 days. Contrary to Complainant's theory, the evidence shows that the rehire category assigned to Complainant upon his termination was not the result of a conscious attempt to punish him for engaging in protected activity; it was merely the product of poorly drafted and executed

corporate employment payroll documents. Furthermore, the fact Respondent assigned Complainant any type of rehire category buttresses Respondent's assertion that he was terminated solely due to a RIF. Designating Complainant as qualified for rehire at any future period is inconsistent with the actions of an employer seeking to disassociate itself with an undesirable employee.

Consequently, in light of everything discussed above, the undersigned concludes that, even if Complainant had established that his protected activity was a motivating factor in his termination, Respondent demonstrated by a preponderance of the evidence it would have taken the same adverse action in the absence of the protected activity.

8. Ruling. Complainant did not demonstrate that Respondent had knowledge of his protected activity or that the protected activity was a motivating factor in Respondent's decision to terminate Complainant's employment. This claim is denied and this case is dismissed.

SO ORDERED this day at Covington, Louisiana.

**TRACY A. DALY
ADMINISTRATIVE LAW JUDGE**

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The 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.