



Issue Date: 28 March 2019

Case Nos.: 2018-WPC-00001

In the Matter of

JAMES R. WETZEL,
Complainant

v.

**M&B ENVIRONMENTAL, INC. and
MAB ENVIRONMENTAL, INC.**
Respondents

DECISION AND ORDER GRANTING RELIEF

This case arises under the employee protection provisions of the Federal Water Pollution Act (sometimes referred to as the Clean Water Act), 33 U.S.C. § 1367, and its implementing regulations at 29 C.F.R. Part 24.

I. PROCEDURAL BACKGROUND

Complainant filed a Clean Water Act (“WPC”) complaint with the Occupational Safety and Health Administration (“OSHA”) on February 24, 2016. In its January 31, 2018 letter, OSHA determined that Complainant and Respondent are covered under the Act and Complainant timely filed his complaint. However, OSHA found that, because Respondent terminated Complainant after he pled guilty to a misdemeanor charge for negligently violating permit regulations, OSHA did not have a reasonable cause to believe that a violation of the WPC occurred. Accordingly, OSHA dismissed the complaint. On February 26, 2018, Complainant objected to OSHA’s findings and requested a formal hearing before the Office of Administrative Law Judges (“OALJ”), and on March 22, 2018 this case was assigned to the undersigned. In accordance with the order issued on March 28, 2018, the Tribunal held a pre-hearing telephone conference on April 17, 2018.

The Tribunal held a hearing in this matter on July 17, 2018 in Cherry Hill, New Jersey, at which time it admitted JX 1 – JX 7, CX 2 – CX 10, and CX 13 – CX 23.¹ Complainant submitted his closing brief on October 5, 2018. Respondent submitted its closing brief on November 8, 2018. Complainant submitted his reply brief on November 30, 2018.

¹ July 17, 2018 Hearing Transcript (“Tr.”) at 10, 30, 32, 35, 38, 41, 54, 69, 77, 78, 80, 85, 86, 125-28, 131. Complainant also offered CX 24 and CX 25 (Tr. at 116-17) but these exhibits were rejected. Tr. at 128, 130, 132. Respondent offered no exhibits at the hearing. Tr. at 11.

II. FACTUAL BACKGROUND AND EVIDENCE

A. Overview of the Events leading to the dispute before the Tribunal

In essence, Complainant alleges that he was employed by a company call MAB Environmental Services, Inc. until he was laid off in 2011. Then Respondent, MAB's successor company, hired him around 2012. From 2011 to 2015 Complainant provided evidence to government officials and testified to a grand jury concerning violations of the Clean Water Act by MAB at the BC Natural Chicken Plant. Ultimately, in December 2015, criminal charges were brought against MAB and its president, Matthew Brozena, and Complainant. Two days after Mr. Brozena learned of Complainant's grand jury testimony, Respondent fired Complainant.

Pursuant to a cooperation agreement with the U.S. Attorney, Complainant pled guilty to negligently violating permit conditions under the Clean Water Act, which is a misdemeanor. JX 2; JX 5. Mr. Brozena similarly pled guilty to negligently violating permit conditions. CX 22 at 42. In connection with the same set of events, Respondent pled guilty to various violations of the Clean Water Act. CX 22 at 43.

B. Stipulated Facts

The parties stipulated to the following facts:²

1. Matthew A. Brozena is the president of MAB Environmental Services, Inc., and Complainant was employed by MAB from August 4th, 2009 to February 22nd, 2011.
2. Complainant was employed by MAB from August 4, 2009 to February 22, 2011.
3. From August 4th, 2009 to February 22nd, 2011, Complainant worked as a licensed operator for MAB at the BC Natural Chicken, a chicken processing plant located in Bethel Township, Lebanon, Pennsylvania.
4. From in or about August 2009 to in or about February 2011, BC Natural contracted with MAB to operate and manage BC Natural's wastewater treatment plant, with respect to regulations and limitations specified in BC Natural's national pollutant discharge elimination system permit issued by the Pennsylvania Department of Environmental Protection.
5. On January 21st, 2011, BC Natural received a notice of violation from Pennsylvania Department of Environmental Protection reporting a series of permit violations.
6. On February 22nd, 2011, Complainant was laid off by MAB due to loss of work.
7. On May 20th, 2011, BC Natural entered into a consent assessment of civil penalty with Pennsylvania Department of Environmental Protection for violations of this permit that occurred between September 2010 to April 2011.
8. Complainant was hired by Respondent on June 4th, 2012.

² Tr. at 5-8.

9. On September 9th, 2015, the United States charged Complainant via sealed information filed in the United States District Court for the Eastern District of Pennsylvania with violating 33 U.S.C. Section 1319(c)(1)(A), negligently violating permit conditions.
10. On December 15th, 2015, the United States charged MAB via an indictment filed in the District Court with violating: (1) 18 U.S.C. Section 371, conspiracy; (2) 33 U.S.C. Section 1319(c)(2)(A), violation of permit, two counts; (3) violation of 33 U.S.C. Section 1319(c)(4), tampering with required monitoring method, two counts; (4) 33 U.S.C. Section 1319(c)(4), false reporting, three counts; and (5) 18 U.S.C. Section 2, eight counts.
11. On December 15th, 2015, the United States charged Brozena via an indictment in the United States District Court with violating: (1) U.S.C. Section 371, conspiracy; (2) 33 U.S.C. Section 1319(c)(2)(A), violation of permit, two counts; (3) 33 U.S.C. Section 1319(c)(4), tampering with required monitoring method, two counts; (4) 33 U.S.C. Section 1319(c)(4), false reporting, three counts; and (5) 18 U.S.C. 2, eight counts.
12. On December 15th, 2015, after the indictment charging Brozena and MAB were filed, the District Court unsealed the information charging Complainant.
13. On February 3rd, 2016, Complainant pleaded guilty to violating 33 U.S.C. Section 1319(c)(1)(A), negligently violating permit conditions.
14. Respondent terminated Complainant's employment on February 5th, 2016.
15. On November 2nd, 2016, MAB pleaded guilty to two counts of violating 33 U.S.C. Section 1319(c)(2)(A), violation of permit; two counts of violating 33 U.S.C. Section 1319(c)(4), tampering with required monitoring method; and three counts of violating 33 U.S.C. Section 1319(c)(4), false reporting.
16. On November 2nd, 2016, Brozena pleaded guilty to two counts of violating 33 U.S.C. Section 1319(c)(1)(A), violation of permit: aiding and abetting.
17. On April 6th, 2017, Brozena was sentenced to a three-year term of probation and a \$100,000 fine.
18. On April 6th, 2017, MAB was sentenced to a five-year term of probation and a \$50,000 fine.

C. Summary of Testimony

James R. Wetzel (Tr. at 18-66)

Complainant began working for a company called MAB Environmental Services in 2009, working at the BC Natural chicken process plant which has a wastewater treatment facility. Tr. at 20, 23, 55. Complainant held a license to operate a wastewater plant by the Pennsylvania Department of Environmental Protection. Tr. at 23. BC Natural held a permit for emitting pollutants flowing out of the facility. Tr. at 23. Mr. Matt Brozena hired him, but he was laid off in February 2011. Tr. at 20-21. Later Mr. Brozena hired him to work for M&B Environmental, Inc. ("M&B"). Tr. at 20. Complainant's salary in 2015 was roughly \$40,000.³ It was

³ Tr. at 50; *see* CX 17 (Complainant's 2015 tax return); CX 18 (Complainant's 2016 tax return). Although the question posed asked about MAB, it is clear from the testimony that counsel was asking about M&B.

Complainant's understanding that these two entities were the same company. Complainant stopped working for M&B in February 2016. Tr. at 22.

Part of Complainant's job was to take samples from BC Natural's waste treatment facility to measure different parameters of pollutants. BC Natural's permit required that it take these samples. Samples were collected two different ways: grab sample and composite samples. A grab sample is a daily reporting sample, obtained by using a dipper and pulling the sample out of the final effluent. Tr. at 23-24. After obtaining the sample, Complainant would test the effluent and report the results on a log sheet. Tr. at 26; CX 3. The grab samples would then be sent out for fecal chloroform testing. Tr. at 24.

Composite samples were pulled over a 24-hour period using a sampler machine. Composite samples are tested for certain pollutants. These were taken once a week and they were sent to a lab. He would set the sampler up on Tuesday and the lab would come and pick up these samples on a Wednesday. Tr. at 24.

If Complainant noticed something wrong with a sample, he would contact Mr. Brozena before turning it in. CX 3 is a logbook where complainant made sample entry notes while at BC Natural. Tr. at 27-28. The September 14, 2010 entry refers to Mr. Brozena instructing Complainant to hold off on the sample and then sample the next day. Tr. at 28-29. In this incident, he called Mr. Brozena⁴ who told Complainant to dump the sample and resample later in the week. Complainant was a little hesitant, but Mr. Brozena told him that they had to sample once a week, but there was no specific day that they had to sample, so it would be fine. Tr. at 29.⁵ Complainant never dumped or resampled without being directed to do so by Mr. Brozena. Tr. at 32. There were other times where Complainant dumped samples. Tr. at 32-33.

Complainant was laid off in 2011 after the company lost its contract. While laid off, investigators from the Pennsylvania government contacted him and meet him at his house about three times.⁶ During these meetings, he admitted to discarding a composite sample at BC Natural, and that he was directed to do so. Tr. at 33-34. After Complainant was hired by M&B, investigators came and saw him at least once to discuss what went on at BC Natural, dumping the samples. Tr. at 34-35. He next heard from the government when he was subpoenaed. Tr. at 35; CX 4. After receiving the subpoena (CX 4), he told Mr. Dennis Murtaugh about it, who was his supervisor at the time with M&B. Mr. Murtaugh worked directly under Mr. Brozena. Tr. at 36. Complainant then hired an attorney. The subpoena was for December 2, 2014 and both he and his counsel had a scheduling conflict, so they set up a meeting in Philadelphia with an Assistant U.S. Attorney and signed a proffer agreement,⁷ and again told investigators about

⁴ See CX 2; Tr. at 30-31.

⁵ See also Tr. at 58-59.

⁶ Complainant admitted on cross-examination that he had not called the Department of Environmental Protection, the EPA, or any other governmental authority about what was happening at the treatment facility. Tr. at 59-60. He also stated that during one meeting, an agent from the Attorney General's office was present. Tr. at 61.

⁷ The testimony about whether Complainant actually testified on December 2, 2014, before the Grand Jury is unclear and confusing. Therefore, the Tribunal asked the following question: "Do you remember

discarding samples at the direction of Mr. Brozena. Tr. at 36-37; CX 5. Later, on July 14, 2015, Complainant signed a plea agreement (CX 6) for negligently polluting a stream in violation of 33 U.S.C. §1319(c)(1)(A).⁸ Tr. at 39-40. As part of that agreement, Complainant agreed to testify against his employer and in exchange the government agreed to reduce his sentence.⁹ Tr. at 40-41. Complainant testified to a grand jury. Tr. at 41; *see* CX 1. In February 2016, Claimant went to court to enter his plea and this occurred prior to Respondents terminating him. After entering his plea he returned to work. Tr. at 44. On the Thursday after he went back to work after pleading guilty, he received a telephone call from Mr. Murtaugh to meet him at the Lawn Travel Plaza first thing on Friday morning. It was there that Mr. Murtaugh handed Claimant his letter of termination (JX 1). Tr. at 44-45.

In 2016, after being terminated by M&B, Complainant worked for a church as a part-time janitor and a traffic control flagger. Tr. at 51. In 2017 Complainant continued to earn wages as a traffic control flagger. Tr. at 53; CX 19. If Complainant had not been terminated by M&B, he would have earned the same amount in 2016 and 2017 as he earned in 2015. Tr. at 53

Complainant is not currently permitted to work as a wastewater operator because the EPA has debarred him. This happened in April 2018 and lasts for five years. Tr. at 54. So even if he was not fired, he would not have been able to work past April 2018 as a wastewater operator. Tr. at 55.

Stephen Frist (pp. 67-89)

Mr. Frist started working for MAB in 2007. Mr. Brozena, the company's owner, hired him to operate wastewater plants. Mr. Brozena trained Mr. Frist for that job and he reported to Mr. Brozena. Tr. at 68-69. While at MAB his role was to go between several plants and collect grab and composite samples.¹⁰ Tr. at 70-71. He also worked for M&B, ending his employment there February 5, 2016. Tr. at 68-69.

On one occasion at a facility called Pleasant Run, when Mr. Frist pulled a composite sample, he was instructed by Mr. Brozena to dump the sample because the ammonia was too high, so it would not be sent to the lab for testing. Tr. at 71-72. Also, at one point, Mr. Frist pulled a grab sample and put chorine into the grab sample to kill the bacteria; an action the permit does not allow. Tr. at 73. The Department of Environment Protection found out about this and issued charges against him for tampering. Tr. at 73. Agents from the Department came

taking a stand and testifying, and a bunch of people in a courtroom?" To this Complainant responded "yes." Tr. at 66.

⁸ On cross-examination, Complainant admitted that the reason he pled guilty was he feared a \$100,000 fine and ten years in prison. Tr. at 62.

⁹ JX 4, the Government's motion for downward depart, reflects a downward departure to Claimant's sentence. According to Complainant, the judge mentioned this when he imposed his sentence. *See* Tr. at 45-46, 49. On cross-examination, Complainant admitted that the reason he cooperated with the Government was to get the best situation he could out of the mess he was in. Tr. at 62. Complainant was sentenced to two years of probation and a \$1,000 fine. Tr. at 48.

¹⁰ Mr. Frist's explanation of what grab and composite samples were was similar to Complainant's description.

to his house to discuss this matter, and at some point he admitted to the investigators that he tampered with the samples at that treatment facility. Tr. at 74. MAB (Mr. Brozena) lost the contract after that incident. Tr. at 75-76. Mr. Brozena was very disappointed that Mr. Frist admitted guilt for tampering. CX 7 is a letter informing Mr. Frist that MAB lost the contract and that Mr. Frist should attend some training. Mr. Frist did not obtain that training nor did Mr. Brozena tell him to receive that training after he issued that letter. Tr. at 76-77.

Eventually, Mr. Frist was arrested for his tampering with public records concerning that sample at the other treatment plant, charged with a felony, and on May 30, 2012 pled guilty to those crimes. He was sentenced to two years of probation and a \$2,500 fine. Tr. at 77-80; CX 8; CX 9; CX 10. At the time of his guilty plea in 2012, he was working for M&B. His plea was published in the newspaper, but he was not sure if Mr. Brozena knew that he had pled guilty. Tr. at 81. Mr. Frist never signed a cooperation agreement to testify against his employer nor did he ever testify before a Grand Jury about this matter. Tr. at 81-82. After his plea, investigators interviewed him, but he never told them that Mr. Brozena directed him to tamper with those samples. After day after his plea, he returned to work. Tr. at 82. Neither Mr. Brozena nor anyone else reprimanded him for pleading guilty or violating the law. Tr. at 82-83.

In addition to the treatment facility described above, at some point a U.S. Attorney in Philadelphia began questioning him about incidents at another treatment facility operated by Mr. Brozena called Buckingham. This was a nursing home with a wastewater system. Tr. at 83. On this instance he did enter into a proffer agreement with the Government (CX 15) relating to providing evidence. After signing this document, Mr. Frist did provide testimony against his employer to a Grand Jury, around August 2015.¹¹ Tr. at 84. For his conduct at this second treatment plant he was charged with tampering and pled guilty. CX 14. Following this plea, he returned to work the next day. Tr. at 85-86. Two days after his plea, Mr. Brozena fired him. Tr. at 86; CX 16.

Matthew A. Brozena (pp. 90-124)

Mr. Brozena was the president of both M&B and MAB corporations. He started MAB himself in around 2001. In 2012 he purchased another company with a partner and changed the company name MAB, which are his initials, to M&B, which reflected his last name and his partner's last name. Tr. at 91. At the time of the incidents here, MAB's principal business was contract operations of water and wastewater treatment facilities. Part of this business includes performing sampling to meet effluent limits set by regulation; measure the amount of pollution that one is allowed to put out into a receiving stream. Tr. at 91. At the time of these incidents, 20 to 30 percent of his business was with government municipal contracts. Tr. at 96.

There are two ways to sample wastewater. One is a composite sample, which is collection over time. The other is a grab sample, which is a snapshot of the water quality at that exact moment. Tr. at 92

¹¹ However, on cross-examination, Mr. Frist testified that he now could not recall if it was Mr. Brozena or Mr. Jim Crafton, the operator of Buckingham, that told him to do something wrong. Tr. at 88.

His company began to operate the BC Natural plant around August 2009. Mr. Brozena knows the Complainant as Complainant worked at BC Natural at the time he began to operate the plant. Prior to his company taking over operations, there were a lot of effluent violations. Tr. at 93. At some point he learned that the federal government was investigating the BC Natural plant. Complainant's supervisor, Mr. Murtaugh, told Mr. Brozena that Complainant had been subpoenaed for the grand jury. Tr. at 98.¹² Mr. Brozena took no action upon hearing this information. The next he heard from the government was when they subpoenaed his documents for all of the facilities he operated. Tr. at 93. Upon reading his own indictment, he suspected that Complainant told investigators that he directed Complainant to discard samples. Tr. at 103. Mr. Brozena knew that Complainant was going to testify against him at a trial. Tr. at 103. As part of discovery in his criminal case, which was before he terminated Complainant, he reviewed the discovery that showed Complainant testified to the grand jury. Tr. at 103-04. Later, his company pled guilty to charges regarding the BC Natural plant. Mr. Brozena pled to negligence to a permit charge. Tr. at 94. He understood this to mean that he failed to supervise his workers properly. Tr. at 97. He pled because he did not have the money for the defense.¹³ Tr. at 94. He denied knowing that Complainant was improperly testing at the BC Natural plant, asserting that he first learned of it in the indictment. Tr. at 95. He denied ever instructing Complainant to break the law. Tr. at 104. According to Mr. Brozena, he pled to Counts 2¹⁴ and 6 of the indictment (JX 2), but during the plea the judge noted and the Government agreed that he did not direct or instruct the Complainant. *See* CX 22.

Mr. Brozena terminated Complainant's employment because he "had no choice." Tr. at 95. Complainant admitted that he broke the law. It was damaging to the business because this kind of business depends on trust, especially in operators who work alone. Similarly, Mr. Fritz could not work because he was non-certified. He could not force another employee to take the responsibility for Complainant at that point. Tr. at 96. As Complainant was debarred, he could no longer work the government contracts, which accounted for 20-30% of Respondent's business. Tr. at 96. Mr. Brozena acknowledged that at the time he initially hired Complainant, Complainant did not have his certification. Tr. at 112. When asked why he needed to fire him because he no longer had a certificate, Mr. Brozena said because Complainant admitted that he broke the law and was no longer eligible to ever get a license; when he hired him he was eligible to get one. Tr. at 113.

Mr. Brozena's company has lost a significant amount of contracts because of these charges and he has had to explain how the situation was corrected. Tr. at 123-24.

III. ISSUES

¹² *See also* Tr. at 101.

¹³ The Tribunal specifically asked if Mr. Brozena entered an *Alford* Plea, and was told that he did not. Tr. at 95.

¹⁴ "As to Count 2, Mr. Brozena will acknowledge that he instructed Mr. Wetzel to resample the composite sample for certain parameters. We agree with that. That's part of the factual basis. We disagree with the claim that he instructed Mr. Wetzel to discard the sample. So, he acknowledges part of it and I think that's a significant part of it, but he does not agree that he said, by the way, dump that sample." CX 22 at 35; Tr. at 110; *see also* CX 22 at 37.

- Did the Complainant engage in protected activity?
- Did the Respondent take an unfavorable personnel action against Complainant?
- Was the protected activity a contributing factor in the unfavorable personnel action?
- In the absence of the protected activity, would the Respondent have taken the same adverse action?

A. Summary of Complainant's Position¹⁵

On September 14, 2010, Complainant took a grab sample for the BC Natural effluent and tested it for ammonia. The sample tested above the permit limits so Complainant called Mr. Brozena, who told Complainant to possibly delay taking the composite sample. The following day Complainant pulled the composite sample and again the sample tested was above the permit limits. Mr. Brozena directed Complainant to dump the composite sample and to resample later in the week so he did so resetting the composite sample machine to take a sample a day later. Compl. Br. at 3-4.

On February 22, 2011, Complainant was laid off from MAB due to loss of work. During this time the Pennsylvania Department of Environmental Protection ("DEP") began an investigation into MAB's operations at BC Natural. Investigators visited Complainant at his home and the content of a logbook the investigator's had seized. During meetings with these investigator's Complainant admitted to discarding a composite sample at BC Natural at the direction of Mr. Brozena. Compl. Br. at 4 citing Tr. at 34.

Complainant produced substantial evidence showing that he engaged in protected activity; specifically, by testifying to a grand jury investigating crimes committed by MAB and Mr. Brozena, and that Respondent was aware of the protected activity at the time of the termination. Comp. Br. at 14. Complainant notes that the United States described his cooperation as "significant." Compl. Br. at 18 (citing to JX 4, page 10). He notes the close temporal proximity between Respondent gaining actual knowledge of Complainant's protected activity and his termination of employment and that a similarly situated employee who was charged with a similar crime (and did not engaged in protected activity), was treated more favorably than Complainant. Compl. Br. at 15, 20-22. He asserts that the evidence provided by Respondent is self-serving and not credible and, despite possible other motivating factors, the evidence proves that one of the motivating factors was Complainant's protected activity. Compl. Br. at 15-16.

Further, despite Respondent's claims, there is no evidence that Complainant's action damaged Respondent's business. Compl. Br. at 25. Complainant maintains that Respondent's argument about his lack of licensure and debarment are pretextual, and that Respondent had a strong motive to retaliate against Complainant. Compl. Br. at 26-28. Finally, Respondent did not prove an affirmative defense and the fact that Complainant committed negligence is not a defense. Compl. Br. at 30. Further, any affirmative defense does not apply because

¹⁵ When asked at the hearing, the parties did not dispute that they were subject to the Act. Tr. at 17. Further, Respondent conceded that its termination of Complainant's employment was an adverse action. Tr. at 17-18.

Complainant acted at the direction of Mr. Brozena. Compl. Br. at 31-33. As for a remedy, Complainant requests reasonable attorney fees and costs, in addition to back pay of \$46,609. He does not seek reinstatement. Compl. Br. at 34-35.

In Complainant's reply brief he asserts that Respondent's argument about Complainant having unclean hands is not a grounds to preclude relief and cites to whistleblower cases he believes supports his position. Reply Br. at 1-5. Complainant argues that recovery is only precluded if Complainant deliberately violated the act and not at the direction of his employer. *Id.* at 5. Here, Complainant only plead guilty to negligently violating the Act. He reasserts his position that he need not prove that his protected activity was the sole motive behind the Respondent's adverse action and that it need only be a motivating factor. *Id.* at 7.

B. Summary of Respondent's Position

Respondent argues that Complainant has failed to meet his burden of proof. It contends that there is no credible evidence that Complainant was fired or discriminated against because of his testimony and cooperation in an enforcement proceeding. Rather, the evidence established that Respondent had a credible bona fide business reason for his termination of employment. Respondent notes that Complainant never voluntarily contacted any government agency regarding his illegal activities, but merely cooperated after his illegal activities were discovered. Resp. Br. at 2. The evidence shows that at the U.S. District Court hearing, counsel for Mr. Brozena repeatedly stated that Mr. Brozena and the complainant would not agree to any factual basis for any guilty plea which involved any admission or statement that either the companies or Mr. Brozena individually directed or instructed Complainant to violate any provision of the Water Pollution Control Act. Resp. Br. at 5.

The company pled to felony violations because the employees (Complainant and Mr. Fritz) bound the company through their actions. Resp. Br. at 5. Mr. Brozena only found out about Complainant's improper testing when the indictment was issued. Resp. Br. at 6. Once Mr. Brozena terminated Complainant because he "had no choice." Resp. Br. at 6 citing Tr. at 95. Mr. Brozena did not terminate Complainant's employment sooner out of concern that it would look like interfering with the investigation. Resp. Br. at 7. Respondent argues that the Federal Government cannot have it both ways. It should not be able to indict and punish Respondent for failing to supervise its employees and then punish it for terminating Complainant's employment for violating the law and requiring it to pay money to Complainant for his conduct.

C. Credibility

In deciding the issues presented, this Tribunal has considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, this Tribunal has taken into account all relevant and probative evidence, and analyzed its cumulative impact on the witnesses' testimonies. See *Fradley v. Tennessee Valley Authority*, Case No. 1992-ERA-19, slip op. at 4 (Sec'y Oct. 23, 1995).

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*,

ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). It is well settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-024 (Jan 31, 2007); *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 14, n.5 (3d Cir. 1975).

This Tribunal finds that Complainant was credible and presented a generally consistent theme. On the other hand, the Tribunal found Mr. Brozena's testimony to be less credible. His rationale for his actions were self-serving, his post-conviction rationales for his actions both before and at his guilty plea in an attempt to minimize his involvement were unconvincing, and he failed to address or rebut any inferences that logically ensue given the sequence of events and the conduct of all parties involved.

IV. CONCLUSIONS OF LAW

A. General legal framework

The WPC's objective is to restore and maintain the chemical, physical, and biological integrity of the Nation's water. 33 U.S.C. § 1251(a).

Section 507(a) of the Federal Water Pollution Control Act (WPC) provides:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any 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 this chapter.

33 U.S.C. § 1367(a).

The Secretary of Labor has articulated the legal framework under which parties litigate WPC retaliation cases.¹⁶ To prevail on a complaint of unlawful discrimination under the environmental whistleblower protection provisions, a complainant must establish that:

¹⁶ 29 C.F.R. §24.109(b)(2) provides:

...[A] determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint, relief may not be

- 1) The parties are subject to the WPC;¹⁷
- 2) Complainant engaged in protected activity;
- 3) He suffered an adverse employment action; and,
- 4) the protected activity caused or was a motivating factor for 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).

As Complainant bears the initial burden the Tribunal will begin its analysis of his case.

B. Complainant's Prima Facie Case

1. Protected Activity

The WPC's whistleblower provision was enacted in order to protect an employee from retaliatory actions taken against him by the company when the employee attempts to bring the company into compliance with the WPC's safety and quality standards. *Passaic Valley Sewerage Commissioners v. U.S. Dep't of Labor*, 992 F.2d 474, 478 (3rd Cir. 1993). 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. § 1367(a). “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).

The employee need not prove that an actual violation of the WPC occurred. Rather, he must prove only that his complaint was grounded in conditions constituting reasonably perceived violations of the environmental acts. *Ilgenfritz v. U.S. Coast Guard Academy*, 1999-WPC-3 (ALJ Mar. 30, 1999). Even if the complaint is not ultimately substantiated, it may provide a basis for a whistleblower case as long as it is grounded in conditions constituting reasonably perceived violations of the environmental acts. *Lebron v. City of Raleigh, N.C.*, 2002-WPC-00002 (October 13, 2004) (citing *Niedzielski v. Baltimore Gas & Elec.*, 2000-ERA-4 at 35 (ALJ Jul. 13, 2000)).

ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.

¹⁷ The parties stipulated to this element so the Tribunal need not address it further.

There can be little doubt that providing information to federal investigators and testifying before a grand jury is protected activity.¹⁸ *Gilligan v. Town of Moreau*, 2000 U.S. App. LEXIS 27198, at *6-8 (2d Cir. 2000); *Khami v. Ortho-Mcneil-Janssen Pharm., Inc.*, 2012 U.S. Dist. LEXIS 15342, at *76 (E.D. MI. 2012). Accordingly, this Tribunal finds that Complainant engaged in protected activity.

2. Adverse Action

The Acts prohibit an employer from firing, or in any other way discriminating against an employee because of the employee's protected activity. 33 U.S.C.A. § 1367(a). The evidence establishes that on February 5, 2016, Respondent terminated Complainant's employment.¹⁹ Complainant testified that he was terminated two days after he pled guilty to a misdemeanor in federal court. Thus, the undersigned concludes that Complainant suffered an adverse action.

3. Motivating Factor

To establish discrimination under the WPC, 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. 29 C.F.R. § 24.109(b)(2); *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). 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. "A 'motivating factor' is 'conduct [that is] . . . a substantial factor' in causing an adverse action." *Onysko v. State of Utah, Dep't Env't'l 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)); *Hulen v. Yates*, 322 F.3d 1229, 1237 (10th Cir. 2003). This is a higher burden for the Complainant than the "contributing factor" standard set forth in *Palmer v. Canadian National Railway/Illinois Central Railroad Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154, (ARB Sep. 30, 2016) (en banc) (reissued with full dissent Jan. 4, 2017), slip op. at 58.²⁰ "There may be other factors of substance but, in the final analysis, [the protected activity] must be the factor that motivates the conduct—'the substantial factor'." *United States v. Jenkins*, 2013 U.S. Dist. LEXIS 92945, 2013 WL 3338650 (E.D. Ky. July 2, 2013).

¹⁸ In addition, "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). The Administrative Review Board ("ARB") has held 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).

¹⁹ *See* Stipulated Fact #14, *supra*; Tr. at 7.

²⁰ *Palmer* lays out the legal standard for cases involving whistleblower protection provisions with the AIR-21 burden-of-proof framework. *Palmer*, slip op. at 16. The decision references the statutes to which it applies, and the Clean Water Act is not among those listed. *See id.*, slip op. at 5 n.14, 15 n.71, 39-40 n.166. Here, Complainant meets the higher "motivating factor" burden, and would therefore also satisfy *Palmer's* "contributing factor" standard if it applied.

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). Causation may be inferred if an adverse action closely follows protected activity. 29 C.F.R. § 24.104(e)(3) (“The required showing may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, giving rise to the inference that it was a motivating factor in the adverse action.”); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). The closer the temporal proximity between the protected activity and the alleged retaliatory action, the easier it is to make an inference of causation. *See Couty*, 886 F.2d at 148 (noting that a temporal proximity of 23 days between the protected activity and the adverse action was sufficient to give rise to an inference of retaliation). On the other hand, if a significant period of time lapses between the point at which Respondent became aware of the protected activity and the point Respondent took adverse action, no such inference is warranted. *See Burrus v. United Tel. Co. of Kansas, Inc.*, 683 F.2d 339 (10th Cir. 1982) (holding three years between the complaint and the termination is too long to give rise to an inference of retaliation).

The Tribunal finds compelling evidence that Complainant’s cooperation with law enforcement officials and his testimony before the grand jury were at significant motivating factor in Respondent terminating his employment. Complainant cooperated with both state and federal law enforcement officials, and offered testimony, concerning MAB, M&B, and Mr. Brozena. Tr. at 34-38. There is no question that Respondent knew of Complainant’s cooperation at the time of his termination. Mr. Brozena testified that by December 15, 2015, he suspected that Complainant told the investigators that he had directed Complainant to discard samples. Tr. at 103. Mr. Brozena also testified that he knew Complainant was going to testify against him at a trial, and that he knew Complainant had provided grand jury testimony against him prior to Complainant’s termination. Tr. at 103-04. He obtained the information about Complainant’s grand jury testimony “about a week or two” following his own initial appearance following his indictment. Such an appearance would have come sometime shortly after the indictment issued upon him and MAB on December 15, 2015.²¹ JX 2; Tr. at 104. These facts alone, especially in their close proximity to Complainant’s termination, provide strong circumstantial evidence of retaliation.

Further, the Tribunal does not find Respondent’s explanation for firing Complainant to be credible. Mr. Brozena alleged that he reviewed Claimant’s Grand Jury testimony when he received discovery in connection with his own criminal charges, and at this point believed that Complainant broke the law. Tr. at 104. However, he asserted that did not fire Complainant at that point because he did not want to appear to interfere with the investigation against himself. Tr. at 105. But after Complainant pled guilty to the charges against him, Mr. Brozena asserted that he “had no choice” but to fire Complainant. Tr. at 95. Mr. Brozena alleged that

²¹ Complainant’s brief represents that this occurred on January 21, 2016. Compl. Br. at 21. The Tribunal is unable to verify that statement from the record before it. During Mr. Brozena’s deposition testimony he does make reference to the “18th.” CX 21 at 72. However, the Tribunal is aware the requirements of Federal Rule of Criminal Procedure 5 which requires that a person come before a magistrate judge without unnecessary delay.

Complainant's criminal actions had damaged his business, which relied on trust in independent operators, and that Complainant and Mr. Fritz were both non-certified and unable to work without the supervision of another certified employee. Tr. at 96. Mr. Brozena agreed that he had hired Complainant in June 2012 while he lacked a water operator's license, but explained that former hiring was premised on Complainant's ability to regain his license—which had lapsed due to lack of continued education—through retesting. Tr. at 96, 113. After Complainant's admission of guilt in his criminal case, however, Mr. Brozena asserted that Complainant was "no longer eligible to ever get a license." Tr. at 113. Mr. Brozena stated that he could not force another licensed employee to be responsible for Complainant, thus necessitating termination. Mr. Brozena also noted that Complainant was debarred from working on government contracts, which constituted 20-30% of Respondent's business. Tr. at 96.

Though the undersigned grants that some of these reasons appear to be legitimate considerations for termination, Mr. Brozena appears to have exaggerated their significance at the time he fired Complainant. For one, his letter of termination states only that Complainant was terminated because he pled guilty to violations of the "Federal Clean Streams [sic] Act." JX 1. Respondent's expansion of this rationale in connection with this litigation indicate a lack of credibility, particularly because its different reasons are unsupported by the documentary evidence. *See Perfetti v. First Nat'l Bank*, 950 F.2d 449, 456 (7th Cir. 1991). Contrary to Mr. Brozena's naked assertion, there is no indication in the record that Complainant would have lost his license immediately following his guilty plea under 33 U.S.C. § 1319(c)(1)(A) for negligently violating permit conditions. It appears that the Pennsylvania State Board for Certification of Water and Wastewater Systems Operators "may" revoke an operator's certificate for "negligence in the operation of the water or wastewater system," 25 Pa. Code § 302.308(b)(1), but nothing mandates that such revocation occur upon a finding or admission of negligence. Mr. Brozena similarly had no immediate need to fire Complainant in February 2016 due to EPA disbarment, because that did not occur until April 2018. Tr. at 55. Moreover, EPA debarment only excludes persons from work on "Federal programs." 2 C.F.R. § 180.125(b). Mr. Brozena asserted that 20-30% of Respondent's contracts were with municipal—not federal—governments, and failed to explain why Complainant could not have been assigned to the remaining contracts even if he was excluded from working on these municipal government contracts. *See* Tr. at 96-97.

Mr. Brozena's explanation for Complainant's termination rings particularly hollow in light of the fact that Respondent retained a similarly situated employee, Mr. Fritz, in 2012 after he pled guilty to tampering with public records, a felony in the third degree. *See* Tr. at 77-80; CX 8; CX 9; CX 10. Such a crime would certainly have placed Mr. Fritz in danger of having his operator's certificate revoked. *See* 25 Pa. Code § 302.308(b)(3). However, following his conviction, Mr. Brozena took no action against Mr. Fritz despite knowing about his guilty plea (CX 21 at 66) and that Mr. Fritz's action had led to the cancellation of a contract (CX 7). In fact, despite issuing an initial letter in December 2010 indicating that Mr. Fritz had to undergo mandatory training for his failure to accurately process tests, the record is silent on whether Respondent disciplined Mr. Fritz for his conduct or eventual guilty plea.²² Tr. at 77. By contrast, Respondent fired Complainant after he pled guilty to a misdemeanor of negligently violating permit conditions. The only difference between these two employees offered at the

²² Mr. Fritz was terminated in 2016 following his second felony conviction.

hearing was that Complainant testified adversely about Respondent and Mr. Brozena to a Grand Jury, while Mr. Fritz did not.²³ Tr. at 81-82. Complainant and Mr. Fritz held the same job and had roughly the same amount of time with the Respondent. Both pled to charges relating to improper reporting of effluent samples. Yet Mr. Fritz pled to a felony and was retained, while Complainant pled to a misdemeanor and was terminated. Such disparate treatment of similarly situated employees is circumstantial evidence of retaliatory motive. See *Henderson v. Wheeling & Lake Erie Railway*, ARB Case No. 11-013, slip op. at 10 (ARB Oct. 26, 2012).

In sum, Complainant has met his burden to show he engaged in protected activity, he was subjected to an adverse action, and that his protected activity was a motivating factor in the termination action. As such, he will prevail in this matter unless Respondent can demonstrate by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity. 29 C.F.R. § 24.109(b)(2).

C. Respondent's Defense: Same Adverse Action in the Absence of the Protected Activity

Where a complainant meets his or her burden of proof, the employer may avoid liability if it proves by a preponderance of the evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior. 29 C.F.R. § 24.109(b)(2); *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 v. U.S. Army*, ARB Nos. 02-108, 03-013, slip op. at 28 (ARB Dec. 30, 2004) (citing *Masek v. The Cadle Co.*, ARB No. 97-069; ALJ No. 1995-WPC-001, slip op. at 7 (ARB Apr. 28, 2000)).

The Respondent has presented little evidence to support his same adverse action defense. Its testimony hinges upon the credibility of Mr. Brozena's testimony and the contents of the Complainant's termination letter.

Respondent's termination letter provides as its basis Complainant's plea to a violation of the Clean Water Act. Just prior to the hearing, Respondent elaborated that Complainant "was fired because of his illegal action for which he plead guilty and admitted to, under oath, in Federal Court." CX 23. At the hearing, Mr. Brozena testified that he terminated Complainant because "he had no choice" because it was damaging his business²⁴ and he no longer had the certification necessary to perform his job. Tr. at 96, 112.

The evidence that Complainant's conviction had damaged its business is meritless. Granted, it may be a factor, but it ignores the fact that Complainant's conviction is based on actions promoted by Mr. Brozena. During his plea, Mr. Brozena, as the sole shareholder and

²³ Mr. Fritz also pled guilty a second time to tampering, but on this second occasion he too testified to the grand jury about Mr. Brozena and entered into a cooperation agreement with the U.S. Attorney. And this time he too was terminated two days after entering his guilty plea.

²⁴ Mr. Brozena testified that 20 – 30 percent of his business was were government municipal contracts. Tr. at 92.

only officer of MAB Environmental Services²⁵ admitted to negligently *causing employees to discard sample of pollutants...*” CX 22 at 9. Further, as the corporate officer, the corporation entered a plea, among other charges, of tampering with required monitoring method and false report, all arising from Respondent discarding of samples for pollutants. *Id.* During the sentencing, Mr. Brozena’s counsel specifically addressed intent and stated “Mr. Brozena will acknowledge that he instructed [Complainant] to resample the composite sample for certain parameters.” CX 22 at 35. However, he did quibble over the U.S. Attorney’s statement of facts that he instructed Complainant to discard the sample. *Id.* It is thoroughly unpersuasive to argue that a company’s business is adversely affected by the very actions that it encouraged to occur that also happened to be illegal.²⁶ The Tribunal discredits Mr. Brozena’s hearing testimony on this point and credits Complainant’s version of the facts as supported by his logbooks. *See* CX 2, CX 3.

Another reason to discredit Mr. Brozena’s rationale is his incentive to preserve his company and his reputation in the industry by placing blame upon “rogue” underlings. By firing the subordinates, he can then attempt to rehabilitate his business’ reputation and salvage the damage caused by the Respondent’s criminal conduct. Further, by attempting to deflect blame solely upon Complainant he creates an argument about the deliberate nature of Complainant’s actions as a defense to any retaliatory actions on its part.²⁷ But the facts presented show that Mr. Brozena has less than clean hands. The preponderance of evidence establishes that he directed the dumping of samples after they were drawn. The fact that he did not plead guilty to that conduct does not mean that it did not occur. He can hedge all he wants about his ultimate culpability, but the facts establish that Mr. Brozena’s own actions were the catalyst to the underlying criminal events. That does not mean the Complainant himself is without fault.²⁸ Complainant clearly was party to misrepresenting the testing samples. However, the evidence supports his claim that his destroying samples was at the direction of Mr. Brozena.

²⁵ CX 22 at 7.

²⁶ Complainant also notes that the offense to which he pled carries the lowest grade of any criminal offense under the Clean Water Act, whilst Mr. Brozena and MAB together pled guilty to nine counts, including multiple felony counts of tampering and false statements. These convictions reduce the credibility of Mr. Brozena’s testimony and of those of Respondent to this matter in general. In addition to the fact that these are felonies and therefore can be considered when assessing a witness’s character for truthfulness, they are crimes of dishonest and thus are particularly probative in accessing a witness’s character for truthfulness. *See* F.R.E. 609(a).

²⁷ *See* 33 U.S.C. § 1367(d).

²⁸ To preclude recovery to a whistleblower because he had some slight participation in the wrongdoing later charged would “mute more than a few whistles.” *Paolella v. Browning-Ferris, Inc.*, 973 F.supp. 508, 513 (E.D. Pa. 1997), *aff’d*, 158 F.3d 183 (3d Cr. 1998). In his brief, Complainant argues that § 1367(d) would not apply, in part, because he only pled to negligence. Compl. Br. at 30. This argument is unpersuasive. The standard of proof in a criminal court is far higher than a civil court. There are lots of practical reasons why a prosecutor would negotiate a plea agreement for a lesser charge, including having a cooperating witness as is the case here. Given the burden of proof necessary for these proceedings, the Tribunal is not convinced that Complainant was simply negligent, but is convinced by a preponderance of evidence that his conduct was at the direction of a corporate officer. *See* CX 22 at 35; Tr. at 32-33, 58-59, 71-72, 110-112; JX 5. Under these findings of fact, the Tribunal still finds that § 1367(d) does not apply as an affirmative defense in this case.

But more importantly, as noted above, there is no indicate in the record that Complainant had lost his PA water operator's license at the time Respondent terminated his employment in February 2016. Similarly, Complainant was not debarred from federal contracts until 2018. Contrary to Mr. Brozena's testimony, therefore, Respondent did not have a pressing need to fire Complainant immediately after his misdemeanor guilty plea due to lack of licensure or debarment. Together with the fact that Respondent failed to terminate the employment of Mr. Fritz in 2012 for a more serious felony guilty plea, the Tribunal is unpersuaded that Respondent would have fired Complainant in the absence of his protected activity.

Finally, Respondent asserts that the Government cannot have it both ways by first indicting and punishing Respondent for failing to supervise its employees, and then punishing it for terminating Complainant's employment after he admitted to violating the law. Resp. Br. at 9. Respondent's argument ignores the fact that its conduct that resulted in both criminal and civil liability. This claim is a *private civil* complaint—not an additional *government* criminal enforcement action.²⁹ Thus, Respondent incorrectly asserts that the government is trying to have it both ways. Respondent's unlawful conduct resulted in criminal charges against its owner and the corporation itself, to which both entered guilty pleas. Its termination of Complainant subsequent to the parties' admitted criminal conduct carried the possibility for additional civil liability if Complainant could show—as he has done here—that his protected activity was a motivating factor in Respondent's decision to take adverse employment action against him. Accordingly, a finding of civil whistleblower liability for Complainant's termination does not conflict with the imposition of criminal charges for Respondent's failure to supervise its employees.

The Tribunal's analysis of the contributing factor element above forecloses a finding that Respondent would have fired Complainant in the absence of his protected activities. The undersigned finds Mr. Brozena's testimony regarding his rationale for firing Complainant to lack credibility and appeared pretextual. Therefore, Respondent has not provided this Tribunal with a credible reason for terminating Complainant's employment on February 5, 2016. Accordingly, it is unable to show that Complainant's termination would have occurred in the absence of his protected activities. *See Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, slip op. at 11-12 (May 26, 2010) (noting that an ALJ's findings of employer's pretext, lack of credibility, and shifting defenses in the element of contributing factor precluded a finding that the employer could establish by clear and convincing evidence that it would have fired the complainant absent his protected activity).

V. CONCLUSION

For the reasons provided, the Tribunal finds Complainant has established a *prima facie* case of retaliation, and Respondent has failed to escape liability by showing that it would have taken the same adverse action in the absence of Complainant's protected activities. Only the question of relief remains.

VI. RELIEF

²⁹ Respondent also seems to ignore that collateral consequences can accompany criminal conduct.

If a violation is found, 29 C.F.R. § 24.105(a) provides that the administrative law judge shall order, where appropriate, the person who committed the violation to: (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with compensation, including back pay, and restore the terms, conditions, and privileges associated with his employment; (3) provide compensatory damages; and assess against Respondent the Complainant's costs and expenses, including attorney's fees, reasonably incurred in connection with the filing of the complaint. *See* 33 U.S.C. § 1367(b), (c).

A. Reinstatement

Reinstatement is one of the remedies available under the statute, however it is not mandatory. It is left to the administrative law judge to determine to direct the Respondent to take "appropriate action." 29 C.F.R. 24.108(b)(2). The ARB has recognized that "circumstances may exist in which reinstatement is impossible or impractical and alternative remedies are necessary." *Nagle v. Unified Turbines, Inc.*, ARB No. 13-010, ALJ No. 2009-AIR-24, slip op. at 5 (ARB May 31, 2013).³⁰ One such situation is when the relationship between the parties is so hostile as to make reinstatement unfeasible. *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, No. 93-ERA-24, slip op. at 7 (Sec'y Feb. 14, 1996). In such circumstances, "economic reinstatement" is an appropriate remedy, which entitles a complainant to "receive the same pay and benefits that he received prior to his termination, but not actually return to work." *Nagle*, slip op. at 5 (quoting 68 Fed. Reg. 14,099, 14,104 (Mar. 21, 2003)). Here, the Complainant affirmatively does not seek reinstatement "due to the animosity that has arisen between the parties." Compl. Br. at 34. Respondent did not address this assertion, so the Tribunal accepts it as true. The Tribunal finds reinstatement is not appropriate in this case, but other relief is warranted.

B. Back Pay

Complainant has the burden to prove the back pay he has lost. The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002). An award of back pay must completely redress the economic injury, and therefore should account for salary, including any raises which the employee would have received, sick leave, vacation pay, pension benefits, and other fringe benefits that the employee would have received but for the discrimination. *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983).

While a non-working employee has the duty to mitigate his damages by seeking suitable employment, it is well established that the employer has the burden of establishing that the back pay award should be reduced because the employee did not exercise diligence in seeking and obtaining other employment. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (Mar. 29, 2000).

³⁰ Citing *Clemmons v. Ameristar Airways*, ARB No. 08-067, ALJ No. 2004-AIR-011; slip op. at 12 (May 26, 2010); *Rooks v. Planet Airways*, ARB No. 04-092, ALJ No. 2004-AIR-092, slip op. at 9 (June 29, 2006).

There is no fixed method for computing a back pay award; calculations of the amount due must be reasonable and supported by evidence, but need not be rendered with “unrealistic exactitude.” *Ass’t Sec’y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 2004-STA-14, ALJ No. 2003-STA-36, slip op. at 5-6 (Jun. 30, 2005). Any ambiguity is resolved against the discriminating employer. *Rasimas*, 714 F.2d at 628. Back pay awards are not reduced by the amount of income and social security taxes that would have been deducted from the wages the complainant would have received. *Id.* at 627. Interim earnings at a replacement job are deducted from back pay awards. *Id.* at 623. Although a terminated employee has a duty to mitigate damages by diligently seeking substantially equivalent employment, the respondent bears the burden of proving that the complainant failed to properly mitigate damages. *Id.*; *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 32 (Feb. 9, 2001).

Complainant asks this Tribunal to calculate his back pay by subtracting his earnings following his termination from the amount he would have earned working for Respondent. In tax year 2015 Complainant earned \$42,353, the last full year he worked for Respondent. CX 17. Complainant’s earnings in 2016 were \$19,656, and in 2017 they were \$23,171. CX 18, CX 19, Tr. at 53. In 2018, Complainant acknowledges that he would no longer be able to work for Respondent once debarred and so he bases his calculations on the period January 1 to April 1, 2018, at his same rate of pay as 2017. This equates to \$5,714. Therefore, his back pay calculation is as follows:

Year	Amount Earned	Amount would have earned	Difference
2016	\$19,565	\$42,353 ³¹	(\$22,697)
2017	\$23,171	\$42,353	(\$19,182)
2018	\$5,714	\$10,444	(\$4,730)
Total	\$48,541	\$95,150	(\$46,609)

In its brief Respondent made no effort to address what damages Complainant should be awarded if he were to prevail. It also did not raise any issue as to whether Complainant adequately mitigated his damages following his termination.³² The Tribunal finds that Respondent has waived these issues.

The Tribunal finds Complainant’s calculations for back pay eminently reasonable and adopts them. In particular, the Tribunal agrees to Complainant’s concession that his back pay would end upon actually being barred from work in this industry. Accordingly, Respondent shall pay Complainant \$46,609 in back pay.

C. Non-Economic Compensatory Damages

³¹ The Tribunal notes that Complainant makes no adjustment for inflation, end of year bonus, or other pay raises during this period.

³² Wrongfully discharged complainants have an obligation to use reasonable efforts to mitigate their damages. *EEOC v. Sandia Corporation*, 639 F.2d 600, 627 (10th Cir. 1980). But “[t]he Respondent has the burden of establishing that the back pay award should be reduced because the Complainant did not exercise diligence in seeking and obtaining other employment.” *Abdur-Rahman v. DeKalb Cnty.*, ARB Nos. 12-064, 12-067; ALJ Nos. 2006-WPC-002, -003 (ARB Oct. 2014), at 4.

Complainant has presented no evidence nor does he seek non-economic compensatory damages so the Tribunal will do no analysis of this possible remedy.

D. Interest

A prevailing complainant is entitled to interest on an award of back pay. *See EEOC v. Ky. St. Police Dept.*, 80 F.3d 1086, 1098 (6th Cir. 1996); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, slip op. at 17-19 (May 17, 2000).³³ Compounding interest is calculated quarterly, and the proper rate is the federal short-term rate, determined under 26 U.S.C. § 6621(b)(3), plus three percentage points. *Doyle*, slip op. at 17-19 (citing 26 U.S.C. §6621(a)(2)). Complainant shall also receive post-judgment interest on his back pay award, which is calculated by the identical formula set forth in *Doyle*.

E. Attorney Fees and Costs

Complainant affirmatively seeks costs and expenses, including attorney's fees. Complainant may submit a Fee Petition within 30 days of this decision detailing the aggregate amount of all costs and expenses that were reasonably incurred by Complainant in this case. Supportive documentation must be attached. Thereafter, Respondent shall have 21 days within which to challenge the payment of costs and expenses sought by Complainant, and Complainant shall then have 14 days within which to file any reply to Respondents' response.

VII. ORDER

Respondent shall provide Claimant with the following:

- \$46,609.00 in back wages, plus interest; and
- Costs and expenses associated with his claim, including attorney's fees.

SO ORDERED.

SCOTT R. MORRIS

Administrative Law Judge

Cherry Hill, New Jersey

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

³³ *See also Cefalu v. Roadway Express, Inc.*, ARB No. 09-070 (Mar. 17, 2011); *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051 (Apr. 10, 2010); *Murray v. Air Ride, Inc.*, ARB No. 00-045, slip op. at 9 (Dec. 29, 2000).

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.