



In the Matter of:

**STEVEN W. JONES,**

**ARB CASE NO. 97-129**

**COMPLAINANT,**

**ALJ CASE NO. 95-CAA-3**

**v.**

**DATE: September 29, 1998**

**EG&G DEFENSE MATERIALS, INC.,**

**RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Clean Air Act, 42 U.S.C. §7622 (CAA), the Toxic Substances Control Act, 15 U.S.C. §2622 (TSCA), and the Resource Conservation and Recovery Act, 42 U.S.C. §6971 (RCRA) (1994).<sup>1/</sup> Steven W. Jones (Jones) alleged that EG&G Defense Materials, Inc. (EG&G) violated these provisions when it discharged him from employment. In a Recommended Decision and Order (RD), the Administrative Law Judge (ALJ) found that EG&G violated the environmental acts and recommended reinstatement, back pay, compensatory damages, and exemplary damages of one dollar. We affirm the ALJ's finding of a violation and order some of the recommended damages.

### **BACKGROUND**

In late June 1994 Jones began working for EG&G as Safety Manager at the Tooele Chemical Agent Disposal Facility (the Disposal Facility) located at the Tooele Army Depot (the

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<sup>1/</sup> The RCRA is also known as the Solid Waste Disposal Act. *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec. and Rem. Ord., Jan. 25, 1995, slip op. at 1 n.1. In this decision, the three statutes under which Jones brought his complaint will be referred to collectively as "the environmental acts."

Depot) in Utah. EG&G operates the Disposal Facility, which incinerates stockpiled lethal chemical weapons, under a contract with the United States Army. Complainant's Exhibit (CX) 30.<sup>2/</sup> The weapons, called "agents," are stored at the Depot in igloos adjacent to the Disposal Facility's plant. Although the Depot and the Disposal Facility both are Army facilities, they were overseen by different management divisions within the service.

The Disposal Facility is subject to various federal statutes, including the environmental acts at issue in this case.<sup>3/</sup> The chemical weapons incinerator was similar in design to an earlier prototype chemical disposal plant that had been built on Johnson Atoll in the Pacific. In 1994, the Tooele Disposal Facility in Utah was not yet in operation. The staff was working on obtaining authorization to operate under the TSCA, and also was working on several compliance issues relevant to the RCRA. RD at 7. The Disposal Facility also requires an air approval order under the CAA. *Id.*

Before being hired by EG&G, Jones had a long career in safety. While an officer in the Air Force, he received a Master's degree in safety. Transcript (T.) 68, 71. He is a certified safety professional and certified hazardous material safety manager. T. 69-70. From 1984 to 1991, he held various civilian positions as a safety and occupational health manager with the United States Navy, during which he received excellent performance appraisals and commendations. CX 1-13. Jones joined the Office of the Inspector General (IG) of the United States Army in 1991, where he inspected chemical and nuclear weapons depots, chemical demilitarization facilities and chemical weapon laboratories. T. 89-90; CX 1. Among other facilities, he inspected the military's first chemical weapons incinerator located at Johnson Atoll.

Jones was hired by EG&G's administrative services manager, Joe Hanny. Hanny reported directly to EG&G's General Manager and President, Henry Silvestri. T. 100. Upon reporting to work on June 27, 1994, Jones met Silvestri for the first time. Silvestri used colorful language to direct Jones to appease the "customer," the local unit of the Army's Office of Program Manager for Chemical Demilitarization (PMCD), telling Jones to "kiss [PMCD's] ass" and using the word "motherf\_\_\_\_\_." T. 101-102.

Prior to Jones's arrival at the Disposal Facility, EG&G's Safety Manager for the site was Michael Hampton. Hampton shared responsibility for environmental regulatory compliance with Michael Hayes. T. 1375. There is disagreement in the record regarding the circumstances

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<sup>2/</sup> Pursuant to the Board's order, the parties stipulated to an appendix consisting of portions of the record that was before the ALJ. The Board has found it necessary to examine, and refer to, additional portions of the record in deciding this case.

<sup>3/</sup> The contract requires a safety program plan that shall comply with "Federal, state, and local health and safety requirements including OSHA requirements of 29 C.F.R. 1926 [and] EPA hazardous waste requirements (40 C.F.R. 260-267)." CX 30 at 83. We note also that federal agencies such as DOD are "persons" subject to the requirements of the Clean Air Act, *see* 42 U.S.C. §7602(e), and also are subject to the requirements of the RCRA. 42 U.S.C. §6961.

of Hampton's departure as Safety Manager and Jones's being hired for the job. Hampton testified that he voluntarily stepped down from the Safety Manager position because, as the Disposal Facility entered the last stages prior to operation, it was best for the project that the Safety Manager have a significant background in Army safety rules. T. 1393-94. Hampton lacked that background. Hampton's supervisor, Joe Hanny, testified to the contrary, stating that Hampton did not volunteer to be demoted. T. 2332. According to Hanny, he gave Hampton the option of either stepping down or hiring someone who had an adequate background in safety at a chemical weapons facility. *Id.*; T. 2353.

Hampton did not have a role in selecting his replacement. T. 1394-95. When Jones arrived as the new Safety Manager, Hampton became a subordinate staff member of the Safety department, but with no decrease in pay. T. 1394.

The Disposal Facility was expected to undergo surrogate trial burns in the autumn of 1994 and to begin "hot" operations in early 1995. CX 113, 114. PMCD urged EG&G to meet those target dates. *Id.* PMCD's Program Manager, Tim Thomas, believed that the successful resolution of environmental issues was the key to completion of the trial burns. T. 2307-08; CX 113. In their first meeting, Jones discussed with Silvestri an upcoming inspection of the Disposal Facility by the Army IG, where Jones had just left a position. He told Silvestri that the IG would examine whether the lessons learned from mistakes made in the prototype chemical weapons incinerator at Johnson Atoll were being incorporated at the Tooele Disposal Facility. T. 119.<sup>4/</sup>

According to Jones, the IG also would examine the rift between PMCD (which was responsible for the management and direction of the disposal of the chemical weapons stockpile) and the Depot (which was in charge of the chemical weapons themselves). T. 119-120. Jones informed Silvestri that the Depot and PMCD would have to work together, especially on emergency preparedness issues. T. 120. Silvestri became angry when Jones mentioned the rift and told Jones not to allow Depot safety personnel to come on the Disposal Facility site because PMCD did not want to allow it.<sup>5/</sup> T. 120. Jones was so surprised by Silvestri's angry reaction that he asked whether he was fired. T. 121.

Jones immediately began to identify weaknesses in EG&G's safety program. During his first few days at the Disposal Facility, Jones found that a safety document lacked sampling data for airborne asbestos concentrations. Consequently he required the workers to wear more extensive protective equipment, which caused their work to slow down. T. 149-159. Hanny told

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<sup>4/</sup> There had been an accidental release of agent from the Johnson Atoll facility, for example. T. 186.

<sup>5/</sup> Silvestri denied telling Jones to bar Depot safety personnel, T. 1035, but the ALJ did not credit Silvestri's testimony when it was contradicted by Jones's testimony.

Jones that PMCD was upset about the delay, but Hanny agreed that Jones was correct on the issue. T. 150.

Jones next detected problems at the Monitoring Support Building Laboratory (MSB Lab), which is the only part of the Disposal Facility in which employees work with live Army chemical agent. T. 152. There, workers dilute the agent to a strength of two parts per million for testing the ACAMS, a chemical agent monitoring system. T. 1734-41.

While visiting the MSB Lab, Jones saw open vials of agent being carried outside of the exhaust hoods, workers who did not wear masks or gloves, and offices in the vicinity where agent was being used. T. 152-53. He also observed that the hoods lacked charcoal filters and certification stickers. T. 154. The hoods were venting directly into the atmosphere.

Jones asked some of the workers why the Lab was operated in this fashion, but they did not know the reason. Jones suggested shutting down the lab briefly while he determined if it was acceptable under the regulations to vent dilute agent into the atmosphere and to dump agent down the drains. T. 156-157. Other managers concurred in the suggestion. T. 161-162. No one informed Jones that there was an existing document, CX 36, providing a waiver to the MSB Lab from complying with the Army's general regulations governing chemical agent laboratories. The Lab reopened about a week later, after the waiver document was produced. T. 1090.

Both Jones's superiors and PMCD were upset about the Lab closing. T. 163, 165-166. Silvestri admitted that he used foul language when discussing the shut-down and that he believed Jones acted too abruptly. T. 1090-91.

On July 13, 1994 Jones learned that a cylinder that fed the ACAMS in the MSB Lab was leaking hydrogen gas. T. 170. He feared that a static spark could ignite the escaping gas and cause the Lab to explode. Consequently Jones directed staff members to notify both the Depot fire department and the Disposal Facility's control room. T. 170-171. The control room ordered an evacuation from the area near the leaking cylinder. T. 171.

Silvestri considered Jones's steps in response to the hydrogen gas leak to be an abrupt overreaction. T. 1098. He testified that the proper procedure was to call the control room, which in turn could decide to call the Depot fire department. *Id.* Silvestri was upset because he believed that Jones told the fire department to respond "hot," *i.e.*, to use lights and sirens.<sup>6/</sup> Silvestri told Jones that PMCD was upset about the Depot's fire department being allowed on the Disposal Facility site, and that the EG&G Safety department could have fixed the problem itself. T. 175-76. He also was upset about the interruption of the work at the Lab, which lasted a few hours. T. 175.

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<sup>6/</sup> The employee whom Jones directed to call the fire department did not tell the department to respond "hot." T. 1893.

Several days later, on July 19, 1994, there was a chemical waste handling incident in the brine reduction area of the Disposal Facility, where waste liquids from the chemical weapons destruction process are directed through a series of huge dryers that reduce the waste liquids to a salt, to be disposed of as hazardous waste. T. 193. The brine plugged up a shaker at the bottom of a dryer and a large quantity of sodium fluoride dust blew out of the top of the dryer into a large building. T. 194. Ingesting small amounts of sodium fluoride is hazardous and sometimes lethal. T. 197; CX 43.

Jones received a telephone call that he should go to the brine reduction area because several workers there were covered with sodium fluoride dust. T. 194. Jones found 10 to 12 workers who were affected, some of whom had skin rashes and watery eyes. T. 195. He asked the supervisor for the material safety data sheet on sodium fluoride and learned that the data sheet was not available at the brine reduction area. *Id.* Jones then telephoned an emergency poison number for information on sodium fluoride. T. 196.

When Silvestri arrived at the brine reduction area, Jones said it would be prudent for the exposed workers to leave the area, take showers, and report to the clinic for treatment of their eyes and the skin rashes. T. 197. Silvestri protested that this approach would delay the work, but acceded to Jones's suggestion when he learned that another crew would be available quickly to finish the work. *Id.* Silvestri faulted Jones for acting precipitously in handling the brine reduction incident. T. 1121.

Applying his usual methods as an experienced safety manager, upon arriving at the Disposal Facility Jones promptly had begun an internal audit in which he researched applicable regulations, made inspections to determine if there was compliance with the regulations, and listed deficiencies. T. 91-92, 211-13. Jones believed the audit was necessary because of the risks to workers and to the environment and for EG&G to be fully prepared for the scheduled IG inspection.

Jones submitted the audit to Silvestri on August 2, 1994. The audit identified major deficiencies such as a lack of inspections, lack of an emergency preparedness plan, and improper or missing hazard analyses. T. 220-221. It also included a plan of action to correct the deficiencies, with time frames for completing the corrections.

Silvestri reacted angrily to the internal audit and told Jones never again to put anything negative about the plant in writing.<sup>7/</sup> T. 225-226, 267-268. Silvestri also told Jones that "the customer" was angry about it. T. 168. Silvestri considered many of the listed deficiencies to be paperwork shortcomings. T. 1155.

A separate facility called the treaty compliance building also was located at the Depot, although it was not part of the EG&G-operated Disposal Facility. The treaty compliance facility

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<sup>7/</sup> Silvestri denied making the statement to Jones. T. 1102.

will be used by representatives of the Russian government to sample, observe, and verify the destruction of the Tooele chemical weapons stockpile. T. 1832-33; RD at 47. The treaty compliance building was being constructed at Tooele by a contractor other than EG&G. Apparently there was no site safety submission for the building. T. 1104. When Jones brought up the issue, Silvestri informed him that the lack of such a document for the treaty building was outside of EG&G's responsibility. *Id.* Silvestri believed that, nevertheless, Jones notified PMCD of the lack of a site safety submission for the treaty facility, and PMCD was aggravated. *Id.*

According to Silvestri, some unnamed people at the site believed that Jones also raised the issue of the lack of a safety submission for the treaty building with the IG during the August inspection. T. 1104. Again, PMCD was upset about the issue being raised. *Id.* Jackson of PMCD reminded Silvestri several times that the treaty building was not covered by EG&G's contract. T. 1158.

James Smith, who had been working for EG&G in Ohio, was transferred to Utah temporarily and assigned to assist Silvestri beginning on August 22, 1994. T. 858. Upon Smith's arrival, Silvestri revealed that he was close to firing Jones because of his abrupt actions in the MSB Lab closing, the brine reduction area incident, and the hydrogen cylinder incident. T. 1121, 1123. Silvestri also told Smith that Jones's relationship with PMCD was not good and that morale in the Safety department was poor. *Id.* Smith asked Silvestri to permit him to counsel Jones to see if any improvement would occur. T. 1121.

Smith subsequently met with Jones, but did not tell Jones about any specific instances that had led to the counseling, such as the MSB Lab shut down, the leaking hydrogen cylinder, or the brine reduction incident. T. 878, 894-95. Instead, Smith said generally that there were complaints from both EG&G and from government managers concerning Jones's "challenging, confrontational" relationship with PMCD, and "general lack of good judgment and acceptable interpersonal skills." CX 63; Respondent's Exhibit (RX) 43; T. 877. However, the only example Smith gave of Jones's confrontational relationship with the customer was the belief that Jones told the Army IG about the lack of a site safety plan for the treaty compliance building, which upset PMCD. T. 869. Smith offered no examples of Jones's allegedly demeaning treatment of his staff, since Silvestri had not provided any examples to Smith, T. 892, and Smith had only recently arrived at the site. Smith also did not offer Jones any training to improve his management style, or the opportunity to transfer to a different position. T. 895.

Smith warned Jones that the counseling was very nearly a "pre-termination" session. T. 870. Jones told Smith that he was trying to run a safety program under difficult circumstances since the prior Safety Manager (Hampton) was now working under him as a subordinate. Smith cut off Jones's explanation, however. T. 878.

According to Silvestri, the Safety department's morale continued to deteriorate after the counseling session. T. 1124. Jones was present at staff meetings held after the counseling session, but did not participate even when his contribution was needed. T. 1124, 1127. Silvestri

heard that Jones told both his subordinates and PMCD personnel about the counseling session, and Silvestri considered the disclosures inappropriate because they rendered Jones ineffective in doing his job. T. 1124.

Another difference of opinion arose between Jones and his managers after the counseling session. Prior to Jones's arrival, the MITRE Corporation had prepared a safety assessment report that included a compilation of deficiencies and hazards in the design, piping, valves, flanges, and machinery at the Disposal Facility. T. 325-26; CX 56 (excerpt). In August 1994 Jones received an Army directive to implement the MITRE report in EG&G's Safety System plan. T. 326; CX 55, CX 57. Jones worked with both PMCD and EG&G personnel to figure out how to implement the report. T. 327.

Initially, Jones examined portions of the Disposal Facility to see if the suggested corrective actions listed in the MITRE report had been made for the most serious hazards identified, but Jones was unable to find the identified hazards. T. 329-30. Consequently, Jones decided that a hazard analysis would have to be done on each serious problem identified in the MITRE report. T. 330-31, 336. He also determined that the Safety Department needed to examine and redraw the "as-built" drawings so that there was an accurate blueprint from which to work. T. 331, 336. He sent a memo to Silvestri's executive assistant, Allen Reihman, to that effect. CX 57 (inset note).

When Reihman met with Jones late in the day on September 13, 1994, Jones said that the hazard analyses involved a substantial process that could take six months, which would further delay hot operations at the Disposal Facility. T. 339-40. Reihman asked Jones to confirm that the Army expected EG&G to do the hazard analyses outlined by Jones. T. 341. Reihman believed that it would be a duplicative effort for EG&G to resolve the MITRE report risks because the Army was working on it. T. 1685.

Jones met immediately with PMCD engineer John Hanson, who said that the Army did not want hazard analyses, but rather that Jones was expected to sign a document "accepting" the MITRE report risks. T. 342. Jones was not comfortable about the legality of accepting the risks. *Id.*

Jones next met with PMCD's Dave Jackson, who advised Jones not to worry about signing a risk acceptance document because it was unique to the Army and that they could "get around" an OSHA rule. T. 343. Although Jackson indicated that it was important to resolve the issue of accepting the risks listed in the MITRE report, Jones did not reach a resolution. T. 343-47. Jones was fired the next day. Silvestri, who made the discharge decision, testified that he was unaware of the MITRE report and related issues. T. 1059-60.

Silvestri testified that he learned of two additional incidents after the counseling session that led him to decide to fire Jones. First, Silvestri heard that Jones told members of the Safety department that management had accused them of sleeping on the night shift. T. 1124-25.

Silvestri considered this a “divisive thing to do” because staff members would not trust management. T. 1125.

Second, Silvestri purportedly learned that a secretary, Patty Andrews, was looking for another job because Jones told her that Silvestri called her a “lazy bitch” because she did not answer the telephones. T. 1126. Silvestri denied calling Andrews that name. *Id.* According to Smith, the Andrews incident was the “straw that broke the camel’s back” and led directly to the decision to fire Jones. T. 881; *see also* T. 1126-27 (Silvestri).

On September 13, 1994, Smith called Jones to a meeting and fired him. T. 871. Smith admitted that he was acting on Silvestri’s behalf, and that he had not formed an independent judgment about firing Jones. T. 896.

## DISCUSSION

### I. EG&G’s Constitutional Claim

\_\_\_\_\_After briefing on the merits had concluded, EG&G filed a motion arguing that under the Seventh Amendment it has the right to a jury trial on this complaint. EG&G asserts that two of the remedies Jones seeks are legal in nature: compensatory and exemplary damages. It further contends that the rights Jones seeks to vindicate in his complaint are private rights, rather than public rights. Citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), and *Feltner v. Columbia Pictures Television, Inc.*, 118 S.Ct. 1279 (1998), EG&G contends that this case meets the Supreme Court’s test for determining whether there is a constitutional right to a jury trial when a statutory right is assigned by Congress to a non-Article III forum, such as this Board.

Both Jones and the Office of the Solicitor of Labor submitted briefs in opposition to EG&G’s motion on the jury trial issue. The Solicitor suggests that this Board is not authorized to rule on the constitutionality of the environmental acts pursuant to which Jones brought this case, and we agree. The Supreme Court consistently has reasoned that “adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994), quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974). *See also Califano v. Sanders*, 430 U.S. 99, 109 (1977) (“Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore access to the courts is essential to the decision of such questions.”) and *United States v. Bozarov*, 974 F.2d 1037, 1040 (9th Cir. 1992) (“[A]n agency has no authority to declare its governing statute unconstitutional.”). Consequently, we decline to address EG&G’s constitutional argument.<sup>8/</sup>

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<sup>8/</sup> We also note that the Department of Labor has adopted a similar stance with regard to this question. When developing the procedures for handling complaints under the environmental acts (29 C.F.R. Part 24), several commenters challenged the constitutionality of the provision found at (continued...)

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<sup>8/</sup>(...continued)

29 C.F.R. §24.7 authorizing the award of compensatory damages upon a finding of a violation of the employee protection provisions. In the preamble to the final rulemaking, the Department observed that the compensatory damages provision “merely tracks the statutory provision that compensatory damages are available as a remedy. DOL, as the agency given the administrative authority to implement that statutory provision, has no authority to question the constitutionality of the statute.” *See* Procedures for Handling Discrimination Complaints Under Federal Employee Protection Statutes, 63 Fed. Reg. 6614, 6620 (Feb. 9, 1998).

## II. The Merits

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because he engaged in protected activity. A complainant initially may show that a protected activity likely motivated the adverse action. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a “causal link” or “nexus,” *e.g.*, that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Kahn v. United States Sec’y of Labor*, 64 F.3d 261, 277 (7th Cir. 1994). A respondent may rebut this *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action, and that the protected activity *was* the reason for the action. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 505-508 (1993).

Although the “pretext” analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the “presumed” retaliation raised by a *prima facie* case, the inference “simply drops out of the picture,” and “the trier of fact proceeds to decide the ultimate question.” *St. Mary’s Honor Center*, 509 U.S. at 510-11; *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, Final Dec. and Order, Feb. 15, 1995, slip op. at 11 and n.9, *aff’d Carroll v. United States Dep’t of Labor*, 78 F.3d 352 (8th Cir. 1996). In this case, however, EG&G challenges each element that forms the basis for the ALJ’s finding that EG&G retaliated against Jones because he engaged in protected activities. Therefore, we will first examine the evidence supporting the elements of Jones’s claim to determine whether Jones engaged in protected activity. Our analysis then will turn to a second element that must be present for a complainant to prevail in a discrimination case, whether the employer (*i.e.*, EG&G) knew of the protected activity. Finally, before considering remedies, we assess the relative strength of Complainant’s evidence of retaliation compared with EG&G’s claim that it had a legitimate, non-discriminatory basis for terminating Jones.

### A. Protected Activities

Protected activities include employee complaints that “are grounded in conditions constituting reasonably perceived violations of the environmental acts.” *Crosby v. Hughes Aircraft Co.*, Case No. 85-TSC-2, Sec. Dec. and Ord., Aug. 17, 1993, slip op. at 26, *aff’d Crosby v. United States Dep’t of Labor*, 1995 U.S. LEXIS 9164 (9th Cir.); *Johnson v. Old Dominion Security*, Case Nos. 86-CAA-3, *et seq.*, Sec. Final Dec. and Ord., May 29, 1991, slip op. at 15. Employee complaints about worker health or safety may be protected under the environmental acts if they “touch[ ] on public safety and health, the environment, and compliance with the [environmental acts].” *Scerbo v. Consolidated Edison Co.*, Case No. 89-CAA-2, Sec. Dec. and Ord., Nov. 13, 1992, slip op. at 4-5. But when a complaint is limited solely to an occupational hazard, it is not protected under the environmental acts. *Minard v. Nerco Delamar Co.*, Case

No. 92-SWD-1, Sec. Dec. and Rem. Ord., Jan. 25, 1995, slip op. at 9; *see also Aurich v. Consolidated Edison Co.*, Case No. 86-ERA-2, Sec. Rem. Ord., Apr. 23, 1987, slip op. at 3-4.

EG&G contends that Jones cannot prevail because his asserted protected activities concerned worker safety and compliance with Army regulations, but not the environmental acts or the regulations implementing them. The company argues that Jones's activities involved only "speculative impacts to the environment." Brief of Respondent (Resp. Br.) at 6.

Jones has both general and specific rebuttals to EG&G's contention. He argues that in view of the hazardous nature of a nerve gas incinerator, there is an "inevitable overlap between safety concerns and environmental concerns" such that it renders nearly all of his employment activities as Safety Manager protected under the environmental acts. Brief of Complainant (Comp. Br.) at 7. The ALJ agreed with this contention:

Were internal reporting of safety concerns and procedures at the specific industries covered by RCRA and TSCA, which can affect public safety and health, excluded from these Acts' whistleblower protections it would serve to stifle raising internal safety concerns, concerns which can affect the environment under these statutes. It would stifle the raising of safety and safety procedure concerns as serious in their impact and effect on the public health and the environment as those in the nuclear industry[,] albeit not as widespread. \*\*\* Here the internal reporting of safety concerns and the questioning of safety procedures by the Safety Manager in this chemical weapons incinerator, uniquely and solely controlled by and subject to [the] military, more than touches on compliance with the environmental statutes under which his whistleblower complaint is brought. Such actions are the essence of assuring that a military facility with [the Disposal Facility's] purpose, handling the unique toxic chemicals and hazardous wastes it handles and solely controlled by the military and by its contractor under a military contract, comply with RCRA, TSCA and CAA.

RD at 58.

We agree with the ALJ's finding that many of Jones's activities and complaints were protected under the environmental statutes because they pertained generally to the risk of an emission of toxic substances from a dangerous instrumentality, *i.e.*, an incinerator for destroying military chemical agents (including nerve gas). RD at 58. Like nuclear power plants, chemical agent incinerators have a great potential of harming the public in the event of a serious accident or defect, as was noted in a decision involving the Tooele Disposal Facility, *Chemical Weapons Working Group v. Dep't of the Army*, 101 F.3d 1360, 1362 (10th Cir. 1996) (denying motion for stay pending appeal of denial of preliminary injunction) (Lucero, dissenting):

Appellants' claims appear facially substantial. They assert that since August 13, 1996, the date of the district court's denial of the preliminary injunction, nerve agent has leaked into non-agent areas at Johnson Atoll Chemical Agent

Destruction System (a prototype facility upon which the Tooele Chemical Agent Disposal Facility is modeled), and has been discovered in non-airtight filter vestibules at [the Tooele Disposal Facility]; decontamination fluid has leaked through cracks in a concrete floor above an electrical wiring and equipment room at [the Tooele Disposal Facility]; and the slag removal system in the liquid nerve agent incinerator malfunctioned at [the Tooele Disposal Facility], leading to operation shutdown. This list is non-exhaustive.

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In my mind, the issues presented for our consideration and their potential effect upon the public *and the environment* are far too important to dispose of them by summary denial. (Emphasis added).

Jones does not rely solely on the general argument that his work activities inherently involved environmental safety concerns, but also contends that several of his activities constituted reasonably perceived violations of the environmental acts: (1) shutting down the MSB Lab for improper venting of dilute chemical agent, (2) notifying the fire department of a leak in a hydrogen cylinder, (3) submitting an internal audit identifying deficiencies in the program, and (4) advising managers and PMCD of the need for comprehensive risk analyses and safety reviews to address hazards identified in the MITRE report, which he also refused to certify as “acceptable.” Comp. Br. at 8. We address these activities in turn to determine whether they constitute protected activity under the environmental statutes.

#### 1. MSB Lab Shutdown

Citing Jones’s written memoranda on the MSB Lab, which mentioned only an Army regulation, EG&G contends that Jones was not expressing concerns about violations of environmental statutes or regulations when he closed the Lab temporarily. Resp. Br. at 12-13. EG&G argues further that there is no evidence “that Silvestri had any understanding that Jones’s concerns went beyond the requirements” of the Army regulation. *Id.* We disagree.

Jones observed that Lab personnel were venting agent directly into the atmosphere through hoods that did not have charcoal filters or stickers certifying that the amount of air flow was sufficient. T. 154. Jones asked Lab supervisor Martin Morse whether the MSB Lab had special authority to operate in that manner, since it was not consistent with other Army laboratories that handled chemical agents. T. 154-55. Jones specifically asked why the MSB Lab handled chemical agent in an unfiltered hood, when there were several other laboratories at the Tooele complex that had filtered, certified hoods. T. 156.

Several of the chemical agents handled in the MSB Lab are covered under TSCA and RCRA. RD at 14. Therefore, when Jones expressed concern about military chemical agent being vented directly into the atmosphere, he clearly expressed concerns that touched on the public’s environmental safety.

The fact that Jones expressed concern about a violation of an Army regulation does not negate the environmental concerns he also expressed when the lack of charcoal filters and air flow certification on the hoods was raised with personnel from PMCD and EG&G. Where a complainant has a reasonable belief that the respondent is violating the environmental laws, any other motives he or she may have had for engaging in protected activity are irrelevant. *See Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec. Dec. and Rem. Ord., Jan. 10, 1996, slip op. at 8 (concerning a violation of the Energy Reorganization Act) and cases there cited. Jones's actions with regard to the MSB Lab constituted protected activity. We agree with the ALJ's similar finding. RD at 60.

## 2. Reporting Hydrogen Leak to Fire Department

EG&G argues that Jones's concern with the leaking hydrogen cylinder was covered by the Occupational Safety and Health Act (OSHA) and therefore did not arise under the environmental acts. Resp. Br. at 13. In addition, EG&G maintains that Jones did not express to Silvestri the fear of an emission that would violate the environmental acts. *Id.* at 14.

Jones testified that he believed the hydrogen leak could lead to an explosion that would destroy the MSB building, in and around which numerous hazardous chemical agents were stored. T. 173. We take judicial notice that hydrogen is a highly flammable gas. *See Nathaniel v. Westinghouse Hanford Co.*, Case No. 91-SWD-2, Sec. Dec. and Ord., Feb. 1, 1995, slip op. at 2-3 n.2, 8 n.7, and 9 (discussing need for a spark free environment where hydrogen gas is present). It therefore required no speculation on Jones's part to understand that a hydrogen leak in the vicinity of stores of toxic chemicals posed a hazard of emissions to the general environment outside the plant. Like the ALJ, RD at 60, we therefore find that Jones's decision to summon the fire department about the hydrogen leak was a protected activity under the environmental acts.

## 3. Internal Audit

In the executive summary of the internal audit he submitted to Silvestri, Jones stated that there was a deficiency in the Disposal Facility's Chemical Accident/Incident Response and Assistance Plan (CAIRA Plan), also known as an Emergency Preparedness (EP) Plan. RX 36; T. 220. The EP plan was required under the RCRA. T. 225, 2053. Therefore, when Jones identified a deficiency in the EP plan, he raised an environmental concern under the RCRA. We agree with the ALJ's view that the submission of the internal audit summary was a protected activity. See RD at 60.

## 4. Activities Concerning the MITRE Report

The MITRE report identified deficiencies in the design, piping, valves, flanges, and machinery at the Disposal Facility. T. 326. The report identified 150 hazards of imminent catastrophic severity, called "RAC 1." T. 328. For many of the RAC 1 hazards, there was a

risk of a release of toxic chemical agents into the atmosphere. T. 342; CX 56 at 363-366, 376-389.

Having been directed by the Army to incorporate the MITRE report findings into the Disposal Facility's Safety System Plan, CX 55, 57, Jones determined that he must perform a hazard analysis on each RAC 1, which included updating the "as-built" drawings for the plant. T. 330-331. Jones reported the necessity of hazard analyses to his superiors at EG&G. This report constituted protected activity because the analyses likely would lead to repairs or changes in the plant that would diminish the likelihood of a release of toxic chemicals into the atmosphere. *See Crosby v. Hughes Aircraft Co.*, Case No. 85-TSC-2, Sec. Dec. and Ord., Aug. 17, 1993, slip op. at 28 (indicating that a complaint about a problem in a computer program would be a protected activity under the environmental statutes if the program "could cause the emission of a harmful element into the environment"), *aff'd sub nom. Crosby v. United States Dep't of Labor*, 1995 U.S. App. LEXIS 9164 (9th Cir. Apr. 20, 1995).

In response to Jones's notice about the need for hazard analyses, PMCD informed him that he must sign a document indicating that all of the RAC 1 deficiencies identified in the MITRE report were "acceptable." Jones did not sign because he believed that it might not be "legal" to accept those risks. This declination also constituted a protected activity, because Jones in effect was pressing the need to correct deficiencies so as to diminish the likelihood of a catastrophic release of toxic chemicals into the atmosphere. *See Abu-Hjeli v. Potomac Elec. Power Co.*, Case No. 89-WPC-1, Sec. Final Dec. and Ord., Sept. 24, 1993, slip op. at 12 (complainant engaged in protected activity when he informed managers about his doubts concerning the validity of studies that could be used to support licenses or permits issued under the Clean Water Act). We join in the ALJ's similar finding that Jones's activities concerning the MITRE report were protected under the environmental acts. RD at 61.

#### B. EG&G Was Aware of Jones's Protected Activities

EG&G contends that its managers did not know the basis of Jones's protected activities under the environmental acts and their regulations. EG&G concedes that there is an overlap between Jones's job as Safety Manager and the environmental regulations promulgated under the RCRA, but nevertheless contends that "the mere fact that certain safety and environmental regulations might overlap is of little evidentiary value unless Jones actually engaged in protected activity by raising a concern about environmental regulations *that was perceived as such by EG&G.*" Resp. Br. at 7. In support of its assertion that EG&G managers were unaware that Jones had raised environmental concerns, EG&G specifically points to Silvestri's lack of personal experience in environmental compliance as the reason why he perceived Jones's concerns as relating only to OSHA workplace safety rules and Army regulations. Resp. Br. at 7-8.

We reject EG&G's claim that Silvestri was not aware that Jones raised concerns about environmental problems as being inconsistent both with the relevant facts and law. With regard to EG&G's assertion that in fact Silvestri did not perceive Jones' concerns as having an

environmental component, Resp. Br. at 7-8, we note that the Army regulation that Jones cited in his memoranda about the MSB Lab shut down concerned the level of environmental protections, including charcoal filters on hoods, needed in a laboratory handling military chemical agents. T. 154. Such a filter is for the benefit of the environment outside the plant, where the air is vented. The employees working in the lab do not receive a benefit from the charcoal filter other than as members of the community at large who breathe the air outside the Disposal Facility. Because Silvestri was aware that Jones had questioned EG&G's compliance with the Army regulation, it is clear that EG&G's management in fact was aware of Jones's *environmental* concerns.

More important legally, however, the environmental acts do not require that a complainant articulate each statute or regulation that potentially could be violated because of a defect or safety issue about which he complains. Indeed, for an employee's complaint to be protected, there is no requirement of a showing that an actual violation of an environmental statute would have occurred. *Minard, supra*, slip op. at 24. Rather, a communication about a hazard or defect is sufficient where the *complainant* reasonably has perceived a violation of the environmental acts or regulations. *Crosby, supra*, slip op. at 26.

In this case, the hazards Jones identified, including a leaking hydrogen cylinder, deficient emergency preparedness plans, and known safety defects in the physical plant, reasonably could lead to a dangerous emission of toxic chemicals into the environment.<sup>9/</sup> We find that this "perception" reasonably would be made by all of the employees at Tooele, including Silvestri and other EG&G managers, who either were aware or should have been aware, that Jones raised environmental concerns.

C. Jones Has Demonstrated by a Preponderance of the Evidence That His Termination Was in Unlawful Response to His Protected Activities

\_\_\_\_ As noted above, the burdens of production and persuasion in whistleblower cases are based on the framework applied under Title VII of the Civil Rights Act of 1963. *See Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 9-10, *aff'd*, 78 F.3d 352 (8th Cir. 1996). The question to be decided in this case is whether Jones has demonstrated by a preponderance of the evidence that his termination by EG&G was in response to his protected activity. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Odom v. Anchor Lithkemko/Int'l Paper*, Case No. 96-WPC-00001, Case No. 96-WPC-01, Oct. 10, 1997, slip op. at 3. The finding that there is an illegitimate motive requires direct evidence "showing

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<sup>9/</sup> It is preposterous to assert that managers at a facility for destroying chemical weapons would not comprehend that a leaking hydrogen cylinder connected to a lab building near stores of military chemical and nerve agents would pose a danger of emissions of toxic chemicals into the environment. Jones's protected activity was instructing a subordinate to telephone the fire department, which reflected his fear of an imminent danger of explosion of a flammable gas.

a specific link between an improper motive and the challenged employment decision.” *Carroll*, 78 F.3d at 357.

If Jones has demonstrated that a retaliatory motive contributed at least in part to his termination, and if EG&G also has proven that a non-discriminatory motive played some role in its decision (*i.e.*, if the trier of fact finds that dual motives existed), then it is EG&G’s burden to demonstrate by a preponderance of the evidence that it would have terminated Jones for the legitimate reasons alone. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977); *Odom, supra*.

The ALJ found that Jones demonstrated by a preponderance of the evidence that the reasons EG&G cited for discharging him were pretextual, RD at 136, and we agree. We also find that Jones established by a preponderance of the evidence that the real reason for his discharge was his engaging in protected activities.

In addition to the ALJ’s conclusion that Jones was fired for discriminatory reasons, with which we concur, we note that the testimony of EG&G’s principal officer at the Tooele site strongly supports this result as well. Silvestri testified that he told Smith that Jones was very near to being fired because of his actions in the MSB Lab, brine reduction area, and hydrogen leak incidents. T. 1121. With regard to the Lab closing and the hydrogen cylinder leak, we have found that Jones was engaging in protected activities.<sup>10/</sup> Therefore, this record contains the required direct evidence linking the impermissible motive (Jones’s protected activities) and the adverse employment action.

EG&G also articulated facially legitimate reasons for discharging Jones: his confrontational relationship with PMCD and his demeaning behavior toward his subordinates. EG&G has a written policy permitting discharge “for the convenience of the company” when an employee fails to adapt to the work environment or fails to interact effectively with co-workers, supervisors, or customer personnel. RX 3; T. 1128. EG&G argues that its decision to discharge Jones was in accord with this policy. Under a dual motive analysis, we shall analyze both the credibility and the weight of the evidence to determine if EG&G established that it would have discharged Jones for legitimate reasons even if he had not engaged in any protected activities.

The evidence in support of EG&G’s claim that it terminated Jones because of his allegedly “confrontational” style with the customer is questionable. EG&G gave only one example in support of this point, the treaty compliance building matter, and this incident involved only a *suspicion* that Jones was responsible for the report of non-compliance, without

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<sup>10/</sup> The incident in the brine reduction area of the Disposal Facility appears primarily to have involved exposure of workers to hazardous materials, and not actual or potential environmental releases. Arguably, the incident may have raised concerns only under OSHA, and not the environmental laws.

any direct knowledge by EG&G of involvement by Jones.<sup>11/</sup> The company provided no documentary evidence or testimony from affronted PMCD employees indicating that Jones was too confrontational or otherwise difficult to work with.

EG&G's claim that Jones demeaned subordinates in public, *see* CX 63 (Probationary Employee's Review Form), also lacks depth when reviewed in its full context. EG&G witnesses at the hearing mentioned various problems, but we find it noteworthy that Smith, who conducted the counseling session and notified Jones of his discharge, was unaware of these incidents. It seems strange that Smith and other managers would not inform Jones of these incidents of demeaning staff members if the incidents were sufficiently serious to merit discharge, especially since Smith arranged the counseling session with the goal of helping Jones improve his behavior and performance.

EG&G summarized the problems with Jones's performance as "general lack of good judgment and acceptable interpersonal skills." CX 63. In support of this characterization, the company criticized Jones for several reorganizations of the Safety Department staff, T. 928, but at least one of the reorganizations was necessitated by a "secret" promise that Joe Hanny made to Mike Hampton as he stepped down from the Safety Manager position. RD at 131.<sup>12/</sup> Again, if this was a sufficient reason to discharge Jones, it is telling that Smith did not mention staff reorganization as a basis for counseling and firing Jones.

In light of the sparse evidence of Jones's alleged confrontational style and lack of good judgment, and the fact that Smith, who counseled and discharged Jones, did not know of any of the incidents of demeaning behavior toward subordinates, we find that EG&G did not demonstrate by a preponderance of the evidence that it would have discharged Jones even if he had not engaged in protected activities. *See* RD at 136-37 (ALJ's similar conclusion).

In summary, we find that Jones was fired in violation of the whistleblower provisions of the environmental acts. Jones engaged in a variety of protected activities that were known to

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<sup>11/</sup> When Jones spoke with Silvestri about the lack of a site safety submission for the treaty compliance building at Tooele, Silvestri told him that the building and safety plan were outside of EG&G's responsibility. T. 1104. Referring to the site safety submission, Silvestri testified, "That was called, *I believe by Steve*, to the customer's attention. It kind of aggravated the customer. And I was reminded by the customer that the facility was not in EG&G's scope of work." *Id.* (emphasis added). Apparently others at Tooele also believed that Jones raised the same issue with the Army IG, and although Silvestri testified that he was not personally upset, he conceded that it did cause PMCD "some concern." T. 1105. By Silvestri's own testimony, he did not *know*, but merely *believed*, that Jones was responsible for bringing up a safety issue with PMCD.

<sup>12/</sup> Only after naming other persons as team leaders did Jones learn of, and accede to, Hanny's promise that Mike Hampton would be a supervisor after he stepped down. T. 1550; RD 131. The ALJ found that it was logical for Jones to reorganize the staff since it had increased significantly in number in the months prior to Jones's becoming Safety Manager. RD at 135.

EG&G, and we find that the record shows that these protected activities formed the primary motivation in EG&G's final decision to discharge him. Although EG&G has argued that it would have terminated Jones for legitimate, non-discriminatory reasons, we find that the evidence in support of this claim is debatable and weak, and the EG&G has not demonstrated by a preponderance of the evidence that it would have acted to remove Jones even in the absence of his protected activities.

## THE REMEDY

Under the whistleblower provisions of the environmental acts, a successful complainant is entitled to affirmative action to abate the violation, including reinstatement to his former position, back pay, costs, and attorney fees. *E.g.*, 42 U.S.C. §7622(b)(2)(B) (1994) (CAA). In addition, compensatory damages are mandatory under the TSCA, 15 U.S.C. §2622(b)(2)(B)(iii), and may be awarded under the CAA, 42 U.S.C. §7622(b)(2)(B), and the RCRA. 42 U.S.C. §6971(b) (1994). The TSCA also provides that the complainant may be awarded exemplary damages "where appropriate." 15 U.S.C. §7622(b)(2)(B)(iv).

### A. Reinstatement

Jones seeks reinstatement to his former position as EG&G's Safety Manager at the Disposal Facility. RD at 137. EG&G shall reinstate Jones to his former position, with the same conditions and benefits of employment that he enjoyed in the position from which he was discharged. Because our order is mandatory,<sup>13/</sup> we need not discuss front pay, *see* RD 139, which is used as a substitute when reinstatement is impractical. *Doyle v. Hydro Nuclear Servs.*, Case No. 89-ERA-22, ARB Final Dec. and Ord., Sept. 6, 1996, slip op. at 7 and cases there cited.

### B. Back Pay

A successful complainant usually is entitled to back pay from the date of termination until reinstatement, less any interim earnings, as well as interest on the back pay amount. *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, Case No. 93-ERA-24, Dep. Sec. Dec. and Rem. Ord., Feb. 14, 1996, slip op. at 19. The interest rate is specified in 26 U.S.C. §6621. *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Dec. and Ord. on Damages, Oct. 30, 1991, slip op. at 18-19, *aff'd in relevant part and rev'd on other grounds*, *Blackburn v. Martin*, 982 F.2d 125 (4th Cir. 1992).

#### 1. Severance Pay is Deducted from Back Pay

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<sup>13/</sup> The remedy is a civil action for enforcement when a party fails to comply with our order. *E.g.*, 15 U.S.C. §2622(d) and (e) (1994) (TSCA).

EG&G contends that the back pay award should be reduced by the amount Jones received as severance pay. Resp. Br. at 34. We concur. Any severance payments EG&G made to Jones shall be deducted from the amount of back pay owed. *Creekmore, supra*, slip op. at 19; *McCouston v. Tennessee Valley Auth.*, Case No. 89-ERA-6, Sec. Dec. and Ord., Nov. 13, 1991, slip op. at 24.

## 2. Jones Mitigated His Damage by Seeking Other Employment and Undertaking Self Employment

Victims of employment discrimination have the duty to mitigate their damages by seeking suitable employment. *Doyle, supra*, slip op. at 6, citing *Booker v. Taylor Milk Co., Inc.*, 64 F.2d 860, 864 (3d Cir. 1995) (under Title VII). Back pay awards are reduced by interim earnings or by an amount earnable with reasonable diligence. *Id.*

EG&G argues that Jones failed to mitigate damages by abandoning his job search after two months and gambling with self-employment. Resp. Br. at 34-35.<sup>14/</sup> The company seeks a reduction of the back pay by the amount that Jones could have earned with due diligence.

Jones initially tried informal means to get back his EG&G job but was not successful. T. 437-442. Jones then sought jobs in the safety field<sup>15/</sup> through newspaper advertisements, trade journals, library research, the unemployment office, and contacts with former colleagues. T. 449-51. RD 137; CX 78. He sent out 70 or 80 resumes to various corporations, seeking work anywhere in the United States. T. 446, 451. He had no job offers in the time he searched for employment.<sup>16/</sup>

Reasonable efforts to find employment include checking want ads, registering with the state employment agency, and using personal contacts. *Doyle*, slip op. at 7. Jones made such efforts and we find that his job search was sufficiently diligent. *See* RD at 138.

In light of his lack of success in searching for work, Jones concluded that he was not going to obtain a job in safety or a safety related field anywhere in the United States, or even in other countries. T. 452. He and his wife, who also sought a job, decided to purchase and run a used appliance repair business. *Id.* They purchased the business at the end of 1994, took possession in January 1995, and reported no salary or income from the business in 1994 and 1995.

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<sup>14/</sup> In its reply brief, EG&G withdrew its argument that Jones's contact with the media also constituted failure to mitigate his damages. EG&G Response Br. at 17 n.8.

<sup>15/</sup> Jones defined his professional field broadly to include "environment, fire, safety, any safety related jobs that could possibly tie in" to his experience. T. 450.

<sup>16/</sup> Jones began his job search in early October 1994 (within the third week after his discharge) and continued to seek employment throughout November and December of that year. T. 447.

EG&G contends that after too short a job search, Jones unreasonably chose to gamble on “risky” self employment and thus failed to mitigate his damages. Resp. Br. at 38. But “self employment can constitute employment for purposes of mitigating damages, as long as the self employment was a reasonable alternative to finding other comparable employment.” *Smith v. Great American Restaurants, Inc.*, 969 F.2d 430, 438 (7th Cir. 1992); accord, *Hoffman v. Bossert*, Case No. 94-CAA-4, ARB Fin. Dec. and Ord., Jan. 22, 1997, slip op. at 5.

The respondent has the burden of showing that Jones’s self employment was an unreasonable withdrawal from the job market. *Hoffman*, slip op. at 5. EG&G provided no evidence to support its contention that the business Jones entered was so risky that it was not a reasonable choice. The ALJ found that “[t]here is no indication in what is presented that Jones’s efforts in this business activity are not directed to ultimately realizing a profit to replace income destroyed by his EG&G firing and the firing’s effects on any currency he had in his lifetime Safety career.” RD at 138. As the ALJ explained, it is reasonable that it take some time to develop a business to the point of profitability. *Id.* In addition, one aftermath of his firing was that Jones had a poor credit rating, which hampered him in borrowing funds for his new business and promoting its profitability. *Id.*

On the record evidence, we find that EG&G did not meet its burden of establishing that Jones’s self employment constituted failure to mitigate his damages. See *Hoffman*, slip op. at 4-5 (in absence of evidence to the contrary, complainant fulfilled duty to mitigate by undertaking self employment in a landscaping business from which he earned no income). Therefore, the full amount of back pay should continue until reinstatement or Jones’s declination of a *bona fide* offer of reinstatement, unless Jones’s business enterprise has become profitable in the time since the hearing, as we discuss below.

### 3. There is No Double Recovery

EG&G argues that the ALJ apparently did not consider several factors related to valuing Jones’s business that must be considered so as to prevent double recovery. Resp. Br. at 39. The record is clear that, as of the time of the hearing, Jones and his wife had not taken any salary from the appliance repair business and the business itself had not earned any profit. See RD at 138 and T. 773 (the only salaries paid by Jones’s business were those of other employees, not Jones or his wife, and the company earned no profits in 1994 or 1995). However, we note that the record on this issue ends with the 1996 hearing.

In establishing the exact amount of back pay owed, EG&G may ask Jones to provide copies of federal income tax returns for himself and his business (if any) so that EG&G may ascertain whether Jones has taken any salary or whether the business has earned any profit since 1995. If EG&G asks for these documents, Jones shall have the duty to provide them. Should any such records reveal that, since the hearing, Jones has taken a salary or the business has earned a profit, EG&G shall deduct the amount of salary and/or profit from the amount of back pay owed.

### C. Compensatory Damages

The ALJ ordered EG&G to pay compensatory damages for his equity losses in rental properties on which foreclosure occurred, for the loss of his good credit rating, and for “pain and suffering incurred in the loss of his professional reputation and vocational abilities, embarrassment in repossessions, foreclosures and ruined credit, and for inability to supply his family’s financial needs.” RD at 140-41. EG&G contends that Jones did not provide sufficient evidence to show that his discharge was the proximate cause for any of the losses for which the ALJ awarded compensatory damages. We consider here each of the elements of the ALJ’s recommendation regarding compensatory damages.

#### 1. Lost Equity on Rental Properties

Jones testified that the rental properties were foreclosed because of the loss of income from his job with EG&G. T. 450. However, the rental properties were not profitable even before EG&G fired him because Jones was putting a lot of improvements into them. T. 775. Then, after the discharge, his properties experienced “the normal winter slide for the low income housing,” to which Jones testified he was accustomed. T. 775-76. In light of this testimony, we find that Jones did not establish that his discharge caused the foreclosures.<sup>17/</sup> Consequently we will not award compensation for the lost equity on the five rental properties.

#### 2. Award for Loss of Good Credit Rating

EG&G attacks the \$40,000 award for the loss of Jones's good credit rating because “the only evidence of record is Jones’s testimony and some 1995 credit reports.” Resp. Br. at 45. Jones testified that the loss of income from his job with EG&G meant that he could not make payments on financial obligations he had incurred earlier and that the creditors reported his defaults to credit bureaus.<sup>18/</sup> T. 455; CX 81. Jones attempted to obtain a loan to purchase the appliance repair business but was unsuccessful because of his poor credit rating. T. 455. In addition, he has been unable to obtain loans to allow him to purchase and sell new appliances. *Id.*

Injury to a person’s credit standing is a basis for awarding compensatory damages in employment discrimination cases. *See Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1053 (5th Cir. 1998) (noting that under EEOC guidelines, such injury is compensable in Title VII cases).

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<sup>17/</sup> Jones did not provide an essential causal link between the discharge and the foreclosures. We would view this issue differently if, for example, he had testified that after the discharge he was financially unable to make necessary repairs, the tenants fled, and he was unable to re-rent the properties because of the lack of necessary repairs.

<sup>18/</sup> We here consider the effects from Jones’s defaulting on personal obligations other than the mortgages for the rental properties discussed earlier.

As EG&G acknowledges, Jones's credit reports show many defaults in payments about one year after his discharge from EG&G. Resp. Br. at 45; CX 81. Although EG&G found evidence of two credit card debts charged off as bad debt prior to the discharge, Resp. Br. at 45, there are far more similar entries in Jones's credit report after the discharge. We find that there was a very significant deterioration in Jones's credit report after the discharge.

The deterioration in Jones's credit rating, coupled with Jones's testimony regarding his lack of success in obtaining loans for his business, usually would be sufficient evidence to merit compensation for injury to his credit standing. In this case, however, the loans that Jones was unable to obtain were for the appliance repair business. The back pay we have awarded will compensate Jones fully for the years when he was unable either to take a salary or earn any profit from the appliance business. Consequently, we will not make a separate and additional award for injury to credit standing in this case. We will, however, consider the injury to credit standing in awarding damages for pain and suffering.

### 3. Pain and Suffering

EG&G attacks the \$50,000 award for pain and suffering on the ground that Jones did not provide proof of the existence or magnitude of his emotional distress. Resp. Br. at 46. The company points out that Jones's testimony was not corroborated by that of family members or a mental health expert. *Id.* at 47.

Although the testimony of health professionals may strengthen the case for entitlement to compensatory damages, it is not required. *Busche v. Burkee*, 649 F.2d 509, 519 n.12 (7th Cir. 1981), *cert. denied*, *Burkee v. Busche*, 454 U.S. 897 (1981); *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Sec. Final Dec. and Ord., Sept. 17, 1993, slip op. at 27-28. All that is required is that the complainant "show that he experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992), *citing Carey v. Piphus*, 435 U.S. 247, 263-64 and n.20 (1978).

Nor is testimony from family members always necessary for entitlement to compensatory damages. In another case involving a complainant's loss of a job in his long standing profession, the Board ordered substantial compensatory damages based solely upon the testimony of the complainant concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts. *Creekmore, supra*, slip op. at 24-25; *see also Crow v. Noble Roman's, Inc.*, Case No. 95-CAA-08, Sec. Final Dec. and Ord., slip op. at 4 (complainant's testimony sufficient to establish entitlement to compensatory damages).

Jones described his emotional reaction to the loss of his job and income from EG&G: The toughest part of being fired for me is not being able to work in the career field that I chose. As long as this cloud -- I feel a cloud is hanging over me -- it's impossible for me to do that. I've had to do a job basically repairing used appliances, trying to make ends meet, trying to provide food.

T. 458. He also testified that in the aftermath of his discharge, he experienced significant embarrassment when his neighbors witnessed the repossession of his car from his home and when customers saw the repossession of his truck from the appliance repair shop. T. 454.

Another consequence of his discharge was loss of medical coverage, which prevented his wife from having a planned operation to restore hearing in one ear that was totally deaf. The operation was necessary because of deterioration in the hearing in her "good" ear. T. 458-59. In addition, Jones was not able to continue providing financial support to two stepdaughters who were attending college. T. 459. Here we also consider the evidence of injury to Jones's credit standing. Prior to the discharge, he always was able to obtain loans; afterward, he was not. T. 457.

The ALJ found that "[Jones's] testimony as to the emotional distress and the effects of the public circumstances surrounding these events, and his inability to support his family's needs

is sufficient to establish the magnitude of the injuries [ ] clearly resulting from the discriminatory discharge, [and] supportive of the amount he seeks for this category of compensatory damages.” RD at 140. The \$50,000 award in this case is comparable to awards in similar cases<sup>19/</sup> and we find that the record supports it.

#### D. Exemplary Damages

Jones sought exemplary damages of \$150,000 under the TSCA “to send a clear message to EG&G that retaliation against whistleblowers, particularly in the context of dangerous chemical weapons incineration, is intolerable.” RD at 140. The ALJ awarded one dollar in exemplary damages, finding that it is “an adequate deterrent and message as to future misconduct at a chemical weapons incinerator.” *Id.* Jones objects that “[a] one dollar pecuniary award is simply not adequate either to punish EG&G or deter it from its illegal activities.” Comp. Reply Br. at 44.

The Secretary has found that awards of exemplary damages “serve in punishment for wanton or reckless conduct to deter such conduct in the future.” *Johnson v. Old Dominion Security*, Case Nos. 86-CAA-3, 4, 5, Sec. Final Dec. and Order, May 29, 1991, slip op. at 29. According to the Restatement (Second) of Torts § 908 (1979), the relevant inquiry is whether the wrongdoer demonstrated reckless or callous indifference to the legally protected rights of others, and whether the wrongdoer engaged in conscious action in deliberate disregard of those rights. As the Secretary has explained, the requisite “state of mind” is comprised both of intent and the resolve actually to take action to effect harm. *Johnson*, slip op. at 29.

In *Johnson*, the respondent discharged complainants who had complained of serious health problems because of exposure to PCBs on their jobs. The Secretary found that the respondent “manifested indifference to the public health purposes of the TSCA in its treatment of Complainants,” who were treated as “expendable.” *Johnson*, slip op. at 29. But the Secretary also found that the respondent’s “intent and actions” did not meet the threshold for an exemplary damages award. *Id.* at 30.<sup>20/</sup>

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<sup>19/</sup> See, e.g., *Van Der Meer v. Western Kentucky Univ.*, Case No. 95-ERA-38 (ARB Final Dec. and Ord., Apr. 20, 1998, slip op. at 8-9 (\$40,000 for embarrassment because of escorted removal from university job even where the complainant suffered little out-of-pocket loss); *Creekmore*, slip op. at 25 (\$40,000 for emotional distress from layoff); *Doyle*, slip op. at 10 (\$40,000 for emotional distress from discriminatory refusal to hire); *Gaballa v. The Atlantic Group*, Case No. 94-ERA-9, Fin. Dec. and Ord., Jan. 18, 1996, slip op. at 7 (\$35,000 for emotional distress from blacklisting where complainant already had received some compensation through settlement of a related claim); and *Marcus v. Tennessee Valley Auth.*, Case No. 92-TSC-5, Sec. Dec. and Ord., Feb. 7, 1994, slip op. at 10 (adopting ALJ’s award of \$50,000 for emotional distress because of discharge).

<sup>20/</sup> In cases where the trier of fact finds the requisite state of mind, the inquiry proceeds to whether an award is necessary for deterrence. The decision whether to award punitive damages (continued...)

In this case, EG&G demonstrated indifference to the steps taken by Jones, as Safety Manager, to ensure compliance with environmental safety and regulations. We agree with the Secretary's finding in *Johnson* that indifference to the purposes of the environmental acts is not sufficient to constitute the requisite state of mind for an award of exemplary damages. Therefore, we do not accept the ALJ's recommended award of one dollar in exemplary damages.

E. Attorney Fees and Costs

The ALJ shall afford Jones the opportunity to submit a detailed request for payment of attorney fees and costs and shall afford EG&G the opportunity to respond to the petition. *See* RD at 140-41. The ALJ thereafter shall issue a supplemental recommended decision setting forth the amount of attorney fees and costs that EG&G shall pay.

### CONCLUSION

We find that EG&G violated the employee protection provisions of the three environmental acts when it counseled and discharged Jones. It is **ORDERED** that EG&G:

1. Reinstate Jones to his former position as Safety Manager at the Tooele Disposal Facility with identical wages, benefits, and conditions of employment.

2. Pay Jones back pay from the date of termination to the date of reinstatement, or declination of a *bona fide* offer of reinstatement. Any severance payments EG&G made to Jones shall be deducted from the amount of back pay owed. EG&G shall pay prejudgment interest on the back pay award at the interest rate set forth in 26 U.S.C. §6621.

3. Pay Jones compensatory damages of \$50,000.

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<sup>20</sup>(...continued)

involves a “discretionary moral judgment.” *Smith v. Wade*, 461 U.S. 30, 52 (1983); *accord, Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1461 (10th Cir. 1985). If the purposes of the statute can be served without resort to punitive measures, the Board does not award exemplary damages. *E.g., White v. The Osage Tribal Council*, Case No. 95-SDW-1, ARB Dec. and Rem. Ord., Aug. 8, 1997, slip op. at 10 (rejecting exemplary damage award where the Board “fully expects future compliance” with the Safe Drinking Water Act).

It is further **ORDERED** that the ALJ issue a supplemental recommended decision on attorney fees and costs.<sup>21/</sup>

**SO ORDERED.**

**PAUL GREENBERG**

Member

**CYNTHIA L. ATTWOOD**

Acting Member

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<sup>21/</sup> Because this decision resolves all issues with the exception of the collateral issue of attorney fees and costs, it is final and appealable. *See Fluor Constructors, Inc. v. Reich*, 111 F.3d 979 (11th Cir. 1997) (under the analogous employee protection provision of the Energy Reorganization Act, a decision that resolves all issues except attorney fees is final).