



In the Matter of:

KENNETH DOBREUENASKI,

ARB CASE NO. 97-125

COMPLAINANT,

ALJ CASE NO. 96-ERA-44

v.

DATE: June 18, 1998

ASSOCIATED UNIVERSITIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER OF DISMISSAL

This case arises under the employee protection provision of the Energy Reorganization Act (ERA), as amended, 42 U.S.C. §5851 (1994). Complainant, Kenneth Dobreuenaski (Dobreuenaski), asserts that Respondent, Associated Universities, Inc. (AUI), discriminated against him at its Brookhaven National Laboratory, Long Island, New York, by demoting and constructively discharging him for engaging in various protected activities.

Following a six-day hearing, the Administrative Law Judge (ALJ) issued an Interim Recommended Decision and Order (R. D. and O.) finding that Dobreuenaski had been unlawfully demoted but that he had not been constructively discharged. R. D. and O. at 8-10, 12-13. The ALJ awarded damages of \$168.00 for lost wages. R. D. and O. at 13.^{1/}

We find that the record supports the ALJ's holding that Dobreuenaski was not constructively discharged. However, we conclude that the ALJ's analysis is fundamentally flawed regarding Dobreuenaski's demotion and find that the demotion was lawful. Accordingly, the complaint will be dismissed.

BACKGROUND

^{1/} The ALJ later issued a Final Recommended Decision and Order incorporating the R. D. and O. by reference and awarding amounts for attorney's fees, costs and disbursements.

1. Facts

Dobreuenaski began his AUI employment as a technician in 1981. Beginning in 1984, his work involved operating the “waste concentration facility” at Building 811. Although he complained informally about Building 811 for a number of years, R. D. and O. at 4, he filed his first formal internal complaint in February 1994, referring, *inter alia*, to contamination of the building, poor maintenance, and problems with storage tanks, alarms and level indicators. CX 5; T. 814-15.

AUI responded by forming an investigative committee separate from Dobreuenaski’s Safety and Environmental Protection Division to look into the matter. The committee did not find the situation dangerous but offered various recommendations. It summarized its conclusions as follows:

The Committee concludes a number of improvements and the completion of the upgrades in progress are necessary prior to operation of the evaporator, and strict compliance to surveillance procedures must be assured by more effective routine oversight and training, but the facility is currently at a minimal safe condition and does not pose a significant threat to workers or the environment. It is emphasized that the Concerns in this report must be address [sic] to achieve higher safety performance.

There was no imminent danger observed in any aspect of the physical plant or any of the operational aspects. However, the Committee found noncompliance with Laboratory ES&H requirements and internal requirements set in the operational procedures. The noncompliances occurred due to one or more of the following:

1. Inadequate oversight by management,
2. Inadequate ownership for safety and operations by management and Mr. Dobreuenaski,
3. Violations of procedures and ES&H requirements by Mr. Dobreuenaski.

CX 7 at 3, Mar. 16, 1994.

The committee report noted that Dobreuenaski had made a videotape of the area in December, 1993, but had refused to share it with the committee:

It is noteworthy that Mr. Dobreuenaski told the Committee during the interview on February 10, 1994 that he had a videotape that was made on December 13, 1993 to document the conditions of the facility. The Committee asked to view the tape because it was expected to significantly help validate or dispute some of his claims. During the second meeting with Mr. Dobreuenaski on February 12, 1994, he was again asked if the Committee could view the videotape. On both occasions Mr. Dobreuenaski chose not to give a definitive answer when asked for permission and thus did not comply with the request. Because a number of cleanups in the facility had taken place prior to the time the Committee toured the area, the actual conditions at the time of the complaint, including those shown by the videotape, could not be verified to the extent possible had the tape been viewed.

CX 7 at 5. Similarly, despite continued requests, Dobreuenaski never provided the videotape to aid his division's efforts to address problems raised in the report. T. 936-37, 1004-06; CX 8 at 2. He later provided the tape to a television station, which featured extracts and an interview with Dobreuenaski in a January 10, 1996 news report on AUI's purported leakage of radioactive waste into the local water system. CX 18.

In May 1994 Dobreuenaski aggravated a prior injury and was on leave for approximately eighteen months. Although he had filed a complaint with the Department of Energy in October 1995, alleging that AUI had not reinstated him because of his protected activities, CX 20, AUI did not learn of that complaint until mid-December, after he had returned to work. T. 1087-88; RX 44.

Under the collective bargaining agreement negotiated by the Oil, Chemical and Atomic Workers Union, Dobreuenaski was entitled to return to his former position as a Group II Radioactive Materials Technician. T. 1213; RX 1. He requested return to his former Group II position, but, during his eighteen-month absence his former position had been eliminated because Building 811 largely had shut down and was not operating. T. 572-74, 695-96, 1194. Accordingly, he was assigned to work with lower-classified Group III hazardous waste technicians while still being paid at the higher Group II wage rate, with the proviso that whenever Group II work became available, he was to be assigned that work. T. 710-11, 1154; T. 576, 590. He was given training for his new chemical technician duties with the hazardous waste team at Building 445. CX 22 at 1-2; RX 10. He also specifically was encouraged by Leonard Emma, Section Head, Environmental Management Section, to raise safety issues to management. T. 1152-53.

Dobreuenaski submitted complaints in two separate Employee Concerns Reporting Forms on December 28, 1995. Concern No. 95-1, RX 5, referred to violations of procedures for Building 811 and checked off the terms "catastrophic or critical emission/release of nuclear or chemical [matter]" and "damage or loss of facilities or equipment" if the concern remained

unresolved. The other complaint, Concern No. 95-2, RX 6, referred to groundwater pollution at Building 811 and improper storage at Building 445.

Again, AUI responded by forming an investigatory committee separate from Dobreuenaski's Safety and Environmental Protection Division. T. 1384-85. It concluded that none of his concerns represented a serious or immediate hazard, but recommended various improvements. It summarized its conclusions as follows:

The committee considered a total of twenty-eight concerns expressed by Mr. Dobreuenaski in his two employee concern submissions (95-1 and 95-2), in a two-hour interview with him, and during tours with him of the HWM (Igloo) area and Building 811 liquid waste collection and treatment areas. Mr. Dobreuenaski and fifteen other staff who were interviewed were all very cooperative and openly and quickly provided the information requested.

The committee concluded that none of the expressed concerns presented an immediate safety threat to Mr. Dobreuenaski, other workers, the public, or the environment. Mr. Dobreuenaski has expressed concern over numerous minor safety issues that have either been corrected, have been cited on Laboratory self-inspections and are scheduled for correction, or should have been brought to the attention of management as a normal part of Mr. Dobreuenaski's daily activities. Conclusions and recommendations for further consideration or follow-up action on specific findings related to Mr. Dobreuenaski's concerns are contained in the report.

The investigation uncovered two management problems. First, there is a lack of understanding of which organization (OER or S&EP) has responsibility for monitoring and maintaining the integrity of the contaminated pads and trench area that formerly supported the "D" tanks. This responsibility needs clarification since the pads have loose contamination and are subject to deterioration. This also suggests a need for clear delegation of responsibility or transfer of ownership for other areas during and after environmental remediation. Second, facility management should take a more active role in the design and construction of major facilities and modifications in order to assure that completed projects would satisfy specified technical and quality requirements.

RX 20 at 6, Jan. 20, 1996. The committee considered Dobreuenaski's concerns "as a possible environmental contamination problem, but in general, these problems were not large enough to be of major concern. . . . [W]e didn't validate them as being serious. [H]e was much more concerned about them than we would judge they should be." T. 1406, 1415.

Around the same time, on January 10, 1996, a local television station broadcast the report referred to above in which Dobreuenaski charged that AUI was leaking radioactive waste into the area groundwater.^{2/} The report contained an interview with Dobreuenaski, a portion of

^{2/} The broadcast transcript stated, in part:

Announcer: "We have a story that is so shocking it sounds almost like a plot from a horror film. In an exclusive report from [sic] Channel 11 News has learned that radioactive waste has been leaking into parts of the Suffolk County water system. The leaks are stemming from waste generated by the Brookhaven National Laboratory. Now one man has come forward to blow the whistle on the operation

Reporter: "Jack, the Brookhaven National Laboratory in Suffolk County is a Department of Energy Research facility with a budget of more than a half billion dollars. The lab conducts nuclear research and operates two nuclear reactors. Shockingly, some of the radioactive waste from this lab along with other chemicals have apparently gotten into the groundwater and around the laboratory."

Ken Dobreuenaski: "I have complained to people, and complained to people, and basically the story I got was we looked into it."

Reporter: "Some have called him the Karen Silkwood of the BNL. Ken Dobreuenaski has worked there as a radioactive materials tech for fourteen years and is now blowing the whistle on how radioactive waste generated by the lab is contaminating drinking water. Here in a building where he used to work he was videotaped trying to clean up radioactive waste that had leaked out when a pump malfunctioned."

Ken Dobreuenaski: "This is rad water from some that [sic] tanks that actually back flowed into the building. Some radioactive water from the nuclear reactor, from the medical department, from anybody that was a user for my particular facility."

Reporter: "The problems began when these materials started getting out of the containment areas and into the ground. Ken Dobreuenaski shot this video tape of conditions in and around the Building 811 that he worked in showing exposed bags of radioactive waste where animals had torn into them."

Ken Dobreuenaski: "This is a mixed waste. This isn't only a carcinogenic, it is asbestos, but it is radioactive contaminated asbestos."

Reporter: "Ken's video also documented areas where radioactive water had leaked into

(continued...)

his 1993 video recording of Building 811 and its environs, and an interview with Senator Alphonse D'Amato calling for further investigation.^{2/}

Alan MacIntyre, who supervised the Group II technicians, learned in January 1996 that a wastewater transfer was scheduled to take place. On January 22, MacIntyre requested that Dobreuenaski participate in this effort with another Group II technician by entering the basement of Building 811 for approximately five minutes to turn on two or three valves. T. 328-32. MacIntyre arranged for health physicist Nick Contos to explain the safety of the assignment, and Dobreuenaski was offered a respirator to assuage his concern with radioactive airborne particles. T. 378-82; RX 11. Nevertheless, Dobreuenaski refused the assignment because he was concerned about contamination. T. 335. He was issued a verbal warning on January 23 for his refusal to perform the assigned task. RX 13; T. 331-34.

Because of the publicity resulting from the telecast, AUI management decided to clean and decontaminate the basement in Building 811. T. 426-28, 1011-13. MacIntyre assigned the job to Dobreuenaski and Eric Klug, another Group II technician. T. 397. MacIntyre arranged a meeting for January 24 with Dobreuenaski and others to plan the project. An hour before the scheduled meeting, Dobreuenaski informed MacIntyre that he would not participate either in the planning or execution of any clean-up or decontamination activities regarding the basement. MacIntyre requested that Dobreuenaski provide a written statement. RX 15. Dobreuenaski's written statement objected to alleged "contamination problems" in the assigned work area. T. 337; RX 16. Dobreuenaski's assessment of danger was incorrect. As the ALJ noted, "[t]here is no doubt, on this record, that Respondent overwhelmingly proved that the level of radioactivity in the 'pit' [basement] and the exposure thereto was not harmful." R. D. and O. at 13, n.25 (citations omitted).

AUI and the Union ultimately resolved Dobreuenaski's employment status by agreeing to his reassignment to a Group III chemical technician position outside the scope of Building 811 work (with the possibility of return to his former position if he agreed to perform the requisite duties in the future), with the provision that he receive the specialized training that he had previously requested for handling chemical waste. T. 590-94, 658-60. As the Union explained in its February 8 letter to him:

^{2/}(...continued)

the ground as far back as the mid-80's."

Ken Dobreuenaski: "These 300,000 gallon tanks started leaking rad water and we just kind of put pans under them. But if it rained or in this case there was any snow melting off the pad, this just went into the open groundwater."

CX 18 at 1.

^{3/} Shortly after his television appearance, Dobreuenaski was contacted by a Senate employee, flown to Washington, D.C. and questioned by that employee and Senator Ted Stevens. T. 718-19.

We had discussed two possible options for you, one was reassignment as a HWM Tech, the other was a voluntary lay-off. At the time of meeting you presented a third option, which was to retain your present position, but not including the duties of Building 811. Our bargaining unit represents the work done at Building 811 as Radioactive Material Technician work, which you are unwilling to perform. At that time you declined to accept any offer, and asked that the union decide for you. Representing the best interest of the union and our members I asked if the Laboratory would reassign you as a HWM Tech. The laboratory agreed to this option. The union and the laboratory also agreed to negotiate your return as a Radioactive Material Technician should you be willing to perform the duties of that job in the future.

RX 30.

Dobreuenaski's reassignment to the Group III chemical technician position began on February 2, 1996. Because he was involved in training and needed a place to study, he was assigned to an individual office in a temporary trailer occupied by other workers. T. 1159, 1329. After management learned that he had complained to a local newspaper that his facility lacked its own bathroom (there was a bathroom in an adjacent building fifteen yards away), he was reassigned to a vacant office in a building occupied by management officials. T. 741-44, 1160-62.

Dobreuenaski remained at AUI for only three works after his reassignment. RX 40. During the week of February 5, 1996, he received offsite training previously scheduled as part of his preparation for resuming his duties the previous December. He was absent from February 12 through 14. He was in his office on February 15 and 16. His tutoring by a high school chemistry teacher retained by AUI began on Tuesday, February 20, and was to have continued for several weeks. T. 1288. He was absent February 25, the day he was scheduled to meet with the investigatory committee established to consider his December, 1995 complaints. T. 910, 1392; RX 44, entry of 2/23/96.

On February 16, 1996, Dobreuenaski received a written warning from the Labor Relations Manager for his second failure to properly notify his immediate supervisor, Karl Sherburg, of his absence. The notice stated:

On January 10, 1996, you did not report for work and you failed to call in to report your absence. At a meeting on January 11th, in the presence of your Union Vice President, you were given a verbal warning regarding your failure to notify your supervisor of your absence. In addition, you were specifically told that you must follow the call-in procedure required of all Hazardous Waste Management employees. You were warned that

another incident of this nature could be cause for disciplinary action.

On February 12th, you did not report for work, nor did you call in to provide notice of your absence. When you spoke with your supervisor on February 13th, you indicated that you had an injury to your calf and needed to receive ultrasound treatment. You offered no excuse for this most recent incident of failing to notify the Laboratory of your absence.

This is the second instance in which you failed to report that you would not be reporting to work. As a consequence, you are being warned that another incident of not providing proper notice of your absence will lead to further disciplinary action.

RX 31.

During the course of a February 26, 1996 counseling meeting with Sherburg on attendance matters, Dobreuenaski accused Sherburg of harassment for requiring that Dobreuenaski adhere to standard attendance procedures for checking in and out. T. 914-23, 1333; RX 52 (Dobreuenaski's cassette tape). Following this meeting, Dobreuenaski requested a voluntary layoff. T. 923-24; RX 34, 35. He subsequently received, *inter alia*, approximately \$14,000 in severance pay. T. 1096-97; RX 36. Pursuant to his request, the payment was calculated on his earlier, higher-paying position as a Group II Radioactive Materials Technician. RX 34 at 2; RX 35.

2. The Administrative Law Judge's Recommended Decision and Order

The ALJ ruled that Dobreuenaski had engaged in activity protected by the ERA employee whistleblower provision on numerous occasions and in a variety of forums. R. D. and O. at 4-5. Moreover, AUI was aware of Dobreuenaski's protected activity. *Id.* at 5. The issue to which the ALJ devoted most of his attention was whether Dobreuenaski had been subjected to adverse action as a result of that protected activity. The ALJ concluded that Dobreuenaski had proven that AUI demoted him to Group III technician, at least in part, because of his protected activities: "I find that Respondent demoted Complainant, in part, for a legitimate reason, and in part, for an illegitimate, retaliatory reason." *Id.* at 6 (footnotes omitted). Because, in the ALJ's view, AUI had not proven by clear and convincing evidence that it would have made the same decision notwithstanding its unlawful motives, the ALJ concluded that Dobreuenaski had been unlawfully demoted. *Id.* at 10.

However, the ALJ concluded that Dobreuenaski had not been subjected to constructive discharge. *Id.* at 11-13. Therefore, the ALJ only recommended relief related to the demotion, in the form of \$168.00 for lost wages. *Id.* at 13.

DISCUSSION

Dobreuenaski argues that AUI downgraded him to a lower paying position and subsequently forced him to resign for filing his three internal complaints and bringing negative publicity to AUI's operations. Complainant's brief to the ARB at 13, 26. "AUI did not want to take the chance of having its retaliation appear too obvious (if they fired Dobreuenaski as a result of his refusal to perform the work assignment), so instead, they suspended him with pay, conspired with the union to demote him and finally took a course of action specifically designed to force him to quit." Complainant's reply brief to the ARB at 10. We disagree.

Dobreuenaski's actions in filing his Employee Concerns complaints and participating in the television report clearly were protected activities under the ERA. *Rudd v. Westinghouse Hanford Co.*, ARB Case No. 96-087, ALJ Case No. 88-ERA-33, ARB Dec. and Ord. of Rem., Nov. 10, 1997, slip op. at 4; *Trimmer v. Los Alamos National Laboratory and University of California*, ARB Case No. 96-072, ALJ Case Nos. 93-CAA-9, 93-ERA-55, ARB Fin. Dec. and Ord., May 8, 1997, slip op. at 2-3; R. D. and O. at 4-5. However, Dobreuenaski has not proved by a preponderance of the evidence that he was demoted or constructively discharged because of his protected activities.

1. Dobreuenaski's Demotion.

The ALJ held that Dobreuenaski was retaliatorily demoted from a Group II Radioactive Materials Technician to a Group III Hazardous Waste Technician position. R. D. and O. at 6-10. The ALJ viewed Dobreuenaski's demotion as unlawful because he determined that it was predicated upon: (1) a motive that the ALJ viewed as lawful, *i.e.*, Dobreuenaski's January 22 refusal to enter Building 811 for a few minutes to turn on the valves; and (2) a motive that the ALJ viewed as unlawful, *i.e.*, his refusal to participate in the cleanup of the building on January 24. The ALJ viewed the January 22 directive as lawful because AUI was then unaware of Dobreuenaski's reluctance to enter the area, while he viewed the January 24 directive as unlawful because AUI was then clearly on notice of Dobreuenaski's reluctance to work in Building 811. Further, because the ALJ concluded that AUI had failed to establish by clear and convincing evidence that it would have demoted Dobreuenaski for the lawful reason alone, the ALJ held that Dobreuenaski had been unlawfully demoted in violation of the ERA whistleblower provision. R. D. and O. at 10.

We disagree. Under the ERA, "a determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor" in the adverse action taken against the complainant. 63 Fed Reg. 6614, 6623 (Feb. 9, 1998), to be codified at 29 C.F.R. §24.7(b); *see* 42 U.S.C. §5851(b)(3)(C) (1994). *Abraham v. Lawnwood Regional Medical Center*, ARB Case No. 97-031, ALJ Case No. 96-ERA-3, ARB Fin. Dec. and Ord., Nov. 25, 1997, slip op. at 6; *Talbert v. Washington Public Power Supply System*, ARB Case No. 96-023, ALJ Case No. 93-ERA-35, ARB Fin. Dec. and Ord., Sept. 27, 1996, slip op. at 4. Dobreuenaski has not met that test.

First, although we agree with the ALJ that Dobreuenaski's work refusals of January 22 and 24 were major reasons for his demotion, we conclude that the ALJ was incorrect in holding that AUI made the January 24 assignment as part of a plan to downgrade him for engaging in protected activities. Dobreuenaski has not proved by a preponderance of the evidence that AUI's actions were intended to force his removal from his prior position. Indeed, the record reflects the opposite. AUI diligently attempted to assuage Dobreuenaski's concerns, only to be rebuffed by him at various turns. The brief January 22 wastewater transfer assignment was accompanied by a discussion with health physicist Nick Contos and an offer of a respirator. Management was precluded from further counseling Dobreuenaski on January 24 for the basement cleanup assignment because he adamantly refused to participate even in a planning meeting where his concerns might be addressed. At the meeting on January 25, attended by MacIntyre, Contos, Klug, and Mike Clancy (Hazardous Waste Management Deputy Group Leader), Dobreuenaski reiterated his refusal and indicated that he would neither read nor sign the requisite Radiation Work Permit for entry into the basement for a short exploratory visit as part of the planning process. He repeated his refusal in the presence of his union representative and was suspended for three days with pay. T. 204, 364-67, 1167-69; RX 17.

AUI's extensive and good-faith efforts to convince Dobreuenaski that his assignments in Building 811 were safe proved unavailing in the face of Dobreuenaski's stubbornness. As MacIntyre testified:

Q. After you asked Mr. Dobreuenaski to clean up -- to go down and clean up the contamination, you asked him to do it a third time, didn't you?

A. I discussed that activity with him a number of times and in the presence of a health physics technician who is an independent function that we have at the laboratory who are professionals. They're trained in assessing the hazards associated with radioactive exposures and contamination, and we had a number of discussions with Ken, and if you want to say that we asked now, are you comfortable, can you participate in the meeting and the ultimate cleanup, yeah, we did. We did do that again.

Q. And what did he say?

A. He maintained that he was not going to go down in the basement.

Q. And you asked him how many times between January 22 and February 1 to go down to Building 811 and clean it up, how many times?

A. It had to be one -- two or maybe three, but the requests came more in the form of meetings, like a planning meeting.

Q. Now, you had three people clean up the contamination in Building 811 at the time that Ken refused to do it?

A. There was at least three that, I think, participated over, you know, the course of the cleanup.

T. 342-43. Indeed, Dobreuenaski was so unreasonable that when AUI and the Union sought to interest him in retaining his position by agreeing to work in Building 811 if it was first cleaned without his participation, he continued to refuse. T. 643-44, 658-59.

Dobreuenaski also has not demonstrated by a preponderance of the evidence the ultimate fact: that his protected behavior was a contributing factor in his demotion. To the contrary, AUI's decision to reassign him was based solely on his refusal to perform work integral to his job classification.

AUI did not fire Dobreuenaski outright, although it was entitled to do so under its collective bargaining agreement. T. 660. AUI conscientiously attempted to allay his concerns, and reassigned him to a different job category so that he would not be called upon to perform work which he rejected. These actions by the employer belie a discriminatory motive. *Accord v. Alyeska Pipeline Service Co. and Arctic Slope Inspection Services*, ARB Case No. 97-011, ALJ Case No. 95-TSC-4, ARB Fin. Dec. and Ord., June 30, 1997, slip op. at 10-11; *Ashcraft v. University of Cincinnati*, Case No. 83-ERA-7, Sec. Dec. and Fin. Ord., Nov. 1, 1984, slip op. at 18-19. The meeting called by Leonard Emma, Hazardous Waste Management Section Head, "to implore my employees not to treat [Dobreuenaski] any differently [because of his participation in the television news report] and to respect his right to say the things he said [so that it not] have any impact on the work environment," T. 1202, and AUI's timely and thorough investigations of his formal 1994 and 1995 complaints are also indicative of its nondiscriminatory intent. *See Timmons v. Mattingly Testing Services*, Case No. 95-ERA-40, ARB Dec. and Ord. of Rem., June 21, 1996, slip op. at 10-13 (determination of unlawful retaliatory intent requires careful evaluation of all evidence pertinent to the mind set of the employer and its agents).

The ALJ's analysis is also flawed because it assumes that Dobreuenaski's safety concerns permitted him to summarily reject the January 24 cleaning assignment.^{4/} Although a work refusal may be protected under the ERA if the complainant has a good faith, reasonable belief that working conditions are unsafe or unhealthful, it loses its protection after the perceived

^{4/} See R. D. and O. at 8, n.13 and surrounding text.

hazard has been investigated by responsible management officials and, if found safe, is adequately explained to the employee. *Stockdill v. Catalytic Industrial Maintenance Co.*, Case No. 90-ERA-43, Sec. Fin. Dec. and Ord., Jan. 24, 1996, slip op. at 2; *Tritt v. Fluor Constructors, Inc.*, Case No. 88-ERA-29, Sec. Dec. and Ord. of Rem., Aug. 25, 1993, slip op. at 6-7, *petition dismissed sub nom. Fluor Constructors, Inc. v. Reich*, 111 F.3d 94 (11th Cir. 1997); *Van Beck v. Daniel Construction Co.*, Case No. 86-ERA-26, Sec. Dec. and Ord. of Rem., Aug. 3, 1993, slip op. at 3. As explained above, AUI's diligent efforts to convince Dobreuenaski that working conditions were safe were rebuffed by his obduracy. Hence, AUI was free to reassign him to a different position.

2. Constructive Discharge

We agree with the ALJ that Dobreuenaski has not proven by a preponderance of the evidence that he was subjected to a constructive discharge for his protected activities. R. D. and O. at 10, 11, 13. Whether a constructive discharge has occurred depends on whether working conditions were rendered so difficult, unpleasant, unattractive or unsafe that a reasonable person would have felt compelled to resign. *Mintzmyer v. Dept. of the Interior*, 84 F.3d 419, 423 (Fed. Cir. 1996); *Talbert v. Washington Public Power Supply System*, ARB Case No. 96-023, ALJ Case No. 93-ERA-35, ARB Fin. Dec. and Ord., Sept. 27, 1996, slip op. at 10; *Nathaniel v. Westinghouse Hanford Co.*, Case No. 91-SWD-2, Sec. Dec. and Ord., Feb 1, 1995, slip op. at 20; *Johnson v. Old Dominion Security*, Case Nos. 86-CAA-3 *et seq.*, Sec. Fin. Dec. and Ord., May 29, 1991, slip op. 19. AUI's treatment of Dobreuenaski was conciliatory and fair-minded, and was not intended to harass him into resigning. As the ALJ explained:

After Complainant's demotion to Group III technician, he was given training appropriate to such category of technician at Respondent. The office space to which he was assigned, I find to be appropriate and not designed to harass. Upon Complainant's (public) complaint relative to accessibility to bathroom facilities, he was accommodated and re-assigned to another office. The record evidence does not support Complainant's proposition that Respondent's behavior relative to the above was designed/intended to harass him or render his job circumstances intolerable. That Complainant was excluded from "plan-of-the-day" morning meetings is adequately explained. He was required to sign-in and out and give notice of absences from work, as any other employee was, not for the purpose of making his work life miserable.

Complainant's argument that Respondent's showing in the employee cafeteria of the T.V. coverage relative to the conditions at Building 811 (and providing transcripts thereof), suggests its motive to ignite the situation and alienate his co-employees from him, does not, of itself, prove anything. [^{5/}] Presumably, that coverage was available for any and all co-employees to view on T.V. (and/or to be informed about) prior to such showing. Furthermore, the claimed animosity he experienced from co-employees cannot otherwise be placed upon Respondent's

^{5/} We agree with this conclusion. The airing of this video in the employee cafeteria was not proven to be part of a pattern of harassment on the part of AUI. Moreover, there was no evidence that Dobreunaski was motivated by the showing of the tape, or by his colleagues' reaction to the tape, to quit his job.

shoulders. Respondent cannot fairly be held responsible for any isolation, ostracism, or scorn to which Complainant was subjected by his co-employees. Many of these co-employees viewed the T.V. coverage as unfair, and threatening of their jobs without, and independent from, any encouragement from Respondent's management. This record fails to establish that Respondent independently or otherwise orchestrated and/or originated, any such adverse peer response.

On February 26, 1996 Complainant informed Mr. Hunter and Respondent's management that he had decided to accept a voluntary layoff . . . There is insufficient evidence in this record to establish that this acceptance of layoff was triggered by anything other than Complainant's voluntary, willing, and apparently examined desire to ". . . just get [himself] out of [Respondent]. [Having] had enough. This is BS, I'm out of here."

R. D. and O. at 11-12 (citations and footnotes omitted) (brackets in original). Thus, we agree with the ALJ that Dobreuenaski had not demonstrated by a preponderance of the evidence that he was constructively discharged.

ORDER

Because Dobreuenaski was not discriminatorily demoted or constructively discharged, the complaint is **DISMISSED**.

SO ORDERED.

KARL J. SANDSTROM
Chair

PAUL GREENBERG
Member

CYNTHIA L. ATTWOOD
Acting Member