U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 October 2004

CASE NOS.: 2003-CAA-00001/00002

In the Matter of:

THOMAS SAPORITO,
Complainant,

vs.

GE MEDICAL SYSTEMS,

and

ADECCO TECHNICAL SERVICES,
Respondents.

Appearances: Thomas Saporito, pro se
Complainant

David Barton, Esquire
For G.E. Medical Systems

Dudley C. Rochelle, Esquire
For Adecco Technical Services

Before: Jennifer Gee
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

INTRODUCTION

This proceeding began when the Complainant, Thomas Saporito ("Complainant"), filed an initial complaint with the Occupational Safety and Health Administration ("OSHA") division of the U.S. Department of Labor on August 27, 2002, alleging that GE Medical Systems ("GEMS") and Adecco Technical Services ("Adecco") violated the employee protection ("whistleblower") provisions of the Clean Air Act ("CAA"), 42 U.S.C. § 7622, the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622, the Comprehensive Environmental, Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9610, the Safe Drinking Water Act ("SDWA"), 42 U.S.C.§ 300j-9(i), the Solid Waste Disposal Act ("SWDA"), 42

U.S.C. § 6971, and the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851. In his complaint, the Complainant alleged that GEMS and Adecco retaliated against him in reprisal for raising safety concerns while working on an assignment at GEMS.

This matter was heard in Phoenix, Arizona, on January 7-10, 2003, and in West Palm Beach, Florida, on April 29, 30, and May 1 and 2, 2003. The Complainant and counsel for both GEMS and Adecco appeared and participated on all the trial dates. Closing briefs were received on January 2 and 5, 2004.

For the reasons set forth below, it is recommended that the Complainant's complaints be DISMISSED WITH PREJUDICE.

ANALYSIS AND FINDINGS

Procedural Background

The Complainant filed a number of complaints against GEMS and Adecco ("Respondents"). He filed his initial complaint on August 26, 2002, against General Electric Company, GE Clinical Services, Inc., GE Medical Systems, Michael R. Triana, Adecco Technical, Adecco North America, and Greg Bradley alleging illegal discrimination, refusal to hire and blacklisting in reprisal for his protected activity. (CX[1] 45.) He alleged violations of the environmental whistleblower provisions of the Clean Air Act, the Toxic Substances Control Act, the Comprehensive Environmental, Response, Compensation, and Liability Act, the Safe Drinking Water Act, and the Solid Waste Disposal Act. In a footnote to the initial complaint, he stated that he was incorporating the Energy Reorganization Act through his reference to the environmental whistleblower protection provisions "insofar as the ERA speaks to employee protection provisions and hostile work environment statues [sic]." He also submitted additional complaints dated August 27, 2002 (CX 46), August 28, 2002 (CX 47), August 29, 2002 (CX 48), September 3, 2002 (CX 49), and September 26, 2002 (CX 50), which added an allegation of refusal to rehire.

In a letter dated September 27, 2002, Clarence Kugler, the OSHA investigator who investigated the Complainant's allegations, advised the Complainant that evidence gathered in his investigation did not support the Complainant's position. On October 2, 2002, the Chief Judge of the Office of Administrative Law Judges for the Department of Labor ("OALJ") received a letter from the Complainant asking for a hearing in his complaints against GEMS and Adecco. The Complainant indicated that he was making the hearing request as the Executive Director of the National Environmental Protection Center ("NEPC") and on behalf of himself, acting pro se. He asked that the hearing be held within 75 miles of his residence in Buckeye, Arizona. On October 7, 2002, the OSHA Regional Administrator issued decisions finding no merit to the Complainant's allegations against GEMS and Adecco. (CX 25.)

On October 11, 2002, counsel for Adecco filed a Notice of Appearance with the Chief Judge asking that the Complainant's request for a hearing be dismissed because it was made

[1] The Complainant's exhibits are identified as "CX." GEMS' exhibits are identified as "GE," and Adecco's exhibits are identified as "AT."

before the decisions were issued[2] and arguing that the proper venue for the hearing was Ft. Lauderdale, Florida, which was closer to where the Respondents were located. Adecco also objected to the participation of the NEPC as a party to this action.

On October 15, 2002, the Complainant supplemented his hearing request with copies of the Administrator's determination letters which had been issued. This matter was then referred to the San Francisco OALJ office for hearing. On October 17, 2002, I issued a Notice of Hearing and Pre-hearing Schedule setting this matter for trial in Phoenix, Arizona, beginning December 3, 2002. On November 5, 2002, the Respondents filed a joint motion for change of venue to Ft. Lauderdale, Florida. The Complainant filed an objection to the change of venue motion.

On November 1, 2002, I held a lengthy status conference with the Complainant and counsel for both Respondents. I prepared an order immediately after the conference[3] summarizing the discussions during the status conference. I denied Adecco's motion to dismiss the hearing request, finding that the pre-maturity defect in the October 1, 2002, hearing request had been cured by the subsequent October 17, 2002, submission.

I also denied a request by the Complainant asking that the NEPC be allowed to participate as a party in this proceeding. I concluded that the criteria set forth in 29 C.F.R. § 18.10(b) for joining an organization as a party were not met because 1) the Complainant was the sole member and only employee of the NEPC; 2) the NEPC's stated interests were the same as those of the Complainant; 3) the addition of the NEPC to this proceeding would not add anything to this proceeding; and 4) the NEPC would not be affected by the decision reached in this proceeding.

At the same time, I also denied the Complainant's request that the NEPC be designated as his representative in this proceeding because the Complainant and the NEPC were essentially one and the same since the NEPC was not incorporated, had only one member, and had no employees. During the conference call, I instructed the parties to discuss payment of the Complainant's travel expenses to drive[4] to Florida for the hearing as a possible resolution of the venue issue.

On November 4, 2002, I conducted another telephone status conference[5] with the Complainant and counsel for both Respondents. The Respondents informed me that the Complainant had substantially increased the amount of money he wanted for his travel expenses from Arizona to Florida. They informed me that because of the extensive travel time and costs

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[2] As the chronology indicates, while a determination had not been issued at the time the Complainant made his initial hearing request, it was issued by the time Adecco's counsel lodged her objection, but she had not received it.

[3] Due to administrative problems, the order was not issued until November 8, 2002. Thus, though the Order refers to a status conference held the day it was issued, the status conference was actually held on November 1, 2002.

[4] The Complainant had asked to be reimbursed for his driving expenses. He explained that he is afraid to fly and needed to transport his computer by car so that he would have access to it during the hearing.

[5] I also prepared an order summarizing this status conference immediately after it was completed. The order also was not issued until November 8, 2002. Because I referred to the status conference as being held on the date of the order, this order also implies that the status conference was held on November 8, 2002. The status conference was held on November 4, 2002.

sought by the Complainant, they were declining to pay for his travel to Ft. Lauderdale. On November 8, 2002, I issued an order denying the motion for change of venue to Ft. Lauderdale.

On November 18, 2002, Adecco filed a motion asking that the trial be continued so that the parties could depose Greg Bradley, a former Adecco employee and a key witness, who had left Adecco's employ and was unavailable to be deposed until after December 2, 2002. On November 19, 2002, I conducted a telephone status conference with the Complainant and counsel for the Respondents during which I granted the motion for a continuance and continued the hearing to January 6, 2003. On November 27, 2002, the Complainant filed a motion asking the venue for the hearing be moved from Phoenix, Arizona, to a location within walking distance of the Complainant's residence in Tonapah, Arizona. During a telephone status conference on December 2, 2002, with the Complainant and counsel for the Respondents, I denied the Complainant's motion for a change of venue to Tonapah.

On December 11, 2002, Adecco and GEMS filed separate motions for summary judgment asking for dismissal of this action. On December 12, 2002, I received the Complainant's motion for summary judgment asking for a ruling in his favor. On December 23, 2002,[6] I prepared an order denying all three motions for summary judgment, approving 14 witnesses, 11 from GEMS and 3 from Adecco, requested by the Complainant and ordering the Respondents to make them available for the hearing.

On December 30, 2002, GEMS filed an emergency motion asking me to reconsider my order to produce 11 GEMS employees to testify in person at the hearing and asking that I consider video or telephone testimony as an alternative to in-person testimony from all the witnesses. On December 31, 2002, I had a telephone conference with counsel for the Respondents. Though the Complainant informed my law clerk that he was available all day for the conference call and messages were left informing him of the time of the conference call, the Complainant could not be reached when the operator attempted to connect him. During the conference call, I ruled that Respondents would be allowed to have certain witnesses testify by phone or video but that certain witnesses had to testify in person. I also agreed that because the courtroom reserved for the hearing did not have video-conferencing equipment available, the hearing would be held in a conference room at the law offices of counsel for GEMS in Phoenix.

During the January 3, 2003, telephonic pre-trial conference, I denied both the Complainant's motion for a continuance and his motion requesting reconsideration of my decision to allow testimony by video-conferencing.

At the start of the hearing on January 6, 2003, the Complainant presented me with a Motion for Default Judgment against the Respondents arguing that he was entitled to a default judgment in his favor under 29 C.F.R. § 18.5(b) because the Respondents had not filed a written answer to his complaints in this case, as required by 29 C.F.R. § 18.5(a). I denied the Motion for Default Judgment at the hearing. The hearing proceeded and was concluded on January 10, 2003, and the post-trial briefing schedule was set at the end of the hearing. On January 10, 2003,

[6] Because of the year-end holidays and the short time frames involved, a courtesy unsigned copy of this order was faxed to the Complainant and counsel for the Respondents before the signed copy was served. Due to an administrative problem, the signed order was not issued and served on the parties until March 24, 2003.

the Complainant sent OSHA another complaint against GEMS, again alleging reprisal under the same statutes for failure to rehire him and for blacklisting him.

On January 24, 2003, I issued an order notifying the parties that I was vacating the post-trial briefing schedule and setting the matter for further hearing. I informed them that after giving further thought to the issue of video and telephone testimony, I had decided that the Complainant was entitled to question his witnesses in person since he had objected to their testimony being offered by phone or video. I struck the testimony of those witnesses called by the Complainant who had testified by video or phone and scheduled the matter for further hearing to take their testimony in person. I also informed the parties that the hearing would take place beginning March 4, 2003, in Phoenix, Arizona, unless the Respondents paid the Complainant's expenses to travel to West Palm Beach, Florida for the hearing. The Respondents' motion for reconsideration of this order was denied on February 6, 2003.

On February 6, 2003, the Complainant filed a Second Motion for Default Judgment, which I denied on February 13, 2003. The March 4-6, 2003, trial dates were vacated when a settlement judge was appointed at the request of the parties to conduct settlement discussions in this matter. After the settlement discussions were unsuccessful, the trial was re-scheduled to April 29, 30, and May 1, 2003, in West Palm Beach, Florida, and the Respondents agreed to pay the Complainant's travel expenses to West Palm Beach.[7]

On February 25, 2003, the Complainant amended his January 10, 2003, complaint pending with OSHA to reiterate his claims that he was being blacklisted. He also asked that his January 10, 2003, and his amended February 25, 2003, complaints be investigated expeditiously by OSHA. Dennis Russell, a Regional Supervisory Investigator for OSHA, forwarded both complaints to me with a request that they be consolidated with the cases already pending before me.

On March 19, 2003, the Complainant filed a motion to amend his complaint pending before the OALJ to add various specifically named individuals as respondents. On April 3, 2003, GEMS filed a motion for sanctions asking that this proceeding be dismissed as a sanction against the Complainant for his alleged bad faith conduct during the course of this litigation.

On April 17, 2003, I issued an order denying the Complainant's motion to amend his complaint to add specifically named individuals and denying GEMS' motion for sanctions against the Complainant. I also denied a request for sanctions made by the Complainant in his response to GEMS' motion for sanctions. In an order issued April 22, 2003, I ordered the Complainant's two complaints filed with OSHA in 2003 to be consolidated with the complaints pending before me, noting that the two complaints did not make any new allegations of reprisal but merely reiterated the Complainant's earlier allegations of failure to rehire and blacklisting.

[7] The Complainant disclosed during an April 4, 2003, telephone status conference with counsel for Respondents that he was permanently relocating to Florida and was not returning to Arizona after the hearing. Despite his plan to relocate to Florida, which would change the proper venue for the hearing to Florida under 29 C.F.R. § 24.6(c), the Respondents paid the Complainant an amount equal to the $178 round-trip bus fare from Phoenix, Arizona to West Palm Beach, Florida, plus $140 for meals. This April 4, 2003, telephone conference was memorialized in an order issued on April 8, 2003, entitled "Order Summarizing April 4, 2003, Telephone Conference."

The trial proceeded as scheduled on April 29, 2003, and was concluded on May 2, 2003, when a post-trial briefing schedule was set. On May 14, 2003, the Complainant filed a motion asking that the post-trial briefing schedule be vacated and that he be allowed to present rebuttal testimony. The Complainant's request to present rebuttal testimony was ultimately denied, as was his motion for reconsideration of my ruling on that motion. The Complainant filed an interlocutory appeal of my denial of his request to offer rebuttal evidence, which was denied by the Administrative Review Board on November 25, 2003. Pursuant to an order I issued on December 3, 2003, the parties submitted their post-trial briefs in this matter. I received the Respondents' briefs on January 2, 2004, and the Complainant's brief on January 5, 2004.

Exhibits Admitted at Trial

At the hearing, the Complainant's exhibits ("CX") 1-2, 4-11, pages 1-8 and 11-12 of exhibit 12, 13, 16-22, 24-26, 28, pages 1-2 of exhibits 32, 33, pages 1-3 and 5-7 of exhibit 34, 35, 38-39, 43-50, 53-54, 56, 59, 62-63, and 68-72 were admitted into evidence. The Complainant's exhibits 3, pages 9 and 10 of exhibit 12, 14, 15, 29, 31, pages 3-5 of exhibit 32, page 4 of exhibit 34, 36, 40, 41, 58, 61, 64, and 66-67 were excluded. The Complainant withdrew his proposed exhibits 23, 27, 30, 37, 42, 51, 52, 55, 57, 60, and 65.

GEMS' exhibits ("GE") A, D-E, H-I, M-S, U, Y, and AA-MM were admitted into evidence. Exhibit W was excluded, and proposed exhibits B-C, F-G, J-L, T, V, X, and Z were withdrawn.

Adecco's exhibits ("AT") A-N, R-S, BB, EE, and HH were admitted into evidence. Proposed exhibits O-Q, T-Z, AA, CC-DD, and FF-GG were withdrawn. The deposition of Greg Bradley was also accepted into the record.

Factual Background

GE Medical System, located in Jupiter, Florida, is a division of General Electric that services medical equipment in various parts of the United States. Adecco Technical is a nationwide employment agency that provides employees to its clients. It maintains an office in Ft. Lauderdale, Florida, that recruits temporary employees. Adecco advertises client vacancies on its web site. An interested applicant can search the Adecco web site for available positions using key word searches to identify vacancies of interest. The key word search yields a list of Adecco client vacancies with the key word in the job title. An applicant can get more information about the specific job by clicking on the job title which pulls up the vacancy announcement. If the applicant is interested in applying, the applicant clicks on a link that says "Apply Now." The link allows the applicant to attach a resume to the vacancy announcement. That resume is processed by a software program called "Attire," which creates a profile of the applicant with minimal information and notifies the recruiter assigned to the vacancy of the applicant's interest. (HT,[8] p. 878.) The actual resume information is stored in another database which is accessed through another search engine, "Smart Search." (HT, p. 1499-1500.)

Adecco's recruiters fill client vacancies by identifying potential qualified applicants for the vacancies and submitting the names of three potential applicants to the client for

[8] References to "HT" are to the hearing transcript

consideration. The applicants are drawn from the resumes of individuals who applied through the web site. In the rare instance where there are not enough applicants, the recruiter searches the Adecco data base for applicants. (HT, pp. 926-28.) The client notifies the recruiter if the client is interested in the applicant. The client interviews the applicants who are referred and makes the hiring decision. If the client decides to hire the applicant, the applicant becomes an Adecco employee and signs an employment agreement which provides that the applicant will be assigned to the particular client and paid at the contract rate specified by the client. The assignments are temporary and can be terminated at will by the client.

Rhonda Johnson is a senior technical recruiter at Adecco's Ft. Lauderdale office. In early 2002, the Complainant submitted a resume (AT A) to Adecco seeking employment. Ms. Johnson received the Complainant's resume and contacted him about part-time employment with GEMS. (HT, p. 822.) She referred the Complainant for an interview at GEMS after verifying his interest in the job. The Complainant was interviewed at GEMS by Michael Triana, Alan Blockhous, Daniel Beatty, and Abel Sierra. (HT, p. 180.) After the interview, Mr. Triana notified Ms. Johnson that GEMS wanted to hire the Complainant to work for GEMS as an electronic technician on a part-time basis working 20 hours per week. (HT, p. 180.) Ms. Johnson notified the Complainant and met with him to complete the paperwork. The Complainant signed an employment agreement with Adecco which provided that he would work for Adecco at GEMS at a rate of $13 per hour beginning March 18, 2002. (AT D.) In the employment agreement the Complainant acknowledged that he was aware that his employment was temporary and that GEMS could request that he be removed from the assignment at any time for any reason whatsoever unless prohibited by law.

The Complainant was supervised at GEMS by Michael Triana.[9] He was assigned to work in the laser area, which was supervised by Pat McQueary. Mr. Triana asked the Complainant to organize the Modality Lab inventory and to participate in weekly meetings at the Modality Clinic. (HT, p. 1925.) The Complainant's specific task involved putting existing parts into anti-static bags, putting an "exchange sheet" on the bag, storing the stock in the appropriate location, and then updating the stock information in "Clarify," an electronic inventory database. (HT, p. 2201.) Alan Blockhous, the group leader for the multi-vendor department, helped the Complainant learn the Clarify program to keep track of his parts. (HT, p. 2202.) The Complainant's primary responsibility was warehousing and helping anyone in the Modality Group who needed help. (HT, p. 1993.)

The GEMEX[10] is a service tool used in the preventative maintenance performed on spectranetics lasers which are used in heart surgery. (HT, p. 296.) The GEMEX unit uses a gas composed of .075% hydrogen chloride gas, .31% xenon gas, .03% hydrogen gas and almost 99.5% neon gas. (HT, p. 301.) The preventative maintenance involves using a gas cart to pump "bad" gas out of a laser chamber in the unit and replacing it with "good" gas. (HT, pp. 297-98.) Mr. McQueary had responsibility or "ownership" for the spectranetics project. (HT, p. 300.)

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[9] Adecco instructed the Complainant to report to Mr. Beatty (CX 12) on his first day of work due to a mix-up. The Complainant was one of a number of individuals interviewed for assignment to GEMS. GEMS hired three individuals, and two of the new hires reported to Mr. Beatty, who had also interviewed the Complainant. The third person hired, the Complainant, reported to Mr. Triana, but Adecco mistakenly assumed that all three individuals were to report to Mr. Beatty.

[10] GEMEX is an acronym for a Gas Exchange Medic Excimer. (Exhibit GE MM, p. 522.)

There was a problem with the parts inventory in the laser and hematology labs. Mr. McQueary and Paul Harris, a project leader for clinical services, were assigned the task of working on the problem, and the Complainant was assigned to help organize the parts in those labs. (HT, pp. 184, 1925.)

On June 10, 2002, Mr. Triana contacted Adecco to have the Complainant made a full-time temporary employee at GEMS. (HT, p. 180.)

Removal of Laser Dyes

On June 21, 2002, the Complainant approached Mr. Triana with a safety concern about laser dyes and dyes that were to be removed from medical lasers being stored at GEMS. (HT, p. 186.) The Complainant suggested that GEMS might want to look into bringing an outside contractor to expedite the removal of the waste. (HT, p. 186.)

Dye Dumping Complaint

In May or June 2002, the Complainant complained to Mr. Triana that laser dye had been dumped into a sink at GEMS. (HT, p. 310.) Mr. Triana followed up and checked the sink but found no stains in it. He found no sign that any dye had been dumped down a sink in the laser area. (HT, p. 311.)

The Complainant also complained to Tim Trent, a member of the Safety Committee, that he thought that laser dye had been dumped into a sink at GEMS. (HT, p. 2120.) Mr. Trent also checked the sink but saw no evidence of a laser dye spill or a clogged sink and took no further action. (HT, p. 2120.) He did not notify the Complainant of his findings. (HT, p. 2121.)

GEMS Safety Committee and Safety Program

GEMS has a Safety Committee consisting of volunteer employees from different levels and departments. The Safety Committee is part of GEMS' health and safety work plan. (GE A.) It was chaired by Steve Hirschberg, who was the Technical Leader in the Metrology Lab, at the time of the Complainant's employment. (HT, p. 1663.) The Safety Committee meets every two weeks. (HT, p. 2138.) It has no discipline authority and exercises no supervisory authority over employees on safety issues. (HT, p. 1799.)

Employees with safety concerns can bring them to the attention of a member of the Safety Committee. The concern is then either entered into a computerized tracking system or taken care of immediately. (HT, p. 2119.) Employee safety complaints that are not considered minor and cannot be resolved quickly are entered into the tracking system and electronically tracked until they were resolved. (HT, p. 406.)

Letters of Recommendation

In June 2002, the Complainant drafted letters of recommendation for himself which he asked Paul Harris, Pat McQueary, and Pat Malloy to sign. (HT, pp. 1930, 2081; CX 17, pp. 12-14; AT L.) The Complainant then submitted these signed letters to Ms. Johnson and asked her to include them in his Adecco personnel file. (HT, p. 904; AT L; CX 17, pp. 11-14.)

Complainant's June 28, 2002, E-mail Message to Mr. Triana

Ms. Zaborowski was the GEMS National Service Director for lasers. Her role was to look at the growth of the business, as well as the marketing position, in different parts of the country. She coordinated the practices and procedures in different offices to achieve some uniformity and supervised 24 field engineers. (HT, p. 676.) Mr. Triana's unit supported the field engineers. Ms. Zaborowski had no supervisory role over the Complainant. (HT, p. 679.)

General Electric wanted its parts inventory reduced by $300,000. To accomplish that, Ms. Zaborowski scheduled a meeting for July 2, 2002, in Jupiter, Florida with Mr. Triana and his staff to discuss the procedure for reaching that goal. (HT, pp. 680, 684.) The plan was to review the inventory and establish which stock was no longer needed and could be moved out. (HT, p. 680.) On June 28, 2002, after Ms. Zaborowski scheduled the meeting, the Complainant sent Mr. Triana an e-mail message (GE M) stating, in part:

> "… I fully realize that you have a very busy schedule Mike; however, inasmuch as the subject matter of this meeting centers around parts without (?) our Modality Group, your attendance at this meeting along with your input and ideas would be extremely beneficial to our team! Indeed, we will most likely be discussing procedures regarding Laser parts, establishing protocol, and creating a structure and framework to address our current and future inventory of Laser parts. … Your input at this meeting would be greatly appreciated by the team."

The Complainant sent this message with a signature block that identified him as the "Multi-Vendor Laboratory Manager" for the National Modality Group. He sent a copy of this e-mail message to Ms. Zaborowski, Tim Bridges, and Pat McQueary. At the time the Complainant sent this message, he was still a temporary employee under Mr. Triana's supervision.

Mr. Triana was annoyed and upset by this e-mail message because he felt it falsely implied he did not attend the meetings, and it was sent to Ms. Zaborowski, Mr. McQueary, and Mr. Bridges. He was also upset by the fact that the Complainant assumed the title of "manager" when he was not a manager. (HT, pp. 313-14.) The Group Leader for the Multi-Vendor Department was Alan Blockhous. (HT, p. 2199.) Mr. Triana sent the Complainant two e-mail messages in response, indicating his annoyance and also suggesting that the Complainant correct his "multi-vendor laboratory manager" job title. (GE M.)

The Complainant attended the meeting with Tim Bridges and Mr. Triana when Ms. Zaborowski visited the Jupiter facility, but the Complainant's only input at the meeting was a suggestion to have the parts inventory as a separate entity. (HT, p. 666.)

Complainant's Concern About Leaking Laser Dyes

On July 22, 2002, the Complainant brought a safety concern about leaking laser dyes to Mr. Triana's attention. (HT, p. 189.) At that time, action had already been initiated to correct the situation. Dick Felix was working with Dave Burrage to remove the dye. (HT, p. 189.)

During the week of July 22, 2002, Mr. McQueary, who was preparing to air transport the GEMEX, resigned effective July 26, 2002. After Mr. McQueary left, Mr. Triana did not assign Mr. McQueary's responsibilities to the Complainant. (HT, p. 329.)

Fire Door Complaint

At some point, the Complainant suggested to Mr. Trent that a door closer should be put on a fire door to ensure that the fire door would remain closed at all times. Mr. Trent considered it a maintenance issue, not a safety issue. He contacted a locksmith and arranged to have the door closer installed. (HT, pp. 2171, 2193.) The closer was installed. (HT, p. 1729.) He is not sure that he reported back to the Complainant that a door closer had been installed, but the door, with the installed closer, was easily visible to everyone, including the Complainant. (HT, pp. 2171-72, 2192.)

The Complainant's Other Safety Complaints

On one occasion, the Complainant reported to Mr. Hirschberg that an employee in his work area was not wearing required eye protection. Mr. Hirschberg spoke to the employee and instructed her to wear it. (HT, p. 1745.) On another occasion, the Complainant reported to Mr. Hirschberg that on kids' day, an employee brought his daughter to work and had her seated in his lap without eye or footwear protection on. Mr. Hirschberg spoke to the employee and informed him that doing so was not a good idea. (HT p. 1747.) The Complainant also reported to Mr. Hirschberg that a fire extinguisher needed to be installed in the equipment tear down area in the Modality Lab. (HT, p. 1748.) Mr. Hirschberg referred the Complainant to Mr. Trent to have the problem taken care of. (HT, p. 1748.)

Graylon Rector Incident

Graylon Rector was a senior level technician and field engineer for GE who worked under Ms. Zaborowski's supervision. Some time in July 2002, he was sent to help repair a 920 dye laser at a customer's location because the regular technician had been unable to repair it. Mr. Rector was the expert in that piece of equipment. He was sent out with instructions to make sure that he had all possible necessary parts for the equipment so that when he left the customer, the customer's equipment would be working and the repair could be done in one trip, even if it meant he requested parts he didn't need. (HT, pp. 662, 687-88.) Mr. Rector requested some of his parts from the Complainant.

On July 24, 2002, the Complainant sent Ms. Zaborowski an e-mail message questioning the propriety of the laser parts order made by Mr. Rector for this assignment. He questioned Mr. Rector's order for $6,500 in parts because he felt it to be excessive. He suggested that limits be placed on the authority of field engineers to order parts for the equipment they work on. (CX 19; GE N.) The Complainant stated that he had questioned Mr. Rector to determine "what analytical steps he had taken in troubleshooting" and that Mr. Rector appeared to be simply "taking a shotgun" approach "to resolve the equipment problem." The Complainant stated that it was imperative that ownership and controls be placed to ensure that field engineers received the proper training for the equipment they had ownership of; that they be required to consult with their Zone Managers before ordering expensive parts; that the limits on their authority to make

purchases be "revisited" to "dissuade" the purchasing activity the Complainant found objectionable; and that they be required to submit a written summary of their repair activities to their Zone Managers. The Complainant also said it appeared that field engineers were enjoying "un-monitored and unchecked" purchasing authority to purchase their repair laser parts. (CX 19.) The Complainant sent a copy of this e-mail message to Mr. Triana, Mr. Bridges, Brian Schuster and Mr. McQueary, but he did not send a copy to Mr. Rector's immediate supervisor. (HT, p. 691.)

This e-mail message upset Ms. Zaborowski "quite a bit" and "pissed" her off because it was her role to judge and question the competence of the field engineers she supervised, not the Complainant's. (HT, p. 686.) She found many inconsistencies and inaccurate statements in the e-mail. The statement that the engineers were not monitored and checked and that there were no checks and balances for the engineers was inaccurate because the engineers were monitored and there were checks and balances. She also considered Mr. Rector's $6,500 parts order to repair the laser to be reasonable. (HT, p. 664.) The e-mail message indicated to Ms. Zaborowski that the Complainant was either monitoring the engineers, which Ms. Zaborowski felt was unacceptable behavior on the Complainant's part, or he was accessing information he had no right to access. (HT, p. 686.) She was upset with the Complainant because it was not his responsibility to keep a shipping log. His role was to establish an inventory of the parts. (HT, p. 716.)

Shortly after the Complainant started at GEMS, Ms. Zaborowski was happy with his work and commented to Mr. Triana and the Complainant in May 2002 that the Complainant was a breath of fresh air. (HT, p. 659.) On June 24, 2002, she sent the Complainant an e-mail message expressing her appreciation for his work. (HT, p. 661; CX 17, p. 9.) The e-mail message about Mr. Rector upset Ms. Zaborowski and changed her opinion of the Complainant. She felt that there were integrity issues concerning the Complainant and that he was creating disturbances and sending out e-mail messages with falsehoods. (HT, p. 694.) She also felt that he demonstrated poor judgment in his e-mail. (HT, p. 694.)

Ms. Zaborowski contacted Mr. Triana and expressed her concerns, explaining that he had a problematic employee. (HT, p. 689.) She told him he had to do something to nip it in the bud because the e-mail was unacceptable. (HT, pp. 687, 693.) Mr. Triana, in turn, contacted the Complainant by e-mail and told him that this message was out of line and that he should reserve his comments. (GE N.) He also pointed out to the Complainant that the Complainant did not know the field engineer's skill level, and he had no knowledge of whether the field engineer had consulted with the zone manager. He instructed the Complainant not to send out any more of these types of e-mails and pointed out that the Complainant was there to "help – NOT HINDER." (GE N.)

Mr. Triana found the Complainant's e-mail message to be disruptive because he had to deal with Ms. Zaborowski who was upset after she received the e-mail, and he had to respond to inquiries from Messrs. Bridges and Schuster when they called asking about it. (HT, p. 321.) He felt the e-mail message included a lot of false assumptions and the message was out of line because the Complainant was assuming a management role over the field engineers, whom the Complainant had no control over. (HT, p. 191.)

At the time Mr. McQueary left GEMS, the spectranetics project was complete and the GEMEX tool had been used and field tested. (HT, p. 322.) GEMS was planning to ship the GEMEX from site to site. Mr. McQueary had expressed some concerns about the logistics of shipping the GEMEX. (HT, p. 324.) Mr. Triana was exploring the idea of making it more compact and a little more durable and was planning to work with a field engineer from California on the project. (HT, p. 324.) Plans had been set in motion for the California field engineer and Abel Sierra, the Service Development Engineer for the Modality Group, to work on the project and for Mr. Sierra to be the lead person on it. (HT, p. 325.) The Complainant was not part of the team that was to work on the project. (HT, p. 325.)

Assignment of Responsibility/Ownership of GEMEX Project to Abel Sierra

On July 29, 2002, Mr. Triana met with Abel Sierra and the Complainant to discuss shipping the GEMEX. (HT, p. 1997.) Mr. Triana explained what he wanted done with the GEMEX and that he wanted changes made so that it could be more compact for shipping. (HT, pp. 1994, 1997.) Messrs. Triana and Sierra and the Complainant discussed possible changes to the GEMEX to make it more compact, but there was no discussion about the safety of the GEMEX, and the Complainant did not raise any issues about shipping the GEMEX by air. (HT, pp. 199, 1994, 1997-98.) Mr. Triana assigned "ownership" of the project to Mr. Sierra but indicated that the Complainant would work with Mr. Sierra on the project. (HT, p. 1998.) He asked the Complainant to uncrate the cart. (HT, p. 326.)

During lunch on July 30, 2002, Mr. Sierra had another discussion about shipping the GEMEX with Mr. Triana, the Complainant and another individual. During the discussion, the Complainant expressed concerns about the shipment of the gases and about the gases being used in a public environment. (HT, p. 2000.) Mr. Sierra stated that it was probably a good idea to use the GEMEX in a well-ventilated area, but he had no concerns about its safety. (HT, p. 2001.) The Complainant suggested that it might be better for the gases to be stored at the client site instead of being shipped with the GEMEX. (CX 45, p. 8.) Mr. Triana was not receptive to the idea. (HT, p. 2003.)

Complainant's Overtime Request to Ms. Zaborowski

On July 30, 2002, the Complainant sent Ms. Zaborowski an e-mail message that he asked Ms. Zaborowski to keep confidential. (GE P; CX 21.) In this message, the Complainant asked for authorization to work overtime, stating that Mr. Triana had denied his overtime request.[11] In the message, the Complainant stated that since his responsibilities were to oversee the entire Modality Lab "inclusive of the Clinical Lab as extended by the Hematology Lab," he was unable to focus on the laser inventory in a timely schedule for completion. He listed six projects that he identified as "on-going" and implied they were assigned to him. These projects included reconstructing the GEMEX cart to make it more durable and portable; testing, validating and qualifying the Hene tubes and associated power supplies to "good stock;" testing, validating and qualifying laser "test fixtures" to be used for training sessions; routine lab harvesting activity;

[11] At that time, the company policy was to only authorize overtime for employees who held revenue generating positions. The Complainant's work was not revenue generating. (HT, p. 695.)

supporting the field engineers on a "daily" basis; and inventorying the service manuals. (GE P; CX 21.)

Ms. Zaborowski knew his claims concerning these "on-going" projects to be untrue. This list incorrectly included projects that had already been completed by other individuals, were the responsibility of other specific individuals, or were not yet ready to be undertaken. Mr. Triana had not assigned the task of reconstructing the GEMEX cart to the Complainant. (HT, p. 329.) That responsibility was given to Mr. Sierra. (HT, pp. 330, 697.) The Complainant also referred to a project to test, validate and qualify Hene tubes and associates power supplies to "good stock" and another project to inventory the service manuals. Ms. Zaborowski, herself, was involved in negotiations with a vendor to handle the testing and validating of the Hene tubes, and the listing of the service manuals had been completed by another employee. (HT, pp. 697-98.) The Complainant did not have the responsibility of overseeing the entire Modality Lab. That responsibility at the Jupiter facility rested with Mr. Harris. (HT, p. 696.)

Ms. Zaborowski forwarded this e-mail message to Mr. Triana on August 2, 2002, and spoke with him about it, bringing up the fact that many of the concerns listed in the e-mail were not the Complainant's function. (HT, p. 699.) Mr. Triana found the tone of the e-mail message to be insubordinate because in the message, the Complainant assumed management responsibility that he did not have. (HT, p. 332.)

Complainant's Pay Increase Request to Ms. Johnson

At 12:01 a.m. on July 31, 2002, the Complainant sent Ms. Johnson an e-mail message asking that his pay rate be increased to $14 per hour immediately. (AT N.) The Complainant based his request on a $14 per hour rate that was to be paid for a new Electronic Repair Technician position at GEMS posted on the Adecco web site.

Complainant's "Final Safety Analysis Review"

At 6:53 a.m. on July 31, 2002, the Complainant sent another e-mail message asking Ms. Zaborowski to notify the Laser team that because he was going to be actively involved in the inventory on August 2, 2002, he would not be able to timely respond to the field engineers' requests. (CX 20.) He made the following request for her to print out an attached Microsoft Word file:

> "Also, please print-out the attached Microsoft Word file which delineates activities associated with the GEMEX unit. Since the departure of McQueary, I have 'Ownership' of this project and share responsibility for its completion." (CX 20.)

The attachment was an inter-office memorandum from the Complainant addressed to Ms. Zaborowski dated July 31, 2002, which identified the subject matter as being the "Final Safety Analysis Review" ("FSAR"). The Complainant sent copies of this e-mail and the attachment to Messrs Triana, Sierra, Trent and Hirschberg. The Complainant also sent a blind carbon copy of this e-mail and the FSAR to Paul Harris and Patrick Mulloy. (HT, pp. 1944, 2083.)

The Complainant stated at the beginning of the FSAR that the purpose of the document was to apprise Ms. Zaborowski of "certain and specific actions, which we are engaging with respect to conducting a Final Safety Analysis Review ('FSAR') … before authorizing and approving its release" to the field engineers. In the FSAR (CX 20), the Complainant identified the following 13 "preliminary conclusions" concerning the GEMEX:

1. The GEMEX was a prototype constructed solely for in-house use at GEMS for design enhancement and for training purposes;
2. The GEMEX cannot be transported safely and was not intended for use by the field engineers;
3. The GEMEX required significant redesign of its frame and housing for safety reasons and for operational considerations in the field;
4. The GEMEX redesign must employ devices to secure the pressurized gas cylinders when the unit is placed in operation in the field;
5. The shipping crate being used to transport the GEMEX required retrofitting to prevent damage during shipment;
6. Individuals involved in the transport of the GEMEX gas cylinders needed to receive the training required by Federal and State laws regarding their shipment;
7. The Field Engineers and everyone else involved in the testing, operation and transport of the GEMEX needed to be trained in the proper operation and use of the equipment and made fully aware of the inherent safety risks associated with using the gas products required to operate the GEMEX;
8. The "Fluid Diagram Schematic" which he had recently completed had to be evaluated and considered by the Complainant and Mr. Sierra and compared to the existing written operational procedure to ensure that the written procedure contained the necessary sequence of steps to provide for the safe operation of the GEMEX;
9. The GEMEX procedures had to be evaluated and considered to ensure that the procedures provided adequate reference to the MSDS documentation, service equipment manuals, and Federal and State laws pertaining to the transport of the gas cylinders, etc.;
10. GEMS needed to look at its training curriculum for sufficiency to address the concerns he listed;
11. GEMS needed to properly assess required materials, parts, and labor to provide a basis to justify a proposed budget for retrofitting the GEMEX and its shipping crate;
12. The GEMEX FSAR had to use an acceptance sign-off sheet requiring a thorough review and hand-written acceptance signatures by Mr. Triana, Mr. Sierra, the Complainant (as the project owner of the GEMEX), Mr. Hirschberg, and Mr. Trent;
13. The GEMEX could not be authorized for transport and use in the field under any circumstances unless the GEMEX FSAR was completed and signed off by the individuals identified in item 12.

The Complainant indicated that his opinion was based on 30 years of experience. He also acknowledged in a footnote that Mr. Sierra and Mr. Triana might not agree with his preliminary

conclusions but went on to state: "[n]onetheless I have requisite ownership and share responsibility for the GEMEX project.…" (emphasis added). (CX 20.)

The Complainant was never assigned the task of conducting a safety review of the GEMEX.

Mr. Harris' Reaction to the FSAR

After Mr. Harris received his copy of the FSAR, he skimmed through it and then went to Mr. Triana and asked what it was all about. Mr. Triana said that the Complainant had some safety concerns, and he did not want to discuss them with Mr. Harris. (HT, p. 1945.) Mr. Harris, who was aware that the Complainant had possession of the GEMS digital camera, then asked Mr. Triana if the Complainant had the GEMS digital camera because of his safety concerns. Mr. Triana was not aware that the Complainant had the camera and asked Mr. Harris to get the camera and to download the pictures that were on it. (HT, p. 1946.) Mr. Harris retrieved the camera and downloaded the pictures onto his computer. He found the camera included one picture of the GEMEX and two pictures of a work environment. (HT, p. 1946.) After Mr. Triana looked at the downloaded pictures, he told Mr. Harris that there was no need to save the pictures and that he did not want them. (HT, p. 1947.) Mr. Harris asked if he could delete the pictures, and Mr. Triana gave him permission to do so. (HT, p. 1947.) However, Mr. Harris first e-mailed the pictures to the Complainant. (HT, p. 1948.)

On August 2, 2002, Mr. Harris visited the Complainant at his work station and told the Complainant that the pictures of the GEMEX had been erased from the digital camera. He also told the Complainant that it was inappropriate to escalate a safety concern in the manner that he had with his e-mail message and that it was inappropriate to "blind copy people." (HT, p. 1953.)

Mr. Mulloy's Reaction to the FSAR

Mr. Mulloy glanced at the Complainant's FSAR briefly and discarded it because he knew nothing about it and had never seen the GEMEX. (HT, pp. 2086, 2088, 2090.) After he received the FSAR, he did discuss it with the Complainant, who showed him the GEMEX. The Complainant told Mr. Mulloy that he had a disagreement with Mr. Triana about the safety issues on the GEMEX. (HT, p. 2090.) Mr. Mulloy referred the Complainant to Mr. Burrage. (HT, p. 2089.)

Mr. Sierra's Experiences After Receiving the FSAR

Mr. Sierra received the Complainant's FSAR but found it difficult to understand. He found there were too many untrue statements in it and didn't know where to start after he received it. (HT, p. 2015.) One of Mr. Sierra's concerns was that the Complainant described the GEMEX as a prototype when it wasn't. (HT, p. 2019.) He was also concerned that the Complainant identified himself in the FSAR as being part of the National Environmental Group and felt the Complainant was taking the situation "out of proportion." (HT, p. 2026.)

After Mr. Sierra received the FSAR, he bumped into Mr. Triana in the hallway. Mr. Triana told Mr. Sierra that he was mad at the Complainant about the FSAR and that he was going to talk to the Complainant. (HT, p. 2026.) He did not indicate to Mr. Sierra that he was

going to discipline the Complainant for sending the FSAR memo. (HT, p. 2026.) Mr. Triana indicated that he felt the Complainant's use of the three-page FSAR was inappropriate, that the FSAR inaccurately described the GEMEX as a prototype, and that the Complainant identified himself using an inappropriate title. Mr. Triana also said he was upset that the Complainant had distributed the memo so widely and had gone outside the chain of command. (HT, p. 2071.) Mr. Triana told Mr. Sierra that if the Complainant had concerns, he expected the Complainant to bring the concerns up with Mr. Triana first or with the group.[12] (HT, p. 2072.) Mr. Sierra told Mr. Triana that he did not know how to deal with the FSAR because there were so many things in it, and he did not understand why the Complainant referred to the GEMEX as a prototype. (HT, p. 2026.)

Mr. Sierra also went to discuss the memo with the Complainant on July 31, 2002. When he spoke to the Complainant, he did not tell the Complainant that he considered the FSAR to be a "good effort" on the Complainant's part or that it could be used as a guide for completing the FSAR. (HT, p. 2026.) During that conversation, the Complainant told Mr. Sierra that Mr. Triana had threatened to fire him, but the Complainant did not indicate why he felt Mr. Triana wanted to fire him. (HT, p. 2028.)

Ms. Zaborowski's Reaction to the FSAR

After receiving this message Ms. Zaborowski became concerned about the Complainant's statement that he had "ownership" of the GEMEX because she and Mr. Triana had decided that Mr. Sierra would have ownership of the project, and it appeared that the decision she and Mr. Triana had made was being "totally turned around." (HT, p. 701.) Ms. Zaborowski also felt the Complainant's memorandum included a fabrication of issues that weren't there and raised concerns that had been addressed earlier in the year. (HT, pp. 672, 702.) After receiving this e-mail, Ms. Zaborowski called Mr. Triana to discuss it and to convey her concerns. (HT, p. 665.)

Mr. Trent's Reaction to the FSAR

Mr. Trent did not know what the GEMEX was before he received the FSAR and had no knowledge as to whether or not it was a prototype. (HT, p. 2133.) After reading the FSAR, Mr. Trent discussed with his immediate supervisor the requirement included in the FSAR that he sign off on the GEMEX. He informed his supervisor that he had no intentions of signing any document about the GEMEX, and his supervisor concurred. (HT, p. 2126.) He also discussed the FSAR with the Complainant and instructed the Complainant to take his concerns to Mr. Burrage. (HT, p. 2126.)

Mr. Triana's Reaction to the FSAR

After Mr. Triana read the e-mail message, he called the Complainant into his office. Mr. Triana was upset and angry about the e-mail message because it was the third time the Complainant had sent out an e-mail that he felt was unfounded. He also felt it was disruptive to the workforce and incorporated a number of false assumptions. (HT, p. 215.) Mr. Triana admonished the Complainant about going outside the chain of command and sending out the FSAR. (HT, pp. 204-5.)

[12] The Modality Group had weekly meetings that the Complainant attended with other employees in the Group.

Mr. Hirschberg's Reaction to the FSAR

Mr. Hirschberg received this e-mail after he returned from vacation on August 11, 2002. When he contacted Mr. Triana to discuss it, Mr. Triana informed him that the Complainant had been let go and that the e-mail was no longer an issue. (HT, pp. 1758, 1760.)

Mr. Triana's First Contact with Mr. Bradley

On July 31, 2002, after he received the Complainant's FSAR, Mr. Triana contacted Greg Bradley, the Branch Manager of the Adecco Technical's Fort Lauderdale, Florida office, and informed Mr. Bradley that there were some performance issues involving the Complainant. (HT, p. 241.) Mr. Triana reported that the Complainant was spending an inappropriate amount of time away from his work station, that his work performance had degraded, that he was not getting his equipment out as scheduled, and that he had a condescending and degrading attitude. (Bradley Depo[13], pp. 33-4; HT, p. 241.) He also told Mr. Bradley that there had been a problem with Ms. Terracino and that the Complainant was sending out disruptive e-mail messages. (HT, p. 241.) Mr. Triana said the Complainant had had a drastic attitude change and was condescending and degrading, and his attitude was having a negative effect not only on his ability to manage the production of the equipment but also on the entire team and department. (Bradley Depo, pp. 34, 136.) Mr. Triana indicated to Mr. Bradley that he did not want Mr. Bradley to take any action at that time. (Bradley Depo, p. 34.)

Complainant's Concern About Storage of GEMEX Gases

On August 1, 2002, the Complainant complained to Mr. Triana that he believed the GEMEX tanks were being improperly stored in the Modality Lab in a horizontal position. (HT, p. 216.) After the Complainant raised that concern, Mr. Triana went with the Complainant to Brian Adams' area to look at the possibility of storing the gas in Mr. Adams' area. (HT, p. 216.) Mr. Adams objected to the tanks being moved to his area. Despite his objections, Mr. Triana ordered the tanks moved, and the Complainant, himself, moved the tanks. (HT, pp. 1099-1101.) As a result of the Complainant's concern, the GEMEX gas tanks were temporarily placed in an area called the "the tank farm" and then put in a cage with other gas tanks when there was room. Mr. Triana instructed Mr. Trent to install chains so the tanks could be stored upright and chained against the wall. (HT, p. 2143.)

At 1:17 p.m. on August 1, 2002, the Complainant sent Tim Trent a "follow-up" e-mail message about the storage of the GEMEX gas cylinders, indicating there might be a safety risk in the way they were being stored. (GE R; CX 34, p. 2.) The Complainant sent a copy of this e-mail message to Mr. Triana and Mr. Hirschberg. Mr. Trent understood from the e-mail message that the Complainant was concerned that there was not enough ventilation where the GEMEX gas cylinders were being stored and wanted Mr. Trent to investigate it. (HT, p. 2142.) Though the Complainant described the message as being a "follow-up" regarding the storage of the GEMEX gas cylinders, Mr. Trent considered this to be a whole new complaint since the horizontal storage of the tanks had been resolved. (HT, p. 2144.) Mr. Trent investigated the Complainant's latest complaint but concluded there was no problem because he was not aware of

[13] Mr. Bradley left Adecco after the Complainant's termination and relocated to Gaithersburg, Maryland. His testimony was submitted by deposition.

an OSHA requirement for forced air ventilation, and the fire marshal was aware of the storage arrangement and had approved it. (HT, pp. 2142, 2178.)

Mr. Triana sent an e-mail message to Mr. Hirschberg about the storage location at 3:28 p.m. on August 1, 2002, indicating that he had followed up on the gas storage issue with Mr. Burrage and though Mr. Burrage felt the current storage area was fine, the gas was going to be moved. (CX 34, p. 3.) Mr. Hirschberg was on vacation when the gas cylinder storage issue arose. He returned from vacation on August 11, 2002, and received this series of e-mail messages at that time. Mr. Hirschberg did not take action in response to the Complainant's e-mail message because when he returned, he saw Mr. Triana's response and believed the issue had been resolved. (HT, pp. 1731, 1737.)

Complainant's August 1 Meeting with Mr. Triana and Mr. Burrage

On August 1, 2002, after the tanks were moved to the tank farm, Mr. Triana found the Complainant "tinkering" with the GEMEX cart and told the Complainant to leave the cart alone and to return to "parts harvesting." The Complainant responded by asking if Mr. Triana was going to fire him and asked Mr. Triana if he knew what "EHS" stood for. (HT, p. 222.) Mr. Triana then took the Complainant to meet David Burrage, the Environmental Health & Safety Officer, to try to resolve the Complainant's environmental health and safety ("EHS") concerns. Mr. Triana asked Mr. Burrage to help him resolve the Complainant's concerns about the neon and hydrogen chloride ("HCl") gas mix. The Complainant expressed concerns to Mr. Burrage about the potential danger posed if HCl gas leaked from the GEMEX tanks. (HT, pp. 2437, 2438.) Mr. Burrage then reviewed the Material Safety Data Sheet ("MSDS") for HCl gas with the Complainant. (HT, pp. 223, 2437.) The Complainant also pointed out that the manufacturer of the gas suggested installing alarm equipment where the gas cylinders were stored. (HT, p. 2515.) At one point during the meeting, Mr. Burrage asked the Complainant if he had had EHS training. When the Complainant replied that he had not, Mr. Burrage gave him a CD labeled "EHS Training" and asked the Complainant to review it. (HT, p. 1103.) At the conclusion of the meeting, Mr. Burrage asked the Complainant if his concerns had been resolved, and the Complainant responded "yes." (HT, pp. 224, 1206.) The Complainant also indicated to Mr. Burrage that there were no other concerns that Mr. Burrage could help the Complainant with. (HT, p. 224.)

After the Complainant left, Mr. Burrage spoke briefly to Mr. Triana and told Mr. Triana that he would speak to the industrial hygienist about whether or not they needed to put an alarm on the GEMEX unit. (HT, p. 2529.) When he spoke to the outside industrial hygienist about the idea, the industrial hygienist laughed and said it would be overkill. (HT, p. 2529.) Mr. Burrage instructed Mr. Triana to arrange for the alarm anyway. (HT, p. 2529; GE I.)

Complainant's August 2, 2002, E-mail Message to Mr. Burrage

At 5:12 a.m. on August 2, 2002, the Complainant sent an e-mail message to Mr. Burrage with two attachments, a copy of his FSAR and a memorandum addressed to Mr. Burrage about "Safety Concerns and Retaliatory Discrimination" alleging that Mr. Triana had retaliated against him. (CX 2.) He alleged in his memo that Mr. Triana had removed him from the GEMEX project in reprisal for his FSAR, that Mr. Triana had openly threatened to fire him in front of his

co-workers and peers, and that Mr. Triana had threatened to cut off his e-mail access because of the FSAR he distributed. He asked Mr. Burrage to investigate the concerns raised in the FSAR and asked for a written response to his memo from GEMS management within 15 days, stating that if he did not receive a response, he would "seek recourse through the Federal and/or State authorities." (CX 2.)

The Complainant sent copies of this e-mail message to Ms. Zaborowski and Messrs. Trent, Hirschberg, and Sierra. He did not send a copy to Mr. Triana. Mr. Trent, after reading the e-mail, considered the Complainant's statements about Mr. Triana in the memorandum to be slanderous and forwarded Mr. Triana a copy of the Complainant's e-mail message at 8:48 a.m. on August 2, 2002, with a note: "Hey, Mike, I thought you should see this since he doesn't have the balls to send you a copy! This was distributed to a few people in the building." (HT, pp. 2181-2; CX 18, p. 6.) Mr. Trent was disturbed by the e-mail because he felt that the Complainant should have discussed his problem directly with either Mr. Triana or with the Human Resources staff instead of sending it to individuals who had nothing to do with it. (HT, p. 2183.) He was also disturbed by the fact that the Complainant had not bothered to send a copy of the e-mail to Mr. Triana.

After reading the Complainant's August 2, 2002, e-mail, Mr. Burrage's immediate reaction was that he had been lied to and that it was "off the wall." He was shocked and felt he had wasted his time meeting with the Complainant the day before and that there were other motives behind the Complainant's action. (HT, pp. 2537-8.) He was also suspicious of the fact that the Complainant had sent such a lengthy e-mail at 5 a.m. Mr. Burrage then contacted Mr. Triana, Steve Clark and Nancy DeWitt in the legal department because he was extremely uncomfortable with the e-mails and memos and did not know what to do about them. (HT, p. 2539.)

Mr. Burrage's Meeting with the Complainant on August 2

On August 2, 2002, the Complainant was walking outside the lab with Paul Presti, who had arrived the preceding day to help another technician with a laser. The Complainant gave Mr. Presti a copy of his FSAR and began complaining to Mr. Presti about the GEMEX. (HT, p. 1912.) Mr. Presti had no knowledge or training about the GEMEX and did not understand the Complainant's complaints, but he did understand that the Complainant was not happy with the GEMEX. (HT, pp. 1907, 1913.) While Mr. Presti was walking with the Complainant, they had a brief encounter with Mr. Burrage outside the lab. (HT, p. 1914.) Mr. Presti had no idea who Mr. Burrage was, but noticed that Mr. Burrage appeared stern, though not angry or upset at the Complainant. (HT, pp. 1915, 1917.) Mr. Burrage had a brief conversation with the Complainant during which he said to the Complainant that they needed to talk and that if the Complainant had a problem, they needed to talk about it. (HT, p. 1915.) Mr. Burrage asked Mr. Presti if he was involved with the laser, and after Mr. Presti responded "no," the Complainant said that he would talk with Mr. Burrage about it later. (HT, p. 1915.) Mr. Burrage agreed and left. Before leaving, he told the Complainant that he disagreed with 95% of the Complainant's safety concerns. (HT, p. 2553.) Mr. Burrage did not ask for Mr. Presti's opinion about the GEMEX, and Mr. Presti did not make any comments about the GEMEX to Mr. Burrage. (HT, p. 1918.)

Decision to Terminate the Complainant

After Mr. Triana received the Complainant's August 2, 2002, e-mail message to Mr. Burrage that was forwarded to him by Mr. Trent, he went to discuss the matter with Mr. Burrage. Mr. Triana and Mr. Burrage decided to discuss it with Steve Clark, the Human Resources manager, because of their concerns about the false allegations in it and its wide distribution. (HT, p. 227.) They conferred with Mr. Clark about all the e-mail messages that had been sent out. During the conversation with Mr. Burrage and Mr. Clark, Mr. Triana commented that the Complainant had been away from his work area and had taken pictures and that he did not know what the Complainant was doing. (HT, p. 2504.) He indicated he was not sure whether the Complainant was "fabricating things for OSHA" or what the story was. (HT, p. 2498.)

Mr. Clark suggested that they consult with their legal counsel, Nancy DeWitt. Messrs. Triana, Burrage, and Clark then conferred with Ms. DeWitt about the other incidents that had transpired earlier in the week, including an apparent attempt by the Complainant to get access to a restricted drive location. (HT, p. 229.) During the consultation, they discussed the Complainant's apparent attempt to hack into the GEMS computer system, the various e-mails he had sent with false allegations in them, the disruption to the workforce caused by the e-mails, the insubordinate nature of the e-mails, his actions towards Tracy Terracino which had upset her, and Mr. Burrage's feeling that the Complainant had lied to him at the end of their meeting. (HT, p. 231.) They decided to send the Complainant home and notified Greg Bradley, the Adecco Branch Manager at the Ft. Lauderdale office, of their decision, explaining the reasons. Mr. Triana informed Mr. Bradley that he did not want the Complainant to return to GEMS because of the disruption the Complainant had caused, the performance problems he had, the Complainant's insubordinate conduct, his attempt to hack into the computer system, and his lack of integrity. (HT, p. 235.) Messrs. Triana and Burrage made Mr. Bradley aware of the FSAR that the Complainant had sent, and Mr. Burrage forwarded to Mr. Bradley a copy of the Complainant's August 1, 2002, e-mail alleging that Mr. Triana was retaliating against him. (Bradley Depo, pp. 35, 40.) Mr. Bradley agreed with their decision to remove the Complainant from the job site. (HT, p. 232.)

Mr. Bradley contacted the Complainant that afternoon and informed him that GEMS wanted him to turn in his time card and leave the facility and that he would be informed as to his work status the following week. (Bradley Depo, p. 52.) He instructed the Complainant to call him the following Monday. (HT, p. 1346.) Mr. Triana escorted the Complainant to the door of the facility. (HT, p. 234.)

On Monday, August 5, 2002, Mr. Bradley received a call from Mr. Triana instructing Mr. Bradley to fill the Complainant's position. (Bradley Depo, p. 55.) Mr. Bradley then sent the Complainant an e-mail message notifying him that his assignment at GEMS had been terminated. (Bradley Depo, pp. 57-58; Exhibit 5 of Bradley Depo.)

The Complainant called Mr. Bradley on August 5 at 5:08 a.m., 6:09 a.m., 7:00 a.m., and 7:48 a.m. (HT, p. 1348; CX 8, p. 9.) The Complainant had never met Mr. Bradley and no basis for believing that Mr. Bradley would be in his office before 8:00 a.m. (HT, p. 1348.) The Complainant made no attempt to contact Mr. Bradley by phone after 7:48 a.m. on August 5, 2002. (HT, p. 1348.)

On August 26, 2002, Mr. Bradley sent the Complainant an e-mail message asking for details to explain the statement he made in the e-mail to Mr. Burrage that Mr. Triana threatened to fire him in front of the Complainant's peers. (Bradley Depo, pp. 72-73; Exhibit 9 of Bradley Depo.) The Complainant did not respond to the e-mail message. (Bradley Depo, p. 73.)

Events After Complainant's Termination

Victor Smith, the GEMS Systems Security Manager, identified everyone who had received either a carbon copy or a blind carbon copy of the Complainant's August 2, 2002, e-mail to Mr. Burrage. (HT, p. 2593.) In addition to the individuals who were identified earlier, the e-mail message was also sent to Jason Fisher, the supply manager, and Christine Novak. Both these individuals had nothing to do with the GEMEX. (HT, p. 2590.) On August 6, 2002, Mr. Burrage sent an e-mail message to each of the individuals who received the Complainant's e-mail and notified them that he understood they might have received an e-mail from an Adecco employee raising safety concerns related to the calibration of lasers. He assured them that the safety concerns had been reviewed and brought to closure. (CX 32.) He did this to try to overcome the negativity that the Complainant's e-mail message had generated. (HT, pp. 2591, 2593.)

After the Complainant's assignment to GEMS was terminated, Mr. Bradley informed Rhonda Johnson, the Adecco recruiter, that the Complainant's contract at GEMS had ended. She understood that to mean that the Complainant was no longer an employee of GEMS or Adecco and that his employment contract with Adecco was null and void. (HT, p. 844.) Mr. Bradley sent the Complainant an e-mail message at 1:26 p.m. on August 5, 2002, notifying him that his assignment had ended. (Exhibit 5 of Bradley Depo.)

On August 5, 2002, Mr. Bradley instructed Ms. Johnson to direct any contact from the Complainant to him. (HT, p. 846.) At 2:42 p.m. on August 5, 2002, the Complainant sent Ms. Johnson an e-mail message stating that he had spoken to "George,"[14] an Adecco supervisor, who said that Ms. Johnson would send him a confirmation that GEMS had cancelled his contract. The Complainant also asked her to submit him for the technician position that Adecco had available at GE. (CX 8; AT R.) Ms. Johnson responded to the message on August 6, 2002, notifying the Complainant that she had already submitted the quota of applicants for the position he was asking about and informing him that he had to contact Mr. Bradley about his employment with GEMS. (AT R; HT, p. 920-21.) She also forwarded this e-mail to Mr. Bradley. (HT, p. 843.)

On August 8, 2002, the Complainant sent Ms. Johnson an e-mail message (AT S) asking for a complete copy of his personnel file and copies of any documentation concerning his employment at GEMS. He sent a copy of this e-mail message to Mr. Bradley. Mr. Bradley instructed Ms. Johnson not to respond to this e-mail. He responded himself, telling the Complainant that all his contacts with Adecco were to be with Mr. Bradley and that there were no other assignments for the Complainant at that time. (HT, p. 923; AT S.) Mr. Bradley also reminded the Complainant that he was an Adecco employee and that his assignment at GEMS had terminated. He suggested that the Complainant register with another employment agency.

[14] "George" was apparently Mr. Bradley. Adecco had no one named "George" on its staff.

Tracy Terracino Incidents

On July 29, 2002, the Complainant sent Tracy Terracino, another GEMS employee, an e-mail message telling her that he wanted to say "hello" because he had seen her in the halls and in the café. (GE HH.) The e-mail message made Ms. Terracino uncomfortable, so she responded and told him she did not know who he was and preferred that he not correspond with her. (GE HH.) She had seen the Complainant in her work area using the photocopier and knew he did not work in her area. The Complainant made her uncomfortable, so she tried to avoid him when possible. Also, she had heard from co-workers a week or two before July 29, 2002, that the Complainant had been asking questions about her, who she worked for, and what her last name was. (HT, pp. 1810, 1819.) When her co-workers told her that the Complainant had been asking about her, she told them not to tell the Complainant anything because the Complainant "creeped" her out. (HT, p. 1820.) Before she received the e-mail message from the Complainant, another worker, Christine Novak, told her that she had given the Complainant personal information about Ms. Terracino. (HT, p. 1820.)

Ms. Terracino spoke to Mr. Triana on July 29, 2002, about the e-mail message she had received from the Complainant. She informed Mr. Triana that she had received unwelcome advances and e-mails from the Complainant and that he was hanging around her area. She was upset and angry about the contacts when she spoke with Mr. Triana, but she was not crying. Mr. Triana asked her if she wanted him to go to Human Resources about the situation, but she said she would handle it. (HT, pp. 245, 1810.) Mr. Triana discussed Ms. Terracino's complaint with Mr. Bradley on July 31, 2002, but he did not report the complaint to Human Resources.

A couple of days after receiving the Complainant's e-mail message, as she walked through the Complainant's work area to visit Mr. Hirschberg, who was a friend of hers, Ms. Terracino noticed a picture of herself on the Complainant's computer. (HT, pp. 1811, 1838.)[15] She had not given the Complainant permission to take a picture of her. (HT, p. 1812.) Though seeing the picture on the Complainant's computer disturbed her, she did not report it to anyone because she felt that her response to the Complainant's e-mail would cause him to stay away from her. (HT, p. 1839.)

One of the reasons for the Complainant's termination was that he had engaged in inappropriate conduct with Tracy Terracino because he sent her an inappropriate e-mail, was loitering around her work station, was asking personal questions about her, had a picture of her on his computer monitor, and had taken a picture of her at the work place without her consent using GEMS' camera. (Stipulation of the Parties, HT, p. 1710.)

Computer Issues

Each employee at GEMS is assigned a MS or MSA number which serves as an identification number for accessing the computer. The MS or MSA number determines the

[15] The picture Ms. Terracino saw is not part of the record. However, GEMS did find on the Complainant's computer hard drive a picture of Ms. Terracino walking out of the area where the Complainant and Mr. Hirschberg worked. This picture was admitted as Exhibit GE JJ. Ms. Terracino testified that the picture in Exhibit GE JJ was taken without her knowledge or consent, but it was not the picture she saw on the Complainant's computer. (HT, p. 1838.) GE did not find any other pictures of Ms. Terracino on the Complainant's computer. (HT, p. 1846.)

scope of the employee's access to the GEMS computer system. (HT, p. 2273.) The Complainant had access to the Clarify and Oracle programs when working on the parts inventory. (HT, pp. 2201-2.) While only a manager could authorize access to the Clarify and Oracle programs on the GEMS computer network, any employee could access the programs if the employee was provided with an authorized username and password. (HT, pp. 2276, 2278.)

A GEMS employee with a computer problem first contacts the Help Desk, which is located in India. If the Help Desk is unable to resolve the problem, a local IT person is contacted, and a work order, or ticket, is generated. (HT, pp. 2280-82.)

In May 2002, the Complainant sought help from the Help Desk, and then IT, because he could not get access to the network. Rotasha Severe, a GEMS Systems Support Technician who was assigned the problem, determined that the Complainant's computer had been taken off the domain. She then called Victor Smith, the GEMS Manager of Technology and Infrastructure and Systems Security Manager, for help because she was not authorized to add users to the network. (HT, pp. 2325-26.) Because the Complainant's computer had been removed from the domain, it became "invisible" to the GEMS computer system, making it possible for the Complainant to bypass some of the GEMS computer security policies and impossible for the GEMS IT staff to monitor his computer usage or to lock him out. It also made it possible for the Complainant to access and read files in the system that he would not otherwise be able to access. (HT, pp. 2326-27.) Removing a computer from the domain requires a conscious effort and a series of deliberate steps by the computer user. (HT, pp. 2328-29.) Mr. Smith added the Complainant to the system and verbally admonished him about removing himself from the domain again.

In mid-June 2002, GEMS installed a new server for its computer system and slowly migrated the data from the older server to the new server one department at a time. The Complainant's department data was moved to the new server on July 31, 2002. (HT, pp. 2291, 2293.) The new server had new security settings, guidelines and policies. With the new server, users could no longer routinely access department shared files. Each department manager was responsible for informing his or her staff of the changes in the file access procedures and for providing Mr. Smith with a list of the employees who would be allowed access to the shared files. (HT, p. 2294.) Access to the new server was limited to those employees who were given access by their managers before the data was moved. (HT, pp. 2293-94.)

On August 1, 2002, Ms. Zaborowski sent the Complainant an e-mail message asking for a copy of the most recent "Good Stock Inventory." The Complainant found he was unable to access the web server to identify the most current version and informed her by e-mail that he had requested IT assistance for the problem. (CX 4, p. 4.) The Complainant had not been notified of the new procedures and had no way of knowing about the new access procedures. (HT, p. 2295.) Ms. Severe was assigned to the Complainant's problem.

On August 2, 2002, while Mr. Triana was meeting with Victor Smith in his office, Mr. Smith received a call from Ms. Severe. (HT, p. 2233.) Ms. Severe informed Mr. Smith that an

employee needed access to a file on the network share.[16] She asked Mr. Smith if she could grant the employee access to the folder. He asked Ms. Severe who the employee was. After learning that the employee was the Complainant and supervised by Mr. Triana, Mr. Smith asked Mr. Triana if the Complainant could have access to the network share folder. (HT, p. 2237.) Mr. Triana told Mr. Smith that he would not authorize the Complainant to have access, commenting that "there were other issues or situations going on." (HT, pp. 2237-38; 2331-33.)

Later that afternoon, Mr. Smith saw Mr. Triana in the hall and told Mr. Triana that he had given the Complainant a verbal warning before August 2, 2002, after the Complainant took himself off the domain. (HT, p. 2333.) At that time, Mr. Triana asked Mr. Smith for any information that Mr. Smith or his staff might have about any events involving the Complainant. (HT, p. 2242.)

On August 5, 2002, Mr. Smith sent Mr. Triana an e-mail message (CX 4, p. 1) telling Mr. Triana that about 30 days earlier the Complainant had tried to log into the GEMS computer system as a network administrator of the computer assigned to him and tried to make changes. (HT, p. 2247.) Mr. Smith said the Complainant had fouled up the security settings and an IT systems support team member had to ask for Mr. Smith's help to reset the environment. In a later e-mail message to Mr. Triana on November 19, 2002, Mr. Smith corrected the information he provided on August 5, 2002. He informed Mr. Triana that there had actually been three network related requests concerning the Complainant. He expressed the opinion that the Complainant was systematically testing their network security. (HT, p. 2285.) He reported that on April 29, 2002, the Complainant attempted to gain access to the department shares and was given access by a Tier 2 onsite IT staff member, and on May 7, 2002, the Complainant had taken himself off the GEMS Network Domain and could not add himself back in, so he asked for help from the IT staff. He noted that removing a computer from a domain is a deliberate act, especially in a Windows 2000 environment. (CX 4, p. 6.)

After the Complainant was terminated on August 2, 2002, Mr. Triana seized his computer. Mr. Triana turned the Complainant's computer over to Mr. Smith's staff on Monday, August 5, 2002. Mr. Smith's staff then replicated the contents of the Complainant's hard drive and burned a copy of the contents onto a CD. (HT, pp. 2267-8.) When Mr. Smith examined the contents of the Complainant's hard drive, he found a third-party vendor firewall program which would have locked Mr. Smith's staff out of the Complainant's computer and prevented the IT staff from probing or monitoring his computer use. (HT, p. 2335.) Mr. Smith also found that many files which should have been present, including all files related to the Complainant's activities, had been deleted from the computer. (HT, p. 2335.) Only the Complainant had the power to delete the Complainant's user files.

The Complainant's Job Search Efforts

On August 8, 2002, the Complainant applied for an Instrument Control Technician position with Seminole Electric Cooperative, Inc. in Palatka, Florida, through the Adecco web site. The vacancy was posted on Adecco's web site. (HT, pp. 1277-78; CX 6, pp. 48-53; CX 43,

[16] A network share was a computer folder sitting on the GEMS computer network that had department related data. Each department had its own dedicated network share. (HT, p. 2234.)

p. 5.)[17] Adecco sent an automated message to the Complainant acknowledging receipt of his application. (CX 6, p. 54.) His application was routed to Ms. Johnson. When she transferred the Complainant's information to Mr. Bradley, she also informed Mr. Bradley that she had already submitted enough technicians[18] for consideration for that position. (HT, p. 850.) This position was listed again on the Adecco web site on August 28, September 19, September 24, September 29, October 2, October 5, November 24, and December 6, 2002. (CX 6, pp. 55-60, 86, 95, 115.)

On September 24, 2002, the Complainant applied for a position as a Biomedical Specialist with GEMS that was posted on the GE web site on September 12, 2002. (HT, p. 991; CX 6, pp. 39-41.) The Complainant received an acknowledgment of the receipt of his application from the GE Human Resources office on September 24, 2002, telling him that a business representative might be contacting him about the position. (CX 6, p. 44.) He was not contacted about the position. (HT, p. 992.) The announcement for this position continued to appear on the GE web site on September 29, October 6, and November 3, 2002. (CX 6, pp. 45-47, 66.)

On November 3, 2002, the Complainant applied for unidentified[19] positions with Roddord Corporation and Dynalco Controls through the Adecco web site. (CX 43, p. 5.)

On November 24, 2002, the Complainant applied for an unidentified position with GE at Oakwood Hospital in Detroit, Michigan that was posted to the GE web site on November 20, 2002, and a Biomedical Technician in Lubbock, Texas, that was posted to the GE web site on November 13, 2002. GE acknowledged receipt of both applications.[20] (CX 6, pp. 99-110.)

On November 24, 2002, the Complainant submitted applications for four positions posted on the Adecco web site. This included a Maintenance Technician in Tucson, Arizona, with Slim Fast, a Monitor Technician position in Phoenix, Arizona, with InterTech Computer Products, a Printer Technician position in Phoenix, Arizona, with InterTech Computer Products, and a Blow Molding Technician position with Rubbermaid, in Goodyear, Arizona. (CX 6, pp. 89-94, 97-98; Bradley Depo, pp. 88-93; CX 43, p. 5.) The Complainant received automated messages acknowledging receipt of these applications. (HT, pp. 1290-92; CX 6, pp. 90, 92, 94, 98.) He also again applied for the Instrument & Controls Technician position with Seminole Electric Cooperative in Palatka, Florida, that he applied for on August 8, 2002. (CX 6, p. 95; CX 43, p. 5.) Adecco sent the Complainant an e-mail acknowledging receipt of his application for the job in Palatka, but noted that he had previously applied for the position. (CX 6, p. 96.)

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[17] The identity of the employers listed on the Adecco web site that the Complainant submitted applications for is reconstructed from CX 6 and Exhibit 10 of Greg Bradley's deposition, which is also CX 43, page 5, and will be referred to as to CX 43, p. 5. CX 6 identified the job title and position number of the jobs that the Complainant applied for, and CX 43, p. 5 identified the specific employer associated with the position number.

[18] Again, the procedure was for Ms. Johnson to submit three resumes for each vacant position that was to be filled. (HT, p. 852.)

[19] The Complainant did not include any documents relating to these applications in CX 6, so the specific position titles or job descriptions are not available. I determined that he applied for these positions by comparing CX 6 with the Adecco computer record of the Complainant's application history, CX 43, p. 5 and Exhibit 10 of Mr. Bradley's deposition.

[20] I note that the candidate reference number assigned to the Complainant's application is the same for both positions.

In November 2002, Catherine Lusk, an Adecco technical recruiter in Tucson, Arizona, came across the Complainant's name for the Maintenance Technician Position at Slim Fast in Arizona. (HT, p. 941.) She contacted the Complainant in the morning on November 25, 2002, about the vacancy. (HT, pp. 942, 950.) The Complainant was initially antagonistic towards her because she would not reveal the employer, but he finally expressed interest in the job, and she sent his resume on to Slim Fast. (HT, p. 948; AT EE.) Slim Fast notified Ms. Lusk by e-mail on December 18, 2002, that they were interested in interviewing the Complainant and wanted her to start the pre-screening process. (HT, p. 963.) Ms. Lusk attempted to contact the Complainant about the Slim Fast interview twice by leaving messages on his answering machine, but her efforts to contact the Complainant were unsuccessful. (HT, pp. 965-6.)

On December 11, 2002, the Complainant applied for positions with GEMS as a Senior Depot Repair Technician and as a Depot Repair Technician in Jupiter, Florida. He received an acknowledgment of these applications.[21] (CX 6, pp. 120-131.) He also applied for a position as a Biomedical Technician in Jupiter, Florida (CX 6, p. 132), but he received no acknowledgement of that application.

The Complainant eventually moved to Tonapah, Arizona and applied for the positions of operation and maintenance technician at PG&E, full-time baker at the Wild Flower Bread Company, and night computer operator at PetsMart. (HT, p. 997; CX 6, pp. 69-72.) The Complainant also applied for a job as a bartender and cashier at a bar in Tonopah, Arizona, on December 10, 2002, and as a cashier in Buckeye, Arizona, on December 11, 2002. (HT, p. 1003.)

The Complainant did not follow-up on any of his job applications to check on the status of his applications. (HT, p. 1293.) He never attempted to contact anyone in an Adecco office about job openings, and he never visited an Adecco office about job opportunities. (HT, p. 1294.) None of his job applications were successful.

The Complainant's Reference Check

In mid-August 2002, after being terminated, the Complainant retained the services of Documented Reference Check ("DRC") to conduct a reference check on himself. (HT, pp. 1297-98.) On September 10, 2002, Linda Oparnica with DRC contacted Mr. Bradley at Adecco and pretended to be a prospective employer conducting a reference check on the Complainant. She said she had a resume for the Complainant and wanted to understand what he had done for Adecco. Mr. Bradley told her he had to refer her to their corporate office. She then asked if there was something that she should be aware of about the Complainant. Mr. Bradley responded "no," and told her the Complainant's job title.

Ms. Oparnica then asked if the Complainant had given proper notice before leaving, and Mr. Bradley informed her that the Complainant's assignment was terminated, so notice was not required. When she asked why the assignment was terminated, Mr. Bradley told her she had to speak with the corporate office. When she asked for the Complainant's dates of employment, Mr. Bradley stated that he did not know them off the top of his head and asked what dates the

[21] For some unknown reason, the Complainant was given the same candidate reference number for the last three applications he submitted. (CX 6, pp. 101, 110, 131.)

Complainant had put down. At that point, Ms. Oparnica, who had begun the conversation by saying she had the Complainant's resume in front of her, stated that the Complainant had not submitted a resume. Mr. Bradley then informed her that the Complainant had only worked for Adecco for a few months and again referred her to the corporate office. She asked why his employment only lasted a few months, and Mr. Bradley stated that he had said all that he could say. (CX 40.)

The Complainant's Allegations

On August 26, 2002, the Complainant filed the first of a series of complaints with OSHA alleging that he had been terminated in retaliation for raising safety concerns at GEMS. (CX 45.) He alleged in his first complaint that he engaged in the following protected activity:

1. In late July 2002, he reported to Mr. Triana that dye was leaking from the Coherent 900 series dye lasers and had been dumped in a plastic sink in the warehouse. He asked that warnings be posted in the area where the dye had leaked onto the floor and that the area be secured until the dye could be cleaned up. (CX 45, p. 7.)
2. On July 30, 2002, he expressed concern to Mr. Triana about the shipment of the GEMEX gases as well as the use of the gases in a public environment and suggested having the GEMEX gas stored at the client locations. (CX 45, p. 8.)
3. On July 31, 2002, he submitted his FSAR that detailed his concerns about the GEMEX "prototype" and the transport and use of GEMEX gases. (CX 45, p. 9.)
4. On July 31, 2002, he raised safety issues concerning leaking dye during a Modality Group meeting. (CX 45, p. 10.)
5. On August 1, 2002, he met with Mr. Trent and discussed the idea of placing the GEMEX gases at the various client facilities, explaining that he was concerned that the gas cylinders were being stored horizontally on top of each other in an enclosed, non-ventilated room. (CX 45, p. 12.)
6. After speaking with Mr. Trent on August 1, 2002, he reported to Mr. Triana his safety concerns about the storage of the GEMEX gas cylinders. (CX 45, p .12.)
7. After the GEMEX gas cylinders were moved to the tank holding area on August 1, 2002, he contacted Mr. Trent and asked him to inspect the new storage area to make sure it was proper and had sufficient ventilation. (CX 45, p. 13.)
8. During a meeting with Mr. Triana and Mr. Burrage on August 1, 2002, the Complainant told Mr. Burrage that the GEMEX procedure did not include language to warn people about safety issues associated with the GEMEX gases or about what constituted adequate ventilation. (Exhibit 45, p. 14.)

The Complainant alleged that his activities were protected under the CAA, TSCA, CERCLA, SDWA, SWDA, and ERA. Additional complaints were later filed or amended to incorporate claims that Respondents had also violated the whistleblower protection provisions of these statutes by failing to rehire him and by blacklisting him.

After the complaints were investigated, the OSHA Regional Administrator in Atlanta, Georgia, issued two decisions on October 7, 2002, informing the Complainant that his complaints did not support a merit finding of retaliation by GEMS or Adecco for his termination. (CX 25.) In the determination letters, the Administrator noted that only a limited investigation was conducted into his complaints because the Complainant had asked that the findings be issued within 30 days of the receipt of his complaints.

In his post-hearing brief, the Complainant asserted that he engaged in the following 13 protected activities:

1. Reporting the improper handling, storage, and disposal of toxic laser dye and reporting that laser dye had been dumped down a sink;
2. Reporting that an employee had spilled laser dye on his person in public;
3. Sending a safety complaint on July 31, 2002, to GE, detailing safety concerns related to the GEMEX and the gases used by the GEMEX;
4. Expressing safety concerns about the GEMEX and GEMEX gases to his coworkers at GE;
5. Sending an August 2, 2002, safety complaint related to the GEMEX and GEMEX gases, the retaliation taken against him for bringing up safety concerns, the hostile work environment at GE, and the chilling effect on the workforce that resulted from the retaliation directed towards him;
6. Bypassing the GE chain of command in raising safety concerns;
7. Expressing an intent to contact OSHA about his safety concerns;
8. Verbally reporting his safety concerns to GE management and safety team members;
9. Taking pictures of his safety concerns and conducting an investigation of his concerns to report to OSHA;
10. Sending his safety concerns to his coworkers to warn them;
11. Holding a television news conference about his safety concerns at the entrance to the GEMS facility;
12. Causing a proceeding under the environmental statutes that he filed his complaints under;
13. Participating in the proceedings under the environmental statutes that he filed his complaints under.

Though the hearing in this case focused on the Complainant's allegations that he was fired, not rehired and blacklisted in retaliation for his protected activity, he listed 30 alleged retaliatory acts by GEMS, and 7 alleged retaliatory acts by Adecco, in his post-hearing brief.

He alleged in his post-hearing brief that GEMS retaliated against him by:

1. failing to provide him with EHS Training;
2. refusing to act on his safety complaints;
3. refusing to provide him with feedback on his safety concerns;
4. refusing to enter his safety concerns into the EHS auto-tracking system;
5. disciplining him for bringing safety concerns;
6. admonishing him for bringing safety concerns;

7. threatening him with discharge for bringing safety concerns;
8. threatening him with discharge in front of his coworkers for bringing safety concerns;
9. attempting to coerce and intimidate him into retracting his safety complaints;
10. attempting to bribe him with a permanent job offer at GE to retract his safety complaints;
11. yelling and screaming at him during a discipline meeting about his safety concerns;
12. threatening to cut off his e-mail because he sent other employees his safety concerns;
13. removing him from the GEMEX project;
14 senior GE managers speaking to him in a condescending manner;
15. senior GE managers admonishing him for bypassing the "chain-of-command" in bringing his safety concerns;
16. failing to investigate his safety concerns;
17. failing to encourage him to raise safety concerns;
18. GE senior management falsely accusing him of wandering around the warehouse without authorization;
19. GE senior management intentionally and willfully destroying pictures of his safety concerns, which he intended to bring to OSHA;
20. GE senior management intentionally interfering with his safety investigation and report to OSHA;
21. GE senior management intentionally denying him access to the GE network computer system to prevent him from recovering his safety investigation materials to report to OSHA;
22. retaliating against him for raising safety concerns;
23. subjecting him to a hostile work environment;
24. creating a "chilling" effect at the workplace at GE;
25. conspiring with Adecco to fire him;
26. firing him on August 2, 2002, for engaging in protected activity;
27. engaging in a continuing violation by refusing to rehire him;
28. blacklisting him from further employment;
29. failing to abate violations of the environmental statutes;
30. introducing suborned perjured witness testimony at the OALJ hearing.

(Complainant's Post-hearing Brief, pp. 6-7.)

Some of these allegations were duplicative; some are not employment actions covered by the whistleblower protection provisions; and some have no merit. Additionally, I note that because the Complainant did not make most of these specific allegations until his post-hearing brief, GEMS did not have an opportunity to specifically respond to them during the simultaneous briefing process.

In his post-hearing brief, the Complainant alleged that Adecco took the following retaliatory actions against him:

1. conspired with GE to fire him and then fired him;
2. interfered with his safety investigation and report to OSHA;
3. failed to investigate his safety complaints;
4. refused to rehire him;
5. blacklisted him from further employment;
6. failed to abate violations of the environmental statutes that senior Adecco managers were aware of and realized were violations of Federal and state law;
7. introduced suborned perjured witness testimony at the OALJ hearing.

(Complainant's Post-hearing Brief, pp. 7-8.)

The Applicable Law

The Complainant alleges that Respondents violated the whistleblower protection provisions of six different environmental statutes, the CAA, TSCA, CERCLA, SDWA, SWDA, and ERA, by retaliating against him for his alleged protected activities. The environmental statutes the Complainant relies on all include provisions which prohibit an employer from discharging or discriminating against an employee for engaging in an activity protected by the particular environmental statute. The implementing regulations for the whistleblower protection provisions all of these environmental statutes are found at 29 C.F.R. Part 24.

The employee protection provisions of the CAA, ERA, SDWA, and TSCA have identical language about prohibited personnel actions. They all state, in relevant part: "No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)…." 42 U.S.C. § 7622(a) (CAA); 42 U.S.C. §5850(a) (ERA); 42 U.S.C. § 300J-9(i) (SDWA); 15 U.S.C. § 2622(a) (TSCA).

The SWDA and CERCLA have slightly different language from the CAA, ERA, SDWA, and TSCA, but they both state: "No person shall fire or in any other way discriminate against or cause to be fired or discriminated against, any employee or any authorized representative of employees…." 42 U.S.C. § 6971(a) (SWDA); 42 U.S.C. § 9610(a) (CERCLA).

The statutory language in all the environmental statutes is very broad in its description of the prohibited employment actions. However, in evaluating claims of reprisal under the environmental statutes, the ARB and reviewing courts have applied the framework developed for a pretext analysis under Title VII of the Civil Rights Act of 1964 and other employment discrimination laws. *See e.g. Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 277 (7th Cir. 1995); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Cate Jenkins v. U.S. Environmental Protection Agency*, ARB No. 98-146, ALJ No. 88-SWD-2 (ARB Feb. 28, 2003). They have found that not every action taken by an employer takes constitutes an adverse action under the employment discrimination statutes. *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996). A prohibited adverse action must be a tangible employment action.

In a Title VII context, the Supreme Court defined a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment

with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S.C. 742, 761; 118 S.Ct. 2257, 2268 (1998). *Compare Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 706-10 (5th Cir. 1997) *and Dollis v. Rubin,* 77 F.3d 777, 781 (5th Cir. 1995) (acts must constitute ultimate employment decisions rather than being "tangential" to future decisions which might be ultimate decisions) *with Price v. Delaware Dep't of Correction,* 40 F. Supp.2d 544, 552-53 (D. Del. 1999) (adverse action must be serious and tangible enough to affect an employee's terms and conditions of employment). *See also Mungin v. Katten, Muchin & Zavis,* 116 F.3d 1549, 1556 (D.C. Cir. 1997); *Williams v. Bristol-Myers Squibb Co.,* 85 F.3d 270, 274 (7th Cir. 1996).

Other employment actions, such as stripping an employee of job duties or altering the quality of an employee's duties, are actionable if they have tangible effects. *Cate Jenkins v. U.S. Environmental Protection Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 20 (ARB Feb. 28, 2003); *Scamardo v. Scott County*, 189 F.3d 707, 709-11 (8th Cir. 1999) (reduction of duties leads to elimination of job); *Dahn v. Flynn*, 60 F.3D 253, 258 (7th Cir. 1994) (qualitative reductions in job responsibilities, without discharge, transfer, demotion, or salary loss do not constitute an adverse employment action). Generally, courts have held that to be actionable under the whistleblower protection statutes, an action must constitute a "tangible employment action." Obviously material adverse actions such as discharge, demotion or loss of benefits and compensation are actionable. *Fierros v. Texas Dep't of Health,* 274 F.3d 187, 192-194 (5th Cir. 2001) (denial of a pay increase may constitute an "ultimate employment decision").

Thus, despite the broad language as to the types of employment actions that employers are prohibited from taking against whistleblowers, the courts and ARB have generally limited such employment actions to tangible or adverse employment actions or actions that have tangible effects. Other employment actions are not actionable under the whistleblower protection provisions.

Generally, a complainant who alleges retaliation for whistleblowing has the burden of first establishing a *prima facie* case by showing that the employer is covered by the particular statute, that the complainant engaged in a protected activity, that the employer had actual or constructive knowledge of the protected activity and took some type of adverse action against the Complainant, and finally, that an inference is raised that there was a relationship between the protected activity and the adverse action. *See Macktal v. U.S. Dept. of Labor*, 171 F.3d 323, 327 (5th Cir. 1999); *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 933 (11th Cir. 1995); *Passaic Valley Sewerage Com'rs v. U.S. Dept. of Labor*, 992 F.2d 474, 480-81 (3d Cir. 1993); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Hasan v. Sargent and Lunch*, ARB No. 01-001, ALJ No. 02-ERA-7, slip op. at 3 (ARB Apr. 30, 2001). If the complainant meets this burden, he creates a rebuttable presumption and shifts the burden to the employer to produce evidence that the complainant was subjected to the adverse action for a legitimate non-discriminatory reason. *Martin v. Azko Nobel Chemicals, Inc.*, ARB No. 02-031, ALJ No. 01-CAA-16 (ARB July 31, 2003), citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

This case has been fully tried on the merits. The ARB has stated that when a whistleblower case has been fully tried on the merits, the issue is not whether the complainant has established a *prima facie* case of reprisal for engaging in protected activity, but whether the

complainant has proven by a preponderance of the evidence that Respondents retaliated against him because of his protected activity. *Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056, 02-059, ALJ No. 01-CAA-18, slip op. at 10, n. 8 (ARB Nov. 28, 2003); *Martin v. Azko Nobel Chemicals, Inc.*, ARB No. 02-031, ALJ No. 01-CAA-16 (ARB July 31, 2003).

If the Complainant has proven by a preponderance of the evidence that he was discriminated against because of his protected activity, the burden then shifts to the Respondents to prove by a preponderance of the evidence[22] that they would have taken the same adverse action regardless of the Complainant's protected activity.

Applying this approach to the Complainant, to meet his burden of proof, he must first establish that the Respondents' alleged retaliatory actions are prohibited by the whistleblower protection provisions of the various cited environmental statutes. Then, he must demonstrate, by a preponderance of the evidence, that their action was retaliatory.

The Complainant's Claims Against GEMS

As stated earlier, the Complainant identified 30 different retaliatory acts that GEMS allegedly took against him for his protected activity. Each alleged retaliatory act will be discussed separately.

1. Failing to provide him with EHS Training

The Complainant alleged that GEMS failed to provide him with EHS training in reprisal for his protected activity. This alleged failure to provide the Complainant with EHS training is not a tangible employment action. Moreover, the evidence does not support this claim. The Complainant was not given EHS training when he started at GEMS, but he was given the training CD by Mr. Burrage after Mr. Burrage learned that he had not received the training. The Complainant was offered the training on August 1, 2004, just before he was terminated, and well after the Complainant had engaged in most of his alleged protected activity. (HT, p. 1103.)

2. Refusing to act on his safety complaints

The Complainant alleged that GEMS retaliated against him by failing to act on his safety complaints. This is clearly not a "tangible employment action." A failure to act on a safety complaint, even if true, is not an employment action that has a tangible effect on the Complainant.

More importantly, the evidence does not support the claim that GEMS failed to act on his safety complaints. GEMS did not act on his FSAR, but it did act on many of his other safety complaints. The door closer was installed on the fire door; the GEMEX gas tanks were moved after he complained about their storage; and Mr. Triana instructed Mr. Burrage to have alarms put on the GEMEX gas tanks. Three different individuals, Messrs. Trent, Triana, and Burrage, investigated his complaint about dye being dumped in a sink and found no evidence of it. (HT,

[22] Under the ERA, the employer must show by clear and convincing evidence that it would have taken the same action. *See* 42 U.S.C. § 5851(b)(3)(D); *Martin v. Azko Nobel Chemicals, Inc.*, ARB No. 02-031, ALJ No. 01-CAA-16 (ARB July 31, 2003).

pp. 311, 457-58, 2120.) Mr. Triana acknowledged not taking any action in response to the Complainant's complaints about leaking laser dye, but he explained that by the time the Complainant brought it to his attention, Messrs. Felix and Burrage were already working on removing the dye. (HT, p. 189.)

Furthermore, though Mr. Hirschberg, the chairman of the Safety Committee, acknowledged that he did not act on every single safety complaint the Complainant made, he did take care of some of the complaints the Complainant made to him. He spoke to the employee that the Complainant reported for failing to wear required eye protection, and he also spoke to the employee who brought his daughter into the lab with no eye or footwear protection, advising him that doing so was not a good idea. (HT, pp. 1745-46.) Mr. Hirschberg explained that he did not take action on all of the Complainant's safety complaints, because he felt overwhelmed by the number of complaints made. He "felt like [the Complainant] was searching for things to make [his] life hell." (HT, p. 1751.) His failure to act on every one of the Complainant's safety complaints was motivated by lack of time, not retaliation.

3. Refusing to provide him with feedback on his safety concerns

The Complainant alleged that GEMS retaliated against him by refusing to provide him feedback on his safety concerns. This, again, is not a tangible employment action that is prohibited under the whistleblower protection provisions.

There is some validity to the Complainant's claim that he was not given feedback on his safety concerns. While the Complainant did get feedback about some of his safety complaints, Mr. Trent and Mr. Hirschberg both acknowledged that they did not *always* give him feedback on his complaints. Mr. Trent admitted that he did not report back to the Complainant about his dye dumping complaint after he checked the sink and saw no signs of any dye being dumped into it. (HT p. 2120.) Mr. Hirschberg testified that he became uncomfortable being near the Complainant, partly because of his apparent preoccupation with safety complaints. (HT, pp. 1756-57.) However, some of the corrective measures, such as installation of the door closer on the fire door, were readily apparent, and the Complainant was involved in some of the corrective measures, such as moving the GEMEX tanks. The Complainant has not offered evidence that the failure to give him feedback was retaliatory.

4. Refusing to enter his safety concerns into the EHS auto-tracking system

The Complainant alleged that another act of retaliation was the failure to enter his safety concerns into the EHS auto-tracking system. His numerous safety concerns were not entered into the tracking system, but this is not a tangible employment action that is prohibited by the whistleblower protection provisions.

5. Disciplining him for bringing safety concerns

The Complainant alleged that GEMS retaliated against him by disciplining him for bringing safety concerns. Since the only disciplinary action taken against him was his termination, this will be discussed with his allegation that he was fired in retaliation for his protected activity.

6. Admonishing him for bringing safety concerns

The Complainant alleged that he was admonished for bringing safety concerns. Admonishments are not covered by the whistleblower protection provisions of the environmental statutes. There is no evidence that any admonishments the Complainant received had any tangible adverse impact on the Complainant.

Moreover, there is no evidence to support this allegation. The Complainant was admonished by Mr. Triana, but he was not admonished for bringing his safety concerns. He was admonished for assuming authority and a job title he had no right to assume when he identified himself as the "multi-vendor laboratory manager," sending e-mail messages to other GEMS employees who had no involvement in the subject matter of the e-mail messages he was sending, questioning the authority and judgment of Ms. Zaborowski on the basis of inadequate information, and sending e-mail messages that included inaccurate information.

7. Threatening him with discharge for bringing safety concerns

The Complainant alleged that GEMS retaliated against him by threatening him with discharge for bringing safety concerns. Even if this allegation were true, the threat is not a prohibited employment action under the whistleblower protection provisions.

The only evidence to support this claim is the Complainant's testimony. The Complainant made it a point to tell other GEMS employees that Mr. Triana had threatened to fire him, but none of them ever witnessed or overheard Mr. Triana making any such threat.

Though the Complainant tried to get Mr. Sierra to testify that Mr. Triana said he was going to take disciplinary action against the Complainant for the FSAR, Mr. Sierra emphatically stated that Mr. Triana merely said that he was going to talk to the Complainant about it. The Complainant claimed that Lee Waters overheard a part of a conversation between the Complainant and Mr. Triana during which Mr. Triana threatened to fire him. However, Mr. Water's testimony didn't support the Complainant's claim. Mr. Waters testified that he heard an argument between them during which the Complainant said "What are you going to do, fire me?" (HT, p. 2110.) Contrary to the Complainant's claims, Mr. Waters testified that Mr. Triana did not respond and merely left the room. (HT, p. 2110.)

8. Threatening him with discharge in front of his co-workers for bringing safety concerns

The Complainant alleged in his post-hearing brief that Mr. Triana approached him on August 1, 2002, and yelled at him in a very loud and condescending manner, admonishing him for continually bringing up safety issues about the GEMEX and threatening to fire him if he ever raised another safety concern at GEMS. (Complainant's Post-hearing Brief, p. 57.) He claimed that this threat was made in front of his co-workers and peers, yet he offered not a single witness to this allegedly widely-witnessed incident. Thus, there is no credible evidence to support this claim. In any event, even if it had occurred, as with many of the other allegations, this is not a prohibited employment action.

9. Attempting to coerce and intimidate him into retracting his safety complaints

The Complainant alleged that GEMS attempted to coerce or intimidate him into retracting his safety complaints. As discussed earlier, the Complainant alleged that Mr. Triana threatened to fire him if he did not stop pursuing his safety concerns about the GEMEX. Presumably, this coercion and attempted intimidation allegation is based on the threats of termination. However, as discussed earlier in relation to the threats of termination, the Complainant offered no credible evidence to support this claim. Furthermore, an "attempt to coerce or intimidate" is not a prohibited personnel action.

10. Attempting to bribe him with a permanent job offer at GE to retract his safety complaints

The Complainant alleged at the hearing and in his post-hearing brief that Mr. Triana offered him a permanent position at GEMS if he would drop his safety concerns about the GEMEX. (Complainant's Post-hearing Brief, p. 38.) He testified that during his confrontation with Mr. Triana on July 31, 2002, about the FSAR, Mr. Triana told him that he could have Mr. McQueary's job or another vacancy if he would stop pushing the safety issues with the GEMEX. (HT, p. 1085.) Mr. Triana denied ever making such an offer to the Complainant, and I find it implausible that in the same conversation Mr. Triana would threaten to fire the Complainant and also offer him a job. More importantly, again, this is not a prohibited personnel action.

11. Yelling and screaming at him during a discipline meeting about his safety concerns

The Complainant alleged in his post-hearing brief that Mr. Triana yelled and screamed at him during the conversation he had with Mr. Triana after he sent out his FSAR. (Complainant's Post-hearing Brief, p. 33.) This is not a prohibited personnel action.

12. Threatening to cut off his email because he sent other employees his safety concerns

The Complainant alleged in his post-hearing brief that during his confrontation with Mr. Triana after the Complainant sent out his FSAR, Mr. Triana threatened to cut off the Complainant's e-mail if he continued to go outside the chain of command to raise his safety complaints. (Complainant's Post-hearing Brief, p. 34.) The threat to cut off the Complainant's e-mail access may have been made, but it is obvious from the overall record of the Complainant's prior use of the GEMS e-mail system that Mr. Triana's threat was not in response to the Complainant's alleged safety concerns but rather to the disruption the Complainant caused by widely distributing his inaccurate e-mails to employees who had no knowledge or interest in the subject matter of the e-mails. The Complainant had already been warned not to send out e-mail messages that contained inaccurate information. Thus, there is no merit to this allegation. Moreover, this is not a prohibited employment action.

13. Removing him from the GEMEX project

The Complainant alleges that GEMS retaliated against him by removing him from the GEMEX project. Though the Complainant was assigned to work on the project with Mr. Sierra, the evidence clearly establishes that the project was never "his" and that he never had "ownership" of the project. Management has the right to decide who should work on a project,

and removing him from this project had no tangible impact on the Complainant's employment status. Thus, this is not a prohibited employment action.

14 Senior GE managers speaking to him in a condescending manner

The Complainant alleged that senior GE managers, presumably Mr. Triana and Mr. Burrage, spoke to him in a condescending manner. This is not a prohibited employment action.

15. Senior GE managers admonishing him for bypassing the "chain-of-command" in bringing his safety concerns

The Complainant alleged that GEMS managers admonished him for bypassing the "chain of command" in bringing his safety concerns. Mr. Triana did admonish the Complainant for going outside the chain of command with his FSAR, and he acknowledged that the Complainant had the right to go outside the chain of command to raise safety concerns at GEMS. Mr. Triana explained he was upset about the July 31, 2002, e-mail message to Ms. Zaborowski because the FSAR was based on assumption instead of fact and in the e-mail message, the Complainant stated that he did not have time to perform his duties and that the laser field engineers would have to adjust their schedules to him. (HT, pp. 212-13.) In any event, an admonishment, without evidence of a financial impact, is not a tangible employment action prohibited by the cited environmental statutes.

16. Failing to investigate his safety concerns

The Complainant alleged that GEMS retaliated against him by failing to investigate his safety concerns. This allegation is the same as that raised in allegation 2, which has already been addressed.

17. Failing to encourage him to raise safety concerns

The Complainant alleged that GEMS retaliated against him by failing to encourage him to raise safety concerns. This allegation is not supported by the evidence. The evidence actually contradicts the Complainant's allegation. GEMS had a safety program that made it possible for employees to raise safety concerns, and several of the GEMS employees who testified stated that they had raised safety concerns of their own. Mr. Hirschberg testified that he encouraged the Complainant to raise safety concerns during the Complainant's first week of employment. (HT, p. 1752.)

It is obvious from the number of safety complaints the Complainant made that the Complainant took every opportunity to communicate his safety concerns. The Complainant raised safety concerns right up until his termination, and no effort was made to discourage the Complainant from communicating these safety concerns. Mr. Hirschberg testified that the Complainant raised so many safety concerns that he was unable to keep up with them because safety was not his primary job. (HT, pp. 1750-51.) Despite the fact that he felt overwhelmed by the number of safety concerns that Complainant brought to his attention, Mr. Hirschberg did not contact anyone or take any action to stop the Complainant from raising the safety concerns. (HT, p. 1757.) Moreover, the Complainant was obviously comfortable communicating his concerns,

since he also communicated safety concerns to Mr. Trent and Mr. Triana. (HT, p. 2174.) In any event, this allegation is not a covered tangible employment action.

18. GE senior management falsely accusing him of wandering around the warehouse without authorization

The Complainant alleged that GEMS senior management falsely accused him of wandering around the warehouse without authorization. This is not a tangible employment action.

19. GE senior management intentionally and willfully destroying pictures of his safety concerns, which he intended to bring to OSHA

The Complainant alleged that GEMS senior management intentionally and willfully destroyed pictures of his safety concerns, which he intended to bring to OSHA's attention. This allegation apparently stems from the fact that after Mr. Triana looked at the pictures that were on the GEMS digital camera, he gave Mr. Harris permission to delete the pictures from the camera and Mr. Harris' computer hard drive. This is not a prohibited tangible employment action. I also note that the Complainant still had a copy of the pictures since Mr. Harris testified that he e-mailed copies of the pictures to the Complainant before deleting them.

20. GE senior management intentionally interfering with his safety investigation and report to OSHA

The Complainant alleged that GEMS senior management intentionally interfered with his safety investigation and report to OSHA. Though the record clearly demonstrates that the Complainant made numerous "safety" complaints and had numerous complaints about the GEMEX, there is no evidence that he was conducting a safety investigation on his own or that he had plans to make a report to OSHA. At one point during this proceeding, the Complainant alleged that Mr. Triana misinterpreted the display of the OSHA logo on his computer while he was reviewing the information EHS training CD to be a plan to file a report with OSHA. In any event, as with the other allegations, this is not a covered tangible employment action.

21. GE senior management intentionally denying him access to the GE network computer system to prevent him from recovering his safety investigation materials to report to OSHA

The Complainant alleged that GEMS senior management intentionally denied him access to the GEMS computer system to prevent him from recovering his safety investigation materials to present to OSHA. This is presumably a reference to the fact that after GEMS changed servers and the security protocol in the Modality Lab, the Complainant could no longer access the network share folders, and Mr. Triana instructed Mr. Smith not to give the Complainant access to those folders. It is undisputed that the Complainant was denied access to the shared files after the Modality Lab computers were updated on July 31, 2002. However, this is not a prohibited personnel action.

I also note that this allegation is inconsistent with the Complainant's claims earlier in this proceeding about why he needed access to the GEMS network share folders. This inconsistency

demonstrates the Complainant's lack of credibility. The Complainant stated consistently during the hearing that he was seeking access to the shared files because Ms. Zaborowski asked him for information about the parts inventory that he had worked on, and he needed access in order to provide her with that information. (HT, p. 1095.) He did testify that he had pictures of the GEMEX that he took with the GEMS digital camera and transferred to the GE server, but he also explained that he took the pictures to show a machinist what it looked like and why they were making changes to the GEMEX unit. (HT, p. 1095.) Until he filed his post-hearing brief, he never mentioned anything about a need to recover safety investigation materials for a report to OSHA.

22. Retaliating against him for raising safety concerns

This is merely a general retaliation allegation that encompasses all the specific allegations discussed herein.

23. Subjecting him to a hostile work environment

The Complainant alleged that GEMS subjected him to a hostile work environment. Subjecting an employee to a hostile work environment in retaliation for the employee's whistleblowing activity is prohibited under the whistleblower protection provisions of the environmental protection statutes, even though it may not be a tangible employment action. *Dierkes v. West Linn-Wilsonville School District*, ARB No. 02-001, ALJ No. 00-TSC-002 (ARB June 30, 2003); *Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2 (Sec'y Jan. 26, 1996), slip op. at 47.

The Secretary of Labor stated in *Varnadore* that the criteria laid out by the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986), for establishing a hostile work environment claim under Title VII of the 1964 Civil Rights Act are equally applicable to hostile work environment claims under the whistleblower protection provisions of the environmental statutes. Under the *Meritor* standard, for a hostile work environment claim to be actionable, the hostile environment must be sufficiently severe or pervasive to alter the conditions of the whistleblower's employment or create an abusive working environment. *Id.*, at 67, 106 S.Ct. at 2405; *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999). The Supreme Court reaffirmed the *Meritor* standards in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993), where it also said that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. *Id.*, at 23, 114 S.Ct. at 371. However, the hostile or abusive environment determination is not based on the complaining party's subjective perception of the environment as being hostile and abusive. It must be shown that a reasonable person would perceive the environment to be abusive. *Gupta v. Florida Board of Regents*, 212 F.3d 571, 583 (11th Cir. 2000).

The Complainant did not specify the conditions that he alleges gave rise to the alleged hostile work environment. He presumably bases his claim on some of the 30 above-listed retaliatory acts he has alleged against GEMS, such as threats of termination, failure to investigate his safety complaints, threats to cut off his e-mail, etc. He did, however, specifically state at the hearing that Mr. Trent's e-mail comment to Mr. Triana, "I thought you should see this since he

doesn't have the balls to send you a copy!" demonstrated the hostile work environment at GEMS. (HT, pp. 2182-83; CX 18, p. 6.)

Applying the *Meritor* and *Harris* standards to this case, I find the Complainant has failed to prove that GEMS created a hostile work environment for the Complainant because of his protected activity. The Supreme Court stated in *Harris* that the factors to be considered in evaluating a hostile work environment may include the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. The Complainant has failed to show that these criteria were met. As discussed earlier in this decision, he failed to prove most of his alleged retaliatory acts. Also, though the Complainant made numerous allegations of verbal mistreatment by Mr. Triana, there was no evidence to corroborate his testimony. The only testimony relating to hostility was offered by Mr. Mulloy who, instead of testifying about Mr. Triana's hostility towards the Complainant, testified that the Complainant became increasingly more hostile and paranoid about Mr. Triana with the passage of time. (HT, p. 2101.)

Furthermore, there was no evidence whatsoever that the Complainant's ability to perform his work was impacted by a hostile work environment. He communicated freely with his co-workers and superiors, and the only references to problems with his ability to complete his assignments were caused by his unauthorized assumption of duties and responsibilities that were not his to assume. Also, he never communicated any information whatsoever to Ms. Johnson or anyone at Adecco about a hostile work environment at GEMS. His earlier communications with Ms. Johnson were about how happy he was with his assignment at GEMS. (AT I, J, K, and L.) Moreover, on July 31, 2002, just two days before his termination, he e-mailed Ms. Johnson asking for a raise. (AT N.)

After he was terminated, Mr. Bradley e-mailed the Complainant, requesting for information about the claim he made to Mr. Burrage that Mr. Triana had threatened to fire him, but the Complainant did not respond to Mr. Bradley's e-mail. Given the fact that the Complainant was not hesitant at all about communicating his safety concerns and his desire for a raise, I find it highly improbable that the Complainant would have remained silent if his work environment was sufficiently hostile to meet the *Meritor* and *Harris* standards.

24. Creating a "chilling" effect at the workplace at GE

The Complainant alleged that GEMS retaliated against him by creating a "chilling" effect at the workplace at GE. He offered no specific details to explain this allegation, and there is no evidence to support this very general claim. Other GEMS employees testified that they had made safety complaints and had no concerns about doing so.

Also, if a "chilling" effect on making safety complaints existed, it did not deter the Complainant. As GEMS pointed out in its closing brief, the Complainant made additional safety complaints on August 1 about the storage of the GEMEX gas tanks after his allegedly heated meeting with Mr. Triana concerning the FSAR, during which Mr. Triana allegedly attempted to bribe him with a job offer and also threatened to fire him. More importantly, Mr. Triana responded to the Complainant's safety concerns after meeting with the Complainant about the

FSAR and arranged for the tanks to be moved, despite objections from another GEMS employee about the new storage location. Again, it is not a prohibited tangible employment action.

25. Conspiring with Adecco to fire him

The Complainant alleged that GEMS conspired with Adecco to fire him. There was no evidence of a conspiracy to fire the Complainant. GEMS was Adecco's client. The Complainant's contract with Adecco involved an assignment for him to work at GEMS at the discretion of GEMS. His assignment was terminable at will. When GEMS decided to terminate the Complainant's assignment and notified Adecco of its decision, Adecco's responsibility was to carry out that decision. Furthermore, this is not a prohibited tangible personnel action.

26. Firing him on August 2, 2002, for engaging in protected activity

The Complainant alleged that GEMS fired him on August 2, 2002, for engaging in protected activity. This will be separately discussed later in this decision.

27. Engaging in a continuing violation by refusing to rehire him

The Complainant alleged that GEMS retaliated against him by refusing to rehire him and has engaged in a continuing violation by continuing to refuse to rehire him. This will be discussed separately later in this decision.

28. Blacklisting him from further employment

The Complainant alleged that GEMS retaliated against him by blacklisting him and has engaged in a continuing violation by continuing to blacklist him, making it impossible for him to obtain employment. This will be discussed separately later in this decision.

29. Failing to abate violations of the environmental statutes

The Complainant alleged that GEMS retaliated against him by failing to abate violations of the environmental statutes. This is not a tangible employment action.

30. Introducing suborned perjured witness testimony at the OALJ hearing

Finally, the Complainant alleged that GEMS retaliated against him by introducing perjured testimony at the OALJ hearing. There is absolutely no evidence to support this claim. Furthermore, as with so many of the Complainant's other allegations, it is not a tangible employment action.

The Complainant's Claims Against Adecco

The Complainant alleged that Adecco engaged in seven different acts of reprisal against him. As with the allegations against GEMS, each will be discussed separately.

1. Conspired with GE to fire him and fired him

The Complainant alleged that Adecco conspired with GEMS to fire him and fired him. A conspiracy, even if true, does not constitute a prohibited tangible employment action under the whistleblower protection provisions. As mentioned earlier in this decision, GEMS was Adecco's client. GEMS had the authority to decide whether or not to terminate an Adecco employee's assignment. Since the Complainant was hired by Adecco to work on a temporary assignment at GEMS, once that assignment was terminated by GEMS, the Complainant's employment with Adecco also ended. His termination by Adecco was not the product of a conspiracy, but rather the result of a contractual business arrangement. The termination decision was GEMS', not Adecco's. Thus, I find the Claimant has failed to prove that Adecco terminated him in retaliation for his protected activity.

2. Interfered with his safety investigation and report to OSHA

The Complainant alleged that Adecco interfered with his safety investigation and report to OSHA, but he made no specific factual allegations in support of this claim. Unless his termination can be construed as interference with the Complainant's "safety investigation," no evidence was offered to support this claim. In any event, even if this claim were true, it is not a prohibited tangible employment action.

3. Failed to investigate his safety complaints

The Complainant alleged that Adecco retaliated against him because it never investigated his safety complaints. He never communicated his "safety complaints" to Adecco. He admitted on cross-examination that he never communicated any safety or environmental complaints to anyone at Adecco either directly or indirectly. (HT, pp. 1253-54.) Adecco learned of his safety complaints through GEMS, but the Complainant admitted that he did not ask GEMS to forward his complaints to Adecco. (HT, p. 1254.) Adecco had no duty or obligation to investigate these alleged "safety complaints." Also, as with almost all of the other allegations, this is not a prohibited tangible employment action.

4. Refused to rehire him

The Complainant alleged that Adecco retaliated against him by refusing to rehire him and has engaged in a continuing violation by continuing to refuse to rehire him. This will be discussed separately later in this decision.

5. Blacklisted him from further employment

The Complainant alleged that Adecco retaliated against him by blacklisting him and has engaged in a continuing violation by continuing to blacklist him, making it impossible for him to obtain employment. This will be discussed separately later in this decision.

6. Failed to abate violations of the environmental statutes that senior Adecco managers are aware of and realize are violations of Federal and State law

The Complainant alleged that Adecco retaliated against him because it failed to abate violations of the environmental statutes that senior Adecco managers were aware of and realized were violations of Federal and State law. First, there is no evidence that anyone at Adecco was ever aware of any violation of Federal or State environmental laws. As mentioned above, the Complainant admitted that he never communicated any of his concerns, either directly or indirectly, to Adecco. Second, even if Adecco was made aware of any violations, abatement of those violations was not within Adecco's control since it had no control over the GEMS facility or operations. Finally, and more importantly, this allegation does not allege a prohibited tangible employment action.

7. Introduced suborned perjured witness testimony at the OALJ hearing

As with GEMS, the Complainant alleged that Adecco retaliated against him by offering perjured testimony at the OALJ hearing. Again, there is absolutely no evidence to support this claim, and, as before, it is not a prohibited employment action.

GEMS Had A Valid Reason for Terminating the Complainant's Employment

The Complainant alleges that GEMS and Adecco terminated his employment because of the numerous safety concerns that he communicated to various individuals at GEMS. GEMS, in contrast, asserts that it had good cause for terminating the Complainant's employment, and Adecco terminated him because he worked for its client, GEMS, and his assignment had been terminated by the client.

GEMS asserts that it had legitimate, non-discriminatory reasons for removing the Complainant from its worksite. These reasons include allegations that the Complainant: was insubordinate towards GEMS management; attempted to gain unauthorized access to restricted computer systems on July 8, 2002, and again on August 2, 2002; failed to perform his job assignments; disrupted GEMS' workplace (including, but not limited to, repeatedly sending false and unfounded e-mails to numerous people even after being warned not to do so); harassed Ms. Terracino; and lied to GEMS' management. (GEMS' Post-hearing Brief, p. 17.)

The decision to terminate the Complainant's assignment was made jointly by Messrs. Triana, Burrage, and Clark. It was the Complainant's e-mail message to Mr. Burrage accusing Mr. Triana of retaliating against him that triggered the conversations that let to his termination. Though the triggering e-mail message also included a copy of the FSAR, the evidence does not support a conclusion that the Complainant was terminated because of his authorship of the FSAR or any of his other safety complaints.

There is no dispute that the Complainant started at GEMS as a good employee and received compliments for his work. At the end of June 2002, three GEMS employees signed letters of recommendation that the Complainant wrote for their signature. Mr. Triana, who played a role in his termination, and whom the Complainant accuses of retaliating against him, hired the Complainant and also recommended that the Complainant be made a full-time employee. Ms. Zaborowski complimented the Complainant on his work shortly after he started.

However, as the Complainant's employment at GEMS continued, those individuals who initially approved of his work changed their opinions of him after he gave himself titles he was not entitled to, assumed authority he did not have, sent out disruptive e-mail messages with inaccurate information and assumptions, and became progressively more hostile towards Mr. Triana.

By the time the decision was made to terminate the Complainant's assignment at GEMS on August 2, 2002, the Complainant had engaged in several acts of conduct which caused GEMS management to be concerned. Specifically,

- On June 28, 2002, he sent an e-mail message to Mr. Triana asking Mr. Triana to attend a meeting. The e-mail conveyed the impression to the reader that the Complainant was Mr. Triana's supervisor and Mr. Triana had not been attending meetings. In this e-mail message, the Complainant gave himself the title of "Multi-Vendor Laboratory Manager" of the National Modality Group when he was, in fact, a temporary employee under Mr. Triana's supervision. He unnecessarily sent copies of this message to Ms. Zaborowski, Mr. Bridges and Mr. McQueary.
- On July 24, 2002, he sent an e-mail message to Ms. Zaborowski, questioning the competency and purchasing decisions of Mr. Rector, whom Ms. Zaborowski supervised and over whom the Complainant had no supervisory responsibility. The e-mail message included inaccurate assumptions about the way field engineers were monitored and supervised and indicated to Ms. Zaborowski that the Complainant had taken it upon himself to monitor the field engineers whom she supervised. He unnecessarily sent copies of this e-mail message to Messrs. Triana, Bridges, Schuster, and McQueary, who had no supervisory role over Mr. Rector, and failed to send it to the person who did supervise Mr. Rector. The inaccuracies and assumption of authority incorporated in the e-mail prompted Ms. Zaborowski to contact Mr. Triana and inform him that the Complainant's July 24, 2002, e-mail was unacceptable and that he had a problematic employee whom she expected Mr. Triana to do something about.
- On July 30, 2002, he went over Mr. Triana's head after Mr. Triana rejected his request for overtime and sent another e-mail message to Ms. Zaborowski asking for overtime authorization. Again, he included in his e-mail message inaccurate statements, including claims of responsibility that he did not have for various projects. He falsely claimed responsibility for overseeing the entire Modality Lab. The Complainant asked Ms. Zaborowski to keep his e-mail message confidential and to not disclose it to Mr. Triana, who was his supervisor. Ms. Zaborowski forwarded the e-mail message to Mr. Triana and spoke to Mr. Triana about it, pointing out to Mr. Triana that the e-mail message brought up many matters that were not the Complainant's function. Ms. Zaborowski was again concerned because of the numerous inaccurate statements in this e-mail message.

- On July 31, 2002, he sent Ms. Zaborowski another e-mail message with a copy of his FSAR, communicating his concerns about the GEMEX. He sent copies, and blind carbon copies, of the e-mail message to numerous GEMS employees, including employees who knew nothing about the GEMEX. In his email message to Ms. Zaborowski, and repeatedly in the FSAR, he claimed "ownership" of the GEMEX, though he had never been given any duties beyond helping Mr. Sierra to modify the GEMEX for shipping. His FSAR was upsetting to Ms. Zaborowski who became concerned about his claimed "ownership" of the GEMEX. It disturbed Mr. Sierra, who didn't know what to do with the e-mail because it contained so many inaccuracies. It disturbed other GEMS employees who received it and didn't know what to do with it, including Mr. Trent, who was assigned sign-off responsibility in the FSAR, and knew nothing about the GEMEX.
- On August 1, 2002, the Complainant met with Mr. Triana and Mr. Burrage to discuss his concerns about the GEMEX gases. At the conclusion of the meeting, he told Mr. Burrage that his concerns had been addressed. He went home and sent Mr. Burrage a memo, with a copy of his FSAR which reiterated his concerns about the GEMEX, alleging that Mr. Triana was threatening to retaliate against him for the FSAR, and asking Mr. Burrage to take action to take care of the concerns raised about the GEMEX in his FSAR and the alleged retaliation by Mr. Triana. He asked for a written response to his requests from GEMS management within 15 days. This was upsetting to Mr. Burrage, who believed that the Complainant's concerns about the GEMEX had been addressed. The Complainant unnecessarily sent copies of this e-mail to individuals who had no interest or role in addressing his retaliation claim and knew nothing about the GEMEX.
- At some point, the Complainant started asking other GEMS employees for information about Tracy Terracino. His inquiries and actions made her uncomfortable, and his subsequent e-mail message to her prompted her to contact Mr. Triana on July 29, 2002, and report that she had received unwelcomed advances from the Complainant and that he had been hanging around her work area.
- Mr. Triana was informed by Mr. Smith that it appeared that the Complainant had tried to bypass the GEMS computer security and hack into their computer system by removing himself from the domain.

Mr. Burrage testified that during the discussions about the Complainant, there was a serious concern that the Complainant needed to be taken off the job site because of what they construed to be irrational behavior, including harassing Ms. Terracino, lying to Mr. Burrage, and attempting to hack into the GEMS computer system. There was also a concern that he was not an employee who had the value system that GE wanted in its employees. (HT, p. 2478.) Another factor in the Complainant's termination was his reference to himself as a department manager when he was merely a temporary employee. (HT, p. 2566.) Mr. Burrage also testified

that during one of the conference calls on August 2, 2002, about the Complainant, they discussed whether or not the Complainant was fit for duty and whether he was performing his duties in the warehouse, since he was seen roaming around the lab. (HT, p. 2557.) Mr. Burrage acknowledged that during the discussions about terminating the Complainant, OSHA was also mentioned. He explained, however, that the discussion about OSHA took place because of a possibility that the Complainant could try to use an alleged OSHA complaint to challenge his termination. (HT, p. 2479.)

Mr. Burrage also expressed doubt that the motive behind the Complainant's August 1, 2002, FSAR e-mail was to promote the safety culture at the facility because the Complainant sent the e-mail to employees who had nothing to do with the activities covered in his e-mail, such as employees in the accounting and customer service departments. (HT, p. 2567.) He explained that the Complainant also had lied to him because he looked the Complainant in the eye on August 1, 2002, and asked him if his concerns had been addressed, and after answering "yes," the Complainant left and wrote his August 2, 2002, e-mails raising the same complaints.

Mr. Triana testified that they had issues with the Complainant regarding his contacts with Tracy Terracino; his disruptive e-mail messages about Mr. Rector and telling Mr. Triana to attend the meeting with Ms. Zaborowski; his insubordinate attitude; his failure to do his assigned tasks; and his attitude and personality change. They also had issues with the Complainant's integrity since he apparently had falsely told Messrs. Burrage and Triana on August 1, 2002, at the end of their meeting, that his concerns about the GEMEX gases had been addressed. (HT, p. 231.)

Mr. Triana was concerned about the Complainant's practice of sending out e-mail messages to broad audiences with unfounded assumptions concerning subjects that Mr. Triana felt the Complainant did not have knowledge about. (HT, p. 321.) Mr. Triana found this practice to be disruptive because he had to respond to the phone calls from the recipients of the Complainant's e-mail messages, and it was disruptive to the addressees who received the e-mail messages. (HT, p. 321.) He also considered the Complainant's e-mail message to Ms. Zaborowski, asking for overtime, to be insubordinate since the Complainant assumed management responsibilities he didn't have in the e-mail message. (HT, p. 392.) Ms. Zaborowski similarly felt that the Complainant was insubordinate towards Mr. Triana. (HT, p. 680.)

Mr. Triana testified that when he made the decision to terminate the Complainant, the most important factors were the Complainant's insubordination, the disruption of the workforce that he had caused, the Complainant's apparent attempt to hack into the GEMS computer system, and his apparent lack of integrity. These factors weighed 8 out of 10 on a scale of 1 to 10 with 10 being the most significant factor in his decision. (HT, p. 287-88.) The Complainant's distribution of the FSAR to everyone was also a factor, but it had a lesser weight of 5. The incident with Ms. Terracino was also a factor, though it was only a 4 on the same scale, as was his knowledge that the Complainant had been going around taking pictures. (HT, pp. 287-88.)

The Complainant attempted to support his claim of a retaliatory firing by trying to get witnesses to corroborate his claims. However, his attempt was unsuccessful. It is apparent that there was friction between Mr. Triana and the Complainant. Mr. Mulloy was aware that there

were disagreements between the Complainant and Mr. Triana and stated the disagreements were not limited to the GEMEX. He observed that the Complainant disagreed with Mr. Triana on "every point" and that the Complainant's behavior changed at some point. (HT, p. 2099.) He testified that the Complainant became very combative and paranoid, and the combativeness and paranoia was directed at Mr. Triana. (HT, p. 2099.) However, Mr. Mulloy noted that though the Complainant became very hostile towards Mr. Triana, he had no idea whether Mr. Triana reciprocated the hostility. (HT, p. 2101.)

As stated in the discussion about allegation 7 against GEMS, the Complainant made it a point to tell numerous employees that he thought Mr. Triana was going to fire him. However, not a single one of his witnesses saw or heard Mr. Triana actually threaten to fire him. For example, the Complainant attempted to get Mr. Sierra to say that after getting the FSAR, Mr. Triana told Mr. Sierra that he was going to discipline the Complainant. Instead, Mr. Sierra testified that though Mr. Triana was upset and expressed his anger about the Complainant, he merely said that he was going to meet with the Complainant. (HT, p. 2026.) Mr. Sierra said emphatically that he did not get the impression that the Complainant was going to be disciplined for sending out the FSAR. (HT, p. 2026.)

The same was true of Mr. Harris. In his conversation with Mr. Harris about the FSAR, Mr. Triana did not tell Mr. Harris that he was going to take disciplinary action against the Complainant, nor did Mr. Harris get the impression that Mr. Triana was planning on taking any disciplinary action against the Complainant. (HT, p. 1955.) Mr. Harris testified that he did not recall Mr. Triana ever saying before August 2, 2002, that he wanted to fire the Complainant, and he expressed the opinion that he did not believe that such a comment was ever made. (HT, p. 1952.)

Mr. Presti did not even remember the Complainant telling him that he thought Mr. Triana was going to fire the Complainant or that he had been threatened because he had raised safety concerns about the GEMEX. (HT, p. 1919.)

Brian "Lee" Waters also testified that he never heard Mr. Triana threaten to fire the Complainant. (HT, p. 2109.) He did overhear one argument between Mr. Triana and the Complainant during which the Complainant said "what are you going to do, fire me?" (HT, p. 2110.) Mr. Waters observed that Mr. Triana responded to the question by leaving the room. (HT, p. 2110.)

The evidence simply does not support the Complainant's claim that he was fired in reprisal for his protected activity. His distribution of the FSAR was a consideration in his termination, but it was a minor consideration when weighed against all the other valid reasons for firing him. Moreover, it was not the safety concerns raised in the FSAR that contributed to his termination, but rather the inaccurate statements in it and the broad distribution of the FSAR to employees who were not involved in the GEMEX. GEMS and Adecco, the Complainant's direct employer, had very valid reasons for being concerned about the Complainant and terminating the Complainant's employment. He had assumed authority he did not have, sent e-mail messages with inaccurate assumptions and information, sent disruptive e-mail messages to employees who had no connection to the subject matter, assigned himself titles and responsibilities that he never had, continued to send disruptive inaccurate e-mail messages

despite warnings to stop, and engaged in conduct that Ms. Zaborowski and Mr. Triana both felt was insubordinate.

Added to this were Mr. Burrage's doubts as to the Complainant's integrity and Mr. Triana's knowledge that his conduct towards Ms. Terracino had concerned her and made her uneasy. Mr. Burrage had concerns about the Complainant's integrity since he sent out his FSAR to numerous GEMS employees after telling Mr. Burrage that his safety concerns about the GEMEX had been addressed.

Mr. Triana also had a very serious concern that the Complainant had apparently attempted to hack into the GEMS computer system by taking himself off the domain so that the GEMS computer security program could not track his computer use.

The Complainant repeatedly engaged in conduct that exceeded the scope of his authority and responsibilities and assumed authority he did not have. He compounded the abuse of authority by bringing in other individuals who had no interest in his matters or concerns. For instance, even if the Complainant had the authority to question Mr. Rector's parts order, there was no reason for the Complainant to send his July 24, 2002, e-mail message about Mr. Rector to anyone other than Ms. Zaborowski, who was Mr. Rector's supervisor, and perhaps to Mr. Triana, since Mr. Triana was the Complainant's supervisor. Instead, the Complainant sent the e-mail message to other individuals who had no relationship to Mr. Rector. Moreover, even if it could be argued that the Complainant could question the propriety of Mr. Rector's parts order, he did not have the authority to question whether Mr. Rector had the proper training to do his work or to comment that the field engineers were working unmonitored and unchecked. (HT, p. 318.) The Complainant did not supervise the field engineers and did not have the knowledge to make such an assessment. (HT, p. 319.)

It is noteworthy that even Ms. Zaborowski had concerns about the Complainant. Ms. Zaborowski initially found the Complainant's work to be "great," and she told Mr. Triana that she considered the Complainant to be a "breath of fresh air." (HT, p. 659.) However, her final impression of the Complainant was very different. Her assessment of the Complainant changed in late July 2002 because he was "creating fires" with issues that were not his responsibility. (HT, pp. 660, 663.) She felt he developed some integrity problems as he tried to create a job for himself, and she considered him insubordinate towards Mr. Triana. (HT, p. 680.)

Thus, I find GEMS has proven by very clear and convincing evidence that it had several valid, non-discriminatory reasons for terminating the Complainant. Since the Complainant's assignment at GEMS was terminated, his employment contract with Adecco was also terminated. Thus, Adecco also had a non-discriminatory reason for terminating the Complainant.

Respondents Did Not Blacklist the Complainant

"Blacklisting" is specifically mentioned at 29 C.F.R. § 24.2(b) as a violation of the employee protection provisions of the environmental protection statutes. In *Pickett v. Tennessee Valley Authority,* ARB Nos. 02-056 and 02-059 (ARB Nov. 28, 2003), when discussing the fact that blacklisting is a prohibited activity, the ARB wrote:

> A blacklisting may arise 'out of any understanding by which the name or identity of a person is communicated between two or more employers in order to prevent the worker from engaging in employment.' 48 Am. Jur. 2d, *Labor and Labor Relations*, § 669 (2002). Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. *Barlow v. U.S.*, 51 Fed.Cl. 380, 395 (2002) (citation omitted.)

Pickett v. Tennessee Valley Authority, slip op. at 9. Blacklisting includes communication of an adverse employment recommendation. *Leveille v. New York Air National Guard*, Case Nos. 94-TSC-4, 94-TSC-4, slip op. at 10 (Sec'y Dec. 12-11-94).

The Complainant alleges that GEMS and Adecco blacklisted him because he was never contacted by any prospective employers. He argues that their failure to contact him after he submitted his application meant that he was blacklisted. (HT, pp. 997, 1317, 1319.) He expressed the opinion that the lack of contact from prospective employers meant the employers decided not to contact him after checking his references. (HT, p. 997.)

In support of his claim, the Complainant offered the transcript of a conversation between Mr. Bradley and Ms. Oparnica, an employee of Document Reference Check, a reference check company that he retained. (CX 40.) As discussed earlier, Mr. Bradley provided Ms. Oparnica with minimal information about the Complainant and referred her to Adecco's corporate office. The Complainant argued that Mr. Bradley's refusal to provide specific information about the Complainant and his insistence that Ms. Oparnica call Adecco's corporate office was evidence of blacklisting. (HT, p. 1122.) This is simply not the case.

The transcript of the conversation shows that despite Ms. Oparnica's efforts to get Mr. Bradley to make negative comments about the Complainant by asking him very pointed questions such as why the Complainant had worked only a few months, Mr. Bradley very firmly refused to respond and referred her to Adecco's corporate office. If he had wanted to ruin the Complainant's employment chances, Mr. Bradley would have taken advantage of the opportunity offered by Ms. Oparnica, since he had no way of knowing that Ms. Oparnica was not a legitimate prospective employer for the Complainant. His response to Ms. Oparnica's inquiry was consistent with the Adecco policy, as confirmed by Mr. Bruno, of only confirming dates of employment when it receives inquiries about former employees. (HT, p. 1514.)

Other than this transcript of the telephone conversation with Ms. Oparnica, the Complainant offered no evidence to support a blacklisting claim. There is no evidence whatsoever that Adecco or GEMS ever communicated with a prospective employer and instructed it not to hire the Complainant or gave the Complainant a negative reference. There is no evidence that any prospective employer even contacted GEMS or Adecco to make an inquiry about the Complainant.

The fact that the Complainant never got a follow-up inquiry to his job applications could be attributed to numerous reasons unrelated to blacklisting. He may not have been qualified; there may have been someone more qualified than he was; or the employer may just have preferred another applicant. The Complainant testified that he applied over the Internet for jobs

throughout the United States. He submitted copies of job announcements for jobs in states scattered throughout the United States,[23] including, Hawaii, Pennsylvania, Illinois, New York, Ohio, West Virginia, Michigan, Texas, and North Carolina. (CX 6, pp. 17, 19-21, 23, 26-31.) Given the broad geographic range of the applications, it is also possible that the Complainant was never contacted about some of his applications because a local applicant was selected. It would not be unreasonable for a prospective employer to take more seriously a job application from a local applicant, as opposed to someone who lived in another part of the country and would have to relocate.

The Complainant's job prospects may also have been reduced by the fact that he indicated on his resume that he expected a comprehensive benefits package that included relocation expenses. (HT, pp. 1322-23; AT BB.) He also testified that though he was applying for jobs that paid between $10 and $15 per hour, he expected these potential employers to pay his permanent relocation expenses, as well as his transportation expenses to his interview. (HT, pp. 1327, 1487, 1489.) It is highly unlikely that an employer unwilling to pay relocation expenses would consider his application.

One employer specifically stated that a local applicant was preferred. The Complainant included an announcement for an Electronics Maintenance Technician position in Greensburg, Pennsylvania (CX 6, p. 30), which said very clearly "Local candidates preferred, no relocation assistance offered." This employer would never have considered the Complainant, nor could the Complainant have seriously considered applying since he testified that he would require relocation expenses to be paid.

Also, though the Complainant included a number of job announcements in CX 6 that he printed off the Internet, he did not offer evidence that he actually applied for each of the jobs. He did, however, offer evidence of his on-line applications for jobs with GE and Adecco by including a printout of the acknowledgments that he received. His applications with Adecco were further verified by the printout that was included with Mr. Bradley's deposition.[24] He included no similar automated electronic acknowledgments for the other vacancies he included in CX 6. In fact, he did not apply for all the jobs included in CX 6. On cross-examination, he admitted that he did not apply for the jobs listed on pages 2-5 (HT, p. 1281), 35-36 (HT, p. 1287), 48 (HT, p. 1289), 61-65 (HT, p. 1289), and 114-16 (HT, p. 1293) of CX 6.

Also, the undisputed evidence is that the Complainant never followed up on the jobs he did apply for. He never attempted to contact the prospective employers to check on the status of his applications. He never contacted GE or Adecco to follow up on the applications he submitted to them. Though one of his on-line applications with Adecco resulted in an interview opportunity with Slim Fast, he did not return Ms. Lusk's phone calls about the interview, nor did he attend the interview. (HT, pp. 1293-95.)

The evidence shows that after applying for an Adecco position on August 8, 2002, right after his assignment at GEMS was terminated, the Complainant did not apply for another position with Adecco until November 2002, three months later. (CX 43, p. 5.) The Complainant

[23] As will be discussed later, the Complainant did not actually apply for every job listing included in CX 6.
[24] That printout actually included two positions that the Complainant did not include in CX 6.

testified at one point that he did not apply for individual jobs with Adecco because he assumed that once his application was on file, he would automatically be matched to any vacant positions he qualified for. (HT, p. 1270.) That is not how the Adecco placement system works. Adecco is not an employment agency that looks for jobs for its applicants. It looks for applicants for its employer clients. Ralph Bruno, the Adecco Vice President of Technical Operations, testified that Smart Search, Attire and the Adecco web site do not allow an applicant to submit a resume once and be considered for every possible job. (HT, p. 1501.) To be considered, the Complainant would have had to apply separately for each Adecco web site vacancy.

The Complainant's own printout of the Adecco vacancy announcements shows that with each announcement, the applicant had to click "Apply now" to submit an application. (CX 6, pp. 1, 3-8, 49, 55-60, 89, 91, 93, 95, 97, 136, 138.) His multiple job applications submitted to the Adecco web site on November 3 and 24, 2002, show that he was well aware of the application process.

On cross-examination, the Complainant admitted he had no evidence that GEMS or Adecco had ever given him a bad reference. (HT, pp. 1319, 1329-30.) Blacklisting requires evidence that a specific act of blacklisting occurred. *Pickett v. Tennessee Valley Authority*, slip op, at 9. Mr. Triana testified that he was never contacted about any of the Complainant's applications for employment with GEMS in Jupiter, Florida. (HT, p. 237.) The Complainant has not produced any evidence that a bad reference was given by anyone at GEMS or Adecco. Lack of contact from a prospective employer, without more, is not sufficient to show blacklisting. *Id.*

I find the Complainant has failed to prove by a preponderance of the evidence that GEMS and Adecco blacklisted him in retaliation for his protected activity.

The Complainant Failed to Prove His Failure to Rehire Claim

The Complainant alleges that GEMS and Adecco retaliated against him by failing to rehire him after he submitted applications for employment to them. A refusal to rehire or to hire an individual who engaged in a protected activity is a prohibited personnel action if it was in reprisal for protected whistleblower activity. *Flanagan v. Bechtel Power Corp.*, 81-ERA-7 (Sec'y June 27, 1986); *Chase v. Buncombe County, N.C.*, 85-SWD-4 (Sec'y Nov. 3, 1986). To prove this allegation, a complainant must show that the complainant applied and was qualified for the position sought, that the complainant was not hired, and that either someone less qualified was hired or the position remained open after the complainant was rejected. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802; 93 S.Ct. 1817, 1824 (1973); *Hasan v. Florida Power and Light Co.*, 2000-ERA-10 (ALJ Feb. 6, 2003), *aff'd* (ARB June 27, 2003); *Holtzclaw v. Commonwealth of Kentucky*, ARB 96-090, ALJ 95-CAA-7, slip op. at 4 (ARB Feb. 13, 1997).

GE Did Not Retaliate Against the Complainant by Failing to Rehire Him

After his assignment at GEMS was terminated, the Complainant sought employment with GEMS through Adecco and by applying directly through GE's web site. He asked Ms. Johnson to submit his name to GEMS for a position at GEMS that he saw posted on Adecco's web site. However, as noted earlier, when she received the Complainant's request, she had already submitted enough names to GEMS for consideration. Mr. Bradley acknowledged at his

deposition that it was his belief that GEMS was not interested in considering the Complainant as an employee after it terminated his assignment, so the Complainant would not have been referred for any positions with GEMS. However, there is no evidence that the Complainant applied for any other jobs at GEMS through Adecco. Since the Complainant did not apply for any other positions at GEMS through Adecco, consideration of his application to Adecco for a job with GEMS never became an issue.

The Complainant, however, did apply for employment directly with GE through its web site. The Complainant applied for positions with GE in Jupiter, Florida as a Biomedical Specialist, Senior Depot Repair Technician, Depot Repair Technician, and Biomedical Technician. He also applied for an unidentified position with GE at Oakwood Hospital in Detroit, Michigan, and a Biomedical Technician position in Lubbock, Texas, with GE.

However, the Complainant has failed to satisfy the criteria set forth in *McDonnell Douglas v. Green* as restated above. He has merely submitted evidence of his application for the positions. He has not shown that he was qualified for the jobs. He did demonstrate that the Biomedical Specialist position remained open after he submitted his application, but he still did not show he was qualified for the position. With respect to the other GE positions he applied for, he has not shown the jobs remained vacant after he applied or that they were filled by less qualified individuals.

More importantly, even if the Complainant had shown that he was qualified for the positions and that they remained vacant after he applied, GEMS' failure to rehire him was not retaliatory. GEMS had numerous valid reasons for terminating the Complainant. Mr. Triana testified that he would not consider the Complainant for employment because of integrity issues, the disruption, the harassment, and the attempt to hack into the computer system. (HT, p. 239.) Each of those reasons would also constitute a legitimate non-discriminatory reason for not re-hiring the Complainant. An employer is not required to rehire an employee who has engaged in protected activity when the employer is dissatisfied with the employee's previous work record. *See, e.g. Becker v. West Side Transport, Inc.*, ARB No. 01-032, ALJ No. 2000-STA-4 (ARB Feb. 27, 2003); *Gibson v. Arizona Public Service Co.*, 90-ERA-29, 46 and 53 (Sec'y Sept. 18, 1995).

Thus, I find the Complainant has failed to prove that GEMS failed to rehire him in retaliation for his protected activity.

Adecco Did Not Retaliate Against the Complainant by Failing to Rehire Him

The Complainant's allegation against Adecco presents a slightly different situation from the usual failure to hire cases. Adecco is an employment agency that contracts with individuals to work temporarily at client locations, and it also performs the traditional employment agency function by finding permanent employees for its clients. In the first instance, the individuals are Adecco employees, while in the latter situation, the individuals become employees of the client. However, regardless of the individual's employment status, Adecco does not make the ultimate hiring decision. Adecco is essentially a gatekeeper and makes the initial decision as to whether an applicant should be referred to the client for a possible interview. The client/employer decides who to interview, does the interviewing, and makes the hiring decision.

While Adecco does not make the actual hiring decision for the positions it advertises, the criteria articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, for proving a discriminatory failure to hire, is equally applicable to this case. Adecco advertises the positions and solicits applications. Adecco's decision not to refer an application to an employer for consideration is comparable to a decision not to hire. If Adecco decides not to forward a particular application to its client, and the position remains vacant, Adecco continues to advertise for applicants to fill the vacant position.

Applying the *McDonnell Douglas* criteria to the instant case, the Complainant must show that he was qualified and applied for a position advertised by Adecco, that his application was not submitted to the employer, and that the position remained vacant or was filled by a less qualified individual. The burden then shifts to Adecco to articulate a legitimate, non-discriminatory reason for its failure to submit the Complainant's application to the employer. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802, 93 S.Ct. at 1824.

After his assignment with GEMS was terminated, the Complainant sent Ms. Johnson an e-mail message asking her to submit him for a technician position that Adecco had available at GE. Ms. Johnson did not do so because she had already submitted the quota of applicants for the position he was asking about. (HT, pp. 9200-21; AT R.) Thus, there was a legitimate, non-discriminatory reason for her failure to submit his name for that position.

On August 8, 2002, the Complainant applied for a position as an Electronic Repair Technician with Seminole Electric that was posted on the Adecco web site. However, by the time Ms. Johnson received the Complainant's application, she had, again, already submitted the quota of applicants for consideration for that position. (HT, p. 850.) Again, there was a legitimate, non-discriminatory reason for her failure to submit his name for that position.

The Complainant did not apply for employment through the Adecco web site again until November 3, 2002, when he applied for unidentified vacancies with Roddord Corporation and Dynalco Controls. The Complainant did not include copies of the announcements for these jobs in CX 6, which he said was evidence of his job search efforts, making it impossible to identify the job title or requirements. Without even minimal information about the jobs, the Complainant has failed to prove that he was qualified for these unidentified positions that he applied for on November 3, 2002.

Then, on November 24, 2002, the Complainant applied for jobs through the Adecco web site as a Maintenance Technician with Slim Fast, Monitor Technician with Intertech, Printer Technician with Intertech, Blow Molding Technician with Rubbermaid, and as an Instrument & Controls Technician with Seminole Electric Cooperative. With respect to these November 24, 2002, applications, the Complainant has again failed to prove that his failure to get any of these jobs was the result of discriminatory action by Adecco. There is no evidence of discrimination with respect to the Maintenance Technician position at Slim Fast. The undisputed evidence is that Ms. Lusk referred his application to Slim Fast as a possible candidate for the position. The Complainant was given an interview opportunity but failed to follow through by returning Ms. Lusk's phone calls. Responsibility for his failure to get that job lies with the Complainant.

With respect to the other four jobs he applied for on November 24, 2002, he has failed to satisfy the *McDonnell Douglas v. Green* criteria for establishing a failure to hire. He has merely demonstrated that he applied for these positions. He has offered no evidence that he was qualified for any of the positions he sought. Additionally, though he did offer evidence that the Instrument & Controls Technician position remained vacant after he applied for it, he offered no evidence to show that any of the other positions remained vacant or that less qualified individuals were referred for interviews. He admitted on cross-examination that he had no evidence to show that the positions were filled by less-qualified individuals. (HT, p. 1296.)

The Complainant disputes Adecco's claim that he was contacted about the Slim Fast position interview and that he failed to follow through. He denied that Ms. Lusk ever contacted him on November 25, 2002, about the position at Slim Fast, claiming that it was not possible for her to contact him by phone because he was on the Internet for the majority of the day. (HT, p. 985.) This denial is not credible. The Complainant's own phone records show that on November 25, 2002, he was on the Internet from 6:10 a.m.[25] to 6:39 a.m., 6:44 a.m. to 7:48 a.m., 7:51 a.m. to 8:10 a.m., 8:21 a.m. to 8:32 a.m., 11:16 a.m. to 11:29 a.m., 11:43 a.m. to 12:35 p.m., 1:07 p.m. to 1:23 p.m., 2:17 p.m. to 2:45 p.m. and 7:56 p.m. to 11:25 p.m. (CX 33.) Ms. Lusk forwarded the Complainant's resume to Slim Fast at 11:41 a.m., after speaking with the Complainant for 5-15 minutes. (HT, p. 951, AT EE.) There was ample time between 8:32 a.m. and 11:16 a.m. for Ms. Lusk to have a 5-15 minute conversation with the Complainant about the Slim Fast job.

There is no evidence that any recruiter at Adecco was ever instructed not to consider the Complainant's applications. Adecco maintains a computer file of its employees. Mr. Bradley vehemently denied that he made any type of notation in the Complainant's Adecco file that the Complainant should not be considered for jobs, and he denied that he ever told an Adecco client that they should not hire the Complainant. (Bradley Depo., p. 95.) Mr. Bruno testified that he has reviewed the comments in the Complainant's Adecco file and has seen no notes that would indicate to a recruiter that they should not consider the Complainant's resume or that the Complainant should never be hired. (HT, p. 1506.) Similarly, Ms. Johnson, who was familiar with the notes that are entered into an employee's computer file, also denied ever seeing anything in the Adecco computer system that said the Complainant should not be considered for an Adecco position. (HT, p. 930.)

Adecco's denial that there was a decision to refrain from rehiring the Complainant is further supported by the fact that Ms. Lusk considered the Complainant's application for a job with Slim Fast. Ms. Lusk testified that she had no knowledge of the Complainant before his name appeared in Smart Search as an applicant for that job. She had had no contact with any employees of GEMS, Mr. Bradley or Ms. Johnson. (HT, p. 962.) She was not given any instructions to treat the Complainant's application any differently from anyone else's. (HT, pp. 961-62.) The fact that the Complainant was not interviewed for the Slim Fast position was due solely to inaction on his part.

[25] The Complainant testified that the phone records were recorded in Eastern Standard time, which was two hours ahead of the local Arizona time. (HT, p. 986.) These times are the local Arizona time.

Thus, I find the Complainant has failed to prove that Adecco retaliated against him by failing to rehire him or refer him for interviews.

The Complainant's Credibility

This case rests in part on the Complainant's credibility. It is based on the numerous allegations he made against GEMS and Adecco that were discussed above. He made numerous allegations against GEMS and Adecco about retaliatory actions on their part, and he also made numerous claims about various matters in this case to support his retaliation claim. The evidence has convinced me that the Complainant lacks credibility and has a pattern of distorting the facts to fit his needs. The Complainant exaggerates the importance of his role in events and the extent of his responsibility, as well as the scope of his tasks and accomplishments.

Many of the Complainant's allegations and claims were unsupported by the evidence, and some were simply untrue. His conduct also impacted his credibility. Because his credibility and the veracity of his claims were an important factor in the outcome of this case, I will specifically discuss some of the claims and conduct that impacted my assessment of his credibility.

Automatic Conversion to Permanent Employee Status

The Complainant alleged in his August 26, 2002, OSHA complaint that when Mr. Triana first offered him the part-time position at GEMS, Mr. Triana told him that if he performed well at GE, after a one-year period of continuous employment at GE, he would be made a full-time permanent employee. He also alleged that Ms. Johnson confirmed this information. He claimed that it was common knowledge that there was a practice of converting Adecco employees to full-time permanent GE employees after one year at GEMS. (CX 45, p. 3.)

There is no evidence whatsoever to support this claim. Mr. Triana denied ever making such a promise to the Complainant when he first hired the Complainant, or even when he converted the Complainant to temporary full-time status. (HT, p. 180.)

Though Ms. Johnson acknowledged that the Complainant would have had an opportunity to become a full-time GEMS employee if there was a vacancy at the end of a year, she denied that she ever told the Complainant that he would be automatically made a permanent full-time employee with GEMS, provided his performance was satisfactory. (HT, p. 839.) Moreover, she testified that she has placed other Adecco employees at GEMS, and none of them have ever become a permanent GEMS employee after working there through Adecco. (HT, p. 886.)

Mr. Beatty, who supervised Adecco employees, testified that GEMS sometimes had positions categorized as "temp to permanent" positions. These positions would be filled by temporary employees who would be converted to permanent status if their performance was acceptable and there was a vacant permanent position available. He testified, however, that it was not a practice at GEMS to automatically convert Adecco employees to permanent GEMS employees after a year of satisfactory performance. (HT, p. 1568.)

Mr. Hirschberg also testified that he was aware of Adecco employees who became permanent GEMS employees, but he did not know how long it took before they became

permanent employees, and he was not aware of any procedure for them to automatically become permanent GEMS employees. (HT, pp. 1671-72.)

Similarly, Mr. Harris testified that he was not aware of any policy of automatically making Adecco employees permanent GEMS employees after a year. (HT, p. 1929.) He testified that individuals had to apply for open permanent positions. (HT, p. 1930.)

Taking Over McQueary's Work

The Complainant claimed that after Mr. McQueary left GEMS, he assumed Mr. McQueary's responsibilities, but none of the evidence supports this claim. He offered no credible evidence to support this claim. The Complainant questioned Mr. Sierra about whether Mr. Triana told the Complainant during lunch on July 30, 2002, that he was making arrangements to forward Mr. McQueary's phone calls to the Complainant, but Mr. Sierra said he did not recall that happening. (HT, p. 2003.) Moreover, transferring Mr. McQueary's phone calls does not equate with transferring his responsibilities to the Complainant.

Unauthorized Assumptions of Authority and Responsibility

The Complainant assumed a title he did not have and repeatedly assumed responsibilities that he did not have. He started by assigning himself the title of "Multi-vendor Laboratory Manager" in the e-mail message he sent to Mr. Triana on July 28, 2002, informing Mr. Triana of a meeting that Mr. Triana already knew about and implying that Mr. Triana had not been attending past meetings. Ms. Zaborowski testified that this e-mail message gave the impression that Mr. Triana was the Complainant's subordinate and had not been attending the meetings. (HT, p. 684.) Neither implication was true. (HT, p. 684.)

As discussed earlier in detail, in his e-mail message asking Ms. Zaborowski for overtime, the Complainant falsely claimed responsibility for numerous projects that had been completed by others, were not ready for assignment, or had been assigned to others, including to Ms. Zaborowski. Also, as discussed in detail earlier, he assumed authority he didn't have in questioning Mr. Rector's qualifications and judgment.

The Complainant's Claimed Ownership of the GEMEX Project

In his July 31, 2002, e-mail message to Ms. Zaborowski, the Complainant repeatedly stated that he had "ownership" of the GEMEX project, and he reiterated this claim in his first OSHA complaint. The Complainant claimed in the OSHA complaint that during the meeting on July 29, 2002, with Mr. Sierra, Mr. Triana assigned ownership of the GEMEX to the Complainant and asked Mr. Sierra to assist the Complainant "as needed." (CX 45, p. 8.) The Complainant repeated this claim at the hearing. (HT, p. 1073.) There is absolutely no evidence to support this claim.

Mr. Triana repeatedly denied ever giving ownership of the GEMEX project to the Complainant and testified that he gave ownership of the project to Mr. Sierra on July 29, 2002. (HT, pp. 183, 223, 325, 342; CX 39.) Mr. Sierra, whom I found to be very sincere, unbiased, and credible, corroborated Mr. Triana's testimony about the ownership assignment on July 29, 2002. When asked if he became aware that Mr. Triana had given ownership of the Modality Lab

to the Complainant, Mr. Sierra emphatically responded "no" and stated that the Complainant was in charge of "helping everybody in the Modality Group in warehousing things." (HT, pp. 1991, 1998.)

The Complainant also suggested that Mr. Sierra gave him "ownership" of the GEMEX project. This is even less credible. Mr. Sierra was not a manager and would not have the authority to make such an assignment. Moreover, Mr. Sierra denied ever giving "ownership" of the GEMEX to the Complainant or telling the Complainant that he could take the lead on the project. (HT, p. 2027.)

The testimony given by both Mr. Sierra and Mr. Triana is consistent with that of Ms. Zaborowski, who also testified that the Complainant never had "ownership" of the GEMEX project. (HT, p. 705.) She testified that it was the ownership claim in the Complainant's July 31, 2002, e-mail message to her that upset her and caused her to be concerned about the Complainant. (HT, p. 701.)

The Complainant's Claimed Ownership of the Modality Lab

In his July 30, 2002, "confidential" e-mail to Ms. Zaborowski asking for overtime approval, the Complainant falsely stated that it was his responsibility to "oversee" the entire Modality Lab. (HT, p. 696.) To support this claim at the hearing, the Complainant asked Mr. Sierra if Mr. Sierra became aware as of June 2002, that Mr. Triana had given the Complainant ownership of the Modality Lab. Mr. Sierra responded "no" and said that the Modality Lab was not part of the Complainant's responsibility. (HT, p. 1991.) Mr. Sierra further testified, in response to the Complainant's own questions, that while the Complainant worked at GE, he took direction or instruction from anyone in the Modality group to perform whatever task needed to be done, especially if it related to warehousing. (HT, pp. 1991, 1993.) HT, p. 1991.)

The Complainant claimed that he was given ownership of the Modality Lab and the Modality Group parts. In his post-hearing brief, he stated that he was given ownership by Mr. Triana in late March 2002. (Complainant's Post-hearing Brief, p. 11.) Mr. Triana denied that he ever gave the Complainant "ownership" of the Modality Lab. (HT, pp. 183, 223.) The Complainant did not have responsibility for overseeing the Modality Lab. Ms. Zaborowski testified that responsibility for the Modality Lab rested with Paul Harris, who was the National Service Director at the Jupiter facility. (HT, p. 696.) Mr. Harris, in turn, testified that while Mr. Triana asked the Complainant to organize and clean up the Modality Lab, the Complainant did not have "ownership" of it. (HT, p. 1925.) He testified that he would not characterize the Complainant's Modality Lab duties as constituting "ownership" of the Modality Lab. (HT, p. 1925.) The Complainant's responsibility was to oversee the parts harvesting of the Hematology Lab and to pick and ship parts requested by individuals. (HT, pp. 329, 331.)

The Complainant's ownership claim is simply incredible. Even without the testimonies of Mr. Triana, Mr. Harris, Mr. Sierra, and Ms. Zaborowski, it is implausible that Mr. Triana would have turned over responsibility for the Modality Lab to a part-time employee who was not even directly employed by GEMS. Even less plausible is his claim that he was given ownership of the lab in late March 2002, right after he started. It is inconceivable that Mr. Triana would assign that type of responsibility to a new part-time temporary employee.

Opinions and Statements Attributed to Mr. Sierra

The Complainant alleged in his August 26, 2002, OSHA complaint that after the Modality Group meeting ended on July 31, 2002, Mr. Sierra approached him and expressed concern for how Mr. Triana was treating the Complainant and complimented the Complainant on the FSAR, stating that it could be used as a guide to complete the GEMEX project. (CX 45, p. 11.) To support this claim at the hearing, the Complainant specifically asked Mr. Sierra if he had told the Complainant on July 31, 2002, that he felt the safety complaint was a good effort on the Complainant's part and that the FSAR could be used as a guide for completing the GEMEX. In response to this question, Mr. Sierra emphatically answered "no," saying that he didn't know how to deal with it because he didn't know the Complainant was the National Environmental Group, the Complainant had identified the GEMEX as a prototype when it wasn't, and the Complainant had taken the matter out or proportion when the only issue was making the unit more compact. (HT, p. 2026.) When questioned at the hearing about the FSAR, Mr. Sierra also said he didn't know where to start with the FSAR because "there were too many lies" in it. (HT, p. 2015.) Because I was uncertain that Mr. Sierra had said "lies," as opposed to "lines," I asked him, myself, whether he meant "lines" or "lies." He responded "Lies" and went on to say "There were too many things that were not true from this thing." (HT, p. 2015.)

The Complainant also alleged in his August 26, 2002, complaint that Mr. Sierra went on to say that he was "comfortable" with the Complainant's abilities and that he was giving "ownership" of the GEMEX project back to the Complainant. (CX 45, p. 11.) This claim is not credible, nor is there evidence to support it. Since Mr. Sierra did not have management responsibilities, he would not have had authority to give "ownership" of the GEMEX to the Complainant. More importantly, Mr. Sierra denied ever giving the Complainant ownership of the GEMEX. At the hearing, the Complainant specifically asked Mr. Sierra if he gave ownership of the GEMEX to the Complainant as of July 31, 2002, and Mr. Sierra emphatically responded "no" and stated that he only gave the Complainant the responsibility for repackaging the GEMEX to make it more compact. (HT, p. 2027.)

The Complainant implied that Mr. Sierra shared the Complainant's safety concerns about shipping the GEMEX, stating in his August 26, 2002, OSHA complaint that in the July 30, 2002, discussion with Mr. Triana about shipping the GEMEX, Mr. Sierra said that he had read the MSDS documents for the GEMEX gases and suggested that some type of respirator might be needed. (CX 45, p. 8.) Mr. Sierra acknowledged saying that he had read the MSDS sheets, but he denied ever saying that some type of respirator might be needed. (HT, p. 2001.) At the hearing, Mr. Sierra stressed that the MSDS documents focused on the worst case scenario. He clarified that he had had no concerns about safety. (HT, p. 2001.)

With respect to the FSAR, the Complainant testified that Mr. Sierra "appreciated" the detail in the FSAR and complimented him on it. (HT, p. 1092.) Mr. Sierra's testimony completely refutes that claim. At the hearing, Mr. Sierra very convincingly conveyed his confusion and concerns about the FSAR, which he said he also communicated to Mr. Triana. He explained he felt overwhelmed by the FSAR because it raised so many things that he did not know how to address. He had never heard of the National Environmental Group that the Complainant alleged he was acting on behalf of. He knew the GEMEX was not a prototype as

described by the Complainant, and he felt the Complainant had blown the scope of their project out of proportion. (HT, p. 2026.)

The Complainant offered into evidence a fluidic diagram of the GEMEX that he prepared. (CX 38, p. 10.) He asked Mr. Sierra if Mr. Sierra understood that the Complainant had prepared the diagram to bring the GEMEX into compliance with the regulatory requirements of the MSDS documents associated with the gases. Mr. Sierra emphatically answered "no" and explained that the whole issue was about shipping and making the unit more compact and that the Complainant had prepared the diagram so that the first load crew would know what they were dealing with. (HT, p. 2011.)

Mr. Sierra's testimony was important to the Complainant's case because unlike Messrs. Triana and Burrage, he was not a manager and played no role in the Complainant's firing. Unlike Mr. Hirschberg, he did not express any problems in his dealings with the Complainant, and unlike Mr. Trent, he had not communicated any animosity towards the Complainant. He impressed me as a co-worker who wasn't even sure why he was called as a witness. He appeared sincerely concerned by the Complainant's actions while he was employed at GEMS. Unfortunately for the Complainant, Mr. Sierra's testimony serves to highlight the scope of the Complainant's exaggerations and the inaccuracy of his claims.

The Complainant's Statements Concerning Mr. Presti

The Complainant testified that Mr. Presti called him before August 2, 2002, and said that Ms. Zaborowski was sending him to help the Complainant out with the laser parts. (HT, p. 1108.) Mr. Presti, however, testified that the purpose of his trip was not to meet with the Complainant about laser parts. He testified that he happened to be in the area the day before and had told Ms. Zaborowski that he was going to stop in at the Jupiter facility. (HT, p. 1910.) This is consistent with Ms. Zaborowski's testimony that she was aware that Mr. Presti had stopped by the Jupiter facility, but that he had not gone there are her request. (HT, p. 713.)

The Complainant testified that in the confrontation with Mr. Burrage on August 2, 2002, that took place when the Complainant was with Mr. Presti, Mr. Burrage asked Mr. Presti if he had seen the GEMEX and what he thought about it, and Mr. Presti answered that it was not something he expected GE to send around the United States to hospitals. (HT, p. 1109.) Neither Mr. Presti nor Mr. Burrage corroborated the Claimant's testimony. Mr. Presti testified that his exchange with Mr. Burrage was limited to two questions as to whether Mr. Presti was involved with the laser and the GEMEX, and that after he responded no, Mr. Burrage walked away. (HT, p. 1915.) Mr. Burrage testified that he asked Mr. Presti if he was familiar with the GEMEX and if there was anything unsafe with it and that Mr. Presti responded that there weren't any safety concerns that he knew of. (HT, p. 2553.) While Mr. Burrage's testimony differs slightly from Mr. Presti's, it is very clear that Mr. Presti never said that the GEMEX was not something he expected GE to send around the United States to hospitals.

Problems with the Complainant's Resumes

The Complainant also demonstrated a pattern of evading or "bending" the truth while seeking employment. In the past 30 years, the Complainant has had 28 different jobs. (HT, p.

1131, GE KK.) He has had 20 different jobs since 1988, when he left Florida Power. (HT, p. 1131.) He has been involuntarily discharged from 12 of the 20 jobs he has held since 1988. (HT, p. 1134.)

In the resume that the Complainant submitted to Adecco (AT A), he did not include his jobs with Atlantis Seafood Company, Wellington Regional Medical Center, Nova University or Motorola Corporation. He was fired from all of those jobs. (HT, p. 1138.)

The Complainant indicated in the resume he submitted to Adecco (AT A), that he worked for various power generation stations from January 1982 to January 1998, falsely implying that he was continuously employed in that industry for 16 years. On cross-examination by GEMS' counsel, the Complainant admitted that he did not work for power generation stations from 1982 to 1998, stating that he worked until 1992. However, he refused to admit that the "1998" date in his resume was "false," claiming twice that "it's not accurate" and that "it could have been a typo." (HT, pp. 1138-39.) However, on further cross-examination by Adecco's counsel, it turned out that even a claim that he worked in power generation stations from 1982 to 1992 would be misleading because it implies he worked in for power generation stations for 10 consecutive years. He worked at Florida Power and Light from March 1982 until December 1988, when he was involuntarily terminated. (HT, p. 1134.) He did not work for a power generation station again until September 1991, when he worked for APS Palo Verde Nuclear Generation Station, and that employment ended in December 1991, when he was involuntarily terminated. (HT, pp. 1139, 1225.) If the December 1988 to September 1991 period is excluded, he only worked in power generation stations for 6 ½ years at most.

The Complainant falsely stated that he left each of his jobs at APS and Houston Power and Light for a better job when, in actuality, he left both jobs involuntarily. (HT, pp. 1139-40.) His resume also suggests that he was continuously employed from 1973 through 2001, but he admitted on cross-examination that that is not true. (HT, p. 1140.) He falsely stated in the resume he submitted to Adecco that his hourly rate of pay while working at BellSouth was $23. (HT p. 1222.) He testified that it was less than $23 per hour but that he worked a lot of overtime and estimated that his hourly pay was $23. (HT, p. 1222.)

The Complainant also had no qualms about changing the job titles of his various jobs to fit the job he was applying for. He changed his Bell South "facility technician" and APS "instrument control technician" jobs to "electronics technician" when he was applying for an "electronics technician" job at Adecco. (HT, pp. 1226-27; AT A.) He admitted that he changed his job titles because he wanted the electronics technician job that he was applying for. (HT, p. 1227.) He also had no qualms about giving Adecco the impression that he was continuously employed from January 1973 up to 2001, when he submitted a resume to Adecco. (HT, p. 1233.) In fact, there was a nine-year gap in employment that was not disclosed in the resume he submitted to Adecco. (HT, p. 1244.) As an explanation for the false statements and impressions in his resume, the Complainant expressed the opinion that resumes are not required to be truthful. (HT, pp. 1244, 1246.)

The Complainant's Use of the GEMS Camera

It is apparent from the various explanations the Complainant has provided about different events that he conveniently shifts the purpose of his claims to support his argument or theory. For instance, the Complainant testified that he took pictures of the GEMEX with the GEMS digital camera and put the pictures on the GEMS server to show the machinists what the GEMEX looked like and the changes that needed to be made. (HT, p. 1095.) However, for the purposes of pursuing his retaliation claim, those pictures instead became part of his effort to investigate the GEMEX before making a report to OSHA, and his inability to access the new GEMS server became support for his theory that he was being prevented from recovering his safety investigation materials to report to OSHA. (Complainant's Post-hearing Brief, p. 7.)

Statements Concerning His Job Search Efforts

He testified that he did not apply for every job listed on the Adecco web site that he felt he was qualified for because he believed that once he submitted his resume to Adecco, he would be considered for every job in the Adecco system. (HT, p. 1274.) His actions were inconsistent with that claim. He submitted a resume on August 8, 2002, for the Instrument Control Technician position posted on Adecco's web site. (HT, p. 1273, CX 6, pp. 51-53.) If he truly believed that he did not need to submit his resume again to be considered for other vacancies, he would not have specifically applied for the jobs posted on the Adecco web site on November 3 and 24, 2002.

Claim's Concerning the Complainant's Computer

The Complainant denied being responsible for removing his computer from the domain and deleting any files from his computer. He suggested that since Mr. Triana had custody and control over his computer from August 2-5, 2002, Mr. Triana might have been the person who deleted the files from his computer. However, as Mr. Smith explained, the Complainant's computer identified the Complainant as the last user, and that would not have been possible if Mr. Triana had been the last person to access the Complainant's computer. (HT, p. 2365.)

Mr. Smith also explained that someone else who logged onto the Complainant's computer could only delete files from certain areas on the computer and that person would not be able to delete files that were tagged with the Complainant's user identification. Files that only the Complainant could have accessed had also been deleted. (HT, pp. 2345, 2363.)

The Complainant also implied that someone else could have accessed his computer and removed it from the domain in May 2002. However, Mr. Smith explained that when Ms. Severe worked on the Complainant's computer on May 7, 2002, the first thing she did was to identify the last user, and she determined that the Complainant was the last user. Mr. Smith explained that with the Windows 2000 operating system that was on the Complainant's computer, it was not possible for someone else to log into the Complainant's computer, delete the files to remove him from the domain, and then reinstate the Complainant's user name as the last user on the computer. (HT, p. 2352-53.)

Misrepresentations in the Complainant's Post-hearing Brief

The Complainant's penchant for making claims that are unsupported was further reflected in his post-hearing brief. For example, despite the fact that Mr. Sierra emphatically declared that he never told the Complainant that his FSAR was a "good effort" and could be used as a guide for completing the GEMEX (HT, p. 2026), the Complainant stated in his post-hearing brief that Mr. Sierra "complimented Saporito about the detail and effort that he put in the FSAR (safety complaint) that they could use it as a guide to complete the GEMEX project." (Complainant's Post-hearing Brief, p. 44.) In fact, Mr. Sierra testified that he told Mr. Triana that there were so many things wrong with the FSAR that he did not know what to do with it. (HT, p. 2026.) At the hearing, Mr. Sierra described the FSAR as containing "too many lies" so he didn't know where to start with it. (HT, p. 2015.)

The Complainant repeatedly interspersed his post-hearing brief with false statements that he attributed to witnesses. For example, in response to questioning by the Complainant, Mr. Sierra specifically testified that Mr. Triana did not say he was going to discipline the Complainant, and that he did not understand from Mr. Triana that the Complainant was going to be disciplined for sending out his FSAR. (HT, p. 2026.) In his post-hearing brief, however, the Complainant said "Triana told Sierra that he was going to discipline Saporito because he sent the safety complaint." (Complainant's Post-hearing Brief, p. 47.)

The Complainant claimed in his post-hearing brief that Mr. Burrage asked for Mr. Presti's opinion of the GEMEX and that Mr. Presti responded that he would not send it out in the field to be used in public places. (Complainant's Post-hearing Brief, p. 68.) In fact, Mr. Presti never testified that Mr. Burrage asked for his opinion about the GEMEX. He testified that the extent of his exchange with Mr. Burrage about the GEMEX was an inquiry Mr. Burrage made to Mr. Presti as to whether he was involved in the laser. (HT, p. 1915.)

CONCLUSION

In conclusion, the Complainant has failed to prove by a preponderance of the evidence that Respondents, GEMS and Adecco, violated the whistleblower protection provisions of the CAA, TSCA, CERCLA, SDWA, SWDA, and ERA by retaliating against him for his protected activities. As discussed in detail above, the Respondents had valid non-discriminatory reasons for terminating the Complainant's employment. There was no evidence that either Respondent blacklisted the Complainant, and the Complainant failed to prove that the Respondents' failure to rehire him was the result of prohibited discrimination.

ORDER

Accordingly, it is RECOMMENDED that the Complainant's claims be DISMISSED WITH PREJUDICE.

A

JENNIFER GEE
Administrative Law Judge

NOTICE OF REVIEW:

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.