U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 September 2005

CASE NO: 2005-WPC-00003

In the Matter Of:

ARTHUR J. BARRY,
Complainant

v.

SPECIALTY MATERIALS, INC.,
Respondent

APPEARANCES:

Jeffrey L. Levy, Esq., on behalf of Complainant

Matthew C. Donahue, Esq., on behalf of Respondent

BEFORE: COLLEEN A. GERAGHTY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. Statement of the Case

This claim arises under the employee protection provisions of the Federal Water Pollution Control Act of 1972, codified at 33 U.S.C. § 1367 Section 507 (herein after "the WPC") and the implementing regulations at 29 C.F.R. Part 24. On September 23, 2004, Arthur J. Barry ("Mr. Barry" or "Complainant") filed an administrative complaint against Specialty Materials, Inc. ("Company" or "Respondent") with the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") alleging several violations of the WPC, including his September 21, 2004 discharge. ALJX 1. On April 6, 2005, the Regional Administrator of OSHA advised the Complainant that the evidence he submitted did not support a *prima facie* claim that he was dismissed for engaging in activities protected under the WPC. OSHA concluded that the Complainant failed to show that his discharge was related to his protected activity and the Respondent established that it would have taken the same unfavorable personnel action due to economic necessity, even in the absence of protected activity. Accordingly, OSHA concluded that the Respondent provided a legitimate,

non-discriminatory reason for the Complainant's discharge, and therefore, OSHA dismissed the complaint. *Id.*

On April 11, 2005, the Complainant filed a request for an appeal and a hearing. The matter was referred to the Office of Administrative Law Judges for a formal hearing. On April 20, 2005, the Court issued a Notice of Hearing and Pre-Hearing Order scheduling a formal hearing for May 23, 2005, in Boston, Massachusetts. On May 19, 2005, at the Respondent's request and, without objection from the Complainant, the Court issued an order continuing and rescheduling the hearing for June 27, 2005. At the hearing on June 27, 2005, the parties were afforded an opportunity to submit documentary evidence and testimony was heard from the Complainant and from Respondent's President Monte Treasure. The official transcript of the proceedings is designated ("TR"). The following exhibits were received into evidence:

1. Complainant's Exhibit Numbers 1-2 ("CX")
2. Respondent's Exhibit Numbers 3, 5, 6, and 11 ("RX")
3. Administrative Law Judge's Exhibit Numbers 1-8 ("ALJX")

TR 7, 10-12, 29, 33, 34, 41, 53, 94, 95-97, 100-101. The parties filed post-hearing briefs.[1]

II. ISSUES

The issues presented in this proceeding:

1. Whether the Complainant engaged in protected activity;
2. Whether the Respondent had knowledge of the protected activity;
3. Whether the Complainant suffered adverse action as a result of any protected activity; and
4. Whether the Respondent has established that the adverse action was taken for a legitimate, non-discriminatory reason.

III. FACTS

The Complainant worked for Specialty Materials, Incorporated or its predecessor companies since 1986. TR 18. Monte Treasure, the president of SMI, explained that Specialty Materials' predecessor company was a company called AVCO and AVCO was bought by Textron in 1986. *Id.* at 82-83. Since 1986, Textron has gone through several structural changes. In 1986, Textron and AVCO Specialty Materials merged into Specialty Materials Textron. *Id.* In 1996, said entity became Textron Defense System. *Id.* Subsequently, Textron Defense System sold off its fiber and metal matrix business to a private investor named John Menzel ("Mr. Menzel") in December 2001 and became the entity currently known as Specialty Materials, Inc. *Id.* at 84. Eventually, the metal matrix sector of the business dissolved, and Specialty Materials became a boron and silicone carbide fibers business and specialized in making high performance fibers for various applications,

[1] The Court has hand-numbered the pages in Respondent's brief as it was not paginated. When submitting briefs to the Court, each page must be numbered.

automotive, aerospace, and sporting goods. *Id.* Currently, the Specialty Materials has one building and one warehouse on Middlesex Street in Lowell, Massachusetts. *Id.*

The Complainant testified that during his tenure at Specialty Materials and its predecessor entities, his duties consisted of facilitating and installing various equipment, working on plant renovations, engineering, HVAC designing and processing changes. *Id.* at 18. The Complainant explained that as a result of the production of boron and silicon carbide fibers, mercury is in the waste water and Specialty Materials was required to have a water filtration and pre-treatment system to remove the mercury before the waste water is discharged into the public water/sewer system for the City of Lowell. *Id.* at 25. The Complainant testified that in 2001, the Respondent began working with a company called Solmetics to build a water treatment system that would function appropriately and would remove mercury from the fibers to an acceptable level. *Id.* at 26. This system went into operation in approximately 2002 or 2003. *Id.* The regulatory oversight for Specialty Materials' water pre-treatment system is handled by the City of Lowell. *Id.* at 100.

The Complainant reports that Doug Smith the assistant manager at the Company was operating the pre-treatment system in 2002 and 2003. TR 26. In the summer of 2004, the Complainant's supervisor, Steve Pilioglos, who is also the plant manager asked him to take the steps necessary to obtain a license to operate the waste water pre-treatment system. *Id*. The Complainant expressed interest, and during the summer of 2004, he took a level II class to prepare for the system licensing exam. *Id.* He testified that, during the course, his instructor informed him that he should be taking a level III class because the instructor thought that the Company's pre-treatment system, which was to remove mercury before the plant's waste water was discharged into the Lowell, Massachusetts water treatment system, appeared more complicated than a level II system involving simply adjusting the pH levels. *Id.* at 27-28. At that time, the Complainant did not know whether Specialty Materials' water treatment facility was rated as a level II or level III system. *Id.* at 28. According to the Complainant, he began researching the Massachusetts state website in order to educate himself about the regulations describing how to rate the system. *Id.* As he did his research, he discovered that as a system operator he could be fined $2,500 by the State of Massachusetts for operating a system without an active license. *Id.* at 27-28, 35.

Mr. Barry testified that, upon completing the course, he received a certificate from the institution, filled out an application, took and passed the examination, and received a license in the mail sometime in early August 2004. TR at 29: CX 1. However, when he received his license, he noticed that its status was inactive. TR 30. He understood this "inactive status" to mean that he was not licensed to operate the company's water pre-treatment system until his license was activated. *Id.* Mr. Barry testified that he had felt uncomfortable operating the system with an inactive license because he could be fined $2,500 per day. *Id.* at 31.

In order to activate his license, the Complainant completed a state application and described in detail the kind of system he would be operating. *Id.* at 30. He then submitted the form to the state. *Id.* at 31, 63-65. The Complainant said that he made a statement in the application that he believed the Company's system was not rated. *Id.* at 46. To this date, Mr. Barry does not know what level Specialty Materials' system is as it was not rated during his

tenure at the company. *Id.* at 65. He testified that he received his active license from the state after his dismissal from the Company. *Id.* at 31.

The Complainant testified that after he completed the course, and the paperwork to activate his license but before he received his activated license, the assistant manager, Mr. Smith, began to train him on the Company's waster water pre-treatment system. TR 32-33. However, the Complainant stated he was concerned about operating the system without an active license. He stated he told his supervisor that he was uncomfortable operating a system with an inactive license and he was unsure of the rating for the plant's water treatment facility and whether his Level II license was sufficient to operate the Company's system. TR 35. The Complainant stated that his supervisor was dismissive. *Id.* Therefore, on August 19, 2004 he wrote an e-mail to the company president, Mr. Treasure. TR 32-35; CX 2. In the e-mail message, the Complainant stated that he regretted having to go over his supervisor's head, but that when he attempted to explain his concern the atmosphere becomes belligerent and his supervisor dismisses him.[2] CX 2. The Complainant informed Mr. Treasure that he was concerned about operating the waste water facility without an active license which could result in a $2,500 per day penalty and he also raised concerns regarding the handling of mercury in both the wastewater treatment system and in the plant. The e-mail message also stated that the Complainant believed he needed to obtain a ruling from the Board of Registration before "getting himself and the company in trouble." TR 35-41; CX 2. The Complainant reports that he ended the message by stating that he did not want to have to resort to having OSHA come in and clean our dirty laundry. TR 37-38; CX 2.

The Complainant stated that the day after he sent the e-mail message to the president, Mr. Treasure called a meeting. The Complainant was present as well as Mr. Treasure, the complainant's supervisor Steve Pilioglos and Al Kumnik, the principal scientist. TR 42. The Complainant reports that Mr. Treasure was agitated with him, swore and was upset that he had written such a document. TR 43-45. The Complainant stated that he explained his concern that the regulations required an individual to be licensed for the level of system the operator would be running and that the Specialty Materials system was not rated. He also expressed concern that he could not operate a wastewater treatment system unless he possessed an active license and his license was inactive at that time. TR 44-48. The Complainant told the others that he was concerned that he could be subject to penalties of up to $2500 per day. *Id.* The Complainant stated that the meeting lasted at most thirty minutes

[2] The Complainant testified later that he had not had a conversation with his supervisor about operating the waste water system without an active license prior to sending an e-mail message to the Company president. TR 42. It appears the Complainant may have been confused on this point as later testimony reveals that the Complainant told his supervisor, Mr. Pilioglos, of his concern that the license he was obtaining to operate the plant was inadequate for the type of system the company had. Mr. Barry testified that he informed his supervisor that he had filled out an application to activate his license and had stated in this application that the system was unrated. In any event, the evidence shows he discussed other issues with his supervisor and the supervisor had responded dismissively because the Complainant later testified that he did not get along with his supervisor. TR 45. According to Mr. Barry, his prior attempts at conversation on another environmental concern regarding mercury levels had been unsuccessful. CX 2. His supervisor had become "belligerent" and had been "quick to dismiss" the Complainant. *Id.* Hence, prior to sending out the August 19, 2004 email, the Complainant indicated he chose not to have a conversation with his supervisor specifically about the regulation, which provides he could get fined $2,500 for operating the system without an active license.

and that at the end it was determined that he would not operate the waste water system. TR 45-46.

The Complainant reports that he was not involved in operating the waste water system following the meeting on August 20, 2004. TR 47. The Complainant testified that on September 22, 2004, Mr. Treasure called him to the office and told him he was being terminated as a cost saving measure. Id.

Mr. Treasure recalled that the meeting included a discussion of the pre-treatment system, mercury, and licensing issues. TR 103-106. Mr. Treasure testified that the discussions reached an impasse as far as operation of the waste water system as the Complainant stated that he could not become active until the Company's system was rated and the City of Lowell was not rating the system. TR 103. Mr. Treasure reports that Mr. Pilioglos kept pointing out that he was licensed and the Complainant worked for him. Mr. Treasure said that the Complainant was told that Mr. Pilioglos had an active license to operate the system, and that he would operate the system until the Complainant got his inactive license activated. *Id.* at 103-104. According to Mr. Treasure, he understood that the Complainant could not operate the system unless his license was activated by the City of Lowell, and therefore, it was decided that the task of operating the waste water treatment system would be reassigned to Mr. Pilioglos. *Id.* at 122. Mr. Treasure also testified that he had asked the Complainant to activate his license by calling the City of Lowell, just as Mr. Pilioglos had done. *Id.* at 121.

Mr. Treasure explained that Mr. Pilioglos has a level II system license and that he had operated the company's system before the Complainant had taken the courses. *Id.* at 124. According to Mr. Treasure, Mr. Pilioglos had called the Lowell, Massachusetts and had activated his license because the water treatment system had not been rated. *Id.* at 104. By doing so, Mr. Pilioglos would not have to operate the unrated system with an inactive license. *Id.* Mr. Treasure explained that the Company has completed the paperwork necessary for the City of Lowell to rate its system but stated that the City is behind schedule on rating systems. Therefore, he indicated that the City activated Mr. Pilioglos' license in the interim so that the plant's system would not be operated by an unlicensed operator, even though the City had not yet rated the Company's water treatment system. TR 104-106. Mr. Treasure testified that although the system continues to be unrated at this time, Mr. Pilioglos, with his level II license, continues to operate the system with the knowledge of the appropriate entities in the City of Lowell. *Id.* at 120. Mr. Treasure testified that Lowell officials equated the Company's system as a level II system until the City could actually inspect and rate the system. *Id.* at 104. Because the Company has submitted the paperwork necessary to obtain a rating of its system to the City, the City has given an interim approval until it gets around to rating the Company's system. Mr. Treasure testified that Company is in full compliance with the regulations. *Id.* Mr. Treasure testified that he tried to explain this to Mr. Barry, but that it became a "chicken and egg type of thing" with the Complainant maintaining his position that his license was inactive and it could not be active until the Company's waste water system was rated. *Id.* at 105-106, 121.

In the backdrop of the Complainant's concerns, the Company had its own financial concerns. *Id.* at 86. Although Specialty Materials profited in 2002, the Company's earnings dropped by December 2003. *Id.* According to Mr. Treasure, the rise in energy costs and health insurance prices affected the Company's profits. TR 87. As a consequence, in the Spring of 2004, Mr. Treasure and the Company's owner, Mr. Menzel, hired Convergence Group, an outside consulting firm, to help analyze the company's financial situation and make recommendations for improving profitability. *Id.* at 89-92. The consultant, Steve Bishop, discussed the Company's budgets, various costs, and concerns with Mr. Treasure, and Mr. Menzel and he created a profit recovery "game plan." *Id.* The goals were to reduce expenses by consolidating the facilities, consolidating or reducing the work force and make use of multitask responsibilities in order to increase productivity and to increase revenue. *Id.* at 90; ALJX 6 at 7; RX 4.

Following the consultant's recommendations, the Respondent consolidated operations into one building but this action alone was not sufficient to achieve the cost savings required. TR 89-93; ALJ 6 at 7. Mr. Treasure explained that in August 2004, the Company also raised their product prices ten percent. TR 96; RX 3. Mr. Treasure stated that because the Specialty Materials manufactures high cost and high performance materials, the Company is very sensitive to product pricing. TR 97.

During this period in which the Company was working to restore profitability, the Company distributed a memo to all employees with their paychecks on June 30, 2004 notifying them of a salary and hiring freeze and a postponement on the merit reviews which normally occurred in July. *Id.* at 92-94, RX 3. The Company also posted a similar message on the bulletin board. *Id*. In addition, Mr. Treasure stated that during the company picnic in August, he explained to the employees that the Company was not on a profitable track and that it would have to tighten the belt and delay raises and freeze permanent positions. *Id*.

Mr. Treasure acknowledged that he was not warning people about impending layoffs in the summer of 2004 because the Company had hoped to become profitable again and also because the Company viewed layoffs as a last resort. *Id.* at 118-119. Mr. Treasure testified that every element of the costs of operation was considered. *Id.* at 92. Pointing to the profit and loss sheet from January through August 2004, Mr. Treasure noted that the Company remained unprofitable with a net loss of approximately $788,321. *Id.* at 95, RX 6. Mr. Treasure testified that when sales and profits continued to lag, it became clear to him and to the Company owner Mr. Menzel that additional cuts needed to be made and layoffs would be necessary. TR 108.

According to Mr. Treasure, the company decided to eliminate positions where job duties could be shared with and by other people or where the position could be eliminated entirely. *Id.* at 109. Mr. Treasure stated that he looked at the situation from a function perspective. *Id.* He looked at those employees operating in an "indirect function," which is when a worker does not go directly into the cost of producing the product. *Id.* at 110. In order to determine who to terminate, Mr. Treasure looked at three areas – research and development, marketing, and facilities. *Id.*

In the research and development area, the company looked at Dr. Jim Marzic who had been hired the prior year. *Id.* at 110. However, his supervisor, Dr. Ray Suplinskas, decided to voluntarily retire due to health reasons. *Id.* From the sales and marketing department, one of the two people was discharged. *Id.* As to the employees in the facility division, Mr. Treasure testified that the plant manager, Mr. Pilioglos, and the assistant plant manager, Mr. Smith, had done the work when the predecessor entity owned the company. *Id.* at 109. Thus, they had the capability of doing the work without the Complainant. *Id.* Mr. Treasure stated that he did not consider the issues the Complainant raised with the waste water system in his decision to select the Complainant as one of the employees to lay-off or dismiss. *Id*. at 111. He testified that he viewed the meeting on the waste water system as the Complainant having a concern and getting it out on the table with the right people so that it would get resolved. *Id*. at 112. Mr. Treasure stated that the salaries of the three employees let go tallied up to approximately a quarter of a million dollars. *Id.* at 111. He also said that the Claimant received a severance package of three months salary. *Id*.

On cross examination, Mr. Treasure acknowledged that even after implementing all the recommendations, Specialty Materials is still not profiting and to the date of the hearing was at a loss of approximately $150,000. *Id.* at 117. Currently, the company has thirty two full time employees and four "temps" who were hired through job shops for direct labor as reactor operators on the line. *Id.* at 117. In the facilities division, currently, Mr. Pilioglos and Mr. Smith work in that department. *Id.* at 118. No new employees have been hired since the beginning of the year. *Id.*

IV. APPLICABLE LAW

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

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee…by reason of the fact that such employee…has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of this chapter.

33 U.S.C. § 1367(a).

The Secretary of Labor has articulated the legal framework under which parties litigate retaliation cases. In environmental whistleblower proceedings, the Complainant has the burden to show a *prima facie* case of retaliation by showing:

1. that the Complainant engaged in protected activity as defined by the WPC;
2. that the Respondent had actual or constructive knowledge of the protected activity and took some adverse action against the Complainant; and
3. that an inference is raised that the protected activity of the Complainant was the likely reason for the adverse action

Passaic Valley Sewerage Com'rs v. U.S. Dept. of Labor, 992 F.2d 474, 480-481 (3rd Cir. 1999); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Macktal v. U.S. Dept. of Labor*, 171 F.3d 323, 327 (5th Cir. 1999) (discussing similar burden shifting framework under the Energy Reorganization Act); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277 (7th Cir. 1995) (discussing similar burden shifting framework under the Energy Reorganization Act); *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir, 1998) (discussing similar burden shifting framework under the Safety Transportation Assistance Act); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (holding that the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), burden shifting framework is applicable to environmental safety statutes). The employee's burden in establishing a *prima facie* case is "not onerous; rather, a *prima facie* showing is 'quite easy to meet.'" *Kahn*, 64 F.3d at 277 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

The Respondent can rebut the Complainant's *prima facie* case by showing that it would have taken the adverse action, even if the Complainant had not engaged in the protected activity, by establishing that the action was motivated by a legitimate, non-discriminatory reason. *Passaic*, 992 F.2d at 478; *Simon*, 49 F.3d at 389; *Kahn*, 64 F.3d at 277-278. The Complainant can still prevail if it proves by a preponderance of evidence that the Respondent's offered reason is not the actual reason for the adverse action; in other words, by showing that the employer's reason is merely pretext for the retaliatory action. *Id.*

A. Protected Activity

In regards to protected activity, the Complainant argues that he engaged in activity protected under the WPC by indicating that the Respondent's waste water system was unrated when filling out the application to activate his license with the State of Massachusetts. C. Br. at 5. The Complainant also contends that he engaged in protected activity when he complained to the Respondent about the unrated pre-treatment system and he refused to operate the system without an active license. *Id.* On the other hand, the Respondent contends that the Complainant did not engage in protected activity because he complained about a regulatory process, an unrated system, for which the Company already had permission to operate, from the City of Lowell. R. Br. at 6. Specialty Materials had operated and continued to operate with an unrated system and with the local regulatory authority having full knowledge of this. *Id.* at 6-7.

The WPC's whistleblower provision was enacted in order protect an employee from retaliatory actions taken against him by the company when the employee attempt to bring the company into compliance with the WPC's safety and quality standards. *Passaic*, 992 F.2d at 478. The employee need not prove that an actual violation of the WPC occurred. Rather, he must prove only that his complaint was "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Ilgenfritz v. U.S. Coast Guard Academy*, 1999-WPC-3 (ALJ Mar. 30, 1999). Even if the complaint is not "ultimately substantiated," it may provide a basis for a whistleblower case as long as it is "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Lebron v. City of*

Raleigh, N.C., 2002-WPC-00002 (October 13, 2004) citing *Niedzielski v. Baltimore Gas & Elec.*, 2000-ERA-4 at 35 (ALJ Jul. 13, 2000).

Respondent argues that the Complainant was not pressured to operate the system and that it was already being operated by Mr. Pilioglos, who oversaw the operation of the recovery system. R. Br. at 6. Mr. Treasure testified that the system was approved by the City of Lowell and that Mr. Pilioglos had been operating the system with a level II license approved by the city. He further testified that he had read the regulations detailing the operation of the facility and that the company is in full compliance with the regulations. The company told the Complainant that he did not have to work on the system until his license was activated.

The Complainant believed that it was necessary for the Company's waste water system to be rated before he could operate it and he also believed that he could not operate the system unless his license was active. The Complainant testified credibly that he readily began taking classes to become licensed to operate the water pre-treatment system when asked by his supervisor. In the course of taking the classes, his instructor suggested that the Complainant ought to be taking classes on operating a Class II system rather than a Class II system as the instructor believed the Specialty Materials system was more likely a Class II system. The instructor referred the Complainant to a Massachusetts website containing regulations addressing the licensing requirements and also the criteria for rating waste water systems. Thereafter, he researched the state's website regarding the regulations about pre-treatment systems and found he could be fined $2,500 for operating the system without an active license. In addition, he knew that the company's system was unrated by the state. All these factors led him to believe that a violation of the regulation existed. On the basis of the information he possessed when he made his complaints, the Complainant's belief that the company may have been violating environmental regulations was reasonable.

The Complainant engaged in protected activity in three instances – the Complainant made a report to the State regarding the unrated system in his license application; the Complainant made a report to Mr. Pilioglos regarding his concerns that the license he was getting was inadequate to operate the plant system; and the Complainant made a report to Mr. Treasure regarding the same issues.

Beyond the complaint made to the State licensing entity which is clearly activity protected under the WPC Act, internal complaints are specifically recognized as protected activity because the employee is encouraged to first take environmental concerns to the employer to allow the alleged violation to be remedied without governmental interference. *Thakur v. State of New Mexico Environmental Dept. Construction Programs Bureau*, 1998-WPC-00005 (ALJ October 21, 1999) citing *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y Apr. 27, 1987). Such complaints also allow the employer an opportunity to justify or clarify its policies where the alleged violations are a matter of an employee's misconception. *Id.* citing *Ilgenfritz*, 1999-WPC-3, at 479; see also *Bostwick v. Springer & Associates, Inc.*, 2003-WPC-00009 (ALJ October 16, 2003); *Hager v. Noveon Hilton-Davis*, 2004-WPC-0004 (ALJ August 19, 2005). An informal complaint to a supervisor may constitute protected activity. *Passaic*, 992 F.2d at 480; *Clean Harbors*, 146 F.3d at 19.

Although the Complainant did not discuss with his supervisor the possibility of being fined, he did inform the supervisor that he had concerns regarding the license and the unrated system. Furthermore, the Complainant sent an email to Mr. Treasure on August 19, 2004, also expressing his concerns regarding the unrated system and the status of his license. In the email, Mr. Barry discussed the State regulation and that his belief that he could be fined $2,500 per day for working on a system without a valid license. *Id.* I find that the Complainant's internal communication to Mr. Treasure was protected activity.

B. Employer's Knowledge of Protected Activity and Adverse Action

An employee can present through either direct or circumstantial evidence that the employer had knowledge of his protected activities when it took the adverse action. *LeBron*, 2002-WPC-00002 (October 13, 2004) citing *Samdurov v. Gen. Physics Corp.*, 89-ERA-20 (Sec'y Nov. 16, 1993). Both require that "the evidence must establish that an employee of Respondent with authority to take the complained of action, or an employee with substantial input in that action had knowledge." *Id.* citing *Mosely v. Carolina Power & Light*, 94-ERA-23 (ARB Aug. 23, 1996).

The evidence indicates that the Respondent had knowledge of the Complainant's protected activity when it laid him off. Mr. Treasure had knowledge of Complainant's internal complaint to Mr. Pilioglos. In the email, Mr. Barry states that "[w]hen I mentioned to Steve [Pilioglos] that my current license I 'inactive' his reply was that 'this didn't stop me from working on the system'." CX 2. Through the Complainant's email, Mr. Treasure knew that the Complainant had discussed with Mr. Pilioglos the issues as to the license and unrated system. Furthermore, Mr. Treasure acknowledged receipt of the email sent to him on August 19, 2004 regarding the Complainant's concerns about the unrated system. During the meeting following his e-mail to Mr. Treasure, both the Complainant and Mr. Treasure relate that the Complainant's concerns regarding the pretreatment plant and the concerns with the Complainant's license were discussed. Accordingly, I find that the Respondent had knowledge of the Complainant's protected activity.

Shortly after the protected activity the Employer dismissed the Complainant. Therefore, I conclude that the Complainant has suffered adverse action.

C. Inference that Protected Activity was the Reason for Adverse Action

In order to establish that the Complainant's protected activity caused the Respondent's adverse action, he needs only to present a reasonable inference of such action. The Complainant's burden to present an inference of unlawful discrimination is not onerous. *Bostwick v. Springer & Associates, Inc.*, 2003-WPC-00009 (ALJ October 16, 2003) citing *McMahan v. California Water Quality Control Board, San Diego Region*, 90-WPC-1 (Sec'y Jul. 16, 1993). Causation may be inferred if an adverse action closely follows protected activity. *LeBron*, 2002-WPC-00002 citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). The closer the temporal proximity between the protected activity and the alleged retaliatory action, the easier it is to make an inference of causation. *Id.* citing *Blackburn v. Metric*

Constructors, Inc., 86-ERA-4 (Sec'y June 21, 1988) (holding four months between the complaint and the termination is a sufficiently short period of time to give rise to the inference). On the other hand, if a significant period of time lapses between the time Respondent is aware of the protected activity and the adverse action, the absence of a causal connection between the protected activity and the adverse action may be sufficiently established. *Id.* citing *Burrus v. United Tel. Co. of Kansas, Inc.* 683 F.2d 339 (10th Cir. 1982) (holding three years between the complaint and the termination is too long to give rise to an inference of retaliation).

The Complainant was laid off approximately one month after the email to Mr. Treasure and the August 20th meeting with Mr. Treasure, Mr. Kumnick, and Mr. Pilioglos regarding his concerns with the unrated waste water system and his license. The Complainant's protected activity and his termination are extremely close in time. Due to the temporal proximity of the termination, I find the evidence is sufficient to raise an inference of retaliatory discharge.

The Complainant has shown that he engaged in protected activity; that the employer had knowledge of the protected activity; that he experienced an adverse employment action; and that a reasonable inference of a nexus between his protected activity and the adverse action exists. I find that the Complainant has established his *prima facie* case under the WPC.

D. Respondent has presented a legitimate, business reason for Complainant's Discharge.

Once the Complainant has established a *prima facie* case, the Respondent may attempt to rebut by showing that it had a legitimate business reason for the dismissing the Complainant. The Respondent contends that a legitimate business reason exists for the Complainant's discharge. R. Br. 6. Specialty Materials was suffering financially and had to cut expenses. *Id.* The Complainant counters that even if the company needed to discharge some employees in order to cut costs, the timing of the layoffs suggests that a dual motive exists in terminating Barry. C. Br. 6. The Complainant further argues that Mr. Treasure must have at least considered Mr. Barry's complaint about the pre-treatment system issues when he decided which positions to eliminate. *Id.* In addition, the Complainant contends that Mr. Treasure and Mr. Pilioglos were "frustrated" and "annoyed" by Mr. Barry's complaints and his refusal to operate the system. *Id.* Hence, the Complainant asserts that if he had simply operated the Respondent's water treatment equipment without a valid license, the Company would not have terminated him. *Id.*

When both whistleblowing activities and legitimate, nondiscriminatory reasons could have motivated an employer's decision to terminate an employee, a "dual motive" may exist. Where other reasons besides retaliation may account for the employee's termination, the employer has the burden to prove by a preponderance of the evidence that it would have terminated the employee even if the employee had not engaged in the protected activity. *Passaic* at 481.

The Respondent produced evidence, which was not contradicted, indicating that the Company was losing money by the end of December 2003. In response to its declining financial state, in the Spring of 2003 the Company began working with a business consultant in order to develop a strategy to recover profits. The consultant recommended a series of actions for the company to implement, which included consolidating the facilities, cutting the costs of utilities, consolidating and reducing the work force and increasing prices.

Following the consultant's recommendations, Specialty Materials consolidated its operations from two buildings to one. Furthermore, the Company expected to cut the costs of utilities and merge the workforce by consolidating the buildings. The building consolidation process was completed in early September 2004. The Respondent also raised product prices beginning in August 2004. In addition, in July the Company told employees it was delaying raises and instituting a hiring freeze. The Company president spoke with employees again in August at the annual picnic and indicated that additional belt-tightening measures would be required. Despite these measures, the profit and loss sheet shows that the Respondent was still losing money at the end of August 2004. Reducing the workforce was the last strategy the Company considered in its efforts to regain its financial footing. However, when losses continued at the end of August, the Respondent determined that it was necessary to eliminate some positions, one of which was the Complainant's in order to achieve additional cost savings.

The preponderance of evidence clearly shows that the company had a legitimate business reason for Mr. Barry's termination. The Company had hired the consultant before the Complainant raised any issues regarding his concerns about operating an unrated system with an inactive license. The consultant discussed and made his recommendations as to how the Respondent could recover profits in the Spring of 2003, which is prior to the date that Mr. Barry made any of his complaints. Under these circumstances, the timing of the termination was consistent with the consultant's recommendation and the termination was the last of the recommendations to be implemented by the Company. Therefore, I find that the Respondent has satisfied the burden of presenting by a preponderance of evidence a legitimate, nondiscriminatory reason for the Complainant's discharge.

Even when the Respondent has provided a legitimate, business reason for the termination, the Complainant can nevertheless prevail if he shows that the business reason is merely pretext for the unlawful termination. At this stage, the Complainant has the ultimate burden of persuading the court that the reasons articulated by the Respondent are pretextual by a preponderance of evidence. The Complainant may meet this burden by showing that the protected activity more likely than not motivated the Respondent to take the adverse action or by showing that the Respondent's offered reason is not credible. *Kahn*, 64 F.3d at 278.

The Complainant argues that the Respondent's proffered business reason is merely pretext. Mr. Treasure and Mr. Pilioglos were frustrated with Mr. Barry and Mr. Treasure, at the very least, considered Mr. Barry's complaint when he decided to lay off people. C. Br. 6. The Respondent argues that the Company's business reason is not a pretext for the Complainant's discharge and that the company informed its employees about the financial situation. R. Br. 8. I find that the Complainant's pretext argument does not prevail.

I find that Mr. Treasure was initially concerned and unhappy that the Complainant wrote the e-mail message detailing his concern regarding the unrated waster water system and his inactive license, as I credit the Complainant's statements that Mr. Treasure was upset and swore during the meeting to discuss the e-mail concerns. However, despite any frustration he may have had, Mr. Treasure attempted to reassure the Complainant that the Company was not asking him to operate a system he was not authorized to operate on an inactive license. And in response to the Complainant's concerns, Mr. Treasure told him he did not have to operate the waste water system and he reassigned those duties to the plant manager. Apart from the issues raised by the Complainant, during the same period, Mr. Treasure had been working to improve the financial condition of the Company. The cost cutting efforts implemented throughout the summer of 2004 had resulted in some improvements in the Company's financial state, but not enough to avoid layoffs.

The Company is relatively small and employs under 35 people in three divisions. In determining which positions to eliminate, Company president Treasure denied that he factored in the Complainant's concerns about the waste water treatment system. Mr. Treasure stated that he identified positions not involved in production and positions whose duties could be shared by other people or positions, or eliminated entirely. Three positions were identified for layoff or termination, one from each division, i.e., research and development, sales, and facilities.[3] The salaries of the three employees identified for dismissal amounted to approximately a quarter of a million dollars. In addition to the Complainant's position, two other positions were eliminated. The Complainant's position was eliminated because two other employees who were on the production side of the business, the assistant plant manager Smith and the plant manager Pilioglos had performed the facilities work before Speciality Materials was sold to its current owner, and they could take over those functions and eliminate some of the duties the Complainant had performed. Currently, Mr. Pilioglos and Mr. Smith handle the facilities department work, and no new employees have been hired to the facilities division. Therefore, I find that the decision to eliminate the Complainant's position was consistent with the stated purpose and process used in identifying positions whose job duties could be a shared with or picked up by other employees.[4] Additionally, two other

[3] Although three positions were identified, the boss of the research and development individual initially dentified for removal stated that he was thinking of retiring and, if the Company had to downsize, he would retire. TR 110-111. Even though the original research and development division employee slated for removal was retained, his boss retired in his place and the Company shed three positions.

[4] The Complainant argues that he was not given a reason to suspect his position was in jeopardy. Although Speciality Materials did not explicitly warn the employees about the possibilities of layoffs, the Respondent did inform employees that the Company was losing money, and that raises were delayed and hiring frozen in a memo which was included with paychecks in July and posted on the Company bulletin board. Later, in August, the Company told employees that its efforts to regain profitability had not been sufficient and additional belt tightening was necessary. Although I credit Mr. Barry's testimony that he did not think layoffs were coming, I cannot credit his testimony that he was not aware of the impact the poor financial condition and the efforts management was taking to reduce costs would have on the Company. The Complainant was aware and was involved in the Company's efforts to consolidate its physical facilities. He received the memo included with paychecks in July 2004. The Respondent provided its employees with information about its financial situation. Mr. Barry should have, at a minimum, understood that the Company's financial situation was troubled.

positions were also eliminated at the same time as the Complainant's and there is no evidence that either of those employees had engaged in protected activity. Accordingly, I conclude that the Complainant has not demonstrated that the Respondent's legitimate business reason for his discharge, its poor financial condition, was a pretext. Therefore, I find that the Respondent did not violate the employee protection provision of the Federal Water Pollution Control Act.

VI. ORDER

It is recommended that the complaint of Arthur Barry against Specialty Materials, Inc. Based be **DISMISSED**.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts
CAG:dr

NOTICE OF APPEAL RIGHTS

To appeal you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, D.C. 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes