U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 July 2006

Case No.: 2005-ERA-00008

In the Matter of:

MICHAEL BACKUS
Complainant

v.

INDIANA MICHIGAN POWER COMPANY
Respondent

APPEARANCES:

Donn C. Meindertsma, Esquire
For the Complainant

John T. Burhans, Esquire
For the Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises out of a complaint of retaliatory discharge filed pursuant to Section 211 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. Section 5851, *et seq*. The implementing regulations are found at 29 C.F.R. Part 24. The ERA affords protection from employment discrimination to employees of Nuclear Regulatory Commission ("NRC") licensees who engage in activity that effectuates the purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2011, *et seq*. Specifically, the law protects so-called "whistleblower" employees from retaliatory or discriminatory actions by the employer. 42 U.S.C. § 5851(a)(1).

Michael Backus ("Complainant"), represented by counsel, appeared and testified at the formal hearing held September 26, 2005 in St. Joseph, Michigan. I afforded both parties the opportunity to offer testimony, question witnesses and introduce evidence. [1] Both parties were given the opportunity to submit post-hearing briefs, and thereafter, I closed the record. I based the following findings of fact and conclusions of law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered.

STATEMENT OF THE CASE

Procedural History

Complainant worked as a maintenance mechanic for Respondent between 1987 and his termination on May 12, 2004. (Tr. at 693-94). Complainant filed a complaint with the Department of Labor in July of 2004, alleging that his termination violated the employee protection provisions of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851. (ALJX 1). After obtaining counsel, he filed an amended complaint on August 13, 2004. (ALJX 2). The Occupational Safety and Health Administration ("OSHA") investigated the complaint and on January 26, 2005, issued a recommendation of dismissal, which Complainant timely appealed on January 27, 2005. (ALJX 3, 4). Subsequently, the claim was transferred to the Office of Administrative Law Judges. (ALJX 5).

Complainant contends that he engaged in protected activity three separate times. He alleges that on May 4, 2004, he informed his supervisor that he would not work the ordered overtime hours because they were unreasonable and unsafe. As a result, Complainant did not report for duty. Then on May 6, 2004, the company held a fact-finding meeting where Complainant asserts that he argued again that the overtime hours were unreasonable and unsafe. Last, on May 7, 2004, Complainant asserts that he raised the same safety concerns again during a telephone conversation with a manager of Respondent. Complainant argues that as a direct result of his failure to work due to his safety complaints, he was terminated by Respondent. Complainant asserts that his termination amounted to a discriminatory action for his engagement in protected activity.

Respondent counters that Complainant did not engage in any protected activity and furthermore, that Complainant's termination stemmed from his failure to report for an overtime assignment. Respondent argues that Complainant was terminated for insubordination and that it was in no way related to the issue of safety.

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[1] The following citations to the record are used herein:

ALJX – Administrative Law Judge Exhibit; JX – Joint Exhibit; CX- Complainant Exhibit; RX--Respondent Exhibit; and, TR – Transcript of the hearing

Issues

1. Whether Complainant engaged in protected activity under the ERA;

2. Whether Complainant thereafter was subjected to adverse action regarding his employment;

3. Whether Respondent knew of the protected activity when it took the adverse action;

4. Whether the protected activity was the reason for the adverse action; and

5. What damages, if any, Complainant is entitled to because of the retaliatory actions taken by Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

To establish a *prima facie* case of unlawful discrimination under the environmental whistleblower statutes, a complainant needs only to present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination. As the Secretary and the Administrative Review Board have noted, a preponderance of the evidence is not required. *See Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 1 n. 7 (ARB May 30, 2003). A complainant meets this burden by showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in protected activity under the statute of which the employer was aware, that the complainant suffered adverse employment action and that a nexus existed between the protected activity and the adverse action. *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995).

Once a complainant meets his initial burden of establishing a *prima facie* case, the burden then shifts to the employer to simply produce evidence or articulate that it took adverse action for a legitimate, nondiscriminatory reason: a burden of production, as opposed to a burden of proof. When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, the rebuttable presumption created by the complainant's *prima facie* showing "drops from the case." *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 255 n.10 (1981). At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Thus, after a whistleblower case has been fully tried on the merits, the administrative law judge does not determine whether a *prima facie* showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity. *Williams*, slip op. at 1 n. 7.

If Complainant proves by a preponderance of the evidence that a retaliatory or discriminatory motive played at least some role in the respondent's decision to take an adverse action, only then does the burden of proof shift to the respondent employer to prove an

affirmative defense and show that the complainant employee would have been terminated even if the employee had not engaged in protected activity. *Lockert*, 867 F.2d at 519 n. 2. Congress has specifically placed a higher burden on the employer in an ERA case in such circumstances, i.e., to demonstrate by "clear and convincing" evidence that it would have nevertheless taken the same action. 42 U.S.C.A. § 5851(b)(3)(D); *Schlagel v. Dow Corning Corp*., ARB No. 02-092, ALJ No. 01-CER-1 (ARB April 30, 2004).

Summary of the Evidence

Credibility Determinations

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence, while analyzing and assessing its cumulative impact on the record. *See, e.g., Frady v. Tennessee Valley Authority*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995) (*citing Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony. *See, Altemose Constr. Co. v. National Labor Relations Board*, 514 F.2d 8, 15 n. 5 (3d Cir. 1975).

Credibility is that quality in a witness which renders his evidence worthy of belief. For evidence to be worthy of credit,

> [it] must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it.

Indiana Metal, 442 F.2d at 52. Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses and gathered impressions as to their demeanor. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses. Probative weight is granted to the testimony of all witnesses found credible.

The transcript of the hearing in this case is 1,810 pages, comprised of the testimony of twenty-two different witnesses. After reviewing the testimony, I have found that all the witnesses are credible; however, there are instances where I have found their testimony either irrelevant or unsupported and I will discuss these findings as I rely upon the testimony in my analysis.

A. Complainant's Hearing Testimony

In 1987, Michael Backus started working for Respondent as a Maintenance Mechanic C. (Tr. at 693-94). He then progressed to a Maintenance Mechanic B by working through rotations with different departments and obtaining qualification cards. He finally advanced to an A mechanic in the early 1990s by completing more time and training. (Tr. at 694-95). Complainant was a Maintenance Mechanic A when he was terminated on May 12, 2004. (Tr. at 695-96). He testified that prior to his termination he had never been disciplined, except for a letter in his Personnel file in the late 1980s for carrying a gun in his truck on site. (Tr. at 697). Complainant equated the incident to a misunderstanding. He worked for Respondent for twenty-two years and performed his job well. (Tr. 913).

Complainant performed mechanical work on all kinds of systems, structures, and components at the plant.[2] (Tr. at 696). He was also responsible for performing pre-job briefs which were held prior to the performance of job activities in a contaminated area in order to keep radiation exposure low. (Tr. 701-03). The crew supervisor and the members of the crew were present during the briefings. (Tr. at 702-03). At the start of a job, a supervisor was assigned and the clearance used to tag and make the equipment safe to work on was received in order to ensure no harm would come to the workers or the equipment. (Tr. at 703-04). The clearance is addressed in the walk-down process prior to putting the job on the schedule.[3] (Tr. 704). On May 4, 2004, Complainant was working on the condensate booster pump discharge valve check. (Tr. at 703). The most important tag-outs were the pump, its power source, and its flow chart. (Tr. 704). Then the valve would be taken apart and isolated. (Tr. at 704). Complainant stated that the procedures had to be followed step-by-step as written and that each step had to be signed off before moving to the next step.[4] (Tr. at 705). The procedures for the discharge check valve were extensive and filled a 1.5 inch binder. (Tr. at 706). Complainant stated the work on the check pump started on May 3, 2004. (Tr. at 706, 708).

David Luther was Complainant's supervisor. (Tr. at 712). Complainant testified that his ordinary work schedule was day shift from 7:30 a.m. to 4:00 p.m. Monday through Friday. (Tr. at 707). He stated that he usually went to bed around 10:00 or 11:00 p.m. and arose at least an hour and-a-half before his shift started. (Tr. at 708). He normally did not work on Saturdays or Sundays and this included the Saturday and Sunday prior to May 3, 2004. (Tr. at 707). However, on May 3, 2004, Larry Woods, maintenance supervisor, approached Complainant about working voluntary overtime on the check valve from midnight to 7:00 a.m. on May 4, 2004. (Tr. at 708-09). Complainant declined the overtime.

On May 4, 2004, Complainant reported for work at 7:30 a.m. and was paid overtime for working through his lunch. (Tr. at 710-11). He was approached in the early afternoon by Dewayne Timmons, maintenance supervisor, about working overtime on a night shift from 10:30

[2] Complainant admitted Respondent's maintenance mechanical shop expectations as CX 5 for the purpose of describing his duties as of April 2002. (Tr. at 702).
[3] *See* CX 5 No. 9.
[4] *See* CX 5 No. 6.

p.m. to 7:00 a.m. on a volunteer basis. (Tr. at 711-13, 715). He accepted the overtime assignment because he would be off the next day after working sixteen hours in a twenty-four hour period. (Tr. at 713). Complainant stated that an employee who worked sixteen hours in a twenty-four hour period was entitled to an eight-hour rest period.[5] (Tr. at 713-14). Complainant testified that he interpreted this to mean that management had no discretion to deny a rest period to him since he would be working sixteen hours within a twenty-four hour time frame. (Tr. at 714). He did not discuss the rest period with Mr. Timmons when volunteering because he assumed he would receive a rest period. (Tr. at 715). However, Mr. Timmons later informed Complainant that the start time was changed to midnight and as a result, he would not be entitled to a rest period. (Tr. at 715-16). Complainant then declined the voluntary overtime. (Tr. 716).

Complainant argued that management had manipulated the start time of the shift to avoid giving a rest period and rest pay. (Tr. at 716-17). However, he was unaware of anyone in management who was trying to figure out which employees would receive rest pay and which were not. (Tr. 953). He testified that he also stated that he believed the overtime shift was unsafe and unreasonable. (Tr. 716-17). He stated that management chooses from two groups of mechanics to perform overtime, those on the day shift and those on the afternoon shift. (Tr. at 956). When management sets up the overtime, they don't know who will get rest pay and who will not because it depends on who worked through lunch and who did not. (Tr. at 956). Complainant alleged that management was trying to avoid the sixteen hours in a twenty-four hour situation so they could still cover the day shift. (Tr. at 957-58). Management chooses how overtime is configured. (Tr. at 958-59). Complainant alleged that in the past he has suggested alternatives of four-hour overtime shifts to whoever was willing to listen. (Tr. at 959). He contended that management changed the start time of the night shift so that there would be an eight-hour block of time between the end of the day shift and the beginning of the night shift so people would be forced to work their day shift following the overnight overtime shift. (Tr. at 960). However, Complainant testified that he believes that someone in management was trying to deprive him of rest pay. (Tr. at 960).

Complainant was ordered to perform the overtime shift on May 5, 2004. (Tr. at 717). He testified that the shift time change required him to work his regular shift, then go home at 4:00 p.m., return at midnight and then work until 4:00 p.m. the next day. (Tr. at 717). Complainant stated that he did not feel capable of performing the long shifts. (Tr. at 717). He had previously worked double shifts in the past and stated that by the time a sixteen-hour shift was over, he was fatigued and tired. (Tr. at 718). However, Complainant agreed that during that week he had worked a normal schedule, was in good health, was not taking any medication and did not have any physical ailments. (Tr. 965). Complainant testified that Mr. Timmons informed him that he was required to work the overtime. (Tr. at 719). Complainant agreed that Mr. Timmons followed the proper procedures for ordering overtime. (Tr. at 719, 997). His name was included on the list of individuals to force into overtime on the "call-out" sheets.[6] (Tr. 996). However, he disputed whether he should have been the first person on the "call-out" list to be forced into the overtime. (Tr. at 996).

[5] *See* JX 18.
[6] *See* JX 20 and CX 6.

Complainant and Mr. Timmons had several conversations regarding the overtime request. (Tr. at 721). He said that Mr. Timmons told him that he was being forced to work and that he responded by telling Mr. Timmons the overtime hours were unreasonable, unsafe and he could not work them. (Tr. at 721). Complainant testified that he told Mr. Timmons to do whatever he had to do, but that he would not work the shift. (Tr. at 721). He said that he was trying to give Mr. Timmons a "heads up" that he was quite adamant about the changes in time in order to avoid giving a rest period. (Tr. at 722). Complainant understood that he was required to come in and work the overtime. (Tr. 977). He stated that he informed Mr. Timmons he was forty-two years old and that he believed the shift would have been unreasonable for anyone of any age, even Carl King. (Tr. at 979). He asserts that his concern was that he was being told to work an unreasonable amount of hours and that it was unsafe. (Tr. at 980). Complainant testified that he thought it was unsafe because he might not be totally coherent during the course of the shift, and as he told the NRC, he would not be up to snuff. (Tr. at 980). At no point did Complainant tell Mr. Timmons that he was not fit for duty. (Tr. at 975). However, in his rebuttal testimony he stated that he believed the company was not abiding by its fitness-for-duty policies in ordering the overtime. (Tr. 1782). He had reported for work at midnight before and stated that it was not a particularly unusual requirement. (Tr. at 975-76). Complainant agreed that he was loud at times during his conversations with Mr. Timmons but said he was never unprofessional or belligerent. (Tr. at 722). He has never asserted that Respondent needs to change its fitness-for-duty policy, its work hour limitations or its regulations. (Tr. 982-83).

The union contract requires Respondent to pay for a rest period if over sixteen hours are worked in a twenty-four hour period. (Tr. at 723). Complainant testified that, although he was concerned about rest pay, he was mainly worried about being off the next day. (Tr. at 722-23). He believed that he would not be entitled to a rest period if he worked the overtime configuration Mr. Timmons was ordering. (Tr. at 723-24). Complainant testified that he kept track of his own work hours by entering his time into the computer on a daily basis. (Tr. at 766). He worked eight hours on May 5, 2004, the day shift on May 6, 2004, and one-and-a-half hours of overtime on third shift. (Tr. 760-61). He also volunteered for eight and-a-half hours of overtime on Friday, when it was requested by Mr. Timmons. (Tr. at 761). Complainant was paid for eight and-a-half hours on May 4, 2004, because he worked through lunch, but if he taken a lunch, he would have only worked eight hours. (Tr. at 768-69). Therefore, if Complainant had come in at midnight and worked until 7:30 a.m. the following morning, he would have been entitled to a rest period. [7] (Tr. at 770). He did not realize this until after he failed to show up for the overtime. (Tr. 726). Generally there is no lunch schedule on overtime. (Tr. at 770). Complainant testified that Mr. Timmons never asked him how many hours he had worked. (Tr. at 771).

Complainant was directed by Mr. Timmons to report for overtime at midnight. (Tr. at 737). However, he told Mr. Timmons that he would not be in at midnight and went home. (Tr. 989). He left the plant around his normal quitting time at 4:00 p.m. (Tr. at 738). He thought that the break between 4:00 p.m. and midnight was not really a rest period because it's his normal time to be awake. (Tr. at 739). Complainant stated that he could have come back and worked another eight-hour shift, but not a sixteen-hour shift. (Tr. at 739). He lived about one-half-hour from the plant and owned a farm. (Tr. at 740). He stated that he was a hobby farmer

[7] JX 54 is a copy of Complainant's timesheet.

and had farm chores to do when he got home. (Tr. at 740). However, he did not tell Mr. Timmons that he had farm chores to do. (Tr. 740). Complainant failed to show up for the overtime assignment on May 5, 2004. He reported for work at the start of his next shift on May 5, 2004, and again worked on the check valve. (Tr. at 756). He claimed to voice his opinions regarding the overtime to Joe Giuffre, the maintenance manager leading the morning meeting. (Tr. at 757). Complainant stated that Mr. Giuffre's reaction was very negative which Complainant attributed to Mr. Giuffre's problems with rest pay. (Tr. at 758).

Complainant agreed that he had refused overtime on many other occasions. (Tr. at 741). He recalled refusing overtime for supervisors Melba Hughes and Brett Taylor, but stated he was never disciplined for the refusals. (Tr. at 743). He stated that he had no problems with working overtime and that he had a good attitude toward it. Although his attitude toward overtime has diminished some in recent years, the amount of overtime he has worked has not changed. (Tr. at 744-45). Complainant stated that he would get paid time and-a-half for working overtime, and when he worked his second day off, he would get paid double time. (Tr. at 745). Complainant was listed as having 1,169 hours of worked and refused overtime.[8] (Tr. at 746-47). The union agreement states that an employee shall make him/herself reasonably available for overtime as a condition of employment.[9] (Tr. at 748-49). Complainant testified that he believes he made himself reasonably available for work on May 4, 2004 and May 5, 2004, because he agreed to work the overtime portion of the shift which he thought was reasonable. (Tr. at 749). He stated that no definition for "reasonably available" actually exists and that Respondent never provided him with a definition. (Tr. at 749-50). However, he testified that he would have been fit for duty had the shift started at 10:30 p.m. instead of midnight. (Tr. 921). He stated that he made himself available for the overtime and that he made a determination of whether he could accept or reject the forced overtime on May 4, 2004. (Tr. at 750). Complainant had worked sixteen-hour shifts before. (Tr. 925). At the time of his refusal, Complainant was aware of other employees who had refused to work overtime, which he states sets a precedent of accepting overtime refusals. (Tr. at 750-51).

Complainant testified that he did not think the company had the right under the collective bargaining agreement to force him to work the overtime. (Tr. at 918-19). He agreed with Mr. Scally that the company had no language pertaining to forced overtime. (Tr. at 919). He stated that the contract referred to reasonable availability for overtime, and he believed that the un-safeness of the hours caused the overtime to be unreasonable. (Tr. at 919-20). Complainant did not think he would be disciplined for his refusal to work the forced overtime because the contract does not use the word "forced." (Tr. at 920). He stated that he refused to work the overtime because it was an unsafe and unreasonable task that he was being asked to perform. (Tr. at 920). He read from his deposition testimony that stated part of his reason for refusing to work was that he was trying to protect the union rights under the contract. (Tr. at 921).

Complainant agreed that some other mechanics had volunteered or were forced into working the overtime. (Tr. 905-06). He testified that some of them worked the full sixteen hours in a row and some were unable to complete the work, including Mr. Bates. (Tr. 906). He also agreed that some of the workers received a rest period while some that had only worked

[8] *See* CX 6 Respondent's employee overtime list.
[9] *See* JX 8 p. 14 Sec. 6A

fifteen and-half hours did not. (Tr. 906). Complainant stated that, out of all the mechanics forced to work the overtime, he was the only one who refused to work and who did not show up. (Tr. 906-07). Complainant testified that Bob Maggard, another mechanic, also started at 7:30 a.m. on May 4, 2004, the same time as he did. (Tr. at 907). He stated that they both went home at 4:00 p.m. and both worked eight hours. (Tr. at 908). Mr. Maggard then returned at midnight and worked seven and-a-half hours, then went home and received rest pay. (Tr. at 908). He also testified that while he slept through midnight, Messrs. McKelvey, King and Bates all came in to work. Complainant agreed that Mr. Bates would never work on equipment while fatigued or knowingly leave equipment in an unsafe condition. (Tr. at 994). He stated that even though Mr. Bates became tired during his shift and had to leave, he did not believe that would necessarily happen to him. (Tr. at 994-95). Mr. Bates never told Complainant that he had worked on safety-related equipment while fatigued. (Tr. at 995-96).

Complainant stated that as of the week before the hearing, he learned he would have gotten rest pay had he reported to work. (Tr. at 908-09). He stated that he was told he was not going to get a rest period. (Tr. at 909-10). However, Complainant agreed that his assumption that he was not going to get rest period was incorrect. (Tr. at 910). Complainant agreed that had he told Mr. Timmons that he had worked sixteen hours in a twenty-four hour period, he would have received rest pay. (Tr. at 910-11). He was well aware that he had worked through lunch but did not bring this to Mr. Timmons' attention. (Tr. at 911). He stated that Mr. Timmons could have found out that he had worked through lunch if he had already filled out his timesheet, but acknowledged that he was not sure when he filled out his timesheet that day. (Tr. at 912). Complainant also failed to tell Joe Giuffre that he had worked through lunch. (Tr. at 913).

Complainant testified that he was trained to talk to his supervisor when assigned an unsafe task. (Tr. at 985). He stated that the goal in raising an issue with a supervisor is to revise the task to make it safer. (Tr. 985). He has successfully raised safety issues in the past which he has gotten resolved. (Tr. at 985). Complainant was never disciplined for raising those issues. (Tr. at 985). He neither spoke with Messrs. Luther, Giuffre, Rollins nor Finnisi regarding his concerns about the shift time on May 5, 2004. (Tr. at 986). He knew that Mr. Luther was the supervisor asking him to perform the overtime, and that he was in fact his supervisor. (Tr. at 987). Complainant knew that Mr. Timmons did not set the schedule because his boss had set the shift expectation. (Tr. at 988). He assumed that Mr. Timmons' boss was Mr. Giuffre. (Tr. at 988-89).

Respondent requested Complainant's attendance at a fact-finder meeting in order to determine Complainant's reasoning for failure to report for overtime.[10] (Tr. 776). Donna Kelly, Respondent's human resources administrator, David Luther, Complainant's front line maintenance supervisor, and Billy Scally attended the meeting. (Tr. at 762, 776). Complainant stated that he had no idea he might be disciplined as a result of the fact-finding meeting. (Tr. at 1002). He acknowledged that he was glad the meeting occurred because it gave him an opportunity to say what he thought about the whole situation. (Tr. at 1003). At the beginning of the meeting, Mr. Luther asked Complainant a prepared set of questions and Complainant interrupted him to ask where Respondent's authority to force him to work comes from. (Tr. at

[10] A more detailed description of the meeting is discussed below in the fact-finder meeting section and the meeting transcript is located at JX 21.

1003). He wanted to know what grounds the company was using to force him to work. (Tr. at 1003-04). The contract did not contain the word "force," and he wanted Mr. Luther to define the term used by Mr. Timmons. (Tr. at 1004, 1015-16). He then asked what guidelines were used to force him to come in for overtime. (Tr. at 1005). Complainant knew of overtime guidelines used by the company. (Tr. at 1005). As of May 6, 2004, he believed that because a new contract had been negotiated, there was a stipulation that the original overtime guidelines were null and void. (Tr. at 1006). He then stated that he believed that Respondent had no contract or procedural authority to force him, as a mechanic, to work overtime. (Tr. at 1006). He stated that if overtime was scheduled, past practice dictated notification by hard copy and because there was no hard copy, this was not a scheduled overtime but a block of hours. (Tr. at 1007-08). Complainant agreed that he was forced to come in, not that he was forced for overtime. (Tr. at 1008-09).

Complainant stated that during the meeting he informed the participants that he was not physically capable of working the number of hours the overtime assignment required, which he testified meant that he did not feel it was safe for him to perform the assignment. (Tr. at 791-92, 1012-13). He testified that he expressed his concerns by saying that the assignment and the block of hours he was asked to work was unsafe, not that any particular safety violation would occur. (Tr. at 1021, 1022). He never indicated that any particular procedure was not being followed or that a piece of equipment was in an unsafe condition. (Tr. at 1022). He stated that he continued to believe that he made himself available for overtime by saying that if there was a drastic need for people, he would work. (Tr. at 792). Complainant agreed that he told Mr. Timmons to make whatever provisions necessary to staff the shifts because he was not going to report for the overtime at midnight. (Tr. at 793). However, Complainant was upset with the fact that Mr. Luther failed to address the working hour limitations and whether the overtime was safe at the meeting. (Tr. at 795). Complainant testified that during the meeting he consistently informed the participants that he refused the overtime because it was unreasonable and unsafe. (Tr. at 796). He then stated that he was upset with the overtime change because Mr. Timmons told him that the shift was moved back one-half hour to avoid rest pay, which Complainant stated was unsafe. (Tr. at 796). Complainant further testified that during the meeting Mr. Luther and Ms. Kelly neither responded to his concerns about safety, nor did anyone from Respondent ever respond to his safety concerns before he was terminated. (Tr. at 797, 799). Complainant stated that neither he nor anyone else at the meeting raised the number of hours that he had actually worked as an issue and no one discussed whether the hours entitled him to a rest period. (Tr. at 799). No one discussed his time sheets during the fact-finding investigation. (Tr. at 802). Complainant testified that during the meeting Mr. Scally made the comment "we believe we are the safety buffers for the community" and no one responded. (Tr. at 802-03). Complainant then stated that he argued at the meeting that if he fell asleep on the job, he could be disciplined and could put safety at issue. (Tr. at 803). He stated that Mr. Scally also informed Ms. Kelly and Mr. Luther that if he had worked the overtime he would have been awake for thirty-two hours straight and as a result, public safety would be at risk. (Tr. at 804). Complainant testified that he consistently argued that the rest pay was not an issue and that his only concern was rest time. (Tr. at 805-06).

Mr. Scally attended the meeting to represent Complainant as a union steward as entitled under labor laws in case the meeting led to discipline. (Tr. at 1002). Complainant stated that he

spoke briefly with Mr. Scally about the meeting beforehand, but stated that Mr. Scally knew very little about the factual circumstances prior to the meeting. (Tr. at 1005). During the meeting, Mr. Scally argued on Complainant's behalf. (Tr. at 1016). Complainant agreed that Mr. Scally stated that if Complainant came in at midnight, he would only have fifteen and-a-half hours of work, which would keep the company from paying rest time.[11] (Tr. at 1016, 1017). Complainant did not believe he told Mr. Scally how he felt before the meeting. (Tr. at 1016). Mr. Scally argued that Respondent changed the overtime start time to avoid paying rest pay. (Tr. at 1018).

After the meeting, Complainant was placed on suspension starting Monday, May 10, 2004. (Tr. at 800). He was informed of his suspension by telephone on Friday morning, May 7, 2004. (Tr. at 801). Complainant was then terminated on May 12, 2004. (Tr. 727). Complainant's discharge notice stated failure to report for an overtime assignment as the reason for his termination.[12] (Tr. at 751). Complainant agreed that the Employee Handbook provided for termination of an employee for refusal to work overtime employment without a satisfactory excuse. (Tr. at 751-52). He argued that his actions were not insubordination.[13] Complainant refused to sign his discharge paper because it stated he was being terminated for failure to report for an overtime assignment. (Tr. at 753). He claims that he made himself available for the overtime, but refused to work a forced set of hours he thought were unsafe and unreasonable. (Tr. at 753). He continues to argue his actions were not insubordination. (Tr. at 753). Complainant stated that Respondent has never provided employees with a list of acceptable reasons for refusing overtime. (Tr. at 755). Complainant testified that in his opinion there are many acceptable reasons for refusing forced overtime. (Tr. 755-56). He believed that the hours he was being forced to work were unsafe and unreasonable, which to him were justifiable reasons for refusing the forced overtime. (Tr. at 755-56). He asserts that neither Mr. Giuffre nor Mr. Luther ever told him that he was being terminated for insubordination. (Tr. at 756). Complainant testified that, after the fact-finding meeting but before his termination, he raised the issue of safety during a phone conversation with Ms. Kelly. (Tr. at 808-09). He testified that he informed her that he refused a shift that was unreasonable and unsafe, not an overtime assignment. He also stated that after he was terminated he discussed his safety concerns in three union grievance responses and during arbitration. (Tr. at 811). However, Complainant testified that he agrees Respondent terminated him for his refusal to work, and that Respondent had no reason to terminate him. (Tr. 915, 916).

Complainant stated that while employed with Respondent he focused on personnel, industrial, nuclear and radiological safety. (Tr. at 928-29). He cited safety as a top priority and stated that it was always on his mind. (Tr. at 929). He believes his fellow workers and supervisors viewed him as a safe worker. (Tr. at 929). Complainant claims that he was fired for raising a safety issue. (Tr. at 929). However, he stated that being safety conscious is a very important thing at the plant, which is drilled into the workers as the number one priority. (Tr. at 929-30). He understood as of May 4, 2004, that a worker must always be fit for duty to ensure

[11] However, it has already been established that this was a misunderstanding. Complainant actually would have had sixteen hours because he worked through lunch.
[12] *See* JX 10 p. 1663 (Complainant's termination notice).
[13] The Employee Handbook provides that insubordination is a terminable offense. (JX 7, No. 25). However, Complainant argues that No. 25 was never cited as a reason for his termination. (Tr. 752-53).

work was performed safely. (Tr. at 930). He believed that he had never worked when he was unfit for duty. (Tr. at 931). Complainant was trained annually on the plant's fitness-for-duty policy.[14] (Tr. at 931). He understood that under the policy, a worker should not work while fatigued. (Tr. at 932). Complainant testified that he was unaware of any instance where another worker reported for work at the plant when he was unfit for duty. (Tr. at 933). Complainant argued that he had previously declined an overtime assignment based on fitness-for-duty and was not disciplined. (Tr. at 934). However, he did not state whether this was a forced overtime situation. He had also worked on previous occasions, had become too ill to continue and was allowed to go home. (Tr. at 934). Complainant knew that the proper thing to do when becoming fatigued at work was to report it to a supervisor according to the policy. (Tr. at 934). The supervisor would then evaluate the employee and take necessary steps, including sending him home or finding him a way to get home, but the employee would not continue working. (Tr. at 935). The policy does not limit an employee to only an eight-hour rest period; it provides very broad protection from having employees working while they are fatigued. (Tr. 950).

During his testimony, Complainant agreed that it's not necessarily unsafe to have a mechanic work sixteen hours. (Tr. at 990-91). He testified that he could safely perform up to nineteen hours of work depending on the circumstances. (Tr. at 991). Complainant was never required to work hours that violated the work-hour limitations at the plant. (Tr. at 991). He agreed that the great majority of overtime at the plant is on a voluntary basis. (Tr. at 991). No NRC regulation limits work to twenty-four hours in a thirty-two hour period. (Tr. at 991-92). The NRC regulations permit twelve hours in a twenty-four hour time period as stated by Mr. Simons, but they also permit working sixteen hours within twenty-four hours. (Tr. at 992). Complainant stated that there was nothing illegal about what Respondent asked him to do on May 4-5. (Tr. at 992).

Complainant then argued that under the collective bargaining agreement Respondent needed just cause to terminate him. (Tr. at 816). He went on to state that just cause first requires notice, which requires Respondent to provide an employee forewarning or foreknowledge of the possible or probable consequences of the employee's conduct.[15] (Tr. at 819). Complainant testified that he was never given notice that refusing an overtime assignment could lead to termination. (Tr. at 819). He urged that the hours he was directed to work would affect the efficient and safe operation of the Respondent's business, which would contravene the second prong of just cause. (Tr. at 821). Complainant testified that he did not believe the employer's investigation was conducted fairly and objectively. (Tr. at 822). Furthermore, he stated that he did not believe the Respondent applied its rules, orders and penalties even-handedly and without discrimination because there were other employees who had done the same thing and were not disciplined. (Tr. at 822-23). He contends that he was fired for refusing to work a block of hours that he believed violated fitness-for-duty. (Tr. 1793).

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[14] Complainant received fitness-for-duty training on March 8, 2004, as evidenced by JX 12 p. 323. (Tr. at 931-32).

[15] *See* JX 8, p. 1601. Complainant also filed union grievances against Respondent. These grievances were settled by an arbitrator, who found no merit to Complainant's arguments. The arbitrator even found that Complainant did not raise a safety concern when he refused to work the overtime shift. However, although the arbitrator found Respondent had every reason to discipline Complainant, since he was not provided with notice that his actions could lead to termination, the arbitrator ruled that the punishment was too harsh. Therefore, Respondent was ordered to reinstate Complainant. *See* Complainant's post hearing brief Exhibit A. The findings of the arbitrator are not binding on this Court, for different legal standards apply.

Complainant was a member of the bargaining committee during the union negotiations with Respondent. (Tr. at 729). Complainant testified that Respondent wanted to eliminate the rest period clause in the new contract. (Tr. at 730). He also took part in the negotiations of the first contract in 1999, and stated that at that time the rest period language came directly from the Employee's Handbook.[16] (Tr. at 730-31). Complainant believed that Respondent had suggested the rest period language be included in the first collective bargaining agreement. (Tr. at 732). However, Complainant argued that during the bargaining for the current contract, Respondent had a change of heart and wanted to remove the rest period provisions. (Tr. 733). The union countered with the argument that there were forty-one condition reports where there had been a violation or misuse of the working hour limitation policy. (Tr. at 733). The rest period language remains in the contract. (Tr. 33).

Complainant also addressed the corrective discipline recommendation form which stated he informed his supervisor that he would not be fit for duty, not well rested and would not report for the overtime assignment at midnight.[17] (Tr. at 832-33). He testified that the document failed to say anything about the safety or unreasonableness concerns he raised in the fact-finding interview. (Tr. at 833). The document had a recommended action of termination and a supporting statement identifying other occasions when Complainant had acted unfavorably. The form indicated Complainant's reluctance to participate in the Maintenance Performance Evaluations and his refusal to get recertified as a OJT/TPE evaluator and to perform activities as an OJT/TPE evaluator. (Tr. at 835). Complainant disagreed with these statements.

Complainant argued that he did not want to go through the recertification process because he thought the process would discipline employees who fail to qualify twice in a row. (Tr. at 836-37). He believed that there was still an issue as to whether being a TPE evaluator was a provision of his employment. (Tr. at 837). Complainant then stated that he and another co-worker had a "passionate" meeting with Mr. Giuffre on March 10, 2004, about their fear of being involved in what could lead to the discipline of a fellow mechanic. (Tr. at 838-39). Complainant testified that when he expressed his views, it was explained to him that he was not the evaluator; he was to provide training to those of a lesser level than he was and that a review board and the Union would be involved in the person's remediation, so he continued his certification.[18] (Tr. at 839). Complainant urged that he never refused to re-qualify but that he did express reluctance. (Tr. at 843). The resolution of the meeting was that Complainant re-qualified. (Tr. at 843-44).

Since his termination, Complainant has been self-employed in a small excavating business called Mike's Bobcat and Backhoe Service. He earns less money than he did at Respondent. (Tr. at 727-28). He testified to making close to $90,000 a year while working at the Respondent's plant. (Tr. at 728). He stated that he enjoyed his job and took pride in his work. (Tr. at 728). Complainant received unemployment insurance following his termination but received no severance pay. (Tr. at 872). Complainant asserts that as a result of his termination he has suffered numerous economic and compensatory losses as well as emotional distress. Complainant testified that he does not regret the decisions he made in May 2004. (Tr.

[16] *See* CX 7 page 2 (Employee Handbook and Supplement for Production and Maintenance).
[17] *See* JX 10, p. 1658.
[18] A meeting synopsis was recorded by Charlie Powell and is included at JX 59.

at 903). He does not feel that he shares the blame for the events that occurred on those days, but if he had to do it over again now, he would do things slightly differently. (Tr. at 903).

B. Complainant's witnesses

Kurt Layman has worked for Respondent as a maintenance mechanic for around twenty-five years. (Tr. 63). He worked from 3:30 p.m. until midnight on May 4, 2004. (Tr. 64-65). Mr. Layman agreed that he was probably asked to volunteer for the overtime assignment but declined. (Tr. 67). He then discussed that the overtime list ranks employees from the one who has worked the least hours to the one who has worked the most, and the ones on the top are asked to perform overtime first. (Tr. at 69). The list attempts to distribute overtime equitably. (Tr. at 88). Overtime is taken from volunteers first, and mandatory overtime is ordered according to the list. (Tr. at 70). The list recycles every January. (Tr. at 82). Mr. Layman testified that he observed a conversation between Complainant and Mr. Timmons. (Tr. 71-2). He stated that Mr. Timmons informed Complainant that the start time for the overtime had changed to midnight and that Complainant would also have to work his regular day shift. (Tr. 72). Mr. Layman testified that Complainant informed Mr. Timmons that he would not work sixteen hours after he had already worked eight hours that day. (Tr. 73). Mr. Timmons then walked off. (Tr. 75). He stated that he never heard Complainant provide a reason for the refusal. (Tr. 73). Mr. Layman testified that the word "safety" was never used. (Tr. 75). Mr. Layman then stated that he has never worked the hours configuration requested of Complainant but believes that amount of hours would raise safety concerns because of tiredness and dull senses. (Tr. 76, 77). However, he did acknowledge that anyone who becomes too tired or feels that he is not fit for duty can notify his supervisor. (Tr. 89-90). He did not know of anyone who was asked to work these hours before or after this incident. (Tr. 81, 86).

Robert Bates was also asked by Dewayne Timmons to work the overtime assignment starting at 10:30 p.m., which he accepted. (Tr. at 97-98). He thought if he worked overtime on that night, he would receive rest pay for the next day and not have to work his regular shift. (Tr. at 98). However, Mr. Timmons later informed Mr. Bates that the start time for the overtime shift had changed to midnight and that the expectation was to work the overtime shift and the regular shift the next day. (Tr. at 99). Mr. Bates then declined the voluntary overtime because he felt it was unsafe to work the large numbers of hours in a short amount of time. (Tr. at 99-100, 125; 1748). Mr. Timmons then told Mr. Bates that he was being forced to work the overtime and that he was still expected to work his regular shift the next day. (Tr. at 100, 128). Mr. Bates stated that he understood he would not get rest pay because he would not work sixteen hours within a twenty-four hour time frame. (Tr. at 101, 131). Mr. Bates testified that he informed Mr. Timmons that he believed working twenty-four hours within thirty-two hours was unsafe and excessive. (Tr. at 104). Mr. Bates stated that Mr. Timmons did not present the option of simply working the overtime instead of the overtime and the regular shift. (Tr. at 104). As a result, Mr. Bates worked the overtime and the start of his shift the next day. However, he became overly tired around 5:30 a.m. or 6:00 a.m. and informed Mr. Rollins. (Tr. at 116, 118-19, 136, 159). Mr. Bates also informed Joe Giuffre of his fatigue and that he needed to go home around 7:00 a.m. or 7:30 a.m. (Tr. at 119, 143). Mr. Bates stated that he was relieved from duty by Tim Hutchinson around 7:30 a.m.. (Tr. 121-22). He finished up his paperwork prior to leaving, which required mental alertness. (Tr. at 121-22, 145). Mr. Bates testified that he drove himself

home, but that he was tired and "nodded off a couple of times." (Tr. at 123). Mr. Bates did not receive rest pay on May 5, 2004. (Tr. at 152). He stated that had his overtime started at 10:30 p.m., he would have finished the shift at 6:00 a.m., so he would have been leaving the plant around the same time he became overly tired. (Tr. at 153).

Mark Raycraft, a maintenance welder, was in Mr. Timmons' office when he overheard a phone conversation between Mr. Timmons and "John." (Tr. 167). Mr. Raycraft stated that the conversation involved a discussion about not paying rest period if the shift time was moved. (Tr. at 173-74). Mr. Raycraft was unsure who was on the other end of the line, but he assumed that it was John Arnold, the AOB/NOB crew supervisor, but that it also could have been John Lygand. (Tr. 166, 168). Mr. Raycraft later found out that the start time for the night shift overtime was changed and assumed it was so they would not have to pay rest pay. (Tr. at 167). Mr. Raycraft was not asked to perform the overtime because he was a welder and the overtime work required mechanical expertise. (Tr. at 168.) Mr. Raycraft agreed that the company has a policy protecting workers and keeping employees from working at the nuclear plant while fatigued. (Tr. at 170). He stated that he has been forced by supervisors to perform overtime periodically when needed, and that the policy states employees shall make themselves reasonably available for overtime assignments as a condition of employment. (Tr. at 171). However, he believes the phone conversation was inappropriate with respect to the rest period because if an employee works more than sixteen hours in a twenty-four hour period, he is entitled to a rest period. (Tr. at 172). Mr. Raycraft stated, "By manipulating the hours, by the start hours, by a half an hour, you never exceed that. And therefore, you don't have to pay the rest period, but you still have a tired worker working on the components at the plant." (Tr. at 172). Mr. Raycraft had no personal knowledge of Complainant's condition on May 4, 2004, his personal reasons for refusing the overtime or the reason why the shift time went from 10:30 p.m. to midnight (Tr. at 175), or Complainant's personal reasons for refusing the overtime (Tr. at 176). However, Mr. Raycraft stated that under the collective bargaining agreement, it was management's right to assign work and set schedules. (Tr. at 175-76).

Robert DeVries has been friends with Complainant for over twenty years. (Tr. 193-94). He has worked at Respondent for around five years as a mechanic. (Tr. at 178-79). Mr. DeVries has never been forced or required to work overtime but he has volunteered. (Tr. 179, 195, 196). He was unaware of anyone who has refused to work forced overtime other than Complainant. (Tr. at 195). He agreed that failure to obey a direct order could be insubordination. (Tr. at 196). He was also asked by Dewayne Timmons if he would volunteer for the overtime. (Tr. at 180). Mr. DeVries stated that the overtime was scheduled to start at 10:30 p.m. but was changed to midnight on May 5, 2004 for a reason unknown to him; however, he thought it was changed because Respondent was trying to save money by not paying rest pay. (Tr. at 181, 195). The start time change for the overtime period did not impact Mr. DeVries' ability to qualify for a rest period, so the time was not changed to deny him rest pay. (Tr. at 198). Mr. DeVries was aware that Complainant volunteered for the same overtime shift but un-volunteered once the start time changed. (Tr. at 196). He informed Mr. Timmons that he had come in early that day and would be eligible for a rest period. (Tr. at 182). He testified that on May 4, 2004 around 3:30 p.m. or 4:00 p.m., he heard Complainant ask Mr. Timmons in the hallway vicinity if he was expected to work the overtime shift and then come back or if he was to stay for his normal shift from midnight to 4:00 p.m. (Tr. at 189-90, 197). Mr. Timmons responded that Complainant was

expected to work overtime and then his normal shift. (Tr. at 190). Mr. DeVries stated that an employee is always expected to report for the regular shift unless there's some reason for being released from that shift. (Tr. at 197). He agreed that working a straight sixteen hours in a twenty-four hour period does not violate any company working hour policy. (Tr. at 197). However, he testified that he has neither worked nor been asked to work sixteen hours continuously after having worked a regular shift of eight hours with only an eight-hour break, but that he has worked a straight sixteen hours. (Tr. at 192, 198). Mr. DeVries stated that being directed to work that hours configuration is ridiculous, unsafe and unreasonable. (Tr. at 192, 201). Mr. DeVries thought that working those hours is unsafe because the environment is hot and it puts too much stress on the body to think straight and be physically able to do some of the things the employees do. (Tr. at 193). However, he was aware of the company's fitness review policy and knew that if an employee believes he is no longer fit for duty, he should notify management. (Tr. at 199).

Timothy Hutchinson testified that he has worked for Respondent as a maintenance mechanic for more than six years. (Tr. at 202-03). Mr. Hutchinson was working the day shift on May 4, 2004. (Tr. at 208). On that day, Mr. Hutchinson heard that overtime was being requested, but he was not included because he was not qualified for the specific job of check valves. (Tr. at 206-07). Mr. Hutchinson testified that had previously worked sixteen continuous hours, but he had never worked nor been asked to work sixteen continuous hours after working a regular eight-hour shift with an eight-hour break. (Tr. at 205, 222). Mr. Hutchinson was unaware of anyone other than Complainant who had been asked to work that configuration of hours. (Tr. at 205). Mr. Hutchinson stated that if he were asked to work that configuration of hours, he would object and say that he probably couldn't perform it because it would be too hard for his body to adjust. (Tr. at 206). Mr. Hutchinson stated that if you're fit for duty, it's not necessarily unreasonable to be asked to work a sixteen-hour shift, nor is a sixteen-hour shift a violation of any company working hour limitation policy. (Tr. at 221, 222). He testified that unless a mechanic is released for some reason, he is expected to report for the assigned shift. (Tr. at 221). Mr. Hutchinson stated he has never refused to work a forced overtime shift. (Tr. at 221-22). Mr. Hutchinson had no personal knowledge of why the start time of the overtime shift was changed, but believed it was changed to avoid rest pay. (Tr. at 220). When Mr. Hutchinson was getting ready to leave around 4:00 p.m., he overheard Complainant asking Mr. Timmons if he had to come in at midnight and work until 4:00 p.m., to which Mr. Timmons affirmatively responded. (Tr. at 208, 221). He stated that he heard Complainant argue that he was unable to support that shift and would not work it. (Tr. 208-09). Mr. Timmons simply responded that those were the hours expected by management. (Tr. at 208-09). Mr. Hutchinson did not hear Mr. Timmons offer Mr. Backus a choice of just working the overtime. (Tr. at 213, 222). However, Mr. Hutchinson stated that if a maintenance mechanic realizes he is no longer fit for duty during the course of a shift, he should report his condition to management. (Tr. at 222). Mr. Hutchinson stated that if Complainant had worked the assigned overtime and become unfit for duty, he could have told management that was the case. (Tr. at 222). Mr. Hutchinson did not work the overtime on the night of May 4- May 5, 2004, but reported for work on May 5 around 7:00 a.m. (Tr. at 213). He was asked by Messrs. Mason and Giuffre to relieve Mr. Bates who was too tired and fatigued to finish his shift. (Tr. at 215).

Robert Huber worked the night of May 4 – 5, 2004, when one of the plant's emergency diesels, which powers other equipment for safe shutdown of the plant should an accident occur, became inoperable due to a fuel oil leak. (Tr. at 225, 226). The repair operation had a seventy-two hour deadline for returning the piece of equipment to working order, to fall within the final safety analysis report with the Nuclear Regulatory Commission before having to shut the unit down. (Tr. at 227). Mr. Huber became aware of Complainant's dispute regarding overtime when he failed to show up for the assignment on May 5, 2004. (Tr. at 228). He testified that he was instructed during the morning hours of May 5 to turn over his work and the status of the operation on the diesel to Robbie Bates. (Tr. at 228-29). Mr. Huber stated that during the turnover, Mr. Bates appeared very tired and had trouble retaining information. (Tr. at 230, 231, 249). He asked Mr. Bates what was going on because he had never seen Mr. Bates or any other worker at the plant acting somewhat confused on a worksite. (Tr. at 258). Mr. Huber stated that Mr. Bates informed him he did not want to work the overtime shift but he was forced and that had not gotten any sleep prior to coming in. (Tr. at 232, 250, 253). He stated that he thought Mr. Bates should not have been at work because he appeared unfit for duty. (Tr. at 251). Mr. Huber testified that around 4:30 a.m., he informed Denny Willemin, a production superintendent, what he had observed when speaking with Mr. Bates. (Tr. at 232-33, 240, 254, 262). He stated that he was concerned about Mr. Bates, the work he was performing and nuclear safety. (Tr. at 233). He noted that the fitness-for-duty policies direct employees on what to do when they observe someone not fit for duty, which would include reporting to Mr. Willemin. (Tr. at 234). Mr. Huber stated that Mr. Willemin noted his concern but did not get back with him regarding the situation during that shift.[19] (Tr. at 234-35).

William Scally is a maintenance mechanic for Respondent and the chief union steward and vice president of the IBEW Local 1392. (Tr. at 271, 295, 350). He is responsible for making sure the collective bargaining agreement is enforced. (Tr. at 271-72). He was the chief steward associated with the grievance filed by Complainant as a result of the termination on May 12, 2004, thus he has been responsible for attending arbitration and investigatory meetings prior to the actual grievance meetings. (Tr. at 272, 350). Mr. Scally stated that the Union performed its own investigation in addition to the one performed by Respondent. (Tr. at 272).

Mr. Scally testified that he is familiar with the work schedules of employees at Respondent due to his union representation. (Tr. at 274). He stated that he is unaware of any maintenance worker who has ever worked a period of twenty-four hours within a thirty-two hour time span, but agreed it could have happened without his knowledge. (Tr. at 275, 334). Mr. Scally agreed that the union contract requires employees to make themselves reasonably available for overtime assignments as a condition of employment.[20] (Tr. at 276, 289, 332). He testified that Mr. Dawson, the company's HR representative who negotiated the contract, informed him that "anything we tell you is reasonable." (Tr. 290). Mr. Scally does not agree with Mr. Dawson and stated that by not allowing an employee to get enough rest, the working hours are unreasonable. (Tr. 276, 290). He also stated that typically there are seven and a-half hours between shifts. (Tr. 1768). However, he agreed that they are supposed to have an eight-hour break in between shifts. (Tr. 1777). Mr. Scally believes it was unreasonable to expect

[19] Mr. Huber's testimony also referenced a letter he wrote regarding his observations and concerns regarding Mr. Bates. (Tr. 235-65). *See* JX 40.
[20] *See* JX 8, Article 6.

Complainant or Messrs. Bates and King to work twenty-four hours in a thirty-two hour time span because safety is a top priority at a nuclear power and by requiring them to work those hours they are putting individuals in an unsafe configuration. (Tr. at 276).

Mr. Scally argues that a rest period should have been given. (Tr. at 278). He stated that a rest period allows someone who has worked a certain number of hours to go home and get some rest for the purposes of safety. (Tr. at 278). Mr. Scally was unaware of any workers who had voluntarily worked during their rest period, with the exception of turnovers. (Tr. at 359). The employee's compensation for working during his rest period would equate to double pay, but is not recorded as double time. (Tr. at 339-40). Mr. Scally figured that if Complainant had worked the eight hours of rest pay, he'd have earned eight times sixty per hours (double is regular rate), and thus it would have been to his financial benefit to work the hours. (Tr. at 358). Mr. Scally considers a request to work during a rest period an improper interpretation of the contract. (Tr. at 360). He acknowledged that a rest period typically means an employee will have the opportunity to rest. (Tr. at 338). He also agreed that if an employee becomes too tired to work he may ask to go home. (Tr. at 343). He testified to having worked sixteen hours in a row in the past but stated in his deposition that he could have worked more than sixteen hours in a row. (Tr. 351, 356). Mr. Scally testified that even if the employee has worked a double shift the day before, he is expected to report for work the next day if scheduled for a day shift unless he is entitled to rest pay. (Tr. at 352). He recognized that this hour configuration is uncommon but not unprecedented. (Tr. at 353).

Mr. Scally stated that during the last negotiations over the collective bargaining agreement, Respondent proposed doing away with the rest period policy arguing that the NRC guidelines should be good enough. (Tr. at 282-83). The Union rejected the proposal and retained the current language. (Tr. at 283). Specifically, Mr. Scally stated that Joe Giuffre told him before Complainant's termination that he did not agree with "rest pay" and did not feel that the company should be obligated to abide by it. (Tr. at 283-84; 1771). Mr. Scally testified that the Union wanted to keep the rest period provision in the contract to give the members the right to get rest and to keep the public sector's safety in mind. (Tr. at 284). He argued that fatigued people should not be working on safety-related equipment. (Tr. at 285).

Mr. Scally agreed that management has the right to assign work and schedule working hours. (Tr. at 342). However, he believed that Respondent has tried to manipulate overtime quite a few times to get out of paying rest pay and premium pay. (Tr. at 324). He assumed that is what management was doing when they changed the overtime start time from 10:30 to midnight. (Tr. at 287). He thought it was unreasonable and unethical. (Tr. 322). However, he indicated that both Messrs. Maggard and DeVries received rest pay for working the night shift on May 5, 2004. (Tr. at 324). Mr. Scally analyzed Complainant's overtime sheets from the first week of May 2004. (Tr. 292). He testified that, according to the sheets, Complainant was reasonably available for overtime pursuant to the terms of the collective bargaining agreement, because Complainant had accepted the overtime based on reasonable hours and only declined when Respondent decided to change the hours. (Tr. at 292-93). Mr. Scally did not hear the conversation between Mr. Timmons and Complainant on May 4, 2004. (Tr. at 326). Mr. Scally urged that an employee can be reasonably available and still not show up for work. (Tr. at 317).

However, he agreed that the issue of what constitutes insubordination is up to the company to decide. (Tr. at 319-20).

Mr. Scally testified that he had refused overtime in the past. (Tr. at 298, 328). He stated that in 1999 he was asked by his supervisor, Mr. Mason, to work and he refused because his son was coming home. (Tr. 299, 330). He indicated that he was not disciplined in any way for refusing the overtime. (Tr. at 300). On another instance, Tom Williams called him and told him that he was being forced to work overtime but he refused to work, citing child care issues. (Tr. at 300, 329). Mr. Williams was irritated but he did not take any action against him. (Tr. at 300). Mr. Scally testified that he believes that it is up to the individual to decide whether or not it is reasonable to refuse forced overtime, and if someone is told he's forced to work overtime, he can decide whether or not to come in. (Tr. at 331-32). Mr. Scally believed Complainant had the right to decide whether he thought it was reasonable to stay home. (Tr. at 332). However, he agreed that Complainant's situation was much different from Mr. Willemin's, which he attributed to merely a misunderstanding, while Complainant knew he was supposed to report in. (Tr. at 351). Mr. Scally stressed that safety, the reasonableness of the overtime in accordance with the collective bargaining agreement, and things going on with one's family are legitimate reasons to refuse overtime. (Tr. at 303, 328). He has never refused overtime for a safety reason. (Tr. at 328). He stated that Respondent has no guidelines in place establishing the acceptable reasons for refusing overtime. (Tr. at 303-04). In his rebuttal testimony Mr. Scally indicated that whether Respondent had a right to force overtime was never at issue even though it was the first thing Complainant brought up at the fact-finding meeting. (Tr. 1775-76).

Mr. Scally testified that he digitally recorded the May 6, 2004 fact-finding meeting for his own personal notes with a device in his pocket, which he did not consider to be concealed. (Tr. at 344). He never informed the meeting attendants that he was recording the conversations. (Tr. at 345). He never compared his notes with those taken by Donna Kelly. (Tr. at 361). However, he indicated that he had seen the notes taken by Donna Kelly during the May 6th meeting and stated that his recording was more accurate than her notes because she failed to mention when Complainant and he brought up the safety concerns.[21] (Tr. at 362). Mr. Scally stated that during the meeting he argued that the requested overtime was unreasonable and unsafe. (Tr. at 307). However, he acknowledged that workers in other parts of AEP (outside of the nuclear business) were working forty hours straight. (Tr. 325). He argued that neither Ms. Kelly nor Mr. Luther responded to his safety concerns during or after the meeting. (Tr. at 310). He also recalled that during the meeting, part of Complainant's reasoning for refusing the job assignment was that he would not receive rest pay. (Tr. at 332, 336).

Mr. Scally participated in all of Complainant's union grievances. (Tr. at 311). Complainant was terminated before the grievance meetings were held, where the safety concerns were brought up. (Tr. at 320). The grievances were denied. (Tr. at 311, 320). He stated that during the grievance disputes, Respondent attempted to argue that Complainant had a habit of being reluctant to work overtime hours. Mr. Scally compared Complainant's overtime history with the rest of the plant and found that in the twelve months prior to his termination (April 2003 – April 2004), Complainant worked 510 hours of overtime, compared to an average of 419 for the rest of the plant workers. (Tr. at 312-13). From January 1, 2004 through May 12, 2004, Mr.

[21] Ms. Kelly's notes are located at JX 38.

Scally had fifty-six hours of overtime and Mr. Backus had sixty and one-half hours of worked overtime. (Tr. at 314). However, during cross-examination, Mr. Scally agreed that the amount of available overtime actually depends on the number of outages and the amount of overtime varied during the year. (Tr. at 315). Mr. Scally acknowledged that between, January 1 to May 12, 2004, there were no outages, which significantly reduced the amount of available overtime. (Tr. at 367).

Mr. Scally testified that he has known Complainant for thirteen years, and believes that he should be reinstated. (Tr. at 353-54). Mr. Scally would consider it a victory for him as chief steward if Complainant is reinstated. (Tr. at 354).

David Maybry's testimony did not include the events in May of 2004. He discussed the task performance evaluator training ("TPE") that he and Complainant went through together. (Tr. 378, 384, 389). He stated that both Complainant and he had concerns about being involved in the discipline of their peers. (Tr. 384). They discussed their concerns with Mr. Giuffre. (Tr. 387). None of Mr. Maybrey's issues involved safety. (Tr. 389). In his deposition, he stated that Complainant may have used profanity when he expressed his concerns. (Tr. 390-91, 394). Mr. Mabry stated that Complainant was "passionate" in expressing his concerns but was not belligerent. (Tr. 390, 393). He stated that he was never criticized nor disciplined for expressing his concerns or for anything related to the TPE evaluation.[22] (Tr. 398).

Baynard Simons was employed as a maintenance mechanic at Respondent for just over six years. (Tr. at 399). He has been a union steward for about three years and testified that he was unaware of Respondent's policies for refusing overtime or for insubordination. (Tr. at 411-12, 429-30). He met with the union to assist in preparing for the Backus arbitration.[23] (Tr. at 434). Mr. Simons testified that he and Complainant were in the administrative room after lunch when Mr. Timmons announced there would be an overtime "call-out" for third shift from 10:30 to 8:00 starting the night of May 4, 2004. (Tr. at 402-03, 438-39, 444). Mr. Simons and Complainant both volunteered for the overtime. (Tr. at 403, 445). Mr. Simons stated that his willingness to volunteer was contingent upon getting a rest period. (Tr. at 404, 445). He testified that Mr. Timmons later came back and informed him that the overtime start time had changed to midnight. The group told Mr. Timmons that he would not find anyone willing to work that configuration because it is unreasonable, unsafe and that they could not physically work that long. (Tr. 405, 459, 464). Mr. Simons argued that there was no way he could get off at 4:00 p.m. and get any kind of sleep after being up for only eight hours. (Tr. at 495-96). He stated that since the start time had changed, the rest period was no longer an option because he would only have fifteen and a-half hours. (Tr. at 405, 453). Typically, Respondent would give employees sixteen hours off between shifts, but normally there would be seven and-a-half hours between working the day shift and coming in for an overnight overtime shift. (Tr. at 447).

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[22] JX 10 p. 1658 includes the OJT/TPE evaluation and write-up that Complainant received, which noted Complainant refused to perform activities as an OJT/TPE evaluator prior to receiving a direct order. (Tr. 394-95).

[23] Mr. Simons participated in the January 3, 2005 meeting. (Tr. 434). JX 42 contains notes from the meeting. The notes contain arguments the union planned to use in Complainant's case, including: Complainant was the best man in the shop; received a 9.40 job performance review; and that NRC/Company policy allows refusal for fatigue. (Tr. at 489, 503).

Mr. Simons argued that by changing the start time, Respondent was trying to avoid giving out a rest period. (Tr. at 406). Mr. Simons unvolunteered for the overtime when the start time was changed. (Tr. at 406, 446). He did not think that Mr. Timmons ever stated why the start time changed just that it was his boss' expectation to work from midnight to 4:00 p.m. the next day. (Tr. at 407, 485). He testified that he witnessed conversations between Mr. Timmons and Complainant regarding overtime. (Tr. at 399-400, 422, 471). Mr. Simons stated that his memory was foggy regarding the conversations but remembered that he was present when Mr. Timmons came back and told Complainant that he was forced to work the overtime starting at midnight. (Tr. 408). He testified that Complainant informed Mr. Timmons that Respondent had no means of forcing him to work the overtime shift. (Tr. at 463). He stated that Complainant then told Mr. Timmons to do what he had to do to make sure he got people in that night because he was not coming in and was not available for that shift. (Tr. at 464). Complainant said he could not physically do the shift. (Tr. at 464). At no time did Mr. Simons hear Mr. Timmons offer Mr. Backus the option of just working the overtime shift for seven and-a-half or eight hours. (Tr. at 485). Mr. Simons stated that he and Complainant agreed that the overtime was unsafe and unrealistic. (Tr. at 408).

Mr. Simons also recalled that Robbie Bates was forced to work the overtime. (Tr. at 456). He stated that Mr. Bates did not refuse the overtime. (Tr. at 457). However, he saw Mr. Bates in the morning around 8:00 or 8:30 and stated that Mr. Bates looked extremely fatigued and really glad to be going home. (Tr. at 498). He also heard that Mr. King was forced to work overtime. (Tr. at 457-58, 496). Mr. King worked the same configuration of hours that Complainant was asked to work. (Tr. at 465). Mr. King was able to complete all the hours of work while Mr. Bates had to go home due to fatigue. (Tr. 465). Mr. Simons learned later that Messrs. DeVries and Maggard also came in to work the midnight shift. (Tr. at 458). Mr. Simons stated that everybody was upset over the overtime. (Tr. at 457).

Mr. Simons testified that when overtime is called, management requests volunteers, but if no one volunteers, the people lowest on the overtime list are then forced or required to work. (Tr. at 408, 455). The list is used to distribute overtime equitably through the contract requirements. (Tr. at 456). Mr. Simons could not remember being forced to work overtime, but stated that it was a possibility. (Tr. at 473). He was not forced to work the overtime because he had accumulated more overtime hours than Complainant according to the list. (Tr. at 456). He argued that the hours were unsafe because in his experience, working on limited sleep causes him to be extremely tired. (Tr. at 409). Normally, if a person works a day shift and then an overtime shift, he would get off at midnight and report the next day at 7:00 a.m. for his regular start time. (Tr. at 483, 499). Mr. Simons stated that this shift is a rarity, but that it has happened. (Tr. at 500). He stated that the shift can be unreasonable depending on a person's condition and how much sleep he got the night before, but for someone who had worked just a normal day it would not necessarily be unreasonable. (Tr. at 500). He testified that working twenty-four hours in a thirty-two hour period could be reasonable, but that it would be different than what Complainant, Mr. Bates and Mr. King were assigned because they would work the day shift, find out they had an overnight shift, go home, try to sleep in the evening, and then have to report back for a sixteen-hour shift. (Tr. 484, 500). He did not believe that the eight-hour break before working sixteen hours would provide nearly enough sleep because he would not be up long enough to sleep once coming home at 4:00 p.m. (Tr. at 486). He believed that under NRC

guidelines, the most a person can work is twelve hours in twenty-four hours or twenty-four hours in a forty-eight hour time period.[24] (Tr. at 414, 449, 451). Mr. Simons stated that the company's policy is to try not to force people to work overtime. (Tr. at 492).

Mr. Simons stated that if the working hours requested are unreasonable, relief can be obtained under the grievance and arbitration provisions of the Collective Bargaining Agreement. (Tr. at 502). He stated further that on any given day, someone may become severely ill and need to go home. (Tr. at 424, 427). Also if someone had insomnia or did not sleep well the night before, he might become exhausted and need to go home if it's severe enough. (Tr. at 424-25). He was never involved in an occasion where he became exhausted at work and asked to go home. (Tr. at 425, 426). However, he has become sick while at work and was released to go home by Mr. Luther. (Tr. at 426, 467). The general employee training includes an annual fitness-for-duty training at the plant. (Tr. at 428, 503). Someone working while not fit for duty is subject to disciplinary action. (Tr. at 428).

Mr. Simons represented Complainant in a meeting with Messrs. Giuffre, Kurchier and Mabry regarding Complainant's refusal to undergo qualification to be an OJT/TPE evaluator. (Tr. at 475-76). He stated that Mr. Giuffre told Complainant that he needed to do the job assignment or they would have a disciplinary meeting. Complainant responded by arguing that Mr. Giuffre was forcing him to do it. (Tr. at 477-78). As a result of the meeting, Complainant complied with the job assignment given by Mr. Giuffre and went through the process to be qualified as a TPE. (Tr. at 478-79). Mr. Simons had also previously worked with Complainant on a weekly basis. (Tr. at 420-21, 425). He described Complainant's work ethic as superb and stated that, other than May 4, 2004, he knew of no other time Complainant had refused overtime. (Tr. at 421). He had also worked with Complainant on overtime shifts and Complainant had not become exhausted. (Tr. at 425).

Patrick Freehling was a maintenance mechanic A at Respondent and is a distant cousin of Complainant. (Tr. at 506-07, 532). He testified that he had refused overtime in the past and was not disciplined. He stated that he has been asked to work the configuration of hours requested of Complainant, but he always declined. (Tr. at 508-09). He was first asked to work that schedule by Mr. Vonk sometime during 2001 while he was reporting to Mr. Zimmerman. (Tr. at 510). Mr. Freehling worked his day shift from 7:00 or 7:30 a.m. until 3:00 or 3:30 and then went home. (Tr. 510-11). He was asked if he would volunteer to come in around 6:00 or 7:00 p.m., which he refused because he had not been to bed yet. (Tr. at 510-11). He was then called a second time and told he was being forced to come in. (Tr. 511). He thought he could make it through the night but because of his lack of sleep he was afraid of working on a critical component that keeps the reactor safe to the public. (Tr. at 511). However, Mr. Freehling worked the night overtime shift since he was forced. (Tr. 512) When he finished his work the next morning, he went to his supervisor, Mr. Zimmerman, and told him that he had worked sixteen hours in a twenty-four hour period and was exhausted and needed to go home. (Tr. at 512-13, 538-39). Mr. Freehling stated he had been awake for twenty-five hours, possibly longer, and had not slept during his eight-hour break because he had things to do. (Tr. at 513). As a

[24] Mr. Simons reviewed JX 9, which contained the company's work hour limitations policy that provided a break of eight hours between shifts. (Tr. at 450, 490). In JX 9, 3.1.1 references a twelve-hour workday but does not say anything about a sixteen-hour workday. (Tr. at 491).

result, Mr. Zimmerman said that he would find something less challenging and unrelated to plant safety for him to work on so he could stay the additional eight hours. (Tr. at 513-14). Mr. Zimmerman informed Mr. Freehling at the start of his regular shift that he needed to stay. (Tr. at 532).

Mr. Freehling testified that he raised two issues with Mr. Zimmerman: safety and the collective bargaining agreement. (Tr. at 514, 539, 540). Mr. Freehling stated that his main issue was fatigue. (Tr. at 523). Mr. Freehling argued that when you work sixteen hours within a twenty-four hour time period, you are entitled to a rest period under the NRC guidelines unless you are the only one there and have been approved by the plant manager to exceed the hours. (Tr. at 515). John Heward and Complainant also participated in Mr. Freehling's discussion with Mr. Zimmerman because the conversation involved contract interpretation. (Tr. at 517, 539). Mr. Freehling stated that Complainant explained to Mr. Zimmerman the contract and what qualified Mr. Freehling to go home. (Tr. at 517-18, 539). Mr. Freehling stated that he was then allowed to go home. (Tr. at 518, 540). He did not receive any discipline, counseling or coaching following the incident but he did receive rest pay. (Tr. at 518, 540). Mr. Zimmerman never responded to Mr. Freehling's safety concerns. (Tr. at 519-20). Neither Messrs. Giuffre, Timmons, Rollings nor Finnisi were involved with the situation. (Tr. at 541).

Sometime in late 2002-03, Mr. Freehling refused to work overtime when asked by Larry Woods, his supervisor. (Tr. at 520, 541). He received a call from Mr. Woods on his cell phone while working on his uncle's farm and was told that he was being forced to work. (Tr. at 520-21). However, he told Mr. Woods that he would not work because he had stuff to do. (Tr. at 521-22, 541, 542, 550-51). Mr. Woods said not to tell anyone he spoke with him. (Tr. at 522, 551). At that point, it was clear to Mr. Freehling that Mr. Woods was not expecting him to come in. (Tr. at 543). He was never disciplined and there was never any other discussion about the incident except for an email he sent to the union after Complainant was terminated. (Tr. at 522, 543). Mr. Freehling was unaware if Messrs. Giuffre, Timmons, Finnisi, or Rollins were involved in his overtime orders. (Tr. at 543-44). Mr. Freehling testified that he was never warned by management that if he refused an overtime assignment he would be fired, and stated that refusal of overtime happened a lot, even more times than people are attesting to testify about. (Tr. at 528).

Richard Rose worked in the mechanical maintenance department at Respondent as an electrician for more than five years. (Tr. at 572-73). He is no longer with the company. (Tr. 598). Mr. Rose testified that during the 2002 refueling outage where the plant shuts down for a month to be refueled, he was told by Sam Stewart, the electrical superintendent at the time that everyone was required to work the seventh day of their week. (Tr. at 575-76, 597). Typically they would have six working days and then a day off. (Tr. at 596). Mr. Stewart was not Mr. Rose's first line supervisor. (Tr. at 597). Mr. Rose stated that during an outage, twelve-hour shifts are typical. (Tr. at 595-96). During the meeting, Mr. Rose asked whether he was required to work the forced overtime if he had plans. (Tr. at 578). Mr. Stewart informed him that he was required to work a reasonable amount of overtime per the contract and continued his conversation. (Tr. at 578). Mr. Rose met with Mr. Stewart after the meeting and talked about the contract requirements. (Tr. at 580). Mr. Stewart informed him that he was expected to come into work, but he told Mr. Stewart he would not do it. (Tr. at 580). As a result, Mr. Stewart told

Mr. Rose to do what he had to do and he would do what he had to do. (Tr. at 580). Mr. Rose stated that he would not work on his regular day off because he did not want to and he did not think that working eighty-four hours a week was reasonable. (Tr. at 581).

As a result, Mr. Rose did not report to work on the seventh day for the forced overtime. (Tr. at 582). He stated that Mr. Stewart did not excuse him from work and that he expected to face some disciplinary action, but he did not care because he felt that the request was too much. (Tr. 582). Upon his return, Mr. Rose was told by Mr. Millet that he had him down as sick, but Mr. Rose informed Mr. Millet that he was not sick, he just did not want to work. (Tr. at 584-87). Mr. Millet informed Mr. Rose that Mr. Stewart and John Stover, electrical supervisor, had both been looking for him to see if he had come in to work the overtime. (Tr. at 586). Joe Giuffre instructed Mr. Millet to sit down with Mr. Rose and discuss the need to show up and work the overtime that is required. (Tr. at 588-89). Mr. Giuffre was not present during the meeting. (Tr. at 598). Mr. Rose was not disciplined; however, he asked Mr. Millet to discipline him by putting a letter in his file because he would possibly file a grievance. (Tr. at 591). Mr. Rose never filed a grievance. (Tr. at 599). He stated that he was never concerned about being fired because he thought the typical punishment would be three days off without pay. (Tr. at 591). Mr. Millet neither wrote a letter as requested by Mr. Rose, nor did Mr. Rose receive any written communication concerning coaching or counseling. (Tr. at 591). He was never disciplined as a result of this incident. (Tr. at 591-92, 599).

Jason Willemin was also disciplined for not showing up for an overtime assignment. (Tr. 601). The facts surrounding Mr. Willemin's incident are not analogous to Complainant's termination. Mr. Willemin signed a volunteer overtime list for two eight-hour shifts on Friday, April 9th and Saturday, April 10th. (Tr. at 601-02). He stated that traditionally, once he signed the volunteer sheet, someone would call him and tell him whether he's accepted or not. (Tr. at 607). After Mr. Willemin signed the list, Mr. Giuffre asked other team members if they were interested in voluntary overtime, and Mr. Giuffre looked at Mr. Willemin and said that he already had him down, which to Mr. Willemin meant that he was already on the volunteer list. (Tr. at 606). However, according to Mr. Giuffre, it meant that Mr. Willemin was approved for overtime on those days and was expected to show up for work. (Tr. at 607). Mr. Willemin did not tell anyone that he would not be reporting on Friday or Saturday. (Tr. at 615). He then received a voice mail from Ronnie Simmons, a co-worker, on Friday telling him that he had been accepted for overtime on Friday night starting at 4:30, which Mr. Willemin did not receive until approximately 8:00. (Tr. at 616, 619). As a result, he did not report to work. (Tr. at 616-17). Mr. Willemin called the plant a couple of times but received no answer. (Tr. at 617). He also failed to report for overtime on Saturday because he had not heard from anyone in management and was waiting for confirmation. (Tr. at 617-18).

A fact-finding meeting was then held to determine the reason Mr. Willemin failed to report to work.[25] (Tr. 608). Mr. Willemin stated that he did not show up for the overtime because there was a misunderstanding about whether he was assigned and confirmed on the overtime shift. (Tr. at 620). He testified that he was not refusing an overtime direct order to

[25] *See* CX 9.

show up. (Tr. at 620). Mr. Willemin was then disciplined by Joe Giuffre and Mike Allee.[26] (Tr. at 602). Mr. Giuffre, along with Donna Kelly and Paul Carteaux, made the decision to discipline Mr. Willemin and the discipline was relayed to Mr. Willemin by his supervisor, Mike Allee. (Tr. at 603). He was given a three-day suspension without pay for failure to report for a scheduled overtime assignment. (Tr. at 615). Mr. Giuffre was of the opinion that Mr. Willemin had committed himself to the overtime, which is why he was disciplined. (Tr. at 611). Mr. Willemin never had a face-to-face meeting with Mr. Giuffre, but instead dealt with Bruce Neal, who was Mr. Giuffre's representative. (Tr. at 612). Mr. Willemin stated that no one from management told him they accepted his explanation for not reporting for overtime. (Tr. at 613-14). He understood his suspension as management's rejection of his explanation for not reporting for overtime. (Tr. at 614). He testified that he did not expect to receive discipline for a miscommunication. (Tr. at 614-15). He had never received discipline prior to this incident. (Tr. at 615).

Wayne Freehling worked as a maintenance mechanic welder at Respondent for twenty-one years. (Tr. at 621-22). He stated that he made himself reasonably available for overtime and was unaware of a company rule that penalizes refusals to do overtime. (Tr. at 622). He reviewed the employee handbook which provided discipline for "failure to report for regular assignment or refusal to work overtime assignment without a reason satisfactory to the company." (Tr. at 636-37). Mr. Freehling stated that he normally does not have a problem with the way the overtime process works and that when forced, the worker is required to show up for the overtime shift. (Tr. 630-31). However, he added that nuclear workers also have a fitness-for-duty policy that requires them to be able to work at full capacity. (Tr. at 631). If a worker becomes fatigued during an overtime assignment, he can tell management that there is an issue. (Tr. at 632).

Mr. Freehling was forced to work overtime during the 2004 Easter weekend by his supervisor, Gary Zimmerman. (Tr. at 623). Mr. Zimmerman reported to Joe Giuffre, the maintenance manager, at the time. (Tr. at 623). Mr. Freehling normally worked from 7:30 a.m. until 4:00 p.m. (Tr. at 625). He volunteered for a midnight shift from 11:00 p.m. to 7:00 a.m. (Tr. 624-25). He was then instructed by Mr. Zimmerman that he would also have to work an additional overtime assignment on the afternoon shift the following day from 3:00 p.m. to 11:00 p.m. (Tr. at 624-25, 632). He would have been required to finish the overtime night shift, go home and come back for an afternoon shift and then work the night shift he had already volunteered for again. (Tr. at 633, 638). Mr. Freehling stated that he did not want to work the afternoon shift because of fatigue. (Tr. at 625, 633). He never considered his actions as insubordination because, per the fitness of duty policy, he believed he was doing the right thing even though the shift had not occurred. (Tr. at 637). He thought that his fitness-for-duty explanation was accepted by Mr. Zimmerman. (Tr. at 637-38). At about 5:00 on his first night shift, Mr. Zimmerman told Mr. Freehling not to worry about the afternoon shift and to just report for the midnight shift from 11:00 to 7:00 a.m. (Tr. at 628-29, 633). Mr. Freehling had no communication with Mr. Giuffre. (Tr. at 634). Mr. Freehling was unaware if Messrs. Rollins,

[26] A confidential email from Joe Giuffre to Donna Kelly and Paul Carteaux is located at CX 9, stating that Mr. Willemin signed up for overtime and did not show, so he called security and placed Mr. Willemin's badge on administrative hold. (Tr. at 603, 604)

Finnisi, or Carteaux were involved in the process of determining whether or not he had to report for his overtime shift. (Tr. at 634).

Richard Jones was ordered to work overtime in January of 2004. (Tr. 639, 643). Larry Woods, his supervisor, called Mr. Jones and informed him that since he was unable to contact anyone else he would have to come in and work overtime. (Tr. 640, 644). However, Mr. Jones informed Mr. Woods that he had to decline the overtime because his children were with him and his wife was not there. (Tr. 642). He was never disciplined for refusing the overtime assignment. (Tr. 642). He believed that he had been reasonably available for overtime. (Tr. 642-43). Mr. Jones testified that he was unaware of any guidelines for acceptable or unacceptable reasons for refusing overtime. (Tr. 643, 645). However, he acknowledged that the employee handbook provided for disciplinary action for an employee's "failure to report for regular overtime assignment or refusal to work overtime assignment without a reason satisfactory to the company." (Tr. 646). Mr. Jones was unaware if Messrs. Giuffre, Rollins, Finnisi, or Carteaux were involved in his overtime situation. (Tr. at 646-47).

Edward Crampton worked in the maintenance department for almost three years before he transferred to another group. (Tr. at 649-50). Mr. Zimmerman informed Mr. Crampton that he was forced to work overtime on October 15, 2001. (Tr. 655). However, Mr. Crampton said that he was unable to work that day because his wife had surgery the week before. (Tr. 655-56). Mr. Crampton refused to come in under the fitness-for-duty clause because he would have been up all night Saturday and Sunday with his wife. (Tr. 655-56). As a result, he received a verbal counseling session for refusing to report.[27] (Tr. at 656). Mr. Zimmerman administered the counseling. (Tr. at 673). Mr. Giuffre was not involved in the counseling session. (Tr. at 673). As a result of the warning he filed a union grievance. (Tr. at 657). Mr. Crampton was unaware if Messrs. Giuffre, Rollins, Finnisi, or Carteaux were involved in his overtime situation. (Tr. at 673).

Then in February of 2004, Mr. Crampton suffered a heart attack. (Tr. 662). He spoke with Mr. Giuffre about being taken off the overtime and TPE lists because he could not go into the office building with radioactive dye in his body and because he was unsure if the stress around the TPE contributed to his heart attack. (Tr. at 662-64, 674). Mr. Crampton did not provide any medical documentation restricting his performance. (Tr. at 674). However, he did not consider himself fit for duty upon returning from his heart attack. (Tr. at 665, 674-75). Mr. Giuffre denied his request and told Mr. Crampton that he had to take the TPE test as scheduled, even though Mr. Crampton was concerned about the stress the test would cause him. (Tr. at 665). He took and failed the TPE twice. (Tr. at 665). He then transferred to the procedure group in November because he felt the atmosphere in the maintenance department was too hostile. (Tr. at 665-67). Mr. Crampton discussed his encounter with Mr. Giuffre with Bob Powers, who was in upper management outside of the Cook plant. (Tr. at 667).

[27] CX 11 p. 7 relates to Mr. Zimmerman's effort to force Mr. Crampton into forced overtime. (Tr. at 650-51). The letter states that he received a verbal counseling but no disciplinary action. (CX 11 p.7). Also the letter discussed that under the collective bargaining agreement an employee must make himself reasonably available for overtime and when an overtime assignment is made it is not an option whether or not to come in.

Jeffrey Heward worked twenty-four years in the maintenance department for Respondent. (Tr. at 678-79). He was unaware of any discipline he had received at the plant. (Tr. at 679). However, he testified that he refused overtime on two different occasions. (Tr. at 679, 685). The first time was around four years ago and his supervisor was Warren Mason. (Tr. at 679). Mr. Heward stated that Steve Vonk, another supervisor, informed him that he was needed to work overtime, but that he informed Mr. Vonk he was unable to work because it was his wedding anniversary and he had already made plans. (Tr. at 680, 685). He stated he was given a telephone number to call and talk to Dan Farley about not coming in for overtime. (Tr. at 680, 685). Mr. Farley stated he could have the overtime off but that they just can not have everybody refusing overtime. (Tr. at 681, 685). Mr. Farley was the Assistant Director of Maintenance and reported to Mr. Rollins. (Tr. at 681). Mr. Heward did not have any personal knowledge that Messrs. Rollins, Finnisi, Giuffre, or Carteaux were in any way involved in the first situation. (Tr. at 686).

The second time Mr. Heward refused overtime was about two years ago. (Tr. 681-82). His supervisor was Larry Woods, who he stated probably reported to Mr. Giuffre at that time. (Tr. at 681-82). Mr. Heward testified that Mr. Woods called his house and told him that he had to come in to work overtime. (Tr. 682, 686). He stated that he did not want to come in. (Tr. 682, 686). He testified that he was fit for duty, he just did not want to work. (Tr. at 682, 686). Mr. Heward stated that he thought Mr. Woods was forcing him into work, but that when he told Mr. Woods that he was not coming in, Mr. Woods said okay and hung up the phone. (Tr. at 683, 686-87). Mr. Heward stated that this occurred on a weekend and he returned to work on Monday. (Tr. at 683). No one ever discussed with him why he did not come in and he neither received a letter in his file, a written warning, suspension, counseling, coaching, nor was he terminated. (Tr. at 683-84). Mr. Heward did not have any personal knowledge that Messrs. Rollins, Finnisi, Giuffre, or Carteaux were in any way involved in the second situation. (Tr. at 687). He testified that he has not refused any other job assignments. (Tr. at 684).

Matthew McKelvey testified via deposition on August 10, 2005. (CX 30). After Complainant was terminated, he wrote a letter to Mr. Scally expressing that he had refused to work overtime in the past but was not disciplined. (Depo. Exhibit 1). However, Mr. McKelvey's refusal was much different from Complainant's. When Mr. McKelvey refused to work, the company was about to go into a fall refueling outage and the new outage hours were going to start. (p. 25-26). However, Mr. McKelvey was not aware of the new hours until he went to work that day. (p. 25-26). He had planned to attend a wedding of a close friend, so he informed his supervisor that he could not work the overtime. (p. 26). Mr. Woods told him not to worry about coming to work and that he was not needed. (p. 26). McKelvey's overtime was a scheduled overtime situation not a "call-out" like Complainant's. (p. 38). McKelvey had never refused to work overtime any other time. (p. 28).

C. Respondent's Witnesses

Larry Meyer worked for Respondent as the Director of Training and Human Performance. (Tr. 1174). He was responsible for implementing training for mechanics in order to improve the problems with mechanical maintenance at the plant. (Tr. 1176). When he started working for Respondent, there was a problem with the mechanical maintenance performance, so

he used training to improve the performance. (Tr. 1177). Workers who were considered role models were selected as the trainers. (Tr. 1177). Complainant was selected as a trainer. (Tr. 1178). However, Mr. Meyer became concerned with Complainant's actions after observing him having a "temper tantrum" when trying to use the work package that was used for training employees. (Tr. 1179). Complainant was training a young employee during this incident. (Tr. 1179). Mr. Meyer observed Complainant using a lot of foul language and throwing the work packet around.[28] (Tr. 1179). Mr. Meyer had never met Complainant before this incident and he made no note in Complainant's file. (Tr. 1180). Instead, Mr. Meyer mentioned the incident to maintenance manager and supervisor, John Arnold, and a maintenance leader coached Complainant. (Tr. 1180).

Then in April 2004, Mr. Meyer observed Complainant during a training session. (Tr. 1182). He told the group that they were doing a good job keeping the jobsite clean and orderly. (Tr. 1185). However, Complainant did not agree that housekeeping should be a top priority at the plant and as a result, started to orally attack Mr. Meyer's comments. (Tr. 1185). Complainant used unprofessional mannerisms and language. (Tr. 1185). Mr. Meyer emailed Mr. Rollins about Complainant's conduct.[29] (Tr. 1186). Mr. Meyer testified that Mr. Luther spoke with Complainant about the incident but was unsure whether anything was documented. (Tr. 1190). He testified that he had "very seldom" seen anyone act like Complainant had in a nuclear power plant. (Tr. 1192). He believed the actions were very unacceptable. (Tr. 1192). However, Mr. Meyer took no part in Complainant's termination and was uncertain whether the incidents he observed were used to support Complainant's termination. (Tr. 1197).

Dewayne Timmons has worked for Respondent for fifteen years. (Tr. 1527). He is currently a maintenance supervisor, but on May 4, 2004 he was a first line supervisor in the mechanical maintenance group. (Tr. 1527). However, Complainant was never part of Mr. Timmons' crew[30] and Mr. Timmons was never a supervisor over Complainant's work. (Tr. 1528, 29). Mr. Timmons was also a duty supervisor, meaning he was at times responsible for performing overtime "call-outs." (Tr. 1528). On May 4, 2004 he was asked by John Arnold to perform a "call-out" for the night shift. (Tr. 1529). He used the overtime list to get volunteers. (Tr. 1530). Mr. Arnold told him that the start time of the overtime was 10:30. (Tr. 1531). Complainant had agreed to volunteer for the 10:30 start time overtime. (Tr. 1533). However, Mr. Timmons testified that he then realized that the employees would not get an eight-hour break in between their day shift and the overtime shift if the shift started at 10:30. (Tr. 1534). The contract required an eight-hour break. (Tr. 1534). Mr. Timmons urged that when he first performed the "call-out" that it just did not register to him that the shift only allowed for a six and-a-half hour break. (Tr. 1559). As a result, he discussed the situation with Mr. Giuffre, who told him to change the start time to midnight. (Tr. 1535). Mr. Timmons stated that he never discussed rest pay with Mr. Giuffre or with anyone else and was not aware of any attempt by management to avoid paying rest pay.[31] (Tr. 1535; 1559-60).

[28] However, Complainant testified that he never threw anything. (Tr. 1788).
[29] A copy of the email is located at JX 10. Mr. Meyer's identified Complainant as a problem and urged that if he was not dealt with he would curtail the organization. (JX 10).
[30] JX 14 contains a list of the members of Mr. Timmons' crew.
[31] However, in JX 10 p. 1617, Mr. Arnold states that Mr. Timmons called him and said that the start time of 10:30 would require rest pay and wanted to know if this should be changed. Mr. Timmons testified that he does not recall this conversation. (Tr. 1559-60).

Mr. Timmons then had to perform another "call-out" for the new midnight start time. (Tr. 1536). All of the employees who had previously volunteered now declined the overtime. (Tr. 1536). He did not recall the reasons they declined. (Tr. 1568). As a result, Mr. Timmons told Complainant that he was high on the overtime list and was going to be forced to work the overtime because there were no volunteers. (Tr. 1537). Complainant responded by saying that Mr. Timmons had no authority to force him to work overtime. (Tr. 1537). Mr. Timmons was surprised by Complainant's response because he had never had anyone refuse to work forced overtime before. (Tr. 1537). He testified that, even though he was not Complainant's immediate supervisor, he had authority to force him to work overtime through company policy. (Tr. 1549). Mr. Timmons discussed the situation with Mr. Giuffre who told him to go back and make sure Complainant realized that he was being forced to work the overtime. (Tr. 1538). He then went back and spoke with Complainant again but Complainant again stated that Mr. Timmons had no authority to make him work, that the contract did not allow it, that he had other things to do and that he was not coming in. (Tr. 1538). Complainant told Mr. Timmons to do what he had to do but that he was not going to work the overtime. (Tr. 1538). Mr. Timmons testified that Complainant never refused to work based on safety concerns, that he would not be fit for duty or because he would not receive rest pay. (Tr. 1538). Mr. Timmons stated that he would have forced Complainant to work even if he had known that Complainant would have qualified for rest pay because of Complainant's position on the overtime list. (Tr. 1539-40).

Mr. Timmons never gave Complainant the option of only working the overtime shift. (Tr. 1543-44). Complainant was expected to work the overtime shift and his regular day shift; that was management's expectation. (Tr. 1570). He stated that he had no authority to grant Complainant rest pay because he was not Complainant's supervisor and did not know how many hours Complainant had worked. (Tr. 1541). When work hour limitations are an issue, Mr. Timmons expects the employee to bring them to his attention. (Tr. 1541). Complainant knew how many hours he had worked. (Tr. 1542). The hours configuration of the shift did not violate any working hour limitations. (Tr. 1545). Mr. Timmons was not involved in Complainant's termination.[32] (Tr. 1545). He was not sure whether Complainant had ever refused overtime in the past. (Tr. 1570).

Messrs. Bates, McKelvey and King were also forced by Mr. Timmons to work the overtime shift. (Tr. 1542). However, Mr. Bates was only forced because Complainant had refused to show up. (Tr. 1542). Mr. Bates informed Mr. Timmons that he was not sure if he could do the overtime shift and his regular shift. (Tr. 1542). He was not sure if he would be fit for duty the next morning. (Tr. 1543). Mr. Timmons told him to wait until the next morning and they would deal with the situation then. (Tr. 1543). Mr. Timmons did not have a similar conversation with Complainant. (Tr. 1543).

Mr. Timmons testified that Complainant was a good worker and was always civil to him. (Tr. 1577-78). He believed Complainant had a good attitude except for the training incident involving on-the-job-training (OJT/TPE). (Tr. 1547; 1579). He stated that when the training began Complainant refused to participate. (Tr. 1547). Mr. Timmons had to get Mr. Giuffre to

[32] JX 10 includes an email and memo written by Mr. Timmons in relation to Complainant's refusal to work the overtime assignment. (Tr. 1545-46).

talk to Complainant and then Complainant eventually performed the training. (Tr. 1547). Complainant's refusal had nothing to do with safety or fitness-for-duty. (Tr. 1547).

Paul Carteaux was the Human Resources Manager involved in Complainant's termination. (Tr. 1586). Mr. Carteaux stated that he received a telephone call from Messrs. Giuffre and Rollins who informed him that Complainant had failed to show up for a forced overtime assignment. (Tr. 1586). The three categorized the incident as insubordination because Complainant did not call in or show up for a reasonable overtime. (Tr. 1586). Mr. Carteaux informed the men that a fact-finding investigation and meeting needed to be conducted. (Tr. 1586). He wanted to find out all the facts before proceeding. (Tr. 1586). He testified that he had never dealt with a forced overtime refusal. (Tr. 1587). Mr. Carteaux also called the company's corporate counsel, Fred Sagan, and explained the situation to him. (Tr. 1587). Mr. Sagan informed him that he had dealt with similar situations in the past where even the first offense resulted in termination due to the severity of the offense. (Tr. 1588).

Mr. Carteaux then met with Ms. Donna Kelly and Messrs. Rollins, Giuffre and Finnisi to discuss whether termination was the proper disciplinary action. (Tr. 1589-90). The company uses a consensus decision-making process where a group gets together, reviews the facts and decides on a course of action. (Tr. 1589). The group discussed the facts of the situation, the severity of the offense, Complainant's length of employment and good work history. (Tr. 1590). Mr. Carteaux never actually discussed the incident with Complainant but instead relied upon the fact-finding investigation file in making his decisions.[33] (Tr. 1594). The group discussed the pros and cons of the situation. (Tr. 1590). The entire group agreed that termination was the proper disciplinary action to take in Complainant's case. (Tr. 1590). Mr. Carteaux testified that he believed Complainant should be terminated because the company has an obligation of health and safety to the public to ensure that workers are present for work. (Tr. 1591). No one at the meeting indicated that Complainant be fired because he raised safety concerns. (Tr. 1591). Mr. Carteaux stated that the fact-finding investigation did not reveal that Complainant originally refused to work the overtime for safety reasons. (Tr. 1592). The group was aware at the time of the termination that it is unlawful to terminate an employee for raising safety concerns. (Tr. 1592).

The company uses a progressive discipline policy which is discussed in the employee handbook. (Tr. 1597-98). However, Mr. Carteaux testified that even though this was Complainant's first offense, the group felt that Complainant should be terminated due to the severity of his actions. (Tr. 1597). The group discussed but rejected lesser penalties. (Tr. 1598). The group also examined Complainant's pattern of behavior in formulating the decision. (Tr. 1600). They also considered whether other individuals had received similar discipline for the same actions. (Tr. 1601). Mr. Sagan knew the history of not only the Cook plant but whether similar instances had occurred within the entire American Electric Power System.[34] Mr. Sagan indicated that there had been similar instances throughout the company where a first "no show," "no-call" offense had resulted in termination. (Tr. 1601). Mr. Carteaux did not ask Mr. Sagan

[33] JX 10 is the final written findings of the fact-finding investigation.
[34] The Cook Plant where Complainant was employed is a subsidiary of American Electric Power.

where the incidents occurred or the names of the individuals involved. He was not aware of anyone at the Cook plant who had been disciplined for refusing forced overtime.[35]

Joseph Giuffre works as a technical training manager at Respondent. (Tr. 1206). However, in May 2004 he was the mechanical maintenance manager. (Tr. 1206). He reported to Kenny Rollins, and Mr. McClellan was the general supervisor he worked with in preparing job tasks for the mechanics. (Tr. 1221). Mr. Giuffre stated that the maintenance supervisor was responsible for facilitating the maintenance assigned to the crew, reviewing the crew's work, making sure the crew had the proper equipment, participating in pre-job briefs, training the crew and coaching the crew. (Tr. 1224). He was also responsible for coordinating overtime.[36] Mr. Giuffre described the process of getting workers for overtime. (Tr. 1231). He stated that if a supervisor fails to get the appropriate number of volunteers, he is then required to force additional workers to work the overtime based on the workers' positions on the overtime list. (Tr. 1231). Supervisors have the authority to force employees to work overtime through the management rights clause. (Tr. 1232). He testified that the union accepted the overtime guidelines even though certain employees, including Mr. Scally, disagreed with the right to force overtime. (Tr. 1233).

Mr. Giuffre testified regarding the company's fitness-for-duty policy. (Tr. 1236). He stated that when an employee becomes fatigued or for some other reason becomes unable to perform his duties, the employee should go to his supervisor or manager and explain the situation. (Tr. 1236). The manager will then evaluate the situation and determine whether the employee should be sent home.[37] (Tr. 1236, 1293, 1294). All mechanics were trained on how to raise safety issues or concerns. (Tr. 1238). Mr. Giuffre stated that Complainant had raised safety issues with him in the past regarding maintenance procedures and they were dealt with accordingly. (Tr. 1239). However, he testified that Complainant had never come to him and argued that he would be unfit for duty or that any other workers were being ordered to work when they were unfit for duty. (Tr. 1242-43). Under the work hour limitations, employees cannot work more then sixteen hours in twenty-four hours, twenty-four hours in forty-eight hours, or seventy-two hours in a week. (Tr. 1244).

When Mr. Giuffre started working at the plant there were problems with performance in the maintenance department. (Tr. 1245). As a result, he started to implement more training and performance evaluations. (Tr. 1246-48). All mechanics were required to participate in the training and evaluations. (Tr. 1249). However, Complainant did not want to participate in either situation. (Tr. 1253). Mr. Giuffre discussed with Complainant his concerns and he finally agreed to participate in the evaluations. (Tr. 1254). Complainant did not want to participate because he did not think he would adequately perform. (Tr. 1255). The refusal had nothing to do with safety. (Tr. 1255). Complainant was also qualified as a task performance evaluator where he could evaluate other employees during their on-the-job-training. (Tr. 1259).

[35] Apparently there was an incident involving Jason Willemin, who refused to work overtime. However, the facts of his situation were different from those of Complainant. Mr. Carteaux testified that he did not remember the incident involving Mr. Willemin but stated he was obviously involved. (Tr. 1602-06).

[36] JX 4 includes the overtime assignment guidelines which were drafted by Respondent and the union.

[37] Mr. Giuffre discussed that when Mr. Bates worked the forced overtime on May 5, 2004, he became too fatigued to continue and had to be sent home. (Tr. 1295-99). Mr. Giuffre stated that he even offered to find Mr. Bates a ride home. (Tr. 1295-99). However, Mr. Bates testified that he was not offered a ride home. (Tr. 1749).

Complainant's status was later revoked and Mr. Giuffre chose Complainant to re-qualify because of his expertise and how he interacted with the other employees. (Tr. 1262). Complainant again refused to participate. (Tr. 1264). Complainant spoke with Mr. Giuffre about his concerns, stating he did not want to be involved with evaluating other employees which could lead to their termination. (Tr. 1264). Mr. Giuffre ordered Complainant to re-qualify, which he did. (Tr. 1265).

In April 2004, Mr. Giuffre and Mr. McClellan discussed the need for an overtime shift between midnight and 7:30 a.m. starting on May 3, 2004. (Tr. 1283-84, 1288). They needed the employees to perform the work on the check valve 24/7 because it involved a critical component of the plant. (Tr. 1288). They already had a day shift and afternoon shift to work so they only needed workers for a night shift. (Tr. 1283-84). They also needed the shifts and the overtime to be eight hours apart. (Tr. 1283-84). Mr. Giuffre testified that they never set up the hours to avoid paying rest pay. (Tr. 1287). Larry Woods and Dewayne Timmons were asked to perform the overtime "call-outs." (Tr. 1289). Mr. Woods performed the May 3, 2004 "call-out" and Mr. Timmons performed the one on May 4, 2004. (Tr. 1289). Mr. McClellan was on vacation on May 4th so John Arnold was filling in for him. (Tr. 1289). Mr. Arnold asked Mr. Timmons to perform the "call-out." (Tr. 1290). Mr. Timmons conducted the "call-out" and then around 3:00 p.m. came and got Mr. Giuffre out of a meeting. He told Mr. Giuffre that there were problems with the "call-out." (Tr. 1290). Mr. Giuffre testified that he told Mr. Timmons that the start time for the overtime should be midnight so they would have eight hours between regular shift and the overtime. (Tr. 1290). Mr. Timmons stated that he had volunteers for a 10:30 start time but feared he would not get any if it started at midnight. (Tr. 1291). Mr. Giuffre told him to go through the list and force overtime if necessary. (Tr. 1291). Mr. Timmons later came back and told Mr. Giuffre that he had forced some people to come in but that he was having a problem with Complainant. (Tr. 1291). Mr. Giuffre stated that he told Mr. Timmons to go back and explain to Complainant that he was being forced to work the overtime. (Tr. 1291). Complainant was expected to work sixteen hours starting at midnight. (Tr. 1292).

When Complainant failed to show-up for the overtime assignment, Mr. Giuffre placed him on administrative hold and ordered a fact-finding investigation. (Tr. 1301). Then Messrs. Giuffre, Carteaux, Rollins, Finnisi and Jenson conducted a meeting to determine what disciplinary action should occur. (Tr. 1302). The group determined that termination was required in this case. (Tr. 1303). They categorized Complainant's actions as insubordination because he refused a direct order. (Tr. 1303). Complainant was terminated May 12, 2004. (Tr. 1304). Mr. Giuffre stated that, even if Complainant's actions were not considered insubordination, he still would have supported termination because Complainant refused a direct order, which Mr. Giuffre argues interferes with the safety of the plant. (Tr. 1304). He did not believe that counseling or coaching was proper in Complainant's case because he forcefully refused to work. (Tr. 1307). They could not allow such actions and effectively run the organization. (Tr. 1308). The group determined that Complainant failed to come in to work because he believed the company could not force him to work overtime. (Tr. 1305). They relied heavily on Messrs. Timmons' and Arnold's accounts of the incident. (Tr. 1305). They looked into whether Complainant raised safety concerns but determined that none were raised when he refused to work. (Tr. 1305). However, he agreed that fitness-for-duty came up during the fact-finding investigation. (Tr. 1325). Mr. Giuffre did not give Complainant the option of only

working the overtime. However, he testified that if Complainant had become fatigued he could have requested to go home under the fitness-for-duty policy. (Tr. 1306).

Mr. Giuffre was unaware of any other instance when an employee refused to work forced overtime. (Tr. 1307). He testified to a situation involving Jason Willemin, who failed to report to work. (Tr. 1312). Jason had volunteered to work an overtime assignment and then did not show up for the assignment. (Tr. 1312). A fact-finding investigation was conducted which came to the conclusion that Mr. Willemin was confused as to whether he was supposed to report to work or not. (Tr. 1313). He was suspended for three days without pay. (Tr. 1313). Mr. Giuffre wanted to fire Mr. Willemin because he believed Mr. Willemin was lying. (Tr. 1313). Mr. Giuffre stated that the situation was completely different from Complainant's because Complainant forcefully refused to come in. (Tr. 1317).

Larry Woods has worked at Respondent for six years. (Tr. 1418). He works as a tool room supervisor and at times he fills in as a mechanical maintenance supervisor and duty supervisor. (Tr. 1418). As a duty supervisor, Mr. Woods is responsible for performing "call-out" requests to find volunteers to work overtime. (Tr. 1418-19). He made a "call-out" on May 3, 2004.[38] (Tr. 1419). Mr. Woods asked Complainant if he would be willing to volunteer and he agreed. (Tr. 1421). However, Complainant then asked whether he would receive rest pay, so Mr. Woods asked Mr. McClellan about the start time. Mr. Woods told Complainant that the start time was actually midnight and not 10:30 and, as a result, Complainant declined to volunteer. (Tr. 1421). Mr. Woods testified that he has never forced anyone to work overtime. (Tr. 1423). He stated that he just told Complainant the required overtime hours and never asked how many hours Complainant had already worked that day. (Tr. 1427). Those who volunteered for the May 3, 2004 "call-out" received a rest period. (Tr. 1428). He never tried to force Complainant into working the overtime because he received volunteers. (Tr. 1429). Mr. Woods testified that rest pay had nothing to do with the change in start time from 10:30 to midnight. (Tr. 1436). The May 3, 2004 "call-out" was the first he had performed for night shift since the hours had changed for the crew in January. (Tr. 1438). Mr. Woods recalled times when maintenance mechanics had worked eight hours, had a break and then worked sixteen straight hours. (Tr. 1429). However, he could not recall names and he had never worked that configuration before. (Tr. 1429).

John Arnold works as a mechanical lead instructor at Respondent. (Tr. 1444). In May 2004 he worked in the mechanical maintenance department as a production coordinator for the valve crew. (Tr. 1447). He was responsible for coordinating the activities for the crew. (Tr. 1451). Mr. Arnold worked very closely with Complainant on numerous occasions and was responsible for completing Complainant's task performance evaluation (TPE). Mr. Arnold gave Complainant a task and he had two hours to complete it. However, Complainant refused the task and did not say why he was refusing. (Tr. 1499). Mr. Arnold asked Mr. Giuffre to speak with Complainant and after two hours of counseling and coaching, Complainant finally agreed to perform the task. (Tr. 1453). Complainant was not disciplined. (Tr. 1500). Complainant failed the task but, after some practice, finally passed. (Tr. 1501). Next, Mr. Arnold dealt with Complainant when Complainant was chosen to perform a task demonstration for an INPO visit. (Tr. 1458-59). Complainant did not want to participate in the demonstration and had a "temper

[38] *See* JX 20 p. 1887.

tantrum." (Tr. 1458-59). Complainant was not happy with the work package and was throwing it around. (Tr. 1458-59). He was also using foul and unprofessional language. (Tr. 1458-59). Messrs. Meyers and Rollins were present at the time and they calmed Complainant down. (Tr. 1458-59).

On May 4, 2004, the first line supervisor was out, so Mr. Arnold took over and monitored the crew's work. (Tr. 1462). He worked with Complainant that morning. (Tr. 1462). The group encountered a number of problems with the job and Mr. Arnold determined they would need a third shift to continue the job. (Tr. 1467). He went to Mr. Giuffre and asked if they should get a third shift together because the work was taking longer then expected. (Tr. 1467). Mr. Giuffre told him to contact the duty supervisor and get volunteers for a third shift. (Tr. 1468). They did not discuss a start time for the overtime. (Tr. 1468). Mr. Arnold decided to set the overtime start time at 10:30 p.m. (Tr. 1470, 1482). He was not involved in the May 3rd "call-out" and did not know it had started at midnight. (Tr. 1470). Mr. Giuffre never told him to start the time at 10:30 p.m. (Tr. 1471).

Mr. Timmons performed the "call-out." (Tr. 1471). Mr. Arnold testified that they got an unusually large amount of volunteers including Complainant. (Tr. 1472). He was surprised when Complainant volunteered because Complainant was known for not working a lot of overtime and is normally high on the overtime list. (Tr. 1475). Mr. Arnold even asked Complainant if he volunteered. (Tr. 1475). He stated that Complainant said he was volunteering as he got rest pay. (Tr. 1475). However, Mr. Timmons later called Mr. Arnold and asked if he was sure about the 10:30 start time because it could involve rest pay. (Tr. 1473, 1485). However, Mr. Arnold wanted to keep 10:30 as the start time so they would have a turnover. (Tr. 1473). He told Mr. Timmons to talk to Mr. Giuffre and make sure he knew the start time was set for 10:30 p.m. (Tr. 1487). Mr. Arnold then went to the human resources office to read the union contract to determine if rest pay would be involved.[39] (Tr. 1473).

When Mr. Arnold came in the following morning, Mr. Timmons informed him that Mr. Giuffre had changed the start time and that Complainant failed to report for forced overtime. (Tr. 1476, 1491-92). However, he agreed that Mr. Giuffre could have always intended it to start at midnight. (Tr. 1476). He did not believe that Mr. Timmons was really concerned with paying rest pay because the real problem was that management likes to have eight hours off between shifts. (Tr. 1488-89). Mr. Arnold was simply concerned with getting the job finished. (Tr. 1489). His understanding was that the third shift would work 10:30 p.m. until 7:00 a.m. and then be off the next day. (Tr. 1490-91). He testified that, at times when there is a critical need for workers, they can get an exception to the eight-hour break in between shifts. (Tr. 1494). He believed that given the condition of the value, a six and-a-half hour break would have been satisfactory. (Tr. 1498). Mr. Arnold agreed, however, that deviations had to be approved by the plant manager and that he did not have authority to do so. (Tr. 1511). He stated that a normal work day was usually ten to twelve hours but that the work on May 4th was not a routine plant activity. (Tr. 1516). The work was planned to be finished in a certain amount of time. (Tr. 1516). Mr. Arnold was not involved in Complainant's termination. (Tr. 1505).

[39] JX 8 includes the new union contract which took effect April 1, 2004.

Donna Kelly is the human resources administrator at Respondent. (Tr. 1613). She works with the managers and supervisors on coaching, counseling and disciplinary issues. (Tr. 1614). She also helps with grievances, negotiations and arbitrations. (Tr. 1614). Ms. Kelly worked with the negotiations over the new union contract so she could be "the point of contact in human resources for administering the labor relations agreement." (Tr. 1615). She discussed that the purpose of the language in the contract requiring the company to distribute overtime over a reasonable period of time is to ensure that all the employees share in the overtime equally. (Tr. 1618). This is to ensure that a small group of employees are not working all the overtime. (Tr. 1618). Also, the contract ensures that the employees will make themselves reasonably available, meaning they will work their fair share of overtime. (Tr. 1619). Ms. Kelly also testified the union agreed that employees could be forced into working overtime unless the situation involved some type of extraordinary circumstances. (Tr. 1620). There is nothing in the contract that limits management's ability to force an employee to work overtime.[40] (Tr. 1622). She also discussed that the purpose of the rest period provisions was to compensate the employee for working over the sixteen hours. (Tr. 1623-24). Actually some employees can work through their rest period and receive their regular pay plus the rest pay. (Tr. 1624). Under the NRC guidelines, an employee cannot work more than sixteen hours straight. (Tr. 1628). Also a break of at least eight hours shall be allowed between work periods, including turnover time. (Tr. 1628). Employees are responsible for keeping up with their own hours. (Tr. 1627). There is no company policy that orders employees to input their hours on the actual day the hours are worked. (Tr. 1627). They just have to write them down before the end of the pay period. (Tr. 1627). Ms. Kelly testified that when Complainant was given an eight-hour break in-between his shift ending at 4:00 p.m. on May 4 and the overtime shift starting at midnight on May 5, it was consistent with the work-hour limitation policy. (Tr. 1629).

Ms. Kelly next testified regarding the company's fitness-for-duty policy.[41] (Tr. 1636). The policy is modeled after 10 C.F.R. Part 26. (Tr. 1716). She stated that all employees have the duty to report to their supervisor or management when they are unfit for duty. (Tr. 1636). This includes when they become fatigued or for any other reason that they are unable to comply with their duties. (Tr. 1636). Employees were even reminded of this obligation in the company newsletter. (Tr. 1636-37). Ms. Kelly was unaware of any mechanic who was not allowed to go home when he was fatigued. (Tr. 1639).

Ms. Kelly testified that the company follows a corrective discipline policy.[42] (Tr. 1640; 1693). As a result, management has discretion as to what discipline should be taken in each situation. (Tr. 1640). When an incident occurs management accesses the situation; they talk about it in a fact-finding process; determine the seriousness of the situation and then apply the appropriate level of discipline. (Tr. 1640-41). Ms. Kelly stated that the handbook adequately provides employees with notice that they can be disciplined for refusing overtime. (Tr. 1641). During each fact-finding situation, a member of human resources works with the employee's

[40] JX 4 includes the overtime guidelines established in December 2002. The guidelines provide that "if the supervisor fails to get the appropriate number of volunteers, the supervisor will force additional personnel to take overtime assignments using the overtime list." (Tr. 1631).
[41] JX 6 includes the company's fitness-for-duty policy.
[42] Ms. Kelly agreed that at times discipline may take a progressive track but it all depends on the seriousness of the offense. (Tr. 1694).

supervisor to gather the facts of the incident. (Tr. 1642). This individual questions the employees involved, gathers documentary evidence and examines the employee's personnel file. (Tr. 1642).

Ms. Kelly took part in the investigation surrounding Complainant's termination. (Tr. 1642). She first met with Messrs. Rollins and Giuffre, who both explained that Complainant was forced to work overtime on May 5, 2004, but failed to show up. (Tr. 1648). Complainant was expected to work overtime and his regular day shift. (Tr. 1685). She then spoke with the first line supervisor and set up a fact-finding meeting. (Tr. 1648). The purpose of the meeting was to determine why Complainant refused the overtime assignment. (Tr. 1652). Complainant, Ms. Kelly, Mr. Luther and Mr. Scally attended the meeting.[43] (Tr. 1649). Ms. Kelly testified that Complainant knew he was expected to show up for overtime. (Tr. 1654). In her mind, Complainant never gave a specific reason as to why he would not work the overtime. (Tr. 1655). He simply said you cannot force me and I could not physically do it. (Tr. 1655). She urged that she took all of Complainant's allegations during the meeting seriously, including those related to safety. (Tr. 1728). Ms. Kelly stated that, although during the meeting Complainant never said that he would not be fit for duty, it seemed like that was what he was indicating. (Tr. 1658). However, later the consensus group including Ms. Kelly and Messrs. Carteaux, Finnisi, Rollins and Giuffre, determined that Complainant was not just having a bad day when he refused because he had refused orders before. (Tr. 1659). The group established that Complainant was insubordinate because he refused a direct order. (Tr. 1659). The whole group agreed that termination was necessary in this case. (Tr. 1660). Ms. Kelly prepared Complainant's discharge notice which stated his reason for termination as failure to report for an overtime assignment as required. (Tr. 1642-43; 1710-11). She explained the reasoning to Complainant. (Tr. 1676). Ms. Kelly believes that when Complainant refused to come in for overtime he never raised a safety concern. (Tr. 1729).

She believed his punishment was appropriate even though he had no prior formal discipline. (Tr. 1676). The group used the seven tests of just cause to determine whether the punishment was proper. (Tr. 1677). The first test is notice and they determined that the employee handbook provided Complainant with notice that he could be disciplined for his actions.[44] They also determined that the overtime order was reasonable. (Tr. 1677). The fact that Complainant found the overtime unreasonable does not make it unreasonable. (Tr. 1677). Even if Complainant had become too tired to continue, he could have asked to go home at such time. (Tr. 1678). Third, an investigation was conducted and Complainant agreed that he refused to come in for the overtime. (Tr. 1678). Fourth, the investigation was conducted fairly. (Tr. 1678). Ms. Kelly stated that she objectively investigated the situation. (Tr. 1679). Fifth, the record included proof that Complainant failed to show up when ordered to do so and that there was no proof that Complainant raised any safety concern when he refused. (Tr. 1679). Sixth, they had to ensure that Complainant was treated equally. (Tr. 1679). Ms. Kelly was not aware of anyone else who had ever refused a direct face-to-face order from a supervisor. (Tr. 1679).

[43] The transcript of the fact-finding meeting is summarized below and therefore, I will not summarize Ms. Kelly's testimony on direct or cross-examination regarding the meeting.

[44] In the arbitration proceedings it was determined that Complainant was not given adequate notice as to whether he would be terminated if he refused forced overtime. As a result, Complainant was reinstated. (See Complainant's post-hearing brief, Exhibit 1).

Finally, the group determined whether termination was the proper penalty for Complainant. (Tr. 1680). They believed that termination was needed because of the severity of the insubordination. (Tr. 1680). Ms. Kelly stands by her decision to terminate Complainant. (Tr. 1680).

Ms. Kelly was also involved in other instances when employees either refused overtime or failed to show for an assignment. (Tr. 1664). She stated that Complainant's offense and that of Mr. Willemin were completely different. (Tr. 1644). Mr. Willemin volunteered for overtime but was not sure if he was really supposed to come in. (Tr. 1645). He had expected a supervisor to call him to let him know for sure and when he did not receive a call he did not show up. (Tr. 1645). Mr. Giuffre thought that Mr. Willemin was lying. (Tr. 1645). The consensus group determined that Mr. Willemin should have been there and knew that, but did attribute some of his failure to show up to confusion. (Tr. 1646). Therefore, he was disciplined. (Tr. 1646). Ms. Kelly was also involved when Mr. Crampton refused an overtime assignment. (Tr. 1664). A fact-finding meeting was also held in his case and Mr. Crampton explained that he had already told his supervisor that he would not be available for overtime that weekend because of his wife's surgery. (Tr. 1665-66). Ms. Kelly stated that this was an instance of an employee needing time off and the company was working with him to arrange it. (Tr. 1667). Therefore, he was not disciplined. (Tr. 1667). In Complainant's case there were no mitigating circumstances. (Tr. 1707). The group also considered Complainant's prior behavior and conduct. (Tr. 1707).

Complainant also filed a union grievance as a result of his termination.[45] (Tr. 1668). Ms. Kelly participated in the grievance proceedings. (Tr. 1668). During the fact-finding investigation, neither Complainant nor Mr. Scally provided the group with names of other individuals who had refused overtime. (Tr. 1663; 1697). However, during the grievance process, after Complainant was already terminated, Mr. Scally provided names of other employees who had refused overtime. (Tr. 1697). As a result, Ms. Kelly talked to the individuals' supervisors to determine whether they were similarly situated and verified that their situations were not similar to Complainant's. (Tr. 1698). However, she did not interview the actual employees.[46] (Tr. 1698).

Ms. Kelly testified that employees are expected to be reasonably available for overtime, meaning they are expected to always work overtime which is directed unless they have a good reason to be released. (Tr. 1702). It is up to each employee's supervisor to release the employee from overtime and to determine whether the reason for not working is reasonable. (Tr. 1702-03).

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[45] Ms. Kelly's testimony on direct and cross-examination details the events that took place during the grievance process. However, the legal standards involved in the grievance process are much different than those in an ERA proceeding. Furthermore, the facts that took place during this process were after Complainant's termination. Therefore, when determining the actual facts of this case, I will conduct my own factual analysis by examining the evidence presented to me and I will not simply rely upon the facts elicited during the grievance and arbitration proceedings. Therefore, whether Complainant argued during the grievance proceedings that the hours he was required to work were unsafe is irrelevant. Complainant had already been terminated and the relevant issue is whether he expressed safety concerns prior to his termination.

[46] Counsel used this line of questioning for the purpose of trying to show that the fact-finding investigation was flawed, reasoning that a flawed investigation can be used as circumstantial evidence of discriminatory intent. (Tr. 1700-01). However, the grievance process took place after the fact-finding investigation and after Complainant was already terminated.

She stated that Complainant did not provide a reason to Mr. Timmons as to why he would not work overtime. (Tr. 1703). He simply said he would not work overtime. (Tr. 1703).

D. Fact-Finding Meeting (JX 21)

Respondent held a fact-finding meeting on May 6, 2004 to determine why, when forced to work overtime, Complainant failed to show up for the assignment. Complainant, David Luther, Donna Kelly and Billy Scally all attended the meeting. Mr. Luther informed Complainant at the start of the meeting that the questioning could lead to disciplinary action due to Complainant's failure to appear for forced overtime. Complainant immediately questioned Mr. Luther and Ms. Kelly regarding the meaning of "forced" and where the company obtained the right to force employees into overtime. Ms. Kelly informed Complainant that management has the right to direct work and to schedule assignments. However, Complainant tried to argue that this instance was different because it was not a scheduled assignment.

Complainant asserted that he at first volunteered to work overtime and only refused to work when the start time changed. He stated that the change meant he would not be off the next day. Complainant urged that he "did not feel capable of doing that." However, Complainant agreed that Mr. Timmons told him that he was being forced to work. Complainant stated he told Mr. Timmons that he did not feel capable of performing both shifts. He stated that he said "I am telling you so that you are not being left short-handed, that I cannot be available for that shift." Complainant later stated that it was not like this was a situation where they needed workers for an emergency. Complainant then stated he was not aware that the word "forced" appeared anywhere in their contract.

Mr. Luther questioned Complainant concerning why he refused to show up for the overtime assignment. Complainant responded by stating he informed Mr. Timmons that he would not work that amount of hours and that he did not feel physically capable of working all day, going home and then coming back to work a double shift. Complainant argued that he believes he made himself reasonably available per the contract requirements. However, he agreed that nothing in the contract prevents management from ordering sixteen-hour shifts, but stated there is language protecting against work-hour limitations. Complainant has never asserted that Respondent was making a request in violation of work-hour limitations.

Complainant then started to argue that he was informed that the shift change was made to avoid paying the employees rest pay. He stated that he believed that this was "completely unreasonable to ask of anyone, and it is definitely not safe." Mr. Scally then started arguing that it is unreasonable to request employees to work twenty-four hours in a thirty-two hour time period without allowing for meaningful sleep. Complainant then asserts that if he worked and fell asleep, he would have been disciplined or safety could have been an issue. Ms. Kelly informed Complainant that if he had worked and then believed he could not continue, he could have informed his supervisor. Complainant stated that per his conversation with Mr. Timmons this was not an option.

Complainant again stated that he made himself reasonably available for work and that he had volunteered for overtime in the past. Ms. Kelly informed Complainant that whether he made

himself reasonably available was not at issue; the issue was why he refused to show up for a scheduled overtime assignment. Complainant claimed that it was not scheduled but forced which he believes management had no right to do. He stated "I was told I was being forced" and "I kind of made it be known that, that's not an option for you to do." Complainant was of the belief that management could change an employee's work schedule but not force them to work overtime not included on their regular schedule. Mr. Scally then started to argue working thirty-two hours in a nuclear plant is unreasonable and puts public safety at risk.

Finally, Ms. Kelly asked Complainant whether rest pay had anything to do with his decision not to show up for the overtime. Complainant responded by stating "I mean, hell, yeah it's a bonus." The meeting then ended with Complainant telling Ms. Kelly that he loved his job. (JX 21).

Applicable Law

It must be determined whether Complainant has proven, by a preponderance of the evidence, that he engaged in protected activity under the ERA, that Respondent took adverse action against him, and that Complainant's protected activity was a contributing factor in the adverse action that was taken. *Kelly v. Lambda Research, Inc*., 2000-ERA-00035, at *16 (ALJ April 26, 2002), *citing Dysert v. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997); *Simon v. Simmons Foods*, 49 F.3d 386 (8th Cir. 1995); *Ross v. Florida Power and Light*, Case No. 1996-ERA-00036, ARB Case No. 98-044, Fin. Dec. & Ord., Mar. 31, 1999, slip op. at 6; *see also* 42 U.S.C. § 5851(b)(3)(C). Since this case was fully tried on the merits, I need not determine whether Complainant presented a *prima facie* case, however; I will address the elements as contested by Respondent. *See, U.S.P.S. Bd. of Governors v. Aikens,* 460 U.S. 711, 713 (1983); *Carroll v. Bechtel Power Corp.,* Case No. 91-ERA-0046, Final Dec. and Order, Feb. 15, 1995, slip op. at 11 n.9, *aff'd sub nom; Bechtel Corp. v. U.S. Dep't of Labor,* 78 F.3d 352 (8th Cir. 1996); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007 (Sept. 30, 2003)(discouraging the unnecessary discussion of whether the *prima facie* whistleblower elements are present when the case is fully tried on the merits). Accordingly, the evidence must be reviewed to determine whether Complainant has proven by a preponderance of the evidence that he engaged in protected activity, that Respondent knew of the activity and that this activity was a contributing factor in the adverse action taken by Respondent. *Kester*, ARB No. 02-007.

The burdens of proof are established in Section 5851 (b)(3):

> The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
> (B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that

> it would have taken the same unfavorable personnel action in the absence of such behavior.
> (C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
> (D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

Complainant bears the burden of establishing that the reasons advanced by Respondent for the termination action were not the true reasons for the action but instead, that his engagement in protected activity contributed in part to the adverse action. *See, Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 935 (11th Cir. 1995) (*quoting St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 (1993)). The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action. *Marano*, 2 F.3d at 1140 (citations omitted).

Only if Complainant meets his burden by a preponderance of the evidence does the burden shift to Respondent to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. 42 U.S.C. 5851(b)(3)(D); *Trimmer*, 174 F.3d at 1102. Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than preponderance of the evidence but less than beyond a reasonable doubt. *See, Yule v. Burns Int'l Security Service, supra.* If Complainant establishes by a preponderance of the evidence that his engagement in protected activity contributed to the termination decision, Respondent may nonetheless avoid liability under the dual, or mixed, motive doctrine. Under that doctrine, the employer must establish by clear and convincing evidence that it would have taken the adverse action in the absence of the protected activity engaged in by complainant. *Combs v. Lambda Link,* ARB No. 96-066, ALJ Case No. 95-CAA-18, Oct. 17, 1997, slip op. at 4 and cases cited therein.

The Protected Activity

42 U.S.C. § 5851 defines the employee protections for those discriminated against for engaging in protected activities:

> (a) Discrimination against employee
>
> (1) 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 person acting pursuant to a request of the employee)--
> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);
> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (E) testified or is about to testify in any such proceeding or;
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

Complainant's claim falls under Section 5851(a)(1)(F), the "catch-all" provision. Complainant testified that there was nothing illegal or unlawful in Respondent's work request. (Tr. 992). Accordingly, Complainant must demonstrate that he participated in protected activity, which furthers the purpose of the ERA. 42 U.S.C. § 5851 (1)-(3); 29 C.F.R. § 24.2. An informal complaint to a supervisor may constitute protected activity. *See, e.g., Nichols v. Bechtel Construction, Inc.*, 1987-ERA-00044 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity), appeal dismissed, No. 92-5176 (11th Cir. 1992); *Dysert v. Westinghouse Electric Corp.*, 1986-ERA-00039 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected). To constitute protected activity under the ERA, an employee's acts must implicate safety definitively and specifically. *American Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). The purpose of the act is to protect workers who report safety concerns and to encourage nuclear safety generally. *Id.* at 1295. Respondent contests that Complainant engaged in protected activity and, specifically, denies that Complainant refused to report for work due to a safety concern. Respondent argues that Complainant never raised a safety concern to Mr. Timmons. Complainant avers that he engaged in protected activity by notifying Mr. Timmons that the amount of hours requested was unsafe, that he raised safety concerns during the fact-finding meeting and during a telephone conversation with Ms. Kelly.

Work Refusal

There are different rules that apply when an employee refuses to work. *Pensyl v. Catalytic Inc.*, No. 83-ERA-2 (Jan. 13, 1984), sets out the proper legal standard. *Pensyl* states that a "worker has a right to refuse to work when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful. Whether the belief is reasonable depends on the knowledge available to a reasonable man in the circumstances with the employee's training and experience." *Id.* at 6-7.

Complainant was asked to work eight hours of overtime between midnight and 7:00 a.m. on May 5, 2004, plus his regular day shift hours for a total of sixteen hours. (Tr. 717). Complainant argues that this amount of hours is unreasonable because he had already worked 7:00 a.m. to 4:00 p.m. on May 4, 2004. (Tr. 710-11). Mr. Timmons informed Complainant that he was required to show up for this overtime assignment and Complainant refused. (Tr. 717). I find that the evidence overwhelmingly shows that Complainant did not act as a reasonable person would have in his situation. He did not have a reasonable belief that the working hours were unsafe for a number of reasons.

First of all, although I agree that the amount of hours requested by Respondent appears excessive, Complainant has never asserted that the hours requested were unlawful or that they violated any working hour rules, policies or procedures. (Tr. 992). Next, the preponderance of the evidence does not show that Complainant acted with the belief that the overtime was unsafe at the time he refused. The evidence reveals that Complainant refused the overtime because he actually believed that Respondent did not have authority to force him to work overtime and because he believed he would not receive rest pay. (See JX 21). Complainant testified that he informed Mr. Timmons that the overtime was unsafe and unreasonable. (Tr. 721, 980). However, Complainant must prove his case by a preponderance of the evidence. The preponderance of the evidence does not show that Complainant implicated safety concerns to Mr. Timmons when he refused the forced overtime. The testimony of Mr. Timmons, Mr. Layman and even the Complainant supports a finding that Complainant never implicated safety concerns when he refused to work.[47] Mr. Timmons testified that Complainant never implicated safety to him during their conversations. (Tr. 1538). Mr. Timmons stated that Complainant only argued that Mr. Timmons could not force him to work, that he was not coming in and for Mr. Timmons to do what he has to do. (Tr. 1538). These statements are supported by the testimony of Complainant's witness, Mr. Layman, who overheard the conversation between Mr. Timmons and Complainant. Mr. Layman stated that he never heard the word "safety" used. (Tr. 73, 75). Finally, Complainant's testimony during the fact-finding meeting supports Mr. Timmons'

[47] Although Mr. Timmons' testimony was impeached on the issue of rest pay by Messrs. Arnold and Raycraft, I still find his testimony credible on the issue of whether Complainant implicated safety concerns when he refused to work. An administrative law judge can choose to believe only certain portions of a witness' testimony and rely on it. *See Altemose, supra*. I believe Mr. Timmons' testimony concerning his conversations with Complainant is supported by substantial evidence in the record. Mr. Scally also testified to the contents of Complainant's conversation with Mr. Timmons. However, Mr. Scally did not have any personal knowledge of the contents of the conversation, and therefore, I grant his testimony little weight on the issue of what Complainant actually said to Mr. Timmons when he refused to work overtime.

testimony. During the fact-finding meeting, Complainant immediately interrupted Mr. Luther and demanded an answer on where management gets the authority to force employees to work overtime. (JX 21). Complainant did not believe that Respondent had the authority to force him to work. (JX 21). It was obvious from the conversation that this was Complainant's main concern. (JX 21). Throughout the fact-finding meeting, Complainant discussed his conversation with Mr. Timmons and he never stated that he told Mr. Timmons that the hours were unsafe. (JX 21). Ms. Kelly directly asked Complainant why he did not come in and he replied "I was told I was being forced….I'm of a firm belief that you, as, not saying you, the company does not have the option to do that on an individual basis. How can you…?" Mr. Timmons cannot be held responsible for Complainant's so-called informal complainant if Complainant never actually stated that the hours were unsafe.

Even if Complainant implicated safety concerns to Mr. Timmons when he refused the overtime, he did not have a reasonable good faith belief that the work was unsafe. First, Complainant's main argument is that he believed he could not work the overtime plus his regular day shift. (Tr. 717, 739,). However, Complainant had already worked eight and a-half hours on May 4, 2004, which would have qualified him for a rest period. (Tr. 768-69, 770, 908-09). When Mr. Timmons ordered the overtime, Complainant never informed him that he had already worked eight and-a-half hours. (Tr. 771). Mr. Timmons was not Complainant's immediate supervisor and did not know the amount of hours Complainant had worked. Complainant was responsible for keeping track of his own hours and was in the best position to know whether he had worked enough hours to qualify for rest time. He was trained on the issues of rest time and on his duty to inform his supervisors about the amount of hours he had worked. (Tr. 766, 985). Complainant states that he did not realize that he would have received rest pay/time until immediately before the hearing. (Tr. 908-09). However, I find that a reasonable person would have known the amount of hours he had worked and would have brought that to Mr. Timmons' attention.

Next, Respondent has a long and thorough fitness-for-duty policy which protects workers from working while fatigued. (JX 6). The policy allows an employee to inform his supervisor when an incident occurs that causes him to be unfit for duty. (JX 6). The supervisor then makes a determination concerning whether the employee should go home. (JX 6). Complainant argues that Mr. Timmons never gave him the opportunity to only work the overtime and not his day shift. However, Complainant was always aware of the fitness-for-duty policy and never tried to work the overtime to see if he could complete it. At the time of his refusal, he was fit for duty. (Tr. 965). Mr. Bates was forced to work the overtime since Complainant failed to show up for duty and was allowed to go home after becoming fatigued around 7:00 a.m. the next morning. Respondent has policies in place to prevent workers from working while fatigued and to protect the safety of workers and the community. (JX 6). Complainant received fitness-for-duty training on March 8, 2004. (Tr. 931-32). Therefore, in light of the fitness-for-duty policy, Complainant's reasoning is unfounded.

Accordingly, I find that Complainant did not have a reasonable belief that the overtime assignment was unsafe. His arguments are unreasonable because he never asserted that the overtime was unsafe to Mr. Timmons, he would have qualified for rest time if he had worked the

overtime, other employees chose to work the overtime and he could have used the fitness-for-duty policy if he became fatigued.

However, even if Complainant had a reasonable belief that the overtime hours were unsafe, Respondent adequately clarified the safety of the assignment during the fact-finding meeting. "Refusal to work loses its protection after the perceived hazard has been investigated by responsible management officials…and, if found safe, adequately explained to the employee." *Pensyl*, No. 83-ERA-2 at 6-7. Complainant argues that his safety concerns were never addressed. Respondent counters by stating Complainant never raised any safety concerns to address. However, during the fact-finding meeting Ms. Kelly discussed with Complainant the Respondent's expectations of him. (JX 21). She asked whether it was in violation of the contract to ask an employee to work sixteen hours and Complainant replied "No." (JX 21, p. 4). Ms. Kelly informed Complainant that under the management's rights clause they have the right to force employees to work overtime. (JX 21, p. 1). She went on to state that if an employee is unable to continue an assignment he can always go to his supervisor under the fitness-for-duty policy. (JX 21, p. 7).

Accordingly, I find that Complainant's refusal to work was not a protected activity under Section 211 of ERA. He did not have a reasonable belief that the overtime was unsafe or that it violated health and safety laws and even if his belief was reasonable, it was adequately rebutted by Respondent.

Fact-finding Meeting

To constitute protected activity under the ERA, an employee's acts must implicate safety definitively and specifically. *American Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). "The ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. *Id. citing, Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997). Therefore, an employer has a right to fire employees who do not act in accordance with the employer's rules, polices and procedures as long as they are not using discriminatory practices. *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986). Although the Act's purpose is to protect an employee's ability to make safety complaints, it does not give an employee the ability to safeguard himself from termination when his actions are not protected. *Timmer v. U.S. Dept. of Labor*, 174 F.3d 1098 (10th Cir. 1999). Unfortunately, this is not what Complainant is seeking to accomplish. Complainant was terminated for failing to show up for a work assignment and now after-the-fact he seeks to argue that he was fired for asserting safety concerns.

Complainant alleges that his second protected activity took place during the fact-finding meeting. He argues that he raised specific and definite safety concerns during the meeting. (JX 21). However, when reading the minutes of the meeting, I come to another conclusion. Throughout the meeting, Complainant consistently argued that Respondent does not have the authority to force employees to work overtime. (JX 21, all pages). He used the meeting as an opportunity to argue that the union contract does not allow forced overtime and, basically, that if it did, then the contract needed to be changed. There are only two times in the ten pages of

testimony that Complainant actually mentions safety and he does so only in passing.[48] Ms. Kelly asked Complainant whether the contract prevents employees from working sixteen-hour shifts and he responded by stating

> No. There's language that protects you and there is working hour limitations too.[49] I think it's geared to provide a safe working atmosphere, which we preach continuously, and there is language to see that the person is justly treated if that is in fact a requirement, or an entitlement if that person volunteers to perform that task for the company. I was blatantly told that this shift was come back at midnight so that we do not have to pay you rest pay[50] and you will be expected to stay the entire following day. I think that that is completely unreasonable to ask of anyone, and it is definitely not safe.

(JX p. 4). When reading the last line of Complainant's statement, it seems like he could be raising a safety concern, but when you read the sentence in context with the rest of his argument, one can see that he is just throwing the generalized statement into the argument that he should not be forced to work overtime. Generalized statements are not enough. Later in the conversation he states, "and on top of that if I [unintelligible]. If I couldn't stay awake and fell asleep here then I would get disciplined for that, not to mention that I would be put in a predicament where safety could be an issue." (JX p. 6). This statement is merely a hypothetical…if he fell asleep…it could possibly raise an issue of safety. At the time he refused the overtime he was completely awake and alert. He never tried to work the overtime, so whether he would have become fatigued is uncertain at this point and if he had, he could have used the fitness-for-duty policy and gone home as Mr. Bates did.

I find that Complainant's arguments during the fact-finding meeting do not rise to the level required for an informal complaint under the ERA. His complaints, if you can even call them that, were not definite, they were merely hypothetical questions. The purpose of the ERA is to protect employees who raise genuine safety complaints and concerns. That is not what happened in this case. Complainant is simply trying to use safety after-the-fact, as a means to justify his wrongful refusal. To find that Complainant's actions fall under the protection of the ERA would establish a precedent that would prevent employers from terminating employees who say "oh, that's unsafe, so I am not going to work," because they simply do not want to work overtime.

[48] Mr. Scally made a few comments on the issue of safety but he is not the complainant and before the meeting Mr. Scally had no conversations with Complainant on his feelings about the overtime or his reasons for refusing.

[49] At the hearing Complainant agreed that Respondent was not in violation of any working hour limitations when the overtime request was made.

[50] At the hearing Complainant testified that no one actually came out and told him that the purpose was to avoid rest pay but he believes avoiding rest pay was the purpose of moving the overtime start time.

Telephone Conversation

Finally, Complainant argues that he raised safety concerns during his telephone conversation with Ms. Kelly and Mr. Giuffre on May 7, 2004. (Tr. 809). He testified that during the conversation, Ms. Kelly and Mr. Giuffre informed him that he was suspended for refusing an overtime assignment. (Tr. 809, 1070, 1122, 1371; JX 10 p. 1653). He stated that he responded by arguing that he did not refuse an overtime assignment but instead refused a shift that was unsafe, unreasonable and actually not an assignment. (Tr. 809; 1070, 1122, 1371). This is the extent of the evidence regarding this telephone conversation. The record lacks evidence regarding the full content of this conversation. There is no evidence that Complainant actually explained why the hours were unsafe or that the hours violated any particular law or procedure. Accordingly, for the reasons already discussed above in the other protected activity sections, I find that these statements are not sufficient to constitute an informal complaint or a protected activity.

Conclusion

Although I agree with the arbitrator that Respondent's decision to terminate Complainant was harsh, that is not the issue in this case nor is the fact that the number of hours requested by Respondent appears excessive.[51] The only issues before me are whether Complainant engaged in a protected activity and whether as a result, Respondent discriminated against him. The record substantially demonstrates that Complainant, Michael Backus, has neither proven by a preponderance of the evidence that he participated in a protected activity covered under the ERA nor that he was terminated for raising a safety complaint. Since he has failed to prove that he participated in a protected activity, he has failed to establish a certain element of his claim, and, therefore, his claim must fail.[52]

[51] I agree that the amount of hours Respondent tried to force Complainant to work appears excessive; however, there is no evidence in the record to indicate that these hours violate any law or policy. Management has the right to force an employee to work overtime as long as the hours comply with the hour limitations set forth under the NRC and the union contract.

[52] Even if Complainant had proven that he participated in a protected activity, I would not have found that Respondent terminated him as a result. Although his termination was close in time to his actions, there are other evidence and factors to consider. There is no evidence of record to show that Complainant was disparately treated. None of the witnesses Complainant used were similarly situated. They all had specific reasons for their refusals, which were accepted by management. Complainant was ordered to show up and failed to comply. Furthermore, the individuals who were disciplined were not disciplined by all the same decision-makers as Complainant.

RECOMMENDED ORDER

Based on the foregoing findings of fact and conclusions of law and upon the entire record, I find that Complainant has failed to demonstrate that he participated in a protected activity under the ERA. Accordingly, IT IS RECOMMENDED that the complaint of Michael Backus be DISMISSED.

A

JOSEPH E. KANE
Administrative Law Judge

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, NW, 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, 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, DC 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 the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).