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Issue Date: 14 June 2005

CASE NO. 2004-TSC-00001

In the Matter of:

ROGER G. WALSH,
Complainant,

V.

RESOURCE CONSULTANTS, INC.,
Respondent.

Appearances:

John Dratz, Jr., Esq.
San Diego, CA
for Complainant

Eric M. Steinert, Esq.
Brent I. Clark, Esq.
Los Angeles, CA
for Respondent

Before:
Gerald M. Etchingham
Administrative Law Judge

RECOMMENDED DECISION AND ORDER FOR COMPLAINANT

Background

This case arises under the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et. seq.* and the regulations at 29 C.F.R. Part 24. The TSCA's employee protection provisions, 15 U.S.C. § 2622, protect employees against discrimination in their employment for attempting to carry out the purpose of the Act. The Secretary of Labor is empowered to investigate "whistleblower" complaints filed by employees who allege that they have been so discriminated against.

This case involves a complaint filed by Complainant, Roger Walsh (Complainant), against Respondent, Resource Consultants, Inc, (Respondent or RCI) located in San Diego, California. Complainant alleged that Respondent discriminated against him in violation of the TSCA. The complaint was investigated by Occupational Safety and Health Administration

(OSHA) and the Secretary's Findings were issued on January 7, 2004. OSHA determined that Complainant did not set forth sufficient evidence to establish a prima facie finding in support of his complaint.

Complainant appealed the OSHA decision, and a hearing was held before me in San Diego, CA on December 20 and 21, 2004. Complainant testified and his counsel called David Orr as an adverse witness. Respondent cross-examined both of Complainant's witnesses and additionally called Julie Rapolla, Steve Hickey, and Steven Pomponi as additional witnesses. The following exhibits were admitted into evidence: Complainant's Exhibits (CX) 1 through 10, and Respondent's Exhibits (RX) 1, 4, 5, 7-19, 23-30, and Administrative Law Judge's Exhibits (ALJX) 1-8, ALJX 7 and 8 consisting of the closing briefs of Complainant and Respondent, respectively. TR.[1] at 9-25, 253-258, 344-45, 498-501. Some of the exhibits were admitted for limited purposes, some withdrawn, and some not admitted into evidence as reflected in the record. *Id*.

Respondent filed four motions in limine on the first day of trial. I granted motion number 2 and denied motions 3 and 4 for the reasons stated in the record. TR at 11-35, 277-281. Complainant withdrew his prayer for compensatory damages for health or physical injuries through stipulation at hearing so motion in limine number 1 became moot. TR at 277-79; ALJX 7 at 17. The record closed on March 9, 2005.

The decision that follows is based on arguments of the parties, the record evidence, and the applicable law.

Stipulations:

1. Complainant's actions of contacting Navy civilian personnel regarding alleged multiple inadequacies in the site map and safety and compatibility issues regarding chemical storage constituted protected activities under TSCA.
2. Respondent had knowledge about Complainant's protected activities.

TR at 25-26; ALJX 1 at 3-4. Because there is substantial evidence in the record to support the foregoing stipulations, I accept them.

Issues in dispute:

1. Did Respondent subject Complainant to an adverse action?
2. Was this adverse action due to Complainant engaging in protected activity?
3. If so, what is the appropriate remedy?

[1] References to the hearing transcript are indicated by "TR;"

Findings of Fact and Conclusions of Law

Factual Summary

In October 2002, Respondent took over a contract with the Navy's Fleet Industrial Support Center of San Diego to manage hazardous materials on and off facilities at eleven hazardous material sites throughout the Southwest region. TR at 60, 63. The contract was for a base year and up to nine additional years if Respondent met the performance standards. TR at 60-61. This was a potentially ten-year multi-million dollar contract. TR at 60.

Complainant worked for Respondent from on or around October 1, 2002 to February 10, 2003 as a Hazardous Materials Coordinator at the HAZMAT Minimization Center (HMC) at the 32nd Naval Station in San Diego, CA. TR at 147-148.

For the first month and a half, Complainant's job entailed shelf-life inventory and day-to-day operations with hazardous materials stored at Respondent for the Navy. He then began working on the Consolidated Hazardous Reusable Inventory Management Program (CHRIMP) for which he was tasked with facilitating the minimization of the hazardous materials within the base facilities. TR at 147-148. As part of Complainant's job he observed and suggested improvements to the site map for HMC at the 32nd Naval Station. The site map was a general safety map/blueprint of the facility that laid out the chemical storage locations, emergency exits, eye wash stations, and fire bottles.[2] TR at 93-94, 161-162. The site map was used by employees and firefighters and other rescue personnel. *Id*.

Complainant's direct supervisor from October 2002 through January 2003 was Ron Samonte, the site director for the HMC at the Naval Station. Mr. Samonte was described as a former chief petty officer in the Navy who was very aggressive when he worked at Respondent with Complainant. TR at 227 and 417. Mr. Samonte did not testify at hearing.

Mr. Samonte's supervisor was Steve Hickey, a former Marine for 28 years and, at all relevant times, the assistant program manager for HAZMAT Operations in the Southwest region for Respondent.

Senior to Mr. Hickey was the Program Manager David Orr. At all relevant times, Mr. Orr was the highest ranking official at HMC and Respondent's entire Southwest region including ten other sites for Respondent's client, the Commander Navy Region Southwest. TR at 68-69. Complainant was hired on the recommendation of Mr. Orr. TR at 59-60, 64, 66 and 484. Mr. Orr had previously spent 27 years in the Navy and retired as a supply captain. At all relevant times at RCI, Mr. Orr reported to Thomas Honeycutt, the division general manager, who was located in Vienna, Virginia. TR at 57-60, 416-17.

[2] Site maps are one of the "elements" of each site's "site control plan" used for emergencies at hazardous waste sites. See 29 C.F.R. § 1910.120(d)(3).

The Navy personnel responsible on the other side of Respondent's HAZMAT contract was Georgia Cruz, the environmental representative who oversaw Respondent's environmental compliance at HMC. TR at 164. Ms. Cruz's supervisor was Karen Jarrett, the Zone Manager, and she reported to Kevin Priest, who was the head of Navy's Fleet Industrial Support Center and the highest ranking Navy employee administering the contract with Respondent. TR at 116 and 164.

When Respondent first took over the contract with the Navy, as the successor to ORI Services, hazardous materials were all over the place at Respondent for managing the inventory. TR at 418. Things improved as to inventory management and shelf-life management while Complainant was employed at Respondent. *Id*.

In mid-December 2002, Respondent and Complainant agreed that Complainant would transfer to North Island Naval Air Station on February 10, 2003 to continue his work with CHRIMP in managing hazardous chemical storage.[3] TR at 78, 159. Mr. Hickey thought so much of Complainant that he described Complainant as being the "prototype guy" for the CHRIMP program as Complainant would go out to the customer, learn how to inventory the chemical lockers, bring back the information to establish records and a delivery schedule, and go off to other regional sites within the San Diego region and train other individuals to do similar tasks. TR at 410. Respondent characterized the transfer as a promotion and Complainant characterized it as a lateral move although he was happy with the re-assignment later saying he was looking forward to it and that he was on "cloud nine." TR at 79, 160, 189, 334. The CHRIMP work would have allowed Complainant to be more independent and work away from Mr. Samonte and report, instead, to Mr. Hickey, and later, after the transfer, to Mr. Reisman, an acquaintance of Complainant. TR at 218-19, 225-27. The date of the transfer was to be February 10, 2003. TR at 78, 159, 420-21.

Prior to his transfer away from 32nd St. to North Island, however, Complainant and his immediate supervisor Mr. Samonte had personality issues and did not work well together. TR at 117-18. Complainant was critical of Mr. Samonte's unprofessional handling of personnel, his lax refusal in keeping site maps updated at HMC and his poor leadership abilities in avoiding violations for handling chemicals at HMC. TR at 194-207; CX 10. Complainant believed Mr. Samonte's facility operation procedures were very unethical. TR at 227. In return, Mr. Samonte harassed Complainant by withholding his paycheck, assigning him to lesser tasks such as weed abatement and painting parking lots, and allowing co-workers to tear-down or rip-up the site map revised manually by Complainant. *Id*.

Complainant informed Mr. Samonte, Ms. Cruz, and others that the site map was incorrect throughout his employment. Complainant testified that the site map was severely out of date in 2002 as it referenced buildings that were no longer in existence and was dated September 2000.

[3] Mr. Hickey described Complainant's new work at North Island as having more responsibilities and would involve going to several locations including North Island, Pt. Loma, El Centro, and Miramar once a week to pick up empty hazardous materials, take inventory, and replenish any used materials with new containers. Apparently, there were 30 or so organizations at the Naval Station alone with 300-400 lockers for holding hazardous materials. Complainant would then bring the empty containers back to HMC where a bar code was read and then disposed of accordingly. TR at 419-20.

TR at 166-67. The oil drum layout, 55-gallon drum storage area and fire safety components were not reflected on the site map and there were outdated or missing fire evacuation procedures. *Id*. Complainant testified that he repeatedly brought this to the attention of Mr. Samonte who either failed to respond or responded in an untimely manner. TR at 167, 169. Complainant testified that his desire to correct the site map was not appreciated by other employees, who would remove, destroy or misplace the revised site map. TR at 169, 441-42. Prior to the incidents on February 6 and 7, 2003, referred to below, Complainant would routinely be in contact with Ms. Cruz either by accompanying her on her monthly inspections at HMC or in his attempt to have her continually update the site maps at HMC. TR at 170-171, 206.

On or around January 9, 2003, Ms. Cruz conducted her monthly inspection of HMC. HMC passed the inspection. TR at 69, 71. Following this inspection and being unsuccessful getting Mr. Samonte to correct perceived inefficiencies with chemical storage at HMC, Complainant presented to Mr. Orr a letter with his concerns about "proper storage and compatibility with material being stored at the site." TR at 71, 73; CX 5. Mr. Orr testified that he sent Complainant's letter to Navy personnel Ms. Jarrett, who said she would investigate the matter. TR at 72-73.

Complainant testified that Georgia Cruz would inspect HMC's hazardous chemicals once a month for air and ground compliance. TR at 204 and 206. Complainant opined that Ms. Cruz was incompetent and had no knowledge of chemical compatibility. TR at 204-05. In one instance in January 2003, Complainant observed that Mr. Samonte was not accompanying Ms. Cruz on her monthly inspection so he brought this to Mr. Samonte's attention and proceeded to escort Ms. Cruz around the facility with James Henderson, another co-worker. TR at 206. Complainant observed Ms. Cruz reprimanding a co-worker for having chemicals on the ground but not reprimanding a co-worker, Mr. Henderson, for having chemicals on a doorstep. TR at 206-07. Complainant testified that when Ms. Cruz realized her inconsistent reprimand, she issued seven violations which Complainant said should have been made on her past inspections and resulted in Mr. Samonte changing Complainant's job duties to lesser tasks such as weed abatement and painting of parking lots "deemed as punishment by my [Complainant's] co-workers." TR at 207.

On January 27 or 28, 2003, Mr. Samonte briefly stopped working at Respondent and told Complainant that he was quitting. TR at 118-20, 155, 171. Not until Complainant had his exit interview on February 10, 2003 did Respondent's HR representative, Julie Rapolla, tell Complainant that Mr. Samonte had not quit. TR at 195-96. Instead, Mr. Orr met with Mr. Samonte in late January 2003 and told him that instead of resigning, he should check out employment action plan possibilities and asked him if he would consider taking several weeks off to reconsider his resignation when he came off of leave. TR at 59, 119-20. Ms. Rapolla told Complainant on February 10, 2003 that Mr. Samonte was merely on an extended leave of absence and had not quit Respondent. TR at 195-96.

Complainant's February 2003 Message to Ms. Cruz

The course of events at issue occurred between February 6 and February 10, 2003. Prior to February 7, 2003, Complainant had not been the subject of any disciplinary actions by Respondent in writing or otherwise regarding his performance as an employee at Respondent.

TR at 105, 418-19. In fact, as referred to above, Complainant was set to begin a reassignment promotion to North Island on February 10, 2003. TR at 79, 420-22.

February 7, 2003

On Friday, February 7, 2003, Respondent learned that Complainant had contacted Navy civilian environmental compliance representative Georgia Cruz and her colleague, Mr. Hall, regarding what Complainant perceived to be inadequacies in the site map at HMC. TR at 411-12. Specifically on February 6, 2003, Complainant telephoned Mr. Hall regarding the site map. Mr. Hall passed Complainant's phone message onto Ms. Cruz. In response at 2:58 p.m. on February 6, 2003, Ms. Cruz emailed her supervisor, Ms. Jarrett, stating that Complainant left Mr. Hall a message, asking him to ask Ms. Cruz to "'school' the guys at the HAZMIN Center closer because they keep tearing up the site map he puts on the board." RX 13. In the email, Ms. Cruz asked Ms. Jarrett to tell her if she was overlooking something during her monthly inspections. Ms. Jarrett responded at 6:34 a.m. on February 7, 2003, saying that "You're doing a fine job and we appreciate all the assistance you provide us. Roger [Complainant] is another story…." *Id*.

On February 7, 2003 at 7:47 a.m., Complainant left another telephone message with Ms. Cruz directly asking her "if she could come down and 'school' us, inform us of … the actual procedures that she wants us to carry out with that site map at the location." TR at 171;RX 13 at 1. Prior to this February 7, 2003 call, Complainant said he had called Ms. Cruz half a dozen times beginning in late November or early December regarding the site map, but Ms. Cruz never returned his calls. TR at 297-300. Complainant left the voicemail message to Ms. Cruz because after Mr. Samonte left Respondent in late January 2003, Complainant's co-workers were tearing up the site map with Complainant's pen and ink changes. TR at 235-241. The site map was important because it contained the location of highly-reactive new chemicals and Mr. Samonte was unable to provide input of support and Ms. Cruz was someone Complainant could look to for help in stopping his co-workers' conduct in tearing up the site map. *Id.* and TR at 302-03.

Following the February 7, 2003 call, Ms. Cruz again emailed Ms. Jarrett at 8:31 a.m. informing her that Complainant left her a message this time regarding the site map. RX 13 at 1. At 9:19 a.m. on February 7, 2003, Ms. Jarrett then forwarded Ms. Cruz's emails on to Mr. Priest, who at 9:33 a.m. forwarded the two email messages to Mr. Orr and Mr. Hickey. *Id*.

Mr. Priest wrote in his first forwarded message to Mr. Orr and Mr. Hickey, "This is not good" and that the "employee [Complainant] may have put us on report without giving the chain of command an opportunity to work" and that this "is not an acceptable method of problem solving." RX 13. Mr. Priest wrote in his second forwarded message to Mr. Orr and Mr. Hickey, "This is out of control, please get this back inside the box and advise." TR at 82, 90; RX 13.

Before Mr. Orr arrived at work, Mr. Priest and Mr. Hickey discussed the matter further in a telephone conference from 7:15-7:30 a.m. on February 7, 2003. TR at 421-22. Mr. Priest was upset about Complainant's messages to Georgia Cruz and his not going up the proper chain of command at Respondent with his concerns before contacting the Navy. TR at 422.

Immediately after his conversation with Mr. Priest, Mr. Hickey left his cubicle office and resumed his meeting with Complainant in a conference room across the hall. The two men had met earlier, as previously planned, to discuss the CHRIMP map and Complainant's duties relating to it. TR at 424-26. Mr. Hickey told Complainant about the emails and explained to him the gravity of the situation. Mr. Hickey was upset that Complainant had gone outside Mr. Hickey's chain of command. TR at 437. Complainant described Mr. Hickey as being "extremely distraught" and angry during their meeting and caused Complainant to become increasingly upset at Mr. Hickey's implication that he had committed a grave mistake and that he could be fired over this incident. TR at 173, 176, 179.

Complainant was confused by Mr. Hickey's reaction to the e-mail from Ms. Cruz that went to Mr. Priest and the insinuation that it was improper for Complainant to contact Ms. Cruz. TR at 173. Complainant was confused because he knew that, in the past, contacting Ms. Cruz was within his role as hazardous materials coordinator and there were no problems with any of his prior contacts with Ms. Cruz. TR at 176. Complainant believed that his position of being the hazardous materials coordinator with Respondent allowed him to have frequent contact with Ms. Cruz as Complainant attended her monthly inspections. TR at 176, 204-07. Complainant believed that contacting Ms. Cruz was no problem as his work in coordinating the locations of hazardous materials and her duties with the site map were compatible. TR at 176. Complainant testified that Ms. Cruz had previously incorporated his suggestive changes to the site map. TR at 235-36.

Shortly thereafter, Mr. Hickey received a second call from Mr. Priest and left Complainant in the conference room to go pick up e-mails from Mr. Priest. Mr. Priest repeated his dissatisfaction with Complainant's conduct and how it was causing problems for Respondent. TR at 427. After receiving the e-mails from Mr. Priest, Mr. Hickey also described himself as being "rather upset." *Id*. Mr. Hickey returned to the meeting and showed Complainant the e-mails. TR at 428. Mr. Hickey testified that Complainant was upset because Mr. Hickey told him that "this is not good and that, you know, he [Complainant] is, you know, probably in deep trouble." *Id.* Mr. Hickey told Complainant to wait for Mr. Orr to arrive and indicated to him that Mr. Priest and Mr. Orr were in a conference regarding the e-mails and were deciding what to do with Complainant. TR at 173-74, 179. Despite his outward anger toward Complainant's voicemail to Ms. Cruz, Mr. Hickey admitted that it would have been better for Complainant to have directly contacted Mr. Priest with his concerns than to leave messages for Ms. Cruz because Mr. Priest was Respondent's liaison with the Navy. TR at 439-40.

In response, Complainant said that his e-mails to Ms. Cruz showed negligence and noncompliance on her part. TR at 178-79. He also said that he contacted Georgia Cruz because co-workers were tearing up the posted revised site map. TR at 236-37.

Complainant then asked Mr. Hickey what would happen to him. TR at 413. Mr. Hickey said that he did not know but that he thought it could range from a verbal warning to termination. TR at 413. At no time did Mr. Hickey discuss Respondent's progressive discipline policy with Complainant. See TR at 393-95. Complainant had no knowledge of Respondent's progressive discipline program because he was not provided with Respondent's Employee Handbook at any time. TR at 137, 155, and 374. In fact, Mr. Hickey admitted that he, too, was unaware of

Respondent's policies regarding progressive discipline during the entire five years he had been with Respondent. TR at 434.

Mr. Hickey said that Complainant next asked him if he could resign instead of being fired. TR at 413. In response to that question, Mr. Hickey told him to think about the situation and to "deal with it." TR at 413. Complainant disputed this testimony saying that the topic of his resigning as an alternative to termination did not come up until later that day when the two met again. TR at 180-81, 242-43. Complainant said that, instead, he was told by Mr. Hickey in their morning meeting to wait to talk to Mr. Orr, who was on a telephone conference with Mr. Priest pertaining to the emails. TR at 173-174. Complainant waited 45 minutes for Mr. Orr. When he did not return, Complainant went back to work. TR at 175, 179-180. Complainant left the meeting feeling confused as he believed that Mr. Hickey's anger and distraught nature painted a pretty grave picture of his future with Respondent. TR at 178-79.

Mr. Orr's office was located next to Mr. Hickey's in Building 116. TR at 59. After the telephone conference and during a break in Mr. Hickey's conference with Complainant early on February 7, Mr. Orr asked Mr. Hickey to speak to Complainant to get his "side of the story." TR at 91. Mr. Hickey testified that he told Mr. Orr that Respondent needed to do whatever the government wanted with respect to the e-mail incident and that "our job was to support the client who is Kevin Priest…" TR at 436. Mr. Hickey then expressed his opinion to Mr. Orr that what Complainant had done with his e-mails to Ms. Cruz was "improper" and was "going outside the loop …." TR at 436-37. Later, Mr. Orr also contacted the Human Resources Manager Julie Rapolla to get her guidance on how to proceed with an investigation of Complainant. TR at 85-86, 91.

At the end of the workday on February 7, 2003, Complainant and Mr. Hickey spoke again in Building 116 by the cafeteria. TR at 414. According to Complainant, he said that he told Mr. Hickey that Mr. Orr never returned to speak to him and that in light of Mr. Hickey's behavior in the earlier meeting, he would resign before being fired. TR at 180, 242-43. Mr. Hickey testified that when he saw Complainant later in the day, Complainant was still upset and speaking of resigning. TR at 414. Mr. Hickey told him to think about it over the weekend. TR at 414.

Mr. Hickey and Mr. Orr spoke after Complainant and Mr. Hickey's morning meeting with Complainant. TR at 92. That conversation consisted of Mr. Orr confirming with Mr. Hickey that Mr. Orr was going to meet with Complainant on Monday, at which time he would inform Complainant what was "going to happen because of these emails." TR at 92. During that conversation, Mr. Orr said that he did not speak with Mr. Hickey of any specific disciplinary procedures. TR at 92.

February 10, 2003

On Monday February 10, 2003, Complainant went to HMC to pick up his belongings before heading to North Island to start his new assignment. He took several photographs of reactive chemical lockers that he believed to be above weight for the purpose of calling Ms. Jarrett's attention to this problem. TR at 183. Complainant had previously taken photographs

and he felt it necessary on February 10, 2003 to take additional photographs of lockers that were not yet reflected on the site map at HMC. TR at 334-35. Complainant testified that he took the photos because he wanted to show Ms. Jarrett that chemicals were improperly stored in inadequately ventilated lockers and that new lockers were needed. TR at 335-36.

Co-workers attempted to confiscate Complainant's digital camera, but failed. TR at 183. At Ms. Jarrett's office, Ms. Jarrett told Complainant it was inappropriate for him to take the photographs and she deleted them from his camera. TR at 185. Complainant had contact with Mr. Priest in Ms. Jarrett's office; he told Complainant that he was "extremely concerned" about his conduct as described in the emails. TR at 186.

Later on February 10, 2003, Complainant met Mr. Orr about his telephone messages to Ms. Cruz and the e-mails. TR at 100. Mr. Orr testified that while he knew going into the meeting that the worst discipline to Complainant that could come from the incident was a first-level warning for Complainant not to leave any more messages to Ms. Cruz, he never communicated this to Complainant. TR at 143. Instead, Mr. Orr testified that he was "upset" and he was "chewing Roger [Complainant] out." TR at 101, 142. Mr. Orr also testified that Respondent's corporate HR department in Virginia generally followed Mr. Orr's recommendations regarding disciplinary actions for employees at Respondent. TR at 140-41.

After Mr. Orr, appearing upset, "chewed out" Complainant, he next told Complainant that "if it was up to me, I would recommend firing you" but also said "it's [firing Complainant] not up to me to do that and I'm going to initiate an investigation and send it up to corporate for resolution." TR at 101, 136, 142-43. Mr. Orr said Complainant suddenly said in response, "Can I quit instead?" TR at 101, 143. Complainant denied using the word "quitting" and, instead, commented about resignation versus being fired to Mr. Orr. TR at 242-43. Mr. Orr testified that he replied, "absolutely" and Complainant "basically left the room." TR at 143. Mr. Orr did not try to have Complainant reconsider resigning, as he had asked of Mr. Samonte nor did Mr. Orr refer Complainant to the progressive discipline or grievance process at Respondent. TR at 137.

Complainant testified that the conversation went differently and lasted only three minutes before Mr. Orr said that he had another meeting to attend. TR at 189. Complainant testified that he asked Mr. Orr if he could go start his job at North Island, and Mr. Orr said to him, "No, you are not going to go to North Island. You need to either resign or I'm going to fire you." TR at 188. Complainant testified that he told Mr. Orr that he was within his rights to contact Ms. Cruz, but Mr. Orr said that he would fire him "under violations of company policy and ethics" and that he should proceed to Human Resources. TR at 188-189. Complainant said he "begged" Mr. Orr to allow him to go to North Island, but to no avail. TR at 189. Mr. Orr testified that he did not recall Complainant asking about North Island during that meeting. TR at 102-103. Complainant left the meeting thinking that Mr. Orr was the "very guy who hired me [and was now] telling me he's firing me and it was unbelievable." TR at 189. Mr. Orr did not need to escort Complainant out of the building with security because Complainant left Mr. Orr's cubicle immediately after their short meeting to the parking lot to try to figure out what happened at the meeting. TR at 189-90. At no time did Mr. Orr discuss Respondent's progressive discipline policy with Complainant or refer him to Respondent's employee handbook. See TR at 137, 393-95.

After meeting with Complainant on February 10, 2003, Mr. Orr testified that he returned to his office and immediately telephoned the Human Resources Manager Julie Rapolla and told her that Complainant had just told him that he was resigning and that Complainant might be on his way up to see her. TR at 127.

Later on February 10, 2003, Complainant met Ms. Rapolla who appeared to Complainant to be waiting for him calmly with the exit documents already in front of her when he arrived "very distraught" and prepared to resign "under duress." TR at 190. She testified that Complainant told her he wanted to resign, and therefore she proceeded to execute the exit procedures. During their two hour meeting, Complainant completed the exit questionnaire and dictated a memorandum to Ms. Rapolla. TR at 354-355. The memo related to Mr. Samonte's lack of professionalism and did not mention the ultimatum given to Complainant by Mr. Orr. CX 10; RX 14. Another memo by Complainant to Mr. Orr dated February 10, 2003 with "Resignation" in the subject line stated "The Ethics Shoe was on your foot to come through for your employees with a response, and at least entertain me at the site to look things over." CX 9; RX 15. In Complainant's exit questionnaire, he checked the "supervision" box for his reason of leaving, and explained that:

> NAVSTA HAZMIN having 'No' formal safety and compatibility inspection by unbias[ed] competent people is a safety hazard. A hazard is issuing unstable HAZMAT, Storage and Racking systems. People present from past contractor enjoy and hindered me from stabilizing these conditions which would show their past and present negligence.

RX 16 at 2.

He also wrote "ethics of Steve H and Dave Orr I find upsetting." RX 16 at 2.

Ms. Rapolla testified that Complainant's former supervisor, Mr. Samonte, had come to her three weeks earlier to resign. At the request of Mr. Orr, Ms. Rapolla asked Mr. Samonte to reconsider the resignation, and instead offered him the option to enroll in the Employee Assistance Program or take a vacation. TR at 358. Mr. Samonte decided to take vacation instead of resigning. TR at 357. Ms. Rapolla did not ask Complainant to reconsider his resignation and she failed to offer him any of the options presented to Mr. Samonte. TR at 379-380. At no time during their meeting did Ms. Rapolla inform Complainant of Respondent's policy of progressive discipline. Instead, Ms. Rapolla claimed she told Complainant that he could not be forced to resign and that he was doing it on his own "free will." TR at 355, 382. She also told Complainant that he could be fired without notice because California was an "at-will" employment state. TR at 355, 373.

Ms. Rapolla further testified that Respondent adhered to a progressive discipline policy, and that there has to be a "really, really serious violation" for there to be a termination without first giving that employee three warnings. TR at 393. She had never known of a termination resulting from an employee going outside the chain of command; when that usually occurred, she said the employee would just be reminded of who was in their chain. TR at 394-395.

Complainant wrote a letter to Kevin Priest on February 11, 2003. RX 30. The letter asks Mr. Priest to become more informed about the material handling and safety problems perceived

by Complainant at HMC and contained language stating "I've accept[ed] stepping down. Under duress and emotionally devastated [sic]…." RX 30 at 3. Complainant thought of Mr. Priest as a friend or confidant and hoped to get his job back at Respondent with the letter. TR at 340-41; RX 30.

The progressive discipline procedure is outlined in the Employee Handbook, which Complainant never received. TR at 155, 374, 392-93; RX 27 at 126-29 Respondent's policy provides that discipline can take the form of any or all of the forms listed including termination of employment and that if a situation is deemed to be serious, termination may result immediately. RX 27 at 126-27. If, on the other hand, a progressive discipline procedure is appropriate to the situation, the Handbook lists the procedure for the progressive discipline. RX 27 at 127-28.

Ms. Rapolla testified that Complainant did not receive the manual because they were in the process of making a new one, and thus stopped distributing the old one. TR at 396. Respondent's termination and employee grievance procedures are also contained in the employee handbook. TR at 374, 403-04; RX 27 at 126-35.

Respondent contended that Complainant lied on his RCI job application and on his Public Trust Position Application (a.k.a. federal background disclosure application) about the nature of his termination from his previous employer, Home Depot. A Home Depot "associate action notice" indicated that Complainant was terminated because of "threats of violence." TR at 464; RX 2. Complainant, however, stated on his RCI job application that he left his Home Depot employment for the purpose of "change." RX 3. On his Public Trust Position Application, Complainant characterized his departure from Home Depot as "mutual agreement following allegations of misconduct" as opposed to characterizing his departure as a firing. Complainant testified that while employed at Home Depot, he left a voice message with his supervisor stating that if "he continued to flip me [Complainant] off while in the conversation with him, that I [Complainant] would remove his finger from his hand." TR at 319-20.

Respondent presented evidence showing that had the true nature of Complainant's Home Depot termination been revealed to Respondent, Complainant would not have been hired in the first place or he would have been terminated once the true nature of the termination was revealed. TR at 361. Thus, Respondent sought Complainant's claim for damages to be cut off as of May 26, 2004, the date Respondent first learned of the Home Depot document that stated that Complainant was terminated because of "threats of violence." TR at 463; RX 2. This was the date of Complainant's first deposition. Also, Complainant had signed-off on viewing Respondent's Ethics Video which showed that misinformation in an employee's resume was clear grounds for disciplinary action. TR at 210-11,348-49; RX 28. While Complainant testified that he viewed the Ethics video, the large majority of it dealt with the request that Respondent employees have honesty and integrity in their work and report dishonest behavior to their supervisors or the company hotline. *Id*. Only the last approximately three minutes of the twenty-four minute Ethics video dealt with safety and listed the telephone number of Respondent's Corporate Risk Management Department in Virginia along with the request that an employee contact their supervisor, the corporate risk manager or the hotline to report unsafe acts. RX 28.

Complainant testified that when he left Respondent in February 2003, he was earning $15 per hour. TR at 330. He also testified that he had applied for two positions with new employers since leaving Respondent in February 2003 through the date of trial. *Id*. Those positions involved a job with Helex Water District and another with a company supplying the Navy with food products. TR at 329. Also, Complainant stated that he is self-employed and does "fine" using an elaborate stock purchase software program that helps him in his stock trading business. *Id*. There was no evidence as to Complainant's gross earnings from February 11, 2003 through May 26, 2004.

Respondent prepared and circulated its Employee Termination Summary for Complainant on March 11, 2003 indicating that Complainant was terminated on February 10, 2003. CX 8. Ms. Rapolla had no knowledge of this document although she testified that many of the people on the distribution list were employed at Respondent in San Diego and Virginia. TR at 390, 397-99.

By October 30, 2003, Respondent had abated the storage and safety issues concerning Complainant when he left Respondent on February 10, 2003. RX 20.

Analysis

Witness Credibility

Complainant

Complainant testified and contradicted himself several times raising questions about his credibility. For example, Complainant testified that Mr. Samonte was his immediate supervisor until November 2002 and later changed this date to January 1, 2003. Complainant also testified that he did not write page three of RX 30, a February 11, 2003 letter to Kevin Priest but later admitted to writing it and saying that it was not "doctored." Complainant was also not credible about not remembering whether he left Ms. Cruz a voicemail message at 7:47 a.m. on February 7, 2003 and not knowing the date that he met Kevin Priest in a parking lot.

Also, I observed and found telling, Complainant's demeanor, veracity, and manner in responding to questions at hearing. What I initially viewed as evasiveness was more accurately understood as Complainant's deliberate attempt to answer questions to his best ability. For example, there was a line of questioning where Respondent's counsel attempted to confirm that Complainant had discussed the concept of resignation with Mr. Hickey three days before meeting with Mr. Orr. TR at 243. Complainant denied that this occurred because rather than viewing the time period between the two meetings generally from Friday, February 7 to Monday, February 10 as being three days, Complainant was viewing the time more exactly as being two and one-half days. TR at 243-44. Similarly, when Respondent asked Complainant to view a letter drafted by Complainant almost two years before trial that was not a part of Complainant's exhibits (RX 30), Complainant initially denied writing that he had "accepted stepping down." TR at 254-58. Complainant denied writing this portion of the letter using such language until he had a chance to review the letter fully in context and noted that soon thereafter, the letter states that Complainant "accepted stepping down under duress and emotionally devastated [sic]." *Id*. and TR at 338-41.

Respondent also focuses on Complainant's failure to mention the "ultimatum" from Mr. Orr during his February 10 exit interview with Ms. Rapolla and in drafting his parting memoranda as evidence questioning Complainant's veracity. I find this understandable as I understood from viewing Complainant at hearing that Complainant's primary focus while employed at Respondent involved his disagreement with the way Respondent managed the hazardous chemicals as evidenced by Complainant's complaint to OSHA seeking abatement of dangerous conditions at HMC. See RX 20-22, 24. I observed this also in Complainant's testimony as Complainant was clearly frustrated with Mr. Samonte, Mr. Hickey, and Mr. Orr ignoring his pleas for better hazardous chemical management at HMC.

While I find that Complainant has proven his prima facie whistleblower case, I also find that Complainant's main concern while facing termination on February 10, 2003 was documenting his legitimate concerns about Respondent's hazardous materials management rather than emphasizing the "ultimatum" presented by Mr. Orr despite Mr. Orr's secret knowledge that nothing more than a warning would come of Complainant's telephone messages to Respondent's client. This also explains why Complainant did not believe that he had filed a formal whistleblower action. See RX 24. As a result, I find that Complainant was a more credible witness than Mr. Orr and Ms. Rapolla as to the events occurring from October 2002 through February 11, 2003 for the added reasons that follow.

David Orr

David Orr testified that Mr. Hickey was not upset on February 7, 2003 when both Mr. Hickey and Complainant testified that Mr. Hickey was very upset with Complainant. Mr. Orr also testified that he clearly told Complainant on February 10, 2003 that the ultimate decision about whether or not to take disciplinary action against Complainant was not Mr. Orr's to make. While perhaps technically true, Mr. Orr's position as the highest ranking official at Respondent's San Diego facilities and Respondent's past record of hiring and disciplining employees based on his own recommendations made Complainant reasonably believe that he would be fired and Mr. Orr's statement less than credible. Mr. Orr also testified that on the morning of February 10, 2003, he expected Complainant to still take his new job on North Island but that he did not remember if he discussed whether Complainant could report to North Island that day. Later, Mr. Orr testified that he expected Complainant to go to North Island after their February 10, 2003 meeting. These statements are not credible as Complainant was more believable at trial when he testified that he asked to report to his North Island position during their February 10, 2003 meeting and that Mr. Orr specifically told him not to report there.

Mr. Orr told Complainant on February 10, 2003 that if it was up to him, he would recommend termination of Complainant's employment as a result of Complainant's e-mails to Ms. Cruz. Mr. Orr later recants this statement by saying that it is not up to him and that Respondent's Human Relations makes the ultimate decision. He also testified that he knew going into his meeting with Complainant that the worst discipline to Complainant that could come from the incident was a first-level warning for Complainant not to leave any more messages to Ms. Cruz. TR at 143. As a result, Mr. Orr's statement to Complainant that he would recommend termination was untrue and made only to intimidate Complainant to resign. Moreover, Mr. Orr

was not credible in his testimony as any recommendation to Respondent's corporate headquarters about Complainant's job status was very likely to be followed as it had been in the past. Complainant was not informed of Respondent's progressive discipline policy not having been given Respondent's Employee Handbook.

Finally, I find Mr. Orr's statement that Complainant asked him at the February 10, 2003 meeting whether he could "quit instead" as not credible and inconsistent with his later testimony that as soon as Complainant left his office on February 10, 2003, Mr. Orr called Julie Rapolla and told her that Complainant had just said "he'd like to resign." TR at TR at 101 and 127. As a result, I find it very credible and reasonable for Complainant to have believed in his meeting with Mr. Orr on February 10, 2003 that his only options were termination or resignation particularly given Mr. Orr's admitted unnecessary "chewing out" of Complainant, Mr. Orr's level of admitted anger toward Complainant, and Mr. Hickey's reminder to Mr. Orr that he needed to do whatever Mr. Priest and the government wanted them to do with respect to Complainant's telephone message to Ms. Cruz. Moreover, even Respondent characterized the end of Complainant's employment as a "termination." *See* CX 8.

Julie Rapolla

Julie Rapolla was not credible when she testified that she told Complainant on February 10, 2003 that no one could force him to resign and that he insisted on resigning. Respondent argues that this is evidence that Complainant voluntarily resigned. Respondent ignores, however, that at the same time she met with Complainant, Ms. Rapolla also told Complainant that California is an "at-will" employment state and that *employees like Complainant could be terminated at any time without notice.* I find this statement inconsistent with the argument that Ms. Rapolla did not contribute to the plan to force Complainant to resign or be terminated. Ms. Rapolla could just as easily as Mr. Orr have tried to talk Complainant out of resigning like she did with Mr. Samonte or at least told Complainant about Respondent's progressive discipline program or that the worst action Complainant faced was a warning for his telephone messages to Ms. Cruz and Mr. Hall. Had Ms. Rapolla actually tried to tell Complainant that he did not have to resign, one would expect her to also mention Respondent's progressive discipline policy and the improbability that Complainant would be fired for leaving voice messages. Ms. Rapolla did not treat Complainant the same way she treated Mr. Samonte when faced with his attempted resignation by suggesting vacation leave or looking into employee action plan options for Complainant. At the request of Mr. Orr, Ms. Rapolla had asked Mr. Samonte to reconsider the resignation, and instead offered him the option to enroll in the Employee Assistance Program or take a vacation. TR at 358. With Complainant, however, she had the resignation papers drawn up in furtherance of Mr. Orr's plan to force Complainant out of employment at Respondent.

Finally, Respondent prepared and circulated its Employee Termination Summary for Complainant on March 11, 2003 indicating that *Complainant was terminated on February 10, 2003*. CX 8. Ms. Rapolla was not credible when she testified that she had no knowledge of this document although she testified that many of the people on the distribution list were employed at Respondent in San Diego and Virginia. TR at 390, 397-99.

All in all, I find Complainant's inconsistencies and evasiveness as a witness are outweighed by his non-contradicted testimony that when Mr. Samonte briefly left Respondent in

late January 2003, there was lawlessness at the 32nd St location and because site maps were being torn down, Complainant felt compelled to contact Ms. Cruz as he had done previously with no negative repercussions. Based on the aforementioned inconsistencies and contradictions in Mr. Orr's and Ms. Rapolla's testimony and behavior, I find that they were not credible witnesses and accord little weight to their testimony. I find it more likely than not that either on request from Mr. Priest or when faced with this unhappy client (Mr. Priest), Mr. Orr. Mr. Hickey, and Ms. Rapolla made a concerted effort to force Complainant to resign or be terminated and that Complainant reasonably believed that his telephone messages to Georgia Cruz would directly result in his termination of employment. Moreover, the disparate treatment Complainant received from Mr. Orr and Ms. Rapolla, as compared to their combined efforts to prevent Mr. Samonte from resigning in late January 2003, confirms their intentions to push Complainant out of employment because of his protected activities.

With the foregoing determinations in mind, I turn to the remaining issues in this case:

General Statement of Law

To establish a *prima facie* case of retaliation or discriminatory motivation under the whistleblower provision invoked in this case, a complainant must show: 1) he or she engaged in protected conduct; 2) the respondent was aware of that conduct; 3) the respondent took some adverse action against the complainant; and 4) the complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Zinn v. University of Missouri*, 93-ERA-34 and 36 (*Sec'y* January 18, 1996); *Dartey v. Zack Co. of Chicago*, 82-ERA-2 (*Sec'y* April 25, 1983). The respondent may rebut the complainant's *prima facie* case by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason for the action. The complainant may counter the respondent's evidence by proving that the legitimate reason proffered by the respondent is pretext. *Dartey*, 82-ERA-, slip op. at 6.

In this case, Complainant and Respondent stipulated and I find that there is substantial evidence in support of the first two elements (Complainant engaged in protected conduct and the Respondent was aware of that conduct). See Stip. Fact Nos. 1 and 2 above. The issues in dispute relate to the third and fourth elements.

As will be discussed below, Complainant has established that Respondent took adverse action against him and presented evidence proving that the protected activity was the likely reason for the adverse action.

Respondent Subjected Complainant to an Adverse Action by Effectively Discharging Him

Complainant and Respondent presented different versions of Complainant's discharge. Complainant testified that he resigned after Mr. Orr said to him, "You need to either resign or I'm going to fire you." TR at 188. Complainant testified that he told Mr. Orr that he was within his rights to contact Ms. Cruz, but Mr. Orr said that he would fire him "under violations of company policy and ethics" and that he should proceed to Human Resources. TR at 188-189. Mr. Orr testified that he did not put Complainant to such a choice and instead he said to Complainant

that "if it was up to me, I would recommend firing him" but that he also clearly said "it's [firing Complainant] not up to me to do that and I'm going to initiate an investigation and send it up to corporate for resolution." TR at 101. Mr. Orr said Complainant said in response, "Can I quit instead?" TR at 101. Mr. Orr replied, "Absolutely" and told him to go to Human Resources. TR at 101.

In both versions, Complainant reasonably believed he was losing his job. If Complainant's version of events were accepted, he was clearly going to lose his job, whether he chose to resign or be terminated. The inevitableness of Complainant losing his job is less clear with Respondent's version of the termination. I find, however, that Complainant's objective belief that he was going to be terminated has been established for the reasons explained below.

First, Complainant objectively believed Mr. Orr had the power to make staffing decisions, including hiring and firing decisions. Mr. Orr was three levels above Complainant in the chain of command, after Mr. Samonte and Mr. Hickey. At the time Complainant was hired, Mr. Orr was the Program Manager of the HAZMAT Operation in the Southwest Region and at the time of Complainant's termination, he was the Operations Center Manager. TR at 53-54. Mr. Orr has been mischaracterized as a "mid-level manager" since he himself testified that there was nobody above him that had to do with the HAZMAT site at Respondent in San Diego. TR at 48; TR at 59. Mr. Orr testified that he interviewed and hired Complainant and that ultimate approval of the hire required approval by his boss, Mr. Honeycutt, who was located in Vienna, Virginia. TR at 67. Mr. Honeycutt, however, did not interview Complainant or have any other direct involvement with Complainant's hiring; he seemingly relied on his top local person, Mr. Orr, to make recommendations, which he then would approve. TR at 67; TR at 141. Taking into consideration Mr. Orr's high-level position and his power to make staffing decisions, I find that it was reasonable for Complainant to believe that Mr. Orr's "recommendation" that he be terminated was essentially the final word on the matter. Furthermore, I find Complainant's testimony is credible that Mr. Orr told him not to go to North Island on February 10, 2003. This is consistent with Mr. Orr's angry statements to Complainant that led Complainant to reasonably believe that he was being terminated as reflected in Respondent's Employee Termination Summary. See CX 8.

Second, Respondent argues that Complainant "overreacted" by resigning since Respondent employs a progressive discipline procedure. Complainant cannot be held responsible for knowing about Respondent's progressive discipline procedure since he never received the Employee Handbook, which discusses the progressive discipline and termination procedure. TR at 374.

Mr. Orr, on the other hand, can be held responsible for knowing about Respondent's progressive discipline procedure. TR at 108-109. Mr. Orr and the Human Resources Manager Julie Rapolla testified that the progressive discipline procedure generally entails giving employees three written warnings before considering termination. TR at 108-109; TR at 373. Neither Mr. Orr, Ms. Rapolla, nor Mr. Hickey mentioned Respondent's progressive discipline policy during critical meetings with Complainant in February 2003. Both Mr. Orr and Ms. Rapolla also testified that termination without the three warnings only occurs if there is a "really serious violation" or "extremely serious." TR at 108; TR at 393. Ms. Rapolla testified that in her

experience, when an employee who has gone out of the chain of command – like Complainant did – he or she would "likely" receive "verbal counseling." TR at 395. Therefore, when Mr. Orr told Complainant that he was going to recommend termination, and completely failed to mention to him the three-warning system, Complainant objectively believed that there was just one form of discipline in this situation – termination.

Third, when Complainant met with Ms. Rapolla to execute the formal exit procedures, she failed to offer him the same options offered to Mr. Samonte, who had come to her three weeks earlier to resign. TR at 379-380. At the request of Mr. Orr, Ms. Rapolla asked Mr. Samonte to reconsider his resignation, and offered him the option to enroll in the Employee Assistance Program or to take a vacation. TR at 358. Complainant was offered no such options, thus supporting Complainant's objective belief that he was losing his job.

It has been established that Complainant believed he was losing his job, whether he chose to resign or be terminated. The Ninth Circuit in *Cooper v. Neiman Marcus Group*, 125 F.3d 786 (9th Cir. 1997) has held that when an employee chooses to resign after being offered the choice to resign or be terminated, that employee has been "effectively discharged" because under both options, she would lose her job. *Cooper* was a wrongful discharge action under the ADA in which the plaintiff suffered from a speech problem without the prospect of improving. She was put on a 90-day probation by her Employer who told her that during that time she could either leave the company to seek other opportunities and be terminated at completion of probation, or continue to work for the company and be terminated if she did not correct her speech problem. Cooper chose to resign since her speech problem was not going to improve. The Court held that Cooper was "effectively discharged" because under both options, she would lose her job.

Defendant in the *Cooper* case -- like Respondent in this case -- cited to "traditional constructive discharge" cases. In those cases, the U.S. Supreme Court has held that "to establish 'constructive discharge' the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342, 2347 (2004). The Ninth Circuit in *Cooper,* however, said that those traditional cases were inapplicable in situations where the employee is given an option to resign or be terminated:

> The traditional constructive discharge line of cases is inapplicable here, because the facts and circumstances in this case are wholly dissimilar to those in such cases. Constructive discharge cases involve the imposition on an employee of intolerable work-related conditions which make it impossible for him to continue in his job and cause him to abandon it. Cooper's claim here, however, is entirely different. It is that Neiman Marcus was unwilling to permit her to continue to perform her job, because, in Neiman Marcus' view, she was unable to speak at a "standard level". No work-related conditions existed that made the job so intolerable that a reasonable worker would have quit her employment. Instead, according to Cooper, Neiman Marcus made the decision to discharge her, giving her only two options regarding the manner of her

> departure, under either of which her termination would be effective within 90 days.

Id. at 790-791.

Further support of the use of the constructive discharge doctrine in this way is found in *Kahn v. Commonwealth Edison Co.,* 92-ERA-58 (Sec'y Oct. 3, 1994). This whistleblower case under the Energy Reorganization Act (ERA) involved an employee (Kahn) who was given the choice to resign or to be fired; Kahn opted to resign. The Secretary of Labor found that the Respondent "took adverse action against Kahn when it gave him the option of resigning or being fired, which constituted constructive discharge." *Id*. at 3. *See also Earwood v. D.T.X. Corp*., 88-STA-21 (Constructive discharge is when employee involuntarily quit or was coerced into quitting).

In sum, I find that Respondent subjected Complainant to an adverse action by effectively discharging him.

Nexus Exists Between Complainant's Protected Activity and Respondent's Adverse Actions Against Him

Complainant must raise the inference that the protected activity caused the adverse action. *See Zinn v. University of Missouri*, 93-ERA-34 and 36 (*Sec'y* January 18, 1996); *Dartey v. Zack Co. of Chicago*, 82-ERA-2 (*Sec'y* April 25, 1983); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981) (Title VII case); *Cohen v. Fred Mayer, Inc.,* 686 F.2d 793 (9th Cir. 1982) (Title VII case). To establish a *prima facie* case, a complainant need produce only enough evidence to raise the inference that the motivation for the adverse action was his protected activity; not to establish motivation. *Pillow v. Bechtel Constr., Inc.,* 87-ERA-35 (Sec'y July 19, 1993). In making a *prima facie* case, temporal proximity between the protected activities and the adverse action may be sufficient to establish the inference that the protected activity was the likely motivation for the adverse action. *Larry v. Detroit Edison Co.,* 86-ERA-32 (Sec'y June 28, 1991); *Conaway v. Valvoline Instant Oil Change, Inc.*, 91- SWD-4 (Sec'y Jan. 5, 1993); *Abu-Hjeli v. Potomac Elect. Power Co.,* 89-WPC-1 (Sec'y Sept. 24, 1993).

The parties have stipulated that Complainant engaged in a protected activity when he reported safety issues to the Navy personnel, and that Respondent was aware of this protected activity. I have found that Respondent took adverse action against Complainant by effectively discharging him. For the reasons discussed below, I find that Complainant presented sufficient evidence to carry his ultimate burden of establishing that Respondent took adverse action against him in retaliation for a protected activity.

There was a relatively short time period -- four days -- between the protected activity and the adverse action. On February 6, 2003, Complainant first engaged in protected activity when he telephoned Mr. Hall, a colleague of Ms. Cruz, regarding the site map. That message was brought to the attention of Ms. Cruz and Ms. Jarrett that same day. On the following day, Complainant again engaged in protected activity when he telephoned Ms. Cruz directly asking

her "if she could come down and 'school' us, inform us of what is the actual procedures that she wants us to carry out with that site map at the location." TR at 171. Ms. Cruz, via email, immediately brought that phone call to the attention of Ms. Jarrett, who then forwarded Ms. Cruz's emails on to Mr. Priest. Mr. Priest then forwarded the messages to Mr. Orr and Mr. Hickey who met with Complainant. RX 13.

On that same day, February 7, 2003, Mr. Orr asked Mr. Hickey to speak to the Complainant to get his "side of the story." TR at 91. Mr. Orr also contacted the Human Resources Manager Julie Rapolla to receive her guidance on how to proceed with an investigation of Complainant. TR at 85-86, 91. That day, Mr. Hickey met with Complainant to explain the gravity of the situation. Mr. Hickey told Complainant that the discipline could range from a verbal warning to termination. TR at 413. Mr. Hickey said that Complainant asked him if he could resign instead of being fired. TR at 413. In response to that question, Mr. Hickey told him to think about the situation and to "deal with it." TR at 413. Later that day, Mr. Hickey told Mr. Orr that Complainant inquired into resigning. TR at 92 and 413.

On Monday February 10, 2003, Complainant had contact with Mr. Priest in Ms. Jarrett's office. Mr. Priest told Complainant that he was "extremely concerned" about the emails. TR at 186.

Complainant then met with Mr. Orr, and the disputed conservation took place. Mr. Orr allegedly told Complainant that "if it was up to me, I would recommend firing him" but that he clearly said "it's [firing Complainant] not up to me to do that and I'm going to initiate an investigation and send it up to corporate for resolution." TR at 101. Mr. Orr said Complainant said in response, "Can I quit instead?" TR at 101. Mr. Orr replied, "Absolutely" and told him to go to Human Resources. TR at 101. Complainant testified that Mr. Orr said to him, "You need to either resign or I'm going to fire you." TR at 188.

In sum, I find that the three-four days between the protected activities and the adverse action is sufficient to prove that the protected activity was the likely motivation for the adverse action. Further, the record does not show that Complainant engaged in other conduct that warranted discharge. In fact, prior to the protected activity on February 6 and 7, 2003, Complainant was transferring to North Island, which Respondent characterized as a promotion. TR at 77-78.

I find that Complainant has established all four elements of a *prima facie* case of retaliation or discriminatory motivation under the whistleblower provision invoked in this case.

Remedies

The remedy section under 15 U.S.C. §2622(b)(2)(B) of the TSCA states:

> If in the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order (i) the person who committed such violation to take affirmative action to abate the

> violation, (ii) such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment, (iii) compensatory damages, and (iv) where appropriate, exemplary damages. If such an order issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

Abatement

Complainant filed a complaint with OSHA concerning safety and health hazards at Respondent. In response, OSHA conducted an inspection at Respondent that was completed on December 18, 2003. The results of OSHA's inspection confirmed some of the complaints. The confirmed concerns included the chemical hydrazine being stored with incompatible chemicals, a leaking roof on three conex boxes where water reactive chemicals were being stored with hydrazine and other flammable chemicals, and there was a need to "air out" and leave open conex boxes to prevent a concentration of vapors from different types of chemicals. These concerns were all abated at Respondent by December 2003 and therefore there is no relief related to abatement as the issue became moot by actions taken in 2003. See TR at 17-19; RX 20-22.

Complainant also requests that Respondent post all HMC centers in the Southwest region with signs reminding employees that state and federal laws protect them in reporting safety violations or hazardous conditions to government agencies. Posting shall occur as referenced in my order below.

Back Pay

Respondent contended that Complainant lied on his RCI job application and on his Public Trust Position Application (a.k.a. federal background disclosure application) about the nature of his termination from his previous employer, Home Depot. A Home Depot "associate action notice" indicated that Complainant was terminated because of "threats of violence." TR at 464; RX 2. Complainant, however, stated on his RCI job application that he left his Home Depot employment for the purpose of "change." RX 3. On his Public Trust Position Application, Complainant characterized his departure from Home Depot as "mutual agreement following allegations of misconduct" as opposed to characterizing his departure as a firing.

Respondent argued that if the true nature of his Home Depot termination was revealed to Respondent, Complainant would not have been hired in the first place or he would have been terminated once the true nature of the termination was revealed. TR at 361. Thus, Respondent sought Complainant's claim for damages to be cut off as of May 26, 2004, the date Respondent first learned of the Home Depot document that stated that Complainant was terminated because

of "threats of violence." TR at 463; RX 2. U.S. This was the date of Complainant's first deposition.

A Supreme Court case, *McKennon v. Nashville Banner Pub. Co*., 513 U.S. 352 (1995) provides guidance on this issue. In that wrongful discharge case under the ADEA, the plaintiff's wrongdoing was also revealed during her deposition. The Court concluded that the "employee's wrongdoing must be taken into account" in determining remedial relief, even if the information is acquired during the course of discovery in a suit. *Id*. at 361-362. The Court held that "as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy" and that *backpay should be calculated "from the date of the unlawful discharge to the date the new information was discovered*." *Id.* at 361-362. (Emphasis added.) The Court, however, required the employer to establish that the wrongdoing was of such severity that the employee in fact would have been terminated had the information been revealed. *Id.* at 362-363.

I find that Respondent established that Complainant's wrongdoing was of such severity that he would have been terminated had the information been revealed. Mr. Orr testified that he would not have hired Complainant had he known about the nature of his discharge from Home Depot. TR at 465. He also testified that if the information was divulged during Complainant's employment he would have made a recommendation to corporate human resources to terminate him. TR at 465-466. Mr. Orr also testified that his disciplinary actions were generally followed. TR at 141. HR Manager Ms. Rapolla also testified that had a company investigation been conducted and it proved that Complainant provided inaccurate information, "discharge, I would say, definitely [would have] happen[ed]." TR at 361. Thus, since I find that Respondent has established that Complainant would have been terminated had the true nature of the Home Depot termination been revealed, Complainant's back pay award is cut-off on May 26, 2004.

Complainant would have continued to earn $15 per hour over a forty hour work week from February 11, 2003 through May 26, 2004. *See* Tr. at 330. I calculate that Complainant is owed *$40,200.00* (62 weeks x 40 hours x $15 per hour) together with interest at highest legal rate by Respondent for back wages plus interest less Complainant's actual gross wages over the same time period as stated below.

Mitigation

The TSCA's employee protection provisions do not explicitly require victims of employment discrimination to mitigate damages. *See* 15 U.S.C. §2622(b)(2)(B). Nevertheless, the Eleventh Circuit said in a whistleblower case under the Energy Reorganization Act that even though the employee protection provision of the statute does not explicitly require mitigation of damages the "Secretary and the ARB have consistently imposed such a requirement, in keeping with the general common law 'avoidable consequences' rule and the parallel body of damages law developed under other anti discrimination statutes." *Hobby v. USDOL*, No. 01 10916 (11th Cir. Sept. 30, 2002) (unpublished) (case below ARB No. 98 166, ALJ No. 1990 ERA 30). The Eleventh Circuit further stated:

> [Respondent] Georgia Power bears the burden of proving that [Complainant] Hobby did not properly mitigate. ... To meet this

> burden, it must show that (1) there were substantially equivalent positions available; and (2) Hobby failed to use reasonable diligence in seeking these positions.... "Substantially equivalent employment" would be a position providing the same promotional opportunities, compensation, job responsibilities, working conditions, and status.... Just as the burden of proving a failure to mitigate falls on Georgia Power, so the "benefit of the doubt" ordinarily goes to Hobby. As the Sixth Circuit has observed, "A claimant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence. The claimant's burden is not onerous, and does not require him to be successful in mitigation. The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job market."

Quoting from *Rasimas v. Michigan Dept. of Mental Health***,** 714 F.2d 614, 624 (6th Cir. 1983).

Complainant testified that he had applied for two jobs since his discharge. TR at 330. He stated that he only applied to two jobs over a year and ten month period because he had been self-employed as a stock trader. TR at 330. I find that Complainant has met the low standard required for proving mitigation. Complainant's gross earnings from February 11, 2003 to May 26, 2004 need to be determined, and will off-set the back wages damages award. The record will be re-opened for the limited purpose of resolving this issue and Complainant will provide Respondent with proof of his gross wages during this time period at the time he submits his petition for attorney fees and costs.

In conclusion, I shall afford Complainant the opportunity to submit a detailed accounting of his gross wages earned from February 11, 2003 to May 26, 2004 and shall afford Respondent the opportunity to respond to this submittal. Thereafter, I shall issue a supplemental recommended order setting forth the net amount of back wages, if any, to be paid by Respondent to Complainant.

Compensatory Damages

No compensatory damages have been requested as Complainant withdrew his request at hearing as confirmed in his closing brief. TR at 277-79; ALJX 7 at 17.

Exemplary Damages

Complainant requested exemplary damages in the amount of three times of his back pay damages request. Under 15 U.S.C. §2622(b)(2)(B)(iv) of the TSCA, exemplary damages are allowed, when appropriate. Under a leading TSCA environmental whistleblower case in regards to exemplary damages, *Johnson v. Old Dominion Security*, 86-CAA-3, 4 and 5 (Sec'y, May 29, 1991), the Secretary stated:

> Exemplary awards serve in punishment for wanton or reckless conduct to deter such conduct in the future. The Restatement (Second) of Torts § 908 (1979) describes a two-step analysis. The threshold inquiry centers on the wrongdoer's state of mind: did the wrongdoer demonstrate reckless or callous indifference to the legally protected rights of others, and did the wrongdoer engage in conscious action in deliberate disregard of those rights. The "state of mind" thus is comprised both of intent and the resolve actually to take action to affect harm. If this state of mind is present, the inquiry proceeds to whether an award is necessary for deterrence…Generally, a bare statutory violation is insufficient to substantiate such an award.

Respondent's retaliatory discrimination did not go beyond the statutory violation of putting Complainant to the choice of being fired or resigning. This falls short of the circumstances present in a number of cases in which exemplary damages were awarded, including the case cited by Complainant, *Trueblood v. Von Roll America, Inc*. (2003) ARB No. 03-096, ALJ No. 2002-WPC-3. In the *Trueblood* case, the Complainant endured "pervasive" intentional retaliatory discrimination on a "regular" basis over a three year period. The ARB found that the many instances of retaliatory discrimination by the Respondent were motivated by its desire to eventually discharge Ms. Trueblood. In the case before us now, Complainant did not endure pervasive and regular retaliatory discrimination; he suffered from one adverse action. The record also indicates that Respondent was not on a mission to terminate Complainant. In fact, up until the situation that arose on February 6 and February 7, 2003, Respondent was planning on transferring Complainant to North Island, a move characterized as a promotion. Thus, I do not find the existence of the requisite state of mind and conduct needed for exemplary damages.

Attorney Fees and Costs

Under 15 U.S.C. §2622(b)(2)(B) of the TSCA the Secretary may order a violator to pay "a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued." Since I have found that Respondent violated the employee protection provisions of the TSCA, Complainant's Counsel is entitled to recover reasonable attorney attorneys' fees and costs for services performed in this matter.

I shall afford Complainant's counsel the opportunity to submit a detailed request for payment of reasonable attorney fees and costs and shall afford Respondent the opportunity to respond to the petition. Thereafter, I shall issue a supplemental recommended order setting forth the amount of attorney fees and costs that Respondent shall pay.

RECOMMENDED ORDER

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, I **RECOMMEND** Complainant Roger Walsh be awarded the following remedy:

1. Expunge from and revise Complainant's personnel records at Respondent to properly reflect that Complainant was not terminated and did not resign from employment on February 10, 2003 but, rather that he was terminated effective May 26, 2004 for not fully disclosing the circumstances of his earlier termination from Home Depot when he applied for work at Respondent consistent with this Recommended Decision and Order.
2. Pay to Complainant the sum of $40, 200.00 together with interest at highest legal rate dating from February 11, 2003 on the unpaid sums less Complainant's gross wages during that same time period based on proof submitted within thirty days to me on the re-opened record consistent with this Recommended Decision and Order. Respondent shall have thirty days to file a response from receipt of this newly submitted evidence.
3. Post on all bulletin boards of Respondent's Southwest region HMC facilities, a copy of this Recommended Decision and Order for a period of 90 days, ensuring it is not altered, defaced or covered by any other material.
4. Notify in writing all witnesses in this proceeding, who testified at the hearing that retaliation for such testimony is illegal.
5. Set forth in the notification, required by item 4 of this order, in detail the procedures for filing a complaint with the Secretary of Labor should such a violation occur.
6. Complainant's Counsel shall file their fee petition within 30 days of this decision. Respondent shall have 30 days from receipt of fee petition to file a response.
7. Any net back wages plus interest owed by Respondent to Complainant shall be referenced in a supplemental recommended order issued concurrently with approval of a specific amount of approved attorney fees and costs.

A

Gerald M. Etchingham
Administrative Law Judge

San Francisco, California

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