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**Issue Date: 06 May 2008**

Case No: 2006-TSC-2

IN THE MATTER OF:  
SAMUEL BUCALO,  
Complainant,

v.

UNITED PARCEL SERVICE,  
Respondent

BEFORE: Thomas F. Phalen, Jr.  
Administrative Law Judge

**DECISION AND ORDER DENYING RELIEF UNDER THE ACT**

This case arises under Section 23(a) of the Toxic Substances Control Act of 1986 (“TSCA”), 15 U.S.C. § 2622, *et. seq.*, as amended, and the regulations promulgated hereunder, at 29 C.F.R. Part 24, which are employee protective provisions of TSCA. The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety and health concerns or other requirements established by TSCA.<sup>1</sup>

This proceeding involves a complaint filed on our about May 27, 2005 by Mr. Samuel Bucalo (“Complainant”) against United Parcel Service (“UPS” or “Respondent”), located in Sharonville, Ohio. Mr. Bucalo alleges UPS discriminated against him in violation of the Act. The complaint was investigated by the Occupational Safety and Health Administration (“OSHA”) and the Secretary’s Findings were issued on January 12, 2006. OSHA determined that Complainant’s complaint was without merit, finding that Mr. Bucalo did not engage in protected activity. Complainant objected and on January 23, 2006 requested a hearing before an administrative law judge. The case was assigned to me, and a hearing was held before me in Cincinnati, Ohio on March 13-15, 2007. The parties filed post-hearing briefs. The decision that follows is based on the arguments of the parties, the evidence of record, the testimony offered at hearing, and the applicable law.

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<sup>1</sup> I note I dismissed the claim under the Surface Transportation Act upon a motion for directed verdict from Respondent, as Complainant had failed to articulate any protected activity under the act. (Tr. 702-03). Complainant presented no evidence of any refusal to drive or a concern of a violation of the Federal Motor Carrier Safety Act.

## ISSUES

The following issues are presented for adjudication:

1. Whether UPS is subject to the TSCA.
2. Whether Complainant engaged in protective within the meaning of the Act.
3. Whether Respondent subjected Complainant to adverse employment action because of his protected activity.
4. If so, what is the appropriate remedy?

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### A. UPS Subject to TSCA

The Toxic Substances Control Act is geared towards those companies who engage in the “manufacture, processing, *distribution in commerce*, use, or dispose” of toxic substances. 15 U.S.C. §2601(a)(2) (*emphasis added*); *see also Devers v. Kaiser-Hill Co.*, ARB Case No. 03-113. Mr. Willis testified that he handled numerous mercury spills for UPS. Furthermore, he testified that as a corporation, they were trying to reduce and eliminate “the sources of those spills from the products that we carry for customers.” (Tr. 518). Thus, UPS is on notice that it distributes toxic substances in commerce, and it is therefore a company subject to the Act.

### B. Testimony and Evidence of Record

#### *Testimony of Sam Bucalo*

Complainant testified that he began working at UPS on March 1, 1979 while he was in college and has worked there ever since. (Tr. 43). Since the mid 1980’s, off an on, Mr. Bucalo has held appointed and elected union steward jobs. He identified Joint Exhibit 5, and noted it was a history of various jobs he held while working at UPS. He worked as an unloader, loader, full time driver in 1990, and presently worked as what is known as a 22.3 air driver/car wash. (JX 5; Tr. 44). A “22.3” job is taken from article two, section three of the national master agreement. Basically, it is a combination of two part time positions into one full time position. (Tr. 45). The car wash portion of the position involves driving a truck to its final destination within the facility for mechanical work, fueling, cleaning, and prepping them for the next day. (Tr. 46-47). The air driver involves driving a truck to make pickups of skids of packages. (Tr. 47). According to Mr. Bucalo, it can best be summed up as a “work as directed” position, where you work where you are needed, be it unloading trucks, sorting off the belt, or whatever else one is directed to do. (Tr. 48). In his experience sorting belts, Mr. Bucalo became very familiar with how the belt system worked, while he was not familiar with where outbound doors went.

In May of 2005, Mr. Bucalo reported to work around 5 p.m. every evening. The week before, he was on vacation. (Tr. 57-58). On May 2, 2005, Mr. Bucalo reported to work at 5 p.m.

At this time, he was working in the car wash, taking a few trucks to the mechanic shop. (Tr. 58). Around 8 p.m., a fellow worker named Mr. Bowman, who was also a 22.3 worker, stopped Mr. Bucalo and asked him if he had heard there was a mercury spill. Upon being asked if he had any experience, Mr. Bucalo replied “in my twenty-six years at UPS, I had never encountered one.” Mr. Bowman asked Mr. Bucalo if in his capacity as a union steward if he would investigate the matter.<sup>2</sup> Mr. Bucalo noted he remembered hearing about a mercury spill in the news, and knew it was dangerous.

Mr. Bucalo proceeded to call Mr. Roa, who serves as the business agent for Local 100 and had been with UPS for thirty years at 8:19 p.m. (Tr. 65; JX 11). Mr. Roa told Mr. Bucalo to continue to investigate. Mr. Bucalo then looked for Mr. Jeff Funk, who was the sort manager for the building, and he was a person Mr. Bucalo “felt like he could trust.” (Tr. 66). However, Mr. Bucalo found Mr. Michael Crump, his immediate boss. (Tr. 67). The two proceeded to argue about whether Mr. Bucalo had a right to be involved at this point. Mr. Bucalo alleged Mr. Crump told him it was “none of his business and that it had been taken care of.” Mr. Bucalo noted he responded that he was the union steward and needed to be included in the process. However, Mr. Bucalo also testified that Mr. Crump told him UPS was responding to the spill, but that Mr. Bucalo did not trust Mr. Crump. (Tr. 176). He expressed his concern for his fellow employees and that as a union steward, he had a right to investigate to protect them. (Tr. 176). Mr. Bucalo admits he never expressed any concern for anyone outside the building, or the environment. Upon asking for Mr. Funk, he was told that Mr. Funk was busy. At this point, Mr. Bucalo received permission to clock out for lunch. (Tr. 68). He told Mr. Crump he was going to investigate as he “had a concern.” (Tr. 69).<sup>3</sup> However, it was perfectly clear to Mr. Bucalo that Mr. Crump did not want him to investigate the spill. (Tr. 179).

After clocking out, Mr. Bucalo went to the “right-to-know station,” which has all the MSDS sheets for handling toxic substances.<sup>4</sup> Upon finding the number to call regarding toxic substances, Mr. Bucalo called it at 8:36 p.m. (Tr. 75, JX 11). He wanted to get some information on the spill because he was “at this point ... concerned for the employees in the building.” (Tr. 75-76). Mr. Bucalo testified that he spoke with an individual named Scott, and identified himself as a union steward. After discussing the spill with Scott, he transferred Mr. Bucalo to another person to whom Mr. Bucalo gave a fax number to receive MSDS sheets on mercury. Mr. Bucalo stated he received this fax “almost immediately.” (Tr. 77).<sup>5</sup> Upon reading the sheets, Mr. Bucalo learned that “this was pretty nasty stuff.” (Tr. 79). Mr. Bucalo then went to the re-wrap area (for damaged packages) to find out if the situation was being handled properly. (Tr. 80). Upon arriving, Mr. Bucalo discovered that a mercury package had not been found. (Tr. 80). He then spotted Mr. Mike Simonds washing his hands. Mr. Simonds told Mr. Bucalo he had actually touched the mercury, and that it was about the size of a half dollar and on the sort belt. (Tr. 80). After touching it, he informed Mr. Bucalo that the mercury

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<sup>2</sup> However, Mr. Bowman testified that he simply told Mr. Bucalo about what happened, and never directly asked him as a union steward to investigate. (Tr. 254).

<sup>3</sup> Mr. Bucalo indicated clocking out to investigate grievances was a common practice. (Tr. 69-70). He testified that when he clocks out he is emancipated from service, and is therefore free to do whatever he believes is proper. Furthermore, he believes acting as a union steward gives him the elevated status of a manager. (Tr. 180).

<sup>4</sup> This book was admitted as JX 2.

<sup>5</sup> This fax can be found at JX 13.

split up into tiny beads and went down and under the belt. Mr. Bucalo testified that his concerns were rising because the package “could be anywhere in the building.” (Tr. 83).

Mr. Bucalo then called Scott back at 8:49 p.m. (Tr. 85; JX 11). Upon informing Scott that the mercury spill was the size of a half dollar, the package had not yet been found, and they did not have a spill kit, he alleged Scott told him to “shut down the building.” (Tr. 85). Mr. Bucalo then went to find Jeff Funk. (Tr. 86).

Mr. Bucalo eventually found Mr. Funk in a huddle with other supervisors. At this time of night, Mr. Funk as the sort manager, was probably the highest ranking person in the building. (Tr. 87). Mr. Funk saw Mr. Bucalo, and without speaking, pointed him to Mr. Gary Willis, whom Mr. Bucalo had never met before. (Tr. 87). Upon introducing himself as the union steward and asking questions, Mr. Willis informed him they had not yet found the package. Mr. Bucalo asked if they should evacuate the building, as this is what Scott said they should do. Mr. Willis informed him that he was involved with the committee that designed the mercury response and had handled over thirty-five mercury spills this year alone, thirty-seven last year, and this is how things were handled. (Tr. 88). This response made Mr. Bucalo feel more comfortable because “they knew what they were doing” and “had experience with mercury spills.” (Tr. 91).

Mr. Willis then showed Mr. Bucalo digital pictures of the mercury beads, and pointed to the belt where they were found.<sup>6</sup> They did not approach the area because there was caution tape around the direct area where the spill was spotted. (Tr. 97). Mr. Willis assured Mr. Bucalo that this was not a large spill. (Tr. 92). Furthermore, Mr. Willis told Mr. Bucalo that a number of belts around the spill area had been shut down and the area evacuated. (Tr. 195).<sup>7</sup> At the end of this conversation, a clean up crew showed up “in their space suits” to clean the spill. (Tr. 96). He noted Mr. Willis later told him he appeared agitated at this point. Mr. Bucalo stated it may have been because in his mind, he was thinking they deliver packages to houses and schools and offices across the country, and they had yet to find the package. (Tr. 97-98). At this time, Mr. Bucalo felt it was time for him to leave the area as he did not want to interfere with the clean up. (Tr. 99).

Later that evening while Mr. Bucalo was telling his fellow employees what he had learned, Mr. Willis walked up to him and volunteered to tell him about how the clean up process worked. (Tr. 100). He told Mr. Bucalo about a sniffer that detects levels of mercury, and informed him that the sniffer indicated there were no signs of mercury in the back of the building. Upon asking for a copy of that report, Mr. Bucalo was told he would not be receiving one. (Tr. 100).

Shortly before his shift ended, Mr. Bucalo stated someone asked him about Mr. Simonds having mercury on his clothes and hands. Mr. Bucalo asked him if he was okay and if anyone had told him to see a doctor. Upon being told no by Mr. Simonds, Mr. Bucalo found Mr. Willis and asked him to talk to Mr. Simonds. (Tr. 102). After this, Mr. Bucalo clocked out and conducted his steward’s walkthrough of the building to “observe if supervisors were working in

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<sup>6</sup> They were approximately thirty feet away from the spill at this point. (Tr. 92).

<sup>7</sup> In fact, the belts were shut down immediately upon the discovery of the mercury. (Tr. 267).

violation of the contract.” (Tr. 103).<sup>8</sup> He only started doing this walkthrough recently, because in April, they had “supervisors performing all the work, sorting, unloading, loading the trucks” after sending the per hour workers home.<sup>9</sup> Upon learning this in April, Mr. Bucalo confronted Jeff Funk about this and filed a grievance. However, that evening after conducting his walkthrough, Mr. Bucalo went home.

Mr. Bucalo considered Mr. Willis to be an honest man of integrity, and he had no reason not to trust him. (Tr. 185). Concerning their conversations that evening, Mr. Bucalo stated Mr. Willis had “resolved the issues before” him. (Tr. 186). However, while Mr. Bucalo felt he received all the information that was available that evening, he still had issues he wanted resolved. (Tr. 187).<sup>10</sup> Mr. Bucalo noted he repeatedly told Mr. Willis he was concerned for the employees in the building. Upon being asked if he ever expressed a concern that mercury would leave the building and expose the members of the public, Mr. Bucalo stated “I think that’s understood,” but he could not remember if he discussed this with Mr. Willis. (Tr. 191). Mr. Bucalo did admit he never expressed a concern for the environment outside the building. (Tr. 191). Mr. Bucalo noted the concern that the package would be delivered to the community grew in his mind as the night went on – but he believed he only discussed this matter with hourly employees, and never discussed his concerns with management. (Tr. 192-93).

The next day on May 3, Mr. Bucalo was told by Mr. Michael Crump to report to Mr. Jeff Soule’s office, the division manager. (Tr. 106). Mr. Bucalo made some phone calls to the union hall to tell them he would need representation before reporting to Mr. Solue. Besides Mr. Solue and Mr. Bucalo, also present for the meeting were Mr. Crump, and Mr. David Roa. The basics of the meeting was that Mr. Solue was concerned that Mr. Bucalo, who was not a trained responder, had entered the spill area and interfered with those that were trained responders while they were performing their duties in handling the spill. (Tr. 108). They decided to take Mr. Bucalo out of service because he “could have caused a chaotic situation.” (Tr. 109). Mr. Bucalo expressed to Mr. Soule that he had an elevated status as a union steward and that he did not have to follow management’s instructions. (Tr. 205-06). Mr. Soule informed Mr. Bucalo that he was to follow management’s instructions no matter what, and that he could grieve later. (Tr. 208).<sup>11</sup> His discipline would be decided after an investigation. (Tr. 110).<sup>12</sup>

Mr. Bucalo received a phone call on May 4 from Mr. Roa where he was informed he would receive a one day suspension (to which he would file a grievance), and they would have a meeting with Mr. Solue on May 5. (Tr. 111). Mr. Bucalo, Mr. Solue and Mr. Roa were present for this meeting. Mr. Solue informed him the investigation revealed he had not entered the spill area or interfered in the response, but that he had failed to follow the instructions of Mr. Michael Crump. Mr. Bucalo disputed that Mr. Crump ever told him to stay away from the area, and that

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<sup>8</sup> Mr. Bucalo testified that he cannot remember the exact time he clocked out, but his shift ends at 1:30am. (Tr. 104).

<sup>9</sup> He had done this walkthrough approximately 10-15 times.

<sup>10</sup> However, Mr. Bucalo never testified specifically as to what those issues were – and there is no evidence he stated he had more concerns to Mr. Willis.

<sup>11</sup> In fact, in the labor world, Mr. Bucalo noted that the general rule of thumb is to follow instructions and grieve later. (Tr. 214). In fact, Mr. Bucalo filed over 300 grievances while at UPS – showing he was familiar with the process.

<sup>12</sup> Mr. Bucalo’s grievance for this instance may be found at JX 17.

besides, he had a right to be there as a union steward. At this meeting, Mr. Bucalo stated he thought that the delivery of the package would have been a violation of the Surface Transportation Act. He informed Mr. Solue that he would be contacting OSHA and the NLRB. (Tr. 112). Mr. Bucalo then reported for work at 5 p.m. on the evening of May 5.

After he clocked out that night at 1:24 a.m., Mr. Bucalo grabbed a soda from the break room, and then proceeded to do his “walk through” to look and see if supervisors were performing hourly work. (Tr. 113; 223). Mr. Bucalo saw someone doing hourly work, and found Mr. Todd Wachter who was a supervisor on the sort. Mr. Bucalo told him he was conducting a steward’s investigation, and Mr. Wachter told him to “go back to work.” Upon learning that Mr. Bucalo was already off the clock, Mr. Wachter told him to leave. Mr. Bucalo told him he was “conducting a steward’s investigation, which is protected under article 4 of the national master.” (Tr. 115). He again told Mr. Bucalo to leave, upon which Mr. Bucalo stated he replied “I bet you would.” Upon asking to speak with Mr. Wachter’s boss, he was told no, and that he still wanted him to leave. Mr. Bucalo then threatened to file a grievance and charges. Mr. Wachter stated he did not care, and that Mr. Bucalo was to leave. Finally, after yelling ensued, Mr. Bucalo started to walk away and stopped to write down the details of the conversation before he forgot them. (Tr. 117). Mr. Wachter then “yelled at him” telling him to leave, which Mr. Bucalo, at this point, did.

After stepping outside the plant, Mr. Bucalo realized he had a pair of keys to a truck in his pocket, so he went back to the OMS office to put the keys away in case they were needed the next day. When Mr. Bucalo finally reached his car, he realized his “hands were shaking” as a result of the confrontation with Mr. Wachter. (Tr. 119). On his way home, Mr. Bucalo called Mr. Roa to leave him a message and tell him what happened between him and Mr. Wachter. Mr. Bucalo then decided to report the matter to the police. He drove to a police station on Reading Road and explained to an officer what had happened. He was then directed to the Sharonville police office, and there he met an Officer Saylor. (Tr. 121). Upon telling him he wanted to file charges, the office stated “all you really want to do is talk to Mr. Wachter’s boss, right?” Upon answering in the affirmative, the officer called the plant and spoke with Mr. Ray McDaniels, who was now on the clock as the sort manager. After driving back out to the plant Mr. McDaniels met with Mr. Bucalo where he expressed his concern over the way Mr. Wachter spoke to him, feeling he was being discriminated against because he was looking for supervisors performing hourly work. Upon talking about the steward’s investigation, Mr. McDaniels stated he did not know the contract that well, but that maybe a supervisor could walk through with him. Regardless, he stated they could meet the next evening after he spoke with labor and the division manager. (Tr. 122).

When Mr. Bucalo reported for work the next day on May 6 at 5 p.m., he was told to again report directly to Mr. Soule’s office. In the office were Mr. Soule, Mr. Carlos Garcia (the feeder division manager), and Mr. Roa. Mr. Soule stated that Mr. Bucalo had failed to follow instructions the previous night when Mr. Wachter asked him to leave. Because Mr. Bucalo failed to follow instructions, he was being terminated.<sup>13</sup>

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<sup>13</sup> JX 18, dated May 10, is a copy of the official discharge letter. JX 19 is Mr. Bucalo’s grievance regarding his termination, and page two of this document is his grievance relating to his confrontation with Mr. Wachter. Mr.

Upon cross-examination, Mr. Bucalo testified that he had undergone numerous OSHA compliance training exercises regarding spills. (Tr. 169). Part of that training is for individuals who are not designated responders to not touch, leave area, and tell a supervisor. (Tr. 170).<sup>14</sup> Mr. Bucalo noted he was not a designated responder and has never been trained as one. He agreed that only designated responders should respond to a spill, but that in the case of mercury, Mr. Bucalo opined not even they should respond because it is so dangerous. (Tr. 171). This would be even truer, according to Mr. Bucalo, for non responder employees. (Tr. 184). Mr. Bucalo conceded he had no knowledge of the properties or dangers of mercury, other than it is liquid metal. (Tr. 172).

Mr. Bucalo also testified that Mr. Bowman never expressed any concern about the public outside the building, or the contamination of the environment. He also conceded that he included language in a recent complaint he raised in regard to a diesel spill that expressed concerns for the safety of the general public. (Tr. 199; JX 29). Mr. Bucalo testified that he had learned through this process to express such concerns to be covered under the TSCA, and that he had not expressed such concerns in regard to the mercury spill. (Tr. 200). Even the press release he had drafted regarding this incident was to express concern for the safety of the workers in the building. (Tr. 201).<sup>15</sup> I had no reason to question Mr. Bucalo's credibility. By appearance, consistency, and painfully truthful accounting of the matter, he did not establish either protected activity or a violation of the Act.

#### *Testimony of Mr. David Roa*

Mr. Roa testified that during the meeting on May 3, Mr. Crump's position was that he had told Mr. Bucalo not to get involved in the spill situation. Mr. Soule also wanted to investigate to what extent Mr. Bucalo inserted himself into the investigation. On May 4, Mr. Roa received a phone call informing him that Mr. Bucalo would be brought back to work that day with only a one day suspension under 17-I for failing to follow instructions. According to Mr. Roa, a 17-I infraction is one of the "cardinal sins" where an employee could be removed immediately without progressive discipline. In his opinion, failing to follow instructions would not normally be considered a 17-I infraction, and in his experience, this was the first time it was considered at such a level. (Tr. 319).

During the May 5 meeting, Mr. Roa noted Mr. Soule told Mr. Bucalo that management was responsible for handling emergency situations that "too many chiefs" could undermine the process. (Tr. 314-15). Mr. Crump's position was that he instructed Mr. Bucalo not to go over to the spill area and to not get involved in the situation. (Tr. 369-70). Mr. Soule also told Mr. Bucalo that he had to follow instructions, as chain of command was important. Also in that meeting, there was a concern expressed by Mr. Bucalo of "how far that mercury could have traveled through the building." (Tr. 317).

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Bucalo, after numerous proceedings, was eventually returned to work without back-pay on December 12 of that year. (Tr. 130-131).

<sup>14</sup> Mr. Bucalo noted this was not always the case, but noted it would be in a mercury spill.

<sup>15</sup> This press release was never distributed. Mr. Bucalo made no official announcement and did not contact the media. (Tr. 202).

At the May 6 meeting, Mr. Roa said he was shocked when they terminated Mr. Bucalo for conducting a walk-through, as he had often done this with other managers. (Tr. 321). According to his notes, Mr. Wachter noted it took Mr. Bucalo eight minutes to leave after being instructed multiple times to do so. (Tr. 376). During this discussion according to Mr. Roa, there was probably no mention of the Surface Transportation Act, and definitely no mention of the TSCA. Mr. Roa also noted that this meeting only dealt with the issue surrounding Mr. Wachter, and no mention of the mercury spill occurred. (Tr. 377).

*Testimony of Mr. Joseph Mullikin*

Mr. Mullikin testified that that he is currently a laborer manager for UPS and has served as such since September of 2002. (Tr. 427). His responsibility is to make sure the contract is adhered to by both the company and the union and to address discipline issues. As such, he has knowledge of the contract and the various discipline procedures under UPS. According to Mr. Mullikin, a 17-I infraction is a general provision that is intended to cover those infractions not enumerated in sections A-H. (Tr. 429). Examples of a 17-I infraction include violence, sexual harassment, and failure to follow instructions. (Tr. 429). In fact, Mr. Mullikin gave an example of an individual being fired for failure to follow instructions under 17-I, and he also noted that 17-I does not require a written or verbal warning before termination.

*Testimony of Mr. Gary Willis*

Mr. Willis testified that he is the facilities engineer for the Kentucky district plant engineering department. Prior to this, he was in the corporate environmental affairs program in the Atlanta facility. (Tr. 516). He has been with UPS approximately twenty years. He was the person responsible for handling the mercury spill. (Tr. 550).

In implementing a response program, UPS determined that it was best to always use outside contractors in dealing with mercury and not use or train designated responders to deal with such a hazardous situation. (Tr. 518). Mr. Willis outlined his experience in dealing with mercury spills, indicating he had handled very large spills, and other small spills. (Tr. 519-20).

Part of the training UPS provides employees teaches them that if they encounter a suspicious spill or package to stop the progress of the package, do not touch, notify a supervisor and leave the area. (Tr. 522). Risks that occur when these instructions are ignored include danger to the employee ignoring the procedure and those around him/her. (Tr. 522). Furthermore, the system is designed to allow the facility management to properly respond to protect the health and safety of UPS's employees. (Tr. 522-23).

On the evening of May 2, 2005, Mr. Willis received a phone call from Mr. Jeff Funk while on his way home from work. Mr. Funk informed Mr. Willis he believed they might have a mercury spill at the Sharonville facility. He immediately called someone to call UPS's two contractors in the area to respond to the spill, and he headed back to the plant himself. (Tr. 529). He called both contractors to ensure at least one would make it promptly to respond. Upon returning to the plant, Mr. Willis met up with Mr. Funk. After the team arrived, cleaned up the



mercury, and checked for traces with the lumex meter – they proceeded to check possible belts a package may have traveled to containing mercury. (Tr. 545).

Before the contractors arrived, Mr. Willis first met Mr. Bucalo. (Tr. 551). Mr. Willis described Mr. Bucalo as being “excited” when he first met him. (Tr. 551). Mr. Willis testified, concurring with Mr. Bucalo’s testimony, that he explained the discovery and clean-up process regarding the mercury. He also told Mr. Bucalo about his background and his experience in handling such matters. (Tr. 552). Mr. Willis also testified that Mr. Bucalo expressed concerns about the employees’ health and safety in the building. (Tr. 552). During this conversation, Mr. Willis specifically remembers Mr. Crump coming up and telling Mr. Bucalo to head back to his work area. (Tr. 565). Mr. Willis also found it unusual that Mr. Bucalo approached him (and the other managers) during this situation. (Tr. 553). However, in order to help calm him down and make him feel comfortable with the situation, Mr. Willis explained the process. He testified that at no time did Mr. Bucalo express concerns regarding any environmental laws or regulations. At no point was Mr. Willis involved in the decision to discipline Mr. Bucalo. (Tr. 597).

#### *Testimony of Mr. Jeff Soule*

Before joining UPS, Mr. Soule served as a master sergeant in the United States Marines reserves for about twenty-five years. (Tr. 608). Mr. Soule has been with UPS for twenty-eight years.<sup>16</sup> Mr. Crump serves as Mr. Bucalo’s direct supervisor, and Mr. Soule is three steps above Mr. Bucalo. (Tr. 618). He did not receive notice of the mercury spill until the following day. (Tr. 623). When he spoke with Mr. Crump, he told Mr. Soule that Mr. Bucalo came to him and asked to go and see about it. Mr. Crump said he instructed him not to go into that area and reminded him of his proper response – don’t touch, leave area, notify supervisor. (Tr. 625). Later when Mr. Crump was in the area, he told Mr. Soule he saw Mr. Bucalo and instructed him to leave the area again. (Tr. 625).

At 5 p.m., Mr. Soule heard Mr. Bucalo’s side of the story. According to Mr. Soule, Mr. Bucalo confirmed Mr. Crump’s story, even the part about being instructed not to go into the area. (Tr. 626). Upon learning that he took lunch to investigate, Mr. Soule informed Mr. Bucalo that just because he was on a break did not mean he was free to disregard a supervisor’s instructions. (Tr. 626). Mr. Bucalo disagreed with this. However, Mr. Soule reminded Mr. Bucalo that if he disagreed with a manager’s instructions, he had other avenues to pursue other than disobedience, such as a higher supervisor, a grievance, or even an outside agency. (Tr. 629). At the end of the meeting, Mr. Bucalo acknowledged he failed to follow the instructions of a supervisor. (Tr. 630). Mr. Soule took Mr. Bucalo out of service until he could investigate if he entered the restricted area.

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<sup>16</sup> He also testified his employment with the reserves and UPS overlaps. (Tr. 611). It is also important to note that Mr. Soule had only recently begun working in this supervisory position in this plant on March 1, 2005. (Tr. 615). This equates to only two months before the spill. (Tr. 648). Upon meeting Mr. Bucalo, Mr. Bucalo informed him he had problems with previous supervisors and pending grievances. Mr. Soule told him that everything else was in the past. If he showed up for work, did his job, and left at the end of the day – they would have no problems. (Tr. 621).

Mr. Soule testified that even though he determined Mr. Bucalo did not enter the restricted area, he still deserved to be punished for failure to follow instructions. Here, his failure to follow instructions could have resulted in endangerment, slow down the response time to the spill, and asking questions about a subject he knew little about. (Tr. 632).

On May 5 when Mr. Soule informed Mr. Bucalo that he was receiving a one day suspension, he also spent forty minutes with Mr. Bucalo explaining exactly what following instructions meant to him. Mr. Soule told him that barring a supervisor telling him to jump off a cliff, he should follow instructions. (Tr. 640). Mr. Bucalo told him he had trust issues with management, but Mr. Soule responded that he trusted the company and that he would be happy to be Mr. Bucalo's avenue. At the end of the meeting, Mr. Bucalo told Mr. Soule he "fully understood exactly what following supervisor's instructions meant." If he did not like the instructions he was getting, he could write a grievance. (Tr. 642).

That evening, Mr. Soule received a phone call from Mr. Carlos Garcia informing him that Mr. Bucalo had failed to follow Mr. Wachter to leave the building after being told to do so numerous times. (Tr. 643). This was only hours after his forty minute conversation on following directions took place. He waited the next day to hear Mr. Bucalo's side of the story before making a decision. (Tr. 644). Mr. Bucalo stated that Mr. Wachter would not let him investigate to see if supervisors were working. Based on this conversation with Mr. Bucalo, Mr. Soule determined that based on his failure to follow his instructions to follow instructions, he had no effect on Mr. Bucalo, so he terminated his employment.<sup>17</sup> During this time, no mention of the spill was made. (Tr. 646). Based upon all of their conversations, Mr. Soule felt Mr. Bucalo's only concern was for the hub employees. (Tr. 647).

#### *Testimony of Mr. Wachter*

Mr. Wachter testified that he served as the operation supervisor on the night sort at the Sharonville building. (Tr. 706). He was responsible for the safety, service, production, and all other aspects of the hub operation. He saw Mr. Bucalo during the early hours of May 6, 2005 as Mr. Bucalo was standing near door sixty-nine. The two approached each other, and Mr. Wachter asked Mr. Bucalo what he was doing. Upon hearing that he was walking around the building looking for supervisors working, Mr. Wachter told him he could not do that and he needed to leave. (Tr. 710). Mr. Bucalo at this point told Mr. Wachter he would get in trouble for stopping him, and that NLRB charges would be filed against him. Mr. Wachter responded "that's fine [Mr. Bucalo], you need to leave the building." The two continued to argue, and Mr. Wachter kept telling Mr. Bucalo that it was time for him to leave and he needed to do so. (Tr. 710). Mr. Bucalo eventually walked away, but proceeded to write something on a sheet of paper. (Tr. 711). Mr. Wachter continued to tell him to leave and he could finish writing whatever he was writing in the parking lot. At this point, their "voices were elevated." Mr. Bucalo eventually left.

Mr. Wachter then ran into Mr. Ray McDaniel, his boss, about ten to fifteen minutes later. (Tr. 712). He proceeded to tell Mr. McDaniel about the altercation with Mr. Bucalo. Later,

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<sup>17</sup> Mr. Soule also noted that Mr. Bucalo was not a shop steward but a 22.3 steward, and that there was a shop steward that could have conducted that walk.

around 2:30 a.m., Mr. McDaniel radioed Mr. Wachter to inform him that Mr. Bucalo was back with a police officer, but that he (Mr. McDaniel) would handle the situation. (Tr. 712). The next day, he was asked questions about this incident by Mr. Carlos Garcia to which he repeated the incident as testified to at the hearing. (Tr. 713).

### C. Statute and Analysis

Under the TSCA, an employee is protected if the employee:

- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act;
- (2) testified or is about to testify in any such proceeding; or
- (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

15 U.S.C. § 2622(a); 29 C.F.R. § 24.2(a); *see also Melendez v. Exxon Chemicals Americas*, ARB CASE NO. 96-051 (July 14, 2000).

The complainant's burden is to establish a prima facie case by showing that: (1) the complainant engaged in protected conduct; (2) the respondent employer was aware of that conduct; and (3) the employer took some adverse employment action against the complainant. *Zinn v. University of Missouri*, 93-ERA-34 and 36, slip op. at 6-8 (Sec'y Jan. 18, 1996). The complainant must also present evidence sufficient to raise at least an inference that the protected activity was the likely reason for the adverse action. 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 a pretext. *Dartey v. Zack Company of Chicago*, 82-ERA-2, slip op. at 6 (Sec'y April 25, 1983).

Internal complaints and steps that are preliminary to the filing of complaints with Federal or state environmental protection agencies are subject to protection under the employee provisions of the environmental protection acts. The conclusion that internal complaints qualify as protected activities has been upheld by several United States Courts of Appeals. *See Jones v. Tennessee Valley Authority*, 948 F.2d 258, 264 (6th Cir. 1991); *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 20 (1st Cir. 1998); *Bechtel Construction Co. v. Sec'y of Labor*, 50 F.3d 926, 932-33 (11th Cir. 1995); *Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474 (3d Cir. 1993), *cert. denied*, 510 U.S. 964; *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); and *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982).

The Secretary has stated that complaints which only relate to workplace safety do not touch upon general public safety and health. *See Sawyers v. Baldwin Union Free School District*, 85-TSC-1 (Sec'y Oct. 24, 1994); *Aurich v. Consolidated Edison Co. of New York, Inc.*, 86-CAA-2 (Sec'y April 23, 1997). Complaints about safety in the workplace fall under the

jurisdiction of the OSHA and not the CAA. *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 01-SWD-3 (ARB Mar. 31, 2005); *Post v. Hensel Phelps Constr. Co.*, 94-CAA-13 (Sec'y Aug. 9, 1995) (stating that environmental whistleblower statutes generally do not protect complaints restricted solely to occupational safety and health, unless the complaints also encompass public safety and health or the environment).

Finally, the gathering of evidence in support of a whistleblower complaint, including the gathering of evidence by means of tape recording, is a type of activity that has been held to be covered by the employee protection provisions referenced at 29 C.F.R. §24.1(a). *See, e.g., Mosbaugh v. Georgia Power Co.*, Case Nos. 91-ERA-1/11, Sec'y Dec., Nov. 20, 1995, slip op. at 7-8; *cf. BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 48-49 (1st Cir. 1998) (holding that complainant's photocopying of company documents was not protected because complainant had not raised a safety-related concern to management that such documents could be said to support).

Pertinent case law indicates that the reasonableness of a whistleblower's belief regarding statutory violations by an employer is to be determined on the basis of "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." *Minard*, slip op. at 7 n.5 (quoting work refusal standard from *Pensyl v. Catalytic, Inc.*, Case No. 83-ERA-1, Sec'y Dec., Jan. 13, 1984, slip op. at 7). A survey of decisions issued by the Secretary and the Board in which the *Minard* standard has been applied also reveals that, whether or not the term "good faith" has been used, the whistleblower has been required to have actually held a belief that there were pertinent statutory violations at the time he or she engaged in the activity subject to whistleblower protection. *See, e.g., Oliver v. Hydro-Vac Services, Inc.*, Case No. 91-SWD-00001, Sec'y Dec., Nov. 1, 1995, slip op. at 9-13.33.

Finally, to be protected under the TSCA, safety and health complaints must be related to the "requirements of the environmental acts or the regulations implementing them." *Deavers v. Kaiser-Hill Co.*, ARB Case No. 03-113 (ARB Mar. 31, 2005). Furthermore, complaints restricted solely to occupational safety and health are not covered under the environmental whistleblower statutes unless the complaint also encompasses a concern for public safety and health or the environment. *Id.* at 10. The complaint "must be more than speculative or vague – it must inform the employer of the conduct that needs to be remedied." *Id.* at 11, quoting from *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op at 4 (ARB Apr. 8, 1997).

#### 1. Protected Activity

Mr. Bucalo expressed a number of times that he was concerned about his fellow workers in the plant in regards to the mercury spill and the location of the package. At no time did he express a concern for the environment or those outside the plant with Mr. Crump, Mr. Funk, Mr. Soule, Mr. Garcia or Mr. Roa. In fact, Mr. Bucalo even admitted that he never verbally expressed a concern for the environment or those outside the building. (Tr. 200). Counsel for Complainant asks this court to interpret his questions about the location of the package to constitute notice to the Employer that Complainant was concerned about the people outside the building. (Compl. Reply Brief at 3). Counsel even goes as far to state that "[i]t is undisputed

that Mr. Bucalo's initial concerns were for employee safety," but that his questions to Mr. Willis about the location of the package rise to the level of protected activity as it can be inferred he was concerned about the public and the environment. (Compl. Reply Brief at 6). However, Mr. Bucalo only spoke to his supervisors about the safety of his coworkers, so it can only be inferred that they would reasonably interpret this to also be concern for his coworkers.

Mr. Bucalo also never directly expressed a concern that UPS was handling the spill in an improper manner. More so, according to his own testimony, Mr. Bucalo felt relieved when Mr. Willis told him of his experience and what was being done to remedy the situation. (Tr. 91). Mr. Bucalo testified that he considered Mr. Willis to be a man of integrity. (Tr. 185). Furthermore, Mr. Bucalo never expressed to anyone, or even opined at the hearing, that the procedure used to clean up the spill was improper and in violation of any law.

To read the whistleblower provisions to protect any employee who involves themselves during the middle of what could be a crisis would be to read the statute out of context. An employee must express a concern that a violation of an environmental law or procedure has been violated or in accordance with the purpose of the Act, express a concern for the safety of the public or environment. Mr. Bucalo did not do this, but only expressed concerns that would fall under OSHA workplace safety. Therefore, because Mr. Bucalo never expressed a concern for those outside the building, under the reasoning articulated by the Board in *Deavers* and other numerous opinions, I find his complaints do not rise to the level of protected activity under the Act. Therefore, relief under the Act should be denied.

## 2. Nondiscriminatory Reasons for Adverse Action

Even if I were to find that Mr. Bucalo engaged in protected activity, I still would have found that Employer's termination of Complainant had nothing to do with the protected activity, but the actions were for wholly different reasons.

The night following the mercury incident, Mr. Soule, whose testimony I found to be wholly credible based upon his demeanor and long history as a Marine, sat down with Mr. Bucalo and discussed the importance of following directions now that he was in charge.<sup>18</sup> He clearly articulated to Mr. Bucalo, and Mr. Bucalo admits, that he was instructed to follow directions of his supervisors unless the instruction rose to the level of "jump off a bridge." If he disagreed with the instruction, Mr. Bucalo was to take the remedies available to him, which included filing a grievance with the union, talking to someone higher up, or complaining to an outside agency, but he was still to follow directions as the chain of command was there for his safety. That very same evening after a forty minute lecture from Mr. Soule on following instructions, Mr. Bucalo not only disobeyed Mr. Wachter, but engaged in an altercation after failing to follow Mr. Wachter's instructions to leave the building to such a level that Mr. Bucalo sought the help of local police.<sup>19</sup>

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<sup>18</sup> As noted above, Mr. Soule was relatively new to the plant and was three levels above Mr. Bucalo.

<sup>19</sup> A lot of what was litigated actually asks the undersigned to determine Mr. Bucalo's rights under the collective bargaining agreement to investigate matters as a union steward (i.e., walk around the plant off the clock and ignore directions from supervisors). There is a process for that, and it is not before the undersigned. I refuse to make a legal determination regarding Mr. Bucalo's rights in this instance when the way to resolve that dispute is not before

Mr. Bucalo's only punishment for his actions on the evening of May 2, 2006 was a one day suspension, which was for failure to follow directions. Mr. Soule determined that Mr. Bucalo had not interfered with the mercury clean up, but could have created a chaotic situation by failing to follow directions and comply with his training. The next evening after being told to obey orders from supervisors, Mr. Bucalo was arguing with Mr. Wachter about his right to walk through the plant, and the issue of the mercury spill never even came up. Furthermore, in his termination meeting, the mercury incident was not mentioned. Mr. Soule testified that because Mr. Bucalo had failed to heed his instructions to follow orders and grieve later, he determined that he could have no effect on Mr. Bucalo, and therefore terminated his employment. I find that this reasoning was justifiable and in no way related to his independent investigation of the mercury spill. Therefore, even if Mr. Bucalo engaged in protected activity, which I have found he did not, there is insufficient evidence to establish a violation under the Act, and therefore, he would not be entitled to relief under the Act as UPS terminated him for entirely independent reasons.

### ORDER

The complaint of Sam Bucalo for relief under the whistleblower provisions of the Act is DENIED.

**A**

THOMAS F. PHALEN, JR.  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant

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the undersigned but before another body. Counsel for Complainant even acknowledged it is not this court's role to interpret the contract. (Tr. 699).

Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order. If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).