



In the Matter of:

JOSEPH TRACANNA,

ARB CASE NO. 98-168

COMPLAINANT,

ALJ CASE NO. 97-WPC-1

v.

DATE: July 31, 2001

ARCTIC SLOPE INSPECTION SERVICE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

Appearances:

For the Complainant:

Billie Pirner Garde, Esq., John M. Clifford, Esq., *Clifford, Lyons & Garde, Washington, D.C.*

For the Respondent:

Gregory L. Youngmun, Esq., *DeLisio Moran Geraghty & Zobel, Anchorage, Alaska*

FINAL DECISION AND ORDER

Complainant Joseph Tracanna alleges that he was constructively discharged, harassed, and denied reemployment by Respondent Arctic Slope Inspection Service (ASIS) in retaliation for activities protected under the Toxic Substances Control Act, 15 U.S.C. §2622 (1994) (TSCA), the Water Pollution Control Act, 33 U.S.C. §1367 (1994) (WPCA), the Clean Air Act, 42 U.S.C. §7622 (1994) (CAA), and the Solid Waste Disposal Act, 42 U.S.C. §6971 (1994) (SWDA) (the Acts).

This case has been before the Board before. The Administrative Law Judge (ALJ) assigned to the case initially recommended that the complaint be dismissed because Tracanna, who initially appeared *pro se*, exhibited a “pattern of refusing to cooperate in the discovery process, refusing to

^{1/} This case has been assigned to a panel of two Board members as authorized by Secretary’s Order 2-96. 61 Fed. Reg. 19,979 (1996).

comply with any lawful discovery, and refus[ing] to comply with discovery orders of the [ALJ].” *Tracanna v. Arctic Slope Inspection Serv.*, ALJ No. 97-WPC-1, Recommended Order of Dismissal, slip op. at 2 (July 13, 1997). The Board rejected the Recommended Order and remanded the case for further proceedings. *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 97-123 (Nov. 6, 1997). Tracanna retained counsel, and discovery and a hearing on the merits followed. In September 1998 the ALJ issued a Recommended Decision and Order (R.D. and O.) finding in favor of Tracanna. *Tracanna v. Arctic Slope Inspection Serv.*, ALJ No. 97-WPC-1 (Sept. 18, 1998). ASIS appealed to this Board.

We find that Tracanna was not subjected to retaliatory adverse action. Therefore, we dismiss this complaint.

BACKGROUND

I. Facts.

ASIS was a contractor of Alyeska Pipeline Service Company (Alyeska) providing inspection services on the Trans Alaska Pipeline System. In December 1993 Joseph Tracanna began work for ASIS as an electrical inspector.

Tracanna had been involved in whistleblowing activity on the pipeline before he went to work for ASIS. Tracanna’s history as a whistleblower was commonly known; in fact, his activities were at least in part responsible for a July 1993 congressional hearing investigating conditions on the pipeline.

ASIS hired Tracanna to work on Alyeska’s National Electric Code (NEC) Compliance Project at the Valdez Marine Terminal (VMT). The purpose of the NEC Project was to detect electrical deficiencies at the terminal, and the work was to be done according to Alyeska’s inspection plan and guidelines. On February 25, 1994, Tracanna issued a Non-Conforming Report (NCR) regarding the electrical grounding system at VMT. Tracanna indicated that the problem presented an “imminent threat” because it could create an “unsafe condition which could present a significant hazard to plant personnel.” Complainant’s Exhibit (CX) 14. Alyeska employees responded negatively to this NCR and to Tracanna for writing it. A meeting was convened regarding the NCR, which included representatives of ASIS (including Tracanna), Alyeska, and an Alyeska consultant; the Alyeska consultant confirmed the substance of the NCR as well as Tracanna’s characterization of the problem as an “imminent threat.” Tracanna’s supervisor subsequently validated the NCR.

Tracanna issued a second NCR on March 31, 1994, regarding an “imminent threat” to worker safety and property in the event of an earthquake. Tracanna’s supervisor validated that NCR the same day.

In the meantime, in March 1994 Alyeska changed the standards to be used to conduct the inspections from the NEC to the Alaska Occupational Safety and Health Code (AKOSH) and the

Alaska National Safety Code (ANSC).^{2/} On April 1, 1994, shortly after this change in standards, Tracanna requested that ASIS remove him from the Project and reassign him to other electrical work. In his letter requesting removal from the Project, Tracanna explained that “[m]y philosophy is apparently different than the current actions being undertaken. I can not ignore the safety problems myself and other electrical inspectors have reported.” CX 22.

Employees of ASIS were either on active status (while they were assigned and working on projects) or inactive status (if they were not currently working on a project but were available for recall). Inactive status also is referred to as “layoff.” In response to his request, on April 2, 1994, ASIS placed Tracanna on inactive, or layoff status, but eligible for reassignment.

Two other inspectors, Larry Coffman and Lee Adams, also requested removal from the AKOSH Project at about the same time as Tracanna and for similar reasons. R.D. and O. at 6-7. Coffman, who had been detailed from another ASIS position to work on the NEC Project, was returned to his previous position. On April 5, 1994, after Tracanna was laid off, Adams requested that he be removed from the Project. He continued to work on the AKOSH Project and related projects for 19 days after his request and left the Valdez Marine Terminal on April 24, 1994. Respondent’s Exhibit (RX) 53.

Between his layoff on April 2, 1994, and August 1, 1995, ASIS offered Tracanna eight positions, three of which he accepted. The ALJ found the following chronology of events:

- On April 13, 1994, Tracanna was offered a full time Quality Control Engineer position in Anchorage – which involved directing electrical inspectors, reviewing quality inspection plans, and performing inspections. Tracanna rejected the position because he was “not comfortable” with the job description, and because he believed that the offer was illusory and merely a pretext to remove him from field inspection work.
- On April 18, 1994, Tracanna was offered a two week on/two week off electrical inspector position in Fairbanks. He rejected this position because he felt it would require that he move to Fairbanks, and that the schedule would be confusing and inconvenient.
- On June 17, 1994, Tracanna was offered a full time Baseline Inspector position on the pipeline. He rejected that position because he did not want to work on the pipeline out of fear for his personal safety.
- In early June 1994, Tracanna was offered a full time Electrical Quality Specialist position in Anchorage. On August 17 Tracanna rejected this position because it involved doing electrical inspection work inside Alyeska’s office buildings in Anchorage, and because Tracanna believed the position was entry level and would constitute a demotion.

^{2/} Thereafter the Project was referred to as the AKOSH Project or the ANSC Project. For simplicity’s sake we will refer to the AKOSH Project.

- In early June 1994, Tracanna was offered a two week on/two week off electrical inspector position at VMT opposite Larry Coffman. Tracanna declined this position because he did not want to commit himself to a part-time position when he anticipated obtaining a full-time position.
- In June 1994 Tracanna was offered a temporary Crane Inspector position on the pipeline. Tracanna accepted this offer and worked for five days.
- Between July 3, 1994, and August 4, 1994, Tracanna filled in for Coffman as an Electrical Inspector at VMT.
- Between September 1994 and April 1995 Tracanna was placed back on layoff status.
- On April 3, 1995, Tracanna was offered a temporary Crane Inspector position, which he accepted and held for four weeks.
- On June 4, 1995, ASIS again placed Tracanna on layoff status.

R.D. and O. at 8-10; RX 66.

Tracanna submitted his resignation to ASIS on August 1, 1995, and then filed a whistleblower complaint with the Department of Labor's Wage and Hour Division. He alleged that he was placed on layoff, not offered other electrical inspector positions, harassed, and forced to resign because he had engaged in activity protected by the Acts. OSHA determined that his complaint was without merit, and Tracanna sought a hearing before a Departmental Administrative Law Judge. *See* 29 C.F.R. §24.4.

There was conflicting testimony about the amount of electrical inspection work that ASIS performed in the period after Tracanna's layoff. Two Alyeska employees and some of the other ASIS electrical inspectors testified that there was a lot of electrical inspection work, but they did not specify whether that work was related to the AKOSH Project or was non-AKOSH work, or whether the work met Tracanna's other conditions for reassignment, such as full-time inspection work located in Anchorage or Valdez. Officials of ASIS testified that there was little non-AKOSH work and that all inspection work declined significantly in late 1994 and into 1995. Although 13 electrical inspectors were hired after Tracanna's layoff on April 2, 1994, they were all hired for work on the AKOSH Project or to do pipeline inspection, work which Tracanna had declined. RX 58.

II. The ALJ's Recommended Decision and Order.

After a hearing, the ALJ issued a Recommended Decision and Order (R.D. and O.) finding that: 1) Tracanna's requested removal from the Project and layoff was a constructive discharge because the "working conditions . . . were rendered so unsafe that a reasonable person would have felt compelled to resign"; 2) "Tracanna was the victim of harassing and threatening comments subsequent to issuing his February 25, 1994 NCR"; 3) ASIS discriminated against Tracanna when it failed to reassign him to other electrical inspector work after he requested removal from the NEC

Compliance Project; 4) the positions offered to Tracanna by ASIS between April 1994 and August 1, 1995, were demotions and were discriminatorily calculated to keep him away from full-time positions in his area of expertise; and 5) Tracanna's resignation on August 1, 1995, was also a constructive discharge because ASIS failed to assign Tracanna to available electrical inspector positions and continually offered him inferior jobs, making his conditions at ASIS "so difficult, unpleasant, and unattractive [that] a reasonable person would have felt compelled to resign" R.D. and O. at 13-14, 17-18.^{3/}

The ALJ found that Tracanna was entitled to back pay and compensatory damages. In a supplemental recommended decision the ALJ awarded Tracanna attorney's fees and costs. Supp. Ord. Awarding Attorneys' Fees and Costs on Recon. (Jan. 19, 1999). ASIS then petitioned this Board to review the ALJ's decision.

SCOPE OF REVIEW

The Board has jurisdiction to decide appeals from recommended decisions arising under the whistleblower provisions of the Acts. Secretary's Order No. 2-96, 61 Fed. Reg. 19,978 (May 3, 1996). Under the Administrative Procedure Act, the Board has plenary power to review an ALJ's factual and legal conclusions. See 5 U.S.C. §557(b) (1994). As a result, we are not bound by the findings and conclusions of the ALJ, but retain freedom to review factual and legal determinations *de novo*. See *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000) (under employee protection provisions of several environmental acts). See generally *Mattes v. United States Dep't of Agriculture*, 721 F.2d 1125, 1128-30 (7th Cir. 1983) (relying, *inter alia*, on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), in rejecting argument that higher level administrative official was bound by ALJ's decision).

DISCUSSION

In order to establish a violation of the whistleblower provisions of the Acts, a complainant must prove that he or she engaged in protected activity and that the respondent took adverse action against him or her because of that protected activity. *Carroll v. United States Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996) (under comparable Energy Reorganization Act whistleblower provision). There is no dispute that Tracanna engaged in protected activity both prior to and during his employment with ASIS. He issued two NCRs, one in February and one on March 31, and in the course of asking to be removed from the AKOSH Project he complained about the perceived reduction in safety associated with the switch from the NEC to the AKOSH Code. See CX 32; Brief of Respondent Arctic Slope Inspection Services, Inc., at 6. However, ASIS argues on appeal that the ALJ erred in ruling that ASIS took adverse action against Tracanna in retaliation for Tracanna's protected activities.

^{3/} However, in an apparent contradiction, the ALJ found that Tracanna failed to prove that he actually applied for an electrical inspector position, that he was rejected for such a position, and that someone else was hired or the position remained vacant. The ALJ also found that ASIS' actions did not constitute a continuing adverse employment action. R.D. and O. at 15.

In this section, we evaluate in turn each of the alleged adverse actions cited by Tracanna or relied upon by the ALJ. For the reasons discussed below, we find that Tracanna's request to be removed from the AKOSH Project in April 1994 was not a constructive discharge. We find also that ASIS' decision to lay off Tracanna and its failure to reassign him to anything other than temporary positions after he requested removal from the AKOSH Project was not retaliatory. Finally, we find that Tracanna's resignation on August 1, 1995, was not a constructive discharge. Therefore, we reject the ALJ's recommended decision and dismiss the case.

I. Whether Tracanna's request to be removed from the AKOSH Project was a constructive discharge.

The ALJ found that Tracanna's request to be removed from the AKOSH Project amounted to a constructive discharge:

Based on the evidence in the record, I find that Mr. Tracanna's working conditions on the AKOSH Project were rendered so unsafe that a reasonable person would have felt compelled to resign. Mr. Coffman, Mr. Adams, and Mr. Tracanna all elected to resign from the AKOSH Project because of safety concerns associated with the decreased AKOSH standards from the NEC standards. There is no evidence to the contrary and the credible testimony of Mr. Coffman and Mr. Tracanna tends to prove that any reasonable person under the same conditions would have felt compelled to resign.

R.D. and O. at 13-14. As developed by the courts, a "constructive discharge" occurs when an employee, who has not been terminated directly by his employer, finds his working conditions objectively so intolerable that it is necessary to resign his employment.^{4/} However, as the Seventh Circuit Court of Appeals has held:

Establishing constructive discharge is a two-step process. First, "a plaintiff needs to show that his working conditions were so intolerable that a reasonable person would have been compelled to resign." . . . Second, the conditions "must be intolerable **because of unlawful discrimination.**"

Simpson v. Borg-Warner Automotive, Inc., 196 F.3d 873, 877 (7th Cir. 1999), citations omitted, emphasis added. See *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1050 (7th Cir. 2000) ("to establish a claim for constructive discharge under Title VII, a plaintiff must prove that his working

^{4/} Because Title VII utilizes virtually the same language in describing prohibited discriminatory acts and shares a common statutory origin, this Board has applied Title VII and related discrimination case law when analyzing concepts such as constructive discharge in employee protection cases. See, e.g., *Martin v. Department of the Army*, ARB No. 96-131, ALJ No. 93-SWD-1, slip op. at 7 (ARB July 30, 1999); *Berkman v. United States Coast Guard Academy*, ARB No. 98-056, ALJ No. 97-CAA-2, slip op. at 22-23 (ARB Feb. 29, 2000).

conditions were so intolerable *as a result of unlawful discrimination* that a reasonable person would be forced into involuntary resignation.” (citation omitted, emphasis supplied)).

In the context of an environmental whistleblower case such as this, it is incumbent upon the complainant to establish both that working conditions were objectively intolerable, **and** that those conditions were the result of unlawful retaliation on the part of the employer. Here, the ALJ found that Tracanna had established the first element: He found that Tracanna’s working conditions were so unsafe that a reasonable person would have been compelled to resign.^{5/} However, the unsafe conditions upon which the ALJ rested his constructive discharge analysis **were not the result of retaliation on ASIS’ part**; they were the result of Alyeska’s switch from the NEC to the AKOSH and ANSC Codes as standards to be used by ASIS in conducting the electrical inspections at VMT.

Constructive discharge analysis is not applicable to every employment discrimination and retaliation case in which an employee has quit his job because working conditions were so intolerable that a reasonable person would have been compelled to resign; there must be a nexus between the intolerable conditions and discrimination or retaliation. Here that nexus is entirely absent: Tracanna requested removal from the AKOSH Project not because of unlawful discrimination but because of his belief that the AKOSH and ANSC standards were less safe than the NEC guidelines. Therefore, Tracanna’s request to be removed from the AKOSH Project did not constitute a constructive discharge.

II. Whether ASIS’ April 2, 1994 decision to place Tracanna on inactive (layoff) status was in retaliation for his earlier protected activity.

On April 1, 1994, Tracanna asked to be removed from work on the AKOSH Project and to be reassigned to “other electrical duties not associated with the [AKOSH Project].” CX 22. The following day ASIS placed Tracanna on layoff status. There is no dispute that the layoff constituted adverse action. However the parties disagreed over whether the layoff was in retaliation for Tracanna’s NCRs, his criticism of the AKOSH Project, and his request to be removed from the AKOSH Project.

The ALJ found ASIS’ layoff of Tracanna retaliatory because: 1) there was temporal proximity between Tracanna’s protected activity and the layoff; 2) Coffman and Adams similarly requested removal from the AKOSH Project but were treated differently from Tracanna; and 3) there were expressions of anti-whistleblower animus directed at Tracanna. R.D. and O. at 12, 14. On review ASIS challenges these determinations. We conclude that Tracanna failed to prove that ASIS’ decision to place Tracanna on layoff status was motivated by retaliatory animus.

A. Temporal proximity. Tracanna issued NCRs in February and on March 31. On April 1 he requested to be removed from the AKOSH Project because, as he stated in his email to ASIS officials, “I can not ignore the safety problems myself and other electrical inspectors have reported.” CX 22. Thus, Tracanna engaged in protected activity and within a very short period of time he was

^{5/} In light of the fact that Tracanna failed to prove the second element of a constructive discharge, we need not determine the validity of the ALJ’s finding regarding the first element. However, we possess serious reservations regarding this finding as well.

laid off. The ALJ found the closeness in time between Tracanna's protected acts and his layoff to be compelling evidence of causation. R.D. and O. at 12. We disagree.

Temporal proximity may be sufficient to raise an inference of causation in an environmental whistleblower case. *See, e.g., Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). When two events are closely related in time it is often logical to infer that the first event (*e.g.* protected activity) caused the last (*e.g.* adverse action). However, under certain circumstances even adverse action following close on the heels of protected activity may not give rise to an inference of causation. Thus, for example, where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, the inference of causation is compromised.^{6/} Because the intervening event reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action. Of course, other evidence may establish the link between the two despite the intervening event. As the court held in *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000), "we have ruled differently on this issue [raising an inference of retaliatory motive based on temporal proximity] . . . depending, of course, on how proximate the events actually were, and *the context in which the issue came before us.*" (Emphasis added.)

Here, it is apparent that Tracanna's request for removal from his inspector position on the AKOSH Project was an intervening event of sufficient weight to preclude any inference of causation which otherwise would have been drawn from the nearness of Tracanna's protected activity to his layoff. Clearly, once Tracanna had requested to be removed from his position, ASIS' options were extremely limited. Either ASIS could have placed Tracanna in another position, or it could have laid him off. However, in light of Tracanna's intervening request to be removed from the AKOSH Project, it cannot be assumed that ASIS's decision to place him on layoff status was causally related to his protected activity and retaliatory.

B. Disparate treatment. In finding Tracanna's April 1994 layoff to be the result of unlawful discrimination, the ALJ also relied heavily on his finding that ASIS treated Tracanna differently from two other inspectors, Coffman and Adams, who resigned from the AKOSH Project at about the same time as Tracanna for similar reasons. The ALJ found that Coffman and Adams were reassigned to other electrical inspection work while Tracanna was placed on layoff. The ALJ found:

^{6/} In tort law this concept is expressed by terms such as "intervening" and "supervening" cause. *See, e.g., Hiltgen v. Sumrall*, 47 F.3d 695, 705-706 (5th Cir. 1995):

Loosely defined, an "intervening cause" is one which occurs after an act committed by a tortfeasor and which relieves him of his liability by breaking the chain of causation between his act and the resulting injury. . . .

An intervening cause may be an "act of God," such as an extraordinary event of nature . . . or the actions of another, usually, though not necessarily, another tortfeasor; however, a cause is not an intervening cause so as to relieve a tortfeasor of his liability, unless it comes into active operation after the tortfeasor has acted. . . .

The only distinguishing factor between Mr. Tracanna and the two other inspectors was that Mr. Tracanna had a reputation as a former whistleblower and that he had recently issued two NCR's. Respondent has not presented any evidence proving a legitimate reason for having retained Mr. Coffman and Mr. Adams, but not Mr. Tracanna. Curiously, Mr. Adams resigned after Mr. Tracanna and was able to retain a job as an electrical inspector, but Mr. Tracanna was not.

R.D. and O. at 14. ASIS argues on review that the ALJ misread the evidence regarding Coffman and Adams, and that a correct reading of the record establishes that Tracanna was not subjected to disparate treatment. We agree with ASIS that the difference in treatment of Tracanna on the one hand and Coffman and Adams on the other is not of significance in determining whether Tracanna was laid off for retaliatory reasons.

There are significant differences among Coffman, Adams, and Tracanna regarding their employment with ASIS and their treatment after each of them asked to be removed from the Project:

- Coffman was hired by ASIS on August 23, 1991, as a regular electrical inspector at VMT. ASIS later detailed him to work on the NEC Project. When Coffman asked “to go back to my duties I had before [the AKOSH Project],” ASIS had the option to move Coffman back to his regular position and did so.
- After Adams requested to be removed, he continued to work on the AKOSH Project for about three weeks and then departed ASIS. We can find no explanation in the record for Adams’ continued assignment to AKOSH work during the weeks immediately prior to his departure, and no indication of the reason for Adams’ departure from the terminal on April 24, 1994.
- Tracanna started work at the terminal on December 6, 1993, and at all times worked on the NEC Project. Although he was laid off on April 2, later that month he was offered two positions. In mid-April, ASIS offered Tracanna a full time Quality Control Engineer position in Anchorage; and a two week on/two week off position in Fairbanks. Had Tracanna accepted either of these positions, his layoff would have been quite short lived.^{7/}

We think that very little can be made of these facts. Coffman was not similarly situated to Tracanna; therefore ASIS’ different treatment of him does not suggest retaliation. Although Adams may have been hired under circumstances similar to Tracanna, there is simply not enough evidence in the record from which to determine how he was treated after he requested removal from the

^{7/} Tracanna argues that none of the non-temporary positions offered him were acceptable. We address this issue in Part III, below.

Project. Therefore we cannot conclude from the circumstances of these three employees that Tracanna was subjected to disparate treatment.^{8/}

C. Anti-whistleblower animus. The ALJ found that Tracanna was subjected to hostile remarks as a result of his February NCR and his reputation as a whistleblower, which, the ALJ found constituted evidence of retaliatory animus. R.D. and O. at 14. On review ASIS challenges that determination, arguing that the evidence does not support the ALJ's finding. We agree that there is insufficient evidence from which to conclude that ASIS had demonstrated anti-whistleblower animus towards Tracanna.

There is evidence in the record that there was a general atmosphere of hostility toward whistleblowers at VMT after the congressional inquiry in 1993. For example, Walter Glover, another electrical inspector, testified that “[i]t was known all over the pipeline that Plumlee, Skule, Joe [Tracanna], those guys were, you know, commonly referred to as blacklisted, trouble-making whistle-blowers . . . and they wouldn't be coming back.” T. 296. We decline to give much weight to this testimony in light of the fact that, despite his reputation as a whistleblower, Tracanna was hired by ASIS in December 1993, and was offered eight positions after his layoff in April 1994.^{9/}

Larry Coffman testified that, after the congressional investigation of safety problems and the treatment of inspectors on the pipeline, “[t]here was a negative aura that came on at the terminal towards inspection” He stated that slanderous remarks were made and “[i]t was a bad work environment for everyone after that, especially if you were an inspector.” T. 215. However, the only incidents of negative or slanderous remarks Coffman could cite were statements made *by employees of other contractors*, not by ASIS employees or managers. Similarly, Tracanna testified that during the controversy over Tracanna's February NCR, two *Alyeska* employees told him that the NCR should not have been written, and another *Alyeska* employee told Tracanna that he was not a team player. We do not think that comments made by employees of *Alyeska* support a determination of anti-whistleblower animus on the part of ASIS.

Alyeska's Kingrea testified that Carver, one of the ASIS supervisors, “felt that [whistleblowers] were disruptive to the workplace and that . . . their attitude was contagious to other people.” T. 357. But Carver offered Tracanna at least three of the positions made available to him between April 1994 and his final resignation in August 1995. RX 66. Thus Carver's actions are counter to any suggestion that he was motivated to retaliate against Tracanna because of his protected activities.^{10/}

^{8/} The ALJ also found it significant that Coffman and Adams were each sent an “exit letter” addressing their concerns about the changeover from NEC to AKOSH standards, while Tracanna was not. However, evidence in the record shows that Tracanna did receive such a letter, on June 2, 1994. See RX 35.

^{9/} Plumlee and Skule also were hired by ASIS. Marvin Swink, the Vice President/General Manager of ASIS testified that he knew that Tracanna, Plumlee and Skule were whistleblowers when he hired them in 1993.

^{10/} Carver testified that he himself had once been blacklisted for being a whistleblower on the pipeline.

The only specific testimony concerning an expression of hostility toward Tracanna came from James Whitaker, at the time an ASIS quality control supervisor. Whitaker testified that he heard Tracanna's immediate supervisor – Richardson – say at a restaurant that Richardson “was the only [one] with big enough balls to – to get rid of Joe [Tracanna].” T.194-95. Whitaker's account of this incident was challenged by ASIS, which had conducted an internal investigation of Richardson's alleged statement and found that three of the four people Tracanna claimed were present at the time it was made denied having heard such a statement. (The fourth person was not an ASIS employee and was not interviewed.) Moreover, even if we were to find that Richardson made the remark, he would have made it after Tracanna was laid off. And we note that it was Richardson who pressed his superiors to offer Tracanna the two week on/two week off electrical inspector position at VMT in the summer of 1994. We decline to ascribe significance to Richardson's stray, boastful remark.

In any event, the record evidence shows that Carver and Marvin Swink were responsible for placing Tracanna on layoff, and for making decisions about offering Tracanna other positions, not Richardson. Thus, even if Richardson made the alleged statement about “get[ting] rid of Joe,” it would not be legally significant in connection with Tracanna's layoff and subsequent job offers, which were determined by higher-level ASIS personnel. *See Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1263 (10th Cir. 1998) (“An employer . . . may be liable for discriminatory retaliation by reason of the actions of persons in supervisory positions who had significant control over the Plaintiff's hiring, firing, or conditions of employment, or by management-level employees who have ultimate authority to hire, fire and to control conditions of employment.”).

We conclude that the negative remarks made about Tracanna were not made by ASIS employees who were in a position to take adverse action against him. Therefore, we conclude that there is not evidence from which we could find anti-whistleblower animus on the part of ASIS.^{11/}

In summary, the record and the applicable law do not support the ALJ's conclusion that ASIS' decision to place Tracanna on layoff status in April 1994 was retaliatory. The evidence of temporal proximity does not withstand scrutiny, the record does not support a finding that Tracanna was subjected to disparate treatment, and other evidence of anti-whistleblower animus is insubstantial. We therefore conclude that Tracanna has not carried his burden of proving that his layoff in April 1994 was retaliatory.

III. Whether ASIS' failure to place Tracanna in a full time non-temporary position between April 1994 and August 1995 was in retaliation for his protected activities.

The ALJ found that: 1) There was an abundance of electrical inspection work at VMT and on the pipeline; 2) The positions that ASIS offered to Tracanna were inferior to his former position

^{11/} This finding of a lack of proof of retaliatory animus also applies to Tracanna's claim that he was discriminatorily offered inferior jobs and was constructively discharged on August 1, 1995. *See* discussion, *infra*.

and “should be considered demotions”; 3) “ASIS purposely kept [Tracanna] away from full-time positions where he could cause more trouble for ASIS’ relationship with Alyeska”; and 4) “ASIS’ concerted effort to diligently offer Mr. Tracanna employment outside of the electrical inspector positions was an effort, not only to conceal their removing him from such positions, but also to document their offers of ‘generosity’ so that Mr. Tracanna would not be able to claim retaliation at some later point.” R.D. and O. at 16-17. ASIS challenges these findings on review.

The ALJ’s findings regarding ASIS’ failure to place Tracanna in another position after his layoff were entirely dependent upon his finding that Tracanna’s April 1994 layoff was retaliatory. Thus, the ALJ specifically found that, were the case to be considered as a refusal to hire, Tracanna would not prevail. R.D. and O. at 15. In light of our conclusion that Tracanna was not discriminated against when he was placed on layoff, it follows that when he sought to be reassigned to other work he stood in no different position than any other inspector who had completed a project and was awaiting reassignment. Therefore, Tracanna had the burden of proving both: 1) that he applied for a position that was available; and 2) that he was rejected in circumstances that raise the inference that the rejection was motivated by retaliatory animus. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) (“Although the McDonnell Douglas formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought”); *Chavez v. Tempe Union High Sch. Dist. No. 213*, 565 F.2d 1087, 1091 (9th Cir. 1977) (“when there is a charge of overt discrimination, a showing of a job vacancy is essential in order to establish a prima facie case”). As we discuss below, Tracanna failed to prove that there was a vacancy for a job that met Tracanna’s specifications.

The ALJ found that “a tremendous amount of inspection work did exist at VMT” during the period between Tracanna’s layoff in April 1994 and his resignation in August 1995. R.D. and O. at 7. Further, the ALJ determined that ASIS unlawfully failed to offer any of its “abundant” and “substantial” electrical inspector work to Tracanna. In so ruling the ALJ relied heavily upon the testimony of Alyeska’s Kingrea and Bidy, and ASIS employees Coffman and Glover, and rejected the testimony of ASIS’ Carver. The ALJ also explicitly refused to give any weight to the fact that, although there had been extensive discovery in this case, Tracanna had failed to introduce into evidence even one work order for an electrical inspector job (other than for work on the AKOSH Project which Tracanna would not accept):

There is a conflict of evidence in this regard, as Mr. Carver testified that there were no outstanding work orders from Alyeska. In fact, Mr. Carver stated that all work orders were actively pursued, as that was how ASIS made their money. Having considered the testimony and demeanor of the aforementioned witnesses, along with the testimony of Mr. Coffman and Mr. Glover who stated that there was more than enough work for them as electrical inspectors, I find that the weight of the evidence suggests that there was ample work for electrical inspectors. The only evidence suggesting that electrical inspection work was not available was the testimony of Mr. Carver; and I find that the facts plainly do not support Mr. Carver’s position.

In addition, I find that Complainant's inability to produce an actual work order is immaterial, as the credible testimony of the witnesses, specifically Mr. Kingrea, provided herein sufficiently demonstrates to the undersigned that such work was available and Mr. Tracanna was qualified for it.

R.D. and O. at 17. Finally, the ALJ found that the positions ASIS did offer Tracanna were "inferior." As we discuss below, the ALJ's misplaced reliance on the testimony of Kingrea, Bidy, Coffman, and Glover, and rejection of Carver's testimony led to an erroneous determination regarding the work that was available.

First, the testimony of James Kingrea, who was the Alyeska inspection team manager during the time in question, and of William Bidy, Kingrea's assistant, does not support the finding that there were electrical inspector positions available which would have met Tracanna's specifications. Kingrea testified that in the area he was managing "there was a need for a lot [of electrical inspections]" and that getting electrical inspections done "was always a problem." T.358-359. Bidy echoed this opinion. However, both Kingrea and Bidy admitted on cross examination that they did not have any personal knowledge of what positions were available at ASIS during the relevant time period. Therefore, we decline to accord weight to their testimony.

Second, Larry Coffman, an electrical inspector at VMT, testified that "there was a tremendous amount of [electrical inspection] work there to be done. . . . It would probably have been years of work . . ." T. 219. Glover, another inspector at VMT, testified that he had more work than he could keep up with. T.293. However, neither of these witnesses specified whether there was a large amount of non-AKOSH Project electrical inspection work, and neither addressed Tracanna's unwillingness to work a two week on/two week off schedule. In fact, one of the positions Tracanna rejected involved working as an electrical inspector at VMT on a two week on/two week off schedule opposite Coffman. To put it simply, the fact that there was ample electrical inspection work to be done does not necessarily mean that there were vacant electrical inspector positions which also met Tracanna's specifications.

On the other hand, we find compelling the testimony of ASIS' William Carver and Loann Larson (the human resources manager of ASCG, Inc., the parent company of ASIS), and the fact that Tracanna was unable to produce any direct evidence that there were electrical inspector positions available which he was not offered. Carver, who became the general manager of ASIS in the spring of 1994 testified:

[T]here wasn't [sic] any work orders [from Alyeska] that [ASIS] did not actively pursue. That was how we made our money. If we had an inspector on the line, we made money every hour he was there, and if we didn't, we didn't make any money. . . . [T]o my knowledge we actively pursued all the work orders we had.

T. 529. Carver testified that Kingrea never came to him with concerns about a backlog of electrical inspections.^{12/} *Id.*

Carver also testified that ASIS was in difficult financial straits in 1994, and in 1995 Alyeska put pressure on ASIS to reduce its staff, resulting in a 20 to 30 percent contraction in the total number of inspectors, from over 100 to 60 or 70. Larson, who provided human resources services to ASIS during the relevant time period, corroborated Carver's testimony, testifying that ASIS' work, and therefore revenues, decreased in late 1994 or early 1995 because of a decline in work orders from Alyeska. As a result, ASIS imposed wage reductions and laid off some employees.

Finally, we find it highly significant that Tracanna was unable to identify any Alyeska work order for a full-time electrical inspector position at VMT during the period Tracanna was available for reassignment. Consistent with this lack of documentary evidence, Carver testified that no such positions were requested, ordered or filled during that period, and that the only electrical inspector positions filled were ones that did not meet Tracanna's exacting requirements. Tracanna wanted: 1) a full-time, six or seven days a week position;^{13/} 2) that did not involve traveling the pipeline;^{14/} 3) that was not too far from his home base; 4) that was not part of the AKOSH Project; and 5) that was not a demotion from the position he had previously held^{15/}. Tracanna failed to present any credible evidence that such a position existed. Therefore, ASIS' failure to place Tracanna in a position that met his requirements was not retaliatory adverse action.

IV. Whether Tracanna's August 1, 1995 resignation was a constructive discharge.

Tracanna resigned on August 1, 1995. In a letter dated August 2, he stated that ASIS and Alyeska

created a situation where I am now driven to quit my employment as an electrical inspector with ASIS. I have endured discrimination, intimidation, harassment, pay cuts and blacklisting all because of exercising my rights with-in [sic] my employment which are

^{12/} Carver testified that electrical inspections made up only about 10% of all the inspection work ASIS performed; most inspection work involved mechanical or nondestructive testing.

^{13/} ASIS offered Tracanna a two week on/two week off position as an inspector in Fairbanks on April 18, 1994, just days after he resigned from the AKOSH/ANSC Project, but he declined. R.D. and O. at 8. In the summer of 1994, ASIS again offered Tracanna a position as a two week on/two week off Electrical Quality Specialist, but Tracanna declined because "he did not want to commit himself to a part-time position when he anticipated obtaining a full time position." R.D. and O. at 9. Nevertheless, Tracanna did accept three temporary positions between June 1994 and April 1995.

^{14/} Tracanna declined a June 17, 1994 position as a Baseline Inspector on the pipeline because he was concerned for his personal safety. R.D. and O. at 9.

^{15/} In August 1994, Tracanna declined an offer of a position as an inspector working inside Alyeska's office buildings in Anchorage because he felt it would be a demotion to an entry level position. R.D. and O. at 8-9.

protected activities under the law. This situation with regard to the many circumstances I now consider intolerable.

CX 61. The ALJ determined that Tracanna's resignation amounted to a constructive discharge because "ASIS' continued attempts to offer him inferior jobs rendered his conditions at ASIS so difficult, unpleasant and unattractive, a reasonable person would have felt compelled to resign and obtain more appropriate employment elsewhere." R.D. and O. at 18.

As we have noted earlier in this decision, a "constructive discharge" occurs when an employee, who has not been terminated directly by his employer, finds that because of discrimination his working conditions have become objectively so intolerable that it is necessary to resign his employment. We conclude that the conditions Tracanna faced while on inactive status and seeking to be reassigned to a position that suited him were not "objectively intolerable." Therefore, he was not constructively discharged.

The standard by which an alleged constructive discharge is measured is a stringent one. The Ninth Circuit, in which this case arises, has held that:

To support his claim of constructive discharge, [a plaintiff is] required to demonstrate that . . . a reasonable person in his position would have felt that he was forced to quit because of intolerable and discriminatory working conditions. *See Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996). An isolated incident of mistreatment is not enough; [plaintiff] had to show aggravating factors such as a continuing pattern of discriminatory treatment. *See id.* at 1411-12; *King v. AC & R Advertising*, 65 F.3d 764, 767-68 (9th Cir. 1995) (stating that, to defeat a summary judgment, the claimant "had to show that the conditions giving rise to his resignation were extraordinary and egregious") (applying California law of constructive discharge).

Huskey v. City of San Jose, 204 F.3d 893, 900 (9th Cir. 2000); *Fielder v. UAL Corp.*, 218 F.3d 973, 987 (9th Cir. 2000) (same). Of critical importance here is that dissatisfaction with an assignment, a poor performance rating, or even a demotion "does not by itself trigger a constructive discharge." The plaintiff must show that "the conditions giving rise to his resignation were extraordinary and egregious. . . ." *King v. AC & R Advertising*, 65 F.3d 764, 767-68 (9th Cir. 1995).

As we have found above, Tracanna was laid off when he asked to be removed from his position. Within a matter of days after his layoff, ASIS offered Tracanna two positions, both of which he rejected. Other offers followed; however Tracanna rejected all but a few temporary positions because the assignments offered to him did not meet his specifications. The circumstances in which, as a result, Tracanna found himself did not transform his subsequent resignation into a constructive discharge.

CONCLUSION

In summary, we find Tracanna has failed to prove that ASIS' decision to place him in layoff status after he asked to be removed from the AKOSH Project was retaliatory. With regard to the job offers during the period between his April 1994 layoff and August 1995 resignation, Tracanna has failed to prove that suitable job openings were available for which he should have been considered. Finally, the record does not support a finding that Tracanna's 1995 resignation meets the legal standard for a constructive discharge. Accordingly, for the reasons discussed above, this complaint is **DISMISSED**.

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member