

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



In the Matter of:

DOUGLAS EVANS,

ARB CASE NO. 2017-0008

COMPLAINANT,

ALJ CASE NO. 2008-CAA-00003

v.

DATE: March 17, 2020

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Richard R. Renner, Esq.; Kalijarvi, Chuzi, Newman & Fitch P.C.;
Washington, District of Columbia**

For the Respondent:

**Tia Young, Esq.; United States Environmental Protection Agency;
Washington, District of Columbia**

**Before: Thomas H. Burrell, Acting Chief Administrative Appeals Judge,
Heather C. Leslie and James D. McGinley, Administrative Appeals Judges.**

DECISION AND ORDER

PER CURIAM. This case arises¹ under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (1977), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (1980); and the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9(i) (1994) (collectively, the “Environmental Acts”). Regulations implementing these provisions are found at 29 C.F.R. Part 24 (2019). Douglas Evans filed complaints alleging that his former employer, the United States Environmental Protection Agency (EPA), retaliated against him for engaging in activities protected by the Environmental Acts. On November 14, 2016, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) in which he concluded that EPA violated the Environmental Acts when one of its managers fabricated information related to an investigation into Evans’ conduct in the workplace, and Evans was therefore entitled to \$1.00 in nominal damages. For the following reasons, we reverse the ALJ’s conclusion that EPA retaliated against Evans and dismiss the complaint.

BACKGROUND

EPA operates a division called the Radiation & Indoor Environments National Laboratory in Las Vegas, Nevada (“Radiation Lab”). The Radiation Lab provides technical support for radiation, indoor air quality and emergency response efforts. At all times relevant to this matter, Jed Harrison served as Laboratory Director, Richard Hopper was the Laboratory Deputy Director, and Elizabeth Cotsworth served as the Director of the Office of Air and Radiation. Evans began working for EPA through a state rehabilitation program in 1987. In November 1989 he became an official EPA employee and worked as an Environmental Protection Specialist at the Radiation Lab. Complainant’s Brief at 2; D. & O. at 1.

Sometime after 2001, managers at the Radiation Lab began making changes to employee assignments and updating employee position descriptions to describe employees’ roles in the Lab’s emergency responses. The emergency response roles assigned to each Radiation Lab member would thereby become a mandatory part of their jobs. D. & O. at 6. Evans believed that emergency response had always been and should remain voluntary for Lab employees. Complainant’s Exhibit (CX) 122, 128. He was worried that imposing such responsibilities on unwilling and

¹ Evans’ complaint also sought relief under the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, and Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622. As we stated in a prior ruling on this matter, the Federal Government has not waived sovereign immunity under the ERA or TSCA. *See Evans v. Env’tl. Prot. Agency*, ARB No. 08-059, ALJ No. 2008-CAA-3, slip op. at 4 (ARB Apr. 30, 2010). We therefore have jurisdiction over Evans’ complaint to the extent it alleges violations of the CAA, SDWA, and CERCLA.

undertrained employees could create health and safety risks for both the employees and the environment. Transcript (Tr.) 245-46.

Lab employees participated in a union, and Evans was a union steward. The union filed an unfair labor practice (ULP) charge against the Lab for imposing the emergency response program. On November 20, 2003, Evans submitted an affidavit in support of the ULP charge, describing how emergency response participation used to be voluntary, but had become mandatory. CX 82-88; Complainant's Brief at 4.

EPA scheduled a training session for late July 2004 called the "Ruby Slippers Exercise." Evans asked to be excused from the exercise. He asserted that the training would allow managers to assign him and other employees to do work for which they were not qualified. CX 111. After Evans' request to be excused was denied, he obtained a note from a psychiatrist excusing him from participating and gave it to Emilio Braganza, his supervisor at the time. Evans did not attend the exercise. Tr. 248-49.

Sometime around July 7, 2004, Evans submitted a letter to EPA Administrator Michael Leavitt with the subject line "Inequity, Injustice, Harassment, Retaliation & Intimidation R&E, Las Vegas Nevada." CX 120. This letter "is the primary protected activity Mr. Evans relies on to claim his managers retaliated against him" in this case. D. & O. at 9. The letter referred to and criticized several EPA managers by name, accusing them of age discrimination, medical records violations, harassing employees who suffered from medical conditions, ignoring employee opposition to the Ruby Slippers exercise, and changing employee position descriptions. CX 121-28. Cotsworth and Harrison became aware of the letter to Leavitt. Harrison wrote a detailed response to the letter accusing Evans of harassing EPA managers. CX 131-42. The Administrator never responded to Evans' letter.

On May 1, 2006, Hopper informed Harrison that several employees had accused Evans of threatening to bring a gun to work to shoot people. D. & O. at 14-24. That same day Braganza escorted Evans to the front office, where Harrison and Hopper were waiting with two Federal Protective Service officers. Hopper asked Evans for his badge, access card, and office keys. Hopper told Evans he had obtained signed witness statements saying Evans was "going to come in and kill him, kill the director and the co-workers." Tr. 257-58. Federal Protective Service officers interviewed Evans, but no charges were filed against him. He was escorted off of EPA's premises. *Id.* at 258-59. EPA took the threat of workplace violence seriously as an incident took place in a building adjoining the Radiation Lab in

April 2006, wherein a contractor came to the office with a loaded gun while under the influence of drugs and alcohol. D. & O. at 14.

Harrison contacted the human resources office and with their advice decided to place Evans on administrative leave effective May 1, 2006. Evans was not allowed in the building during his administrative leave, but he received full pay. Harrison informed office directors and building security that Evans had been placed on administrative leave and should not be allowed into the building. Hopper told Evans to call his supervisor between 8:00 and 9:00 a.m. each morning while he was on administrative leave. D. & O. at 25-27.

Harrison asked Hopper to investigate the allegations against Evans. Hopper and two other EPA managers interviewed most of the employees that worked in the same area as Evans. The investigation resulted in statements from six other Lab employees, including one witness who later recanted her statement. *Id.* at 14-24, 57.

On May 26, 2006, Evans filed a complaint with the Occupational Safety and Health Administration (OSHA). In this complaint, Evans stated that he engaged in activities protected by the CAA, CERCLA, ERA, SDWA, and TSCA when he informed EPA management and “appropriate enforcement authorities” about the “environmental risks of having employees participate in emergency response (ER) work without sufficient training.” Evans’ May 26, 2006 Complaint at 2. He also stated that he wrote a letter to the EPA Administrator describing these risks, and that the letter “provoked a spiral of harassment and animosity” against him. *Id.*

Evans sought relief that included reinstatement, back pay, expungement of any disciplinary action in his employment records, as well as compensatory damages for emotional distress. Evans’ attorney faxed the OSHA complaint to EPA’s human resources office, and informed the agency that Evans denies making any of the alleged threats. CX 197-98.

After the investigation, Harrison issued a July 19, 2006 Notice of Proposed Removal recommending Evans’ discharge. The proposal was based on Evans’ threats of gun violence, failure to follow supervisory instructions, and disrespectful and malicious conduct toward a supervisor. The last of these charges related to a statement in his 2006 performance appraisal where he asserted that he refused to participate in emergency response training “[d]ue to the fact that Jed Harrison our incestuous Director has forced this program upon employees through intimidation and fear tactics, by withholding promotions and awards from employees who oppose him.” CX 200. Harrison submitted the proposal to Cotsworth, who had final authority to discharge Evans. On August 10, 2006, through counsel, Evans

submitted a response to the proposed removal. He denied making violent threats and asserted that managers had pressured employees to make unfounded statements about Evans. CX 207-11.

Cotsworth reviewed Harrison's proposal and issued a Notice of Decision on Proposed Removal on August 29, 2006. She found Evans' "comments relating to potential violent behavior and veiled threats of harm towards management, in addition to the disrespectful and malicious statements about Jed Harrison, and [his] failure to follow supervisory instructions to be very serious." CX 213. But she also noted that there was insufficient evidence related to one of the charges against Evans, and she considered his sixteen years of federal service with no prior discipline and other mitigating circumstances. CX 212-15; Tr. 380-82. Cotsworth concluded that a seven-day suspension, beginning September 4, 2006, was a more appropriate punishment than removal. She instructed Evans to arrange counseling services with the Employee Assistance Program and attend a Violence in the Workplace Training session upon his return to work. Evans was not paid during his suspension. CX 214.

Evans returned to work on September 11, 2006. Manny Bay became his official supervisor and he was assigned to work on a project led by Mike Messer. Evans considered this assignment less desirable than previous assignments because it was "more physical" and Messer occupied a position with a pay grade lower than Evans' position. According to Hopper, he had nowhere else to assign Evans, Evans was a good fit for the work, and Messer needed the assistance. D. & O. at 66.

Harrison still considered Evans dangerous after his suspension, and he had disagreed with Cotsworth's decision to suspend Evans. According to Evans, he was told that when he returned an armed guard would escort him to and from the building and would monitor him throughout the day. Tr. 265. As part of his return to work, Mr. Evans received psychological counseling through the EPA Employee Assistance Program.

When Evans returned to work after his suspension, he completed an emergency response training course that he had previously refused to complete. Tr. 266-67. In November 2006, Evan's psychologist wrote a "Confidential Summary of Findings," not addressed to anyone, opining that "[t]he working environment at EPA as perceived by [Evans] ... has worsened his anxiety and led to his depression" and suggesting that he "remove himself from [EPA] and seek out a setting that he perceives to be more conducive to his mental wellbeing." CX 242. On November 20, 2006, Evans requested leave from work "until at such time the work environment has changed:"

At this time I have 157 hours of Annual Leave and 649 hours of Sick Leave. I request that my Annual Leave be applied first toward my time and then my Sick Leave. Once my leave is balance become zero I request to be placed on 1 year of leave without pay, at which time I would venture my litigation would have proceeded through the courts and been taken care of.

CX 240. Bay approved Evans's request to use his annual and sick leave, rejected his request for an additional year of leave without pay, and indicated that Evans was expected to return to work on May 21, 2007. CX 241.

Evans again requested a year of leave without pay in a letter dated May 8, 2007. CX 250. On May 15, 2007, Bay rejected that request. CX 251. According to Bay, Evans' absence was causing a staffing shortage and forcing others to perform work that would have been his responsibility. *Id.* Bay also stated that EPA requires employees on leave for serious health conditions to provide medical recertification and directed Evans to submit additional medical information to support his request. *Id.*

Evans filed his first supplemental OSHA complaint in mid May 2007, alleging additional protected activities and adverse actions taken against him. Evans' attorney wrote a letter to Bay dated May 21, 2007 (the day Evans was required to return to work) asking EPA to grant Evans leave without pay until he could obtain an updated psychological assessment from a doctor. On May 22, 2007, Bay denied the request and warned Evans that, having become absent without leave, his continued absence could result in his removal from federal service. CX 253.

After an additional request for an extension Bay informed Evans that if he could obtain medical documentation by June 4, 2007, Evans could apply ten hours of annual leave to his absence without leave, but no leave without pay would be approved. CX 259. Bay sent Evans a letter on June 19, 2007 warning that he continued to be absent without leave and that absence without leave in excess of five consecutive days could result in removal from federal service. CX 260.

On August 2, 2007, Harrison proposed Evans' removal from federal service for remaining absent without leave for 51 workdays between May 21, 2007 and August 1, 2007. CX 266-69. Cotsworth approved Mr. Harrison's proposal, and EPA officially removed Evans from federal service effective September 14, 2007. CX 270-72. In August 2007 Evans filed a second supplemental OSHA complaint accusing EPA of terminating his employment in violation of the Environmental Acts.

OSHA investigated and issued a determination denying Evans' complaints on November 21, 2007. On December 17, 2007, Evans requested a hearing before an ALJ. On January 25, 2008, prior to any hearing, EPA filed a Motion to Dismiss Evans' "original and supplemental complaints" under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim under the Environmental Acts. The ALJ cancelled the hearing, and on March 11, 2008, he issued a Decision and Order Dismissing Complaint. The ALJ concluded that Evans "fail[ed] to state a claim upon which relief can be granted" because his original complaint and letter to the EPA Administrator did not contain information indicating that he "engaged in an activity protected by the Environmental Acts." D. & O. at 5. The ALJ held that allowing Evans further discovery or amendments to his OSHA submissions was unnecessary because "it is not a defect in the Complaint that warrants dismissal, but the absence of Complainant's participation in any protected activity under the Environmental Acts." *Id.* at 3.

Evans petitioned the Board for review. On April 30, 2010, the Board issued a Final Decision and Order affirming the ALJ. Evans appealed to the United States Court of Appeals for the Ninth Circuit. While the case was before the court, the Secretary of Labor, as Respondent, filed a Status Report and Unopposed Motion for Remand (Secretary's Motion), requesting that the case be remanded to the Board to consider whether administrative whistleblower complaints filed with OSHA could be dismissed for failure to state a claim under Rule 12 of the Federal Rules of Civil Procedure.

On July 31, 2012, we issued a Decision and Order of Remand remanding this matter to the ALJ. We held that it was error to grant EPA's Motion to Dismiss because "facial challenges to a complaint must occur in a manner consistent with informal administrative procedures."² The ALJ conducted a hearing on Evans' complaints and on November 14, 2016 issued the D. & O. which is now before us.

JURISDICTION AND STANDARD OF REVIEW

² *Evans v. U.S. Env'tl. Prot. Agency*, ARB No. 2008-0059, ALJ No. 2008-CAA-00003, slip op. at 6 (July 31, 2012). We note that since our remand the rules governing ALJ proceedings have been amended and now include a provision specifically allowing parties to submit motions to dismiss. See 29 C.F.R. § 18.70(c) ("A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. If the opposing party fails to respond, the judge may consider the motion unopposed.").

The Secretary of Labor has delegated to the Administrative Review Board (ARB or Board) authority to review ALJ decisions and issue agency decisions in cases arising under the Environmental Acts. Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (March 6, 2020); 29 C.F.R. § 24.110. The ARB will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo. *Kaufman v. U.S. Emtl. Prot. Agency*, ARB No. 2010-0018, ALJ No. 2002-CAA-00022, slip op. at 2 (ARB Nov. 30, 2011).

DISCUSSION

1. Elements of a Retaliation Claim under the Environmental Acts

The employee protection provisions of the Environmental Acts prohibit employers from discriminating against employees who have participated in activities that further the purposes of those acts or relate to their administration and enforcement, including making internal complaints to supervisors or participating in legal proceedings. 29 C.F.R. § 24.2(b); *see, e.g., Evans v. Baby-Tenda*, ARB No. 03-001, ALJ No. 2001-CAA-004, slip op. at 4 (ARB July 30, 2004). To prevail on a retaliation complaint, a complainant must establish by a preponderance of the evidence that he engaged in protected activity, that the respondent was aware of the protected activity, that he suffered an unfavorable personnel action, and that the protected activity "caused or was a motivating factor in the adverse action alleged in the complaint." 29 C.F.R. § 24.109(b)(2).

2. Protected Activity

Congress passed the CAA to protect the public health by controlling air pollution. 42 U.S.C. § 7401(b)(1); *Nat. Res. Def. Council, Inc. v. U.S. Emtl. Prot. Agency*, 725 F.2d 761, 764 (D.C. Cir. 1984). It passed the SDWA "to assure that water supply systems serving the public meet minimum national standards for protection of public health" and "to assure safe drinking water supplies, protect especially valuable aquifers, and protect drinking water from contamination by the underground injection of waste." H.R. Rep. No. 93-1185 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6454; *see also United States v. Mass. Water Res. Auth.*, 256 F.3d 36, 38 (1st Cir. 2001) ("In 1974, Congress . . . passed the Safe Drinking Water Act . . . with the basic goal of protecting the purity of the drinking water provided by the nation's public water systems."). And the purposes of CERCLA are the "prompt cleanup of hazardous waste sites and the imposition of all cleanup costs on the responsible party." *Culligan v. Am. Heavy Lifting Shipping Co.*, ARB No. 2003-0046, ALJ Nos. 2000-CAA-0020, 2001-CAA-0009, -0011, slip op. at 10 (ARB June 30, 2004).

Evans asserts that he engaged in activity protected by the Environmental Acts by (1) submitting the November 2003 affidavit in support of the union's complaint to the Federal Labor Relations Authority; (2) sending the July 2004 letter to the EPA Administrator; (3) making certain comments in his 2006 performance appraisal; and (4) filing complaints with OSHA. D. & O. at 44. The ALJ held that all of these actions constituted protected activity. We conclude that Evans engaged in protected activity only when he filed his OSHA complaints, the first of which was initiated on May 26, 2006.

When an employee makes a complaint to an employer that is "grounded in conditions constituting reasonably perceived violations" of the Environmental Acts, he or she engages in protected activity. *Devers v. Kaiser-Hill Co.*, ARB No. 2003-0113, ALJ No. 2001-SWD-00003, slip op. at 11 (ARB Mar. 31, 2005). The employee need not prove that the hazards he perceived actually violated the Environmental Acts. *Saporito v. Cent. Locating Servs., Ltd.*, ARB No. 2005-0004, ALJ No. 2004-CAA-00013, slip op. at 5 (ARB Feb. 28, 2006). But a complaint that expresses only a vague notion that the employer's conduct might negatively affect the environment is not protected. *Gain v. Las Vegas Metro. Police Dep't*, ARB No. 2003-0108, ALJ No. 2002-SWD-00004, slip op. at 3 n.3 (ARB June 30, 2004). Nor is a complaint that is based on numerous assumptions and speculation reasonably grounded in perceived violations. *Erickson v. U.S. Envtl. Prot. Agency*, ARB Nos. 2004-0024, -025; ALJ Nos. 2003-CAA-00011, -019, 2004-CAA-00001; slip op. at 7-8 (ARB Oct. 31, 2006).

Evans submitted a six-page affidavit in support of the Union's ULP charge. CX 83-88. The ALJ concluded that this submission constitutes protected activity because it "describe[s] how emergency response participation used to be voluntary, but had become mandatory," and includes an assertion that the Radiation Lab assigned him "responsibilities for which he lacked adequate training, such as designing a biological and chemical trailer." D. & O. at 7. This conclusion is incorrect. The document contains statements about lab employees' participation in emergency response training, but it does not include information about a violation of the Environmental Acts. Furthermore, Evans' assertion that inadequate training could result in safety violations is speculative.

The ALJ also incorrectly concluded that Evans engaged in protected activity when he submitted a letter to the EPA Administrator. Evan's letter referenced "inequity, injustice, harassment, retaliation and intimidation by" local Radiation Lab Management. He also accused Radiation Lab managers of inappropriately procuring employee medical records and then harassing employees who suffered from medical conditions. A portion of the letter addressed the recent changes to the Radiation Lab's emergency response program and personnel's lack of expertise, but

age discrimination at the Radiation Lab was the primary focus. Specifically, Evans objected that individuals who do not want to attend this emergency response exercise are being forced to participate in assignments and roles they have no idea about. D. & O. at 9-10. The ALJ's description of the letter confirms our conclusion that it does not constitute activity protected by the Environmental Acts because it does not describe any reasonably perceived safety violations.

In finding that Evans engaged in protected activity, the ALJ relied on language in the dissenting opinion in our remand of this case, wherein one member opined that good faith allegations under the Environmental Acts are protected “even though the complaining employee may have been profoundly misguided or insufficiently informed in his assessment.” D. & O. at 46, citing *Sylvester v. Parexel Int'l, LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039 and 2007-SOX-00042, slip op. at 34 (ARB May 25, 2011). This is an incorrect interpretation of the legal standard regarding reasonably perceived violations.

To be afforded protection, a complainant's assertion that a violation occurred must be subjectively and objectively reasonable. *Lee v. Parker-Hannifin Corp.*, ARB No. 2010-0021, ALJ No. 2009-SWD-00003, slip op at 9 (ARB Feb. 29, 2012). The “subjective” component of the reasonable belief is demonstrated by showing that the employee actually believed that the conduct of which he complained constituted a violation of relevant law. *Id.*, slip op. at 9-10; *see also Melendez v. Exxon Chems.*, ARB No. 1996-0051, ALJ No. 1993-ERA-00006, slip op. at 27-28 (ARB July 14, 2000). An objectively reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as complainant. *Johnson v. The Wellpoint Co., Inc.*, ARB No. 2011-0035, ALJ No. 2010-SOX-00038, slip op. at 9 (ARB Feb. 25, 2013). A “profoundly misguided” or “insufficiently informed” opinion would not pass this test.

The ALJ concluded that “[a]lthough environmental concerns were not the primary focus of Mr. Evans's letter to the Administrator, ‘[t]he case law makes clear that while environmental statutes generally do not protect complaints restricted solely to occupational safety and health . . . , they do if the complaints also encompass public safety and health or the environment.’” D. & O. at 46. We disagree with the ALJ that the letter constitutes protected activity because it “touched on his concerns regarding the emergency response program” and therefore “touch[ed] on the concerns for the environment or public health and safety that are the focus of the environmental acts.” *Id.*, citing *Williams v. Dallas Indep. School Dist.*, ARB No. 2012-0024, ALJ No. 2008-TSC-00001, slip op. at 9 (ARB Dec. 28, 2012). Evans worked at the agency whose primary mission is protection of the environment. It is arguable that every statement he made in the course of his duties “touched on” the environment. But in the affidavit and letter, Evans was

complaining about employee training and exercises. The fact that Evans complained about training and exercises performed by the Environmental Protection Agency does not automatically render those complaints protected under the Environmental Acts.

The ALJ provided examples of emergencies that Radiation Lab employees had responded to in the past, including Hurricane Katrina, fires near the Los Alamos National Laboratory, and the Hanford, Washington nuclear waste site, to support his conclusion that the affidavit and letter to the EPA Administrator constitute protected activity. *Id.* at 46. But his assertion that Radiation Lab employees need to respond to emergencies does not explain how the public benefits when those employees do not participate in emergency response training.

The ALJ also found that Evans complained about risks that were “more than theoretical,” but then proceeded to describe theoretical examples, including inadequately trained emergency responders who “could cause the environmental contamination of an entire neighborhood” and an improper response to an emergency that “could escalate a relatively minor problem into one that has long-term consequences for the surrounding ground, air, and water.” *Id.* at 47. While these are undoubtedly alarming scenarios, they also show how any interpretation of unsafe conditions from Evans’ statements require assumptions and speculation about what *could* transpire and not what is likely to.

For that same reason, we also disagree with the ALJ’s conclusion that “[t]he portions of the performance appraisal objecting to the emergency response program are protected activity” because Evans “generally objected to the emergency response program because the Radiation Lab’s employees were ill prepared to handle the duties associated with it—a problem that could have environmental implications.” *Id.* at 48. Again, Evans’ concerns here were speculative and not reasonably grounded in perceived violations.

In contrast, the filing of a retaliation claim with OSHA constitutes commencing or instituting a proceeding under the Environmental Acts. We therefore agree with the ALJ’s conclusion that Evans’ May 26, 2006 complaint and his two supplemental complaints, filed in May and August 2007, are protected activities.

3. Adverse Action

We agree with the ALJ’s conclusion that EPA “took numerous adverse actions against Mr. Evans.” *Id.* at 49. But the issue before us is whether these actions constitute retaliation for engaging in protected activity. Because we have

held that Evans engaged in protected activity only by filing complaints with OSHA, we need only identify the adverse employment actions taken after May 26, 2006.

The record supports the ALJ's conclusions that Evans was not subjected to a hostile work environment, and that he exaggerated the conditions of his reassignment and presence of security guards after his return to work. *Id.* at 67-70. And, as explained below, EPA's official removal of Evans from federal service on September 14, 2007 does not constitute an adverse employment action because Evans quit his job at the Radiation Lab. *Id.* at 68.

Therefore, the adverse actions relevant to this case are (1) the July 19, 2006 Notice of Proposed Removal; (2) the August 29, 2006 Notice of Decision on Proposed Removal; and (3) the November 2006 and May 2007 rejections of requests for leave. The remaining question is whether EPA imposed any of this discipline because Evans filed his OSHA complaints.

4. Causation

As explained above, a complainant must prove that his protected activity was a motivating factor in the adverse actions alleged in his complaints. If the complainant makes this showing, "relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity." 29 C.F.R. § 24.109(b)(2). The ALJ held that "EPA would have taken all of the same adverse actions against Mr. Evans regardless of any protected activity, save one: fabricating . . . [a] witness statement." D. & O. at 67.

The ALJ's conclusion that EPA violated the Environmental Acts is based on his conclusion that EPA subjected Evans to an adverse employee action when Hopper fabricated the statement of a witness concerning the threats that resulted in Evans' administrative leave. *Id.* at 72-73. But this fabrication took place prior to the filing of Evans' first complaint. *Id.* at 52 ("Again, there is no direct evidence Mr. Hopper knew of the OSHA complaints ... Hopper had already played his most significant role in this tale before any of the OSHA complaints were made - procuring . . . [a] witness statement and conducting the remainder of the investigation into Mr. Evans's threats."). We conclude that because that fabrication happened prior to any protected activity, Evans has not proven that EPA retaliated against him in violation of the Environmental Acts.

According to the ALJ, most of what Evans characterizes as retaliation was in fact "EPA's response to his inappropriate behavior ... Mr. Evans's inappropriate comments caused Mr. Harrison to believe Mr. Evans posed a genuine threat." *Id.* at

69. The May 2006 responses to accusations against Evans were taken following a different threat of violence that took place in a building adjoining the Radiation Lab in late April of 2006, when an individual working in a nearby building drove onto EPA property with a loaded gun and threatened violence. *Id.* at 14. It is reasonable that, in light of that incident, managers would take accusations of similar behavior very seriously.

The Notice of Proposed Removal and Notice of Decision on Proposed Removal were imposed because of Evans' threats of violence. And Evans' requests for leave in November 2006 and May 2007 were rejected because he had run out of leave hours to use in lieu of working. Nothing in the record indicated that EPA took these actions because Evans filed complaints with OSHA.

Finally, we agree with the ALJ's conclusion that Evans was not constructively discharged but instead quit his job. In an order granting partial summary decision, the ALJ concluded that Evans' refusal to return to work after his extended leave was equivalent to a resignation, stating that "abandoning his job for two months left EPA no choice but to find someone who would come to work and do the job." Order Granting Partial Summary Adjudication at 32. After a full hearing on his complaint, the ALJ found that Evans "left his job because he was unhappy, but that was not due to discrimination, harassment, or retaliation. He was unhappy because he had been punished for his inappropriate comments and because he had been assigned work he disliked." D. & O. at 68.

CONCLUSION

The ALJ erred by concluding that EPA retaliated against Evans for engaging in activity protected by the Environmental Acts. We therefore **REVERSE** the ALJ's ruling, **VACATE** the award of \$1.00 in nominal damages, and **DISMISS** the complaint.

SO ORDERED.