U.S. Department of Labor

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

In the Matter of:

STEVEN ONYSKO,

COMPLAINANT,

v.

STATE OF UTAH, DEPARTMENT OF ENVIRONMENTAL QUALITY,

RESPONDENT.

ARB CASE NO. 2019-0042

ALJ CASE NOS. 2017-SDW-00002
2018-SDW-00003

DATE: December 16, 2020

Appearances:

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

For the Respondent:
Sean D. Reyes, Esq.; *Utah Attorney General*; Alain C. Balmanno, Esq. and Stephen W. Geary, Esq.; *Assistants Utah Attorney General*; Salt Lake City, Utah

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provision of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300(j)-9(i) (1994), and its implementing regulations, 29 C.F.R. Part 24 (2020). Complainant Steven Onysko filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that his employer, the State of Utah's Department

of Environmental Quality, retaliated against him in violation of the SDWA. OSHA investigated and dismissed the complaint on April 21, 2017. Complainant objected and requested a hearing with the Office of Administrative Law Judges.

On February 20, 2019, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) Granting Summary Decision because the undisputed facts showed that there was no genuine issue of material fact and that the complaint should be dismissed. We affirm, adopting and attaching the ALJ's order.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to issue agency decisions under the SDWA.[1] The Board reviews an ALJ's grant of summary decision de novo, applying the same standard applicable to the ALJ for granting summary decision under 29 C.F.R. § 18.72. To be entitled to summary decision, the moving party must show "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."[2]

DISCUSSION

Upon review of the ALJ's grant of summary decision, we conclude that it is a well-reasoned ruling based on the undisputed facts and the applicable law. The ALJ properly concluded that all but six of Complainant's 87 allegedly adverse actions were untimely and not actionable.[3] The ALJ also properly concluded that as to each of the timely alleged adverse actions, Respondent made a showing on summary

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[1] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[2] 29 C.F.R. § 18.72(a).

[3] Complainant has argued on appeal that the ALJ should have considered all of his listed allegedly adverse actions together as a hostile work environment claim. However, Complainant did not argue that theory of adverse action to the ALJ. The ARB typically does not entertain arguments that are first raised on appeal and we decline to do so now. *Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 2001-0103, ALJ No. 1997-SDW-00007, slip op. at 9-10 (ARB May 29, 2003) ("Issues raised for the first time on appeal will generally not be addressed by appellate bodies, absent rare and unusual circumstances.") (citations omitted). In any event, we affirm because even viewing the listed alleged adverse actions in the aggregate, there is no hostile work environment claim as a matter of law. A hostile work environment occurs where "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . ." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)).

decision that it would have taken the same action absent any protected activity and Complainant failed to raise a genuine issue as to any material fact about this affirmative defense.

While Complainant submitted a Declaration and other materials in opposition to the motion for summary decision, the Declaration contained "nothing more than general allegations and nonspecific denials which d[id] not directly address the facts Respondent contend[ed] [we]re undisputed."[4] Nor did any of Complainant's submissions raise a genuine issue of material fact. For these reasons, the ALJ properly concluded that Respondent established that there is no genuine issue as to any material fact and is entitled to summary decision as a matter of law. None of Complainant's arguments on appeal persuade us otherwise.

Accordingly, we **AFFIRM**, **ADOPT** and **ATTACH** the ALJ's Decision and Order Granting Respondent's Motion for Summary Decision.

SO ORDERED.

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[4] D. & O. at 8. On appeal, Complainant has argued that the ALJ impermissibly struck his Declaration. However, the ALJ did not strike the Declaration, but instead thoroughly reviewed it. While it would have been error to have stricken the Declaration for the reason that it was not signed under oath or under penalty of perjury, the ALJ did not take this action. See *Hukman v. U.S. Airways, Inc.*, ARB No. 2018-0048, ALJ No. 2015-AIR-00003, slip op. at 7-8 (ARB Jan. 16, 2020) (in which the ARB held that the ALJ erred in refusing "to credit or even consider several of Complainant's submissions because they were not 'affidavits' or 'sworn statements'" on summary decision). Rather, the ALJ considered the Declaration, but perceived it to be lacking because it contained only nonspecific allegations and denials, rather than raising any genuine issue of material fact, as it was required to do in order to survive Respondent's summary decision motion.

U.S. Department of Labor

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Issue Date: 20 February 2019

CASE NO.: 2017-SDW-00002
2018-SDW-00003

In the Matter of:

STEVEN J. ONYSKO,
Complainant,

vs.

UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondent.

DECISION AND ORDER GRANTING SUMMARY DECISION

This is a claim under the employee-protection provisions of the Safe Drinking Water Act ("SDWA" or "the Act"), 42 U.S.C. § 300j-9, and the associated regulations set forth at 29 C.F.R. §§ 24.100 *et seq.* This case is currently set for hearing in Salt Lake City, Utah, on April 1, 2019. Respondent moves for summary decision in its favor, and Complainant opposes the motion.

First, Respondent contends Complainant has not engaged in protected activity under SDWA.[1] Second, Respondent acknowledges Complainant has suffered six specific adverse employment actions,[2] but contends the other alleged adverse em-

[1] Respondent argues "Complainant's work activities may relate to SDWA processes, but are not specifically enumerated activities protected by statute, as listed in the SDWA" (Motion for Summary Decision, p. 22). Here Respondent seems to argue that the completion of a sanitary survey, for example, could never be "protected activity" because it was merely one of Complainant's job duties, rather than the institution of a "proceeding" as defined in the statute. If Respondent is making that argument, it is unpersuasive. *Jenkins v. Environmental Protection Agency*, ARB No. 98-146, ALJ No. 88-SDW-2, 2003 WL 724100 (ARB, February 28, 2003).

[2] They are: the issuance of a written warning on October 17, 2016 (Respondent's Exhibit 9); a Notice of Intent to Discipline – Written Reprimand issued December 19, 2016 (Respondent's Exhibit 12); a written reprimand issued on January 13, 2017 (Respondent's Exhibit 14); the placement of Complainant on administrative leave with pay on June 12, 2017 (Respondent's Exhibit 24); the issuance

ployment actions, which Complainant identified in a telephonic status conference held May 15, 2018, are not actionable for various reasons, as more fully set forth below. Finally, Respondent contends there is no question of fact that it would have taken adverse action against Complainant regardless of whether he had participated in any protected activity.

In a lengthy, verbose, and conclusionary response, Complainant does not deny Respondent's specific allegations of fact. Instead, he generally denies ever having engaged in the kind of conduct attributed to him by others in their complaints to Respondent. He also attacks Respondent's evidence on various grounds.

I grant Respondent's motion for the reasons discussed below.

Procedural History

The Complainant, Dr. Steven Onysko, represents himself in this matter. Although a self-represented litigant, he is a seasoned one. He was a party in *Onysko v. State of Utah, Department of Environmental Quality*, 2009-SDW-00004, from its docketing at the U.S. Department of Labor, Office of Administrative Judges, in May, 2009, until the United States Court of Appeals for the Tenth Circuit affirmed the adverse decision of the Benefits Review Board on December 4, 2013. In that case, Dr. Onysko represented himself at a four-day hearing in Salt Lake City, Utah, on June 21 through 24, 2010, introducing into evidence the testimony of thirty witnesses, and more than 1,600 pages of documentary exhibits, contending his employer, the State of Utah's Department of Environmental Quality, had violated the employee-protection provisions of the Safe Drinking Water Act, 42 U.S.C. section 300j-9i. On December 22, 2010, Administrative Law Judge Gerald M. Etchingham issued a Decision and Order Dismissing Complaint, concluding,

> Complainant has set forth a number of theories in an attempt to demonstrate his engagement in protected activities in some way served as a motivating factor to alleged adverse actions taken against him by Respondent. After examination of these theories against the record, however, I find them entirely based on Complainant's own subjective interpretation of the facts presented in this case and entirely without merit. . . .
>
> The record in this case demonstrates Complainant to be of superior technical capability as an engineer, perhaps unmatched within Respondent's organizational structure. Nevertheless, the record is also permeated with instances evincing Complainant's shortcomings as a communicator and manager as well as his antagonizing responses toward those who disagree

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of a Notice of Intent to Dismiss on July 10, 2017 (Respondent's Exhibit 26; and the termination of Complainant's employment on October 23, 2017 (Respondent's Exhibit 29).

> with his opinions. This latter characteristic is perhaps best evidenced by the numerous complaints Complainant has filed against various actors attempting to bring about professional and criminal sanctions, none of which any independent arbiter found to have merit. While Complainant did demonstrate his engagement in protected activity under the SDWA, he failed to demonstrate Respondent took any timely adverse action against him. Furthermore, Complainant is unable to show any protected activity engaged in by him motivated Respondent in any way to take adverse action against him.

(Decision and Order Dismissing Complaint, p. 62).

On January 23, 2013, the Administrative Review Board affirmed Judge Etchingham's Decision "on the ALJ's alternative ground that Onysko failed to prove by a preponderance of the evidence that his alleged protected activity was the *motivating factor* for any alleged adverse action, and hold that substantial evidence supports the ALJ's determination" (emphasis in original) (ARB Case No. 11-023, Final Decision and Order, p. 11).[3] On February 12, 2013, the Board denied Dr. Onysko's petition for rehearing or rehearing *en banc*. Dr. Onysko appealed to the Tenth Circuit, which on December 4, 2013, issued its Order and Judgment affirming the Board's Final Decision and Order (*Onysko v. Administrative Review Board*, Case No. 13-9529; *Onysko v. Admin. Rev. Bd.,* 549 Fed.Appx. 749, 752 (10th Cir. 2013)). Throughout these appeals, Dr. Onysko represented himself.

Additionally, under 20 C.F.R. section 18.84, having given the parties an opportunity to show the contrary[4], I take official notice of the fact that Dr. Onysko

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[3] A copy of this document is attached to Respondent's original Motion for Summary Decision as Exhibit 4.

[4] In response to my Notice, Dr. Onysko contends he "has heard that CSRO has no official summary yet of the hearing sessions' dates or proceedings' duration Complainant's CSRO hearing *{sic}*;" he "has heard that CSRO has no official record yet of witnesses presented at Complainant's CSRO hearing;" he "has heard that CSRO has no official record yet of the numbers of exhibits presented by the parties at Complainant's CSRO hearing;" that "[t]he Administrative Law Judge misstates as fact the number of days of CSRO proceedings . . . misstates as fact that Complainant presented testimony of 15 witnesses . . . misstates as fact that Complainant introduced into evidence 37 exhibits." These "non-denial denials" do not show the contrary of the facts I notice, but merely assert the facts as I state them are incorrect. But I took these facts from the first page of the Findings of Fact, Conclusions of Law, and Decision and Order of Hearing Officer Geoffrey Leonard in Utah Career Service Review Office Case No. 2010 CSRO/HO 147, which Dr. Onysko himself filed with me as Exhibit 2 to his Motion to Amend Complaint at 2018-SDW-00003 on November 27, 2018. That page recites that Dr. Onysko appeared *pro se* at the hearing, and sets forth the dates of the hearing, the names of the witnesses Dr. Onysko called at that hearing, and the numbers assigned to the exhibits Dr. Onysko introduced at that hearing. For Dr. Onysko to quibble over these statements, especially after bringing them to my attention in the first place, illustrates not only the extent of his *chutzpah*, but the disingenuous dissembling that, as set forth below, characterizes his opposition to the Motion for Summary Decision., in derogation of his obligations under 29 C.F.R. § 18.35, subsection (b).

represented himself in an administrative hearing before the State of Utah Career Service Review Office, Case No. 2010 CSRO/HO 147, on July 17-19, September 10-12, and September 20, 2018, at which he presented the testimony of fifteen witnesses and introduced into evidence thirty-seven exhibits.

In this case, Dr. Onysko once again alleges his now-former employer, the State of Utah Department of Environmental Quality, has retaliated against him for his protected activities under the Safe Drinking Water Act, 42 U.S.C. section 300j-9i. On May 15, 2018 – almost eleven months after this case had first been docketed at OALJ – I held a telephonic status conference, at the request of the parties. In advance of that conference, I asked the parties to submit a brief statement of the issues each believed were properly before the court for hearing. Dr. Onysko faxed a "Complainant Status Report" identifying these issues:

> 2. Properly Before the Court Issues of Complainant-Alleged, Respondent Actions Retaliatory to Complainant, for Safe Drinking Water Act-Protected Activities
>
> I. October 17, 2016: Written Warning to Complainant
>
> II. December 16, 2016: Utah Title 76, Utah Criminal Code, Chapter 5, Offenses Against the Person, Part *[illegible]* Assault and Related Offenses, 76-5-112 Reckless Endangerment, Respondent Retaliatory Action Against Complainant in Respondent's Malicious Delivery *[illegible]* of the December 16, 2016-Dated Notice of Intent to Discipline – Written Reprimand;
>
> III. December 19, 2016: Issuance to Complainant of the December 16, 2016-Dated Notice of Intent to Discipline – Written Reprimand;
>
> IV. June 12, 2016: Action, by Administrative Leave Letter, Complainant Assignation to Administrative Leave;

(Complainant Status Report, p. 2).

But at the telephonic status conference,[5] Dr. Onysko would not confirm he was complaining of only the four listed acts of retaliation. I asked him to list all the retaliatory actions he alleged, and told him if he were not prepared to do so, I would continue the telephonic status conference to allow him to compile a complete list. Ultimately he said he had such a list, and read into the record eighty-seven instanc-

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[5] As discussed more fully below, a copy of the transcript of the telephonic status conference is attached as Exhibit 2 to Respondent's Motion for Summary Decision.

es he alleged comprised retaliatory action by Respondent for protected activity under the statute.[6] Ultimately, I allowed another: the termination of his employment with Respondent. After his termination, Dr. Onysko filed another whistleblower complaint with OSHA, contending his termination violated the Safe Drinking Water Act. In the interest of judicial economy, I issued an Order on November 8, 2017, allowing Dr. Onysko to amend the complaint in this pending action to add his termination to the list of allegedly-retaliatory actions, provided he dismiss the OSHA complaint to avoid redundancy. He did not dismiss the OSHA claim, which became case No. 2018-SDW-00003, and which was assigned to me on October 12, 2018. On November 13, 2018, after giving the parties an opportunity to be heard, I consolidated Cases No. 2017-SDW-00002 and 2018-SDW-00003 for hearing.

On October 11, 2018, Respondent filed its Motion for Summary Decision in this matter ("Motion for Summary Decision"). Dr. Onysko filed opposition to the Motion on October 25, 2018 ("Original Opposition"). His opposition included no affidavits or declarations based on personal knowledge, and comprised little more than argument. Accordingly, in an Order issued October 26, 2018, I continued the hearing, and, under 29 C.F.R. section 18.72, subsection (e), gave both parties an opportunity to provide supporting evidence for their respective positions under 29 C.F.R. section 18.72, subsection (c). I also directed the parties to file affidavits or declarations signed under oath, or under penalty of perjury. As allowed by that Order, Respondent filed an Amendment to Motion for Summary Decision ("Amendment to Motion") on December 19, 2018, and Dr. Onysko filed his "Complainant Amendment of October 24, 2018, Complainant Opposition to Respondent October 10, 2018, Motion for Summary Decision, and to Respondent December 18, 2018, Amended Motion for Summary Decision" ("Amended Opposition") on January 18, 2019. The Amended Opposition includes 470 pages of argument, 352 pages of exhibits, and his own twenty-four page Declaration (Amended Opposition, Ex. 78). Dr. Onysko's declaration is not signed under oath or under penalty of perjury.

Standard for Summary Decision

A Motion for Summary Decision is appropriate when the parties agree on all the material facts, although they may disagree on the law, and they may disagree as to matters which are not material. My job in ruling on a Motion for Summary Decision is to compare the evidence presented in the moving papers with the evidence presented in the opposing papers, and determine whether there is any conflict in the evidence on any material issue. I do not weigh the evidence. If there is a conflict in the evidence on any material issue, I deny the motion, and the matter proceeds to hearing. If there is no conflict in the evidence on any material point, and the moving party is entitled to a decision as a matter of law, I grant the motion, and

[6] In the May 15, 2018, status conference, Dr. Onysko also reported he intended to call 100 witnesses and introduce 300 exhibits at the hearing. *See* Motion for Summary Decision, Exhibit 2, internal page 7, lines 10-22.

decide the case in favor of the moving party without any additional hearing. *See* 29 C.F.R. section 18.72, subsection (a); *Brockington v. Certified Electric, Inc.,* 903 F.2d 1523 (11th Cir. 1990), *cert. denied,* 498 U.S. 1026 (1991). Summary decision is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A party "cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him." *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968); *see also* Fed. R. Civ. Pro. Rule 56(e); 29 C.F.R. § 18.72(c).

> A moving party without the ultimate burden of persuasion at trial . . . has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact.

Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1002-03 (9th Cir. 2000) (citations omitted). "*Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position*, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation" (emphasis added). *In the Matter of Hooker* v. *Westinghouse Savannah River Company*, ARB No. 03-036, ALJ No. 01-ERA-16 (ARB, August 26, 2004).

The adverse party must set forth specific facts showing a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 317, 323 (1986). The non-moving party must bring forth "significant probative evidence tending to support the complaint." *See T.W. Elec. Serv., Inc.,* 809 F.2d at 630 (9th Cir. 1987). The non-moving party "cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary decision in the hope that something will turn up at trial. . . . There mere possibility that a factual dispute may exist, without more, is not sufficient to overcome convincing presentation by the moving party. The litigant must bring to the . . . court's attention some affirmative indication that his version of relevant events is not fanciful." *Conway v. Smith,* 853 F.2d 789, 794 (10th Cir. 1988).

As I mentioned above, Dr. Onysko's Amended Opposition includes 470 pages of argument, 352 pages of exhibits, and his own twenty-four page Declaration. Dr. Onysko's declaration (Amended Opposition, Ex. 78) is not signed under oath or under penalty of perjury, as Respondent's are. But much more importantly, it consists almost entirely of opinions, arguments, conclusions, and occasional allegations of facts beyond his personal knowledge. For the most part, he does not specifically address the factual allegations Respondent contends are undisputed.

Facts Not in Dispute

In its Original Motion, Respondent set out forty-seven statements of fact as to which it contended there was no evidence to show were disputed. Dr. Onysko did not specifically respond to each of the stated facts, so I have done my best to comb through his opposition in search of such evidence for each fact. I find these facts "undisputed" – not in the sense that Dr. Onysko expressly admits to their truthfulness, but in the sense that he has failed to produce evidence sufficient to raise a genuine question of fact to any of them. As one prominent commentator notes, in federal practice,

> If the summary-judgment movant makes out a prima facie case that would entitle him to judgment as a matter of law if uncontroverted at trial, summary judgment will be granted *unless the opposing party offers some competent evidence that could be presented at trial* showing that there is a genuine dispute as to a material fact. In this way the burden of producing evidence is shifted to the party opposing the motion.
>
> The burden on the nonmoving party is not a heavy one; the nonmoving party simply is *required to show specific facts, as opposed to general allegations*, that present a genuine issue worthy of trial (emphasis added).

Wright, Miller & Kane, 10A Federal Practice and Procedure Civil § 2727.2 (4th ed.)

I disregard Dr. Onysko's Declaration (Amended Opposition Ex. 78) for two reasons. First, it is not signed under oath or under penalty of perjury, as I required in my Order issued October 26, 2018 – a requirement with which Respondent complied. Neither is it limited to matters within his personal knowledge, as required under 29 C.F.R. section 18.72, subsection (c)(4).[7] But much more importantly, even

[7] For example, he asserts the charges in the October 17, 2016, written warning (Complainant's Exhibit SMCX-78, paragraph 4), and the allegations of every person relating to the events of November 9, 2016 (*Id.*, paragraph 15), are "all pretextual." He reports the substances of e-mails sent between third parties in paragraph 26, and the substance of a communication between OSHA and Respondent on November 10, 2016 in paragraph 28, without telling how he knows about them. He declares the state of mind of the Assistant Attorney General in relation to other events in paragraph 31, and the state of mind of Respondent's clients in paragraph 53. In paragraph 69, he denies that "clients

if it were in proper form, it contains nothing more than general allegations and non-specific denials which do not directly address the facts Respondent contends are undisputed (as discussed more fully below). Like the politician facing a hostile press, Dr. Onysko stays resolutely "on message," denying those points he wishes to deny, while not addressing the specifics of the issues put to him. Against a properly-supported Motion for Summary Decision, that simply will not do.

Additionally, Dr. Onysko objects to Respondent's exhibits on grounds of admissibility, hearsay, improper foundation, or other technical defect. But nowhere does he specifically deny the authenticity or substantive content of any document offered by Respondent. I find the following facts undisputed:

1. **Complainant was hired by Respondent as an environmental engineer in March, 1998**.

Supporting Evidence: Respondent's Exhibit 4, Final Decision and Order, *Onysko v. State of Utah Department of Environmental Quality*, ARB No. 11-023, ALJ No. 2009-SDW-004 (ARB, January 23, 2013).

Opposing Evidence: None. But Dr. Onysko objects to Respondent's Exhibit 4 (Amended Opposition, pp. 46-48), arguing it is prejudicial and confusing, and does not comply with Rule 403 of the Federal Rules of Evidence.[8] I overrule those objections.

2. **Working for Respondent, Complainant's job – in his own words – has been to conduct sanitary surveys of public water systems, including deficiencies reports, and review of plans and specifications for public water system new facilities construction.**

Supporting Evidence: Respondent's Exhibit 5, a November 1, 2017, letter from the Complainant addressed to John Nay.

Opposing Evidence: None. On the contrary, Complainant's own Exhibit 59 (Amended Opposition, Ex. 59) includes a job description strikingly similar to the one set forth here, and Complainant nowhere challenges the truthfulness of this statement. But he objects to Respondent's Exhibit 5 (Amended Opposition, pp. 48-52) on the grounds 1) it is not an original document; 2) it is not a complete copy of his November 1, 2017, letter to Mr. Nay, which ran to 120 pages; and 3) Respondent has not properly authenticated it. I overrule those objections.

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have expressed their frustration in working with me." In paragraph 71, he denies that even a single co-worker has ever expressed a preference for not working with him.

[8] Throughout the Amended Opposition, Dr. Onysko raises objections based on the Federal Rules of Evidence. The Federal Rules of Evidence do not apply in this proceeding. 29 C.F.R. § 24.107, subsection (a).

3. In 2007, Complainant was temporarily promoted to Engineering Section Manager. . . . Almost immediately, he had multiple conflicts with his co-workers. As found by the ALJ in Complainant's first OSHA proceeding (*Onysko I*):

a. "Onysko had unreasonable standards that 'could . . . impose additional costs on operators."

b. "Onysko engaged in 'micro-managing everything' such that Onysko could be so 'heavily involved in [an employee's] position beyond what was really required."

c. "Onysko had a 'serious process issue' pertaining to his role as a manager, and that issue was 'rooted in the length of time it took [Onysko] to review plans as well as the existence of "several instances where complaints have been [made] that [Onysko] is 'too focused on his interpretation of the rules."'"

d. "Onysko refused to meet with a consultant or a DEQ project manager about the Slate Canyon Project. [Citation omitted.] A conversation between Onysko and the consultant, which the consultant repeatedly tried to arrange, 'would have resolved one of two major issues with the Slate Canyon Project[,]' but Onysko refused to communicate."

e. "Onysko's engineering manager, Sinclair, received emails from at least four District Engineers whom Sinclair supervised, complaining about Onysko's management performance. . . . Based on these complaints, Sinclair believed that problems with Onysko 'inhibited the District Engineers' ability to do their own jobs efficiently, specifically their ability "to get operating permits that needed to be accomplished out the door."'"

Supporting Evidence: Respondent's Exhibit 4, pp. 4-5.

Opposing Evidence: I find no direct, unequivocal denial in the evidence that these were the ALJ's findings in Case No. 2009-SDW-00004. There are general, nonspecific denials in Dr. Onysko's declaration (Amended Opposition, Ex. 78) from which a reader could infer Dr. Onysko never engaged in the underlying conduct. For example, in paragraph 4 of his Declaration, Dr. Onysko states

> I deny all allegations against me in the October 17, 2016, Written Warning, and other warnings – all pretextual – that Respondent served upon me.

In paragraph 9, he states

> I have always provided quality service to customers; and, I have always communicated in a positive and congenial way what is needed and helpful and how customers can best ac-

> complish any changes needed to comply with the Division of Drinking Water's requirements; and, Ying-Ying Macauley's testimony to the contrary in *Onysko v. Utah Department of Environmental Quality*, Utah Career Service Review Office, 2010 CSRO/HO 147, is scurrilous dishonesty.

In paragraph 12, he avers

> I have never demanded customers to provide information in formats that I prefer, or nor *[sic]* have I ever demanded information not required by Division of Drinking Water' *[sic]* rules; and, Ying-Ying Macauley's testimony to the contrary in *Onysko v. Utah Department of Environmental Quality*, Utah Career Service Review Office, 2010 CSRO/HO 147, is scurrilous dishonesty.

In paragraph 17, he states

> Neither on November 9, 2016, nor at any other time have I engaged in unprofessional or impolite communication with others; and, Ying-Ying Macauley's assertions to the contrary are scurrilous dishonesty.

Dr. Onysko's Declaration (Amended Opposition, Ex. 78) is replete with such statements, and there are two problems with all of them. First, he does not make these statements under oath, or under penalty of perjury, as I directed in my Order issued October 26, 2018. But, even more importantly, these statements are too vague and too evasive to be of any value. As discussed above, Dr. Onysko can meet his burden only with a showing of specific facts, as opposed to general allegations. For example, Dr. Onysko produces no evidence to show that third parties did *not* complain about him to Respondent, or that there was something about those complaints that should have led Respondent to question them. He merely denies that third parties had a reason to complain about him, because he was never difficult for anyone to work with – a conclusion wholly lacking in specifics – and attacks the statements of Respondent's declarants and others as "scurrilous dishonesty" (Complainant's Exhibit SMCX-78, paragraphs 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 47, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59. 60, 61, 62. 63. 64. 65. 66. 67. 68. 69. 70, 71, 73, 76, 82, 83, 85, 87, 88, 89, 90, 91, and 93). For these reasons, Dr. Onysko's declaration does not present evidence sufficient to raise a disputed issue of fact.

Significantly, nowhere does Dr. Onysko specifically deny that Judge Etchingham so found, or that he made those findings after fully litigating the question in a hearing in which Dr. Onysko participated.

Having already overruled Dr. Onysko's objections to Respondent's Exhibit 4, I find these facts undisputed.

4. **Respondent demoted Complainant back to an environmental engineer, and Complainant commenced *Onysko I*, complaining that the demotion was in retaliation for his SDWA protected activities.**

Supporting Evidence: Respondent's Exhibit 4.

Opposing Evidence: None. I have already overruled Complainant's objections to Respondent's Exhibit 4.

5. **After a four-day evidentiary hearing, the ALJ ruled in favor of Respondent, based upon the foregoing findings and others, and the ARB affirmed in a 2-1 decision: "Onysko's evidence pointed to protected activity[,] but it was not clear that it was particularly troubling to Respondent, making his whistleblower claim less persuasive. Moreover, as we elaborate below, there was substantial evidence supporting the Respondent's contrary reasons [for the demotion] that the ALJ believed." . . . The Tenth Circuit unanimously affirmed. *Onysko v. Admin. Rev. Bd.,* 549 Fed.Appx. 749, 752 (10th Cir. 2013).**

Supporting Evidence: Respondent's Exhibit 4, *Onysko v. Admin. Rev. Bd.*, 549 Fed.Appx. 749, 752 (10th Cir. 2013).

Opposing Evidence: I have already overruled Complainant's objections to Respondent's Exhibit 4. Apart from Dr. Onysko's Declaration (Amended Opposition, Ex. 78), which I disregard for the reasons set forth above, there is no evidence to show these statements are untrue.

6. **On September 6, 2016, Respondent received an email, documenting prior telephone calls with Respondent and complaining of dealings by Complainant "on the verge of harassment," according to the author**.

Supporting Evidence: Respondent's Exhibit 6 (copy of e-mail).

Opposing Evidence: None. Complainant objects to Exhibit 6 (Amended Opposition, pp. 52-57) because 1) it is not an original document; 2) it is not complete; and 3) it includes hearsay. I overrule Respondent's objections to Exhibit 6. Nowhere does Dr. Onysko specifically deny the authenticity of the e-mail, the substance of its content, or the fact of Respondent's receipt of it.

7. **In addition to detailing the author's own experiences with Complainant, the author added, "I have talked with private engineers who do water engineering work in Wasatch County about this and they all have similar reactions pertaining to [Complainant] and how difficult he is to work with."**

Supporting Evidence: Respondent's Exhibit 6.

Opposing Evidence: None. I have already overruled Complainant's objections to Exhibit 6. Nowhere does Dr. Onysko specifically deny the authenticity of the e-mail, the substance of its content, or the fact of Respondent's receipt of it.

8. **On September 16, 2016, Respondent received a detailed, five-page letter of complaints against Complainant from Loughlin Water Associates, LLC, documenting issues previously complained of telephonically.**

Supporting Evidence: Respondent's Exhibit 7.

Opposing Evidence: None. Complainant objects to Exhibit 7 (Amended Opposition, pp. 57-62) on the grounds of hearsay and improper authentication. I overrule Complainant's objections to Exhibit 7. Nowhere does Dr. Onysko specifically deny the authenticity of the letter, the substance of its content, or the fact of Respondent's receipt of it.

9. **The Loughlin Letter detailed multiple interactions with Complainant, which the author variously considered "unprofessional," "overly critical," "unnecessarily combative," and "abrasive."**

Supporting Evidence: Respondent's Exhibit 7.

Opposing Evidence: None. I have already overruled Complainant's objections to Exhibit 7. Nowhere does Dr. Onysko specifically deny the authenticity of the letter, the substance of its content, or the fact of Respondent's receipt of it.

10. **The Loughlin Letter concerned, particularly, Complainant's work regarding the Mountaintop Well.**

Supporting Evidence: Respondent's Exhibit 7.

Opposing Evidence: None. I have already overruled Complainant's objections to Exhibit 7. Nowhere does Dr. Onysko specifically deny the authenticity of the letter, the substance of its content, or the fact of Respondent's receipt of it.

11. **The Mountaintop Well is not a public drinking water well and is not connected to any public water system.**

Supporting Evidence: Respondent's Exhibit 8 (letter from Bret F. Randall to Bobby Main dated November 9, 2017).

Opposing Evidence: None. Complainant objects to Respondent's Exhibit 8 (Amended Opposition, pp. 63-67) on the grounds it is not, on its face, based on the personal knowledge of the author; that it comprises inadmissible hearsay; and that it may be a statement beyond the scope of the author's employment. I overrule Complainant's objections to Respondent's Exhibit 8.

12. **On October 17, 2016, Respondent issued a written warning to Complainant, based on the two written complaints and multiple verbal complaints against Complainant by co-workers and members of the public.**

Supporting Evidence: Respondent's Exhibit 9 (Written Warning Memorandum of October 17, 2016).

Opposing Evidence: None. Curiously, although Complainant alleges this warning was issued to him to retaliate against him for protected activity under the Safe Drinking Water Act, and although what appears to be his own signature appears on the second page, he objects to Respondent's Exhibit 9 on the grounds it is not complete, its admission would cause confusion and unfair prejudice, it includes hearsay, it comprises a summary without proper foundation, and because his former supervisor's declaration authenticating it (Respondent's Exhibit 36) is "untruthful," a credibility inquiry beyond the scope of a summary decision proceeding. I overrule Complainant's objections to Respondent's Exhibits 9 and 36. Nowhere does Dr. Onysko specifically deny the authenticity of the written warning, or the substance of its content.

13. **Specific to conduct complained about, the Written Warning instructed Complainant:**

- **"Limit your work-related actions to implementing requirements within DDW's authority. If there are any issues related to implementing or enforcing rules of other divisions and offices in State government, they shall be referred to the appropriate division or office."**
- **"Stay within the scope and authority of DDW. Do not demand customers to provide information in formats you prefer, or demand information not required by DDW's rules."**
- **"Do not threaten to delay processing if customers do not produce work in the format you prefer."**

Supporting Evidence: Respondent's Exhibit 9.

Opposing Evidence: None, apart from general denials in Dr. Onysko's Declaration (Amended Opposition, Ex. 78) that he ever engaged in conduct of the kind the Written Warning instructed him to avoid in the future. I disregard Dr. Onysko's Declaration for the reasons set forth above. Nowhere does Dr. Onysko specifically deny the authenticity of the written warning, or the substance of its content.

14. **On October 26, 2016, [Complainant] timely complained of the Warning Letter to OSHA.**

Supporting Evidence: Respondent's Exhibit 10.

Opposing Evidence: None. While Complainant objects to Respondent's Exhibit 10 (Amended Opposition, pp. 77-79), I am hard-pressed to understand why he would have any reason at all to object to this statement of fact, since it comprises an element of his own case. Putting that to one side, I overrule his objections to Respondent's Exhibit 10, which are that it lacks proper foundation, and that the author of the document is not identified.

15. **Although [Complainant's] initial complaint asserted generally that, "the State continues to retaliate against him with reduction of work responsibilities, harassment, and threatening emails to Complainant," the only retaliatory act specifically identified is the Warning Letter.**

Supporting Evidence: Respondent's Exhibit 10.

Opposing Evidence: None. Nowhere does Dr. Onysko specifically deny the substance of his initial complaint.

16. **On November 9, 2016, Complainant had an incident with another employee, which that employee characterized as "extremely inappropriate," and reported to the local Human Resources Officer.**

Supporting Evidence: Respondent's Exhibit 11 ("Documentation Prepared by Shane R. Bekkemellom").

Opposing Evidence: None. Complainant objects to Respondent's Exhibit 11 (Amended Opposition, pp. 80-87) on the grounds of relevance, improper foundation, hearsay, prejudice, and confusion. Complainant also objects to Respondent's Exhibit 38, a Declaration from Mr. Bekkemellom, on similar grounds. I overrule Complainant's objections to both exhibits. Nowhere does Dr. Onysko specifically deny the fact or substance of the report of the November 9, 2016, incident, although he generally denies uncivil and unprofessional behavior on the date in question.

17. **In December, 2016, Respondent gave Complainant notice of Respondent's intent to issue a written reprimand to Complainant, based on a November 9, 2016, incident, which notice Complainant acknowledged receiving on December 19, 2016.**

Supporting Evidence: Respondent's Exhibit 12 (Notice of Intent to Discipline).

Opposing Evidence: None, apart from conclusionary denials in the Complainant's own Declaration (*see,* for example, paragraphs 15, 16, and 17 of Amended Opposition, Exhibit 78), which I do not consider for the reasons set forth above. Once again, because Complainant contends the issuance of Exhibit 12 comprised retaliation by Respondent for protected activity, I am hard-pressed to understand why he would be unwilling to admit this fact as stated. In any case, Complainant objects to Respondent's Exhibit 12, notwithstanding his signature on the second

page (Amended Opposition, pp. 87-94), as hearsay, and on the grounds it comprises a summary without evidentiary support, and inadequate evidence of authenticity. In the course of those objections, he also objects to Respondent's Exhibit 36 on grounds of insufficient evidence of authenticity, and because in his view it comprises a summary of other evidence. I overrule all of Complainant's objections to Exhibits 12 and 36. Nowhere does Dr. Onysko specifically deny the authenticity of the notice or the substance of its content.

18. **On January 4, 2017, Respondent supplemented the Notice of Intent with additional information, detailing the substance of the November 9th incident as known to Respondent:**

> **On November 9, 2016 and *[sic]* incident occurred between Mr. Onysko and a co-worker, who is not a DDW employee, about an appointment that Mr. Onysko had missed. When Mr. Onysko was shown that he had accepted the appointment to his calendar for the 10:00 a.m. timeslot, he became extremely upset and yelled at a co-worker. Mr. Onysko continued being extremely upset and angry, and continued to yell at the co-worker even after being shown that he accepted the appointment in his calendar. He then questioned why he was not called when he did not show up for the meeting at 10:00 a.m., it was explained to him that this was not the responsibility of the co-worker. Mr. Onysko then stated that this situation was "ridiculous" and that he did not understand why the co-worker did not give him a call when he is "simply on the third floor." To try and resolve the situation, the co-worker apologized to Mr. Onysko for being upset. Despite his actions, his response was "I'm not upset; I'm just disappointed."**

Supporting Evidence: Respondent's Exhibit 13.

Opposing Evidence: None, apart from conclusionary denials in the Complainant's own Declaration (*see,* for example, paragraphs 15, 16, 17, 18, and 19 of Amended Opposition, Exhibit 78), which I do not consider for the reasons set forth above. Complainant objects to Respondent's Exhibit 13 on the grounds he did not receive it until January 13, 2017, and that it is not properly authenticated. I overrule Complainant's objections to Respondent's Exhibit 13. Nowhere does Dr. Onysko deny the authenticity of the supplementary memorandum or the substance of its content. On the contrary, he admits having received it on January 13, 2017.

19. **On January 13, 2017, Respondent issued the written reprimand to Complainant.**

Supporting Evidence: Respondent's Exhibit 14.

Opposing Evidence: None, apart from conclusionary denials in the Complainant's own Declaration (Amended Opposition, Ex. 78), which I do not consider for the reasons set forth above. Although Complainant asserts the stated fact is true, he nevertheless objects to Exhibit 14 (Amended Opposition, pp. 98-102) on the grounds it is not an original document, and on grounds it may cause prejudice, confusion, or mislead the jury. He also repeats his objections to Respondent's Exhibit 36, and may also object to Respondent's Exhibit 15, although this may be a typographical error. In any case, I overrule all his objections to Exhibits 14, 26, and 15. Nowhere does Dr. Onysko specifically deny the authenticity of the written reprimand, the substance of its content, or his receipt of it.

20. **On or about January 23, 2017, Complainant amended his OSHA complaint to include the written reprimand.**

Supporting Evidence: Respondent's Exhibit 15.

Opposing Evidence: None. Once again, I do not believe Complainant in good faith disputes the truthfulness of this allegation. Nevertheless, he objects to Respondent's Exhibit 15 (Amended Opposition, pp. 102-104) on the grounds of lack of foundation, and lack of evidence of authenticity. I deny Complainant's objections to Respondent's Exhibit 15. Nowhere does Dr. Onysko specifically deny the truthfulness of this allegation.

21. **As with his original complaint, although [Complainant's] amendment asserted generally that, "the State continues to retaliate against him with reduction of work responsibilities, harassment, and threatening emails to Complainant," the only retaliatory acts specifically identified are the written warning and letter of reprimand issued October 17, 2016, and January 13, 2017.**

Supporting Evidence: Respondent's Exhibit 15.

Opposing Evidence: None. I have already overruled Complainant's objections to Respondent's Exhibit 15. Nowhere does Dr. Onysko specifically deny the substance of his amended complaint.

22. **Notwithstanding this amendment, Complainant has taken the position that the Letter of Reprimand was "voided a week later after [Complainant] objected. . . . There exists no written reprimand in [Complainant's] Agency personnel file."**

Supporting Evidence: Respondent's Exhibit 16 ("Grievant's Objections to Agency's September 27, 2018 Closing Argument")

Opposing Evidence: None. Although Complainant does not deny he is the author of Respondent's Exhibit 16, he objects to its admission (Amended Opposition, pp. 104-109) on various grounds, including that it is not an original document, improper foundation, it is incomplete, and that is admission will cause unfair preju-

dice, confuse the issues, and mislead the jury. He also objects to Respondent's Exhibit 39 on the grounds the statements of the Declarant are "shockingly dishonest" (Amended Opposition, p. 108). I overrule Complainant's objections to Respondent's Exhibits 16 and 39.

23. **On April 21, 2017, the OSHA investigator issued his report and findings, identifying the two disciplinary letters as the sole, alleged retaliatory actions and finding Complainant engaged in no protected activity under the SDWA.**

Supporting Evidence: Respondent's Exhibit 17.

Opposing Evidence: None. Complainant objects to Respondent's Exhibit 17 (Amended Opposition, pp. 109-115), on the grounds 1) it is a summary document without evidentiary foundation, 2) insufficient evidence of authenticity, and 3) its probative value is outweighed by the potential for unfair prejudice. I overrule Complainant's objections to Respondent's Exhibit 17. Nowhere does Dr. Onysko specifically deny the authenticity of Exhibit 17 or the substance of its content.

24, **On or about May 20, 2017, Complainant timely appealed the investigative findings**.

Supporting Evidence: Respondent's Exhibit 18.

Opposing Evidence: None. Again, I do not believe Complainant in good faith disputes the truthfulness of this allegation. Nevertheless, he objects to the admissibility of Respondent's Exhibit 18 (Amended Opposition, pp. 115-119), on the grounds it is a duplicate, it is not a complete copy of the original, it is likely to cause unfair prejudice, it is likely to confuse the issues, it is likely to mislead the jury, it is not "a definitive, delimiting statement of pleadings," and it somehow violates Federal Rules of Evidence Rules 807 and 403. I overrule all of Complainant's objections to Respondent's Exhibit 18. Nowhere does Dr. Onysko specifically deny that he timely appealed the OSHA investigator's investigative findings, nor would it be in his interest to do so.

25. **The Request for Hearing identified only the two disciplinary letters as Respondent's alleged retaliatory acts**.

Supporting Evidence: Respondent's Exhibit 18.

Opposing Evidence: None. Nowhere does Dr. Onysko deny the substance of Respondent's Exhibit 18. On the contrary, his argument against the admissibility of Respondent's Exhibit 18 (Amended Opposition, pp. 115-119) includes a legal argument that he is not limited to the retaliatory acts specified in his Request for Hearing.

26. **On January 16, 2017, Complainant's supervisor, Ying-Ying Macauley, submitted an abusive conduct complaint against Complainant to the Utah Department of Human Resource Management ("DHRM"), the entity charged with receiving and investigating such complaints.**

Supporting Evidence: Respondent's Exhibit 19.

Opposing Evidence: None. Complainant objects to Respondent's Exhibit 19 (Amended Opposition pp. 120-122) on the grounds it is not properly authenticated, it comprises a summary of other complaints, it is not an original document, it is not a complete copy of the original document, it includes a reference to an event on January 18, 2017 (allegedly impeaching Ms. Macauley's declaration), and it comprises hearsay. I overrule all of Complainant's objections to Respondent's Exhibit 19. Nowhere does Dr. Onysko specifically deny the authenticity of this document, or the substance of its content.

27. **Macauley supplemented her abuse complaint against Complainant on April 12 and again on April 20, 2017.**

Supporting Evidence: Respondent's Exhibits 20 and 21.

Opposing Evidence: None. Respondent again objects to Respondent's Exhibits 20 and 21 (Amended Opposition pp. 123-136) essentially on the same grounds as he objected to Exhibit 19. I overrule all of Complainant's objections to Respondent's Exhibits 20 and 21. Nowhere does Dr. Onysko specifically deny the authenticity of either document, nor the substance of the content of either. Nowhere does Dr. Onysko specifically deny the truthfulness of the stated fact.

28. **On February 3, 2017, due to the pendency of the abuse complaint between Complainant and his supervisor, Respondent temporarily changed Complainant's supervisor to Marie Owens.**

Supporting Evidence: Respondent's Exhibit 22.

Opposing Evidence: None. I do not believe Complainant in good faith disputes the truth of this assertion. Nevertheless, he objects to Respondent's Exhibit 22 (Amended Opposition, pp. 136-142) on the grounds of inadequate foundation, hearsay, on the grounds it comprises a summary of other information, that it is not credible, that he cannot cross-examine the declarant, that the document is prejudicial, that it has not been properly authenticated. He also objects to Respondent's Exhibit 40 on the same grounds. I overrule all of Complainant's objections to Respondent's Exhibits 22 and 40. Nowhere does Dr. Onysko specifically deny the truth of this stated fact.

29. **On May 22, 2017, DHRM issued its report on the abuse complaint, finding four of seven allegations of abuse by Complainant substantiated.**

Supporting Evidence: Respondent's Exhibit 23.

Opposing Evidence: None. Complainant objects to Respondent's Exhibit 23 (Amended Opposition, pp. 142-149) on the grounds it lacks foundation, does not identify persons who spoke to the investigator, includes hearsay, comprises a summary, is not properly authenticated, and is not relevant. I overrule all of Claimant's objections to Respondent's Exhibit 23. Nowhere does Dr. Onysko specifically deny the authenticity of the document, or the substance of its content. Nowhere does Dr. Onysko specifically deny the truth of this stated fact.

30. **On June 12, 2017, Respondent placed Complainant on administrative leave, with pay, as a result of the DHRM report.**

Supporting Evidence: Respondent's Exhibit 24.

Opposing Evidence: None. Complainant objects to Respondent's Exhibit 24 (Amended Opposition, pp. 150-161) on the grounds it lacks foundation, does not comply with Rule 401 of the Federal Rules of Evidence, does not cite one of the fourteen bases for administrative leave set forth in the Utah Administrative Rules, does not comply with Rule 901 of the Federal Rules of Evidence, comprises a summary of other evidence, and does not comply with Rule 1006 of the Federal Rules of Evidence. He also objects to Respondent's Exhibit 40 on the same grounds. I overrule Complainant's objections to Respondent's Exhibit 24. Nowhere does Dr. Onysko specifically deny the truth of the stated fact.

31. **On June 27, 2017, Complainant timely moved to amend this OSHA proceeding to include the administrative leave-with-pay as a further retaliatory act by Respondent.**

Supporting Evidence: Respondent's Exhibit 24.

Opposing Evidence: None. I do not believe Complainant in good faith disputes the truth of this assertion.[9] Nevertheless, Complainant objects to Respondent's Exhibit 24 (Amended Opposition, pp. 162-166) on the grounds it is an incomplete duplicate, it comprises hearsay, it lacks foundation, it violates Rule 1003 of the Federal Rules of Evidence, it is a duplicate, it poses "indisputable danger of unfair prejudice to Complainant" and "indisputable danger of confusing the issues," and it should be excluded under Rule 106 of the Federal Rules of Evidence. I deny all of Complainant's objections to Respondent's Exhibit 24. Nowhere does Dr. Onysko specifically deny the truth of the stated fact.

[9] Indeed, notwithstanding the five pages of argument which follow it, Dr. Onysko titles this section of his Amended Opposition "It Is Undisputed that Complainant Timely Moved to Amend the Case to Include the Administrative Leave with Pay. The Exhibit is Admissible under FRE 807" (Amended Opposition, p. 162).

32. **Although the June 27th Amendment generally refers to "Respondent retaliatory actions of abrogated employee rights, abrogated civil liberties including free speech, and obstruction of Complainant's right to prepare for hearing in these ALJ matters," Complainant does not specifically identify any such actions.**

Supporting Evidence: Respondent's Exhibit 24.

Opposing Evidence: None. I have already overruled Complainant's objections to Respondent's Exhibit 24. Nowhere does Dr. Onysko specifically deny the authenticity of the document or the substance of its content.

33. **On July 10, 2017, Respondent issued a notice of intent to terminate Complainant, based on the result of the abuse investigation by DHRM, the January letter of reprimand, the October written warning, and past disruptive content.**

Supporting Evidence: Respondent's Exhibit 26.

Opposing Evidence: None. Complainant objects to Respondent's Exhibit 26 (Amended Opposition, pp. 166-180) on the grounds it lacks foundation, includes inadmissible hearsay, abrogates Complainant's rights under Rules 805 and 806 of the Federal Rules of Evidence, is prejudicial, is likely to confuse the issues, is likely to mislead the jury, is likely to waste time, does not conform to Rule 1006 of the Federal Rules of Evidence, comprises a summary of other evidence, does not comply with Rule 901 of the Federal Rules of Evidence, does not conform to the Utah Administrative Rules, and is not properly authenticated. Complainant objects to Respondent's Exhibit 40 for the same reasons. I overrule all of Complainant's objections to Respondent's Exhibits 26 and 40. Nowhere does Dr. Onysko specifically deny the authenticity of Exhibit 26, nor the substance of its content.

34. **On July 12, 2017, Complainant timely moved to amend this OSHA proceeding to include the Intent to Dismiss.**

Supporting Evidence: Respondent's Exhibit 27 (Complainant's Request to Amend).

Opposing Evidence: None. I do not believe Complainant in good faith disputes the truthfulness of this stated fact.[10] But he objects to Respondent's Exhibit 27 on the grounds of lack of foundation, inadmissible hearsay, duplicate in lieu of an original in violation of Rule 1003 of the Federal Rules of Evidence, danger of unfair prejudice, and danger of confusion of issues. I deny all of Complainant's objections

[10] Indeed, notwithstanding the five pages of argument which follow, Complainant entitles this section of the Amended Opposition "It Is Undisputed that Complainant Timely Moved to Amend the Case to Include the Intent to Discipline – Termination Letter. The Exhibit is admissible under FRE 807" (Amended Opposition, p. 181).

to Respondent's Exhibit 27. Nowhere does Dr. Onysko specifically deny the truthfulness of this stated fact.

35. **On July 14, 2017, Complainant moved to amend this OSHA proceeding yet again, apparently regarding Respondent's denial of a July 13, 2017, request he had made to enter his former workplace to personally confront Respondent's Executive Director, Alan Matheson, as part of a state disciplinary process and to personally serve his supervisor Marie Owens with an employee grievance. This is not included in any of the 87 acts identified by Complainant, so presumably it has been waived.**

Supporting Evidence: Respondent's Exhibit 28 (Request to Amend); Respondent's Exhibit 2 (transcript of May 15, 2018, telephonic status conference at which Complainant identified alleged acts of retaliation by Respondent against him).

Opposing Evidence: None. I do not believe Complainant in good faith disputes the truthfulness of these statements.[11] But he objects to Respondent's Exhibit 28 (Amended Opposition, pp. 181-185) on grounds of lack of foundation, inadmissible hearsay, duplicate of an original inadmissible under Rule 1003 of the Federal Rules of Evidence, unfair prejudice, and danger of confusing the issues. I overrule all of Complainant's objections to Respondent's Exhibit 28. Nowhere does Dr. Onysko specifically deny the authenticity of Respondent's Exhibit 28 or the substance of its content.

36. **On October 23, 2017, Respondent terminated Complainant**.

Supporting Evidence: Respondent's Exhibit 29 (Final Agency Decision – Termination).

Opposing Evidence: None. Nevertheless, Complainant objects to Respondent's Exhibit 29 for lack of foundation, inadmissible hearsay, attribution of statements to declarants who are not identified, danger of unfair prejudice, danger of confusing the issues, summary of evidence in violation of Rule 1006 of the Federal Rules of Evidence, and inclusion of new allegations against Complainant. Into the bargain, Complainant objects to Respondent's Exhibit 42 on the grounds of ambiguity, misrepresentation, and nonconformity to Rule 901 of the Federal Rules of Evidence. I overrule all of Complainant's objections to Respondent's Exhibits 29 and 42. Nowhere does Dr. Onysko specifically deny the authenticity of Exhibit 28 nor

[11] The title of this section of the Amended Opposition, notwithstanding the five pages of argument which follow, is "It Is Undisputed that Complainant Timely Moved to Amend the Case, to Include Marie Owens' Absence from Work, and Being Told to Email His Request for a Hearing Rather than Being Allowed to Request the Hearing in Person, as Retaliatory Acts. The Exhibit is Admissible under FRE 807" (Amended Opposition, p. 186).

the substance of its content. Nowhere does Dr. Onysko specifically deny the truth of the stated fact.

37. **On or about October 18, 2017, and again on November 17, 2017, Complainant moved to amend this proceeding to include claims arising in connection with Respondent's settlement negotiations and termination of Complainant, which were also the subject of another OSHA complaint filed by Complainant. The Court granted leave to include these additional claims only upon Complainant's withdrawal of the other OSHA proceeding.**

Supporting Evidence: Respondent's Exhibit 1 (Order Allowing Amendment of Complaint issued November 8, 2017).

Opposing Evidence: None. Remarkably, although this is an Order I issued in this very case, and it is part of the record of this very proceeding, Complainant objects to it on the grounds it does conform to Rule 902 of the Federal Rules of Evidence, and does not bear the seal of the court. I overrule all of Complainant's objections to Respondent's Exhibit 1. Nowhere does Dr. Onysko specifically deny the truth of the stated fact, the authenticity of Respondent's Exhibit 1, or the substance of Respondent's Exhibit 1.

38. **Complainant never withdrew his October 2017 OSHA complaint, instead allowing the investigation to proceed to conclusion. Neither did he list those complaints within his list of 87 events.[12]**

Supporting Evidence: Respondent's Exhibit 31 (August 13, 2018, letter from Acting Regional Administrator of OSHA to Dr. Onysko dismissing complaint).

Opposing Evidence: None. Complainant objects to Respondent's Exhibit 31 (Amended Opposition, pp. 203-209) on the grounds it is not authenticated under Rule 902 of the Federal Rules of Evidence, that this proceeding is a *de novo* proceeding, that the exhibit is irrelevant, that the exhibit is likely to cause unfair prejudice, is likely to confuse the issues, and is likely to mislead the jury. I overrule all of Complainant's objections to Respondent's Exhibit 31. Nowhere does Dr. Onysko specifically deny the authenticity of Respondent's Exhibit 31 or the substance of its content.

39. **In the May 15, 2018, status conference in this matter, Complainant identified 87[13] alleged retaliatory acts for this proceeding, pursuant to the Court's direction.**

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[12] There is no dispute that Complainant actually described only eighty-*six* alleged acts of retaliatory discrimination, but, because of errors in numbering – he used number 65 twice, and he omitted numbers 16 and 73 – he ended with number 87. In an effort to avoid further confusion, I, like Respondent (*see* Respondent's Exhibit 2), identify each incident using the numbers Complainant assigned to them in the May 15, 2018, telephonic status conference.

Supporting Evidence: Respondent's Exhibit 2 (Transcript of May 15, 2018, Telephonic Status Conference).

Opposing Evidence: None.

40. **The following numbers, Respondent has already conceded were timely asserted and properly before the Court: Numbers 23 (October 2016 Written Warning), 38 (December 2016 Intent to Issue Written Reprimand), 43 (January 2017 Letter of Reprimand), 64 (June 2017 Administrative Leave Without Pay), 65 (July 2017 Intent to Dismiss).**

Supporting Evidence: Respondent's Exhibit 32 (Respondent's Status Report in advance of the May 15, 2018, telephonic status conference).

Opposing Evidence: None. Although this is a document filed with the court and comprises part of the record of this proceeding, Complainant objects to Respondent's Exhibit 32 (Amended Opposition, pp. 209-218) on the grounds it includes inadmissible hearsay, it is a summary not properly admitted under Rule 1006 of the Federal Rules of Evidence, and includes opinion testimony. I overrule all of Complainant's objections to Respondent's Exhibit 32. Nowhere does Dr. Onysko deny the authenticity of Exhibit 32 or the substance of its content. Nothing gives Dr. Onysko the right to prevent Respondent from acknowledging issues are properly before me in this proceeding.

47. **Numbers 16 and 73 were omitted by Complainant.**

Supporting Evidence: Respondent's Exhibit 2 (Transcript of May 15, 2018, telephonic status conference) at 27:13-22.

Opposing Evidence: None.

Conclusions of Law

1. Retaliatory Acts Alleged by Complainant

As discussed above, during a telephonic status conference on May 15, 2018, I asked Dr. Onysko to describe every act of retaliation by Respondent which he contended was properly before me in this action. He listed a total of eighty-six allegedly retaliatory acts, numbering them 1 through 87 (erroneously omitting numbers 16 and 73, and using number 65 twice). As noted above, Respondent concedes Dr. Onysko timely raised Numbers 23, 38, 43, 64, and 65, and those alleged acts of retaliation are properly before the court. But Respondent objects to the others on one

[13] There is no dispute that Complainant actually described only eighty-*six* alleged acts of retaliatory discrimination, but, because of errors in numbering – he used number 65 twice, and he omitted numbers 16 and 73 – he ended with number 87.

or more of five grounds (Original Motion, pp. 17-28; *see also* Original Motion, Respondent's Exhibit 3):

First, Respondent contends Dr. Onysko has failed timely to complain of many of these incidents (Original Motion, pp. 17-19). A complainant must file a complaint with OSHA within thirty days of an alleged retaliatory act. 42 U.S.C. section 300j-9, subsection (i)(2)(A); 29 C.F.R. section 24.103, subsection (d)(1) ("i.e., when the retaliatory decision has been both made and communicated to the complainant"). On a Motion for Summary Decision, the moving party must affirmatively show untimeliness.

Second, Respondent contends many of the incidents comprise actions by third parties (including employees of Respondent whose conduct is not legally attributable to Respondent) (Original Motion, pp. 24-25).

Third, Respondent contends many of the allegedly-retaliatory acts are not sufficiently offensive, both subjectively and objectively, or sufficiently severe and pervasive, to alter the conditions of employment (Original Motion, pp. 25-26).

Fourth, Respondent argues many of the allegedly-retaliatory acts comprise administrative procedures, including grievance procedures. Respondent contends Complainant cannot collaterally attack state administrative procedures in an OSHA complaint (Original Motion, pp. 26-27).

Fifth, Respondent contends many of the allegedly-retaliatory acts are in fact instances of Complainant's supervisors exercising proper direction over his work, and that directions from a supervisor do not comprise "adverse employment actions" (Original Motion, pp. 27-28).

Analyzing these allegedly-retaliatory acts is a challenge. Strict rules of pleading do not apply in SDWA whistleblower actions, *see* 29 C.F.R. section 24.103, subsection (b). What is more, as evidenced by Respondent's Exhibit 2, the Original Opposition, and the Amended Opposition, bloviation and obfuscation are characteristic of Dr. Onysko's legal and factual arguments. He is often vague, tends to express conclusions as fact, and on occasion even contradicts himself. Bearing that in mind, and not wishing to deprive Dr. Onysko of the opportunity to present a legitimate complaint over the poor choice of a single word, I next consider these objections to the alleged retaliatory acts defined in Respondent's Exhibit 2.

I conclude that, other than Numbers 23, 38, 43, 64, and 65, all of the alleged retaliatory acts are untimely because there is no evidence to show Dr. Onysko made timely complaints within the thirty-day limit of 42 U.S.C. section 300j-9.[14] *See*

[14] As Respondent correctly observes, although Complainant does not specify the dates on which some of these incidents allegedly occurred, "one thing is certain about all of them: they all occurred prior to

Greenwald v. City of North Miami Beach, 587 F.2d 779 (5th Cir. 1979); *Holtzclaw v. Commonwealth of Kentucky Nat. Resource and Environmental Protection Cabinet*, ARB No. 96-090, ALJ No. 95-CAA-7 (ARB, February 13, 1977). Complainant has produced no evidence to support a tolling of the thirty-day limit in any of these instances. What is more, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges," *Nat'l. R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (cited in *Onysko v. Administrative Review Bd.,* 549 Fed. Appx. 749, 755 (10th Cir. 2013); *Holtzclaw,* ARB No. 96-090, slip op. at 3 (finding no continuing violation where each of the alleged acts did not involve the same type of discrimination and was an isolated employment decision lacking a common subject matter). Some are also objectionable on other grounds, as set forth below.

Number 1

"On March 14th, 2016, in a conference call with EPA Steve Gragely, my supervisor disparaged me and discredited my report to her that the Division of Drinking Water was allowing unapproved chemicals for disinfection of water" (Transcript 22:23 – 23:6).

There is no evidence Dr. Onysko filed an OSHA complaint within thirty days of March 14, 2016, so the allegation is untimely. Additionally, disparagement and discrediting a report, without more, do not, as a matter of law, comprise discrimination against an employee with respect to his compensation, terms, conditions, or privileges of employment.

Number 2

"[In] 2016, my supervisor accused me of minimal cooperation for expressing a different professional judgment from her for the Parka City RV Park Water System" (Transcript 23:8-11).

There is no evidence Dr. Onysko filed an OSHA complaint within thirty days of December 31, 2016, so the allegation is untimely. Additionally, an accusation of minimal cooperation, standing alone, does not, as a matter of law, comprise discrimination against an employee with respect to his compensation, terms, conditions, or privileges of employment.

Number 3

"June 14th, 2016, email, from my supervisor of the Summit County Health Department, telling them that I had been removed from the Park City RV Park as-

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when Complainant was placed on paid administrative leave on June 27, 2017, and prior to Complainant's termination on October 23, 2017" (Original Motion, p. 18).

signment, with implications of some type of misconduct by me" (Transcript 23:12-16).

There is no evidence Dr. Onysko filed an OSHA complaint within thirty days of June 14, 2016, so the allegation is untimely. The record is insufficient to allow me to conclude, for purposes of this motion, whether the conduct Dr. Onysko attributes to Respondent in this instance does, or does not, violate 42 U.S.C. section 300j-9, subsection (i)(1), and I do not decide that issue at this time.

Number 4

"June 15th, 2016, the – there was an indemnification meeting where former DDW managers are being litigated again *[sic]* for illegal disbursement of EPA funds. And on that date, I was disparaged in the Attorney General's office as being aligned with the relator, rather than the defendant" (Transcript 23:17-21).

There is no evidence Dr. Onysko filed an OSHA complaint within thirty days of June 15, 2016, so the allegation is untimely. Dr. Onysko's description of this event does not identify the person who allegedly "disparaged" him "as being aligned with the relator" in other litigation, so I do not decide whether Respondent is legally responsible for such "disparagement," or whether such "disparagement" is prohibited under 42 U.S.C. section 300j-9, subsection (i)(1), at this time.

Number 5

"On an unspecified day in June, because the supervisor in her email only alludes to the meeting, not the date, she alleges in a performance evaluation – and I do not follow through or follow up on projects which, I allege is retaliation for exercising my Utah license engineer rights to protect the public and to not render professional judgment on something that is not designed properly" (Transcript 24:1-8).

There is no evidence Dr. Onysko filed an OSHA complaint within thirty days of June 30, 2016, so the allegation is untimely. I need not and do not reach the question of whether this performance evaluation constituted a prohibited adverse employment action.

Number 6

"[O]n August 23rd, 2016, it was the first date of eight phone calls by my supervisor to the consultant engineer, who was eventually filed an abusive – an abrasive accusations against me, leading to my eventual termination on the mountain top well. I filed a subsequent Freedom of Information Analogous Act to obtain those phone records, and I was cited for abusive conduct for making a public records request for something to prove my innocence" (Transcript 24:9-16).

The gravamen of this allegation appears to be that Dr. Onysko was ultimately removed from the Mountaintop Well project because, at least in part, of a series of telephone calls from his supervisor to a consultant engineer. The first of these calls took place on August 23, 2016. The record does not show when the last of them took place. Likewise, the record does not show on what date Dr. Onysko was reassigned away from the Mountaintop Well project. But, as Respondent argues, these events must have taken place before Complainant's termination on October 23, 2017, more than 30 days before Complainant raised them at the May 15, 2018, telephonic status conference (Original Motion, p. 18). Nowhere in his opposition does Dr. Onysko provide any facts to suggest otherwise.

I conclude these allegations are untimely. I find the record insufficiently complete, for purposes of this motion, to allow me to conclude Respondent is not legally responsible for the conduct Dr. Onysko attributes to his supervisor, or to conclude Dr. Onysko's removal from the Mountaintop Well project was not retaliatory, so I do not decide those objections.

Number 7

"[T]hey have a document that my supervisor telephone *[sic]* the General Manager of the Sanitary Service District, who complained about me and solicited a complaint from him. I mean, I will show that at the hearing, where she actually solicits a written complaint from him against me" (Transcript 24:22-25:1).

I conclude this complaint is untimely, because it must have occurred before Complainant's termination, if not his administrative leave. The record is not sufficiently complete for me to rule on Respondent's remaining objections.

Number 8

"Number 8 is the complaint against me by the Special Service District General Manager, alleging false things about my conduct at the Sanitary Survey, which, as you know, is a protected activity" (Transcript 25:2-5).

I conclude this complaint is untimely, because it must have occurred before Complainant's termination, if not his administrative leave. Additionally, this allegation lies against the Special Service District General Manager, and there are no facts to suggest Respondent is legally responsible for complaints originating with the Special Service District General Manager.

Number 9

"[T]he Wasatch County Chair, Mike Kohler, wrote an email to his subordinate, the General Manager of JSSD, which I obtained through a Freedom of Information Act Analogous, exercise at State level, where he offered to call and cause more consequences with me with his friend, the DEQ Director" (Transcript 25: 6-11).

I conclude this complaint is untimely, because it must have occurred before Complainant's termination, if not his administrative leave. I further conclude it cannot, as a matter of law, comprise an adverse employment action or retaliatory conduct by Respondent, since there is no evidence to suggest Respondent bears legal responsibility for the actions of the Wasatch County Chair.

Number 10

"September 6th, 2016, McCalley, my former supervisor, sent a thank you email to Ron Phillip for his complaint against me citing confidential personnel file matters that I allege were untrue, but, anyway, alleging that there were other similar things in my personnel file. So that would be a retaliatory action, because she's not allowed to divulge anything in that personnel file to outside entities" (Transcript 25:16-23).

I conclude this complaint is untimely, because it must have occurred before Complainant's termination, if not his administrative leave. The record is not sufficiently complete to allow me to conclude, for purposes of this motion, that Respondent is not legally responsible for the conduct of Complainant's supervisor in this instance, or that the conduct of Complainant's supervisor in this instance comprises an adverse employment action, and I do not decide those issues.

Number 11

"[T]he Wasatch County Counsel and Chair again will cause trouble for Onysko by discussion with his friend, Director Matheson, at a legislative meeting" (Transcript, 25:24-26:1).

This statement is confusing. On the record before me, it appears to be a complaint about actions taken by the Wasatch County Counsel and Chair, rather than by Respondent, and consequently, as a matter of law, cannot comprise an adverse employment action by Respondent. Dr. Onysko's complaint in any case is untimely, because it must have occurred before his termination, if not his administrative leave.

Number 12

"[T]he JSSD General Manager Phillip's email, it shows the DDW McAuley's *[sic]* still is a complaint against me *[sic]*. There's another email in which she asked him to put his allegations in writing, because she wants to go something with me *[sic]* and nobody has ever filed a written complaint against me before" (Transcript 26:4-9).

This statement, too, is confusing, but I conclude this complaint is untimely, because it must have occurred before Complainant's termination, if not his administrative leave.

Number 13

Number 13: "[T]he geology consultant's firm, Lasso Water and Associates *[sic]*, filed a complaint against me in retaliation to my project root view of – and in what I alleged to be a dangerous and faulty public water supply water well design, and it was retaliatory against me, the complaint, and my Agency did not investigate the complaint, it was the basis of the written warning" (Transcript 26:10-16).

There is nothing in the record before me that would allow me to conclude a complaint from a consulting firm could comprise "retaliation" by Respondent, so to that extent this complaint is not actionable. The record is not sufficiently complete to allow me to decide whether Respondent's alleged failure to investigate was discriminatory, and I do not decide that question. But because all these events must have occurred before Complainant's termination, if not his administrative leave, and accordingly any complaint based on any of the events described is untimely.

Number 14

"[T]here's an email of the written warning letter draft and it exists on September 18th, 2016, before my State employee entitled intake meeting to explain the circumstances of these allegations. They retaliated against me by drafting the letter before they heard my side of the story" (Transcript 16:17-22).

Conduct by Respondent on September 18, 2016, is no longer actionable because there is no evidence of a timely complaint.

Number 15

Number 15: "September 19th, 2016, there was a performance evaluation finalization meeting and in that meeting my supervisor alleged maliciously that I threatened to expose her for unprofessional conduct under our common professional engineering standards. When, in fact, the subject of the meeting was my concern that we were not mentoring our junior engineers, that they were not being super-

vised satisfactorily, that as licensed engineers we were not doing what we're supposed to do and she turned it around to say that I threatened to expose her, although none of that was secret, it was all in the public record" (Transcript 27:2-12).

Conduct by Respondent on September 18, 2016, is no longer actionable because there is no evidence of a timely complaint. I do not decide the issues of whether Respondent is legally liable for the conduct of Complainant's supervisor, as alleged, or whether that supervisor's allegedly-malicious allegation that Complainant threatened to "expose" her comprises an adverse employment action against Dr. Onysko under SDWA.

Numbers 17 and 18[15]

"[O]n our September 28th and September 29th days, one and two, of what I regard as a sham intake meeting to hear my point of view to the complaints against me and I presented materials. That was a protected activity. I presented information, records of violations of State rule to my immediate supervisor at those two meetings, and two weeks later I was given a written warning. So, that certainly would be my assertion of the protected activity. So, that would be 17 and 18, would be those two days of the sham intake meeting" (Transcript 27:22-28:6).

Here, Dr. Onysko seems to claim his own conduct on September 28 and 29, 2016, was "protected activity," rather than retaliation by Respondent. To the extent he intended to raise this episode as an adverse employment action, his complaint is untimely.

Number 19

"I was summoned to meet with the DEQ Deputy Director, Brad Pitt, to discuss criminal activity in the Division of Drinking Water Programs. I strongly – I'm being polite when I say I was invited – I was ordered to appear. I wrote and said, 'I'd be happy to meet with you, but don't put incendiary language in the subject heading. I'm here to report violations of State rules, not criminal activity in the particular instance'" (Transcript 28:7-18).

I conclude this complaint is untimely, because it must have occurred before Complainant's termination, if not his administrative leave. Being ordered by a supervisor to attend a meeting, without more, does not, as a matter of law, comprise an adverse employment action.

Number 20

"October 6, 2016, at that meeting, as I walked into the room, the DHRM Director, who is deciding my fate, I heard her say as I entered the room, 'Onysko has a

[15] There was no Number 16 (Transcript 27:2-22).

history of being a trouble maker here.' And then as I walk into the room, she obviously flushed, her face blushed, because she was embarrassed that she had made the derogatory comment about me. I view that as a retaliatory action" (Transcript 28:19-25).

Conduct by the Respondent on October 6, 2016, even if retaliatory, is no longer actionable because there is no evidence of a timely complaint. Additionally, there is nothing in the record which would allow me to conclude Respondent is legally responsible for the actions of the DHRM Director. What is more, a single unflattering remark, in the context of the entire record before me, does not constitute an adverse employment action.

Number 21

"[A]t a subsequent meeting, on October 7th, 2016, between the Director of DDW and – or, excuse me, the day after that meeting, I received an email from the Director, where he said, 'You stated in yesterday's meeting you were going to retaliate against the geologist who complained about you.' And I was livid. I never said that. I said that I was going to report State violations to appropriate authorities if the Division of Drinking Water was not going to take action. So, I feel that was an attempt to intimidate me with false accusations, so that I would maybe discontinue those attempts to report those actions" (Transcript 29:6-18).

Respondent's conduct on October 7 or 8, 2016, is no longer actionable, because there is no evidence of a timely complaint. Additionally, here Dr. Onysko admits he threatened to take adverse action, if not to "retaliate;" so, to that extent, the Director's alleged statement was correct.[16]

Number 22

"October 12th, 2016, my supervisor sent me a string of three or four aggressive emails arguing over the definition of admonishment. In those sham intake meetings, I had said that one of the supervisors had admonished somebody else. And, frankly, Your Honor, it's been exacerbating for 10 years because of the inability to have verbal conversations with my former supervisor. 'Admonish' is not synonymous with yelling. 'Admonish' is not synonymous with attacking" (Transcript 29:20-30:3).

[16] This allegation provides a good illustration of why Dr. Onysko's declaration (Complainant's Exhibit SMCX-78) does not carry the day on this motion. Nobody disputes a meeting took place between Dr. Onysko and the Director. Nobody disputes that, at the meeting, Dr. Onysko said he would report State law violations to "appropriate authorities" unless the Division of Drinking Water took certain action. Nobody disputes the Director sent Dr. Onysko an e-mail the next day characterizing Dr. Onysko's statement as a threat of "retaliation." The essential *facts* – what the parties did and said – are undisputed. The Director appears to believe Dr. Onysko's words comprised a threat of retaliation, and Dr. Onysko believes they did not. But, ultimately, a disagreement over the *characterization* of what Dr. Onysko said is not a disputed issue of fact.

Respondent's conduct on October 12, 2016, is no longer actionable because there is no evidence of a timely complaint. Even if there were, a disagreement over the meaning of "admonishment" does not, as a matter of law, comprise an adverse employment action.

Number 23

"[T]hat would be the letter of written warning. That's October 17th, 2016. That probably doesn't need much explanation. It's just all of these allegations against me that I believe are unfounded" (Transcript, 30:10-13).

Respondent acknowledges this adverse employment action occurred, and Dr. Onysko's complaint is timely (Original Motion, p. 15, paragraph 40).

Number 24

"[O]n October 26th, 2016 – October 26th, 2016, there was a gag order. The Special Service District General Manager that complained about me, I wanted to go to their public board meeting and bring this to the attention of their Board, and I was pretty much threatened that if I went to that Board meeting and said anything that they deemed to be speaking for the Division, I would be subject to further disciplinary action. So I believe – I consider that to be intimidation and retaliation" (Transcript 30:14-22).

Respondent's conduct on October 26, 2016, is no longer actionable, since there is no evidence of a timely complaint. I do not decide at this time whether this particular direction not to speak for the Division comprises an adverse employment action.

Number 25

"[T]he Wasatch County Councilman who accosted me with his own individual email for disputing the fact that I had done good service doing the sanitary survey, and he alleged that I hadn't, he wrote me an email" (Transcript 30:24-31:3).

There is nothing in the record to suggest Respondent is legally responsible for the actions of a Wasatch County Councilman. Even if there were, this complaint is untimely, because it must have occurred before Complainant's termination, if not his administrative leave.

Number 26

"[T]here was a retaliatory email by my former supervisor, McCauley *[sic]*, accusing me of being – of unprofessional conduct for writing lengthy emails. And, again, exacerbating to me because she has difficulty understanding the written English" (Transcript 31:12-16).

I conclude this complaint is untimely, because it must have occurred before Complainant's termination, if not his administrative leave, and there is no evidence in the record of a timely complaint. I do not address the question of whether Respondent is legally responsible for the actions attributed to Complainant's former supervisor in this instance, even assuming they amounted to an adverse employment action under the facts in this case.

Number 27

"[T]he morning of November 9, 2016, I was in a participatory meeting with other staff and engineers and I was called on by my former supervisor. I made a statement and she accosted me, she raised her voice, she yelled at me, she attempted to humiliate me. Under State rule, that's considered abusive conduct. I made a complaint about her in the AM" (Transcript 31:17-23).

Respondent's conduct on November 9, 2016, is no longer actionable, there being no evidence in the record of a timely complaint by Dr. Onysko.

Number 28

"[L]ater that afternoon, I appeared in Mr. Balmanno's group, the Office of the Attorney General, seeking indemnification because I was going to be filing a professional misconduct claim against the geologist who had improperly designed the public water supply well. I had asked the Division to let me do that on State time. They said no, I was there on personal time. And I had a very brief meeting, just literally a couple of minutes in the Attorney General's office, and I'm alleging that that's a retaliatory action for what –

JUDGE LARSEN: That they wouldn't indemnify you?

DR. ONYSKO: No, that they then alleged that I had yelled and stomped in – I'm alleging that is pretext" (Transcript 32:1-13).

This is another confusing allegation. I believe the gravamen of the complaint is that Respondent would not allow Dr. Onysko, during work hours, to ask the Attorney General to indemnify him for a claim he intended to file. Instead, Respondent told Dr. Onysko to make the request on his own time. At some point, somebody appears to have accused Dr. Onysko, incorrectly in his view, of "yelling" and "stomp-

ing." It is highly unlikely these events would comprise adverse employment action, but I do not decide that question now. Still, Respondent's conduct, if any, on November 9, 2016, is no longer actionable, there being no evidence Dr. Onysko ever filed a timely complaint.

Number 29

" . . . 29 would be the actual written complaint alleging yelling and stomping. The document has a header, 'Events of November 9th, 2016.' I fought for months at the State Records Committee trying to get them to give me the metadata to show when this document was written. I believe that I now have the metadata that shows it was written a week later . . . in the days after they learned of my whistleblower complaint. So I'm alleging that it's pretext" (Transcript 32:17-33:4).

I conclude this complaint is untimely, because the allegedly-objectionable conduct must have occurred before Complainant's termination, if not his administrative leave.

Number 30

Number 30 "would be the actual PDF file, written by this individual, alleging the yelling and stomping.

JUDGE LARSEN: That's the same as 29, isn't it?

DR. ONYSKO: Twenty-nine is the meeting. Twenty-nine would be the retaliatory action and their conduct towards me at the meeting.

JUDGE LARSEN: And 30 is the document that memorializes the same?

DR. ONYSKO: Yes" (Transcript 33:8-17).

I conclude this complaint is untimely, because it must have occurred before Complainant's termination, if not his administrative leave. It also appears to me that Numbers 28, 29, and 30 are redundant and all describe a single incident.

Number 31

"I had a – I filed a grievance over the written warning and on December 3rd, 2016, it was denied. So there was a written denial of the written warning appeal and that would be a retaliatory action" (Transcript 33:19-22).

However unlikely it may be that the denial of an appeal, without more, could comprise an adverse employment action – a question I do not decide – Respondent's conduct on December 3, 2016, even if discriminatory, is no longer actionable because there is no evidence Dr. Onysko ever filed a timely complaint.

Number 32

"The Agency – on December 5th, 2016, the Agency denied my request to make a professional engineering license complaint to the sister State agency that would decide whether or not the mountain top well designers had made error, jeopardizing public health. So that was a retaliatory action, also" (Transcript 33:24-34:4).

Respondent's conduct on December 5, 2016, even if discriminatory, is no longer actionable because there is no evidence Dr. Onysko ever filed a timely complaint.

Number 33

"Thirty-three was a December 5th, 2016, Mr. Balmanno provided me a copy of a memo and there's a hand invitation that says that my supervisor was directed to issue me a written reprimand and I'm trying to find out who did that and I allege that that was for retaliatory purposes and not for the subject matter" (Transcript 34:6-11).

I am unsure of whose conduct Dr. Onysko complains here – the Assistant Attorney General, the author of the handwritten notation, or Dr. Onysko's supervisor – or what action – the delivery of the memo, the creation of the handwritten notation, or the alleged direction to his supervisor. But in any case, Respondent's conduct on December 5, 2016, even if discriminatory, is no longer actionable because there is no evidence Dr. Onysko ever filed a timely complaint.

Number 34

"December 6th, 2016, I obtained the results from this FOIA analogous grammar request, showing these outgoing phone calls from my supervisor to the complainers that made the false accusations against me. And so I'm alleging that not the record of the phone calls, but it's proof of the phone calls that were retaliatory actions and there's seven or eight dates embedded in that. But it's documented on December 6th, 2016" (Transcript, 34:13-20).

The mere fact that Dr. Onysko's supervisor telephoned some of his critics does not comprise an adverse employment action, and Dr. Onysko has made no allegation whatever about the substance of those calls. But even if I assume a sinister purpose, Dr. Onysko appears to have known everything he now knows about those telephone calls on December 6, 2016. Having failed to file a timely OSHA complaint, he has now waived his right to raise them here.

Number 35

"There's an email where the former supervisor McCauley *[sic]*, concedes that hearing an investigation necessitates interviewing Onysko before his written reprimand. Of course, I never was interviewed before my written reprimand, so that show *[sic]* that that was a retaliatory action" (Transcript 34:22-35:2).

I conclude this complaint is untimely, because it must have occurred before issuance of the written reprimand, and there is no evidence Dr. Onysko ever filed a timely OSHA complaint.

Number 36

"[T]here's an email that documents that the DHRM spoke with the Assistant Attorney General, Craig Anderson – Mr. Balmanno's colleague – about the November 9th incident. And nobody will divulge the content of that conversation. I am certain that it was retaliatory statements by Mr. Anderson in retaliation for my protected activity of being a witness for the relator in a fair claimed act *[sic]* against the State of Utah" (Transcript 35:4-11).

These allegations do not comprise an adverse employment action because Dr. Onysko acknowledges he does not know what DHRM said to Mr. Anderson. Even if he knew, neither DHRM nor Mr. Anderson is the Respondent, and there is nothing in the record to suggest Respondent would be legally responsible for their conduct as described. Even if there were, this complaint is untimely, because it must have occurred before Dr. Onysko's termination, and there is no evidence of a timely OSHA complaint.

Number 37

"Director Matheson denied my appeal to make my complaint to the Professional Licensing Agency about the poor design of the public water supply well. He denied my appeal of December 16th, 2016, telling me that it was personal time and that I had no business doing it on State time. That also was retaliation. It's required in my job to have a State Engineering license requires any knowledge be brought to this Board" (Transcript 35:13-20).

Without reaching the question of whether the denial of this appeal comprises an adverse employment action under the circumstances of this case, I conclude this allegation is untimely. It must have occurred before Dr. Onysko's termination, and there is no evidence he ever filed a timely complaint.

Number 38

"December 16th, 2016 – this is a big one. So, 38, this is when they initiated service to me of the notice of written reprimand. Not to take too much of your time, but you get a notice and then you have five days to appeal it, et cetera, et cetera. So – and then the letter comes at a later time. So that's 38, December 16, 2016" (Transcript 35:23-36:3).

Respondent acknowledges this event as an adverse employment action (Original Motion, p. 15, paragraph 40).

Number 39

"Incredibly – this is the crux of this whole issue. I was already on medication. I had already been under doctor's care for all of these terrible things that they had been doing to me. They called me into a meeting, they wouldn't divulge what the purpose of the meeting was. I started experiencing medical distress and they wouldn't get out of my way so I could go get my prescription medicine. They exacerbated a panic anxiety attack. I ended up in a medical emergency clinic. So I'm alleging this is the most egregious retaliatory act, where they refused – they refused to let me exit the room in a medical emergency" (Transcript 36:5-16).

Assuming "they" is "Respondent," and assuming "they" knew Dr. Onysko was in "medical distress," and assuming not "get[ting] out of [the[way" is the same thing as "refus[ing] to let me exit the room," and assuming Dr. Onysko would not have ended up in a medical emergency clinic even if "they" would have not in any way burdened his access to his prescription medicine, there is no evidence in the record of any timely complaint by Dr. Onysko with respect to this conduct. It would be unlike Dr. Onysko *not* to file a timely complaint over such an event if he had any reason at all to believe there was a discriminatory motive behind it – but, in any case, for reasons best known to him, so far as the record shows me, he did not.

Number 40

"Forty was the Step Two denial of that grievance for the written warning. We have various steps in the State government, immediate supervisor, division supervisor, and then –

JUDGE LARSEN: All right.

DR. ONYSKO: That's Step Two. So, No. 40 is December 19th, 2016" (Transcript 36:22-37-3).

Respondent's conduct on December 19, 2017, is no longer actionable, even if discriminatory, because there is no evidence of a timely OSHA complaint.

Number 41

"I went through the Agency, the DHRM, to file an abusive conduct complaint for the way I was treated the previous Friday, and the DHRM official violated confidentiality rules and told my supervisor that I was going to file a complaint, which I believe instigated her retaliation against me in the form of her own abusive conduct complaint against me. But we'll get to that at a later date, all right?" (Transcript 37:4-11).

Nothing in the record suggests DHRM's conduct is legally attributable to Respondent, so to that extent this allegation does not describe an adverse employment action. The record before me is insufficiently complete to determine whether his supervisor's complaint against Dr. Onysko comprises an adverse employment action. But there is no evidence of a timely OSHA complaint by Dr. Onysko about the supervisor's complaint, so he cannot raise these issues in this proceeding.

Number 42

"The Agency alleges that they sent me a supplement to reprimand, alleging answering my five-day response, but I never received that. There's no proof of me receiving it until after I was terminated and Mr. Balmanno provided me a copy. So I would argue that even though I hadn't seen it, it still represented retaliation, because it published more malicious allegations about me" (Transcript 37:13-19).

These allegations appear to duplicate Dr. Onysko's Number 45 below. The alleged wrong appears to be the preparation and distribution of a supplement to the earlier written reprimand, which supplement, in Dr. Onysko's view, included "malicious allegations." But as his statement of Number 45 below indicates, Dr. Onysko learned of this supplement in June, 2017, and thus the complaint is not timely.

Number 43

Number 43 "was the actual letter of discipline, January 13, 2017" (Transcript 37:21-22).

Respondent acknowledges Dr. Onysko suffered this adverse employment action (Original Motion, p. 15, paragraph 40).

Number 44

"On January 18, 2017, my former – my supervisor at the time made a counter abusive conduct complaint against me and in the submitting documents, she put her purpose was removal of Onysko from the Division of Drinking Water. And I feel that was a retaliatory action for me exercising my State entitlement to file an abusive conduct complaint against her" (Transcript 38:8-14).

I need not decide the question of whether Respondent is legally responsible for the actions Dr. Onysko attributes to his supervisor here, nor whether the supervisor's abusive-conduct complaint against Dr. Onysko comprises an adverse employment action in this case (though I appreciate the irony that Dr. Onysko considers his own complaints about his supervisor privileged, but her complaints about him as a wrong). Whatever conduct Respondent engaged in on January 18, 2017, even if discriminatory, is no longer actionable, because there is no evidence Dr. Onysko filed a timely OSHA complaint about it.

Number 45

"On January 23rd, 2017, my former supervisor revised the written reprimand. I did not receive that – there's no proof that I received it until after the Attorney General did disclosures in June of 2017, to me. But, nonetheless, it's a publication of false allegations against me, so damaging my professional reputation" (Transcript 38:16-22).

This allegation appears to duplicate Number 42 above, and, like Number 42, I conclude they are untimely, and Dr. Onysko may not raise them in this proceeding.

Number 46

"I had a Step One and Two grievance meeting with Division of Directors new Director, Marie Owens, having to do with the written reprimand. And she denied that and she would later make accusations about things that I had said in that meeting that were retaliatory against me.

JUDGE LARSEN: So you're saying the denial was retaliatory?

DR. ONYSKO: I'm saying her statements to me and her conduct towards me in that meeting was retaliatory, yes.

JUDGE LARSEN: But not the action itself?

DR. ONYSKO: Yes, the action itself" (Transcript 38:24-39:10).

All of these things must have occurred before Complainant's termination, and there is no evidence he ever filed a timely complaint with respect to any of them. He may not raise them in this proceeding.

Number 47

"February 3rd, 2017, I was reassigned from the engineering section to the – to report directly to the Director and in that letter, there were violations of my State employment rights, in terms of information that she divulged in that letter. That

would be retaliation, because she was trying . . . trying to humiliate me in front of my colleagues" (Transcript 39:12-20).

There is no evidence to suggest Dr. Onysko filed a complaint with OSHA within thirty days of February 3, 2017, so he cannot raise these allegations here.

Number 48

"My former supervisor took an organization chart against the Director's decision and annotated it to show that I had been transferred out of her section and she distributed it on some 20 to 30 desks at the Division of Drinking Water and at a professional meeting in St. George for the purpose of humiliating me or intimidating me into desisting from my complaint against her. I don't know what her actual motive was" (Transcript 39:21-40:3).

Here Dr. Onysko contradicts himself, acknowledging he does not know his former supervisor's motives, but nevertheless asserting she acted "for the purpose of humiliating me or intimidating me." Leaving this contradiction aside, the event must have occurred before Dr. Onysko's termination, and since there is no evidence of a timely OSHA complaint within thirty days of his termination, he cannot pursue these allegations now.

Number 49

"I filed a grievance over the rumor I had heard of my supervisor's abusive conduct complaint against me. Keep in mind, I didn't even hear about this for five months. So, I filed a grievance and the Director found against me and so I'm alleging that is retaliation because they did not inform me of accusations against me that I could have defended myself against" (Transcript 40:5-11).

I am uncertain whether Dr. Onysko is complaining about the denial of his grievance, or Respondent's alleged failure to inform him of the accusations against him, or both. But all of this would have occurred before his termination, and since there is no evidence of a timely OSHA complaint within thirty days of his termination, he cannot pursue these allegations now.

Number 50

"And 50 would be her written answer to that grievance in which she misrepresents and maligns me for – for example – refusing to accept the written reprimand letter, when, in fact, I was in medical distress. I mean, that's just an outright misrepresentation, where I had to leave the room" (Transcript 40:13-18).

I do not decide whether the written answer to the grievance comprises an adverse employment action in this case. But because there is no evidence of an OSHA

complaint about these events within thirty days of Dr. Onysko's termination, he cannot advance these allegations in this case.

Number 51

"Fifty-one was the second of four abusive conduct complaints against me by my former supervisor, the second being February 15th, 2017. It was entitled, 'An addendum to the January 18th complaint'" (Transcript 40:19-22).

I need not decide the question of whether Respondent is legally responsible for the actions Dr. Onysko attributes to his supervisor here, nor whether the supervisor's abusive-conduct complaint against Dr. Onysko comprises an adverse employment action in this case. But Respondent's actions on February 15, 2017, are no longer actionable, since there is no evidence of a timely OSHA complaint within thirty days of the alleged events.

Number 52

"Step One and Step Two grievance three meeting, a secrete *[sic]* disciplinary meeting with Director Owens. And that would be – let's see, let me get this straight. I think there were two meetings. So, February 10th and February 17th, where she met with me and then she met with me again. So, February 17th would be No. 52, all part of the secrete *[sic]* discipline grievance that I filed, and that refers to the abusive conduct complaint, that nobody gave me information about until after I was terminated" (Transcript 41:2-11).

These allegations are difficult to parse. I am not sure whether the wrong Dr. Onysko complains of here is the fact that he met with Director Owens, or the suggestion there was some impropriety which arose during the course of the meetings, or that someone superior from him withheld information from him relevant to the abusive-conduct complaint that he filed. Perhaps it is all of those things. But in any case, Respondent's conduct on February 10 and 17, 2017, even if discriminatory, is no longer actionable. He may not rely on these allegations now.

Number 53

"I had to sign a sequence of three days. So, 53 would be my choice in February 2017, that is reputedly when my accuser in the Office of the Attorney General spoke with the DEQ Director, in the letter that he gave me – and I'll give that number in a minute. He mentioned that he spoke with this person, but they won't tell me what was said in the meeting or tell me what the testimony was" (Transcript 41:13-20).

Again, this statement is confusing, but Dr. Onysko appears to feel aggrieved about a conversation, the substance of which is unknown to him, between the Office of the Attorney General and the Director of the Department of Environmental Qual-

ity. The mere fact of such a conversation – which is all Dr. Onysko alleges here – cannot comprise an adverse employment action. But even if it did, since there is no evidence of any OSHA complaint by Dr. Onysko with respect to these allegations within thirty days of the last day of February, 2017, these allegations are untimely and he may not rely on them now.

Number 54

On "March 28th" (Transcript, 41:23), "[t]he Director met with the Assistant Attorney General, Craig Anderson, about what happened in his office on November 9th, 2016, the date of the alleged yelling and stomping by me. And so I allege that as a retaliatory action, because of his purported testimony against me" (Transcript 41:25-42:4).

The mere fact of a meeting between the Director and the Assistant Attorney General on March 28, 2017, is not an adverse employment action. The record is not sufficiently complete to allow me to conclude Dr. Onysko was not discriminated against in any way in the course of that meeting. But the conduct of Respondent on March 28, 2017, even if discriminatory, can no longer support a claim of retaliation under SDW, because there is no evidence of a timely complaint to OSHA within thirty days of March 28, 2017.

Number 56

"April 10, 2017. By this point, Your Honor, I had doctors' documentation that I needed family medical leave time act time off to deal with some medical distress, and it's documented in the record that the doctor believes it was related to these work issues. And indisputedly I entitled *[sic]* to use this time to go to a doctor's appointment. The Director insisted that, no, it's only when you're really sick, not when you go to a doctor's appointment. I proved her wrong, but she caused me distress and psychological pressure by denying that time and then it was overturned by HR" (Transcript 42:11-21).

While I am disinclined to think that a disagreement over the meaning of the Family Leave Act, ultimately resolved in Complainant's favor, comprises an adverse employment action, I do not so rule on the record before me. But these allegations are untimely, because there is no evidence of a timely OSHA complaint within thirty days of April 10, 2017, or, for that matter, within thirty days of Complainant's termination. He cannot rely on these allegations now.

Number 57

"Fifty-seven would be the third of four abusive conduct complaints by my former supervisor against me and that would be to the Department of Human Resource Management" (Transcript 42:23-43:1).

I need not decide the question of whether Respondent is legally responsible for the actions Dr. Onysko attributes to his supervisor here, nor whether the supervisor's abusive-conduct complaint against Dr. Onysko comprises an adverse employment action in this case. Once again, there is no evidence these allegations were ever the subject of a timely OSHA complaint. The alleged conduct must have occurred before April 20, 2017 (*see* Number 58 below).

Number 58

"April 20, 2017, No. 58, that would be the fourth of four abusive conduct complaints against me by my former supervisor" (Transcript 43:2-4).

I need not decide the question of whether Respondent is legally responsible for the actions Dr. Onysko attributes to his supervisor here, nor whether the supervisor's abusive-conduct complaint against Dr. Onysko comprises an adverse employment action in this case. There is no evidence of a complaint to OSHA within thirty days of April 20, 2017.

Number 59

"Number 59 would be – would be the issuance of the investigative reports of the seven allegations of abusive conduct against me by my supervisor. Four were sustained and I'm alleging that these are retaliatory acts because they were for reasons of Freedom of Information Act analogous requests, which I'm entitled to do under State law . . ." (Transcript, 43:5-10).

I find several reasons why Dr. Onysko cannot raise these allegations in this case. First, an investigation required by state law, performed in conformance with state law, is not an adverse employment action. Second, Dr. Onysko contends the investigative report, with its adverse findings, was issued in response to his request for documents under a State law similar to the Freedom of Information Act, and a FOIA (or similar) request is not "protected activity" under SDWA. Third, these allegations are untimely, since there is no evidence of a timely OSHA complaint within thirty days of Complainant's termination, at the latest. For all these reasons, Dr. Onysko may not raise these allegations now.

Number 60

"Sixty, I reported to my immediate supervisor, then the District Director, that there were citable deficiencies that had to be reported to our EPA data base for two water treatment plants in Tuala *[sic]* County and she accused me of not being a team player, she accused me of uncutting the staff that had approved the designs for those treatment plants, and so since I was reporting to her protected activities, reporting violations and she accosted me and tried to intimidate me and retaliated against me. That's No. 60" (Transcript, 43:12-21).

Here, Dr. Onysko contends his immediate supervisor "accosted" him and "tried to intimidate him" and "retaliated against him," but he does not specify what she actually *did*. At the same time, if Respondent has conducted discovery to resolve those questions, I do not know about it. In any case, these allegations, too, are untimely, even if there is some substance to them, because there is no evidence of any complaint to OSHA within thirty days of the end of Dr. Onysko's employment, at the latest.

Number 61

"And 61 is a similar one, where I questioned the actual design of the facility. So, 60 was the processes that I found deficiencies. She said, 'No, you can't do that, because we can't tell them how to run their treatment plants.' 61, as I pointed out, that the plants were incorrectly designed. She said that was none of my business. It had already been reviewed by staff and I was violating the DEQ Code of Conduct by attacking – and I wasn't attacking my co-workers, but she alleged I was attacking my co-workers" (Transcript, 43:22-44:5).

Again, Dr. Onysko's description of his supervisor's actions raises as many questions as it answers, but on a Motion for Summary Decision, it is the moving party's burden to produce contradictory evidence, and here Respondent has produced none. Even so, the allegations are untimely, since there is no evidence of a timely OSHA complaint.

Number 62

"Sixty-two would be – it's the same water treatment plants. I also found areas that separate water disinfection aspects of those treatment plans *[sic]*. And she questioned my expertise and my ability to make judgment on those particular instances. Although it was my job to do that, doing the sanitary survey. That's 62" (Transcript, 44:7-12).

Undoubtedly a supervisor can question the expertise and judgment of an employee without discriminating against him under SDWA. Even so, the record is not sufficiently complete for me to determine whether discrimination occurred in this case. But even if it did, these allegations are untimely, because there is no evidence of a timely OSHA complaint as late as thirty days after the termination of Dr. Onysko's employment.

Number 63

"Sixty-three is when DHRM noticed me that they had sustained non-verbal abusive conduct by me. They sent me a letter against my supervisor, 63. So that's an operative word, Your Honor, 'non-verbal abusive conduct'" (Transcript 44:14-18).

These allegations are not only untimely, but they do not involve Respondent. DHRM could not have retaliated against Dr. Onysko under SDWA because it was not his employer. He may not rely on these allegations now.

Number 64

"I was reassigned to administrative leave. We've discussed that already before. I was escorted from the building. I wasn't able to take a large number of personal items from my cubicle. Many of these items relate to this hearing matter, where I had notes that I had taken at meetings. I had documentation. I had copies of things I had presented at the intake meetings, at the Director's meetings. Those are still in the possession of the Respondent" (Transcript 44:20-45:3)

Respondent acknowledges Dr. Onysko suffered this adverse employment action (Original Motion, p. 15, paragraph 40).

Number 65 (The First One)

"Sixty-five was a letter of intent to dismiss me for just cause in the good of the public service" (Transcript 45: 10-11).

Respondent acknowledges Dr. Onysko suffered this adverse employment action (Original Motion, p. 15, paragraph 40).

Number 65 (The Second One)

"Immigration *[sic]* improvement district. A water system in the Salt Lake County area, 2002, I wrote a scathing memo to file saying, EPA's loans should not be issued to this entity. I was retaliated against when litigation was made against them. So there's the immigration *[sic]* improvement district" (Transcript 54:6-11).

This allegation does not identify who did the alleged retaliating, but the record is not sufficiently complete to allow me to conclude Respondent did not retaliate against Dr. Onysko in any way with respect to these events. The record is sufficiently complete to allow me to conclude these allegations are untimely, since there is no evidence of an OSHA complaint even within thirty days of Complainant's termination.

Number 66

"Tridel LaPoint (phonetic) water improvement district. The Agency is alleging that I gave poor customer service because I would not violate the Professional Engineering Act and design it for the incompetent or the challenged engineer that was in charge of that" (Transcript 54:13-18).

A mere allegation of poor customer service may well fall short of an adverse employment action, but I need not and do not decide that issue now. These allegations are untimely because there is no evidence of an OSHA complaint even within thirty days of Complainant's termination.

Number 67

"West Corin City, 67. I was accused of excessive or overly meticulous review of a design project that I showed did not have sufficient water pressure, according to State rules" (Transcript 54:19-22).

A mere accusation of "excessive or overly meticulous review" might not comprise an adverse employment action under SDWA. I do not decide that question on the insufficient record before me. But the record supports the conclusion these allegations are untimely, because there is no evidence of an OSHA complaint even within thirty days of Complainant's termination.

Number 68

"Sixty-eight, Hirun City (phonetic). The City adopted an illegal disinfection system. I brought it to the attention of Division of Drinking Water and I was criticized and chastise *[sic]* for doing it" (Transcript 54:23-55:1).

Criticism and chastisement, standing alone, may well not comprise adverse employment actions, and Dr. Onysko has alleged nothing more here. I do not decide that question now. I conclude the allegations are untimely, as there is no evidence of a timely complaint under SDWA even within thirty days of the termination of Dr. Onysko's employment. He may not rely on these allegations now.

Number 69

"Sixty-nine, I was assigned plan review for North Salt Lake City, after the fact. Pipes in the ground, already. Exactly what my former supervisor chose me to follow-up, follow-through. You cannot use x-ray vision to see what is under the ground. I said I cannot approve these new water lines. I can't see it. And I was penalized for it, because I would not do that" (Transcript 55:2-8).

I do not know what Dr. Onysko means when he says he was "penalized." He may mean he suffered one or more of the six adverse employment actions Respondent has already acknowledged. But to the extent he means anything else, these allegations, too, are untimely.

Number 70

"Blue Sky Resort, the same thing. After the fact, they came to get approval for a buried water line, buried valves. I said, 'I cannot do this.' They said, 'Can't

you just kind of look around the ground and see what's going on?' I said, "No, I apply the rules.' So I was penalized for that" (Transcript 55:12-17).

Once again: I do not know what Dr. Onysko means when he says he was "penalized." He may mean he suffered one or more of the six adverse employment actions Respondent has already acknowledged. But to the extent he means anything else, these allegations, too, are untimely.

Number 71

"So, 71 would be Hide Out Town. Another one, the same thing, after the fact plan approvals, that I would not rubber stamp" (Transcript, 55:20-22).

This allegation describes no retaliatory or discriminatory conduct by Respondent. Even if it did, these allegations, too, are untimely, for lack of a timely OSHA complaint.

Number 72

"Park City RV resort. There was an unsafe well, unsafe water tank. They wanted me to just rubber stamp it and approve it and I said, 'No, it doesn't meet minimum construction standards.' They took me off the project and they gave it to a junior engineer who rubber stamped it" (Transcript 55:23-56:3).

I do not now decide, on the limited record before me, whether the removal of Dr. Onysko from the Park City RV Resort project was an adverse employment action. But I do decide these allegations are untimely, there being no evidence of a complaint even within thirty days of the termination of Dr. Onysko's employment.

Number 74[17]

"Midway City. There is a – they proposed to do the same illegal disinfection system that was sweeping through the state, because we're so laxed *[sic]*. I rejected it. I was accused of poor customer service" (Transcript 56:13-16).

An accusation of poor customer service, standing alone, may not comprise an adverse employment action. I do not decide that question on the limited record before me. But I do decide these allegations are untimely, there being no evidence of a complaint even within thirty days of the termination of Dr. Onysko's employment.

Number 75

"I was criticized for my check list, for reviewing well plans and specifications for the mountain top well. My supervisor made false allegations, published them in my written reprimand, in my written warning, emails to the customers that I was

[17] There was no Number 73 (Transcript 55:23-56:16).

asking for things that I was not allowed to ask for under the State rules, and that is absolutely false" (Transcript, 56:17-23).

These allegations, too, are untimely, there being no evidence of a complaint even within thirty days of the termination of Dr. Onysko's employment.

Number 76

"The sanitary survey of the Jordan L. Special Service District Billy Bendens (phonetic) water supply. I went out there. I found problems, deficiencies, that violate the Safe Water Drinking Act *[sic]*. I put them into the data base and my supervisor took them out of the data base. And retaliated against me with poor customer service, because the General Manager said that I shouldn't have done that" (Transcript 56:25-57:7).

I question how Respondent can "retaliate . . . with poor customer service." I make no finding on that issue on the limited record before me. I do conclude these allegations are untimely, there being no evidence of a complaint even within thirty days of the termination of Dr. Onysko's employment.

Number 77

"Seventy-seven was another allegation of me being uncooperative with a team that was assigned to write the membrane rule treatment process. Uncooperative – wait a minute – uncooperative to my supervisor means that I won't subvert my professional judgment in most cases to less-qualified individuals" (Transcript 57:9-14).

Here again, Dr. Onysko's explanation is confusing. A mere allegation of "being uncooperative," standing alone, may not constitute an adverse employment action, but I do not decide that question on the limited record before me. But the record is sufficiently complete to support a conclusion that Dr. Onysko did not timely raise these issues, and cannot rely on them now.

Numbers 78 and 79

"The chlorine – the dose of the swimming pool disinfection chemicals that never should have been used in Utah. We have multiple cities, thousands of people at risk from these chemicals. I brought it to my division's attention. They blew me off. I brought it to EPA's attention. EPA agreed with me. I have letters from the Office of Pesticide Control – I'll show at hearing – where they absolutely agreed with me and the Division refused to do anything and so I turned then *[sic]* in to the OALJ *[sic]* hot line. So we could call that 79, if you'd like" (Transcript, 57:15-25).

This does not appear to me to be an allegation of discrimination or retaliation at all. Here, Dr. Onysko states he "turned [Respondent] in to the . . . hot line" after

EPA agreed with his analysis. But even if there were a retaliatory action buried somewhere in there, it would be untimely, as there is no evidence it has ever been the subject of a timely complaint under SDWA.

Number 80

"Number 80 would be the Billy Bendens water supply, when I was retaliated against the guise for poor customer service, for, in fact, reporting deficiencies" (Transcript 58:3-5).

This appears to me to duplicate Number 76 above, and I still do not understand how an employee can be retaliated "against the guise for poor customer service." But, just as I did with Number 76, I conclude these allegations are untimely.

Number 81

"Number 81, the Mountain Top well. I was retaliated against for filing a professional conduct complaint against the two engineers who engage in public health" (Transcript 58:6-8).

Dr. Onysko does not explain how he was "retaliated against." He may mean he suffered one or more of the six adverse employment actions Respondent has already acknowledged. But to the extent he means anything else, these allegations, too, are untimely.

Number 82

"Pine Hollow water system. The Division illegally approved after the fact use of a chlorine disinfectant system that the rules clearly say must be pre-approved. They did not do the calculations to show that the public was protected. Pine Hollow Water Company" (Transcript, 58:9-13).

Here Dr. Onysko accuses Respondent of serious misconduct – but that misconduct is not discrimination against him. Even if it were, it would be untimely, since there is no evidence of a timely complaint under SDWA even within thirty days of the termination of his employment.

Number 83

"The Mountain Top well. This relates to the design errors by those geologists that I complained about. But the project itself was also where I entered, I made review comments, I put them in the data base, and I was retaliated against for making those comments. I was accused of poor customer service, being that I did a facetious review. I did an overly-thorough review" (Transcript 58:15-21).

These allegations would appear to me to be subsumed in Number 75 above. Even if they are not, they are untimely, since there is no evidence of a timely complaint under SDWA even within thirty days of the termination of Dr. Onysko's employment.

Number 84

"The Aspen Recrest (phonetic) Girls Camp in Wasatch County. I was in the middle of a plan review and a remediation project. It was 12 months in duration. They sent in some information. The Division incorrectly or inadvertently or deliberately assigned that project to someone else, who then approved my project without me knowing of it and without even complying with the condition I had set. And I was accosted for not being a team player, for questioning the action of a colleague" (Transcript 59:4-12).

I have no way of knowing what Dr. Onysko means by "accosted." But even assuming there is some allegation of discrimination or adverse employment consequences somewhere, there is no evidence of a timely OSHA complaint under SDWA. Thus, Dr. Onysko cannot rely on these allegations now.

Number 85

"Number 85 would be the Toulome County Treatment Plant. We talked about the technical issues, but 85 would be the actual instance of the Director ordering me to change my sanitary surveys. I refused to do it. I was entitled to refuse to do it under Engineering Act *[sic]*" (Transcript 59:13-17).

Here, Dr. Onysko seems to allege his own legally-justified refusal to follow the Director's instructions comprises a retaliatory action against himself. Whatever else it may be, this is not an example of an adverse employment action. Even if it were, it would be untimely.

Number 86

"This, Your Honor, is the most preposterous event in my 40 years of engineering experience. I was assigned to a project to deal with a drinking water storage tank that was – had an inadequate overflow. The water was rising to the level, endangering the roof, and the Director of the Division of Drinking Water said, 'Let's let it overflow through the air beds (phonetic). Now, I knew that was the most outrageous thing I had ever heard. I called EPA and they verified that. And I have an expert at EPA that will be at the hearing and say that it's the most ridiculous thing he ever heard.

JUDGE LARSEN: How was that retaliatory? You lost me.

DR. ONYSKO: I was ordered to change it, Your Honor.

JUDGE LARSEN: But you didn't change it.

DR. ONYSKO: Excuse me?

JUDGE LARSEN: You didn't change it, though, did you?

DR. ONYSKO: No. So, I was given a termination letter, saying I'm officious and I reviewed things too thoroughly" (Transcript 59:18-60:14).

If the alleged adverse employment action here is Dr. Onysko's termination, Respondent admits it occurred (Original Motion, p. 15, paragraph 40). If it is anything else, it is untimely.

Number 87

"I was asked to review plans that submitted for the Weaver Fire District. My normal modus operandi is to check with the local fire authority, per State rule requirement. The fire authority – the Fire Marshal said, 'No, please don't approve these. The hydrants are spaced too far apart.' I reported to the Division Director and she accused me of not being a team player, of questioning previous – preconstruction approval by our Division, and, essentially threatening me with termination should these types of things happen again in the future" (Transcript 60:19-61:3).

Respondent acknowledges Complainant's termination was an adverse employment action (Original Motion, p. 15, paragraph 40). To the extent Dr. Onysko intends by this explanation to raise other issues, the allegations are untimely.

2. Adverse Employment Actions Acknowledged by Respondent

I also find and conclude:

48. **Respondent would have issued the written warning of October 17, 2016 (Respondent's Exhibit 9), even in the absence of any protected activity under SDWA.**

Supporting Evidence: Respondent's Exhibit 36 (Declaration of Ying-Ying Macauley), paragraphs 4, 5, 6, 13, 14, 15, 16.

Opposing Evidence: None. In a Declaration (Complainant's Exhibit SMCX-78) which does not conform to 29 C.F.R. section 18.72, subsection (c)(4), Dr. Onysko states "I deny all allegations against me in the October 17, 2016, Written Warning, and other warnings – all pretextual – that Respondent served upon me" (Declaration, paragraph 4). He further contends he has always treated customers courteously, has followed all of Respondent's "rules, policies, procedures, and business practices," and presents other such generalized, self-serving conclusions. But he does

not deny that Ron Phillips complained to Ms. Macauley about him, nor does he deny the substance of that complaint. He does not deny the written complaint to Ms. Macauley from William Loughlin, nor does he deny the substance of that complaint. He does not deny that Ms. Macauley received complaints about him from North Salt Lake City Water System, Sheep Creek Cove Water System, Park City RV Park, the Town of Stockton, Utah, and engineers from Stantec, Aqua Engineering, ESI, Inc., JUB Engineers, Inc., Bowen Collins Assoc., and the State District Engineers. He does not deny Ms. Macauley received verbal complaints from DDW staff, water system operators, water system managers, and engineer consultants regarding his "behavior and communication style." Neither does he allege any facts to show any bias against him on the part of any of those complainants. Beyond his own conclusion that he always acted properly, he offers no evidence to show there was no reasonable basis for any of the complaints, or there was any reason for Ms. Macauley to have doubted them. Particularly because this case has been pending since May, 2017, giving Complainant ample opportunity to conduct discovery, his conclusory, general denials do not demonstrate triable issues of fact. In fact, it would be irresponsible of an employer to receive this many complaints against an employee without taking any action whatever.

49. **Respondent would have issued the Notice of Intent to Reprimand on December 19, 2016 (Respondent's Exhibit 12), even in the absence of any protected activity under SDWA.**

Supporting Evidence: Respondent's Exhibit 36 (Declaration of Ying-Ying Macauley), paragraphs 7, 8, 9, 10, and 13; Respondent's Exhibits 11, 12, and 13.

Opposing Evidence: None, beyond general vague denials (*see, for example,* Complainant's Exhibit SMCX-78, paragraphs 15, 16, 17, 18, 19, and 20). Complainant does not specifically deny the authenticity or content of Respondent's Exhibit 11 or his earlier receipt of Ms. Macauley's October 17, 2016, written warning. Beyond his own conclusion that he conducted himself properly, he offers no evidence to suggest there was no reasonable basis for the complaints about him set forth in Respondent's exhibit 11, and he offers no evidence to suggest Ms. Macauley had any reason to doubt them. In Respondent's Exhibit 11, Shane R. Bekkemellom reports in detail on a number of conversations between himself and Dr. Onysko over the scheduling and re-scheduling of an appointment with Craig Anderson of the Utah Attorney General's Office. Dr. Onysko never specifically admits or denies that such conversations took place. Instead, he merely declares his own conduct was in all respects impeccable, he denies everything in Respondent's Exhibit 11, and argues over the date it was prepared (Complainant's Exhibit SMCX-78, paragraph 29). He entirely overlooks the fact that Respondent did not write Respondent's Exhibit 11. Dr. Onysko's conclusory, general denials do not demonstrate triable issues of fact.

50. **Respondent would have issued the written reprimand on January 13, 2017 (Respondent's Exhibit 14) even in the absence of any protected activity under SDWA.**

Supporting Evidence: Respondent's Exhibit 36 (Declaration of Ying-Ying Macauley), paragraphs 7, 8, 9, and 13.

Opposing Evidence: None, beyond Dr. Onysko's own general denials (*see,* for example, Complainant's Exhibit SMCX-78, paragraphs 40, 41, and 44). These do not demonstrate a triable issue of fact. That Respondent took this action, like its other disciplinary actions against Dr. Onysko, on the basis of multiple complaints about his conduct from third parties is undisputed.

51. **Respondent would have placed Complainant on administrative leave without pay on June 12, 2017 (Respondent's Exhibit 24) even in the absence of any protected activity under SDWA.**

Supporting Evidence: Respondent's Exhibit 40 (Declaration of Marie Owens), paragraphs 4, 5, 6, 7, 8, 9.

Opposing Evidence: None, beyond Complainant's own non-specific denials (such as Complainant's Exhibit SMCX-78, paragraphs 45, 46, 47, and 50). These are insufficiently specific to raise triable issues of fact. Dr. Onysko tacitly admits Ms. Owens had reports of his inappropriate behavior from outside the Department of Environmental Quality, and he offers no evidence she had any reason to disbelieve them.

52. **Respondent would have issued its Notice of Intent to Dismiss on July 10, 2017 (Respondent's Exhibit 26) even in the absence of any protected activity under SDWA.**

Supporting Evidence: Respondent's Exhibit 40 (Declaration of Marie Owens), paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20.

Opposing Evidence: None, beyond Complainant's own non-specific denials (such as Complainant's Exhibit SMCX-78, paragraphs 45, 46, 47, 50, 51, 52, 53, 57, 58, 59, 60).

53. **Respondent terminated Complainant for reasons unrelated to protected activity.**

Supporting Evidence: Respondent's Exhibit 42 (Declaration of Alan Matheson), paragraphs 6 through 17.

Opposing Evidence: None. Complainant objects to Respondent's Exhibit 42 (Amended Opposition, pp. 336-342), on the grounds it is not properly authenticated,

and it is ambiguous. Complainant also responds to several specific paragraphs of the declaration, including paragraphs 6 through 17, with "Future argument prerogative preserved by Complainant." I am unsure what Dr. Onysko means by this, but since he has not requested an extension of time for further response, I disregard it for purposes of deciding this motion. I overrule Complainant's objections to Respondent's Exhibit 42.

54. **Respondent would have terminated Complainant even in the absence of any protected activity.**

Supporting Evidence: Respondent's Exhibit 42 (Declaration of Alan Matheson), paragraphs 6 through 17, paragraph 23.

Opposing Evidence: None. I have already overruled Complainant's objections to Respondent's Exhibit 42.

55. **As a matter of law, Respondent's settlement proposal to Complainant in September, 2017, did not constitute discrimination prohibited under SDWA.**

Under 29 C.F.R. section 18.408, evidence of settlement discussions are not admissible to prove liability. There is no evidence presented by either party to suggest anything improper about Respondent's settlement proposal, described in detail in Respondent's Exhibit 42, paragraphs 20 and 21, and Attachments 2 and 3 – indeed, Attachment 2 shows Dr. Onysko making a counter-proposal, precisely the kind of discussion courts encourage in disputed matters. As Respondent correctly points out, public policy favors the settlement of disputes (Amended Motion, pp. 9-10). Few employers would offer settlements, even to the most deserving employees, if such an offer could comprise an act of discrimination under SDWA.

56. **As a matter of law, Respondent's inadvertent transmission of a termination letter, and its immediate withdrawal, on September 26, 2017, does not comprise an adverse employment action**.

The undisputed evidence shows this was a clerical error (Respondent's Exhibit 42, paragraph 22 and Attachment 3). Complainant submits no evidence to show it was anything more. What is more, the undisputed evidence (Respondent's Exhibit 42, Attachment 2) shows Mr. Matheson told Dr. Onysko in a September 25, 2017, e-mail that he had prepared a termination letter but did not intend to send it pending further settlement discussions between the parties.

CONCLUSION

The Motion for Summary Decision is granted.

SO ORDERED.

CHRISTOPHER LARSEN
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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, N.W., Washington, D.C. 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https:dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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 20001-80001, (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 Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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.