

**U.S. Department of Labor**

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



**In the Matter of:**

**BENJAMIN W.O. KUHAULUA, III,**

**ARB CASE NO. 2017-0067**

**COMPLAINANT,**

**ALJ CASE NO. 2017-WPC-00001**

**v.**

**DATE: March 17, 2020**

**COUNTY OF KAUAI SOLID  
WASTE DIVISION,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Stanford M.J. Manuia, Esq.; *Attorney at Law*; Honolulu, Hawaii**

***For the Respondent:***

**Sinclair Salas-Ferguson, Esq.; *Office of the County Attorney*; Lihu'e, Hawaii**

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

### **DECISION AND ORDER**

PER CURIAM. The Complainant, Benjamin Kuhaulua, filed a retaliation complaint under the Federal Water Pollution Control Act (WPCA) and its implementing regulations. 33 U.S.C. § 1367 (1972); 29 C.F.R. Part 24 (2019). Complainant alleged that his employer, County of Kaua'i Solid Waste Division, violated the WPCA whistleblower protection provisions by withholding his paycheck for four days and constructively discharging him from employment.

On July 8, 2017, Respondent filed a motion for summary decision asserting that any delay that occurred in Complainant receiving his paycheck was a result of the postal service and that Complainant was still an employee and therefore could not have been constructively discharged.<sup>1</sup> Thus, Respondent argued that there was no adverse action in the case as a matter of law.<sup>2</sup>

Complainant filed an opposition to the motion for summary decision including no evidence of any kind and citing no legal authority. In his opposition Complainant abandoned the theory of adverse action based on an alleged four-day delay in receiving a check as he offered no argument to dispute Respondent's arguments. Regarding the constructive discharge allegation, Complainant argued that the Respondent's retention of Complainant on temporary total disability status amounted to constructive termination.

On July 28, 2017, the ALJ granted Respondent's motion for summary decision, concluding as a matter of law that Complainant failed to raise a genuine issue of material fact that Respondent took any adverse action against him. Complainant filed a petition requesting that the Administrative Review Board (ARB or the Board) review the ALJ's order. We affirm.

#### JURISDICTION AND STANDARD OF REVIEW

The WPCA's employee-protection provision authorizes the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies. 33 U.S.C. § 1367. The Secretary has delegated authority to the Administrative Review Board (ARB or the Board) to review an ALJ's decision. Secretary's Order No. 01-2020 (Delegation of

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<sup>1</sup> Respondent submitted evidence Complainant is on temporary leave for a disability related to workers' compensation and that it will return Complainant to his prior job as soon as he provides Respondent with a medical release. D. & O. at 8. In response, Complainant offered no proof of constructive discharge. *Id.*

<sup>2</sup> Respondent also argued that with regard to the alleged check delay, that Complainant's protected activity was not a motivating factor in that delay. D. & O. at 2-3. The ALJ did not address this argument in the D. & O.

Authority and Assignment of Responsibility to the Administrative Review Board) (Feb. 21, 2020).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's decision granting summary decision. See 5 U.S.C. § 557(b) (1976); *Griffo v. Book Dog Books, LLC*, ARB No. 18-029, ALJ No. 2016-SOX-041 (ARB May 2, 2019). Summary decision is permitted where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a) (2017). On summary decision, the ALJ, in the first instance and the Board on appeal must review the record in the light most favorable to the nonmoving party. *Micallef v. Harrah's Rincon Casino & Resort*, ARB No. 16-095, ALJ No. 2015-SOX-025, slip op. at 3 (ARB July 5, 2018).

### CONCLUSION

The ALJ's decision is in accordance with law. For the reasons stated by the ALJ, Kuhaulua failed to raise a genuine issue of material fact that Respondent engaged in any adverse action against him. On appeal, Complainant has failed to raise any genuine issue of material fact with respect to the issue of adverse action as presented to the ALJ. Accordingly, we adopt the ALJ's well-reasoned Order Granting Summary Decision on Reconsideration and attach a copy hereto.

**SO ORDERED.**





Issue Date: 28 July 2017

CASE NO. 2017-WPC-00001

*In the Matter of*

**BENJAMIN W.O. KUHAULUA, III,**  
Complainant,

v.

**COUNTY OF KAUA'I SOLID  
WASTE DIVISION,**  
Respondent.

**DECISION AND ORDER GRANTING  
SUMMARY DECISION**

Appearances:       Stanford M. J. Manuia, Esq.  
                              for Complainant

                              Sinclair Sala-Ferguson, Esq.  
                              for Respondent

Before:               Steven B. Berlin  
                              Administrative Law Judge

**Background and Procedural History**

This case arises under the employee protection provisions of the Federal Water Pollution Act, 33 U.S.C. § 1367 (and its implementing regulations at 29 C.F.R. Part 24).<sup>1</sup> Complainant last performed work for Respondent on September 1, 2015; he has been on a workers' compensation leave since then. It appeared from OSHA's "Secretary's Findings" that the only adverse action

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<sup>1</sup> Complainant's administrative complaint to the Occupational Safety & Health Administration also raised alleged violations under the whistleblower protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105, and the Occupational Safety & Health Act (section 11(c)), 29 U.S.C. § 660(c). With the parties' stipulation, I dismissed the claim under the Surface Transportation Assistance Act because that Act's whistleblower protection provision does not extend to employees of states or their political subdivisions. See Order (Apr. 17, 2017) at 1-2; Tr. Pretrial Conf. 4/14/2017 at 5:6-6:4. As Complainant does not dispute, this Office does not have jurisdiction to adjudicate claims under OSHA § 11(c).

Complainant alleged in his complaint was that Respondent delayed issuing one of Complainant's workers' compensation checks for four days.<sup>2</sup>

On November 15, 2016, I set the matter for a hearing to begin on April 24, 2017. At a telephonic pretrial conference (on the record) on April 14, 2017, I asked Complainant's counsel if Complainant was alleging any other adverse action. Tr. (4/14/2017) at 6:15-23. Counsel stated that "as a result of being a whistleblower, [Complainant was] going to lose his job . . . permanently and not be able to find one on the island [*i.e.*, Kuau'i, where Complainant lives]." Tr. 6:24-7:4.

As this seemed to allege no more than Complainant's anticipation of what he perceived to be a likely future adverse action, I asked again. This time, counsel stated that Complainant was alleging that "he's been constructively terminated." Tr. 7:5-10.

When asked for a brief description of the evidence Complainant intended to present to show a constructive discharge,<sup>3</sup> counsel stated: "Well, basically, when he tried to assert his claim, if he's eligible to work with that injury, he's not medically allowed to go back to work." Tr. 7:24-8:4. As I found that unclear, I questioned further. Eventually, Complainant's counsel stated that "[Complainant's] doctors have indicated that he should not return to that job because of what occurred. So he won't be able to go back." Tr. 13:19-21. Based on that, I stated: "If [Complainant's] doctors are going to say that [Complainant] was so badly harmed that he can never return to employment [with Respondent] – although he might be able to work somewhere else – I could see that as a constructive discharge." Tr. 14:15-20.

Respondent's counsel stated that this was the first he'd heard of an alleged constructive discharge. Tr. 8:17-20. Complainant's counsel conceded that Complainant had never notified Respondent of this allegation. Tr. 8:21-25. But he did not formally move to amend the complaint.

In the interest of justice and despite it being the eve of trial, I *sua sponte* allowed Complainant to amend his complaint to allege a constructive discharge as a second adverse action.<sup>4</sup> Complainant had moved for a continuance, citing health concerns. I continued the hearing to allow Complainant time for his health to improve and to allow the parties time for discovery on the newly alleged constructive discharge. I notified the parties that the case would be heard in the week of August 7, 2017.

On July 8, 2017, Respondent filed a motion for summary decision. Respondent first argues that it timely issued and sent the workers' compensation check, and even if Complainant received it late, it was just a delay in the mail; Complainant's protected activity was not a motivating factor

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<sup>2</sup> Complainant's OSHA complaint is not on the record.

<sup>3</sup> As the trial was scheduled to begin in 10 days, counsel should have known what evidence he would present and should have disclosed it in his pre-trial filings and exchanges.

<sup>4</sup> The procedural rules published at 29 C.F.R. Part 18 apply to cases under the Federal Water Pollution Act. 29 C.F.R. § 24.100(b). Those procedural rules provide that "[t]he judge may allow parties to amend and supplement their filings" after referral to this Office. 29 C.F.R. § 18.26.

in the delay. Second, Respondent argues that Complainant is still an employee and thus could not have been constructively discharged. Complainant filed an opposition on July 17, 2017. I will grant the motion.

#### Undisputed Facts<sup>5</sup>

Respondent employs Complainant as an equipment operator. Decl. of Niitani, ¶ 3. Complainant has been on a workers' compensation leave since September 1, 2015, based on an injury he sustained on August 26, 2015. *Id.*, ¶ 4.

On July 5, 2016, Complainant emailed a form to Respondent's payroll clerk, asking Respondent to change the direct deposit of his workers' compensation check to a different bank. Decl. of Agbulos, ¶ 3. The payroll clerk telephoned Complainant that same day, verified that Complainant wanted the change, and notified him that Respondent would issue one paper check while the change in direct deposit was being arranged. *Id.*, ¶¶ 4-5.

Respondent pays employees bimonthly, on the fifteenth and last day of the month. Decl. of Yasutake, ¶ 3. In preparation for the payroll on July 15, 2016, the Solid Waste Division (where Complainant is employed) received a paper check for Complainant's workers' compensation on July 14, 2016. *Id.*, ¶ 4; Decl. of Agbulos, ¶ 6. The Division Manager took the paycheck to Respondent's mailroom and dropped it off for outgoing mail. Decl. of Yasutake, ¶ 5. This is Respondent's general practice for distributing paper checks when an employee is out on leave, such as for workers' compensation. *Id.*, ¶ 6.

Respondent's human resources manager confirms that Complainant remains an employee in the same job, has not been terminated from employment, and will resume his same job once he is [medically] cleared to return. Decl. of Niitani, ¶¶ 3, 5, 6.

#### Discussion

*Analytical framework for and the parties' burdens on motions for summary decision.* On summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.72 (2015); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56).

Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.40(c).

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<sup>5</sup> Respondent must base its motion on undisputed facts. *See* Discussion below. Accordingly, the fact findings in the text above are for purposes of this motion only.

A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

Although Complainant has the ultimate burden to raise a *prima facie* case at trial, for purposes of its motion for summary decision, Respondent must meet both a burden of production and a burden of persuasion:

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.

If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything. If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense. If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment. But if the nonmoving party produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats the motion.

*Nissan Fire & Marine Ins. Co, Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000) (citations omitted).

The procedural requirements on a motion for summary decision include in pertinent part:

(1) *Supporting factual positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (i) Citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (ii) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

29 C.F.R. § 18.72(c).

*Complainant must show an adverse action as part of his prima facie case.*



In cases arising under [Federal Water Pollution Act (among certain other environmental protection statutes)], a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint.

29 C.F.R. § 24.109(b)(2).

Here, the allegations of adverse action in the complaint, as amended, are: (1) the four-day late delivered workers' compensation check, and (2) a constructive discharge. Although Complainant – through counsel – filed an opposition to the motion for summary decision, he included no affidavits, declarations, deposition transcripts, discovery responses, stipulations, exhibits, documents, or other evidence of any kind. He cited no legal authority.

*The workers' compensation check.* On the allegation of the late-delivered workers' compensation check, Respondent's evidence shows that Respondent was paying benefits through direct deposit, that it was Complainant who interrupted this because he changed banks, that Respondent's payroll clerk knew the change could not be put in place in time for the next check, that she arranged to have a physical check cut on time and mailed to Complainant, that she told him she would do that, and that Respondent mailed the check the day before it became payable. Complainant offers nothing to dispute this and offers no argument to support that an adverse action occurred. He appears to abandon this theory.

I therefore find that Respondent did not delay the workers' compensation by four days as Complainant alleges – or at all. As the undisputed evidence shows that this alleged adverse action never occurred, the theory based on it fails as a matter of law. If there was any delay, the Post Office took too long to deliver the check; it therefore cannot be evidence of Respondent's retaliation.<sup>6</sup>

*The constructive discharge: legal standard.* Constructive termination is tested on an objective standard. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004) (Title VII sexual harassment). A court must determine whether “working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign.” *Id.*; *see also Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007) (applying the *Suders* test in an age discrimination claim). The Board applies the same test to Sarbanes-Oxley cases. *See Gattegno v. Prospect Energy Corp.*, ARB No. 06-118, ALJ No. 2006-SOX-00008, slip op. at 15 (ARB May 29, 2008).

To be objectively intolerable, conditions must deteriorate “to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer.” *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000) (*citing*, EEOC

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<sup>6</sup> Complainant and Respondent are both located on the island of Kauai, Hawaii. It would be reasonable for Respondent to assume that a check mailed on Thursday, July 14, 2016 would arrive at Complainant's address on Friday, July 15, 2016. In any event, the check was mailed before it was owed to Complainant.

Policy Guide, which requires conditions that “foreseeably would compel a reasonable employee to quit”); *see also Hillebrand v. Coldwater Creek, Inc.*, ALJ Case No. 2008-SOX-2010 at 78 (ALJ April 23, 2010) (“an employee is constructively discharged when her working conditions are rendered ‘so difficult, unpleasant, and unattractive that a reasonable person would have felt compelled to resign, such that the resignation is effectively involuntary’”) (quoting *Reines v. Venture Bank & Venture Fin. Group*, 2005-SOX-00112 at 55 (ALJ Mar. 13, 2007)).

The standard is demanding because employers and employees should solve problems within the existing employee-employer relationship. *Poland*, 494 F.3d at 1184. Thus, “[a]n employee may not . . . be unreasonably sensitive to a change in job responsibilities.” *Id.* at 1185 (quoting *Serrano-Cruz v. DFI P.R., Inc.*, 109 F.3d 23, 26 (1st Cir. 1997)). But an employee alleging a constructive discharge need not show that the employer *intended* to cause the employee to quit; the employer’s intent is not an element. *Poland* at 1184 n.7.

The objective test focuses on “‘a reasonable person in [the employee’s] position.’” *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (quoting *Satterwhite v. Smith*, 744 F.2d 1380, 1381 (9th Cir. 1984)); *see also Suders*, 524 U.S. at 141 (“Did working conditions become so intolerable that a reasonable person *in the employee’s position* would have felt compelled to resign?”) (emphasis added). What is intolerable to a reasonable chief operating officer of a technology start-up might differ from what is intolerable to a reasonable line worker at an assembly plant, a mid-level manager, or a chief operating officer of a more established, multi-national corporation. The constructive discharge analysis must take into account the totality of the circumstances. *Watson*, 832 F.2d at 361.

“The determination whether conditions were so intolerable and discriminatory as to justify a reasonable employee’s decision to resign is normally a factual question left to the trier of fact.” *Watson v. Nationwide Ins. Co.*, 823 F. 2d 360, 361 (9th Cir. 1987). Generally, however, a single incident that is not part of a wider pattern is insufficient. *Wallace v. City of San Diego*, 479 F.3d 616, 626 (9th Cir. 2007) (“a plaintiff . . . must show some aggravating factors, such as a continuous pattern of discriminatory treatment”) (citing *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996)).<sup>7</sup>

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<sup>7</sup> Some examples in the case law include:

Courts have generally held that assigning employees to undesirable geographic locations or job duties is not a constructive discharge. Thus, in *Poland*, a long-term employee of the Customs Service who had previously been stationed in four different states and the District of Columbia was not constructively discharged when he was transferred cross-country from Oregon to Virginia and from a supervisory to a non-supervisory position (without loss of pay), especially in that he continued to work for eight months after the transfer until he took an early retirement, thus suggesting that the transfer was something the employee could tolerate. 494 F.3d at 1184-85.

A company vice-president was not constructively discharged when he was passed over for president and the job was given to a man fifteen years younger – even when he was moved to a smaller office and excluded from a lunch meeting, and other executives were told not to discuss financial matters with him. *Schnidrig*, 80 F.3d at 1411-12. As the Court noted, the employer had not demoted the plaintiff, cut his pay, disciplined him, or encouraged him to leave. *Id.* at 1412.

On the other hand, when a district court set aside a jury verdict and rejected a plaintiff’s claim of constructive discharge, the Ninth Circuit reversed. *Wallace v. City of San Diego*, 479 F.3d \_\_\_, 620 (9th Cir. 2006). In *Wallace*, a police sergeant also was a naval reserve officer. *Id.* Over the years, he’d taken several leaves of absence from his police work to go on active duty with the Navy. *Id.* at 620-22. After he served on a seven-month tour in Operation

*Constructive discharge: facts.* There is nothing to suggest that Complainant was forced to resign or has resigned because of intolerable conditions. His theory is somewhat different.

In the pre-hearing conference, the parties understood that Complainant was temporarily totally disabled and on a stress-related workers' compensation leave. I allowed Complainant to amend his complaint based on assertions his attorney made at the conference. Those assertions were that Complainant's medical doctors opined that Complainant could never return to work for Respondent because his work environment there had been so stressful. Under the Act, Complainant would then have to show that the stressful conditions were caused or motivated by his engaging in activity that the Act protects.

On the present motion, as stated above, Complainant offers no evidence in any form. He offers no citation to authority.

The closest Complainant comes to showing a genuine issue in dispute on the issue of constructive discharge is a one-sentence assertion from his counsel about what Complainant's medical records will show if and when Complainant offers them. Specifically, counsel states that the records of three of Complainant's health care providers will "associate" Complainant's whistleblowing with the Complainant's stress injury, continuing need for medical care, and continuing disability.<sup>8</sup>

From this Complainant – through counsel – argues:

Keeping [Complainant] on temporary total disability (TTD) status rather than considering his medical diagnosis resulting from consecutive work stress injuries in the employ of [Respondent] amounts to "constructive termination" . . . .<sup>9</sup>

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Desert Storm, the police department denied him several promotions, reassigned him farther from his home, gave him undesirable or reduced responsibilities, subjected him to repeated discipline disproportionate to the alleged wrongdoing, and denied him permission to teach at the police academy. *Id.* at 621, 626. When he took an extended leave to serve in Bosnia in 1999-2000, he was subjected to discipline for allegedly neglecting to tell the department that his tour had been extended. *Id.* The Court held that this was sufficient to support the jury's finding of a constructive discharge and that it was error for the district court to grant judgment notwithstanding the verdict. *Id.* at 628.

In a Sarbanes-Oxley case, an employee in a leadership position with her own office had received high performance ratings. *Brown v. Lockheed Martin Corporation*, ARB Case No. 10-050; ALJ Case No. 2008-SOX-00049 (ARB Feb. 28, 2011) at 10. After she engaged in protected activity, the employer gave her poor performance ratings, took away some of her core duties, took away her office and parking space, confronted her with "visceral opposition" when she applied for a promotion, asked her to work from home, then asked her to return to work without an adequate workspace, took away her leadership position, refused to allow her to attend an award ceremony at which she was to receive an award, and kept her constantly uncertain as to her job status and whether her job would be eliminated. *Id.* The Administrative Review Board affirmed an administrative law judge's finding that this environment was sufficiently adverse to cause a "reasonable person in [the employee's] shoes" to resign. *Id.* at 11.

<sup>8</sup> See Complainant's opposition brief at 2. Complainant also notes that Respondent accepted Complainant's stress-based workers' compensation claim. *Id.* at 3.

<sup>9</sup> Curiously, Complainant's counsel also argues that keeping Complainant on temporary total disability is "psychologically damaging as [Complainant's] TTD status takes away his hope of working anywhere on the island of Kauai." Nothing requires Complainant to continue receiving temporary total disability benefits. He can

Complainant's opposition brief at 4.

This argument fails for two reasons. First, the undisputed evidence is that Respondent continues to view Complainant as being on a leave related to his workers' compensation claim, that the claim is for a disability that is temporary, and that Respondent will return Complainant to his prior job as soon as Complainant provides Respondent with a medical release. I reject the notion that Respondent's continuing to provide benefits for temporary total disability until Complainant is medically ready to return to work "amounts to 'constructive termination.'" On the contrary, this is the optimal response an employer would give an injured worker: his job is being held open for him while he is recovering from the injury and being provided benefits. Nothing about this begins to approach the standard for a constructive discharge discussed above.

Second, Complainant – through counsel – does not suggest that any medical provider will opine or any medical record will reflect an opinion that, when Complainant otherwise is ready to work, he must not return to work for Respondent because of the negative experiences he had there. That is the kind of proof that Complainant's counsel promised when I allowed Complainant to amend his complaint to allege the second adverse action of a constructive discharge. Complainant has not fulfilled that promise.

In all, Complainant offered no proof of constructive discharge. Actually, he offered no proof at all. Given Respondent's showing that it will return Complainant to his job as soon as he is medically released, Complainant's failure to present any evidence is sufficient grounds to grant summary judgment. See *Nissan, supra*, 210 F.3d at 1102-03.

As the courts have held: "Summary judgment is not a dress rehearsal or practice run; it 'is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.'" *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005); see *Anderson*, 477 U.S. at 257 (plaintiff must present evidence "even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery"); *Far Out Productions, Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001) (non-movant's affidavits were insufficient to raise a genuine issue of material fact because they were "entirely conclusory" and did "not present any specific facts to support" their claims); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 (9th Cir. 1969) (a non-movant is "under a duty to show that he can produce evidence at trial, and is not entitled to a denial of that motion upon the unsubstantiated hope that he can produce such evidence at the trial")

Even if I were to consider Complainant's counsel's suggestion of what evidence might exist in relevant medical records, nothing described as being in that evidence would show a constructive discharge.

Given this failure of evidence, the constructive discharge theory also fails as a matter of law.

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withdraw his workers' compensation claim at any time. More to the point, if his medical providers advise Complainant that he can work and he wants to apply for jobs other than working for Respondent, he need not wait for Respondent to agree.

Order

For the foregoing reasons, I conclude that Respondent has established as a matter of law that it took neither of the adverse actions that Complainant alleges in his complaint, as amended. The showing of an adverse action is a required element of Complainant's *prima facie* case. 29 C.F.R. § 24.109(b)(2). Accordingly,

Respondent's motion for summary decision is GRANTED. Complainant's claim is DENIED and DISMISSED. The hearing set for the week of August 7, 2017 is VACATED.

This order will be served on Complainant's counsel and Respondent's counsel by facsimile or email. All other service is by U.S. mail.

SO ORDERED.



Digitally signed by STEVEN BERLIN  
DN: CN=STEVEN BERLIN, OU=ADMIN  
LAW JUDGE, O=US DOL Office of  
Administrative Law Judges, L=San  
Francisco, S=CA, C=US  
Location: San Francisco CA

STEVEN B. BERLIN  
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, NW, Washington DC 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](mailto: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 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant 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.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive 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.