

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the matter of:	:	
	:	
XCEL PROTECTIVE SERVICES, INC.	:	CASE NOS. 19-CA-232786
	:	19-CA-233141
Respondent	:	19-CA-234438
	:	19-CA-234438
and	:	19-CA-237861
	:	19-CA-241689
INTERNATIONAL UNION, SECURITY, POLICE, and FIRE PROFESSIONALS OF AMERICA, LOCAL 5	:	February 8, 2021

Charging Party

**RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO CROSS-EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION FILED BY CHARGING PARTY**

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I. INTRODUCTION

Pursuant to Section 102.46(a)(2)(d) of the National Labor Relations Board's ("Board") Rules and Regulations, Xcel Protective Services, Inc. ("Xcel") submits this Answering Brief in response to the Cross-Exceptions to the Administrative Law Judge's ("ALJ") Decision ("Decision") filed by the International Union, Security, Police and Fire Professionals of America, Local 5 ("the Union") filed on February 2, 2021.

The Decision addresses the five claims lodged against Xcel in the Complaint issued on July 31, 2019. However, the Union excepted to only one of the claims: that Stephen Mullen was constructively discharged. The ALJ properly found that Mullen was not constructively discharged because the evidence did not support a finding that Xcel's actions or inactions "imposed a situation that was so difficult or unpleasant that it forced Mullen to resign, or that [Xcel] should have foreseen Mullen would have resigned because Xcel did not immediately inform him of the company's investigation into his allegations." Decision, p. 48.

The General Counsel alleges that Mullen was constructively discharged after he, along with colleagues Mark Salopek, Daniel Lein and Jacob Schryver, made a complaint to the U.S. Navy regarding weapons qualifications of their fellow security guards. To support the claim of constructive discharge, Mullen described only *two* incidents of interactions with colleagues that allegedly led him to feel compelled to resign: a text message from security guard Kevin David and an exchange with security guard Thomas Cunningham wherein Cunningham asked for an apology. David and Cunningham were merely upset by the fact that Mullen had falsely claimed that they had failed their qualification for the shotgun on May 9, 2018—a fact to which Mullen admitted.

Nevertheless, Xcel timely and effectively addressed both incidents after Mullen informed management about them. For instance, several lieutenants called David within minutes of him sending the text messages to Mullen to instruct him to stop texting Mullen, and management took

statements from Cunningham and a witness, Norman Simons, regarding the incident between Cunningham and Mullen the next business day after receiving Mullen’s complaint about Cunningham. Indeed, Mullen, at Xcel’s direction, called local law enforcement after receiving the text messages, and local law enforcement said it could do nothing about the text messages, as they posed no legitimate threat. In addition, Simons confirmed multiple times in writing that Cunningham did not in any way—either verbally or physically—threaten Mullen.

Mullen, however, resigned a mere *three days*—which included only *one* business day—after he complained to Xcel about the two incidents. The two minor incidents described by Mullen certainly do not rise to the level of creating conditions so unbearable that Mullen was compelled to resign, particularly given Xcel’s timely and significant response.

As set forth more fully below, the decision regarding Mullen’s constructive discharge should be affirmed.

II. STATEMENT OF THE CASE

A. Xcel Protective Services and Scope of Work at Indian Island

Xcel, formerly called Basic Contracting Services, Inc. (“BCSI”), is a government contractor that provides armed security services to the federal government. Tr.¹, 980. The Board of Directors is comprised of John Kubiak, Belinda Melton and Michael Filibeck, and there are contract managers for each contract that Xcel maintains. *Id.*, 981. At the time of trial, Xcel had nine contracts with the federal government.² *Id.* John Morgan was previously the Chief Executive Officer for Xcel, and he resigned from his position in September 2018, which is when Filibeck

¹ All references to the transcript for this trial will be referred to as “Tr.”

² Xcel’s three government contracts geographically closest to the Indian Island contract are the contract in Oregon for the U.S. Army Corps of Engineers, the contract in North Dakota at Cavalier Air Force Base and the contract in Texas for the U.S. Army Corps of Engineers. Tr., 981.

started working for Xcel. *Id.*, 982. Filibeck "assumed the full duties from the former CEO on or about the 12th of October." Tr., 60.

Xcel maintained the security contract at Indian Island until September 30, 2018, when it was subcontracted to another security company called Homeland Security Solutions, Inc. Tr., 983-84. Michael Terry was the contract manager for the contract at Indian Island, meaning he was the top-ranked Xcel official on-site at that location. Tr., 70, 987. Indian Island is roughly a couple of thousand acres. *Id.*, 45. There are two patrols on the Island: North patrol and South patrol. Tr., 46. The security guards were responsible for patrolling the island and protecting the assets, including munitions. Tr., 45, 81. The security guards reported to the lieutenants, who reported to Terry. Tr., 873.

Xcel's contract with the Navy included a Performance Work Statement ("PWS"), which contained several provisions outlining the scope of the work to be performed by Xcel and operational requirements. R-43. The PWS also describes the work that the security guards were required to perform pursuant to the contract: entry control point services; identification checks; commercial vehicle inspection; roving guard services perimeter patrol; interior patrol; building checks and reaction patrol. R-43³, pp. 25-29.

B. Mullen's Harassment Complaint and Resignation

On July 14, 2018, Mullen sent an e-mail to Terry, alleging that he was being harassed by his colleagues, Tom Cunningham and Kevin David, as a result of the complaint he had raised with ISO Jones on July 9, 2018. J-7 at Bates Number XCEL 1454-1455.

³ Exhibits will be referred to as follows: Joint Exhibit ("J"); General Counsel Exhibit ("GC"); and Respondent Exhibit ("R").

1. Allegations Regarding Cunningham and David

Mullen made several allegations regarding Cunningham and David in his July 9, 2018 complaint. First, he claimed that at some point Cunningham failed on the range with the M500 shotgun and subsequently qualified at a “gravel pit or other location” with Officer Schryver. R-1. Mullen also claimed that on May 9, 2018, Cunningham and David failed the qualification test for the shotgun. *Id.* These allegations turned out to be false.

Cunningham testified unequivocally that he never qualified on the rifle off base and/or at a gravel pit. Tr., 1068. Cunningham also testified that he was not even at the range on May 9, 2018, as he had previously qualified on all of the weapons at the range in January 2018. *Id.*, 1067-68; R-2, p. 21. Notably, Cunningham recalled that both Salopek and Mullen were present at the range in January 2018 when he qualified on his weapons. *Id.* Cunningham testified that he had, in fact, gone shooting with Schryver to get a “refresher course” on the shotgun because he had had some issues with it at the range. Tr., 1071. However, Cunningham testified clearly that he was not told that the shooting event off base with Schryver was a qualifying event: “I went out with him on my own time. I did not get paid. . . . We went out as a social thing.” *Id.*

David testified that when he was interviewed by Rake, Rake asked him if he was present at the range on May 9, 2018. Tr., 1044. David told Rake that he did not recall, and Rake informed him that, according to Xcel’s training records, David was not even present at the range on May 9, 2018. *Id.* Further, David testified that he qualified at the range on all weapons on February 21, 2018, as evidenced by his Small Arms Qualification Record. Tr., 1042-43; R-47.

2. Incident with Cunningham

First, Mullen pointed to an interaction with Xcel employee Tom Cunningham on July 9, 2018, wherein Cunningham allegedly went into the training room where Mullen was at the time and demanded an apology from Mullen for lying about his range qualifications. J-7 at Bates

Number XCEL 01455. Mullen further alleged that Cunningham “swept” him with the barrel of his shotgun.⁴ *Id.*

Mullen testified that he felt threatened by Cunningham during this incident: “He was standing over the top of me, . . . I had nowhere to go. There was a shotgun being pointed at me. It was very uncomfortable and very threatening.”⁵ Tr., 474. Cunningham testified that, after hearing that Mullen had falsely reported that he was not qualified to carry his weapons, he was offended. Tr., 1060. As a result, after hearing about this, when he walked into the training room and saw Mullen there, Cunningham told Mullen that he wanted an apology. Tr., 1061. Mullen told him he was not getting one, and Cunningham continued to insist that he give him an apology. Mullen again told him he would not apologize, and Cunningham turned to walk out of the room. *Id.* At that point, Mullen said to Cunningham that he should not point his weapon at Mullen. *Id.* Cunningham, however, denies that he ever pointed his weapon at Mullen. *Id.*; Tr., 1062. Cunningham testified that he simply wanted an apology from Mullen. Tr., 1061.

After receiving this e-mail, Terry took statements from Cunningham and Norm Simons, who was present for the incident in the training room. Cunningham stated that he walked into the break room and asked him for an apology for remarks he had made about his gun range qualifications because he was offended by the false allegations. R-6; Tr., 1060. He also stated that Mullen said that he was pointing his shotgun at him, and Cunningham denied pointing his shotgun at Mullen. Mr. Simons confirmed that Cunningham was asking Mullen for an apology and that Mullen said he would not give him an apology. R-5. Simons also stated that he looked

⁴ Salopek and Cunningham confirmed it is not unusual for guards to have weapons with them in the training room. Tr., 367, 1062.

⁵ Notably, despite allegedly feeling threatened, Mullen failed to report this incident to anyone immediately after it occurred, including to Terry who called Mullen into his office within minutes of the end of the incident with Cunningham. Tr., 781. Rather, while the incident with Cunningham occurred on July 9, 2018, Mullen did not report it to anyone until July 14, 2018.

up when Mullen stated, “Don’t sweep me with the shotgun,” and Simons saw Cunningham’s shotgun pointed at the floor. *Id.* Finally, Simons stated that he did not “hear, or see, any communication of a threat by either party.” *Id.*

Notably, Mullen testified that he asked Simons to write a statement regarding the incident with Cunningham and Mullen, and Simons declined to write a statement. Tr., 790. In response to Mullen’s request, Simons sent him a text message on July 10, 2018, saying,

I decided to forego the statement. After a lot of reflection. The only thing it will show is [Tom’s] temper. Which is already well known. **I did not see him laser you with the shotgun. Nor did I see or hear or see him threaten you. Verbally or posturally.** From what I have heard and seen today, tomorrow will probably resolve this one way or another, and I don't see any benefit resulting from a statement I would submit. It would not be conclusive one way or another. That's my reflect as a former Des and County Deputy. And I just took a required County On Line course last Sat "Violence in the Workplace". Sorry. Norm.

Tr., 803; R-48 (emphasis added). Notably, this text message was just between the two employees (one of whom is former law enforcement and who had just completed a workplace violence class). No supervisors were included on the message.

When first told about this incident on Saturday, July 14, 2018, Terry immediately took action on the next business day to interview Simons and Cunningham on Monday, July 16, 2018. Terry was unable to take Mullen’s statement because he was not at work on July 16, 2018, and he then resigned the following day. Tr., 922; R-32.

3. Incident with David

With respect to the other incident mentioned by Mullen in his July 14, 2018 e-mail, Mullen claims that David threatened him via text message when he said, “So I’m on your little fucking list, your a fucking idiot & don’t know what you have stepped in. Better call your butt buddy Mark. Slander with no proof dumb ass Stupid leading stupider.” GC-6. Mullen testified that he interpreted this text message as a threat. Tr., 480.

Upon receiving this text message, Mullen called the on-duty lieutenant, Lieutenant Doug Lux, and informed him that David had sent him this text message. Tr., 481-82. Lieutenant Lux called Terry, who told Lieutenant Lux that he should advise Mullen to call local law enforcement if he felt threatened by this text message, but that Xcel could not really address it, as it had not occurred in the workplace. Tr., 909. Lieutenant Lux relayed this advice to Mullen, who called local law enforcement. Tr., 482, 485. Mullen did, in fact, follow Terry's and Lieutenant Lux' advice and call local law enforcement, who told him that there was not much they could do about it. Tr., 488.

David testified that he was upset when he found out that Mullen and Salopek had falsely reported that he was not qualified on his weapons. Tr., 1037. As a result, he sent Mullen a "goofy text" and did not intend to threaten him in any way. *Id.*, 1038, 1040. Notably, David also testified that, within minutes of having sent the text to Mullen, he received a phone call from Lieutenant Lux, who told him not to send any additional text messages to Mullen. *Id.*, 1040. He then received additional phone calls from Lieutenant Vancura and Lieutenant Wilson, both telling him not to send additional text messages to Mullen. *Id.* David testified that, after sending those text messages to Mullen on July 10, 2018, he did not send him any additional text messages. Tr., 1043.

4. Xcel's Response to Incidents

Xcel took several immediate steps to address Mullen's complaints. As set forth above, at Terry's direction, Lieutenant Lux advised Mullen to call law enforcement if he felt threatened by the text messages, and Lieutenant Lux, along with two other lieutenants, immediately called David to direct him not to text Mullen anymore. In addition, Terry obtained witness statements from Cunningham and Simons regarding the incident with Mullen and Cunningham. Further, Terry also put Xcel's policy on standards of conduct in the training room and required all employees to read and sign off that they had read the policy. R-7. Thus, the record shows that Xcel immediately

and effectively addressed Mullen's complaints. Even Salopek agreed that Terry was responsive to this incident. Tr., 370-71.

Xcel did not discipline either Cunningham or David as a result of these incidents. Terry testified that, after reviewing the witness statements from Cunningham and Simons, he did not believe that Cunningham had done anything wrong. Tr., 935. With respect to David, Terry did not discipline him because the actions he took were outside of the workplace, and Terry also did not construe David's text messages as a threat, but merely as his venting his frustration with Mullen. *Id.* Notably, local law enforcement agreed that the text messages did not pose a threat, as well. Tr., 488.

On July 17, 2018, Mullen sent an e-mail to Terry, informing him that he was resigning from his position with Xcel. J-4 at Bates Number XCEL 1225. In his e-mail he stated, "I am separating my employment with Xcel protective services (BCSI) effective immediately. The reason is for work place harassment and threats. . . ." *Id.*

Mullen filed for unemployment after resigning from Xcel in July 2018. Tr., 222. He explained that his unemployment application was denied as he "didn't have a good enough reason to quit." Tr., 222-23.

C. OSHA Investigates and Dismisses Complaint Filed by Mullen

On July 11, 2018, Mullen filed a complaint with OSHA in which he claimed, as he did in his July 14, 2018 e-mail, that he was harassed by David and Cunningham after raising a complaint regarding weapons qualifications. He further alleged that he was constructively discharged based upon this conduct. R-12. OSHA conducted an investigation into Mullen's concerns and dismissed his complaint. Mullen then requested additional review, but OSHA maintained that his complaint had been dismissed. OSHA concluded on August 15, 2019 that, "the record shows that you voluntarily resigned from your employment on July 17, 2018, and the evidence does not support

the allegation of constructive discharge.” R-28.

III. PROCEDURAL HISTORY

On July 31, 2019, the General Counsel issued a Complaint against Xcel, asserting five claims. (“Complaint”)

1. The General Counsel claimed that Xcel violated § 8(a)(1) of the Act when Michael Terry allegedly asked some Xcel employees why they raised pay issues with the Union and told them that if they had any pay issues they needed to bring those issues to him. Complaint, ¶¶ 6, 10.

2. The General Counsel claimed that Xcel violated § 8(a)(1) of the Act when it allegedly constructively discharged Stephen Mullen on July 17, 2018. Complaint, ¶¶ 7(b), 7(d) and 10.

3. The General Counsel claimed that Xcel violated § 8(a)(1) of the Act when it terminated Mark Salopek. Complaint, ¶¶ 7(c), 7(d) and 10.

4. The General Counsel claimed that Xcel violated §§ 8(a)(1) and (a)(3) of the Act when General Powless announced that, because someone had complained about arm-up time, no one would be allowed to go home early in response to Daniel Lein’s complaint about pay for arm-up time. Complaint, ¶¶ 8(a), 8(b) and 11.

5. The General Counsel claimed that Xcel violated §§ 8(a)(1) and (a)(5) of the Act when it failed to furnish documents requested by the Union. Complaint, ¶¶ 9, 12.

In the Decision, the ALJ concluded that Xcel committed the following unfair labor practices:

1. Telling employees that they will no longer be allowed to go home early because someone complained about guard mount pay;

2. Discriminating against Salopek because he engaged in protected concerted activities; and

3. Failing and refusing to provide the Union with information it requested and unreasonably delaying providing the Union with the information it requested.

Decision, p. 60.

The ALJ dismissed the remaining allegations regarding the alleged constructive discharge of Mullen and Terry's comment related to raising issues directly with him. *See* Decision, pp. 50, 56, respectively.

IV. ARGUMENT

A. Xcel Did Not Violate the Act by Constructively Discharging Stephen Mullen

The Union argues that the ALJ improperly concluded that Mullen was not constructively discharged when he resigned from his employment with Xcel on July 17, 2018. This is simply not true.

1. The Union advances the incorrect legal standard for adjudicating this claim.

The Union claims incorrectly that the proper standard for adjudicating Mullen's claim of constructive discharge is the *Wright Line* test. Cross-Exceptions, p. 3. This argument misses the mark. The legal standard regarding a claim of constructive discharge is well settled:

Under the National Labor Relations Act, a traditional constructive discharge occurs when an employee quits because his employer has deliberately made the working conditions unbearable and it is proven that (1) the burden imposed on the employee caused, and was intended to cause, a change in the employee's working conditions so difficult or unpleasant that the employee is forced to resign, and (2) the burden was imposed because of the employee's union activities. *Grocers Supply Co.*, 294 NLRB 438, 439 (1989); and *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

Intercon I (Zercom), 333 NLRB 223, 226 (2001). Moreover, the Decision properly confirmed that this is the correct test. *See* Decision, p. 47.

Wright Line is not applicable here, as this is not a case of employee discipline. Indeed,

Mullen *resigned* from his employment; he was not terminated. Under these circumstances, the test set forth in *Intercon I* is the applicable test for a constructive discharge claim.

2. **Mullen was not constructively discharged under the circumstances because: (1) the conditions of his employment did not rise to the level of being unbearable or so difficult or unpleasant that he was forced to resign; and (2) prior to Mullen’s resignation, Xcel took immediate and significant steps to address the claims of harassment he raised.**

The ALJ held that Mullen reasonably viewed both incidents with Cunningham and David as threatening and that his reporting them to Xcel and asking that they be addressed before returning to work was rational. Decision, p. 48. However, the ALJ further held that he did not believe “the evidence supports a finding that Respondent’s actions/inactions imposed a situation that was so difficult or unpleasant that it forced Mullen to resign, or that Respondent should have foreseen Mullen would have resigned because Xcel did not immediately inform him of the company’s investigation into the allegations.” *Id.*

The timeline regarding the events leading to Mullen’s resignation is not in dispute:

Monday, July 9, 2018	At 10:00 a.m., Mullen sent an e-mail to ISO Jones regarding alleged issues with weapons qualifications (R-1)
Monday, July 9, 2018	At 11:33 a.m., ISO Jones sent an email to Terry asking for training records for several Xcel security guards and asking Terry to remove them from post responsibilities (R-8)
Monday, July 9, 2018	Around 1:30 p.m., Cunningham spoke to Mullen, asking for an apology in response to Mullen’s false allegations about Cunningham’s weapons qualifications.
Monday, July 9, 2018	At 1:50 p.m., Rake sent an e-mail to Terry, forwarding the e-mail from Mullen regarding alleged issues with weapons qualifications. (R-1)
Tuesday, July 10, 2018	David sent Mullen a text message, saying “So I’m on your little fucking list, you’re a fucking idiot & don’t know what you have stepped in. Better call your butt buddy Mark. Slander with no proof dumb ass. Stupid leading stupider.” (GC-6)

Tuesday, July 10, 2018	Mullen called Lieutenant Lux to report that David sent him text messages. After receiving advice from Terry, Lieutenant Lux told Mullen to call local law enforcement if he felt threatened.
Tuesday, July 10, 2018	Mullen called local law enforcement, who said there was not anything they could do.
Tuesday, July 10, 2018	Lieutenant Lux, Lieutenant Vancura and Lieutenant Wilson called David minutes after his text to Mullen to tell him not to text Mullen anymore.
Saturday, July 14, 2018	Mullen sent an e-mail to Terry describing two events involving his co-workers, Cunningham and David, speaking to him about his having lodged a complaint about their alleged falsified weapons qualifications. (J-7 – Bates Number XCEL 1454-1455)
Monday, July 16, 2018	Terry obtained statements from Cunningham and Simons. Simons was present for the event described by Mullen involving Cunningham. (R-5 and R-6)
Monday, July 16, 2018	Terry posted Workplace Guidelines from the Xcel Employee Manual regarding the expected standard of conduct and required all employees to read and sign them. Cunningham and David signed. (R-7)
Tuesday, July 17, 2018	Mullen sent an e-mail to Terry resigning from his position with Xcel. (J-4 – Bates Number XCEL 1225)

With respect to the text messages, the ALJ found that Xcel immediately addressed the situation after Mullen reported it. Decision, p. 48. Indeed, the record evidence makes clear that Xcel took immediate steps to address Mullen’s complaints. When Mullen first called Lieutenant Lux on July 10, 2018, Lieutenant Lux called Terry, who advised Lieutenant Lux to tell Mullen to call local law enforcement if he felt threatened by the text messages. Moreover, Lieutenant Lux, Lieutenant Vancura and Lieutenant Wilson all called David within minutes of his sending the text messages to tell him to cease sending them. Thus, Xcel responded quickly and thoroughly to Mullen’s complaint about the text messages. Further, as noted by the Decision, although Xcel did not inform Mullen that David was instructed to cease all contact with him, there is no evidence

that Mullen heard from David again. *Id.* Thus, the ALJ held that “where David ceased all contact with Mullen once the incident was reported to Respondent, I do not believe that a reasonable employee would have found conditions so difficult or unpleasant so as to be forced to resign.” Decision, pp. 48-49.

The evidence also shows that Xcel responded as quickly as possible to Mullen’s complaint regarding the incident with Cunningham. Mullen sent the e-mail to Terry on Saturday, July 14, 2018, despite knowing that Terry does not typically work on weekends. Tr., 783. Terry took statements from Cunningham and Simons on the next business day, Monday, July 16, 2018. On that same date, Xcel also put its standards of conduct from the Employee Handbook in the training room and required all employees to read them and sign to acknowledge they had done so.

Further belying the constructive discharge claim, it bears emphasis that Mullen did not report the incident to anyone until July 14, 2018, despite having had an opportunity to tell both Terry and Morgan about the situation with Cunningham shortly after the incident occurred, when he was called into Terry’s office on July 9, 2018, to speak with Morgan on the telephone, but chose not to say anything.⁶ Decision, p. 49. The Decision also notes that Mullen had the opportunity to tell Powless about what had occurred with Cunningham when he called Powless on July 13, 2018, to tell Powless that he was not coming into work. However, instead of informing Powless about what had occurred, he simply stated that he was not coming into work until the harassment was addressed. *Id.*

⁶ The Union claims, without any support from the record, that the Employer first became aware of the incident with Cunningham and Mullen when it occurred, because Terry and Morgan were talking over a speakerphone within earshot of the incident, with Terry “in the line of sight of the harassment.” Cross-Exceptions, p. 5. In support of this statement, the Union points to testimony from Mullen wherein Mullen stated that he could hear Terry and Morgan on a telephone call and that the room he was in was across the foyer from Terry’s office. However, notably, there is no evidence that Terry actually became aware of the incident with Cunningham as it occurred, and the Union cannot simply extrapolate that fact from Mullen’s testimony without any evidence to support it.

Moreover, as the Decision found, although Mullen was scheduled to work on July 13, 14 and 15, 2018, Xcel never demanded, or even asked, that Mullen return to work. Decision, p. 49. Then, Mullen resigned on July 17, 2018—a mere *three days*, which included only *one business day*, after he submitted his complaint to Terry. Under these circumstances, the ALJ properly held that, “I do not believe that the General Counsel has established a *prima facie* case that Terry’s inaction for 2 days before he started investigating the Cunningham incident, or his failure to inform Mullen of the investigation, created working conditions so difficult or unpleasant that Mullen was forced to resign.” Decision, p. 49. Indeed, “generally courts allow an employer sufficient time to remedy the intolerable working conditions.” Decision, p. 49, citing *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996).

Here, Mullen waited five days before reporting the incident with Cunningham, and then when he finally decided to report it, he did so on a weekend, when Terry was working from home. The ALJ held that it was not “unreasonable for [Terry] to have waited until he returned to Indian Island on July 16th to begin his investigation and post Respondent’s workplace guidelines.” Decision, p. 49. Further, as the ALJ found, while Xcel was actively investigating Mullen’s complaint against Cunningham, it was not requiring Mullen to return to work. *Id.* Therefore, the ALJ concluded that the evidence did not “[warrant] a finding that Mullen’s working conditions were so difficult or unpleasant that a reasonable employee would have been forced to resign.” *Id.*, pp. 49-50.

The Union argues unconvincingly that Terry knew that Mullen “had a particular sensitivity to workplace harassment and threats” based on the fact that Mullen allegedly told Terry *five years earlier* that another employee at a prior job had caused him to be crushed by a large metal door. Cross Exceptions, p. 7. Therefore, he claims that Terry’s and Morgan’s failure to tell Mullen that

“action had been undertaken to police harassment against Mullen” was constructive discharge. *Id.* The ALJ did not even discuss this issue—perhaps because it lacks any relevance to the constructive discharge claim. Indeed, Mullen allegedly had this experience at a prior job *seventeen years* earlier. Tr., 228. Moreover, as noted in the Decision, the test as to whether working conditions were so difficult or unpleasant so as to force an employee to resign is an objective one. Decision, p. 48, citing *Aliotta v. Bair*, 614 F.3d 556, 566 (D.C. Cir. 2010) (“The test for constructive discharge is an objective one: whether a reasonable person in the employee’s position would have felt compelled to resign under the circumstances.”). Thus, the Union’s conclusion that “[a]ny employee with Mullen’s work history of being crushed in a door by another employee would have quit his job when faced with his employer’s outward indifference to his fate in the workplace and the hands of other employees” is simply inapposite. Cross-Exceptions, pp. 7-8.

There is no dispute here that Xcel took timely and significant steps to address Mullen’s complaints of harassment by both Cunningham and David. Xcel addressed both complaints swiftly and appropriately. Moreover, while Xcel investigated the concerns, Mullen was permitted to stay out of work. Finally, Mullen resigned *one business day* after e-mailing Terry to inform him about the incident with Cunningham. Clearly he did not give Xcel sufficient time to remedy any alleged workplace harassment. For these reasons, the ALJ’s conclusion that Mullen was not constructively discharged should be affirmed.

V. CONCLUSION

For the reasons set forth fully above, Xcel requests that the Board affirm the ALJ’s decision regarding the fact that Mullen was not constructively discharged and overrule the Union’s exceptions related to the same.

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CERTIFICATION

This is to certify that a copy of the foregoing document has been delivered, via e-mail, on this 8th day of February 2021, via e-mail to all counsel and *pro se* parties of record as follows:

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