



**In the Matter of:**

**EARLE DIXON,**

**ARB CASE NOS. 06-147  
06-160**

**COMPLAINANT,**

**ALJ CASE NO. 2005-SDW-008**

**v.**

**DATE: August 28, 2008**

**UNITED STATES DEPARTMENT  
OF INTERIOR, BUREAU OF LAND  
MANAGEMENT,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Mick G. Harrison, Esq., *The Caldwell Environmental Center*, Bloomington,  
Indiana and Richard E. Condit, Esq., *Public Employees for Environmental  
Responsibility*, Washington, District of Columbia**

*For the Respondent:*

**Kevin D. Mack, Esq., Assistant Regional Solicitor, *United States Department of  
the Interior*, Sacramento, California**

**FINAL DECISION AND ORDER**

Earle Dixon filed a complaint alleging that the United States Department of the Interior's Bureau of Land Management (BLM) fired him because he engaged in activity protected under the whistleblower provisions of the environmental statutes,<sup>1</sup> as implemented by the regulations at 29 C.F.R. Part 24 (2006). A United States Department of Labor Administrative Law Judge (ALJ) concluded in a Recommended Decision and Order (R. D. & O.) that BLM fired Dixon because he engaged in whistleblowing activities. Noting that Dixon's complaint arose under the Safe Drinking Water Act (SDWA),<sup>2</sup> the ALJ awarded Dixon a year's salary and benefits and compensatory damages of \$10,000.00. BLM and Dixon timely appealed to the Administrative Review Board (ARB or Board). We affirm both the ALJ's conclusion that BLM fired Dixon for his whistleblowing activities and his award of damages.

### BACKGROUND

The ALJ reviewed the Complainant's and Respondent's arguments, R. D. & O. at 2-9, and then summarized the testimony of the witnesses, R. D. & O. at 9-17. We recite the facts relevant to our disposition of this case.

Dixon was an environmental protection specialist for BLM at its Carson City, Nevada field office. He began work on October 19, 2003, as a two-year term employee, on probation for the first year. His main task was managing the clean-up of the Yerlington copper mining site in Nevada. Hearing Transcript (TR) at 46-47. The mine covered about 3,500 acres, half of it privately owned and the rest federal land. TR at 50-51. Operations were abandoned in 1999, leaving behind significant contamination from the processes used in extraction.

In 2000, the Environmental Protection Agency (EPA) determined that the mine qualified as a superfund site<sup>3</sup> under the Comprehensive Environmental Response,

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<sup>1</sup> They are: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 2005); the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6971 (West 2003) (now known as the Solid Waste Disposal Act (SWDA)); the Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367 (West 2001); the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9(i) (West 2006); and the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003), as well as the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003).

<sup>2</sup> We conclude that the CERCLA's whistleblower provisions also apply. See discussion, *infra*.

<sup>3</sup> "Superfund" is the colloquial name of the CERCLA program that, through technical

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Compensation, and Liability Act (CERCLA). 42 U.S.C.A. § 9610. Nevada did not agree that the site should be part of CERCLA's national priorities list. Instead, Nevada's Department of Environmental Protection (NDEP) developed a memorandum of understanding (MOU) with EPA and BLM in 2002 that permitted the state to take the lead in developing a work plan to clean up the site in a manner "not inconsistent with CERCLA." TR at 51-53, 64. The three agencies were to coordinate their authority and responsibilities "in undertaking investigations and response actions at the site." *Id.* The MOU specified that community involvement was key; thus, county officials, representatives of two Indian tribes, the United States Fish and Wildlife Service, and all other stakeholders would be informed of, and be able to comment on, the clean-up plans. *Id.*

Working out of the Carson City field office, Dixon was BLM's point person for the partnership's efforts to determine the nature, extent, and magnitude of the contaminated site and to develop a comprehensive work plan for clean-up. TR at 46-47. His primary duties were to review work plans, manage the investigations and clean-up efforts on BLM's behalf, and act as liaison to NDEP, EPA, other stakeholders, and concerned citizens. TR at 141-42.

Even before Dixon began work, all was not smooth sailing among the agencies and stakeholders. First, political disagreement over whether the site should be listed under CERCLA section 106 continued unabated. Second, frustration festered among the stakeholders over the lack of progress and delays in cleaning up the site. Third, the technical information about the extent of the contamination of the site caused dissension among all the interested parties, including the Atlantic Richfield Company (ARCO), which was responsible for repaying part of the costs of the clean-up. Fourth, BLM and NDEP were at loggerheads over strategy, progress, and mutual cooperation. Complainant's Exhibits (CX) 3-4.

One of Dixon's primary duties was to secure agreement among the partners on a process area work plan, called a PAWP, which would outline procedures for cleaning up the contaminated parts of the site where copper ore was processed, while protecting the safety of the workers and the surrounding community. Dixon was the technical reviewer of the dozen or so draft plans ARCO and NDEP submitted and found them "deficient in meeting the requirements for CERCLA" and unable to support the strategy for cost recovery. TR at 88-90. Dixon testified that by the time the three agencies agreed on a PAWP, there were about 1,000 soil samples and 67 groundwater samples, compared to the 230 soil and three groundwater samples that ARCO's original plan proposed. TR at 90-91.

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assistance and funding grants, helps the states to identify and clean up hazardous and toxic waste disposal sites. 42 U.S.C.A. § 9611.

In January 2004, Dixon reported to his managers that NDEP's plan to cover the evaporation ponds on the site to prevent contaminated dust from blowing off-site was inadequate. TR at 68-70. The next month Dixon drafted a memorandum outlining the problems and told his managers about his concerns with the PAWP overall. TR at 74-76.

In March 2004, Dixon used his personal Geiger counter to measure radiation levels at the site and prepared a report indicating that uranium had leaked into the groundwater system, which could affect residential areas. TR at 68-71. Dixon continued to object to the substance of the PAWP, noting that maps of the proposed radiation sampling sites were inadequate and that the worker safety plan did not address radioactive hazards. TR at 72. Dixon advocated for more complete analyses of the groundwater sample to comply with SDWA. TR at 83-86.

Prior to a public meeting in March 2004, Dixon told the three agencies that the elevated levels of uranium in the site groundwater were not naturally occurring but rather had been technologically enhanced by the copper extraction process. TR at 91-95. However, ARCO disagreed with Dixon's assessment and NDEP edited his talk for the public presentation to the stakeholders. TR at 92, 95. Dixon told his immediate supervisor, Charles Pope, that NDEP and ARCO's contractors were not paying attention to BLM's concerns about the clean-up. TR at 101-04.

In a conference call at the end of March 2004, Dixon complained that BLM's state office was not providing adequate support or direction and that he was "never really empowered to be the project manager." TR at 116. Dixon's comments about the difficulty of resolving complex technical, regulatory, and political concerns and his harsh criticism of the efforts of the MOU agencies in handling the site clean-up apparently upset BLM State Director Robert Abbey. TR at 117.

At a meeting in June 2004, Abbey took Dixon to task for making statements at meetings and in e-mails accusing NDEP of a conspiracy and cover up in its management of the clean-up efforts. TR at 118. Abbey wanted to fire Dixon, but the Carson City manager, Don Hicks, intervened and asked for time to counsel Dixon and enroll him in communications skills training. Abbey agreed, and Dixon took training in how to communicate with tact and finesse. TR at 119.

In June 2004, Dixon hired a subcontractor to screen the mine site for potential radioactivity so that BLM could develop a health and safety plan as part of the PAWP. TR at 80-81. Dixon further criticized BLM's efforts at a public meeting in July and suggested an aerial radiological survey to evaluate levels of contamination at the site.

In August 2004, Dixon contacted the laboratory that was analyzing groundwater samples from the site and asked it to conduct more comprehensive testing for radioactivity. The lab, which was under contract to ARCO, agreed but an ARCO manager had notified NDEP, which was upset with Dixon's meddling. TR at 85-87.

On August 24, 2004, Dixon attended a public meeting to present BLM's health and safety data on the radiological analysis at the mine site and was confronted by a county commissioner who read a letter from a consultant, Foxfire, stating that there was no significant hazard at the mine site. TR at 122-24. Dixon explained that neither BLM nor EPA supported the Foxfire report's conclusion, but NDEP disagreed. TR at 120-23. Two days later, Dixon met with his working group and informed ARCO that it needed to add more detailed radioactivity sampling to its September testing.

Dixon also played a role in securing money from CERCLA's Central Hazmat Fund (CHF) to conduct a remedial investigation and feasibility study on the evaporation ponds in the BLM part of the site. TR at 99, 111-12. At a meeting in August 2004, a BLM manager stressed the need to comply with CERCLA regulations in using the nearly \$500,000 BLM received for fiscal 2004. TR at 101, 112. BLM also got funds for fiscal 2005. TR at 114.

At some point, Dixon became concerned that 18 tanker loads of contaminated liquids that NDEP had removed from the site might contain low levels of radiation. Dixon was unable to verify that a state contractor had properly disposed of the materials. TR at 114-15. Dixon sent an e-mail to BLM managers stating that surface soil at the site contained significant radium and suggesting that the data be released to the public as soon as possible. TR at 117-20.

On September 9, 2004, Pope certified that Dixon's performance, conduct, and general traits of character had been satisfactory. Pope recommended that Dixon be retained beyond his probationary period. CX 25.

On September 20, 2004, Dixon drafted a letter to ARCO informing the company of the radioactive contamination at the site, the need for more sampling, and its liability for the health and safety of the site workers under CERCLA. CX 20. Abbey received a copy of this letter.

On October 1, 2004, one of the county commissioners complained to Abbey that Dixon was trying to have the site listed under CERCLA and had helped to obtain money from its CHF on an emergency basis to implement CERCLA procedures at the site, including a remedial investigation and feasibility study of the extent of the contamination and clean-up options in line with 40 C.F.R. § 300.430. TR at 111-14, 504-07, 512-15. The county commissioners were concerned about Dixon's "continued association with project management at the site." TR at 627-28.

On October 4, 2004, Hicks drafted a memorandum at Abbey's direction, which concluded:

At this point in time I cannot be reasonably assured of enough change on Mr. Dixon's part to continue his position as environmental protection specialist charged with project

management of the Yerington site and request that he be removed from his position for the above reasons.

CX 23 at 67-68. Hicks explained that he would not have removed Dixon as project manager, but that Abbey was his boss and he therefore supported his decision. *Id.* at 64, 69. Hicks added that he would have moved Dixon to another position within the organization. *Id.* at 71. Further, Hicks declined to sign the termination letter to Dixon, so Abbey signed it. *Id.* at 73-78. BLM terminated Dixon's employment on October 5, 2006. TR at 45, 298-24.

Dixon filed a complaint with DOL's Occupational Safety and Health Administration (OSHA) on November 3, 2006, alleging that BLM had fired him for attempting to enforce regulatory standards in managing the Yerington site clean-up. After an investigation, OSHA dismissed Dixon's complaint, and he requested a hearing before an ALJ. After a three-day hearing, the ALJ found that BLM had terminated Dixon's employment because of his whistleblowing activities, ordered BLM to pay Dixon salary and benefits through October 18, 2005, and awarded Dixon \$10,000.00 in compensatory damages. R. D. & O. at 20. Dixon appealed the damages award, and BLM appealed the ALJ's finding of retaliation.

#### JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's recommended decisions pursuant to 29 C.F.R. § 24.8 and Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.1(a), including, inter alia, the environmental whistleblower protection provisions).

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 findings of fact and conclusions of law.<sup>4</sup> See 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-72 (11th Cir. 1997);

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<sup>4</sup> The Department of Labor has amended these regulations since Dixon filed his complaint. 72 Fed. Reg. 44,956 (Aug. 10, 2007). The amended regulations provide for substantial evidence review of the ALJ's factual findings. 29 C.F.R. § 24.110(b) (2007). We have applied the regulations in effect when Dixon filed his complaint. *Redweik v. Shell Explor. & Prod. Co.*, ARB No. 05-052, ALJ No. 2004-SWD-002, slip op. at 7 (ARB Dec. 21, 2007). Even if the amended regulations were applied to this case, they would not change the outcome. See discussion, *infra*.

*Devers v. Kaiser-Hill*, ARB No. 03-113, ALJ No. 2001-SWD-003, slip op. at 4 (ARB Mar. 31, 2005).

## DISCUSSION

As noted, Dixon filed his complaint under all six environmental statutes and the ERA. *See* n. 1. Initially, the ALJ stated that the complaint arose under SDWA. R. D. & O. at 1. We have jurisdiction over Dixon's complaint to the extent it alleges violations of CAA, SDWA, SWDA, and CERCLA. *See Erickson v. United States Env'tl. Prot. Agency*, ARB Nos. 03-002, -003, -004, -064; ALJ Nos. 1999-CAA-002, 2001-CAA-008, -013, 2002-CAA-003, -018, slip op. at 12-13 (ARB May 31, 2006) (holding that the Department of Justice has determined that the federal government has waived sovereign immunity under these statutes). Inasmuch as Dixon's concerns focused on possibly contaminated groundwater at the Yerlington site and hazardous waste clean-up, we will analyze his complaint under SDWA and CERCLA.<sup>5</sup>

### The legal standards

The employee protection (whistleblower) provisions of the environmental acts generally prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment, i.e., taking adverse action, because the employee has notified the employer of an alleged violation of the acts, has commenced any proceeding under the acts, has testified in any such proceeding or has assisted or participated in any such proceeding.<sup>6</sup>

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<sup>5</sup> In its post-hearing brief, BLM stipulated to the waiver of sovereign immunity under CERCLA and SDWA, among others. Agency Post-Hearing Brief at 1-2. The ALJ did not analyze the complaint under CERCLA.

<sup>6</sup> SDWA provides in pertinent part:

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has –

(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,

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To prevail on a complaint of unlawful discrimination under the environmental whistleblower protection provisions, a complainant must establish that he or she engaged in protected activity of which the respondent was aware; he or she suffered adverse employment action; and the protected activity was the reason for the adverse action, *i.e.*, that a nexus existed between the protected activity and the adverse action. *See Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 16-17 (ARB Feb. 28, 2003).

A mixed or dual motive analysis is appropriate when an adverse action is motivated in part by lawful reasons, and also in part by unlawful reasons. *Mt. Healthy City Sch. Dist. Bd. of Educa. v. Doyle*, 429 U.S. 274, 287 (1977). If a complainant meets his or her burden of proving that the adverse action was motivated in part by unlawful reasons, the respondent may avoid liability by demonstrating by a preponderance of the evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989); *Seetharaman v. Stone & Webster, Inc.*, ARB No. 06-024, ALJ No. 2003-CAA-004, slip op. at 5 (ARB Aug. 31, 2007). The respondent's burden is thus an affirmative defense and arises only if the complainant has proven that the respondent took adverse action in part because of the complainant's protected activity. *Id.* However, the employer bears the risk that "the influence of legal and illegal motives cannot be separated." *Mackowiak v. Univ. Nuclear Sys.*, 735 F.2d 1129, 1164 (9th Cir. 1984).

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(B) testified or is about to testify in any such proceeding, or

(C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

42 U.S.C.A. § 300j-9(i)(1).

CERCLA provides in pertinent part:

No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

42 U.S.C.A. § 9610(a).



The ALJ was correct to apply a dual motive analysis to this case. R. D. & O. at 19.

### **Protected activity, knowledge, and adverse action**

We first review whether Dixon established protected activity, employer knowledge, and adverse action.

SDWA's whistleblower provision protects employees who "commence," "testify," "assist," or "participate" in a "proceeding" or administer or enforce requirements of the act or carry out its purposes. 42 U.S.C.A. §300j-9(i)(1). Likewise, CERCLA's whistleblower provision protects employees who "provide information" to a state or the Federal Government, or "file," "institute," or "testify" at a "proceeding" resulting from administration or enforcement of the chapter. 42 U.S.C.A. § 9610(a). The ARB has interpreted "proceeding" to include internal or external employee complaints that may precipitate a proceeding. See *Erickson v. U.S. Envtl. Prot. Agency*, ARB Nos. 04-024, 04-025, ALJ Nos. 2003-CAA-011, -019; 2004-CAA-001, slip op. at 7 (ARB Oct. 31, 2006) and cases cited therein.

An employee engages in protected activity if he provides information "grounded in conditions constituting reasonably perceived violations" of the environmental acts at issue. *Id.* The employee need not prove that the hazards he perceived actually violated the environmental acts, or that his assessment of the hazard was correct. *Id.* at 8. On the other hand, a complaint that expresses only a vague notion that the employer's conduct might negatively affect the environment or that is based on "numerous assumptions and speculation" is not protected. *Id.*

Measured against this yardstick, we review the evidence that Dixon engaged in protected activity. The ALJ found that "[i]n essence, [BLM] does acknowledge that Dixon engaged in protected activity as [BLM] has stated that Dixon expressed internal and external concerns relative to state and federal assessments of the severity of contamination at the Yerlington mine." R. D. & O. at 17.

However, BLM disputes that any of Dixon's concerns constituted protected activity. Respondent's Brief (RB) at 2-17. BLM argues that the ALJ failed to analyze whether Dixon's activities were actionable under CERCLA and the related statutes. *Id.* at 18-22. BLM did not "concede that Dixon's various off-hand comments, criticisms, or disagreements with strategy should be regarded as protected disclosures under CERCLA," and his "inexperienced, random thoughts and commentary should not be afforded unique protection" under the environmental statutes. *Id.* at 22.

The evidence shows that in carrying out his job duties, Dixon engaged in protected activity under SDWA and CERCLA. He "assisted" or "participated" in actions to carry out the purposes of SDWA. He "provided information" or initiated or tried to initiate a "proceeding" concerning the administration or enforcement of CERCLA's

provisions. The MOU had a sufficient degree of formality to be considered a “proceeding” under both acts.

Specifically, Dixon insisted in November 2003 that domestic wells north of the mine site needed to be screened for radioactivity according to the federal drinking water standards. Dixon told his supervisors that the system monitoring groundwater at the site was inadequate, and that about 30 private wells near the mine site were contaminated with elevated levels of uranium. Later, Dixon informed BLM management that NDEP’s plan to cover the evaporation ponds at the site with on-site material did not comply with CERCLA regulations. When NDEP refused to monitor air quality at the site to determine whether hazardous dust contained elevated levels of metals and radionuclides, Dixon told BLM managers not to approve the proposed work plan.

In February 2004, Dixon told his supervisors that NDEP was trying to shortcut the MOU process and implement remedial actions at the mine site that did not comply with CERCLA. He then conducted a limited radiological survey of the site and reported elevated radioactivity readings. In March 2004, Dixon informed OSHA of the situation at the mine site and the potential hazards to workers. Later that month, Dixon prepared a report for a public meeting on the clean-up progress, but his remarks about possible radioactive contamination of domestic wells from the site were stricken. Dixon informed Pope that NDEP and ARCO’s contractors were ignoring BLM’s concerns.

In April 2004, Dixon drafted a letter to OSHA asking for a review of the documents and requirements for worker health and safety at the site. The letter went to Robert Kelso, BLM’s state hazardous materials director, but he never responded, and Dixon later told Pope that the letter was not sent. Subsequently, Dixon told a contractor how frustrating it was to work with NDEP, which, it seemed, was trying to cover up the problems and conditions at the site. Dixon’s remarks were reported to State Director Abbey, who stated at a meeting in June that he wanted Dixon fired. In response, Dixon pointed out another CERCLA compliance problem in that the state assistant director had not developed a roster of those permitted access to the site.

Other examples of Dixon’s protected activity include: (1) Dixon informed Pope of the hazards and the need for workers to wear respirators after a BLM contractor found elevated levels of alpha radioactivity at the site and (2) Dixon presented the radioactivity data at a public meeting in August 2004 and informed those present that, despite a conflicting analysis from a consultant (the Foxfire report), the data he had collected were scientifically correct.

Based on this evidence, we conclude that Dixon established by a preponderance of the evidence that he engaged in protected activity under SDWA and CERCLA. Further, BLM managers and supervisors were well aware of Dixon’s activities because he reported to them regularly. TR at 305-12; CX 5 at 7-9; CX 6 at 173-178; CX 23 at 93-96. Finally, BLM does not dispute that Dixon’s discharge was an adverse action. Therefore, the issue to be resolved becomes the causal relationship between Dixon’s protected activity and his discharge.

## Causation

As we have said, under the dual motive analysis, Dixon must prove by a preponderance of the evidence that BLM fired him at least in part because of his protected activities. If that burden is satisfied, BLM may avoid liability by proving by a preponderance of the evidence that it would have fired Dixon at the time it did in the absence of his protected activity. *Price Waterhouse*, 490 U.S. at 228; *Mt. Healthy*, 429 U.S. at 287; *Seetharaman*, slip op. at 5. BLM bears the risk that its legitimate, non-discriminatory reasons for firing Dixon cannot be separated from his protected activities. *Mackowiak*. Citing dual motive case law and discussing the evidence on causation, the ALJ “conclude[d] that Dixon was dismissed as his whistleblowing activities – seeking strict enforcement of environmental laws – was [sic] creating political chaos in the State.” R. D. & O. at 19.

On appeal, Dixon’s brief summarizes the evidence establishing that his protected activity was a factor in his termination.<sup>7</sup> Complainant’s Brief (CB) at 13-27. Dixon argues that the October 4, 2004 memo Hicks drafted at Abbey’s direction is direct evidence of retaliation. The memo requesting Dixon’s removal as project manager reflects the hostile reactions to Dixon’s planned initiation of a CERCLA proceeding and other protected activity from those politically involved in the Yerlington site. *Id.* at 13-14. Dixon also relies on Abbey’s testimony that Dixon’s public statements about the radioactive hazards at the site were one of the bases for terminating his employment. *Id.* at 15-16. In addition, Dixon argues that Abbey fired him because Dixon criticized BLM’s clean-up efforts in meetings with the MOU partners and such criticism could jeopardize BLM’s ability to obtain money from the CHF. *Id.* at 17.

As further evidence of retaliation, Dixon notes the irregularity of the procedure in terminating Dixon’s employment. *Id.* at 18. Abbey’s decision was made despite Hicks’ refusal to sign the termination letter, without consulting with Dixon’s immediate supervisor, Pope, and without regard to Pope’s certification that Dixon’s performance during his probationary period was satisfactory and he should be retained. Hicks would have moved Dixon to another position rather than removed him. *Id.* at 19.

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<sup>7</sup> In his Petition for Review, Dixon stated that the ALJ erred in concluding that this was a dual motive case because he should have found that BLM’s reasons for Dixon’s discharge were “pure pretext.” Petition for Review at 2. Given our conclusion that BLM did not meet its burden of proof to show by a preponderance of the evidence that it would have fired Dixon absent his protected activity, we need not address Dixon’s argument.

Dixon's brief also emphasizes the close proximity in time between October 1, 2004, the date the county commissioners complained to Abbey that Dixon was trying to have the site listed under CERCLA and had helped to obtain money from its CHF, and October 4, 2004, the date Abbey decided to fire him. *Id.* at 20. Dixon notes that a county commissioner and ARCO were hostile to his protected activities. *Id.* at 21.

And, finally, Dixon points to evidence of pretext: before OSHA, BLM claimed that it removed Dixon for making unprofessional statements to the press, but that reason was not in his termination notice. *Id.* at 23. BLM submitted to OSHA a collection of constituent complaints that it said Abbey relied on in making his October 2004 discharge decision, but none of those complaints post-dated June 3, 2004, when Hicks intervened and enrolled Dixon in communications skills training. Moreover, difficulties among Yerlington MOU partners continued after Dixon left. *Id.* at 24. BLM argued that there would be no need for Dixon if it closed its Carson City field office, but the reason it closed the office was to abolish his position. *Id.* at 25.

We agree, after reviewing the record, that the evidence is sufficient to meet Dixon's burden of proof to establish that his discharge was motivated in part by his protected activities. The October 4, 2004 memo indicates that Dixon was fired because county commissioners and a congressman were concerned with his "continued association with project management at the site." TR at 626-28; CX 6 at 51-76. Abbey stated that two county commissioners complained at a meeting on October 1, 2004, about Dixon's agenda to use CERCLA procedures in cleaning up the mine site and voiced their opposition to Yerlington being listed as a superfund site. CX 6 at 54. Abbey testified that NDEP had expressed concerns to him about Dixon's statements regarding the need for more testing at the site being released to the public before being presented to NDEP and EPA. TR at 347-51, 53. And Abbey told the OSHA investigator that the transfer of the Yerlington project management to the state office at Reno was implemented because he "wanted to remove Mr. Dixon from the project manager position" and Dixon "*became* the issue rather than the need to clean up the mine site being the issue." CX 8 at 6.

While this evidence reflects Abbey's dissatisfaction with the manner in which Dixon did his job, it also establishes BLM's retaliatory motive in firing Dixon because he (1) raised concerns that the contamination at the Yerlington site was much greater than previously documented; (2) insisted that the work plans submitted by the partners and ARCO comply with CERCLA; and (3) refused to back down from his conclusions about worker health and safety at the site. The October 5, 2004 termination letter states that Dixon was fired for "failure to maintain professional relationships" with the concerned parties involved in the cleanup of the mine site, yet, as the ALJ found, none of Dixon's supervisors had any complaints about his relationships with the MOU partners after the June meeting with Abbey and Dixon's subsequent training. R. D. & O. at 18. Indeed, Dixon's supervisors had instructed him to develop a technical scope of work to be funded from fiscal 2004 and 2005 hazmat money and on September 9, 2004, Pope had recommended that Dixon be retained beyond his probationary year.

While temporal proximity does not establish retaliatory intent, it is “evidence for the trier of fact to weigh in deciding the ultimate question whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.” *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-034, -036, slip op. at 6 (ARB Mar. 30, 2001). In further support of a causal nexus between Dixon’s protected activity and his firing is the temporal proximity of Dixon’s firing (October 5, 2004) to (1) his criticism of the Foxfire report and refusal to accept its findings at a public meeting (August 25, 2004) and (2) the complaints of the county commissioners about Dixon (October 1, 2004). Just a few hours before Abbey directed Hicks to draft a rationale for firing Dixon, the county commissioners told Abbey that they were unhappy with Dixon’s efforts to implement CERCLA at the site and wanted him removed as project manager.

Based on the above evidence and the temporal proximity of Dixon’s firing to his protected activities, we conclude that Dixon has established by a preponderance of the evidence that BLM fired him, at least in part, because he engaged in protected activities. Therefore, we affirm the ALJ on the issue of BLM’s liability. R. D. & O. at 20. But, as we have said, BLM may nonetheless avoid liability by raising an affirmative defense under the dual, or mixed, motive doctrine.

On appeal, BLM takes issue with the R. D. & O.’s summary of witness testimony and minimizes Dixon’s protected activity. Respondent’s Brief (RB) at 2-22. BLM’s preoccupation is with Dixon’s judgment about how the clean-up should be managed, specifically whether to proceed under CERCLA. *Id.* Yet the law does not require that Dixon’s assessment of the hazard be correct, only that his perceptions be reasonable. *Erickson*, slip op. at 8.

BLM goes on to argue that it established legitimate reasons for firing Dixon with “clear and convincing evidence.” *Id.* at 22-26. But that portion of its brief focuses on the political disagreement over whether the site should be listed under CERCLA, frustration among stakeholders over lack of progress and delays in clean-up, and dissension over technical information about the extent of contamination. *Id.* While that discussion may provide an accurate description of the situation as it existed in October 2004, it does not identify reasons wholly separate from Dixon’s protected activity for ending his employment.

On our review of the record, we conclude that BLM’s evidence is insufficient to meet its burden. For example, Abbey testified that moving management of the Yerlington clean-up to the state office would eliminate Dixon’s position, and there was no other funding to keep him employed. TR at 463-64. Abbey also stated that he wanted to remove Dixon because of the lack of overall progress in cleaning up the site and his statements made during conference calls and meetings that criticized the MOU partners’ efforts to develop an acceptable work plan and impugned their motivations. TR at 447-54.

While Abbey was personally displeased with Dixon's methods of managing the site clean-up and wanted to fire him in June, Dixon's protected activities in insisting on CERCLA compliance and publicizing the site's contamination hazards to groundwater are inextricably intertwined with the political tensions inherent in three governmental entities attempting to reach consensus on a clean-up program. *Mackowiak*. Dixon's supposed deficiencies in professional relationships arose in the context of his protected activities. BLM has failed to show that Dixon was fired for poor performance or other reasons independent of his protected activity during his probationary year. Therefore, we hold that BLM did not prove that it would have fired Dixon in October 2004, even if he had not engaged in protected activity.

## Remedies

If the whistleblower establishes retaliation, SDWA and CERCLA provide for remedies.<sup>8</sup> Dixon appealed the ALJ's failure to order him reinstated or award front pay;

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<sup>8</sup> SDWA provides in pertinent part:

(ii) If in response to a complaint filed under subparagraph (A) the Secretary determines that a violation of paragraph (1) has occurred, the Secretary shall order (I) the person who committed such violation to take affirmative action to abate the violation, (II) such person to reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, (III) compensatory damages, and (IV) where appropriate, exemplary damages. If such an order is issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

42 U.S.C.A. § 300j-9(i)(2)(B)(ii).

CERCLA provides in pertinent part:

Whenever an order is issued under this section to abate such violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) determined by the Secretary of Labor to have been reasonably incurred by the applicant for, or in

Continued . . .

he also contested the amount of compensatory damages awarded, and the ALJ's failure to award exemplary damages. Complainant's Reply Brief (CRB) at 27.<sup>9</sup>

The ALJ found that reinstatement was no longer an issue because Dixon's appointment was for two years, with a possible extension to four years. R. D. & O. at 20. Dixon was fired at the end of his probationary year, and the ALJ ordered BLM to pay Dixon's salary and benefits through October 18, 2005, the end of his term appointment. *Id.* The ALJ noted that Dixon obtained some type of employment when he moved to North Carolina, but the details of his earnings were not in the record. *Id.* The ALJ found it "equitable" to grant \$10,000.00 to cover Dixon's relocation costs, but found that exemplary damages were not indicated. *Id.* Finally, the ALJ added that he was "reluctant" to assess a penalty against a federal agency that taxpayers would pay. *Id.*

Dixon argues that he should have been reinstated long enough for so that BLM could have made the decision regarding Dixon's continued employment that it would have been required to make absent its retaliatory discharge. *Id.* at 29.

Reinstatement is a "make-whole" remedy intended to return the complainant to the position that he would have occupied but for the unlawful discrimination. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, slip op. at 7 (ARB Feb. 9, 2001). Although reinstatement is the statutory remedy, the ARB has held that in certain circumstances reinstatement may be impossible or impractical and alternative remedies may be necessary. *Assistant Sec'y & Bryant v. Bearden Trucking Co.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 8 (ARB June 30, 2005).

Project management of the Yerlington site was transferred to BLM's state office in October 2004, and in early 2005, EPA took over clean-up efforts. Therefore, Dixon's job no longer exists and reinstatement is not possible. *See Doyle v. Hydro Nuclear Servs., Inc.*, ARB Nos. 99-041, -042, 00-012; ALJ No. 1989-ERA-022, slip op. at 7-8 (ARB Sept. 6, 1996), *rev'd on other grounds sub nom. Doyle v. United States Sec'y of*

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connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

42 U.S.C.A. § 9610(c).

<sup>9</sup> Dixon filed a timely Petition for Review on September 15, 2006, but never received the ARB's briefing order issued on October 6, 2006. The ARB issued a Show Cause Order on December 29, 2006. Dixon explained that a mix-up in mailing addresses had caused the delay and asked that the ARB consider his reply brief in ARB No. 06-147 as his initial brief in ARB No. 06-160. The ARB agreed by Order dated January 30, 2007.

*Labor*, 285 F.2d 243, 251 (3d Cir. 2002) (reinstatement was impractical because the company no longer engaged workers in the job classification complainant occupied, and had no positions for which the complainant qualified).

Where reinstatement is not possible, front pay is appropriate. *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 1997-CAA-002, -009, slip op. at 27 (ARB Feb. 29, 2000). Front pay may only be awarded for as long as the employee could have expected to hold the job. *Schick v. Illinois Dept. of Human Servs.*, 307 F.3d 605, 614 (7th Cir. 2002).

Dixon's term appointment ended on October 18, 2005. The ALJ ordered BLM to pay benefits and salary through that date. In view of the lack of evidence in the record regarding Dixon's earnings after his discharge, we conclude that the ALJ's order for BLM to pay Dixon salary and benefits from the date of his firing until the end of his appointment constitutes an appropriate award. While Dixon's appointment might have been extended for another two years, front pay beyond the ALJ's award would be purely speculative. *Hobby*, slip op. at 18.

Dixon also argues that the ALJ erred in not awarding damages for Dixon's emotional distress. CRB at 28. Emotional distress is not presumed; it must be proven. *Moder v. Village of Jackson, Wis.*, ARB Nos. 01-095, 02-039; ALJ No. 2000-WPC-005, slip op. at 10 (ARB June 30, 2003). To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Gutierrez v. Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 10 (ARB Nov. 13, 2002).

The only evidence in the record supporting emotional distress is Dixon's response to the following:

Q. How would you describe the impact on your life, your personal life, your emotional state from having been removed in the fashion that you've described?

A. Well, it's been devastating financially. Emotionally it created a hardship that eventually helped lead to my divorce. It's created a lot of emotional distress on my mom. It's just been a hard thing to - - a burden.

TR at 134. Dixon's terse statement does not support an award for emotional distress.

Further, Dixon argues that the ALJ erred in limiting the compensatory damages award to \$10,000.00 because he was "reluctant" to burden the taxpayers with a greater amount. Dixon contends that the ALJ had no basis in law for exempting the government from damages liability since sovereign immunity had been waived. CRB at 28-29.



Dixon testified that he had to sell his house in Carson City, Nevada, and then relocated to Cherokee, North Carolina, for employment - he is Cherokee. He estimated his financial losses at over \$200,000.00, including the loss of back pay, attorney's fees and expenses, borrowing money, and "all these costs." TR at 135.

The ALJ permitted Dixon's counsel to file for attorney's fees. Dixon earned about \$58,000.00 plus benefits annually. TR at 132-33. The ALJ awarded \$10,000.00 for relocation expenses. There is no other evidence of monetary damages in the record beyond Dixon's brief statement. Thus, nothing supports a higher compensatory award. We conclude that the \$10,000.00 award for a cross-country move is reasonable and within the ALJ's discretion.

Finally, Dixon seeks exemplary damages of \$1,000,000.00, arguing that BLM's blatant disregard of his rights and the danger to the environment support such an award. CRB at 29-30.

SDWA permits an award of exemplary (i.e., punitive) damages, 42 U.S.C.A. § 300j-9(i)(2)(B)(ii), but punitive damages are not awardable against the federal government. *Cf. Baker v. Runyon*, 114 F.3d 668, (7th Cir. 1997)(award of punitive damages against the United States Postal Service reversed because under 42 U.S.C.A. § 1981a(b)(1), it is an exempted governmental entity); *see also Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981)(holding that a municipality is immune from punitive damages under 42 U.S.C.A. § 1983); *Mitchell v. Chao*, 358 F. Supp. 2d 106, 114 (N.D. N.Y. 2005) (former federal employee precluded from seeking liquidated damages from Department of Labor under the Age Discrimination in Employment Act of 1967).

Further, nothing in this record would support an award of any amount of punitive damages, let alone the one million dollars Dixon seeks. Finally, the fact patterns in the four United States Supreme Court cases Dixon cites to support his argument for punitive damages are completely inapposite from the facts in this case because none of those cases involves a federal governmental entity. CRB at 30. Accordingly, we reject Dixon's argument. *Cf. White v. The Osage Tribal Council*, ARB No. 96-137, ALJ No. 1995-SDW-001, slip op. at 9 (ARB Aug. 8, 1997) (rejecting exemplary damage award where the ARB "fully expects future compliance" with the Safe Drinking Water Act).

## CONCLUSION

We agree with the ALJ that Dixon established by a preponderance of the evidence that BLM fired him in part because of his protected activities and that BLM failed to prove that it would have fired him in the absence of those activities. We **AFFIRM** the ALJ's award of damages as supported by substantial evidence and therefore accept his

recommended decision. Dixon will have thirty (30) days to file a fully supported attorney's fee petition, and BLM will have thirty (30) days thereafter to file an opposition thereto, if any.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**