

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 September 2007

**CASE NOS.: 2006-WPC-2
2006-WPC-3**

In the Matter of:

**DAISY ABDUR-RAHMAN,
RYAN PETTY,**
Complainants

v.

DEKALB COUNTY,
Respondent

Appearances:

Robert N. Marx, Esq.
Jean Simonoff Marx, Esq.,
For the Complainants

Randy C. Gepp, Esq.
Stephen E. Whitted, Esq.,
For the Respondents

Before: RICHARD A. MORGAN
 Administrative Law Judge

DECISION AND ORDER DENYING RELIEF

Background¹

This proceeding arises under the employee protection provisions of the Water Pollution Control Act, 33 U.S.C. §1367 ("WPCA", "Clean Water Act" or "Act"); and, implementing regulations at 29 C.F.R. Parts 18 and 24.² The Act is designed to "restore and maintain

¹ Complainant's exhibits are marked ("CX"); Administrative Law Judge exhibits ("ALJ"); Respondent exhibits ("RX"); Joint exhibits ("JX"); depositions ("Dep."); and, the transcript testimony ("TR"). Each reference to a TR page number or deposition will refer to the witness whose testimony is being discussed, unless otherwise indicated. Reference to "DeKalb County" most often relates to its Water and Sewer Department.

² Once protected activity is found under one statute, it is not necessary to determine whether other environmental statutes apply. See, *Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108 and 03-013 ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004).

chemical, physical, and biological integrity of the Nation's waters."³

The Act's provisions protect employees from discrimination for attempting to carry out the purposes of the environmental statutes of which they are a part, and specifically for preventing employees from being retaliated against with regard to the terms and conditions of their employment for filing "whistleblower" complaints or for taking other action relating to the fulfillment of environmental health and safety or other requirements of the statute.

On April 11, 2005, Complainant, Abdur-Rahman, timely filed a whistleblower complaint against the Respondent (OSHA #4-5070-05-022) alleging violations of the WPCA.

Ms. Abdur-Rahman complained that the Respondent had unlawfully discharged her based upon her protected activities.

Complainant, Ryan Petty, timely filed a whistleblower complaint against the Respondent, on April 11, 2005 (OSHA #4-5070-05-022), alleging violations of the WPCA.

Mr. Ryan Petty complained that the Respondent had unlawfully discharged him based upon his protected activities.

The Complainants established they engaged in protected activity. However, in the end, in spite of the efforts of their exceptional counsel, they did not establish they were terminated for those activities. The County should not take pride in prevailing in this proceeding. Much of what the County offered was untrue. The unfortunate irony here, is that had these two, highly-educated, and capable employees had a managerially competent immediate supervisor, both they and the County could have had a long-term, mutually-beneficial, relationship which would have greatly served the citizens of Dekalb County. Sadly, they did not and were eventually subjected to lamentable treatment, but treatment which was not proven to violate the Act. This sad affair illustrates the "Peter" principle in action with a technically-savvy employee placed in a supervisory position without having the necessary training or experience.⁴

Procedural History

This matter was referred to the Office of Administrative Law Judges in December 2005. I was assigned the case. Notices of Hearing and Pre-Hearing Orders were issued, on January 9, 2006, February 16, 2006, and June 1, 2006, scheduling formal hearings in Atlanta, Georgia, which after delays commenced on September 25, 2006. There were numerous discovery disputes upon which I ruled, including denying the Respondents' motions to limit remedies and exclude allegedly stolen documents for the Complainants' alleged post-termination "theft" of County documents.⁵ Further hearings were held the weeks of January 30, 2007, February 5,

³ "Pollutant" is defined as "dredged spoil, solid waste, incinerator residue . . . , chemical wastes . . . , and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6)(2000).

⁴ The theory that all members of an organization will eventually be promoted to a level at which they are no longer competent to do their job. Encarta Dictionary: English (North America).

⁵ On November 3, 2006, I granted Complainants' counsel motion for sanctions against the County and awarded attorney fees for the County's failure to produce documents, as ordered, in a timely fashion. I note this case is not like *Dartey v. Zack Co. of Chicago*, 83-ERA-2 (Sec'y April 25, 1983)(Termination for theft of personnel files).

2007, and March 13, 2007. In addition to the remaining Respondent (DeKalb County), Respondent's employees, Ted Rhinehart (Director of Public Works), Roy Barnes (Associate Director, Public Works), John Walker (Manager, Compliance, Technical Services, Department of Public Works), and Chester Gudewicz, Jr. (Compliance Supervisor, Water and Sewer, Technical Services, Department of Public Works), had been originally named by the Complainants. On September 7, 2006, I issued a Show Cause Order asking why the said individually-named employees should not be dismissed from the matter. On September 22, 2006, I issued an Order dismissing the named employees, based on *Lewis v. Synargo Technologies, Inc.*, ARB No. 02-072, ALJ Nos. 2002-CAA-12 and 14 (ARB Feb. 27, 2004).

All parties were afforded a full opportunity to present testimony, offer documentary evidence, submit oral arguments and post-hearing briefs. The following exhibits were received into evidence: Complainant Exhibit Numbers ("CX") 1-6, 11-20, 22-28, 31, 34-38, 40A, 42 A&B, 47-52, 54-56, 59-60, 63, 78-81, 83-88, 90-100, 101 pp 4-110 (except pp. 14-16, 79, 87 and pp 111-end not admitted), 102, 103 (p. 14 only), 104, 109 (limited purpose), 111-112, 115-123, 132, 137-138, 143, 155-157, 160 (only portions re Scott Blvd & Ponderosa Circle), 165, and, 169; Respondent Exhibit Numbers ("RX") 1, 2 (without photos), 3, 9-11, 15, 51A-H, 52-55, 62, 72O-Q, 73A-R, 74, 79-80, 82, 87, 89-90, 99-100, 103-105, and 107. ALJ I contains the parties' stipulations. ALJ II is a list of acronyms. The parties submitted post-hearing briefs on July 30, 2007. Based on the fact the Complainants had exceeded the page limitation for final briefs, the Respondent was permitted a "reply" brief, which was submitted on August 17, 2007.

Most of the evidence related to the Consent Decree between the County and the Georgia EPD was excluded from evidence as it did not pertain to either the time period during which the Complainants worked for the Respondent or the SSOs (defined *infra*) or spills they work on and thus were either irrelevant or their limited evidentiary value was far outweighed by the diversion of time needed to consider them.⁶ See, *Cox v. Lockheed Martin Energy Systems, Inc.*, ARB No. 99-040, ALJ No. 1997-ERA-17 (ARB March 30, 2001).

Parties' Contentions

The Complainants contend they were not legitimately terminated for poor performance, but rather because they had persistently sought Sanitary Sewer Overflows ("SSO") information which the County had but wished to keep undisclosed and due to pointing out and inquiring into the discrepancies they observed at SSO sites and with respect to the preparation of County forms used to report the same. They explicitly do not aver that the County was not reporting SSOs, or had failed to properly report any specific SSO. (TR 280-281).

The County contends the Complainants were terminated "based on the ("unsatisfactory") performance." (TR 294, 309).⁷ At the time, two additional probationary compliance inspectors

⁶ A portion of an EPD Power Point presentation concerning SSOs (Jan. 2005) at Ponderosa Circle for which the state had no "spill" reports from the County, and concerning Scott Blvd. were admitted. (CX 160; CX 101 p. 67). The Ponderosa incident involved a manhole overflow caused by heavy rains with sewer lines with insufficient capacity, with which the Complainants were not involved. The Scott Blvd matter occurred after Complainants were terminated.

⁷ Although in their Response Brief, they argue that the employee evaluations (addressing performance) "were never intended to contain the reasons for the terminations. The County never claimed that the evaluations described the specific grounds for terminations. . . The performance evaluations did not serve as the basis for the terminations." However, I find the County's own rules required performance to be reflected on the evaluation forms.

(Stokes and Anderson), who had allegedly not engaged in protected activities, were also terminated, and the Complainants were treated no differently. They were all probationary” or “at will” employees. The County contends that neither Complainant ever pointed out any explicit violations of state or federal environmental laws to either their supervisors or peers or the State. In essence, they contend the two were problem probationary employees who had not fit in and they were terminated for that.

OSHA Determination

On December 22, 2005, the Regional Administrator for the Occupational Safety and Health Administration, Atlanta, Georgia, (hereinafter “OSHA”) issued a determination finding no violations had occurred as alleged. (RX 99; RX 100). The Complainants objected to the determination and sought a hearing. On December 22, 2005, OSHA referred the matter to the Office of Administrative Law Judges for hearing.

Relief Sought

The relief the Complainants sought includes:

1. Reinstatement and restoration of all benefits, terms and privileges of employment.
2. Back pay and benefits.
4. Abatement of Respondents’ unlawful practices and policies against the Complainants.
5. An order expunging Complainants’ disciplinary record and any negative references therein.
6. An order prohibiting Respondent from disclosing any disparaging information about them to prospective employers or otherwise interfering with any applications they may make.
7. Compensatory damages for emotional distress, mental anguish, and loss of reputation.
8. Exemplary damages.⁸
9. Payment of reasonable attorney’s fees and costs of the Complainants.
10. Interest on all monetary sums awarded.
11. Such other and further relief as may be determined to be appropriate.

⁸ Punitive damages are available only under the Toxic Substances Act, 15 U.S.C. § 2622(b) and the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(B)(ii). See, 20 C.F.R. § 24.7(C)(1).

ISSUES

- I. Whether jurisdiction exists under the environmental act, pursuant to which the allegations were made?
- II. Whether, under the Act, the Respondent terminated the employees, because they:
 - A. Engaged in a protected activity or conduct ? and,
 - B. The employer knew the complainants had engaged in the protected activity?
- III. Is the named Respondent an “employer” as defined in the Act?
- IV. If the Respondent violated the Act(s), what are appropriate compensatory damages, costs and expenses and what further relief, if any, (i.e., compensation, back pay, terms, conditions and privileges of employment, attorney & expert witness fees, and, exemplary damages) should be ordered?

FACTS

Dekalb County operated a Division of Water and Sewer within its Department of Public Works. (Hereinafter “County,” “Department,” or “Division”). In early 2004, Dekalb County decided to tackle one of the most significant factors impeding their sanitary sewer system by aggressively implementing a “Fats, Oils, and Grease” (“FOG”) program. According to the County, FOG from restaurants is the single most significant factor clogging sanitary sewer lines. Prior to 2004, the Water and Sewer Department had had only one FOG inspector whose area of responsibility was County-wide. In 2004, Mr. John Walker, who was in charge, organized his compliance section into four sections each with its own supervisor: FOG; Construction Management; Field Investigations; and, Flow Monitoring. In 2004, the County also hired its first group of six new FOG compliance inspectors. Each was required to hold a bachelor’s degree.

All restaurants produce grease. Dekalb County has over 5,000 food service establishments. (See CX 83). Unlike individual homes, restaurants are required to properly dispose of it by means of properly-sized grease interceptors or traps which collect it. The collected FOG is pumped out of the traps, manifested, and hauled off by a waste disposal company to a landfill for disposal. When this system fails, the FOG can harden in sewer lines with the result that blockages are created. Those blockages can result in either a backup, a sewer pipe bursting, or overflowing. That can undesirably result in the sewage flowing into state waterways.

Both, highly-educated, “degreed”, curious, and highly-motivated, Complainants were hired, in the late summer and fall of 2004, along with four others (Ms. Deirdre Stokes, Ms. Sharita Wilcox, Mr. Bernard Bethea and Mr. Manyon Anderson), as Compliance Inspectors in the recently greatly-expanded, “Fats, Oils, and Grease” (“FOG”) section of the Dekalb County

(Georgia) Department of Public Works. Ms. Abdur-Rahman held a Bachelor's degree in industrial engineering and a Masters in public policy from Georgia Tech. Mr. Petty held a Bachelor of Science degree in biology and had previously worked for the City of Atlanta, Water and Sewer Department. Months prior to that, Mr. Kent, Ms. Simpson, and Ms. McMichael had been hired for the FOG section. Mr. Walker, the Deputy Director, found Ms. Abdur-Rahman to be a "go-getter" who demonstrated initiative.

All of the new compliance inspectors were hired by Chester Gudewicz, Jr., Compliance Section Supervisor, Water and Sewer, Technical Services, Department of Public Works. Mr. Gudewicz headed the FOG compliance section. As with all County employees, their first six months served as a "probationary" period.

The essential job functions of the compliance inspectors, included:

Conducting inspections of grease traps of food service establishments; setting up and maintaining sampling and flow monitoring devices and equipment; processing and servicing customer complaints; maintaining individual inspection files and entering information into the computer; working with and maintaining the grease information management database; appearing and testifying in court concerning non-compliance with codes; completing and maintaining department inspection records and preparing monthly reports; maintaining up to date knowledge of all applicable codes and ordinances; attending continuing education seminars and conferences pertaining to CMOMs, federal and state regulations; conducting surveillance of fats, oil, and grease transporters and providing reports to appropriate authorities; and assisting in tracing the sources of illegal, harmful, or excessive waste discharges into Dekalb County's sewer system and surface waters. (CX 49).⁹

The probationary period lasted approximately six months. It allowed supervisors to determine if new employees would be appropriate additions to the Department, for as Mr. Walker testified, retained employees receive merit service status and are very difficult to terminate.

Mr. Gudewicz, their new immediate supervisor, lacked a four-year college degree, supervisory or management training, and had worked his way up the ranks to his supervisory position. He had been the County's only FOG inspector and was responsible for implementing its aggressive approach dealing with fats, oils and grease impact on sanitary sewers. He had become a FOG expert. Absent training and supervisory experience, Mr. Gudewicz had a cavalier approach to competing paperwork, despite his boss' (Mr. Walker) recommendations and direction.¹⁰ In fact, although Mr. Gudewicz did not remember, Mr. Walker had told him to document any problems and sit down with the employee to discuss them.

Mr. Gudewicz should have known about the desirability of documenting problems having worked at the County with the recently retired Mr. Harold Esslinger previously. The highly

⁹ CX 49 establishes the job duties rather than counsel's opening statement, relied upon by Complainants' counsel.

¹⁰ Mr. Gudewicz successfully completed a "New Supervisor's Workshop" on March 31, 2005. (RX 87).

credible Mr. Esslinger confirmed that the better practice was to use “green” sheets to document serious problems and that even probationary employees got written and completed appraisal forms. However, it was more Mr. Gudewicz’s style to orally counsel employees rather than “write them up.” He applied this philosophy to all his inspectors. Unfortunately, he testified that he was, during this time, also going through one of the most difficult and stressful periods of his life due to personal problems. His wife had cancer, at the time, and he was under pressure to prepare legislation and had a great deal of work as President of the Georgia FOG Alliance. Moreover, Mr. Gudewicz’s trial testimony repeatedly differed from his earlier deposition testimony and he had frequent memory lapses at trial. He admitted the pressures can effect one’s ability to remember.

Dekalb County’s “Employee Information Package” states, “The County’s Performance Management Plan (“PMP”) is designed to be an objective and consistent system for evaluating and providing feedback on job-related criteria and specific work performance.” (CX 60, page 24). Department heads are responsible for assuring employees in probationary status are properly evaluated. (CX 60, page 24). The PMP requires a performance planning conference at the beginning of the “working test period” (probationary period), as was done in this case, to develop objective, standards of measurement, job responsibilities, and expectations. Employees’ performance must be evaluated prior to completion of the probationary period and discussed with them. (CX 60, page 25). Each of the terminated probationary employees had a performance appraisal completed, but were eventually terminated without being shown the evaluations. However, “when an employee’s performance for any job standard is rated at marginal or below standards” their performance must be evaluated on an interim basis “midway in the appraisal period.” (CX 60, page 25). This was not done.¹¹

The employees’ first four months on the job was essentially comprised of on the job training. They were given a Field Manual similar to RX 103. They completed a new employee orientation, in mid-December 2004. (CX 54-55). They were each assigned to conduct independent FOG inspections in a distinct portion of the County, upon completion of their training. (CX 122-123; CX 143). Each inspector had his or her own County truck and was assigned to a specific section of the County. Mr. John Walker, Manager, Compliance, Technical Services, Department of Public Works, and Mr. Gudewicz’s boss, recognizing the Complainants’ potential and experience, additionally assigned them to a team which was to review and rewrite Dekalb County’s FOG ordinances. Ms. Abdur-Rahman had a Masters degree in public policy and was the team “lead” for the project. The FOG committee met regularly and kept their supervisors informed. Ms. Abdur-Rahman was additionally assigned to work on standard operating procedures for the section.

The new compliance inspectors attended weekly staff meetings and training sessions. They accompanied more experienced inspectors and/or Mr. Gudewicz to sites where sewer line problems had been reported. The Complainants and other compliance inspectors learned the Department’s lexicon from Mr. Gudewicz and more experienced inspectors. They came to understand that they would be primarily called out to inspect and report on potentially grease-related “Sanitary Sewer Overflows” (“SSOs”) or “spills”, i.e., sewage erupting from a manhole, which they understood were all required to be reported to the Georgia Environmental Protection

¹¹ Thus, I do not credit the testimony of Mr. Barnes (TR 1881) and Mr. Chen (TR 1666) to the contrary.

Department (“EPD”) because there was a potential for some impact on state waters. In fact, such inspections were one of their job responsibilities. (CX 41). They were led to believe that a “spill” was the same as an “SSO” and “surcharge” when unbeknownst to them, each term had a more distinct technical meaning. Ms. Stokes testified she believed SSOs and “spills” were the same.

It is with some consternation that I note that a number of the Department’s retained employees who testified, including Mr. Gudewicz, Mr. Bethea, Mr. Rudy Chen and Mr. Mincy, originally said the same in their depositions then testified differently at the hearing.¹² However, Mr. John Walker, Deputy Director, testified that within the Department the terms were often used synonymously although they had technically different meanings.¹³ Mr. Barnes, the Water and Sewer Department head, testified that employees often confused the terms “SSO” and “surcharge.” According to Mr. Barnes, the County only kept records of “reportable spills.” (TR 1867, 1871, 1881).

In most cases, when the Complainants visited the site of sewage spills or overflows, they understandably asked many questions. Ms. Stokes confirmed this. For instance, they inquired about the absence of required warning signs or “postings”, about how “fish kills” were determined and reported, and how the “volume” of a spill was calculated. When they observed that the volume of one reported spill appeared to be significantly less than another reported spill, they asked why. They questioned reporting of no fish kills when they had not known of any effort to determine the same. They raised concerns about bioremediation of the spill areas. Ms. Abdur-Rahman was the most vocal and persistent questioner.¹⁴ They questioned the use of stock forms to report SSOs, as it appeared to them that the form language occasionally lead to inaccurate reporting. Mr. Chen, Deputy Director, Engineering Technical Services, established that the “spill” standard form reports were “canned” information for the EPD.

The County could be fined by the EPD for not “posting” spills.¹⁵ Mr. Gudewicz testified that on one occasion he called dispatch to correct the lack of a posting reported by Ms. Abdur-Rahman. According to Mr. Barnes, the EPD had a “zero-tolerance” policy concerning reportable spills and could fine the County for the same. The County routinely reported a great number of spills to the EPD during the time the Complainants were employed. (See CX 101). To be fair to the Complainants, a number of the procedures and methods to determine the data for County reports to the EPD, such as determining spill volumes, do not appear to be based on common sense, but rather bureaucratic invention.

As part of their additional FOG committee work, the Complainants legitimately sought historic County data related to all County SSOs or spills in order to calculate “hot spots” or clusters of SSOs. They correctly assumed that charting such “hot spots” would allow for better focus of remediation efforts. Both Complainants believed, albeit erroneously, that the County

¹² Mr. Jerome Ash, supervisor of the Laboratory Branch, defined the terms. A “spill ” occurs when sewage leaves the manhole and gets into state waters. An “SSO” occurs when sewage leaves the manhole and does not enter state waters.

¹³ The Georgia Rules and Regulations for Water Quality Control, Chapter 391-3-6.05(2)(a), defines a “spill” as “any discharge of raw sewage by a Publicly Owned Treatment Works (POTW) to the waters of the State.” (CX 132).

¹⁴ See, e.g., CX 11 for an email asking a list of questions.

¹⁵ The Georgia Rules and Regulations for Water Quality Control, Chapter 391-3-6.05(3)(g), requires “posting” which must remain in place for at least seven days after the spill has ceased. (CX 132).

was required to report all SSO's to the State. Mr. Petty testified he came to suspect they were not given the SSO's because the County had something to hide.

Unfortunately, as new employees, the Complainants were not totally familiar with SSO reporting and investigation. For instance, they did not know the roll of the Construction and Maintenance section "first responders", under Mr. Walker, in these matters. Those "first responders" made most of the determinations the Complainants had inquired about. There was no requirement to cordon-off spills or to apply lime to remediate them with lime, as the Complainants queried. For instance, the initial responders determined the volume of the spills and investigated fish kills as well as posted signs.¹⁶ Nor did the Complainants completely understand the procedures followed to report spills or SSOs to the EPD.¹⁷ Their FOG section had no responsibility for preparing or sending the mandatory 24-hour or five-day report of spills to the EPD. Neither Complainant knew whether or not the Respondent, in fact, had not properly reported SSOs or violated environmental laws.¹⁸ However, Ms. Stokes confirmed that she had heard Ms. Abdur-Rahman say Dekalb could get in trouble if things were not done right. Mr. Ash confirmed the County had never failed to investigate a fish kill.

Initially, Mr. Gudewicz encouraged such questioning. In fact, the County's Chief Executive had encouraged employees to "go that extra mile and think outside the box for maximum productivity."¹⁹ (CX 60, page 4). Mr. Gudewicz did not provide any of the compliance inspectors direct feedback on their performance. Nor was any feedback provided in writing. Mr. Gudewicz, surprisingly, did not know where the SSO records were maintained, although it turned out they were maintained by Ms. Swann in three binders in an office less than twenty feet away from the Compliance Section. To be fair, however, it was not his function to keep those records. At one point, he took Mr. Petty and Mr. Anderson to a nearby office, where the SSO reports might have been kept and appeared to want to locate those records. Mr. Gudewicz insisted he had not hidden information. However, his trial and deposition testimony concerning the Complainant's requests for SSO information were somewhat inconsistent.

Around the end of December 2004 and in early 2005, Mr. Gudewicz became intolerant of the questioning, viewing the continuous inquiries as "insubordination." Although he denied it, Mr. Walker, had also told the Complainants they did not need the SSO historical data to draft the FOG Ordinance and that they were being "too thorough or scientific." (TR 299). Mr. Gudewicz told them they were "ruffling too many feathers" or "rocking the boat" asking for the SSOs. Although the Complainants disagreed, they were able to complete the FOG Ordinance without the information. I find credible Mr. Walker's testimony that the County really had no motive to "hide" the SSO or "reportable spill" documents from the Complainants.

¹⁶ Mr. Esslinger testified that he had not been aware of the posting requirement until about October 2004. This is consistent with Mr. Walker's reorganization, in 2004, first creating a C & M section, with that duty. Mr. Barnes had been reporting that the signs had been posted prior to October 2004.

¹⁷ The Georgia Rules and Regulations for Water Quality Control, Chapter 391-3-6.05, sets forth the rules for such actions. (CX 312).

¹⁸ In fact, Mr. Barnes testified that documents showing SSO's or sewers requiring maintenance were not required to be reported under environmental laws. (TR 1693, 1881).

¹⁹ One example of "thinking outside the box" arose when Ms. Abdur-Rahman saved the County considerable money by setting up a "bulk-mail" program with the Postal Service. (CX 25, 25).

Not remembering Ms. Abdur-Rahman's assignment to the SOP committee, Mr. Gudewicz also became annoyed by the fact Ms. Abdur-Rahman constantly asked for SOPs concerning what he believed were trivial matters, such as how to remove a manhole cover. For example, in December 2004, she not only had asked for written "protocols" on job expectations, but prepared an SOP on processing compliance inspections. (CX 22; CX 28). At trial, he remembered her role but testified that he thought the committee was to be concerned with more significant SOPs. As late as March 2, 2005, Ms. Abdur-Rahman sent out a template she used to inspect SSOs. (CX 38). A comprehensive Strategic Spill Response Plan was implemented, in March 2006, well-after the Complainants were terminated. (CX 51). Had that Plan been available to the Complainants, many of their questions would have been answered.

Beginning then, the Complainants appeared to grow increasingly frustrated with Mr. Gudewicz's lack of responsiveness. He admittedly would often just walk away and not answer their queries or requests for information. Nonetheless, they, particularly Ms. Abdur-Rahman, continued to pester him. Likewise, Mr. Gudewicz also became frustrated. At trial, the County made much ado about the fact the Complainants did not specifically tell supervisors that they were violating explicit provisions of environmental or other laws. Although they may have only infrequently mentioned that the County could get in trouble with the state, their inquiries and comments during the period of their employment constituted "protected activity" as defined by the Act and regulations. Such comments need not refer to any specific statute or regulation.

On November 23, 2005, after a Microsoft training meeting, Mr. Petty was observed publicly having a spirited exchange in a hallway with a supervisor from another section (Mr. Calhoun) following a Microsoft training session at the Department's offices. Ms. Abdur-Rahman recalled the event quite differently. She had heard Mr. Calhoun "bad-mouthing" their section all day and saw him lunge at Mr. Petty. Mr. Walker and Mr. Petty subsequently discussed the matter. While realizing he could have terminated Mr. Petty over the matter, Mr. Walker assured Mr. Petty he would not be fired over the incident. Nor had Mr. Walker ever observed Mr. Petty act violently. Mr. Calhoun denied having provoked any incident and prepared a memorandum about it. (RX 10). He merely heard his name being called and saw two people pulling an angry Mr. Petty back into the room. Ms. Miltrea McMichael, a current employee, although not recalling exactly, testified that that Mr. Petty had, in fact, confronted Mr. Calhoun. However, both Mr. Petty and Ms. Abdur-Rahman testified that Ms. McMichael had not attended that meeting. Mr. Gudewicz and other supervisors determined that Mr. Anderson had also been "disruptive, disrespectful, and insubordinate," at the same meeting by interrupting and saying they did not know what inspectors do in the field.

Subsequently, in mid-December 2004, another employee, Mr. Mason, who was conducting a safety briefing, accused Mr. Petty of staring him down after he had asked him to quiet down. Mr. Petty flatly denied any inappropriate "staring." (CX 47). Mr. Mason's memorandum also addressed an incident on November 22, 2004, where Mr. Petty and he had a disagreement and the former told him never to speak with him again. (RX 9). Although Mr. Walker admitted this second "staring" incident was not of the same level as the Calhoun matter, it was this second "staring" incident that sealed Mr. Petty's termination with Mr. Walker. Ms. Simpson, a retained compliance inspector who had been recommended for a raise by Mr. Gudewicz, despite similar paperwork problems as Ms. Abdur-Rahman allegedly had, testified

she had overheard Mr. Petty say that Mr. Gudewicz did not know what he was doing. Moreover, Mr. Gudewicz felt that Mr. Petty and Mr. Anderson were “challenging” him because they commented that the FOG form he had developed was not scientific.

Although Mr. Gudewicz had asked the compliance inspectors to ride separately and conduct inspections alone, with limited exceptions, he only noticed that of all the inspectors that the two Complainants were the ones most often not doing so. Mr. Gudewicz testified that Mr. Bethea had told him about it, but the latter denied doing so. Moreover, on the three occasions the Complainants did ride together, they had legitimate bases to do so, unbeknownst to Mr. Gudewicz who merely assumed they had violated his directive. As a result of that and his frustration, Mr. Gudewicz began paying more scrutiny to the Complainants and recalling prior events in a new light. For instance, he noted his belief they had both missed significant portions of a November 2004 Houston conference they were all attending. However, more often than not, Mr. Gudewicz did not verify that what he thought he observed constituted any type of actual dereliction or infraction. Ms. Mohammed’s testimony established that Ms. Abdur-Rahman had not missed the portions of the conference. Ms. Abdur-Rahman’s County truck was either being serviced or worked on when she rode with Mr. Petty. Mr. Petty had only missed a small part of the Houston conference because a coworker had been battered by an estranged spouse and he was legitimately helping her. Ms. Abdur-Rahman had not, in fact, missed any significant portion of the Houston conference. Mr. Gudewicz wrongly suggested Ms. Abdur-Rahman abused sick leave when the County policy explicitly permitted her to take it.

Then, on January 26, 2005, Mr. Gudewicz determined he had heard Ms. Abdur-Rahman had called him “incompetent” and a “liar” after a meeting (see CX 10). Mr. Gudewicz testified that Messrs. Bethea, Petty, Anderson and Ms. Wilcox and Ms. McMichael were present. However, his memo only referred to three of them. Mr. Bethea thought he had heard words to that effect, but testified that Ms. Abdur-Rahman never called Mr. Gudewicz “incompetent” in his presence. Ms. Abdur-Rahman flatly denied ever calling him “incompetent” either to his face or to Mr. Walker. She admitted Mr. Gudewicz expressed belief that they had. Mr. Walker testified he had counseled her about this and she had admitted calling him incompetent. Mr. Walker said he informed Mr. Gudewicz. Nor did Ms. Abdur-Rahman believe she had ever been insubordinate or rude toward Mr. Gudewicz. Ms. Abdur-Rahman testified there was no meeting on 1/26/05, rather Mr. Gudewicz became inexplicably upset during a conversation between her and Mr. Anderson about hot spots and SSOs. That is more consistent with CX 10. Mr. Petty testified that neither he nor Ms. Abdur-Rahman ever called or referred to Mr. Gudewicz as “incompetent”. He testified that neither he nor Ms. Abdur-Rahman had ever raised their voices or act rudely toward Mr. Gudewicz. Ms. Tiffany Simpson, who still works as a compliance inspector, testified that once, after a meeting, Ms. Abdur-Rahman called Mr. Gudewicz incompetent, but never in his presence. She added that she worked “fine” with Ms. Abdur-Rahman.

Mr. Gudewicz was again confused over when and if he had given Ms. Abdur-Rahman a copy of a version of CX 10. His trial and deposition testimony differed. Mr. Gudewicz testified at trial that he did not recall Ms. Abdur-Rahman screaming or calling him a “liar.” He recalled she had called him a “flip-flopper” and, at a meeting, pointing her finger at him and calling him “incompetent.” However, most of the employees did not share that recollection. Nor did Mr.

Gudewicz's memorandum (CX 10) refer to any finger pointing.

Mr. Gudewicz came to the conclusion that Mr. Anderson, another probationary compliance inspector, had become "disrespectful" and unwilling to follow his instructions. Mr. Calhoun had reported that Mr. Anderson had been "disrespectful and insubordinate toward a compliance supervisor." (RX 80). This was all over an incident where Mr. Anderson had declined to sit down at a meeting when told to do so. Mr. Gudewicz was distressed that Mr. Anderson also did not care for the FOG evaluation forms he had created and constantly asked "whys". His "Employee Action" memorandum reflected his belief that Mr. Anderson was: insubordinate; confrontational; belligerent; and, disruptive. (RX 80). Mr. Gudewicz also determined that Ms. Stokes had misled him and as a result of that, dressing poorly, and two traffic accidents, she too would be terminated. (RX 79). Her Performance Appraisal more or less reflected those concerns.

Mr. Gudewicz came to believe the Complainants were disruptive. Some other employees did not fully share this view- - others did. For example, Mr. Bethea, another probationary employee (hired in 1999) who was retained, testified he never complained to management about either Complainant (contrary to Mr. Walker's recollection) and that he had never heard other inspectors complain about them. However, he once heard Ms. Abdur-Rahman scream at and accuse Mr. Gudewicz of lying. He also thought he had heard her refer to him, out of his presence, as not knowing what he was doing or how to run the program. Mr. Bethea did testify that both Complainants were opinionated and uncompromising and because of them "we hated staff meetings." After their departure, office morale was better, according to Mr. Bethea.

Ms. Miltrea McMichael, another retained inspector, testified that Ms. Abdur-Rahman was sometimes "overly opinionated", that is it was her way or no way. Ms. McMichael testified that Ms. Abdur-Rahman was argumentative and disagreed with Mr. Gudewicz at nearly every staff meeting. Mr. Walker recalled Ms. McMichael complaining about Ms. Abdur-Rahman. Ms. Simpson, another retained inspector, testified that Ms. Abdur-Rahman was "extremely opinionated" and unwilling to compromise, but contrary to her deposition testimony she had never heard her scream at Mr. Gudewicz. She testified that she heard Ms. Abdur-Rahman call Mr. Gudewicz incompetent. However, Ms. Stokes, who was terminated at the same time, testified that both Complainants were polite, attentive, respectful, not aggressive, and she had never heard any other inspector complain about them, nor did they finger-point or scream. Mr. Walker testified that Ms. Wilcox, Ms. McMichael and Mr. Simpson had all complained to him about Ms. Abdur-Rahman.

On January 13, 2005, Mr. Gudewicz prepared a memorandum to Mr. Walker, his boss, recommending Mr. Petty's termination. (CX 41; RX 11). The memorandum stated that Mr. Petty was "insubordinate, confrontational, belligerent, disruptive, and inattentive." On January 26, 2005, Mr. Gudewicz had received blank performance reports to complete for his subordinates. On January 28, 2005, Mr. Gudewicz sent a memorandum to Mr. Walker concerning Ms. Abdur-Rahman. (CX 10). Oddly, although the incident where Ms. Abdur-Rahman allegedly had been screaming, and calling Mr. Gudewicz a liar and incompetent had occurred just two days earlier, he did not describe it, the way he did in testimony, in the January 28, 2005 memorandum. Both Mr. Gudewicz and Mr. Walker testified at trial that they had

previously discussed terminating the two. However, at his deposition, Mr. Gudewicz had testified that he did not speak to Mr. Walker until after the performance evaluations had been completed. Mr. Gudewicz testified his deposition testimony was wrong.

Nevertheless, the County kept the two on longer and had them conduct field inspections and continue working on the FOG ordinance revisions. Mr. Petty was peripherally involved in the January 24, 2005, Snapfinger SSO investigation with Mr. Anderson. Mr. Petty observed an area half the size of a football field with debris and a nearby stream. He raised concerns there about posting, cordoning, and bioremediation which he felt irritated Mr. Gudewicz.

On Thursday, January 27, 2005, the Complainants participated in the Panthersville SSO investigation. This was the first SSO for which Ms. Abdur-Rahman had “lead” responsibility. However, it was still used for Compliance Inspector training. Ms. Abdur-Rahman raised concerns about the “no fish kill” report and lack of bioremediation of the fecal matter she observed at the Panthersville site. Mr. Gudewicz did not observe the fecal matter. Mr. Gudewicz testified that Ms. Abdur-Rahman did not raise concerns about fish kill, cordoning, or remediation with him nor did she raise concerns about the same or any failure of the County to handle it properly in her report. (CX 48). This spill was reported to the EPD. (RX 74). The January 27, 2005 report noted no evidence of fish kill, reported posting, and an estimated spill volume of 2,500 gallons. (RX 74).

On February 2, 2005, they participated in the Siupo Chan SSO investigation. (CX 85). On February 23, 2005, they participated in the “Rock Cliff Road” SSO investigation. Ms. Abdur-Rahman reported to Mr. Gudewicz that it was not properly posted when the 24-hour notice stated it was and questioned the volume determination. Her report mentioned the “posting” issue but not any question regarding the volume. (CX 13). This spill was reported to the EPD. (RX 73). The February 23, 2005 report noted no evidence of fish kill, reported posting, and an estimated spill volume of 6,500 gallons. (RX 73; RX 89).

On February 24, 2005, the Complainants participated in the “Rocky Valley Drive” SSO investigation. (CX 103, page 14). Ms. Abdur-Rahman and Mr. Petty again questioned the “sizing” of the spill and Mr. Petty queried about fecal coliform testing of the site and the “no fish kill” report. Ms. Abdur-Rahman’s report does not mention either concern. (CX 17). Mr. Gudewicz testified that neither such concerns nor any other County impropriety had been raised with him. This spill was reported to the EPD. (RX 73). The February 25, 2005 report noted no evidence of fish kill, reported posting, and an estimated spill volume of 4,000 gallons. (RX 73; RX 90).

On February 19, 2005, Ms. Abdur-Rahman reported on the Fairlakes SSO investigation. She and Mr. Petty raised concerns that the site was not posted, as required, and not reported to the EPD. She was concerned about the manner in which the incident had been reported. At some point in her field investigation, Ms. Abdur-Rahman determined the source of the SSO was not the upstream restaurants she had been sent to inspect, which had contributed, but rather a Dekalb County transportation yard and informed Mr. Gudewicz. (RX 2; CX 80). He told her to report the upstream FSEs at fault rather than the sanitation lot. (CX 157). She came to believe the SSO was not reported to the EPD to spare the County being blamed for it and that an attempt had been

made to cajole her to avoid reporting the County. Recently retired Construction and Maintenance supervisor, Eric Rivers, who investigated the matter, testified he determined the event was not a reportable spill because the overflow had not reached state waters. However, he admitted he had not inspected the County lot. Mr. Mincy, a construction inspector, testified that the only manhole with a problem was on the County sanitation lot but there could have been others as well. (TR 1814-1815; RX 75). Ms. Abdur-Rahman's final report implicates the County's sanitation lot. (RX 2). Again, Mr. Gudewicz's testimony at trial concerning Ms. Abdur-Rahman's acceptance of whether the matter was a reportable SSO differed substantially from his deposition testimony. At the deposition, he testified just how adamant she had been that it was a reportable SSO, but at trial testified she had accepted it.

All told, Ms. Abdur-Rahman was involved in only four SSO investigations. She never claimed that any of them had not been properly reported to the EPD. In fact, Mr. Bill Noell, Manager, Compliance and Enforcement, Georgia EPD, testified that he was unaware of any instance where the Respondent had violated the requirements concerning fish-kills, posting, or sizing spills between August 2004 and March 2005.

Sometime, within the first week of February 2005, before the 8th, Mr. Gudewicz formally recommended Ms. Abdur-Rahman's termination. On February 16, 2005, he recommended, in writing, that each of the two Complainants be terminated. (CX 16). Mr. Walker, Mr. Gudewicz's boss, formally recommended termination of the two Complainants and the other two inspectors, in writing, on February 8, 2005. Mr. Walker testified that he and Mr. Gudewicz had had a conversation about terminating Ms. Abdur-Rahman between January 26, 2004 and February 8, 2005 and that he had approved it before he had gotten Mr. Gudewicz's completed written appraisal form. He had read CX 10, a memorandum from Mr. Gudewicz about Ms. Abdur-Rahman and that was the only written document he had seen prior to the termination decision. Mr. Walker testified that he merely scanned the performance appraisals since he had already agreed to the terminations.

The same was true with respect to Mr. Petty; Mr. Walker and Mr. Gudewicz had discussed the termination before the written appraisal was completed. While at his deposition, Mr. Gudewicz testified that he decided to terminate Mr. Petty when he wrote his evaluation, at trial he testified that he decided to do so on January 13, 2005, before completing the evaluation. Mr. Walker testified he cannot remember each compliance inspector and had to rely on his supervisors. All the testimony about who signed which appraisal form when, has little import. The comments on the appraisal forms had little to do with Mr. Walker's decision and as noted, were largely inaccurate. Mr. Walker was not aware of any environmental complaints by the Complainants at the time of their termination. Moreover, Mr. Walker testified that he would not have expected Mr. Barnes or Rhinehart to rely on appraisal form comments to support termination of probationary employees.

Mr. Gudewicz testified that the reasons Ms. Abdur-Rahman was terminated were: unsatisfactory performance; she was argumentative and disruptive, disrespectful and the time required to manage her was "above my means." The evidence, however, does not support the assertion that her actual work performance was unsatisfactory. Mr. Gudewicz testified that the Complainants' requests for documents and historical data were not factors in their terminations.

Mr. Walker testified that Mr. Gudewicz told him the Complainants did not fit in. He replied that since he would have to work with retained employees for the next ten to fifteen years, that if he had problems with them now (it would only get worse). Mr. Walker, himself, had observed a lack of teamwork and poor morale within the section. Mr. Gudewicz told him Ms. Abdur-Rahman was rude, insubordinate, disruptive, and acted as if she wanted to run the Department. He felt it was “one battle after another” and was frustrated. Mr. Walker admitted that the following matters were not the basis for the termination: attendance; sick leave; accident; number of inspections; or, compliance letter errors. These were matters addressed in the performance appraisal which I find was largely contrived. Moreover, Mr. Walker testified that once they had decide to terminate a probationary employee it would be a “waste of time” to discuss any completed appraisal form.

Mr. Roy Barnes, Mr. Walker’s boss, approved the four terminations on February 15, 2005. Mr. Barnes is responsible for over 700 employees and testified he had to trust Mr. Walker’s judgment. Mr. Walker discussed the reasons for terminating all of the CIs with him. Mr. Walker informed him Ms. Abdur-Rahman was difficult, insubordinate, argumentative, constantly challenging her supervisor, reducing section morale, and difficult to manage. He told him Mr. Petty had some anger problems with some incidents with co-workers and supervisors. Mr. Barnes recalled that Mr. Walker had informed him that Mr. Petty posed similar problems, that is he challenged Mr. Gudewicz and was disrespectful. At the time, Mr. Walker had no knowledge of the Complainants’ involvement in the Fairlakes investigation. Mr. Barnes conducted no independent investigation and assumed the appraisal forms were true and accurate. Mr. Barnes testified that it is unusual, even “rare”, for the County to terminate their college-educated employees. Nor could he remember any other college-graduate probationary employees terminated because of their attitudes and insubordination.

The two Complainants continued to perform inspections, i.e., Rocky Valley and Rockcliff. Mr. Gudewicz also celebrated their successful completion of the County’s new FOG ordinance by treating them to a lunch, on March 7, 2005. (CX 92). The ordinance they drafted was exemplary. (RX 82; CX 95). Ms. Abdur-Rahman also completed an exemplary draft of a Uniform Permit System. (CX 93).

The County Human Resources section approved the terminations on March 7, 2005. Mr. Rhinehardt, the Director of Public Works, ministerially signed the terminations with no further involvement. On March 11, 2005, the Complainants and two other compliance inspectors (Stokes and Anderson) were ignominiously terminated.²⁰ (CX 63). They were told to pack up and leave and not given any reasons for their termination nor were they given or allowed to see their completed performance evaluations. Although Mr. Petty had very limited counseling from Mr. Walker, neither had ever gotten any written negative feedback from their supervisor, both were understandably surprised.

The trial testimony revealed Mr. Gudewicz had “papered” the evaluations to support poor performance as a basis for discharge, but the alleged poor performance and improper absences

²⁰ The County later pursued Ms. Stokes with criminal charges for “stealing” County paperwork worth pennies. (CX 104). The matter was not dismissed until January 2007. (CX 169).

were not supported by the facts. Mr. Walker's testimony reflected that he had already decided upon termination and that the performance reflected in the appraisals, which he merely "skimmed", was not the basis for the same. Moreover, Mr. Walker testified that he had observed the morale in the department deteriorate because of the Complainants and that they treated Mr. Gudewicz more like a peer than a supervisor.

It is worth noting Mr. Walker's testimony that that another compliance inspector had been involved in an assault and was not terminated; rather, he was sent to an "anger-management" program and retained.

As a consequence of their terminations, both Complainants lost healthcare coverage and were forced to find employment outside their chosen career fields. Both got unemployment for a time. (CX 111, 112). Ms. Abdur-Rahman retained a career counselor, at great expense, and applied for positions throughout the southeast. However, she never got so far as an interview. Ms. Abdur-Rahman became a manager of a Waffle House fast food establishment with significantly lower benefits and one-third less pay combined with laborious work hours.(CX 115; CX 118).²¹ She has not been able to get full medical coverage for herself thus having to pay a great deal of medical expenses out of pocket. (CX 117; CX 119-121). As a result, she has been unable to have her severe auto-immune disease properly treated and lives in constant pain. She has no sight in her left eye. Mr. Petty was forced to become a truck driver after being unable to find work in his career field. (CX 116). His pay and benefits are \$8,000 to \$10,000 per year lower than they were with the County. (CX 155). As a result, Mr. Petty was unable to afford proper treatment of a scalp condition with the effect of leaving him with permanent scarring. Loss of their County jobs has been both emotionally and mentally devastating for them.

THE LAW

Jurisdiction

A court is said to have jurisdiction when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court's action is not obviously frivolous. *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 591 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954).

Here, the Complainants are properly before this tribunal based upon their properly filed and timely written whistleblower complaints filed under an environmental whistleblower act which this tribunal is authorized to adjudicate.

The Respondent does not challenge the fact that it qualified as an "employer" under the Act and is covered under the provisions of the Act.

Elements of Act

Under the Water Pollution Control Act, or "Clean Water Act", an employer may not fire

²¹ She earned \$3,014 per month in regular pay plus significant overtime pay at the County. (CX 3). Mr. Petty was paid \$3,355 per month plus overtime. (CX 4).

or discriminate against any employee if the employee:

- 1) has filed, instituted, or caused to be filed or instituted, any proceeding covered under this chapter;
- 2) has testified or is about to testify in any proceeding resulting from the administration or enforcement of this chapter.

33 U.S.C. §1367(a). The Act is designed to “restore and maintain chemical, physical, and biological integrity of the Nation’s waters.” An employee need not establish that an actual violation of the underlying environmental act occurred, but rather that her complaint was “grounded in conditions constituting reasonably perceived violations of the environmental acts.” *Ilgenfritz v. U.S. Coast Guard Academy*, 1999-WPC-3 (ALJ Mar. 30, 1999).

To prevail, under the Act, an employee must establish, by a preponderance of the evidence that: (1) she engaged in protected activity; (2) the employer subjected her to an unfavorable personnel action; (3) the employer was aware of the protected activity; (4) the protected activity was a contributing factor in the employer’s decision to take the unfavorable personnel action. *See Keener v. Duke Energy Corp.*, ARB No. 04-091 (ARB July 21, 2006)(decided under Energy Reorganization Act, but same implementing regulations).

Protected Activity

The implementing regulations at 29 C.F.R. Part 24, state the following with regard to the Act summarized above: No employer may discharge or other discriminate against any employee because the employee has:

- 1) Commenced or caused to be commenced or is about to commence a proceeding for the administration or enforcement of any requirement imposed under one of the Federal Statutes listed above;
- 2) Testified or is about to testify in any such proceeding;
- 3) Assisted or participated, or is about to assist or participate in a proceeding or in any other action.

Case law has interpreted which employee acts are considered protected activity under the various employee protection laws and regulations. An employee’s informal complaint constitutes protected activity (under 42 U.S.C. §5851(a) Energy Reorganization Act of 1974).²² *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). *See also, Jones v. Tennessee Valley Authority*, 948 F.2d 258 (6th Cir. 1991); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985); *Mackowiak v. Univ. Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982). If an employee talks about safety to a plant official, an employer, or regulator, he or she acts squarely within the zone of conduct that Congress marked out under 42 U.S.C. §5851(a)(1). Employees who notify their employer of an alleged violation rather than a federal regulator are provided whistleblower protection. *Stone & Webster Engineering Corporation v. Herman*, 115 F.3d 1568 (11th Cir. 1997). The Eleventh Circuit upheld the

²² Which provides an identical analytical framework.

Secretary's interpretation of 42 U.S.C. §5851(a) ("ERA") as shielding the expression of safety-related concerns to fellow workers, when the expression has a public dimension and fits closely into an extended pattern of otherwise protected activity. *See also, Guttman v. Passaic Valley Sewage Commissioners*, 85-WPC-2 (Sec'y March 13, 1992)(FWCPA), 992 F.2d 474 (3d Cir.), *cert. den.*, 510 U.S. 964 (1993).

The Secretary has interpreted the phrase "any other action" under §5851(a)(3) (ERA) to extend beyond mere participation in a proceeding. *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995). The Eleventh Circuit Court of Appeals upheld the Secretary's interpretation, stating that "it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws." The court reasoned that this interpretation "promotes the remedial purposes of the statute and avoids the unwitting consequence of preemptive retaliation, which would allow the whistleblowers to be fired or otherwise discriminated against with impunity for internal complaints before they have a chance to bring them before an appropriate agency." *Id.* Furthermore, allowing informal and internal complaints permits safety concerns to be raised promptly and avoids the unnecessary expense and delay of formal investigations. *Id.* at 933. *See also Passaic, infra.*

Complainants need not be substantial sources of information or the only ones to raise particular matters in order for the activity to be "protected." *See Hermanson v. Morrison Knudsen Corp.*, 94-CER-2 (ARB June 28, 1996), *Diaz-Rabainas v. Florida Power and Light Co.*, 92-ERA-10 (Sec'y Jan. 10, 1996). Nor are the whistleblower's motives relevant as long as their belief the respondent is violating environmental law is reasonable. *See Smith v. Western Sales and Testing*, ARB 02-080, 2002-CAA-17 (ARB March 31, 2004). Moreover, an employee's questioning of a supervisor about procedures may constitute protected activity. *See, Hermanson, supra, citing Nichols.* However, a complaint that only expresses a vague notion that the employer's conduct might negatively affect the environment is not protected. *Erickson v. U.S. EPA*, ARB Case No. 04-024 (2006), 2006 DOL Ad. Rev. Bd. LEXIS 102, *citing Kesterson v. Y12 Nuclear Weapons Plant*, ARB 96-173 (ARB April 1997). Nor is one based on numerous assumptions and speculation. *Erickson, supra, citing Crosby v. Hughes Aircraft Co.*, 85-TSC-2 (Sec'y Aug. 17, 1993).

In *Sasse v. U.S. Department of Labor*, 409 F.3d 773 (6th Cir. 2005), the Court found a U.S. attorney, whose fiduciary duty it was to investigate and prosecute environmental crimes had not engaged in protected activities when he did so because he had not risked his job security taking steps to protect the public good by performing his required duties. Courts have found employees merely performing their duties not engaged in "protected activity" in a number of areas unrelated to the environmental acts. *See, Hoffman v. OPM*, 263 F.3d 1341, 1352 (Fed. Cir. 2001)(Police); *Langer v. Department of Treasury*, 265 F.3d 1259, 1267 (Fed. Cir. 2001)(IRS); *Willis v. Department of Agriculture*, 141 F.3d 1339 (Fed. Cir. 1998)(Compliance inspector). However, the Sixth Circuit's holding has not been shown to represent the view of either the Circuit in which this case arises or of the Administrative Review Board, U.S. Department of Labor ("ARB"). In addressing this issue, the ARB has stated, "the environmental whistleblower provisions are significantly broader in scope than the CSRA (Civil Service Reform Act) whistleblower protection provision" and do not require going outside the chain of command or risking one's job. *Sasse v. Office of U.S. Attorney*, ARB No. 02-077 (Jan. 30, 2004).

Contributing Factor

In *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. §§ 1221(e)(1), the Court observed:

The words “a contributing factor” . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a “significant,” “motivating,” “substantial,” or “predominant” factor in a personnel action in order to overturn that action.

Marano, at 1140 (citations omitted). The Eleventh Circuit holds that to establish a “causal relationship,” in one's prima facie case, one must prove the protected activity and the adverse action are not “completely unrelated.” *Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998) (Title VII case).

Burdens

The burden imposed at the hearing stage requires that a complainant “demonstrate” the requisite elements of entitlement. “Demonstrate,” the Board explained, “means to prove by a preponderance of the evidence.” *Brune*, ARB No. 04-037 at 13 n.33 (citing *Dysert v. United States Sec’y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997)). Therefore, a complainant’s ultimate burden at the hearing stage is higher than it is before OSHA as merely raising an *inference* is insufficient; rather, a complainant must *prove* unlawful discrimination. *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006) at 14 (emphasis added).

A complainant may satisfy this burden through either direct or circumstantial evidence. Under the latter approach, it is appropriate to employ the familiar Title VII analysis.²³ Under this framework, if the complainant initially makes an inferential case of discrimination by circumstantial evidence, the respondent may then proffer legitimate non-discriminatory reasons for taking the adverse action, after which the complainant may attempt to prove these reasons constitute a pretext for discrimination. *Kester v. Carolina Power & Light Co.*, ARB No. 02-007 (Sept. 30, 2003) at 6 n.13 (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).²⁴ At this point, the Court must examine the legitimacy of the employer’s articulated reasons for the adverse action and conclude

²³ The Board made clear that the Title VII analysis is an “evidentiary framework” and not a “burden of proof.” Therefore, whether or not it is employed, the burden of proof, whereby the complainant must demonstrate by a preponderance of the evidence that protected activity contributed to adverse action, remains constant. See *Kester*, ARB No. 02-007 at 7 n.17.

²⁴ The complainant’s initial inferential showing of discrimination is sometimes referred to as a “*prima facie* case.” See *Parshley Am. W. Airlines*, 2002-AIR-10 (ALJ Aug. 5, 2002) at 52. This should not, however, be confused with the complainant’s required *prima facie* showing at the OSHA investigatory level, covered under § 1979.104(b). In noticing this potential source of confusion, the Board commented that it “discourage[s] the unnecessary use of discussion of whether or not a whistleblower has established a *prima facie* case when a case has been fully tried.” *Kester*, ARB 02-007 at 6 n.12. Accordingly, when discussing the complainant’s initial showing under the Title VII analytical framework, the Board has not used the term “*prima facie* case” but rather “[initial] inferential case of discrimination by circumstantial evidence.” See *Peck*, ARB No. 02-028 at 10; *Brune*, ARB No. 04-037 at 14. Likewise, I do so here.

whether the complainant has proven by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune*, ARB No. 04-037 at 14; *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). However, even if this analytical framework is employed, the complainant maintains the ultimate burden of demonstrating by a preponderance of the evidence that he engaged in protected activity and that his protected activity was a contributing factor in the adverse action taken against him. *Kester*, ARB No. 02-007 at 7-8.

A complainant makes an initial inferential case by showing: (1) that the respondent is subject to the Act; (2) that he engaged in protected activity; (3) that he suffered an adverse employment action; and, (4) that a nexus existed between the protected activity and the adverse action. *Overall*, ARB Nos. 98-111 & 98-128 at 13.²⁵ This standard is inherently flexible and designed to be applied as dictated by the facts and circumstances of the specific case. *Burdine*, 450 U.S. at 254 n.6. Proximity in time, generally, may be sufficient to raise an inference of causation. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). However, it should be considered within the context of the particular factors of the case. *See generally, Overall*, ARB nos. 98-111 & 98-128.

Once the complainant sets forth his initial inferential showing, a presumption of discrimination exists. *Burdine*, 450 U.S. at 254 n.7. The burden then shifts to the respondent to articulate a legitimate nondiscriminatory reason for the adverse action. *McDonnell Douglas*, 411 U.S. at 802. The respondent's burden at this point is a burden of production, whereby it must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse action. *Burdine*, 450 U.S. at 255. However, the respondent need not prove that it was actually motivated by these proffered reasons. *Id.* at 254. Indeed, because the respondent's burden at this stage is one of production, and not persuasion, consideration of its stated reasons involves no credibility assessment. *Reeves*, 530 U.S. at 143 (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993)). If the respondent meets this burden, it rebuts the presumption created by the complainant's initial showing. *Burdine*, 450 U.S. at 254.

Once the respondent meets its burden of producing legitimate nondiscriminatory reasons for the adverse actions, the complainant is afforded the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but in fact a pretext for discrimination. *Reeves*, 530 U.S. at 143 (citing *Hicks*, 509 U.S. at 511). A complainant meets this burden by setting forth sufficient evidence to show that the respondent's proffered explanation is unworthy of credence. *Reeves*, 530 U.S. at 143 (citing *Burdine*, 450 U.S. at 256).²⁶

Even if a complainant established that protected activity contributed to an adverse

²⁵ "Nexus" is defined as "[a] connection or link, often a causal one." *Black's Law Dictionary*, 1066 (7th ed. 1999). The nexus requirement has also been described as an "inference of causation" between the protected activity and the adverse employment action. *See Bechtel v. Sec'y of Labor*, 50 F.3d 926, 934 (11th Cir. 1995).

²⁶ It must be noted that a complainant does not automatically establish entitlement at this stage by setting forth sufficient evidence to reject the respondent's explanation. *See Reeves*, 530 U.S. at 148. The Supreme Court has explained that an employer would still be entitled to judgment if the record conclusively revealed some other nondiscriminatory reason for the employer's decision. *Id.*; *see also Fisher v. Vassar College*, 114 F.3d 1332, 1338 (2d Cir. 1997) (noting that the complainant's showing of discrimination is hampered "if the circumstances show that the defendant gave the false explanation to conceal something other than discrimination.").

employment action, thereby proving discrimination, a respondent may avoid liability if it can demonstrate by a preponderance of the evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity.” This burden amounts to an affirmative defense and arises only if the complainant first proves discrimination. *Martin v. Azko Chemicals*, ARB No. 02-031 (July 31, 2003).²⁷ *Kester*, ARB No. 02-007 at 8.

When both whistleblowing activities and legitimate, nondiscriminatory reasons could have motivated an employer’s decision to terminate an employee, a dual motive. may exist. Where other reasons besides retaliation may account for the employee’s termination, the employer has the burden to prove by a preponderance of the evidence that it would have terminated the employee even if the employee had not engaged in the protected activity. *Passaic Valley Sewerage Commissioners v. U.S. DOL*, 992 F.2d 474 (3d Cir., 1993) at 481. In a dual motive analysis, it is the employer's motivation that is under scrutiny. The risk that the illegal and legal motives behind employee termination merge and become inseparable is placed on the employer. It is not enough that the evidence proves that the employer, in retrospect, made its employment decision on legitimate grounds. *Passaic Valley Sewerage Commissioners v. United States Dept. of Labor*, No. 92-3261 (3rd Cir. Apr. 16, 1993) (available at 1993 U.S. App. LEXIS 7906).

DISCUSSION OF FACT AND CONCLUSIONS OF LAW

Generally

As a colleague recently pointed out, like most cases of discrimination or retaliation, the instant case lacks a “smoking gun.” *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989). The complainant need not have any specific knowledge that the respondent’s officials had an intent to discriminate against the complainant, however ERA employee protection cases may be based on circumstantial evidence of discriminatory intent.²⁸ *See Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34, slip op. at 10 n. 7 (Sec’y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984)(quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)).

In *Timmons v. Mattingly Testing Services*, 95- ERA-40 (ARB June 21, 1996), the Board reviewed principles governing the evaluation of evidence of retaliatory intent in ERA whistleblower cases. The Board indicated that where a complainant’s allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mind set of the employer and its agents regarding the protected activity and the adverse action taken. The Board noted that there will seldom be “eyewitness” testimony concerning an employer’s mental process. Fair adjudication of whistleblower complaints requires “full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken.” *Id.* at 5. The Board continued:

Antagonism toward activity that is protected under the ERA may manifest

²⁷ Noting a difference between the ERA “clear and convincing” standard and the WPC standard.

²⁸ Again, the ERA provides an analytical framework as cases interpreting it have been broadly applied in other environmental whistleblower actions.

itself in many ways, e.g., ridicule, openly hostile actions or threatening statements...

When disciplinary action, including termination from employment, is involved, the past practice of the employer in similar situations is relevant to determining whether there has been disparate treatment, which may provide highly probative evidence of retaliatory intent.

Furthermore, a complete understanding of the testimony of the witnesses, including testimony regarding technical procedures, is necessary for the drawing of pertinent inferences and the resolution of conflicts in that testimony.

Id. at 5-7 (citations omitted).

I find here, based on the discussion of the matters set forth below, that the Complainants have without doubt established that the Respondent is subject to the Act and that they suffered an adverse personnel action, i.e., termination. Furthermore, it is established the Complainants engaged in “protected” activity and an inferential showing has been made that a nexus existed between the protected activity and the adverse action.

Protected Activity

The very nature of the Complainants’ jobs required them to investigate environmental matters, appear and testify in court concerning non-compliance, and provide reports to appropriate authorities. The evidence establishes that both Complainants did so. However, the Complainants went beyond the explicit basic job requirements to point out that certain spill sites they visited were not properly “posted,” as required by state law, at the time of their inspections. They questioned the proper calculation of spill volumes when they observed a potential discrepancy between the size of various spills reported. They raised concern about reports of no fish kills when it appeared to them that no appropriate fish kill determinations had been made. They raised concerns about bioremediation of waste discharge sites when they found what they believed was fecal waste. The fact that they did not refer to specific statutory or regulatory sections when expressing these concerns does not obviate the fact that they raised such matters.

Ms. Stokes, whom I find credible, confirmed that she had heard Ms. Abdur-Rahman say the County could get in trouble if things (environmental reports) were not done right. Nor does the fact that they were not totally familiar with the overall picture of how the County responded to the SSOs make their expressed concerns any less protected. The law makes clear that raising such concerns internally to co-workers or supervisors is protected. That is exactly what both Complainants did. In fact, Mr. Gudewicz admitted that he had, on one occasion, called dispatch to pass on Ms. Abdur-Rahman’s report that a site was not properly posted. Ms. Stokes corroborated testimony about the constant environmental concerns raised by the Complainants.

The Complainants’ concerns about the “stock” nature of the Department’s SSO/spill reporting forms was given legitimacy by Mr. Chen, whom I find quite credible, who testified they were “canned” forms and the fact the forms were revised shortly after the Complainants were terminated. Moreover, the dozens of such forms in the record reflect their “canned” nature. Since the Complainants were not the “first responders” to SSOs, it was not their initial responsibility to make determinations of fish-kills or volume. Nor did they have substantial,

unambiguous, evidence that the County had failed in its reporting obligations. In fact, the County had reported both fish-kills and spill volumes which constituted “major” spills.” Moreover, Mr. Noell, Georgia EPD, testified that he was not aware of any County violation related to fish kills, spill sizing or posting between August 2004 and March 2005. However, as the Complainants’ SSO reports illustrate, the data concerning spill volume, fish kill, and posting, was incorporated into their final investigative reports. For example, although Ms. Abdur-Rahman expressed concerns about fish kill and bioremediation at the Panthersville SSO site, those matters were included as initially reported (by others) in her final report, January 27, 2004, which was her first SSO report. Thus, their expressed concerns were both within their general job duties and qualify as “protected” activity.²⁹

Much was made of the Complainants’ requests for historical data or information regarding SSOs or spills which their supervisors did not provide. Both Complainants erroneously believed all SSO’s had to be reported to the State. Mr. Petty came to suspect the County might be hiding the information. It was logical, admirable and in accordance with the County’s Chief Executive’s guidance to “go the extra mile”, for these well-educated and highly motivated employees to seek out the historical data in order to identify “hot spots” where County prophylactic action could best be focused. It is more likely than not that Mr. Walker and Mr. Gudewicz complained they were being “too scientific,” “ruffling feathers” and “rocking the boat.” While some small effort was apparently made to locate those records, Mr. Walker determined that the information was not needed for the Complainants to complete their work on the FOG ordinance committee. That may be true, but, it certainly was part of their job duties to “assist in tracing the sources of illegal, harmful, or excessive waste discharges...” So, Mr. Walker’s determination was surprisingly myopic. It is clear that he had, as a priority, the FOG Ordinance committee completing its work expeditiously.

Employers understandably have the discretion to prioritize and/or to restrict the scope of employee tasks. Even given that, the broad remedial purposes of the Act would be ill-served if such complaints, about not being provided material and information necessary or desirable to execute their duties, by employees were not found to be “protected” activities. These Complainants were compliance inspectors tasked to find the sources of discharges who were deprived of information which if provided would have greatly facilitated achieving the very goals set by the County. When they persisted or complained about not being given the data they were accused of rocking the boat. However, even if these queries and expressed concerns are later determined not to be “protected,” the Complainants’ other actions noted above were.

I observe that it has not been established that the County had nefarious reasons not to provide the historical SSO/spill information which was readily accessible. However, no such motive need be established in order for the Complainants’ requests to qualify as “protected” activity. The evidence does show the County was under state EPD scrutiny, but also that the County time and again reported “spills” as required by state law.

Adverse Personnel Action

It is established that both Complainants were terminated. Even though they qualified as

²⁹ Recognizing they were not the “first responders” who were required to post signs, determine volume and fish kill.

“merit” County employees, the Complainants still had served a probationary period. While it is the employer’s prerogative to terminate such employees for nearly any reason, good or bad, or for no reason at all, the former may not terminate employees for engaging in protected activities. *Kahn v. Commonwealth Edison Co.*, 64 F.3d 271 (7th Cir. 1995).

Relationship Between Protected Activities and Adverse Action

The central issue in this case is whether the Complainants were terminated for their protected activities.

I have little question that, in mid-December 2004 through early January 2005, Mr. Gudewicz became annoyed by the Complainants’ persistent pestering, questioning, and criticisms, particularly by Ms. Abdur-Rahman. Some of this might be similar to the type of antagonism toward activity that is protected, referred too in *Timmons, supra*. Mr. Gudewicz and Mr. Petty’s coworkers became irritated that Mr. Petty constantly referred to how things had been done, presumably better, in the Atlanta Water and Sewer Department, where he had previously worked. Some coworkers believed that the Complainants were overly opinionated and that they insisted on doing things their way. Some testified that they believed the Complainants considered Mr. Gudewicz incompetent. Some viewed the Complainants’ persistence and “go-getter” attitude as “argumentative.”

Mr. Gudewicz, who was going through an understandably difficult emotional and stressful period and who lacked any management training, was having a particularly trying time dealing with these highly-motivated new employees who were so much better educated than he was. While, because of the many inconsistencies between his deposition and trial testimony, I give his testimony little, if any, weight, even he admitted eventually walking away from the Complainants when they pestered him. It is proven the Complainants would rarely take “no” for an answer. Mr. Gudewicz felt like Ms. Abdur-Rahman acted as if she wanted to run the department.

The pestering was comprised of: persistent requests for historical SSO data in order to locate “hot spots”; displeasure with the FOG form Mr. Gudewicz had developed; Ms. Abdur-Rahman’s repeated requests for standard operating procedures; and, the Complainants’ oft skepticism about spill volume determinations and fish-kills reported on the County’s “canned” spill reporting forms. Additionally, the admitted exhibits illustrate that Ms. Abdur-Rahman sent a constant barrage of emails to Mr. Gudewicz, which given the pressure he was under, surely contributed to his irritation. Mr. Gudewicz testified he just did not have the time to manage these employees, i.e., the ones terminated, “it was above my [his] means.” Unfortunately, all this had the cumulative effect that he came to view them and their activities through a negative prism and most often did not check his critical observations against the true facts. For example, his perception about them missing attendance at the Houston conference and perceptions about them riding together were both inaccurate.

The apparent work culture of the “old timer” Water and Sewer Department’s supervisors reflects an over-sensitivity to perceptions of “insubordination,” rudeness, disrespectfulness,

disruption, and challenges to authority.³⁰ Many of these traits were repeatedly mentioned by County supervisors. How thin-skinned Mr. Mason must have been to have complained about Mr. Petty “staring him down” and allegedly telling him never to speak with him again. The alleged incident with Mr. Calhoun also illustrates, among other things, a lack of supervisory acumen. These are types of incidents one might find in a second-grade school room, not a well-managed office.

Lamentably, Mr. Gudewicz and Mr. Walker did not follow the County rules regarding performance evaluations. The guidelines require, “when an employee’s performance for any job standard is rated at marginal or below standards” their performance must be evaluated on an interim basis “midway in the appraisal period.” (CX 60, page 25). That was not done. It might it have made a difference. When Mr. Gudewicz finally did prepare the appraisals, after the termination decision, he largely concocted the bases for his negative ratings. Throughout this proceeding, the County has persistently argued that the Complainants’ performance was the basis for termination. The evidence and largely concocted performance appraisals do not support that.

Mr. Gudewicz recommended Mr. Petty’s termination well before the latter participated in an SSO. He recommended terminating Ms. Abdur-Rahman two days after the “slight” he perceived, on Wednesday, January 26, 2005, before the Panthersville SSO incident and the FairLakes matter. It is likely that a part of what was viewed by supervisors as pestering and “insubordination” was not much more than the manifestation of the Complainants’ protected activity. See, e.g., *Dodd v. Polysar Latex*, 88-SWD-4 (Sec’y Sept. 22, 1994).

Thus, I find the Complainants have established an inferential showing of a nexus between the protected activity and the adverse employment action. That is, the Complainants’ protected activity was a factor, in connection with other factors, which tended to affect the decision to terminate them. I note that it need not have been a predominant, motivating, substantial, or significant factor. See *Marano, supra*.

Employer’s Production of Nondiscriminatory Reasons

The Respondent produced evidence of legitimate, nondiscriminatory reasons for terminating the Complainants. The Respondent offered the Complainants’ “below standards” performance reports and argued the matters reflected in those reports justified termination of the probationary employees.

Ms. Abdur-Rahman’s appraisal referred to: problems with time and statistics; failing to complete an investigation; omissions in documentation; absences; conflicts with supervisors on completing assignments, and; a car accident. Mr. Petty’s referred too: class disruption; disagreement with FOG policies; absences; conflicts with coworkers, and; insubordination.

According to the Respondent, Mr. Petty was terminated for his “anger management” problems, challenging Mr. Gudewicz, and being disrespectful, insubordinate, belligerent, confrontational, and inattentive. This was allegedly supported by the incidents reported by Mr. Calhoun and Mr. Mason, as well as Mr. Gudewicz’s own observations. Mr. Gudewicz’s

³⁰ “Old timer” refers to the tenure of the supervisors.

decision to terminate Mr. Petty was made on or before January 13, 2005, well before the latter participated in any independent SSO investigations.

Mr. Abdur-Rahman was terminated, according to the Respondent, for being argumentative, disrespectful, rude, disruptive, insubordinate, and acting as if she wanted to run the Department, all of which frustrated Mr. Gudewicz, her boss. Moreover, Mr. Gudewicz believed she had been screaming and called him incompetent and a liar or “flip-flopper.” This information was passed on to Mr. Walker in conversations with Mr. Gudewicz before the Complainants’ written appraisals were completed. They discussed Ms. Abdur-Rahman’s termination sometime between January 26 and February 8, 2005. Her participation in SSO investigations after that, i.e., Rock Cliff Road, Rocky Valley Drive, and Fairlakes played no role in the decision. It unlikely her participation in the January 27, 2005, Panthersville investigation played a role, because of the January 26, 2005 incident where Mr. Gudewicz felt slighted.

Mr. Walker and Mr. Gudewicz had discussed Mr. Petty’s termination and Mr. Gudewicz sent a memorandum recommending his termination January 13, 2005. Mr. Walker admitted he cannot know each employee and had to rely on their supervisors. Mr. Gudewicz told Mr. Walker the Complainants did not fit in. Mr. Walker had heard complaints from other employees about how disruptive the Complainants were and how they negatively affected the section’s morale. He testified that he had personally observed the morale in Mr. Gudewicz’s section decline because the latter was treated more like a peer than a supervisor.

Mr. Walker recommended termination of all four inspectors, in writing, on February 8, 2005. Mr. Walker only scanned the final appraisal forms before recommending termination to Mr. Barnes. Mr. Walker testified he was unaware of any environmental complaints raised by the Complainants at the time or that they had been involved in the Fairlakes SSO investigation. The record does show he was “copied” on many of the Complainants’ written reports.

Mr. Barnes supervised over 700 employees and had to rely on Mr. Walker’s judgment. Mr. Walker passed on the above information. Mr. Barnes conducted no independent investigation and assumed the appraisal forms were accurate. Mr. Walker recommended the termination of four compliance inspectors who worked for Mr. Gudewicz, i.e., Mr. Petty, Ms. Abdur-Rahman, Ms. Stokes, and Mr. Anderson. All of them were about to complete their initial probationary period. Mr. Barnes approved the terminations on February 15, 2005. The employees were nevertheless permitted to continue their work on the FOG Ordinance and SSO investigations.

Having made no credibility assessments and not evaluating the Respondent’s proffered reasons for the terminations, I find the Respondent has successfully rebutted the initial inference raised by the Complainants by producing evidence of legitimate, nondiscriminatory reasons for the terminations.

Complainants’ Proof of Pretext

Mr. Barnes testified that it was unusual, even “rare”, for the County to terminate their college-educated employees. Nor could he remember any other college-graduate probationary

employees terminated because of their attitudes and insubordination. Mr. Walker informed him Ms. Abdur-Rahman was difficult, insubordinate, argumentative, constantly challenging her supervisor, reducing section morale, and difficult to manage. He told him Mr. Petty had some anger problems with some incidents with co-workers and supervisors. Mr. Barnes recalled that Mr. Walker had informed him that Mr. Petty posed similar problems, that is he challenged Mr. Gudewicz and was disrespectful. Mr. Barnes was not aware of any protected activity on the part of the terminated employees. He was, in great part, misled by the largely concocted performance appraisals. There was no evidence that Mr. Barnes was aware of Mr. Gudewicz's lack of management training, management ability or the stress he had been under.

Mr. Walker knew that the Complainants were highly educated and that Ms. Abdur-Rahman, in particular, was a highly-motivated, a "go-getter." He knew Mr. Gudewicz's education level and that he had not gotten supervisory training. He also knew that, by his own admission, Mr. Gudewicz was frustrated and not able to manage Ms. Abdur-Rahman as it was "above (his) means." I credit Mr. Walker's testimony that he was unaware of any explicit environmental complaints by the two or that they had been involved in the Fairlakes SSO investigation. However, he was aware of their requests for historical SSO data in order to find hot spots, having told them it was unnecessary for their work to complete the FOG Ordinance. He claimed three compliance inspectors, who had not been terminated, had complained to him about the conduct of the two.

It is quite anomalous that the County would keep an employee, such as Mr. Petty, that allegedly had "anger management" problems and was allegedly belligerent on the payroll as long as they did here after the alleged incidents (11/23/04) creating that perception. Moreover, Mr. Walker had promised Mr. Petty that he would not be fired over the "Calhoun" incident. Further, the County had actually retained another compliance inspector who had actually assaulted someone after sending him to an anger management program. Likewise, while the alleged reasons for terminating Ms. Abdur-Rahman included her being argumentative, disruptive, and disrespectful, oddly, she too was allowed to deal with the public and conduct several SSO investigations, after the pre-February 8, 2005 decision to terminate her employment. Thus, I do not find "anger management," "disrespectfulness", or "challenges" to his supervisor to be true bases for Mr. Petty's termination or that Ms. Abdur-Rahman was "challenging," argumentative or insubordinate, as those terms are generally understood.

Mr. Gudewicz had also recommended terminating Ms. Stokes and Mr. Anderson. He felt Mr. Anderson was "challenging" him by questioning a FOG form and that he had been "disruptive, disrespectful and insubordinate," primarily because he had interrupted at a meeting and had declined to sit when a supervisor directed him to sit. This is another example of the "thin skin" of the Department's supervisors. At least Ms. Stokes' termination was not based on such sensitivities. She had once misled Mr. Gudewicz and had been involved in two traffic accidents, all of which was more or less accurately portrayed in her performance appraisal.

Dekalb County's "Employee Information Package" states, "In no event shall an employee's performance rating be a substitute for disciplinary action" rather it is feedback on job-related criteria and specific work performance. (CX 60, page 24). At least some of the rating comments, made by Mr. Gudewicz, in Ms. Stokes', Mr. Petty's, Ms. Abdur-Rahman's, and, Mr.

Anderson's appraisals refer to incidents, such as being confrontational, belligerent, insubordinate, and disruptive, and vehicle accidents and absences, which, if true, would have been more appropriately handled through minor disciplinary action, but were not.

I do not give much credit to Mr. Gudewicz's testimony. In his deposition, he testified that Ms. Abdur-Rahman had screamed and called him a "liar." However, at trial, he did not recall any screaming (after having heard several witnesses deny they ever had heard her scream) and did not recall her calling him a "liar" but rather a "flip-flopper." I have found that he mostly concocted the Complainants' performance appraisals and wrote comments which, if true, should have been handled by minor disciplinary action. He testified at deposition, that he had decided to terminate Mr. Petty when he wrote his performance appraisal, but changed that testimony at trial. At trial, he testified that Messrs. Bethea, Petty, Anderson, and Ms. Wilcox and Ms. McMichael were present January 26, 2005, when Ms. Abdur-Rahman had allegedly called him "incompetent" and a "liar", but his earlier memorandum about the matter only mentioned three of them, i.e., Petty, McMichael, and Anderson. Both Mr. Petty and Ms. Abdur-Rahman denied ever having said such a thing. Mr. Gudewicz did not refer to any name calling or screaming in his January 28, 2005 memorandum to Mr. Walker concerning Ms. Abdur-Rahman when the incident had allegedly just occurred two days earlier. Mr. Anderson was not called to support the occurrence of the event, nor did Ms. McMichael support it. I conclude that Ms. Abdur-Rahman had not explicitly called Mr. Gudewicz a "liar," a "flip-flopper," or "incompetent". Rather, he may have taken the discussion that way because of his sensitivity.

Mr. Gudewicz was wrong about Ms. Abdur-Rahman's alleged abuse of sick leave. He was wrong about her and Mr. Petty inappropriately missing portions of the Houston conference. He was wrong believing they had violated his policy concerning riding together because they had legitimate reasons to do so. The County's continued reliance on the Complainants' alleged unsatisfactory performance, reflected by the specific examples in their appraisals, as the reason for termination is not supportable. The fact that Mr. Gudewicz allowed both Complainants to continue working after deciding to terminate them is inconsistent with his subsequent downgrading of their performance appraisals. However, it is also inconsistent with terminating them for any environmental complaints.

Unfortunately, the evidence does establish the Water and Sewage Department's poor personnel management practices. First, a worker without any management or supervisory training was made a section head and supervisor. While Mr. Gudewicz undoubtedly knew his FOG work, he was not trained to manage and was not familiar with the County's most basic personnel policies or general management concepts. Mr. Walker, in his admirable zeal to ramp up the FOG program, did not make Mr. Gudewicz's training and supervision a priority.

When nine, highly-educated, degreed, new inspectors were hired, Mr. Gudewicz was simply not up to the task of supervising them. Coming from the old-timer, "thin skinned" County supervisor environment and lacking the equivalent education, he was not equipped to supervise the highly motivated Complainants. He was not equipped to deal with go-getter employees who asked "why" and challenged the way things had always been done. Instead of understanding or properly channeling their inquisitiveness and enthusiasm, he and other first-level supervisors, took their behavior as "challenges" to their authority and as "insubordination."

It appears that Mr. Walker failed to help Mr. Gudewicz through an extremely stressful period of his life, when the latter's spouse had cancer and he was simply overloaded with work. Perhaps, Mr. Gudewicz lacked the training to even have reported his situation to Mr. Walker. Moreover, when he observed Mr. Gudewicz's section decline because the latter was treated more like a peer than a supervisor, he did nothing about it at the time. This type of alleged treatment of a new supervisor is a further sign of not wholly effective or, at best, inattentive management.

Mr. Gudewicz did not "document" problems as they developed as Mr. Walker had told him to do. Mr. Walker did not pay attention to the lack of documentation. When having problems with subordinates, Mr. Gudewicz did not write an interim appraisal as the County's guidance required. Surely, with the stress he was under, he would have felt he lacked the time, if he even considered doing so. When appraised of employee problems, Mr. Walker did not have Mr. Gudewicz prepare interim appraisals or disciplinary write-ups. Mr. Gudewicz either did not check or chose to ignore the true facts behind some of his observations, such as alleged misuse of sick leave or alleged absence from portions of the Houston conference. Nor did Mr. Gudewicz conduct any meaningful "counseling" sessions with the Complainants as Mr. Walker had told him to do. In his misguided style, Mr. Gudewicz did not write up the Complainants for perceived misbehavior with the result that matters simply built up to a critical mass he admittedly could not handle.

When appraisals were finally written, they inappropriately referred to matters which, if true, related to discipline. Mr. Walker admitted to merely scanning the completed appraisals which he passed on to his superiors. He had already decided to terminate the employees based on conversations with Mr. Gudewicz. Mr. Walker admitted that the following matters, referred too in Ms. Abdur-Rahman's appraisal, were not the basis for the termination: attendance; sick leave; accident; number of inspections; or, compliance letter errors.

Mr. Barnes, with his broad responsibility, had to rely on Mr. Walker. Yet, there is no evidence that either considered that Mr. Gudewicz's lack of supervisory acumen was the true source of the problem resulting in the highly unusual recommendation to terminate four highly educated inspectors. Mr. Gudewicz's own testimony about how he would simply walk away from the Complainants when they asked for things or information is yet another illustration of his inability to manage. Mr. Barnes had assumed the performance appraisals were true, but they were not wholly so.

Here, the County had two highly motivated inspectors who turned out a draft FOG ordinance which could serve as a template for any Water and Sewer department in the country. Rather than appropriately harness their demonstrated abilities, they were left to wilt under Mr. Gudewicz's inept personnel management. Rather than accept challenges to the status quo, the thin-skinned supervisors took the Complainants' enthusiasm as "insubordination", "disruption", disrespect and as challenges to their authority.

To make matters worse, here the Department had a worker, Mr. Petty, they claim was confrontational and belligerent, but then, they not only allowed him to continue to work for two

more months with the public, but to remain among his coworkers. Much the same can be said of their decision to allow Ms. Abdur-Rahman to continue working. It simply belies the truth of the County's stated bases for their termination.

Mr. Gudewicz refused to provide the dismissed employees copies of their final appraisals. The manner in which the employees were terminated, with a police officer present, was pathetic. If the soon to be terminated inspectors were that much of a threat, why had they been allowed to continue working? The County's post-termination pursuit of criminal prosecution for the alleged removal of insignificant paperwork by Ms. Stokes and Ms. Abdur-Rahman was, at best, misguided.

Given the timing of the decisions to terminate the Complainants, i.e., January 13, 2005, for Mr. Petty, and before February 8, 2005 for Ms. Abdur-Rahman, it is not established that their participation in the SSO investigations placed in evidence played any role. In fact, Mr. Gudewicz had decided to terminate Mr. Petty before the latter had been involved in any SSO investigation. So, the concerns Mr. Petty raised during the subsequent SSO investigations played no role in the decision to terminate him. Ms. Abdur-Rahman participated in only two SSO investigations, at the most, before the decision to terminate her was made, some time between January 26 and February 8, 2005. She was involved in the Panthersville SSO on January 27, 2005, and the Suipo Chan SSO investigation on February 2, 2005. Ms. Abdur-Rahman had raised concerns, discussed above, during those investigations. But, it is more likely than not that Mr. Gudewicz's perceptions of the January 26, 2005 incident sealed his decision to terminate her. In fact, as Complainants' counsel states, "... after Ms. Abdur-Rahman handed in her report on the Panthersville SSO on January 31, 2005, Mr. Gudewicz told her the report was fine. . ." (Complainants' Brief, page 34). Ms. Abdur-Rahman herself testified to the effect that given Mr. Walker had used the term "incompetent" in relation to Mr. Gudewicz in her meeting with the latter, Mr. Gudewicz must have told him that. (Complainants' Brief, page 41).

To sum up, it is established these Complainants were not terminated for "performance" problems. Rather, it is proven that the supervisory incompetence, illustrated above, was the primary reason for their termination. The Complainants established by a preponderance of the evidence that the reasons offered by the Respondent were not its true reasons and have set forth sufficient evidence to show that the Respondent's proffered explanation is unworthy of credence, i.e., a pretext. But, it was a pretext for incompetence, not protected activity.

Certainly, evidence of the falsity of the Respondent's explanation, coupled with the establishment of a prima facie case can be affirmative evidence of guilt. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 148. However, entitlement is not necessarily established upon such a showing absent the requisite showing of discrimination.

While the Complainants have shown the Respondent's asserted rationale for their termination was false, they did not prove that the Respondent's false rationale concealed discrimination (based on protected activity), but rather poor management. Thus, their showing of "causation" is not satisfied.

Respondent's Evidence of Nondiscriminatory Action

In a dual motive analysis, as here, it is the employer's motivation that is under scrutiny. *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 2004-CAA-5 (ARB Nov. 29, 2006). The risk that the illegal and legal motives behind employee termination merge and become inseparable is placed on the employer. It is not enough that the evidence proves that the employer, in retrospect, made its employment decision on legitimate grounds. Where other reasons besides retaliation may account for the employee's termination, the employer has the burden to prove by a preponderance of the evidence that it would have terminated the employee even if the employee had not engaged in the protected activity.

I have no doubt, whatsoever, that evidence establishes the "motivation" for terminating the Complainants was the result of Mr. Gudewicz's abject inability to manage them. A "motivating" factor requires more proof than a mere "contributing" factor. See *Lopez, supra*. Mr. Gudewicz admitted it (managing these employees) was "above my means." The testimony established that beyond any doubt. The record establishes managerial failure to follow their own guidance and to properly lead these high-motivated and well-educated employees. Nor did management know how to channel their enthusiasm.³¹ The best use the County made of them was to have them complete the critical new FOG Ordinance.

The supervisors under Mr. Walker were "thin skinned," taking offense at the slightest possible perceived affronts and labeling them as "insubordination." This was particularly true of Mr. Gudewicz, who at the time, was under significant stress. While I do not give his testimony much weight, the record does establish that he easily took offense and rather than check into the true facts underlying his suspicions relied on his rather poor ability to observe. The Complainants, like Mr. Anderson, another probationary compliance inspector, who was not shown to have engaged in protected activity, were terminated for these supervisors' inability to handle common challenges posed by enthusiastic and more highly-educated inspectors. I observe that while the employer's articulated reasons may be found pretextual, they may be pretextual for reasons other than unlawful discrimination. *Zinn v. University of Missouri*, 94-ERA-34 & 36 (Sec'y Jan. 18, 1996). The County, understandably, would not want to vilify a valued technical expert, such as Mr. Chester Gudewicz. The County essentially alluded to his significant lack of managerial acumen as Chester's "way of doing things." It is established that his own, admitted, inability to manage the Complainants, was the true motivation for the recommendation and decision to terminate these two employees. Much the same can be said with respect to the two other terminated inspectors.

It is proven by a preponderance of the evidence that expressed environmental concerns were not the motivating factor for terminating these Complainants. The Respondents have established the Complainants would have been terminated even had they not engaged in protected activity because managing them was above their supervisor's means and they did not fit in the peculiar culture of the Water and Sewer Department.

³¹ This is not a case where the legitimate reason is so subjective as to be incapable of objective evaluation. See discussion in *Hill v. Seaboard Coastline Railroad Co.*, 885 F.2d 804 (11th Cir. 1989)(Title VII racial promotion discrimination).

CONCLUSIONS

The Complainants established they had engaged in activities protected under the Act. Although most of what the County offered concerning their tenure was untrue, the Complainants have not proven by a preponderance of the evidence that they were terminated for engaging in protected activity. It is established that the personnel managerial ineptitude of the County Water and Sewer Department, particularly the FOG Compliance section, resulted in a failed employer-employee relationship which was the basis for their termination.

ORDER

The complaints are dismissed.

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RICHARD A. MORGAN
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 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. The date of the postmark, facsimile transmittal, or e-mail communication 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 Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Ave., NW., Washington, DC 20210.

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 the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. 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, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).