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Issue Date: 13 January 2005

CLIFF MORRISS
Complainant

2004-CAA-00014

v.

L G &E POWER SERVICES, LLC.
Respondent

RECOMMENDED DECISION AND ORDER

Cliff Morriss (herein "Morriss"), the Complainant, filed a whistleblower complaint against LG&E Power Services, LLC ("LG&E"), the Respondent, alleging violations of Section 322(a) (1-3) of the Clean Air Act, (CAA). Mr. Morriss alleges that LG&E terminated his employment in January 2004 in retaliation for his raising a concern of possible data tampering regarding LG&E's Continuous Emissions Monitoring System ("CEMS") in October 2001, in violation of Section 322(a) of the Clean Air Act. *See* 42 U.S.C. § 7622(a).

The Act states in pertinent part:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
>
> (2) testified or is about to testify in any such proceeding, or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C.A § 7622. The statute is implemented by regulations providing procedures for handling of discrimination complaints. 29 C.F.R. § 24. An employee who believes that he or she has been discriminated against in violation of the Act may file a written complaint within 30 days after the occurrence of the alleged violation. 29 C.F.R. § 24.3(b)(c).

A hearing was held in Washington, D.C. on September 21, 2004. The Complainant is represented by Carolyn P. Carpenter, Esquire, Richmond, Virginia, and the Respondent by Jonathan P. Harmon, Esquire, and Jeffrey S. Shapiro, Esquire, McGuire Woods, LLP, also of Richmond. Seventeen (17) Complainant's exhibits ("CX" 1 – CX 17) and twenty nine (29) Respondent's exhibits ("RX" 1- RX 29) were admitted into the record. The Complainant,

Chris Hews[1], Donald Keisling, Louie Young, Timothy Dixon, Rosemary Morriss, Anthony Thompson, Sandra Morris, and Margie Kane[2] testified as witnesses.

Post hearing, the record remained open for briefs and reply briefs, and both parties filed briefs including proposed findings, as well as reply briefs.

Applicable Standards

To prove a *prima facie* case of retaliatory discharge, a complainant must show that:

(1) The employee was engaged in protected activity;

(2) Respondent took an adverse employment action against him; and

(3) A causal connection existed between the protected activity and the adverse action.

If Complainant establishes a prima facie case, the burden of proof shifts to Respondent to proffer evidence of a legitimate, nondiscriminatory reason for taking the adverse action.

If Respondent proves its shifting burden, Complainant then has an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered were pretextual.

Stipulations

Prior to hearing the parties submitted certain proposed findings and at hearing the parties stipulated that:

1. Complainant was employed by Respondent at its Roanoke Valley Energy facility from July 13, 1993 until January 28, 2004 as an Electrical & Instrumentation ("E&I") Technician. Transcript ("Tr.") at 10.

2. In mid-2001, Complainant reported the concern that operators were manipulating data. *Id* at 11. The Respondent stipulated that Mr. Morriss was engaged in a protected activity as a whistleblower, as he had filed an internal complaint. Tr. at 9; *See* Respondent's Brief at 15.

3. In December 2001, Donald Keisling investigated Complainant's concern of data manipulation and concluded that data was not being manipulated. *Id*.

4. Although the company exonerated Timothy Dixon of certain charges, it did find that there was inappropriate behavior in the E&I Department. *Id* at 10.

5. In July of 2003, Keisling learned that Complainant had been arrested and incarcerated for assaulting his wife and co-worker, Rosemary Morriss. *Id*.

6. In August 2003, Complainant was placed on leave with pay so that he could attend counseling sessions and sort out personal issues. *Id*. at 11-12.

7. On August 29, 2003, Complainant signed a Return to Work Agreement and returned to work with Respondent. The Return to Work Agreement provided, among[3] other things, that Complainant would not discuss marital issues with other employees at the work place. *Id*. at 12.

8. On November 20, 2003, Complainant was counseled for performance issues and given a Final Warning, a letter of reprimand for three violations of the performance plan:

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[1] Referred to as "Hughes" in the transcript.

[2] A/K/A Spradlin-Kane. Also spelled Cane, Cain and Caine in various pleadings and briefs. I assume she is the same person.

[3] Note the typographical error in the Transcript.

a. Excessive personal cell phone usage on company time;
b. Failure to complete work assigned; and
c. Leaving work at 4:00 p.m. when a job was not finished (when his regular schedule was 7:00 a.m. to 3:30 p.m.). *Id*. 10, 12

9. The termination is an adverse employment action. *See* Respondent's Brief at 15.

Timeline

The Complainant asserted one hundred five (105) proposed findings and the Respondent submitted substantially the same number of proposed findings in its Post Hearing Brief. Most of the factual allegations are not in conflict. There is no dispute that Complainant was employed from 1996 until the date of his termination as an Electrical & Instrumentation ("E&I") Technician. Tr. at 42-43; CX 1.

Beginning in April, 2000, Complainant was supervised by E&I Department manager, Chris Hews ("Hews"). At the time Hews became the E&I Department manager, in addition to Morriss, there were three (3) employees working in the department, i.e., Jeff Dixon, John Hodson, Lee Winder and Fred Thompson. Tr. at 43-44, 156. The record also shows that by 2000, Complainant became the E&I department's expert, also described as the "heavy," "lead person," or "heavy hitter" in CEMS. Tr. at 43-44, 157, 195, 350. The CEMS system is the computer system, consisting of hardware, software, etc., which collects air emissions data, for reporting to the state. Tr. at 43-44.

In March, 2001, an employee from operations, Louie Young ("Young"), was hired for work in the E&I Department. Tr. at 47, 156. Cf. 320 (Young's testimony). Just a few weeks after he began work, Young and Complainant became involved in a dispute involving whether another E&I employee, Fred Thompson, should be assigned to CEMS full time. Tr. at 47-48. In the heat of the argument, when Complainant refused to give his approval to Thompson being assigned full time to CEMS, Complainant alleges that Young stated: "[Y]ou're so smart, they're [the operators] editing data right under your nose and you don't even know it. As a matter of fact, they did it just last week." Tr. at 46-48, 327.

The record shows that Complainant was an expert in the CEMS database, and alleges that he knew that it was "possible" to edit the CEMS data. Complainant alleges that based upon the passion with which Young made his remarks, he understood Young to mean that the operators were in fact changing the data. Tr. at 458. Complainant was assigned the task of conducting an investigation to determine if data tampering had taken place. Thus, Complainant conducted a comparison of the CEMS and the PI data, which was placed on the daily log sheet provided to all E&I employees. Tr. at 51-54, 157-8. By comparing the CEMS and PI data, Complainant determined that the data had been manipulated. Tr. at 52, 366.

In April, 2001, Complainant discovered a metal tag which read, "Payback is a M—F—" on his file cabinet. Tr. at 76, 85; CX 11:1.

In October 2001, Complainant told Hews that he thought operators might be tampering with the CEMS data. Tr. at 49-50, 155-56. Young and Hews testified at hearing that what Young stated was that the operators "could" change the way the plant runs by changing the controls or the use of chemicals. Tr. at 159, 321.

Complainant also shared this information with Dave Smith ("Smith"), who was then responsible for providing environmental reports to the State of North Carolina. Tr. at 52. Hews later requested that Complainant leave Smith out of the reporting loop, because he gets "too upset." Tr. at 52.

Hews reported Complainant's allegation that data had been manipulated to Don Keisling. TR. Hews evidently notified his boss, then plant manager, Quinn Morrison ("Morrison"), of Complainant's concerns and that an investigation was being conducted. Neither Hews nor Morrison documented Mr. Morriss' concerns at that time. CX 6:3; Tr. at 192, 211.

Evidently, Mr. Morrison also notified Mr. Keisling, then plant production manager, of the Complainant's allegation. Tr. at 164, 205-206. At that time, Keisling was production operations manager. Tr. at 46, 205. He supervised approximately twenty five (25) operators, whose responsibility it was to operate the plant, i.e., operate the boiler and turbine and the equipment in the control room. It was further the responsibility of the operators to operate the CEM system. Tr. at 45, 320. Operators are responsible for monitoring to ensure that all applicable emissions requirements shown on the computer screen are within compliance of federal and state air emissions standards and, if not, they are responsible for taking action to bring the plant back into compliance. Tr. at 206.

Keisling testified at hearing that he considered this a serious issue and intended to report it to the state if substantiated. *Id*. at 205-06. Keisling vaguely remembers being informed in the spring of 2002 by either Morrison or Hews that Mr. Morriss had made an allegation that the operators were manipulating CEMS opacity data in order to cover up an "excursion" or "event." Tr. at 208. He says he was not particularly concerned because it was not something he could imagine happening. Tr. at 206. Complainant testified that Young had told him that he had been reprimanded for failing to bring this information to management's attention earlier. Tr. at 61. Young and Hews deny in testimony that Young was reprimanded. Tr. at 164, 340. Keisling asked Complainant to provide the data he believed had been manipulated. *Id.* at 206.

After a couple of weeks, Complainant asked Hews if the assignment could be removed from the daily worklist. Complainant informed Hews that he would like to take the data home to work on, since he was aware that employees were watching him. Tr. at 55, 159. He alleges that Young had informed Complainant that he was getting phone calls at home from operators asking what was happening and if he was trying to get them in Trouble. Tr. at 54, 329.

He also alleges that a number of operators including Christopher Martin ("Martin"), Lead Technician in the Operations Department at the time, were upset with Complainant as a result of his charges. Tr. at 330. Another operator, Terry Leftworth, asked Hews what Mr. Morriss was doing. Tr. at 164, 300. After Complainant took the issue to Hews, Hews met with the employees of the E&I department and told them that Complainant had a concern that operators were changing data. Tr. at 348. Complainant was not involved in this meeting. Tr. at 461.

After determining that the data had been tampered with, using his own comparisons, Complainant shared this information with Hews giving him examples from his comparison of the applicable dates, which showed that there had been manipulation of the data. Tr. at 56, 159.

When Complainant did not hear anything back from Hews about the investigation, he again questioned him about whether any action would be taken. Hews in essence informed Complainant that he should back off, i.e., he told him that if he were to push the issue that it would change the way in which business would be conducted in the future between management and the technicians. Mr. Morriss alleges that Hews was visibly upset by Complainant's questions. Tr. at 56.

Hews says that Complainant's concerns "got lost in all the other stuff we were doing" and "really didn't surface again until after the outages." Tr. at 159, 209.

During October 2001, soon after Keisling became plant manager, Hews and Morriss met with him. Tr. at 57; 206-8. Morriss shared with Hews and Keisling his concerns regarding the

editing of the CEMS data. Keisling testified that he knew that if it was confirmed that the data had been manipulated that he would be required to notify the State of North Carolina. Tr. at 208. Keisling's first reaction was that he could lose his job as a result. Tr. at 57, 209; CX 6:1.

Complainant ultimately provided a list of dates for Keisling to review. Tr. at 57, 161, 213. Keisling then conducted his own comparison of the CEMS data using CEMS and PI data, which Complainant had converted to Excel. Keisling determined that an accurate comparison could not be done, since: 1) the clocks on the computers were not synchronized; 2) the CEMS data was not corrected for daylight savings time; and 3) there was a discrepancy in the rate at which data for the two systems was collected. Tr. at 216-7; CX 6:1-3. He nevertheless compared the CEMS and PI data and concluded that there had been no "excursions" which caused any concern. Tr. at 223; CX 6:1-3. He concluded that there was no evidence of tampering. Tr. at 214-17. He reviewed his findings with Complainant and invited him to provide any additional information. Tr. at 127.

Keisling admitted, however, that some operators have the requisite knowledge to be able to manipulate the CEMS data. Tr. at 215.

Performance Evaluations

In February 2002, Complainant's performance was evaluated by Hews as a part of the company's Performance Planning Review & Development Process. CX 2. Hews rated Complainant's performance consistent with his prior rating, although he rated him down in a number of areas. Specifically, while Complainant had received an "Exceeds Expectations" in Objective #5 (Leadership) the prior year, he received only a "Fully Meets Expectations" this year. Hews noted that Complainant "has definitely taken ownership of the CEM system." CX 3:7; Cf. CX 2:7. As to Objective #7, Hews lowered the rating to between "Fully Meets Expectations" and "Partially Meets Expectations." Hews wrote: "[Complainant] acts with integrity and is genuinely concerned with doing what is right for the Partnership and the environment. He has a luculent grasp of the CEM and passionately pursues keeping the plant environmentally compliant." CX 3:9. Cf. CX 2:9.

In the Supervisors Overall Summary Statement, Hews wrote: "[Complainant] has the capability of being a top E&I, receiving top pay, if he would only let himself become that. He went from a previous year of promoting the team concept and receiving an above average raise, to a year in which he made dealing with him a conflict or challenge. If [he] could see how his actions are defeating himself and turn it around, I am sure he can reach the levels he is seeking. If he doesn't he may never reach what is easily within his grasp." CX 3:11.

On or about March 14, 2002, Complainant wrote a rebuttal to his performance evaluation. Among other things, he noted that he had "discovered the probability that data tampering had been occurring within the CEMs database" and upon discovery, he "immediately brought it to the attention of the E&I manager." CX 3:12; Tr. at 72-75.

Keisling wrote in rebuttal: "This issue was investigated and no tampering was found." CX 3:12.

Complainant further commented: "When I voiced my concerns over various issues, I was ignored. I received no feedback on my concerns, nor did I receive any questions as to why I was concerned. My obvious frustration was probably interpreted as my being 'challenginig or conflicting' as I was never asked about pertinent CEMs issues." CX 3:13.

Complaint to the North Carolina Department of Air Quality ("DAQ")

In the Spring of 2002, Complainant met with a number of North Carolina officials concerning his belief that the company was violating the Clean Air Act. He met with enforcement representatives of the DAQ, the Environmental Protection Agency ("EPA"), and the State Attorney General's office. Tr. at 61; CX 7-8. As a consequence, the DAQ conducted an on-site routine audit, making it known to the company officials that another system (i.e. the PI system) could not be altered and therefore could be used to detect alterations of the CEMS data. Tr. at 59-61, 63-65, 126. The state officials requested the identical data (CEMS and PI), which Complainant had used for his comparisons and had been given to Keisling. Tr. at 63-4,127. Complainant did not inform anyone in management or in the E&I Department about his complaint to the DAQ. *Id*. at 126-27. To ensure that no one at the plant knew that Complainant had complained, the DAQs investigators, including a former CEMS operator, conducted the investigation during a normally scheduled visit to the plant. Tr. at 127-28.

Complainant had been involved in routine audits on eight to ten (8-10) occasions, and testified that this was the first audit in which PI data had been requested by the DAQ. Tr. at 64; *See also* RX 29:2 ("Attach a copy of the PI data Don gave them and a back-up of our raw data."). According to Hews, Complainant was the person with whom the DAQ would primarily deal on the audit. Tr. at 199. Complainant testified that the North Carolina officials suggested that he increase the pressure on the company. He did so by continuing to question what, if anything, the company was going to do further to investigate. He also asked Young to show him his letter of reprimand. T. at 61.

Soon thereafter, the plant engineer, Glenn Outland, who was a long-time friend of Complainant, sent him a veiled message that he should leave the issue alone. Tr. at 63.

The record shows that the DAQ did not take any further action after the visit and no citations were issued. *Id*. at 69, 128.

Complainant alleges that subsequently, co-workers and management became more hostile toward him. Tr. at 87, 167, 229.

Harassment Complaint Against Jeff Dixon

In the Summer of 2002, Jeff Dixon was made Lead E&I Tech. Tr. at 76. As Lead Tech, Dixon was responsible for assigning daily work and updating Hews on the progress of work. If operators had a problem during the day, he was the E&I employee who was called. Tr. at 345. He would attend the morning management meetings in the absence of the E&I manager. Tr. at 345. Although he was not responsible for personnel matters, he had input into performance evaluations. Tr. at 177.

After Dixon became Lead E&I Tech, Complainant observed that Dixon and the other E&I techs "turn[ed] the microscope on…[A]nything and everything I did they would question it. I really had to be perfect in every move I made, everything I did, every anything I worked on they would scrutinize it real heavy." Tr. at 76. Morriss, admittedly E&I's "heavy" in the CEMS area, could now do nothing right. Tr. at 75-79, 86.

In mid-2002, Complainant complained to LG&E's Human Resources Department that Jeff Dixon had been harassing him. Tr. at 81- 82, 435-36. Complainant told Human Resources that he had first complained to management about Dixon's harassment in early 2001, prior to his data tampering complaint, but that he was not satisfied with management's investigation. RX 18. Human Resources interviewed the E&I employees and found no evidence of harassment.

Tr. at 436, 438. On one occasion, Dixon walked in while Complainant was working on the comparisons and made a comment: "You won't do nothing [sic] about it." Tr. at 55.

In April 2003, after the installation of the new CEMS project, which Complainant had worked on full-time, he made a complaint to the company concerning harassment by Dixon. As a part of this complaint, he again raised the issue of the CEMS data manipulation. CX 11:2; RX 17:1. He believed that Dixon's harassment of him was related to the CEMS data manipulation allegation. Tr. at 82, 85. Young confirmed that Complainant's complaint about Dixon was based upon his belief that Dixon's harassment was due to the data manipulation complaint. Tr. at 342.

In June 2003, the company completed its investigation into Morriss' charges against Dixon. CX 11; Tr. at 84, 86. Although the company exonerated Dixon, it did find that there was inappropriate behavior on the part of all employees in the E&I Department. Tr. at 439; CX 11: 5; Tr. at 165. Dixon, however, says that Charlie Braun, VP Operations, told him to continue to do business as usual. Tr. at 352.

Sometime around this time, Dixon stepped down from the Lead Tech position. However, after Morriss' termination, he was again placed in that position. TR 352.

Arrest for Domestic Assault

Complainant was arrested in July 2003 for assaulting his wife, Rosemary Morriss, who also worked at the Respondent's plant in the administrative office. She described the incident as follows:

> The kids [ages 3 and 5, and a 5 year old friend] had an argument over a piece of cheese. . . . I heard him scream at them. He cursed at them and locked them out on the back porch, the three little ones and there was a thunderstorm and they were panicking so . . . my stepdaughter came in and said, "they're on the back porch." They're crying. They're scared. They're panicking and I said, okay. So, I came out there and let them in. . . .
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> I went back to the backroom . . . and I said, everything is okay and he just screamed at me about how, and I can't remember his exact words but the gist was how he had punished his children and I let them off . . . I just knew by the look on his face, the tone of his voice was just going to get worse . . . and he just kept screaming at me about how I need to get out of there. He's going to put me out if I didn't stop and interfering and I didn't know what I was talking about and he just kept getting closer to me and then finally he said, if those kids make one more noise I'm going to kick their mother fucking asses. And I'm going to put them right back out there and I'm going to put you back out there with them. It just kept escalating and it got worse. He picked me up. He carried me all the way down the hall. Slammed me to the ground. I hit my head on the chair and he – I scrambled to get out of there . . .
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> . . . I remember Trying to get away and it didn't matter and he threw me out there and there was my stepdaughter, she was out on the porch and she said "daddy, don't hurt her daddy, don't hurt her" and he slammed the door and locked it and he turned to the kids, the little ones, the three little ones were inside and he locked the door and turned to them and told them to shut the – he was going to kick their – and I panicked. He threatened the kids and he was raging so I ran to the neighbor's house and called 911. At that point there was a standoff. The police got there and he finally came out and they arrested him. It was like a hostage situation.

Tr. 387.

Complainant was arrested and spent two days in jail. *Id*. The Halifax County District Court entered a protective order prohibiting Complainant from having contact with Rosemary Morriss. *Id*. Complainant admits that he lost his temper and forcibly placed his wife on the back porch with the children, but claims she was bruised when they "stumbled" to the ground. Tr. at 94, 129.

Rosemary Morriss contacted Keisling, her direct supervisor, as a result of Complainant's arrest. Tr. at 230, 368; RX 2:1 (July 13, 2003). Mr. Morriss also contacted Keisling before he returned to work after a previously scheduled vacation. RX 2:2 (July 21, 2003). Keisling testified that he informed both Complainant and Mrs. Morriss that they should not bring their personal/domestic situation to work. Tr. at 242; RX 2:5, 8 ("When we talked that night, I stressed the importance of not brining this personal situation into the workplace…"). Mrs. Morriss, however, denies that Keisling communicated such expectations to her at the time. Tr. at 360.

Keisling testified that, as of this time, he was concerned about the possibility of workplace violence. Tr. at 232; RX 2:1 (July 13-17, 2003). However, he admitted that he did not have concerns about Morriss' potential for workplace violence prior to receiving this call from Mrs. Morriss. Tr. at 232.

Co-Workers Voice Concerns for Safety

Later that month, two employees raised concerns for their safety. On July 24, 2003, Operations Technician Chris Martin wrote:

> [C]urrent events between Cliff and Rosemary have added to the tension felt among many plant employees, including you, regarding Cliff's state of mind. Cliff has demonstrated escalating animosity towards me since early in my career with Roanoke Valley Energy and, therefore, I have specific concerns about my safety.

CX 12; RX 2; Tr. at 232-34, 273, 275-76.

Dixon later expressed similar concerns in an email to Keisling and Hews. RX 11; Tr. at 234-36. Dixon explained the reason for his concerns as follows:

> Complainant was not acting like the same person he always had [been] because I had worked with him for eight years or so, and he was – would come in late. . . . I saw him come out of the back room crying one day. His productivity had fallen off. He was under a tremendous amount of stress. You could see it, and since he had singled me out one time as the root cause of all of his problems, I felt like he might do it again.

Tr. at 354; CX 13.

In addition, Young asserted that other E&I technicians were also concerned for their safety because of Complainant's behavior. Tr. at 336.

Counseling Program

Keisling testified that he was concerned about Complainant's erratic behavior and the potential for violence or disruption at work and offered to provide him company paid counseling. Tr. at 239.

Complainant acknowledged that he "needed help with the situation" and entered Respondent's Family Assistance Program on July 27, 2003. Tr. at 93, 133, 239. Keisling

also modified Complainant's work schedule so Complainant could attend his counseling sessions. Tr. at 130.

Sometime between the time Complainant returned to work on July 22, 2003, and in early August 2003, Keisling also talked with other ROVA employees because of the rumors going around the plant and alerted them that they should feel free to report specific inappropriate behavior. Tr. at 243; CX 2:10.

Incident Involving Alleged Suitor

On August 7, 2003, Complainant asked Keisling if he could leave work early for a "personal appointment." Tr. at 134. Keisling permitted Complainant to leave. *Id*. Complainant testified that when he asked Keisling to leave early, he planned to go see his aunt. *Id*. However, Complainant instead drove to co-worker Rick Ogburn's house and confronted Ogburn's fianceé with suspicions that Rick Ogburn and Rosemary Morriss were having an affair. Tr. at 133-35; 276. Complainant knew Ogburn was at work and that this conduct could upset Ogburn and disrupt the workplace. Tr. at 136. Complainant testified that he did so because in the previous year he had heard rumors that Ogburn and his wife, Rosemary, were having an affair, and Rosemary's comments to him at this time appeared to communicate that she had made a firm decision that the marriage was over. Tr. at 99.

Ogburn heard about this while at work and became irate. *Id*. at 278. He told anyone who would listen about the incident. Everyone in the plant knew what had happened even before Keisling knew. Tr. at 304.

Ogburn told Keisling that his fianceé was afraid of Complainant and thought he was a "psycho." *Id*. at 280. When Ogburn met with Keisling, he was "literally steaming," (Tr. at 278) "very hot and pissed off." RX 2:13-14 (August 7, 2003).

Keisling testified that he was concerned that Complainant "may snap or go off the deep end." Tr. at 281-82. Keisling wrote: "I am at the point where I am very concerned that Cliff may snap or go off of the deep end." RX 2:13 (August 7, 2003). He further noted: "I think this is an accident waiting to happen. If Cliff does not let loose, one of the guys may because of Cliff's actions.") RX 2:14.

Keisling suspended Complainant from work with pay. He was ordered not to come onto the company premises and was to have minimal contact with his wife. RX 8.

Return to Work Agreement

Near the end of August 2003, Complainant met with Keisling to discuss the conditions of his return to work. Tr. at 102, 286-87. Keisling offered him a lateral Transfer to a nearby LG&E facility (about 50-60 miles away). Tr. at 102, 286. Morriss was not interested in the transfer because he had only been separated a few weeks from his wife and was hoping for a reconciliation, he had worked at the ROVA facility for ten years, he was only ten minutes from work, and the Southampton facility was not as stable (and in fact has been sold). Tr. at 103.

When Complainant declined, Keisling allowed him to return under a Return to Work Agreement with the following conditions:

> (1) Complainant's work performance had to meet the standards outlined in his personnel evaluation;
>
> (2) Complainant was not to discuss his personal domestic issues at the workplace, including soliciting feedback on these issues from co-workers;

(3) Complainant was not to engage in any personal activity that disrupted his work or his co-workers' work; and

(4) Complainant had to maintain counseling through the company-paid Family Assistance Program.

Tr. at 141-42; RX 8.

Complainant understood that a failure to follow these conditions could result in termination. Tr. at 147.

Second Restraining Order is Entered against Complainant

In September 2003, Complainant went to Hannah's Place, a shelter for battered and abused women where Rosemary Morriss was staying, and, according to Rosemary Morriss' testimony, "kept banging and banging on the door." Tr. at 389. The police were called and another protective order was entered. *Id*. On October 13, 2003, the Court heard evidence and entered a permanent order, prohibiting Complainant from having contact with Rosemary Morriss except in very limited circumstances. Tr. at 143-144; RX 7.

Final Written Warning

In November 2003, Hews gave Complainant a final written warning for the following performance issues:

(1) Excessive cell phone usage, for which Complainant had been previously counseled, and which had been resolved;

(2) Complainant's statement to Hews that he could not complete a job because he had personal issues on his mind, causing Hews to assign another technician to perform the work;

(3) Complainant leaving the workplace for the day with work incomplete, telling another technician that this problem may cause him a late night and saying "good luck";

Tr. at 288.

Hews had personal knowledge of these issues and felt discipline was warranted. Tr. at 184-85. However, he did not know that Complainant was under a Return to Work Agreement and was therefore surprised that this was written as a final warning. *Id*.

Violation of the Return to Work Agreement

On January 18, 2004, Complainant went to Rosemary Morriss' house and was told by her not to come in. Complainant allegedly pushed the door open, grabbed (and bruised) Mrs. Morriss' wrist, and told her "there was nothing she could do about it." Tr. at 147-48, 290, 391-92. When Mrs. Morriss started to call the police, Complainant said "you're going to cost me my job." Tr. at 148-49, 391-92. Complainant was arrested for domestic assault and violation of the protective order and served two days in jail. *Id*.

Keisling asserted:

> Basically, it just made me more concerned of the potential that Cliff may do something irrational on the plant site and end up with the workplace violence. I was still – as time went on [I] became more and more concerned with the work – potential for workplace violence.

Tr. at 291. Keisling also received a phone call from Renee Edwards, the Executive Director at Hannah's Place. Edwards described an incident in which Complainant had screamed at her and told Keisling she was concerned that he might hurt or kill someone. Tr.

at 291-293. Complainant was placed on paid leave while Respondent decided on the appropriate course of action. Tr. at 295.

Shortly after placing Complainant on leave, Keisling met with Sandy Morris, who handled payroll, to tell her that Complainant was on a paid leave of absence. Tr. at 264. During this conversation, Keisling learned that Complainant had been discussing his domestic issues with Morris and other employees at the plant. Tr. at 264-65. Keisling then spoke with Jeff Dixon, Tony Thompson, and Randy Birdsong, for confirmation. Tr. at 265-266, 294. Complainant acknowledged at trial that he spoke with Thompson and Morris about his personal issues. Tr. at 107-108.

Like Keisling, Sandy Morris and Tony Thompson both became concerned about Complainant's potential for violence. Morris recalled an occasion where Complainant became irate after seeing Rosemary Morriss speaking to a male employee. She testified:

> I remember him being very upset. I remember feeling that he was – seemed somewhat paranoid about what he saw . . . He was outraged. He was just going on and talking about how he could no longer take this. He couldn't, you know, he just couldn't stand seeing that type of thing.

Tr. at 422-23. She was concerned about Complainant "becoming too emotional or too irrational and going out and possibly confronting her or the technician." *Id*.

Thompson, a long time friend of the Complainant, testified that Complainant approached him four or five (4 or 5) times per week to discuss his marital issues. Tr. 408-409. Thompson testified that these conversations lasted up to thirty (30) minutes and hindered his ability to do his job. Tr. 408-409. Thompson further testified that after learning that Complainant had been secretly watching Rosemary Morriss' house, he advised that she "watch herself" and asked a friend at the police department to keep an eye on the house. Tr. 410-412.

Termination

Keisling recommended that Complainant be terminated. Tr. at 244, 248-249, 295, 440-41. Kane reviewed the recommendation and determined that Complainant's unexcused absence from work following his arrest constituted an additional reason for termination. Tr. at 440-441. Keisling's recommendation was approved and Complainant's employment was terminated on January 28, 2004. Tr. at 249. Keisling and Kane testified that allegations of 2001 data manipulation did not play any role in that decision. Tr. at 296, 443.

Damages

Complainant alleges he was making $27.19 per hour prior to his termination. His gross wages, including overtime, for 2003 were $73,227. CX 16; Tr. at 117. He testified that he has had to cash in his retirement. Tr. at 114. He has had difficulty paying his bills, which has negatively affected his credit rating. Previously he had an excellent credit rating. Tr. at 115. He has had to borrow money from relatives to keep going. Tr. at 115. He is living between a friend's house and the family lake trailer. Tr. at 115. Although previously offered jobs in the industry, Complainant is now unable to find comparable work. As a result, he has decided that he must look outside the power industry. Tr. at 115.

He has been severely depressed and anxious as a result. Immediately after his termination, he was unable to get out of the house. It was only after two to three (2 to 3) months that he was able to get himself together enough to look for work. Tr. at 116.

Complainant has sought counseling as a result, both before and after his termination. Tr. at 115-116. His depression has prevented him from pursuing employment opportunities. Tr. at 116; CX 15.

Findings

Protected Activity and Adverse Action

The preponderance of evidence standard is used in complaints under environmental whistleblower statutes. *See* ***Martin v. Dept. of the Army***, ARB No. 96-131 at 6 (July 30, 1999); ***Ewald v. Commonwealth of Virginia***, Case No. 89-SDW-1 at 11 (April 20, 1995).

Respondent acknowledges that Complainant engaged in protected activity in raising a concern of data manipulation in 2001 and that his termination constitutes an adverse action. *See* Respondent's Brief at 15. After a review of the entire record, I accept the stipulation that the Complainant was engaged in a protected activity and that the Respondent knew of it and that it was an internal complaint. Mr. Keisling, the plant manager who recommended termination, is also the person in charge of the plant operations section charged by the whistleblower, and is also the person who performed the internal "investigation" into whether the Complainant's concerns were valid. Furthermore, he is also the person who signed the termination letter. Therefore, knowledge of protected activity by Complainant is imputed to Respondent. ***Kester v. Carolina Power & Light Co***., ARB No. 02 007, ALJ No. 2000 ERA 31 (ARB Sept. 30, 2003); ***Scott v. Alyeska Pipeline Service Co***., 92-TSC-2 (Sec'y July 25, 1995). I find that the Respondent fired the Complainant and that this is an adverse activity.

Respondent, however, asserts that Complainant failed to prove a causal connection between the protected activity and his termination in 2004.[4]

Reasonable Belief

Complainant must establish a reasonable belief that his employer was violating the law to present a cognizable whistleblower complainant. ***Rivers v. Midas Muffler Center***, 94-CAA-5 (Sec'y Aug. 4, 1995). The raising of employee safety and health complaints constitutes activity protected by the environmental acts when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes. ***Jones v. EG&G Defense Materials, Inc***., ARB Case No. 97-129, Sept. 29, 1998, slip op. at 7, aff'd on recon., Dec. 24, 1998 (arising under the CAA, the TSCA and the Resource Conservation and Recovery Act, 42 U.S.C. §6971 (1994)).[5]

Mr. Keisling testified at hearing that he considered the report of data manipulation to be a serious issue and intended to report it to the state "if substantiated." *Id*. at 205-206. I have reviewed the Complainant's allegations and reviewed the testimony of Keisling with respect to

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[4] *Citing* ***Dowe v. Total Action Against Poverty in Roanoke Valley***, 145 F.3d 653, 657 (4th Cir. 1998) ("To satisfy the third element, the employer must have taken the adverse employment action because the plaintiff engaged in protective activity").

[5] Cases arising under whistleblower laws protect a complainant's opposition to acts by an employer that he reasonably believes violate the law, even if investigation proves the employer never violated a law. This is so whether the employer never did what the employee complained about, or because the employer's actions were legal. *Id*.; ***Minard v. Nerco Delama Co***., 92-SWD-1 (Sec'y Jan. 25, 1994); ***Clement v. Milwaukee Transport Services, Inc***., 2001-STA-6 (ALJ Nov. 29, 2001)(slip op. at 39).

an investigation he made into the allegations. The record shows that Keisling "investigated" himself. Although he may be correct as to his basis in discounting the Complainant's allegations, the fact that the Complainant's allegations were not investigated by an impartial investigator leads to the conclusion that Complainant had a reasonable belief in the allegations of data manipulation.

I have reviewed materials showing that DAQ reviewed plant data in April 2002, and Hews reports, and a report of the "investigation" performed by Keisling. RX 26; RX 29; RX 28. I find that the evidence does not exonerate Respondent and that Complainant had a reasonable whistleblower belief beginning in Spring, 2001.

Moreover, Respondent stipulated that Complainant was engaged in protected activity, and my review of the totality of the record sustains the stipulation.

Nexus

Complainant has the burden to prove a causal connection existed between the protected activity and the adverse action. ***Matvia v. Bald Head Island Mgmt, Inc***., 259 F.3d 261, 271 (4th Cir. 2001); ***Causey v. Balog***, 162 F.3d 795, 803 (4th Cir. 1998).

A complainant may establish causation by showing direct or circumstantial evidence of anti-whistleblower animus on the part of a respondent and its managers. ***Dillard v. Tennessee Valley Authority***, 90-ERA-31 (Sec'y July 21, 1994). In ***Hobby v. Georgia Power Co***., 90-ERA-30 (Sec'y Aug. 4, 1995), the Secretary held that it was error to consider the Respondent's proffered reasons for terminating the employment of the Complainant in determining whether a *prima facie* case had been established. The Secretary wrote: "An employer's reason for the adverse action goes not to the causal element of a *prima facie* case but to the ultimate question of whether Respondent retaliated against Complainant because he engaged in protected activity." Slip op. at 8-9 n. 5.

I find both direct and circumstantial evidence that a causal connection is established by Complainant. Based on the totality of the evidence, I find that as soon as Complainant advised that he found tampering, Respondent, and especially Mr. Hews and Mr. Keisling, were on notice that Complainant was in whistleblower status. The record shows that Respondent failed to treat Complainant as a whistleblower. Rather, through Complainant's supervisors, Hews and Keisling, Respondent exhibited denial that whistleblowing occurred.

Moreover, the failure to meet the duty to Complainant as a whistleblower caused or aggravated a hostile work situation with Keisling and Hews as well as with other of Respondent's employees who should have been placed on notice that Complainant was entitled to whistleblower status.

A review of the timeline shows that before the data manipulation charge was presented to Hews in March, 2001, the Complainant had no personnel problems, and in fact was named the "heavy" in his department. Although he did have a history of run-ins with some co-workers, he showed no signs of employment related stress. After he became a whistleblower he sought counseling and psychiatric services. The record shows that these began before he began to have the domestic relations problems that are the crux of the Respondent's alleged basis for termination. I find that as a result, Mr. Morriss was subjected to heightened stress at work, that is directly caused by Respondent's failure to acknowledge his whistleblowing status, and by permitting fellow employees to take advantage of his stressful mental state. Mr. Morriss voluntarily sought counseling as a result. The record shows that the Complainant was treated by

R. Prasad Degala, MD., beginning July 23, 2003 for complaints of depression, nervousness, trouble sleeping, crying spells, decreased appetite, a five pound weight loss, and increased irritability. CX 14. Part of the history provided shows that Mr. Morriss has a history of work stress. The referral was made after the July incident and the Complainant expressed a desire to use counseling "to get his wife and children back". Dr. Degala diagnosed depression and prescribed medication. In a note dated October 8, Dr. Degala recorded that although he appeared to be alert, coherent, he also looked mildly anxious and depressed. The record shows that Dr. Degala continued to treat the Complainant until November 23, 2003. Id.

While he was treating with Dr. Degala, the Complainant was also in counseling with Barry Chessis, a psychologist for stress management, anger control and irritability. See report dated March 28, 2004. The Complainant as of that date continues to seek reconciliation with his wife. CX 15.

I accept the unchallenged testimony that Complainant has been severely depressed and anxious as a result. I also accept that it was caused in large part by Respondent's conduct, and that it proves nexus.

I also find that Respondent subjected Complainant to vague or irregular personnel procedures. The evidence shows that there was no standard established to determine the severity or extent for a penalty for any violation.[6] Apparently, the procedures used and the termination penalty determination made in Complainant's case was unprecedented at Respondent company. *See* discussion *infra*. I find that some of the proffered reasons for discharge are not credible. Thus, it is reasonable to infer that the Complainant's termination was based in part, on a retaliatory motive.[7]

Proximity in Time

Respondent argues that more than twenty seven (27) months elapsed between the time Complainant raised the data tampering issue and his termination. It asserts that the time lag between the data manipulation complaint and his termination "weighs heavily" against causation.[8]

Generally proximity in time is used by whistleblower complainants to demonstrate nexus and to develop a *prima facie* case. In making a *prima facie* case, temporal proximity between the protected activities and the adverse action may be sufficient to establish the inference that the protected activity was the likely motivation for the adverse action. ***Overall v. Tennessee Valley Authority***, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001); ***Abu-Hjeli v. Potomac ElecTric Power Co***., 89-WPC-1 (Sec'y Sept. 24, 1993); ***White v. The Osage Tribal Council***, 95-SDW-1, slip op. at 4 (ARB Aug. 8, 1997). A ten-month lapse between the protected activity and the adverse action *may* be sufficient to raise an inference for a *prima facie* case under a Part 24 whistleblower complaint. ***Carson v. Tyler Pipe Co***., 93-WPC-11 (Sec'y Mar. 24, 1995).

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[6] Although there is an itemization of disciplinary penalties in the Employee Handbook (RX 25:99), reference is made to an at-will relationship where Respondent can discharge an employee without reason.

[7] ***Hall v. U.S. Army, Dugway Proving Ground***, 1997-SDW-5 (ALJ Aug. 8, 2002).

[8] *Citing* ***Johnson v. Town of Elizabethtown***, 800 F.2d 404, 406-07 (4th Cir. 1986) (conjecture insufficient to support causation); ***Goldberg v. B. Green & Co***., 836 F.2d 845, 848 (4th Cir. 1988) (same).

Here, Respondent argues a lapse of twenty seven (27) months between complaint and adverse employment action is proof of lack of proximity in time to assert a reverse inference. The U.S. Department of Labor, Administrative Review Board ("ARB" or "Board"), has determined that in some cases a reverse inference may be applicable. The passage of three (3) years from the time of Complainant's protected activity and alleged adverse action, with evidence of lack of animus on the part of Respondents after the protected activity (Complainant had been hired on five (5) different occasions subsequent to the protected activity), persuaded the Board in ***Bonanno v. Stone & Webster Engineering Corp***., 95-ERA-54 and 96-ERA-7 (ARB Dec. 12, 1996), that there was no causal connection between the protected activity and the alleged adverse actions. *See* ***Shusterman v. EBASCO Services, Inc.***, 87-ERA-27, slip op. at 8-9 (Sec'y Jan. 6, 1992), *aff'd mem*., ***Shusterman v. Secretary of Labor***, No. 92-4029 (2d Cir. Sept. 24, 1992) (four-year interval, without credible evidence to contrary, establishes absence of causal connection between protected activity and adverse action).

Complainant responds that the first opportunity Keisling had to retaliate against Morriss for his protected activity, given LG&E's own policies and procedures, were the circumstances which arose in July 2003. ***Price v. Thompson***, 380 F.3d 209, 213 (4th Cir. 2004)(knowledge plus the first available opportunity can create the needed causal connection). "A reasonable trier of fact could [determine] that Keisling bided his time and, when the first opportunity became available, made sure that it was "payback" time for Morriss." *See* Complainant Reply Brief. Complainant argues that nexus is established through evidence that Keisling was upset with him for raising the data tampering issue. He asserts that Keisling's own testimony confirms that he was upset as a result of the allegations, so much so that Keisling considered that his job was at risk. Tr. at 57, 209; CX 6:1. "It is not therefore, as Respondent suggests, a stretch to assume that Keisling was upset with Morriss for raising the issue."

I note that Keisling was not named plant manager until after the Complainant made his initial complaint, and I further note as head of operations, he was in the unit charged with the whistleblower complaint. He, therefore, was on notice that Complainant had status as a whistleblower and was entitled to protection.

Respondent argues that the totality of the evidence establishes that Keisling had other opportunities, was actually very patient and prudent, did not take advantage of his position, and did not seek removal until progressive discipline was meted:

- Provided Complainant with company-paid counseling after Complainant's first arrest for domestic assault;
- Changed Complainant's schedule to accommodate his counseling sessions;
- Recommended the extraordinary option of a paid leave of absence for Complainant, rather than termination or unpaid leave, after Complainant created a workplace disruption by leaving work early to confront a co-worker's fianceé regarding his suspicions of an affair between the co-worker and Rosemary Morriss;
- Offered Complainant a lateral transfer to the nearest LG&E facility;
- Allowed Complainant to return to work under a Return to Work Agreement, which Keisling kept confidential in an effort to respect Complainant's privacy; and
- Chose not to terminate Complainant when he caused a second protective order to be entered in the Fall of 2003 or when Complainant failed to uphold the performance

standards required by the Return to Work Agreement, instead giving him a final written warning.

See Respondent's Brief.

Respondent further argues that Complainant's evidence demonstrates that, after engaging in protected activity, he was made the "lead person" or "heavy" on the CEMS system. "It makes no sense that LG&E would retaliate against Complainant by giving him increased responsibility and overtime on the very system that formed the basis of his protected activity."

Complainant responds that the evidence shows that he was viewed as the CEMS "heavy" prior to the data tampering complaints in 2001. Tr. at 44, 61, 350.

I accept that Complainant is correct on this issue as the record shows Respondent is factually incorrect, since Complainant was made "heavy" prior to March 2001, and increased responsibility and overtime are not proved. Tr. 44, 61, 350.

Therefore, I reject the allegation that time proximity is an important factor in this case. Based on the factors enumerated above, I reject the contention that a lapse of twenty seven months (27) occurred between whistleblowing activities and the adverse employment action. I accept that from October 2001 to March 2002 Respondent, through Keisling, plant manager, failed to credit in the performance evaluation Complainant's good faith belief that a violation had occurred. Subsequently, all of the employees of Respondent's operations and E&I sections should have been placed on notice that the Complainant had engaged in protected activity. Instead, I find that Keisling, (at a minimum), exposed Complainant to further unnecessary confrontations within the E&I section and from operation section employees. I find that from the date of the initiation of protected activity, Complainant was continually, serially, and intensely subjected to adverse employment activities by the conduct of his fellow employees. Although he accepted referral for evaluation, forcing an employee to see a medical doctor during work hours constitutes an adverse employment action; however, that action is not necessarily retaliatory. ***Smith v. Esicorp, Inc***., 93-ERA-16 (Sec'y Mar. 13, 1996).

Therefore, I find that the Complainant was engaged in protected activity during the evaluation process in 2002 and 2003. Each of those is a negative employment activity, even if they may not qualify as an adverse action under the Act.[9]

I also note that proximity in time is not the sole basis to assert nexus. I find that there was a hostile work environment at Respondent's plant in the E&I section that began with whistleblowing.

[9] "Because 'adverse actions can come in many shapes and sizes,'. . . it is important to consider the particular factual details of each situation when analyzing whether an adverse action is material" (***Shelton v. Oak Ridge Nat'l Lab***., 95-CAA-19, at 7 (Sec'y Mar. 30, 2001)(*quoting* ***Knox v. State of Indiana***, (93 F.3d 1327, 1334 (7th Cir. 1996)(*citing* ***Bryson v. Chicago State Univ***., 96 F.3d 912, 916 (7th Cir. 1996) (internal quotation marks omitted)). To qualify as an adverse action under the environmental whistleblower statutes, an action must have a "tangible job consequence," such as dismissal, demotion, or involuntary transfer to a less desirable position (***Shelton***, 95-CAA-19, at 6-8 (*citing* ***Oest v. Ill. Dep't of Corrections***, 2001 WL 12111, at *7 (7th Cir. 2001); ***Davis v. Town of Lake Park***, 2001 WL 289882 (11th Cir. 2001); *See* ***Mandreger v. DeTriot Edison Co***., 88-ERA-17 (Sec'y Mar. 30, 1994); ***Nichols v. Bechtel ConsTructors, Inc***., 87-ERA-44 (Sec'y, Oct. 26, 1992); English v. GE, 85-ERA-2 (Sec'y Feb. 13, 1992)). Because criticism and reprimands are a common feature of a work environment, they are not considered adverse actions absent evidence of a tangible job consequence (***Shelton***, supra, at 8).

Direct Evidence

I also note that Respondent has stipulated that Complainant was entitled to whistleblower status and that, instead of defending his own interests, Keisling had a duty to protect that status, especially after he was subsequently made the plant manager. The parties did not develop evidence to provide insight on what the company policy was with respect to the protection of whistleblowers. It certainly should be company policy and the company should have taken measures to ensure that there were no adverse ramifications for advising first Hews, and then Keisling, that Complainant had a good faith belief in his assertions. In terms of the timeline, it is reasonable to conclude, after a full evaluation of the entire record, that Keisling took no steps to protect Complainant. It is also reasonable to conclude that Kiesling exhibited an interest in ensuring that a full and thorough investigation would not take place.

In addition, Hews, as a manager, should have immediately recognized that Complainant was entitled to protected status under the law. I accept that the record as a whole shows that Hews, the operators as well as the E&I techs were upset with Complainant for raising the data tampering issue. Tr. at 52, 54, 329-330. In fact, soon after Complainant brought forward the data tampering complaint, he was anonymously warned that "payback is a MF." Tr. at 76, 85; CX 11:1.

In testimony, Keisling asserts that he "vaguely" remembers being informed in the Spring of 2002 by either Morrison or Hews that Complainant had made an allegation that the operators were manipulating CEMS opacity data in order to cover up an "excursion" or "event." Kiesling testified:

> I vaguely remember early in 2001, I can't remember an exact time frame, that an allegation had been made that the CEM data had been or could be manipulated. I can't remember the exact context of the conversation, and that was early in 2001 and I believe it was either Quinn Morrison or Chris Hughes that informed me of that. I cannot remember exactly which one. I just have a vague recollection, but they informed me about it and told me that they were in the process of doing their investigation.

Tr. at 206.

I discount this testimony. Respondent has stipulated that Complainant placed Respondent on notice. The object of any investigation would have been the operations department, headed by Keisling. After listening to all of the witnesses, I accept that the allegation would have had to have been extremely serious, and would have challenged many other operations employees.

Respondent argues that Keisling could not have been motivated by an intent to retaliate against Complainant because Complainant was terminated after the institution of a progressive disciplinary action. Respondent further argues that Keisling's actions demonstrate an "altruistic motive rather than a retaliatory one." *See* Respondent's Brief.

I am directed by Complainant to evidence that immediately after Keisling learned from Morriss' wife that he had been arrested for a domestic abuse allegation, he determined that Morriss posed a risk for workplace violence. Tr. at 232. Complainant argues that it was Keisling's "suspicion," rather than any facts, that Complainant posed a risk of workplace violence, which allowed Kiesling to create an opportunity which, under LG&E's policies, would

lead to termination. "Simply speaking, it was not until July 2003 when Keisling was able to create the opportunity to set Morriss up for termination. There was no factual basis for Keisling's 'belief' either in July 2003 or January 2004 that Morriss posed a danger to others, including his wife, in the workplace. It defies belief that a recommendation which lacks a legitimate factual basis could be based upon an altruistic motive." Complainant's Reply Brief.

I agree.

In weighing the testimony of witnesses, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. ***Jenkins v. United States Envtl. Pro. Agency***, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted).

Contrary to the assertion by Keisling that he "vaguely" remembers the allegation of whistleblowing, the record shows that Keisling in fact used the data supplied by Complainant, starting with knowledge of the assertion of a whistleblower allegation in October 2001, approximately five or six (5 or 6) months after the Complainant first raised the issue. Keisling, admittedly, was in charge of the department that was purportedly manipulating data. Tr. at 206. He testified at hearing that he considered this a serious issue and intended to report it to the state if substantiated. *Id*. at 205-06. It is reasonable to expect that he had a lot to lose. The record shows that, in essence, he investigated himself. He therefore had a direct interest in the outcome of the proceedings. He also failed to report the incident in a timely manner. An excursion is supposed to be reported within twenty four (24) hours. Tr. at 208. Keisling reported the incident to his boss, after October 2001, five or six (5 or 6) months after the fact. Tr. at 209. Although the allegation was made in Spring 2001, Keisling did not get the data from Complainant until December 2001. Tr. at 214. In January 2002, he asked Complainant to review his results in his office. Tr. at 220.

An excursion would impact an employee's performance evaluation. Tr. at 210-211. It could result in disciplinary action. Tr. at 211. Keisling acknowledged that the protected activity was discussed when the Complainant's performance evaluation was done in February 2002. Tr. at 221. The evaluation, dated in March 2002, after a meeting with Keisling, was amended to read:

> … during the Rova 2 spring outage of 2001, Cliff discovered the probability that data tampering had been occurring within the CEMS database. Upon his discovery, he immediately brought it to the attention of the E&I manager.

Tr. at 222. Keisling wrote on Complainant's evaluation:

> …no tampering was found and then I signed my name after it.

Tr. at 223. I find this is further proof of Kiesling's interest in the outcome of his "investigation."

Keisling held out to his supervisors that no tampering had occurred. Tr. at 223-224. But he was later told, after an internal investigation within the E&I department of allegations of harassment against Complainant, that there were:

> …inappropriate actions or too many games going on within the department across the board with all of the employees in the E&I department, and basically they had

> a meeting on the plant site and Margie and Charlie went down each issue and finding, line item by line item with Cliff present in the room.

Tr. at 225; EX 11. I accept that Hews, Complainant's immediate supervisor, the operators, and the E&I techs were upset with him for raising the data tampering issue. Tr. at 52, 54, 329-330. I note that as soon as whistleblowing was initiated, Complainant was anonymously warned that "payback is a MF." Tr. at 76, 85; CX 11:1.

I accept that Keisling knew all of that. An employer is responsible only under limited circumstances for adverse actions created by a complainant's co-workers (***Williams v. Mason & Hanger Corp***., 97-ERA-14, 18-22, at 47-48 (A.R.B. Nov. 13, 2002)(*citing* ***Faragher v. City of Boca Raton***, 524 U.S. 775, 799 (1998); *See* ***Wright-Simmons v. City of Oklahoma City***, 155 F.3d 1264, 1270 (10th Cir. 1998); *See also* ***Varnadore v. Oak Ridge Nat'l Lab***., 99-CAA-2,-5, 93-CAA-1, 94-CAA-2,-3, 95-ERA-1 (A.R.B. June 14, 1996), slip op. at 77-78)). In this situation, liability attaches to the employer "if the employer knew, or in the exercise of reasonable care should have known, of the harassment [by the co-worker] and failed to take prompt remedial action" (***Williams***, supra, at 47-48 (citation omitted)). An employer has "constructive notice" of a co-worker's adverse harassing actions "if the harassment [is] so severe and pervasive that management should have known about it" (***Williams***, supra, at 48 (*citing* ***Miller***, supra, at 1278-79)). "To avoid liability [for a co-worker's harassing behavior] an employer must take both preventive and remedial measures to address workplace harassment" (***Williams***, supra, at 48 (*citing* ***Wilson***, supra, at 540-42)). I reject Respondent's argument that the acts of Hews, a supervisor, can not be imputed to Respondent.

Keisling failed to follow up to ensure that there were no further problems, although he had contact with E&I staff on a frequent basis. Tr. at 229.[10] He did not perform a thorough "investigation." A review of a report dated March 8, 2004, sent well after the Complainant was terminated, states that Keisling knew that he stood to be responsible and that the allegation was important as of October 2001. RX 26. Keisling blames the Complainant for the fact that the "investigation" was untimely. *Id*. I find that, although the exhibit is self serving, and rationalizes Keisling's responsibility to investigate, it substantiates Complainant's position that Kiesling was motivated to cover.

Keisling, admittedly, failed to ask Louie Young about CEMS manipulation. Tr. at 213. If Keisling had performed a viable "investigation" into data manipulation, it is reasonable that Young should have been contacted at onset. Instead, Keisling condoned or acquiesced to actions of Hews, Dixon, and others who were potentially harassing Complainant due to whistleblowing activities.

Complainant filed a harassment complaint against Dixon that aired his position that he had become "persona non-grata" in part because of the whistleblowing. I discount any testimony that whistleblowing was not part of that complaint. I also find that, although Complainant was the CEMS "heavy" and continued to be the CEMS "heavy" after the data manipulation allegations, his input was ignored, i.e., he was "persona non-grata." Tr. at 75-79, 86.

[10] Kiesling testified: "On a daily basis, I could see everybody in the department or I may only see one or two people within the department. I go out in the plant at least once or twice a day and basically walk down both units to see how they're running, just to get out and basically, you know, check material conditions, talk to the people, see how the work is going. Tr. at 229.

Again, the harassment complaint against Jeff Dixon, filed in the Summer of 2002, was pregnant with the protected activity issue. To establish a *prima facie* case of hostile work environment, Complainant must establish the following elements:

1. Membership in a protected category or in a Section 210 case evidence of protected activity;
2. Unwelcome harassment;
3. The harassment resulted from having engaged in protected activity;
4. That the harassment effected a term, condition or privilege of employment; and
5. That the Employer knew or should have known of the harassment and failed to take prompt, effective remedial action.

Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986); ***English v. Whitfield***, 858 F.2d 957 (4th Cir. 1988). I find that the Complainant is credible in his accusation that on one occasion, Dixon walked in while Complainant was working on the comparisons of data that are the basis of the whistleblower charge and made a comment: "You won't do nothing [sic] about it." Tr. at 55. I also accept that in April 2003, the issue of the CEMS data manipulation was again raised. CX 11:2; RX 17:1. Young confirms that Complainant's complaint about Dixon was based upon his belief that Dixon's harassment was due in part to the data manipulation complaint. Tr. at 342. While Respondent knew or should have known of the Complainant's protected status, and of the harassment, it failed to take prompt, effective remedial action. Therefore, all of the elements of harassment on the basis of the protected activity are present.

In June 2003, the company completed its investigation surrounding Dixon. CX 11; Tr. at 84, 86. Although the company exonerated Dixon, it did find that there was inappropriate behavior on the part of all employees in the E&I Department. Tr. at 165, 439; CX 11:5. Dixon, however, says that Charlie Braun, Vice President of Operations, told him to continue to do business as usual. Tr. at 352. I find that this is condoning of the harassment due to whistleblowing. The investigation was not conducted in context of the Complainant' status as a protected whistleblower.

I note that Margie Kane testified that the Dixon problem had nothing to do with the tampering of data issue. Tr. at 439. I reject her opinion. She did not take testimony from Mr. Morriss under oath and was not given the entire fact pattern. The record shows that she relied heavily on Keisling's renditions of the facts and of the incidents that occurred prior to her meetings with the E&I employees. As of that period in time, the Respondent remained in denial that the Complainant had whistleblower status.

I accept that it was also within the realm of possibility that Keisling did not want Complainant to prosecute his complaint because he knew that he would have to account for the allegation of data tampering. His rationalization, after the fact, RX 26, shows that he had not been asked to give details until long after the Complainant had been discharged. In this vein, time proximity is not relevant.

I also reject any notion that Hews, Dixon, or any of the other employees who testified against Complainant did so independently.[11] All of their conduct flows from whistleblowing. The totality of the evidence shows that all of them were concerned with job security, and I find

[11] Respondent argues that harassment by Dixon occurred since the mid-1990s and notes that the complaint specifically alleged that Dixon was responsible for the argument with Young that led to the data tampering complaint. "It is elementary that Dixon could not have retaliated against Claimant [sic] for a data manipulation complaint by masterminding the very argument that led to the complaint in the first place." Respondent's Brief. I find that even if that were true, the inference exists that Dixon took advantage of the situation.

that all of the amimus can be traced to the fact that Complainant alleged data manipulation and that the Respondent failed to follow its own procedures to report it. Keisling testified that a first verbal report is due within twenty four (24) hours:

> The written report has to follow within five (5) working days. Sometimes it's seven working days, but it's contained within each of the individual permits.

Tr. at 211. The record is devoid of reports made by Keisling. If any reports were made, they were by Complainant. I find that instead of reporting, Keisling's conduct was to, in essence, cover, in the guise of an investigation. The fact that DAQ has not prosecuted the plant does not exonerate this conduct, as again I find that Complainant had a good faith basis to challenge the data. Again, Respondent stipulated to Complainant's status as a whistleblower. Moreover, the record shows that Keisling took disciplinary action against operators who have been responsible for an excursion. Tr. at 214. This further shows that the matter was important.

Respondent argues that Keisling could not have been motivated by an intent to retaliate against Complainant because Complainant was terminated after the institution of a progressive disciplinary action. Respondent further argues that Keisling's actions demonstrate an "altruistic motive rather than a retaliatory one." *See* Respondent's Brief. However, I reject that Keisling is pristine and has unclean hands as he had the most to lose by exposure of the manipulation of data, especially after he selected *himself* to perform the internal "investigation," which I find was a sham. Moreover, *he* fired the Complainant. It is reasonable to expect that the person most implicated by the protected activity would be the last person to want to see an internal investigation performed. A prime suspect should not be in a position to unilaterally exonerate himself from culpability.

It is just as reasonable that Keisling, recently elevated to plant manager from head of the accused operations section, took full advantage of the situation after the "investigation" ceased in that Complainant's wife was an employee who worked in the same office with him, where Complainant's co-workers were wary of implication in either a manipulation of data or a cover-up of the investigation. *See* admission of seriousness of charges in RX 26. From the onset of the conversation with Hews to the date of termination, Complainant established a continuing violation through a series of discriminatory acts. ***Green v. Los Angeles City Superintendent of Schools***, 883 F.2d 1472 (9th Cir. 1989).

The evidence shows that Complainant was viewed as the CEMS "heavy" prior to the data tampering complaints in 2001. Tr. 44, 61, 350. His opinion as "heavy" was never accorded any credibility by Respondent. However, I find that his belief that tampering occurred is reasonable.

I find that Complainant is generally the most credible witness in the case. He admits to family problems and was, based on my observation, self-deprecating and forthcoming. He admits that he did discuss his personal/domestic situation in the workplace, though he did so with co-workers and managers with whom he had worked for almost eight (8) years.

However, Complainant is adamant that he has been victimized as a result of the allegation that data was manipulated.

I discount Mr. Keisling's testimony as to the onset of the protected activity. As I stated earlier, I find that he has a lot to lose. He did not ask for termination until he had, in essence, made the Morris' domestic case a topic of company conversation, which effectively minimized the importance of Complainant's protected activity status. He was the boss of both Mr. and Mrs. Morris and his office was proximate to Mrs. Morris' place of work. I had an opportunity to note his demeanor while acting as the corporate representative at counsel table and while he gave testimony. I note that the Respondent's witnesses generally factually deferred to his rendition

concerning whether there was a protected activity, and note that the evidence shows that for the period of the time that he was "vaguely" informed until after the claim was filed, he was in denial, since he maintained that no infraction had occurred. I discount that he was "vaguely" informed, and that it is reasonable to conclude that he covered for himself and his unit. If he did not know that Complainant was engaging in protected activity, by the time he was elevated as plant manager, he should have known. I note that some of the other witnesses, especially Hews and Louie Young, looked to him for approval as they testified.

The record shows that Respondent failed to treat Complainant as a whistleblower. Rather, through Hews and Keisling, Respondent exhibited denial that whistleblowing occurred. Moreover, the failure to meet the duty to Complainant as a whistleblower caused or aggravated a hostile work situation with Keisling and Hews as well as with other of Respondent's employees, who should have been placed on notice that Complainant was entitled to whistleblower protection. I credit Complainant's testimony and find that the actions of Hews, Young, Christopher Martin, Timothy Dixon and especially Kielsing constitute harassment, in part based on whistleblower status.

Discrimination against a whistleblower does not have to be the only basis or even a substantial basis to perfect a *prima facia* claim. In ***Marano v. Dep't 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.

2 F.3d at 1140 (citations omitted).

I find that, even if the evidence were entirely based on inference grounded on the fact that there was no standard established to determine the severity or extent for a penalty for any violation, this would be sufficient to establish a *prima facie* case. However, I find that there is direct evidence that Keisling discriminated against Complainant in part based on his whistleblower allegations. Based on a complete review of the evidence, I find that the protected activity contributed to the adverse action against Complainant.

THEREFORE, I find that a nexus exists.

Nondiscriminatory Reason

If Complainant establishes a *prima facie* case, the burden of proof shifts to Respondent to proffer evidence of a legitimate, nondiscriminatory reason for taking the adverse action. ***Spriggs v. Diamond Auto Glass***, 242 F.3d 179, 190 (4th Cir. 2001). Once a complainant establishes a *prima facie* case of discrimination, the respondent needs to "articulate some legitimate, nondiscriminatory reason" to discharge its burden of proof at this stage of the litigation. ***Belt v. United States Enrichment Corp***., ARB No. 02 117 (2004); ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 802 (1973).

In review of Respondent's briefs, no direct mention is made on this issue. However, on the record, counsel recognized that the burden shifts. Tr. at 395. At hearing, I directed the

parties further to matters integral to whether there is a nondiscriminatory basis for termination. I stated as follows:

> I don't have the rules and regulations of LG&E that would set out exactly what would be required within the company policy. All I know is, is I heard some testimony about what the company policy was. I did not really inquire because it's not my province if there are lawyers in the case to inquire specifically about what the company [policy] was, whether there's compare and contrasts with other terminations that have taken place over a period of years, none of that in the record. Okay? And if that's going to be an issue, I'd like to know what, you know, exactly what your position is on it.

Tr. at 479. I also advised the parties to address the "dual motive" theory. Tr. at 473.

I am certain that, if I gave Respondent another opportunity to argue this point, I would be advised that even if the Complainant were a whistleblower and a *prima facie* case were made, the Complainant violated company policy and would be terminated for his misconduct. I discuss this below in a discussion of dual motive.

Although not directed to it, I reference the company handbook at RX 25. Respondent argues in part that it provided progressive, patient due process:

- Provided Complainant with company-paid counseling after Complainant's first arrest for domestic assault;
- Changed Complainant's schedule to accommodate his counseling sessions;
- Recommended the extraordinary option of a paid leave of absence for Complainant, rather than termination or unpaid leave, after Complainant created a workplace disruption by leaving work early to confront a co-worker's fianceé regarding his suspicions of an affair between the co-worker and Rosemary Morriss;
- Offered Complainant a lateral transfer to the nearest LG&E facility;
- Allowed Complainant to return to work under a Return to Work Agreement, which Keisling kept confidential in an effort to respect Complainant's privacy; and
- Chose not to terminate Complainant when he caused a second protective order to be entered in the Fall of 2003 or when Complainant failed to uphold the performance standards required by the Return to Work Agreement, instead giving him a final written warning.

Respondent's Brief.

However, these facts do not establish that there is a nondiscriminatory basis for termination. The Handbook is silent at to the exact penalty to be given for any infraction. There is no evidence of other employee discipline that may form a basis for comparison for conduct and for discipline. Keisling did state that company policy required him to "go through" Human Relations and through his "next level of report." Tr. at 271; RX 25. That "next level" was Charlie Braun. Tr. at 307. It is apparent that Human Relations made the ultimate decision. Tr. at 307.

Keisling testified that his concern for the safety of the plant employees and the violation of the Return to Work Agreement were the bases for termination. Tr. at 264-265.

He stated: "…[T]he recommendation from the plant level to terminate Mr. Morriss was mine and mine alone." Tr. at 270.

Margie Kane, a Respondent Human Relations Department employee, did not set forth in her testimony what the Respondent penalty policy was.[12] However, after she was asked to consult, she added language to Keisling's recommended termination abut unexcused absences because:

> …that was also a violation of his Return to Work Agreement and I felt that it was very important to include all of the reasons that we were terminating his employment in the letter so that he was clear as to why we had made the decisions that we made.

Tr. at 443.

> The days missed were when Mr. Morriss was held in jail for domestic abuse: For an absence to become excused, you would need to have prior approval, for example, vacation day. You would need to be sick, or some type of extremely extenuating circumstances, death in the family, something of that nature.

Tr. at 443-444.

The Handbook states in part:

> If, in the event of illness or for some other important reason, an employee is unable to report for work, his manager should be notified as far in advance as possible. Normally, two (2) hours is the minimum time required to fill an absence, once it is reported. Therefore, two hours should be considered the minimum advance notice time to be given when an employee is expecting to be absent or late.

RX 25 at 84.

It is apparent that Kane did not account for the fact that the Complainant's brother and co-worker had advised the plant of the absence. Given that the Complainant did not have a history of absences, there is no proffer as to why termination is an appropriate penalty for a first offense. Moreover, I note that a reading of the Handbook leads to the conclusion that the provision regarding an "acceptable record of attendance"[13] implies that other employees have an attendance problem.

The first knowledge Kane had of an allegation of workplace violence was immediately prior to termination. Tr. at 450. It is reasonable to infer from her testimony that she had not been consulted as to Respondent's discipline policy prior to termination.

There is no doubt that Complainant was arrested in July 2003 for assaulting his wife, Rosemary Morriss, who also worked at the Respondent's plant. Keisling testified that he feared that the "personal situation" would come into the workplace. Tr. at 232; RX 2:1 (July 13-17, 2003). However, this fact is in dispute, since Mrs. Morriss denies that Keisling discussed workplace safety with her at that time. Tr. at 360.

Complainant acknowledged that he needed help with his domestic situation and willfully entered Respondent's Family Assistance Program on July 27, 2003. Tr. at 93, 133, 239. I note that, although there was no evidence of erratic behavior at work, Keisling initiated discussions

[12] At the termination stage, although the plant manager, Mr. Keisling, had makes the final determination, it is done in conjuction with the Human Resources Department and a corporate Vice President, here Ms. Kane and Mr. Buaun. RX 25.

[13] RX 25: 89.

with other employees "because of the rumors which were going around the plant" and alerted them that they should feel free to report specific inappropriate behavior. Tr. at 243; CX 2:10.

I find that any inference that violence would occur on the premises was, at that time, completely unfounded. As of that time, Keisling had also failed to acknowledge that Complainant was entitled to whistleblower protection.

I discount allegations from Complainant's fellow workers that they had concerns for their safety or the safety of others. Dixon, Young and Thompson all testified that the Complainant was a threat, but I find their testimony to be unpersuasive. In fact, I infer from their testimony that they were responding to a call for witnesses to make a case against Complainant.

I find that the incident involving Rick Ogburn was an employment violation as the Respondent has established that it has an absences policy, and the Complainant requested leave for a false reason. Keisling suspended Complainant from work with pay. He was ordered not to come onto the company premises and was to have minimal contact with his wife. RX 8. Later, Keisling drafted a Return to Work Agreement with the following conditions:

> (1) Complainant's work performance had to meet the standards outlined in his personnel evaluation;
>
> (2) Complainant was not to discuss his personal domestic issues at the workplace, including soliciting feedback on these issues from co-workers;
>
> (3) Complainant was not to engage in any personal activity that disrupted his work or his co-workers' work; and
>
> (4) Complainant had to maintain counseling through the company-paid Family Assistance Program.
>
> Tr. at 141-42; RX 8. Complainant was told that a failure to follow these conditions could result in termination. Tr. at 147. RX 10.

The record shows that Complainant had no problem with his personnel evaluation, which I take to mean is his performance evaluation. He also subjected himself to counseling. The record shows that after Complainant fulfilled the terms of the Return to Work Agreement, and after he was cleared medically and psychologically, he was returned to work status.

In September 2003, after the police were called, a domestic relations state court heard evidence and entered a permanent order, prohibiting Complainant from having contact with Rosemary Morriss except in very limited circumstances. Tr. at 143-144; RX 7. The document prohibited Complainant from discussing his personal/domestic situation at work. Keisling informed him that if the need arose to have off-duty contact with his wife, that he should contact Keisling first. Tr. at 101; RX 8.

In November 2003, Hews gave Complainant a final written warning for the following performance issues:

> (1) Excessive cell phone usage, which Complainant had previously been counseled for and which had been resolved;
>
> (2) Complainant's statement to Hews that he could not complete a job because he had personal issues on his mind, causing Hews to assign another technician to perform the work;
>
> (3) Complainant leaving the workplace for the day with work not completed, telling another technician that this problem may cause him a late night and saying "good luck."
>
> Tr. at 288.

Hews testified that he had personal knowledge of these issues and felt discipline was warranted. Tr. at 184-185. However, he did not know that Complainant was under a Return to Work Agreement and was therefore surprised in testimony when he was advised that this was written as a final warning. *Id*.

On January 18, 2004, Complainant was arrested for domestic assault and violation of the protective order and served two days in jail. Keisling heard about it. He testified as follows:

> Basically, it just made me more concerned of the potential that Cliff may do something irrational on the plant site and end up with the workplace violence. I was still – as time went on [I] became more and more concerned with the work – potential for workplace violence.

Tr. at 291. Keisling also received a phone call from Renee Edwards, the Executive Director at Hannah's Place. Edwards described an incident in which Complainant screamed at her and told Keisling that she was concerned that Complainant might hurt or kill someone. Tr. at 291-293. Complainant was placed on paid leave while Respondent decided on the appropriate course of action. Tr. at 295.

Shortly after placing Complainant on leave, Keisling met with Sandy Morris, who handled payroll, to tell her that Complainant was on a paid leave of absence. Tr. at 264. During this conversation, Keisling learned that Complainant had been discussing his domestic issues with Morris and other employees at the plant. Tr. at. 264-265. Keisling then spoke with Jeff Dixon, Tony Thompson, and Randy Birdsong for confirmation. Tr. at 265-66, 294. Complainant acknowledged at trial that he spoke with Thompson and Morris about his personal issues. Tr. at 107-108.

After discovering that Complainant had discussed his marital affairs with other fellow employees and after having been informed that Complainant was emotional about his wife, Keisling recommended that Complainant be terminated. Tr. at 244, 248-249, 295, 440-441. Kane reviewed the recommendation and determined that Complainant's unexcused absence from work following his arrest constituted an additional reason for termination. Tr. at 440-441. The Keisling recommendation was approved and Complainant's employment was terminated on January 28, 2004. Tr. at 249. Keisling and Kane testified that allegations of 2001 data manipulation did not play any role in that decision. Tr. at 296, 443.

Workplace Violence

Although the Respondent failed to put the express company policy against threats of workplace violence into evidence, I accept that articulated threats of workplace violence are not acceptable by any employer. Respondent does have a provision in the Employee Handbook that prohibits fighting "during working hours." RX 25:87. There is also a provision that prohibits criminal conduct related to job performance. *Id*. at 88. Interestingly, there is a reference in the Employee Handbook to a Code of Business Conduct. *Id*. However, the Respondent failed to put the Code into evidence.

Complainant argues that the Respondent failed to show that there was any threat of violence at work. Respondent relies in large part on the fact that Complainant was jailed and that fellow employees and the head of the shelter made allegations of pending violence. I note that any violence exhibited was offsite, against the Complainant's spouse. RX 6, 7, 13. Complainant was never convicted of a crime involving violence. Tr. at 297. Rosemary Morris admitted in testimony that she suffered no serious injuries nor did she seek medical treatment for

any injuries. Tr. at 297. I note further that there had never been any physical violence or threats of physical violence between Complainant and any other employees. Tr. at 183, 232. The record shows that husband and wife did not come into contact at work.

Keisling testified that the incident that led to termination was based in large part on an assumption that there was a threat of violence and testified that he ultimately based the decision to terminate on the threat. Tr. at 247. He obtained statements from Complainant's fellow employees to substantiate this position. I find that all of them are hollow, and given the time line, and the fact that all are contrary to the full weight of the record, I discount all of them. The account concerning allegations made by Renee Edwards, the Executive Director at Hannah's Place, would be serious, but if it was, there is no indication that a police referral was made by her, and Edwards was not subject to cross examination. Therefore, I attribute little weight to the accusation.[14] I also discount Thompson's testimony. I did not consider the allegations as to threats of violence credible. I noticed that he looked to Keisling for approval during his testimony before me.

I credit Complainant's testimony that he was not convicted of a crime of violence.[15] I recognize that Mrs. Morriss has a difference in opinion on whether she was assaulted, but I note that Keisling apparently unilaterally accepted her rendition, and displayed a certain amount of zeal in learning that there had been a marital dispute.[16] He provided the company camera to help document her alleged bruises. A review of the exhibits shows that no photographs were entered into evidence.

The record shows that Complainant was cleared by the company medical provider to return to work as of August 29, 2002. Tr. at 240; RX 2. If he had not been cleared, this could constitute a basis for discipline. ***Ross v. Florida Power & Light Co***., 1996-ERA-36 (ARB Mar. 31, 1999). At the time of termination, Keisling did not consult the company medical provider whether Complainant posed a danger of workplace violence. Tr. at 237. A review of the only medical records of record does not disclose any threat. CX 14, 15. Although Keisling testified that he recommended terminating Complainant's employment because of his risk of workplace

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[14] I note that it is hearsay.

[15] Ms. Carpenter : So, when you talk about the ones, you're responding to her testimony where she said that you had assaulted her, is that [I take it that a question mark should have followed "that"].

Q. Were you convicted of assault?
A No, ma'am.
Q Were you convicted of any crime related to assault and battery?
A No, ma'am.
Q Were you convicted of breaking and entering?
A No, ma'am.
Q Other then the conviction for violation of restraining order, have you ever been convicted of a crime?
A No, ma'am, other then a speeding ticket.
Tr. at 460 -461.

[16] The record includes three *ex parte* Domestic Violence Consent Orders. RX 6, 7, 13.

violence (Tr. at 247), it is interesting to note that Kane denies that Keisling recommended termination as a result of risk for workplace violence.[17] Tr. at 449.

I find that the conflict in testimony between Keisling's version and Kane's version undermines Respondent's position that any workplace threat existed and substantiates Complainant's position that the termination was pretextual.[18] As there are competing inferences on this point, Respondent failed to meet its burden of proof that termination was as a result of a threat of workplace violence.

It very well may be that the Complainant's domestic situation was violent and if the company had an absolute policy against offsite violence, or had established that the Code of Business Conduct was violated, there may be a legitimate basis to fire Complainant.

However, no evidence of any such standard was placed into the record. If proved, workplace violence is surely a legitimate non-discriminatory basis for termination. However, given the context at termination and the rationale for termination provided, I do not accept any inference that *ex parte* Domestic Relations Orders raise an inference of a tendency toward violence against fellow employees or anyone else at work.

The burden is on the Respondent to show that there was a threat *at work*. (Emphasis added). The burden is not met.[19]

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[17] Ms. Carpenter: Did Mr. Keisling ever recommend to you that Mr. Morriss employment should be terminated because he posed a risk with respect to violence in the workplace?

A No.

Q So when you thought that it was important to give Mr. Morriss notice of all the reasons that he was terminated, do you believe that that letter reflects all of the reasons that he was terminated?

A Yes.

Tr. at 460 -461.

[18] *See* discussion, *infra*. A shift in Respondent's explanation for a termination action can provide support for the conclusion that the action was motivated by retaliatory intent. ***Timmons v. Franklin ElecTric Coop***., 1997-SWD-2 (ARB Dec. 1, 1998).

[19] *See* discussion on dual motive, below. In ***Consolidated Edison Co. v. Donovan***, 673 F.2d 61 (2d Cir. 1982), the Secretary of Labor adopted a decision that Con Edison violated Section 5851 of the ERA when it discharged its employee and ordered reinstatement. Con Edison petitioned the Court of Appeals to set aside the reinstatement, claiming that the discharge was justified because the employee threatened to kill his supervisor. The court adopted the "but for" test, which it found was appropriately applied by the NLRB in dual motive discharge cases (to determine whether Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1973), had been violated) and in the Second Circuit generally. The NLRB adopted the rule from ***Mount Healthy City School Dist. Bd. of Educ. v. Doyle***, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977), which required a *prima facie* showing that protected conduct was a motivating factor in the employer's decision and then placed the burden on the employer to show by a preponderance of the evidence that it would have reached the same decision as to the employee even in the absence of the protected conduct. The court held that the employee produced a *prima facie* case for improper discharge based on evidence of frequent and numerous, legitimate safety complaints. Con Edison failed to sustain its burden of proving that the employee's dismissal was due solely to his having threatened to kill his supervisor. This was primarily due to the fact that the supposedly threatened supervisor did not take the threats seriously and because the evidence was sharply disputed.

Personal Domestic Issues

There is no indication what the company policy is on personal discussions at work. I note that there is a Handbook provision against causing a disruption at work, but I find that it is not applicable to the situation that existed at termination. RX 25: 88.

Complainant did have a history of off duty incidents involving his wife, a co-employee, and on August 5, 2003, he signed the following:

> In connection with recent acts concerning Morriss' on-duty and off-duty behavior, Morriss agrees to participate in mandatory Family Assistance Program (FAP) assessment. He further agrees to abide by and adhere to the counselors' requirements and recommendations. Morriss consents to the release to Company of any and all counseling records and information.
>
> Failure by Morriss to strictly comply with any provision of this Agreement as well as the requirements and recommendations set forth by his counselors, shall be deemed a material breach and Company shall thereby have the right, in its sole discretion, to impose disciplinary action, up to and including termination of employment. Company shall have the right to make reasonable modifications to the terms of this Agreement, as it deems appropriate. Further, nothing in this Agreement alters the at-will nature of Morriss' employment.
>
> Morriss has read, understands and voluntarily accepts the terms of this Agreement.

RX 10.

Apparently, this document must be read in conjunction with a document dated August 9, 2003 (RX 9) executed by Keisling:

> Enter the plant site for any reason without my permission. Plant personnel will be instructed not to let you on the site without checking with me first.
>
> - You cannot call the plant except to discuss issues with me.
> - I advise against contacting other plant employees for any reason even during their off time. If I have reports/complaints of you calling other plant employees and aggravating this issue I will be required to take further disciplinary action.

Id.

I accept that if the company had a policy against workplace disruptions and the personal discussions caused disruptions, and if a proportionate penalty were established in this record, that the Respondent would have a legitimate basis to discipline Complainant.

The agreement that Complainant signed August 29, 2003 included:

> (2) Complainant was not to discuss his personal domestic issues at the workplace, including soliciting feedback on these issues from co-workers and

(3) Complainant was not to engage in any personal activity that disrupted his work or his co-workers' work;

RX 8.

I accept that Complainant did discuss his personal life with other employees. Keisling asked Dixon, Thompson and Randy Birdsong if Complainant had discussed his marital situation with them. Dixon informed him that "[Morriss] has talked with him for advise [sic] on how to solve the current situation." RX 2:25; Tr. at 264. Birdsong and Thompson confirmed that Complainant had talked with them about his marital situation. RX 2:25.

Although Keisling had informed both Complainant and Mrs. Morriss that they should not bring their personal situation into the workplace, he never questioned most of the employee witnesses whether she had spoken with them about their marital problems.

In spite of Keisling's allegation that she had been counseled regarding discussion of her domestic situation in the workplace, no action has been taken against Mrs. Morris. A review of the Return to Work Agreement shows that Mrs. Morriss was not a signatory. RX 8. The record shows that Mrs. Morriss spoke frequently with her co-workers about their domestic situation, showed them her bruises, and told them that Morriss had been violent with her. Tr. at 245, 378 (Rosemary asked Keisling to use the plant's digital camera to take pictures of her bruises); Tr. at 332, 335 (Mrs. Morriss told Young that Complainant had been arrested and showed him her bruises); Tr. at 335 (According to Young, she just needed someone to talk to) Tr. at 370, 378 (Mrs. Morriss admits talking with Dixon, Lee Wilder, Thompson and Robinson, Young and Sandy Morris about their marital problems); Tr. at 426 (Rosemary talked with Sandy Morris regarding her preparations for court hearings, that she was stressed out by the situation, and that she had gone to Hannah's Place, a shelter, because Complainant had abused her). According to Keisling's notes, Sandy Morriss stated that she "knows that they are going through a rough time and has talked with Cliff quite a few times on it." In response to Keisling's further questioning, Sandy Morriss informed him that Morriss had discussed "their domestic problems with her." RX 2:25 (January 21, 2004).[20]

Keisling testified that his concern for the safety of the plant employees and the violation of the Return to Work Agreement were the bases for termination. Tr. at 264-265. He testified: "…[T]he recommendation from the plant level to terminate Mr. Morriss was mine and mine alone." Tr. at 270. Margie Kane added language to Keisling's recommended termination about unexcused absences.

I am left to speculate whether the termination is warranted or arbitrary and capricious. I find that, since Mrs. Morriss was also involved in similar activity, there may be some mitigation.[21] I note that the fact that the August 5, 2003 document (RX 10) refers to an at-will employment situation, and references termination, does not show that the termination was warranted. At best, the penalties are uneven and not based on established company

[20] Although Complainant was subject to a "peace bond" or a domestic relation restraining order, and obviously had a domestic relations problem, it has not been proved that it was work related or violated company policy. Given the unreliable testimony on the issue, it is just as reasonable to infer that Respondent took advantage of the bad home situation to penalize Complainant for whistleblowing.

[21] I take administrative notice that family disputes are often tragic, emotional, and violent.

policy. If Complainant were punished for the same prohibition against discussion of personal matters by Mrs. Morriss and the other employees, it is fair to assume that Mr. Morriss was selectively punished, even if he violated the terms of the Return to Work Agreement. RX 8. Respondent failed to a show what the company policy might have been regarding the penalties imposed for a violation of the Return to Work Agreement. Neither party directed me to cases of similar exercises of penalties involving similar employees.[22] The Respondent did not set forth any basis to show that a violation of some of the terms of the Agreement was actionable in termination. Although the Respondent stipulated that the Complainant engaged in protected activity, this was not considered in fashioning the termination penalty.

Although it seems clear that there was a violation, I find that Respondent has failed to demonstrate a legitimate, non-discriminatory basis for termination, since there are no standards to show what the measure of discipline would be in the event of a violation of company policy.

Alternatively, both Complainant and Mrs. Morriss gave consistent testimony about the *de minimus* effect of the domestic relations incidents on work. I find that they are credible in that the effect as proven is negligible. The incident involving Rick Ogburn and his girlfriend occurred on August 7, 2003. This incident is not proffered to me as a basis for termination. There is no evidence that Mr. Morriss did anything except talk to an acquaintance, off premises. There is no evidence to show how the incident adversely impacted the workplace after Complainant's return to work after August 29, 2003.

Final Written Warning

In November 2003, Complainant received a final warning based on:

(1) Excessive cell phone usage, which Complainant had previously been counseled for and which had been resolved;

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[22] In some companies, such matters are covered by a company handbook or other written policy. Although it is not precedent, the Merit Systems Protection Board, by way of example, has made a distinction between determining whether any action should be taken and determining the appropriate penalty. In ***Douglas v. Veterans Administration*** (5 MSPR 280), the following factors were enumerated:

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
(2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
(3) The employee's past disciplinary record;
(4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
(5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties;
(6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
(7) Consistency of the penalty with any applicable agency table of penalties;
(8) The notoriety of the offense or its impact upon the reputation of the agency;
(9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
(10) Potential for the employee's rehabilitation;
(11) Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
(12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

(2) Complainant's statement to Hews that he could not complete a job because he had personal issues on his mind, causing Hews to assign another technician to perform the work;

(3) Complainant leaving the workplace for the day with work not completed, telling another technician that this problem may cause him a late night and saying "good luck";

Tr. at 288; RX 5.

This event is significant in the context of the timeline, i.e. Hews had received initial notice of protected activity, was Complainant's supervisor, knew or had reason to know that Complainant was a protected whistleblower, and was involved in the Dixon matter. Therefore, I find that this incident is also pregnant with the protected activity.

According to a preponderance of the evidence, this warning was not used to determine whether termination was warranted. Moreover, the record shows that the company has no policy prohibiting the use of cell phones. Tr. at 104; RX 25. Therefore, that aspect was arbitrary and selective.

I also find that the allegations surrounding the matter are very suspicious and are not proved as violations of existing company policy. I credit Complainant's testimony that he did nothing to warrant discipline. I discount Hews' testimony and note that he appeared very nervous and insincere as a witness.

Thus, I find that the facts surrounding the final written warning demonstrates an intent to discriminate, rather than supports a basis for termination. The Respondent has the burden to prove otherwise.

I also find that there is no nexus between the issues covered in the final warning and the reasons given by Mr. Keisling for termination.

Absences

Likewise, Respondent failed to establish what the actual company absence policy is. The Employee Handbook sets forth that unexcused absences *may* be a violation. RX 25:88. On the other hand, the Handbook has a provision that addresses failure to notify a supervisor when unable to report to work. *Id*. at 89. Employees are also required to maintain an "acceptable record of attendance." *Id*.

It is reasonable that one must work to be paid, but as to the charge of a two (2) day absence from work, the evidence shows that Complainant was in jail at the time. Complainant testified that under North Carolina law, any domestic arrest results in mandatory forty eight (48) hour jail sentences. Tr. at 110. Neither party furnished a citation, but I accept that this is accurate. As a consequence of his arrest on January 18, 2004, Complainant was unable to come to work or call in on January 19, 2004. According to the testimony, which was not controverted, his brother, John Morriss, who also works at the company, called Keisling on Complainant's behalf on January 19, 2004, and informed him that Complainant may be released around noon on January 20, 2004. The record also shows that Complainant had sick and vacation time available. Tr. at 118, 255; CX 7.

It is reasonable, after listening to all the witnesses, and reviewing the Employee Handbook, to infer that company policy dictated that if Complainant were unable to come to work due to a legal impediment, the absence would be excused. The Respondent did not relate

the absence to the elements of the "final warning." In fact, the evidence shows that the Complainant had a good attendance record. I credit his testimony that he had leave he could have used,[23] and infer that if the company gives accrued leave, it *may* be used. This is substantiated by CX 16, which shows that the Complainant had an accrued leave balance at termination.

According to the Kane testimony, violation of attendance was a motivation for deciding to terminate. I find it was merely an afterthought, a patent rationalization for the termination decision rendered by Keisling on other grounds. Again, this incident demonstrates an intent to discriminate, rather than supports a basis for termination. The Respondent has the burden to prove otherwise.

Moreover, there is no indication whether the appropriate penalty for such an offense is termination. Respondent maintains that termination is a viable option in an at-will situation, but admits that the Complainant has protected status. Even if the Complainant were subject to discipline, the company policy must be established to show what the penalty might be. A review of the Handbook discloses that the Respondent does not have a whistleblower policy. There is no indication how other Respondent employees are treated when they notify the Respondent of an absence; however, the employer has control of that information and should have provided it. ***Priest v Baldwin Associates***, 84-ERA-30 (Sec'y June 11, 1986).[24]

THEREFORE, after a review of all of the evidence, I find that the Respondent has failed to establish a legitimate, non-discriminatory basis for termination.

Dual Motive

Alternatively, while I find that Respondent has failed to meet its burden to prove a legitimate, non-discriminatory basis for discharge, arguably this case may be viewed as a dual motive situation, and under dual motive theory, with the direct evidence identified in the findings above, there is no way Respondent can separate motives for its actions. To trigger dual motive analysis, a complainant must prove by a preponderance of sufficient evidence, direct or circumstantial, that the protected activity contributed to the employer's decision. ***Kester v. Carolina Power and Light Co***., ARB No. 02 007, ALJ No. 2000 ERA 31, slip op. n. 19 (ARB Sept. 30, 2003). I find that Complainant has done so. Keisling testified that his

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[23] The record shows that unpaid leave given the Complainant prior to termination was not debited. Tr. at 308.

[24] One of the proffered reasons for discharging Complainant was that he was out of his work area for twenty to thirty (20 to 30) minutes. This reason was found to be pretext because

> Complainant's immediate supervisor did not consider Complainant to be out of his work area nor to have violated any company policy
>
> A company official testified that other employees had been fired for being out of their assigned work areas, but could not testify to any specific examples, and no corroborating documents from company records were inTroduced
>
> The Secretary held that in such circumstances, it is reasonable to look to the respondent employer to produce such evidence in its conTrol, at least for the purpose of carrying its burden of going forward. [citations omitted]
>
> The only evidence of company policy provided for termination for three consecutive days' absence without notifying the timekeeper, but was silent regarding being out of one's work area. It was difficult to believe that an employee with one or two full days of unexcused absences would be retained but one out of his work area for 20-30 minutes would be discharged.

concern for the safety of plant employees and violation of the Return to Work Agreement were the bases for termination. Tr. at 264-265; RX 8. He testified: "…[T]he recommendation from the plant level to terminate Mr. Morriss was mine and mine alone." Tr. at 270.

Under dual motive analysis, Respondent must prove that Complainant would have been fired based solely on a concern for the safety of plant employees and violation of the Return to Work Agreement had Complainant not been engaged in protected activity. If direct evidence of discrimination exists, and it is not effectively rebutted, a respondent can avoid liability only by showing it would have taken the same action in the absence of protected activity. ***Mt. Healthy School Dist. Bd. of Education v. Doyle***, 429 U.S. 274 (1977); ***Blake v. Hatfield Elec. Co***., 87-ERA-4 (Sec'y Jan. 22, 1992). ***Bartlik v. Tennessee Valley Authority***, 88- ERA-15 (Sec'y June 24, 1992), slip op. at 4. In the discussion above, I have discounted the allegation that there was proof of a threat to workplace safety.

The Respondent did not set forth any basis to show how any of Complainant's violations were actionable in termination. A review of the Return to Work Agreement shows that no penalties are mentioned. RX 8. There is some language set forth in RX 10 as to at-will employment, but there is no relationship between that document and the reasons cited by Respondent for termination.[25] A review of the Employee Handbook does not establish an independent reason for termination on grounds enumerated by Mr. Keisling.

I find that Respondent failed to meet its burden as it did not establish an appropriate penalty for violation of the Return to Work Agreement or the absence provisions in the Handbook.[26]

I also find that the Complainant was chosen for selective punishment regarding "personal discussions" at work. Although the Complainant's wife, as well as several other employees, obviously discussed the Complainant's marital status and domestic relations at work, only he was penalized.

THEREFORE, after a review of all the evidence, I find that Respondent has failed to establish a separate motive for termination.

Pretext

Although I have determined that Respondent failed to prove it had a legitimate, non-discriminatory basis for termination, I nevertheless note, in an abundance of caution, Complainant's further assertion that the reasons articulated in Complainant's termination letter are not in fact the "real" reason(s) for termination. ***Reeves v. Sanderson Plumbing Products,***

[25] In a dual motive case, one factor cited by the court in finding that the employer failed to carry its burden of proving that the disciplinary action would have occurred in the absence of the employee's whistleblowing activity was evidence presented that the disciplinary actions taken against the whistleblower were substantially disproportionate to discipline imposed by the employer in the past. ***Pogue v. United States Dept. of Labor***, 940 F2d 1287, 1291 (9th Cir. 1991).

[26] In ***Willy v. The Coastal Corp***., 85-CAA-1 (Sec'y June 1, 1994), Respondent fired Complainant as one of its in-house attorneys for failing to report a telephone call to a state agency and lying about it when asked by his supervisor. Under dual motive analysis, the Respondent did not carry its burden of proving that Complainant would have been fired solely for lying about the phone call had he not engaged in protected activity in writing the internal memorandum about environmental violations.

Inc., 530 U.S. 133, 139-140 (2000). ("Although the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case 'and inferences properly drawn therefrom…on the issue of whether the defendant's explanation is pretextual.'" 120 S. Ct. at 2106. *See* Complainant's Brief at 27-28. Arguably, Complainant must then assume the burden of proving by a preponderance of the evidence that Respondent's proffered reasons are "incredible and constitute pretext for discrimination." ***Overall v. Tennessee Valley Auth***., Case No. 1997-ERA-53 at 13. A rejection of an employer's proffered legitimate, non-discriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. ***St. Mary's Honor Ctr. v. Hicks***, 509 U.S. 502 (1993). Once the employer meets this burden of production, "the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity." ***Texas Dept. of Community Affairs v. Burdine***, 450 U.S. 248, 255 (1981). The presumption ceases to be relevant and falls out of the case. The onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reasons for the challenged employment action and the ultimate burden of persuasion remains with the complainant at all times. ***Burdine***, 450 U.S. at 253, 256.

I am advised that "a reasonable trier of fact could determined [sic] that Keisling bided his time and, when the first opportunity became available, made sure that it was 'payback' time for Morriss." *Id*.

I have mentioned that discrimination against a whistleblower does not have to be the only basis or even a substantial basis to perfect a *prima facie* claim. ***Marano v. Dep't of Justice***, *supra*. It does not have to be "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action. *Id*.

I note that Hews issued the "Final Warning." I find Complainant to be credible in asserting that after he told Hews he felt the issues were trivial and that the company was merely looking for a reason to fire him, Hews commented: "Yep, yep, pretty much." Tr. at 104. Although Keisling attempted to distance himself from Hews and stated that only he made the final decision to terminate, I note that Hews was Complainant's immediate supervisor, was the person to whom the initial whisleblowing was made, was the conduit of the allegation to Keisling, and was called to testify to substantiate Keisling's positions. Although Hews was the manager who issued the Final Warning, he admittedly did not draft the letter. Tr. at 184.

I note that the Complainant had an excellent work history prior to the whistleblowing, and was given the responsibility as "heavy" under Hews' supervision. I note that thereafter, things began to deteriorate. I accept that after he "blew the whistle" Complainant became the subject of scorn.

I also note that Complainant was chosen for selective punishment regarding "personal discussions" at work. Although Complainant's wife, as well as several other employees, obviously discussed the Complainant's marital status and domestic relations at work, only he was punished.

In addition, I note the conflict with respect to the testimony of Kane and Keisling as to the basis for termination. Kane did not substantiate the threat of violence basis. Tr. at 449. This undermines the supposed primary basis for discharge. A shift in Respondent's explanation for a termination action can provide support for the conclusion that the action was motivated by retaliatory intent. ***Timmons v. Franklin ElecTric Coop.***, 1997-SWD-2 (ARB Dec. 1, 1998).

THEREFORE, after consideration of all bases for termination, in the alternative, I find that Complainant has proved that the termination was a pretext to discriminate against him.

Damages

Mr. Morriss is entitled to be made "whole," including appropriate orders to restore his reputation, reinstatement and back pay, benefits and compensatory damages under Clean Air Act. *See* 29 C.F.R. §24.7(c)(1). The back pay and benefit considerations may include lost overtime, lost vacation and other chargeable pay remedies such as comp time, sick time, etc., and may include lost pension and health benefit losses and contributions to those plans for hours that would otherwise have been worked. However, Complainant failed to request reinstatement of fringe benefits in this case.

Back Pay

A complainant has the burden of establishing the amount of back pay that a respondent owes. ***Pillow v. Bechtel Construction, Inc***., 87-ERA-35 (Sec'y July 19, 1993). The purpose of reinstatement and a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Back pay awards should, therefore, be based on all of the earnings the employee would have received but for the discrimination. ***Blackburn v. Metric Constructors, Inc***., 86-ERA-4 (Sec'y Oct. 30, 1991).

Complainant alleges he was making $27.19 per hour prior to his termination. Complainant's gross wages, including overtime, for 2003 were $73,227. CX 16; Tr. at 117. Uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party. ***McCafferty v. Centerior Energy***, 96-ERA-6 (ARB Sept. 24, 1997); ***Johnson v. Bechtel ConsTruction Co***., 95-ERA-11 (Sec'y Sept. 11, 1995).

A respondent bears the burden of proving that the complainant did not properly mitigate damages. To meet this burden, the respondent must show that (1) there were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. ***West v. Systems Applications International***, 94-CAA-15 (Sec'y Apr. 19, 1995). The benefit of the doubt ordinarily goes to the complainant. A complainant may be "expected to check want ads, register with employment agencies, and discuss potential opportunities with friends and acquaintances." ***Doyle v. Hydro Nuclear Services***, 89-ERA-22 (ARB Sept. 6, 1996), *quoting* ***Helbing v. Unclaimed Salvage and Freight Co., Inc***., 489 F.Supp. 956, 963 (E.D. Pa. 1989), *quoting* ***Sprogis v. United Air Lines***, 517 F.2d 387, 392 (7th Cir. 1975).

Although Complainant had been previously offered jobs in the industry, he alleges that he is now unable to find comparable work. As a result, he has decided that he must look outside the power industry. Tr. at 115.

The Complainant testified that he took a good job in Dayton, Ohio, but that he had to quit because it was geographically too far from his children to use his visitation rights. Tr. at 116. He worked three (3) days but returned home. He did not state and was not questioned how he was paid. I accept that rejection of the Dayton job is reasonable under the circumstances. This scenario differs from a fact pattern where a complainant makes no effort to obtain suitable employment during the back pay period. ***Timmons v. Franklin Electric Coop***., 1997-SWD-2 (ARB Dec. 1, 1998). I note that Complainant has looked for work unsuccessfully. Respondent put on no evidence to show further mitigation.

Back pay is measured as the difference "between actual earnings for the period and those she would have earned absent the discrimination by the defendant." ***Horn v. Duke Homes***, 755 F.2d 599, 606 (7th Cir. 1979). Complainant has the burden of establishing the amount of back pay that Respondent owes. ***Pillow v. Bechtel Constr., Inc***., 87-ERA-35 at 13 (Sec'y July 19, 1993). The Complainant has not provided me with enough detail to set forth an exact amount of the back pay due. I was not provided pay from similar employees.

However, I note that back pay is easily calculable, with reference to Complainant's pay for 2003. CX 16. Back pay continues to accrue until paid. ***Chapman v. T.O. Haas Tire Co***., 94-STA-2 (Sec'y Aug. 3, 1994). If there is a dispute as to the calculation of back pay, the U.S. Department of Labor, Division of Fair Labor Standards, shall perform the necessary calculations using the Complainant's 2003 wages as the point of comparison.

Therefore, I find that Respondent should provide back wages from the date of termination to the date of reinstatement, less the three (3) days' worth of work he performed in Dayton.

Prejudgment interest on Back Pay

Prejudgment interest on back wages recovered in litigation before the U.S. Department of Labor is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621. The employer is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of the complaint. *See* ***Palmer v. Western Truck Manpower, Inc***., 85-STA-16 (Sec'y Jan. 26, 1990) (where employer has the use of money during the period of litigation, employer is not unfairly prejudiced).

Therefore, I find that Respondent should provide prejudgment interest from the date of termination to the date of payment from this Order.

Reinstatement

I have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." ***Albemarle Paper Co. v. Moody***, 422 U.S. 405, 418-419 (1975) (emphasis added).[27]

Referring to the analogous employee protection provision of the Clean Water Act, the Third Circuit explained that:

> Such "whistle-blower" provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment, such as the Clean Water Act and nuclear safety statutes. They are intended to encourage employees to aid in the enforcement of these statutes by raising substantiated claims through protected procedural channels. * * * The whistleblower provision was enacted for the broad remedial purpose of shielding

[27] We find this prophylactic objective (i.e., preventing "like discrimination in the future") to be particularly compelling in connection with whistleblower statutes like the employee protection provision of the ERA. The whistleblower protection laws are not intended merely to protect the private rights of individual employees, but are part of a broader enforcement scheme that promotes critical public interests. "Congress recognized that employees in the . . . indusTry are often best able to detect . . . violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations." ***Brock v. Roadway Express, Inc***., 481 U.S. 252, 258 (1987) (explaining rationale for comparable whistleblower provision of the Surface Transportation Assistance Act). Thus "[t]he Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits. Protected whistleblowing under the ERA may expose not just private harms but health and safety hazards to the public." ***Beliveau v. United States Dep't of Labor***, 170 F.3d 83, 88 (1st Cir. 1999).

> employees from retaliatory actions taken against them by management to discourage or punish employee efforts to bring the corporation into compliance with the Clean Water Act's safety and quality standards. If the regulatory scheme is to effectuate its substantial goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute.

Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor, 992 F.2d 474, 478 (1993), cert. denied, 510 U.S. 964 (1993).

Although reinstatement is the presumptive remedy in wrongful discharge cases under the whistleblower statutes, there are circumstances in which alternative remedies are preferred. For example, front pay in lieu of reinstatement may be appropriate where the parties have demonstrated the impossibility of a productive and amicable working relationship or where reinstatement otherwise is not possible.

When a complainant states at hearing that reinstatement is not sought, the parties or the ALJ should inquire as to why. If there is such hostility between the parties that reinstatement would not be wise because of the irreparable damage to the employment relationship, I may decide not to order reinstatement, and may order front pay. If, however, the complainant gives no strong reason for not returning to his former position, reinstatement should be ordered. If reinstatement is ordered, the respondent's back pay liability terminates upon the tendering of a bona fide offer of reinstatement, even if the complainant declines the offer. *See* ***Dutile v. Tighe Trucking, Inc***., 93-STA-31 (Sec'y Oct. 31, 1994). ***West v. Systems Applications International***, 94-CAA-15 (Sec'y Apr. 19, 1995).

I note that Respondent has alleged there to be a serious physical threat at work. I reject this allegation for reasons set forth above. I accept that Complainant did not react well in his domestic life, but note that there is no credible evidence that it actually affected job performance.

I find that the problems Complainant has had with fellow employees were actionable on Complainant's part, and that given proper counseling, Complainant should be able to return to employment. Complainant did not ask me to render an order requiring Respondent and fellow employees to cease and desist hostile activities. Had he done so, I would have entered the Order.

Consequential Damages

Compensatory damages are designed to compensate not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. ***Martin v. Dep't of the Army***, ARB No. 96-131, ALJ No. 93-SDW-1, slip op. at 17 (ARB July 30, 1999), *citing* ***Memphis Community Sch. Dist. v. Stachura***, 477 U.S. 299, 305-307 (1986); ***Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (Dep. Sec'y Feb. 14, 1996)*** (compensatory damages based solely upon the testimony of the complainant concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts); ***Crow v. Noble Roman's, Inc.***, No. 95-CAA-08, slip op. at 4 (Sec'y Feb. 26, 1996) (complainant's testimony sufficient to establish entitlement to compensatory damages); ***Jones v. EG&G Defense Materials, Inc***., ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998) (injury to complainant's credit rating, the loss of his job, loss of medical coverage, and the embarrassment of having his car and truck repossessed deemed sufficient bases for awarding the compensatory damages).

Complainant testified that he has had to cash in his retirement. Tr. at 114. He has had difficulty paying his bills, which has negatively affected his credit rating. He alleges that he

previously had an excellent credit rating. Tr. at 115. He testified that he has had to borrow money from relatives to keep going. Tr. at 115. He is living between a friend's house and the family lake trailer. Tr. at 115.

Complainant has sought counseling as a result, both before and after his termination. Tr. at 115-116. He alleges that his depression has prevented him from pursuing employment opportunities. Tr. at 116; CX 15.

The record shows that Complainant was treated by R. Prasad Degala, MD., beginning July 23, 2003, for complaints of depression, nervousness, trouble sleeping, crying spells, decreased appetite, a five pound weight loss, and increased irritability. CX 14. Part of the history provided shows that Complainant has a history of work stress. The referral was made after the July incident and the Complainant expressed a desire to use counseling "to get his wife and children back." Dr. Degala diagnosed depression and prescribed medication. In a note dated October 8, 2003, Dr. Degala recorded that, although he appeared to be alert and coherent, Complainant also looked mildly anxious and depressed. The record shows that Dr. Degala continued to treat the Complainant until November 23, 2003. *Id*.

While he was treating with Dr. Degala the Complainant was also in counseling with Barry Chessis, a psychologist for stress management, anger control and irritability. *See* Report dated March 28, 2004. The Complainant, as of that date, continues to seek reconciliation with his wife. CX 15.

I accept the unchallenged testimony that Complainant has been severely depressed and anxious as a result. He stated that immediately after his termination, he was unable to get out of the house. It was only after two to three (2 to 3) months that he was able to get himself together enough to look for work. Tr. at 116.

I find that the Complainant is credible and that, as a result of Respondent's whistleblowing violation, he has had to cash in his retirement in addition to difficulty paying his bills, which has negatively affected his credit rating. I also accept that he has been depressed and anxious as a result. I accept that he proved (1) objective manifestations of distress, e.g., depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress. I note that soon after he addressed the manipulation charges, Complainant was shunned and harassed by co-workers. Respondent knew or should have known that this conduct was, in part, caused by the whistleblowing. I note that the Complainant has had to seek counseling, which, in part, corroborates the allegations. It is reasonable that he sought counseling for work stress prior to the incidents of domestic problems. Again, Respondent did not produce any evidence to contest the allegations of compensatory damages. I also note, however, that Complainant provided no "special" out of pocket expenses.

I note that in other cases, where no medical expert witnesses were called and no psychiatric evidence was forthcoming, whistleblowing complainants were awarded as much as $250,000.00 for compensatory damages based on emotional distress.[28]

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[28] ***Hobby v. Georgia Power Co***., ARB No. 98- 166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001)($250,00.00). Other cases include:

- ***Hall v. U.S. Army, Dugway Proving Ground***, 1997-SDW-5 (ALJ Aug. 8, 2002). $400,000 in compensatory damages, based upon his mental anguish, adverse health consequence, and damage to his professional reputation. Complainant presented a "most compelling case of repeated and continuous

discrimination and retaliation that has resulted in Complainant suffering greatly …, most particularly his mental health has been compromised, and his professional reputation has been desTroyed, perhaps forever"

- ***Roberts v. Marshall Durbin Co***., ARB No. 03–071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004). Award of $10,000 for compensatory damages although Complainant failed to mitigate and look for work for a period of time.
- ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003) No award. Emotional disTress is not presumed; it must be proven. "Awards generally require that a plaintiff demonsTrate both (1) objective manifestations of disTress, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a proTracted period, feelings of isolation, and (2) a causal connection between the violation and the disTress." Id. "To recover for emotional disTress . . . the complainant must show by a preponderance of the evidence that he or she experienced mental suffering or emotional anguish and that the unfavorable personnel action caused the harm." ***Gutierrez v. Univ. of California***, ALJ No. 98-ERA-19, ARB No. 99-116, slip op. at 9 (ARB Nov. 13, 2002).
- ***Hillis v. Knochel Brothers, Inc***., 2002-STA-50 (ALJ July 21, 2003). Complainant suffered mental anguish and was forced into bankruptcy from the impact of the Respondent's employment action. Complainant was awarded $20,000 in damages for pain and suffering.
- ***Trueblood v. Von Roll America, Inc***., 2002-WPC-3 to 6, 2003-WPC-1 (ALJ Mar. 26, 2003). $50,000 in compensatory damagers for emotional disTress.
- ***Jackson v. Butler & Co***., ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004). $4000 in damages for emotional disTress.
- ***Van der Meer v. Western Kentucky University***, ARB Case No. 97-078, ALJ Case No. 95-ERA-38, ARB Dec., Apr. 20, 1998. The ARB awarded Van der Meer $40,000 because he suffered public humiliation and the respondent made a statement to a local newspaper questioning Van der Meer's mental competence.
- ***Gaballa v. The Atlantic Group***, Case No. 94-ERA-9, Sec'y Dec., Jan 18, 1996, slip op. at 5. Gaballa had been blacklisted, and testified that he felt his career had been desTroyed by the respondent's action. The Secretary reviewed the compensatory damages awards for mental and emotional suffering made in a number of cases, which ranged from $10,000 to $50,000, and awarded Gaballa $35,000.
- ***LaTorre v. Coriell Institute for Medical Research***, 97-ERA-46 (ALJ Dec. 3, 1997), the ALJ found that Complainant had testified credibily about his loss of self esteem and emotional pain and suffering resulting from Respondent's adverse employment action, and reviewing compensatory damages awards of similar complaints, determined that the circumstances justified an award of $26,500 in compensatory damages.
- ***Creekmore v. ABB Power Systems Energy Services, Inc.***, Case No. 93-ERA-24, Dep'y Sec'y Dec., Feb. 14, 1996, slip op. at 25. The Deputy Secretary awarded Creekmore $40,000 for emotional pain and suffering caused by a discriminatory layoff. Creekmore showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company.
- ***Michaud v. BSP Transport, Inc***., ARB Case No. 97-113, ALJ Case No. 95-STA-29, ARB Dec. Oct. 9, 1997, slip op. at 9. The ARB awarded $75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiaTrist. Evidence also showed foreclosure on Michaud's home and loss of savings.
- ***Smith v. Littenberg***, Case No. 92-ERA-52, Sec'y Dec., Sept. 6, 1995, slip op. at 7. The Secretary affirmed the ALJ's recommendation of award of $10,000 for mental and emotional sTress caused by discriminatory discharge where Smith supported his claim with evidence from a psychiaTrist that he was "depressed, obsessing, ruminating and ha[d] post-Traumatic problems."
- ***Blackburn v. MeTric ConsTructors, Inc***., Case No.1986-ERA-4, Sec'y Dec. after Remand, Aug. 16, 1993, slip op. at 5. The Secretary awarded Blackburn $5,000 for mental pain and suffering caused by discriminatory discharge where Blackburn became moody and depressed and became short tempered with his wife and children.
- ***Bigham v. Guaranteed Overnight Delivery***, Case No. 95-STA-37, ARB Case No. 96-108, ARB Dec., Sept. 5, 1997, slip op. at 3. The ARB awarded Bigham $20,000 for mental anguish resulting from discriminatory layoff.
- ***Lederhaus v. Paschen***, Case No. 91-ERA-13, Sec'y Dec., Oct. 26, 1992, slip op. at 10. The Secretary awarded Lederhaus $10,000 for mental disTress caused by discriminatory discharge where Lederhaus showed he was unemployed for five and one half months; foreclosure proceedings were initiated on his

I accept that the depression, nervousness, trouble sleeping, crying spells, decreased appetite, weight loss, and increased irritability are not completely due to harassment or as a result of the termination, but are in large part due to the degeneration of the marriage, and the lack of family harmony. However, I find that a significant part of the depression and related symptoms are compensable. The Complainant has failed to show that the impairment is permanent, and therefore, I do not render an award for future medical treatment. The termination has ultimately negatively affected his credit rating, and I find that this is also compensable.

There is also sufficient evidence that Complainant's reputation has been damaged by Respondent's unlawful action.

Based on a review of the entire record, and after a review of similar cases, I award Complainant sixty five thousand dollars ($65,000.00) for the emotional distress, pain and suffering caused by the Respondent's whistleblower violations.

Interest is not awardable on compensatory damages. ***Smith v. Littenberg***, 92-ERA-52 at 5 (Sec'y Sept 6, 1995).

Attorney's Fees and Costs

Attorney fees which are reasonably incurred by Complainant in connection with bringing the complaint upon which the order was issued will be awarded. ***Deford v. Secretary of Labor***, 42 U.S.C. Section 5851(b)(2)(B). A reasonable fee is not necessarily that agreed to by the Complainant and his/her counsel. ***Blanchard v. Bergeron***, 489 U.S. 87 (1989); ***Blackburn v. MeTric ConsTructors, Inc***., 86-ERA-4 (Sec'y October 30, 1991. Factors to be considered in awarding fees are:

1. Time and labor required;
2. Customary fee;
3. Novelty and difficulty of the questions;
4. The skill requisite to perform the legal service properly;
5. Preclusion of other employment by the attorney due to acceptance of the case;
6. Limitations imposed by the client or the legal circumstances. Priority work that delays the lawyer's other legal work is entitled to some premium;
7. Amount involved and the results obtained;
8. Experience, reputation, and ability of the attorney;
9. "Undesirability" of the case;
10. Awards in similar cases;
11. Whether the fee is fixed or contingent; and
12. Nature and length of the professional relationship with the client.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974).

In addition, litigation costs and expenses are also reimbursable including monies reasonably spent in pursuing the cause of action. ***Goldstein v. Ebasco Constructors, Inc***. No. 86-ERA-36 (May 17, 1988). This includes lodging, paralegal expenses, and the Complainantss transportation expenses to and from the hearing.

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house; bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted.

RECOMMENDED ORDER

Accordingly, **IT IS RECOMMENDED** that Respondent LG&E Power Services, LLC:

1. Reinstate Complainant to full employment status;

2. Pay to Complainant back pay, less three (3) days' pay, from January 28, 2004 to the date of reinstatement. If disputed, ministerial calculations of back pay should be performed by the Division of Fair Labor Standards based on the discussion in the Findings as to damages;

3. Pay to Complainant interest on back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621;

4. Pay to Complainant compensatory damages in the amount of sixty five thousand dollars ($65,000.00) in compensation for distress suffered as a result of the harassment and discrimination endured.

4. Pay to Complainant, all costs and expenses, including reasonable attorney fees incurred by her in connection with this proceeding. Counsel for Complainant will have thirty days from the date of this Order in which to submit an application for attorney fees and expenses reasonably incurred in connection with this proceeding. A service sheet showing that proper service has been made upon the Respondents and Complainant must accompany the application. Respondent will have fifteen days following receipt of the application to file objections.

SO ORDERED

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DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within fifteen (15) business days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely

petition for review is filed, the decision of the administrative law judge shall become the final order of the Secretary unless the Board, within thirty (30) days of the filing of the petition, issues an order notifying the parties that the case have been accepted for review. If a case is accepted for review, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.