

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 31 August 2006

CASE NO.: **2005-SDW-00008**

In the Matter of

EARLE DIXON,
Complainant,

v.

**U. S. DEPARTMENT OF INTERIOR,
BUREAU OF LAND MANAGEMENT,**
Respondent.

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of Section 300j - 9(i) of the Safe Drinking Water Act, 42 USC § 300j-9(i); 29 CFR Part 24.

The Yerington Mine site (located in Yerington, Nevada) was once a copper mining site that has since been abandoned. Waste from the copper leaching process was left on the land. The Nevada Division of Environmental Protection ("NDEP") took over management of the clean-up of the mine site around January 2000. NDEP signed a Memorandum of Understanding ("MOU") with the Environmental Protection Agency ("EPA") and Bureau of Land Management (BLM). The three agencies then worked together to clean up and mitigate the safety hazards on the site.

One of the principal projects tackled by the agencies was a Process Area Work Plan ("PAWP"), which is a plan outlining procedures for cleaning up the Process Area part of the site (where most of the copper processing took place) while protecting the safety of clean-up workers and the surrounding community.

Complainant began working for BLM on October 19, 2003 as the Project Manager. His primary job responsibility was managing the clean-up effort on behalf of BLM. He also served as a liaison to NDEP, EPA, and other mine stakeholders. As a new employee, he was subject to a one-year probationary period.

On October 5, 2004, the Complainant was dismissed by the Respondent. On November 4, 2004, the Complainant filed a complaint with the DOL.¹

Respondent is a federal agency under the United States Department of the Interior. As such, Complainant was a federal employee and therefore not covered under the OSH Act. Moreover, the federal government has not waived sovereign immunity under TSCA, FWPCA, and ERA. Therefore, potential remedies were available to Complainant only under the employee protection provisions of the following statutes: SDWA, CWA, CERCLA, CAA, and SWDA.

Following an investigation in September 2005, the Regional Administrator of the Occupational Safety and Health Administration, United States Department of Labor, held that the Respondent has met its burden of showing legitimate business reasons for terminating Complainant. Accordingly, the complaint was denied.

The Complainant filed an appeal with the Office of Administrative Law Judges and the case was referred to the undersigned Administrative Law Judge. The undersigned presided at a hearing that was held in Reno, Nevada on February 7-9, 2006.

ARGUMENTS OF THE COMPLAINANT

The Complainant states that the issues are

A. Whether the Complainant engaged in protected activity under the federal environmental statutes (Acts);

B. Whether the Respondent had knowledge that the Complainant engaged in such protected activity;

C. Whether the Respondent's decision to terminate Complainant's employment was motivated, at least in part, by the fact that Complainant had engaged in protected activity;

D. Whether the Respondent's asserted reasons for terminating Complainant's employment were a pretext for whistleblower retaliation;

E. If the Respondent's motives were not pure pretext, did the Respondent have dual motives;

¹ Acts cited in this case include: Safe Drinking Water Act ("SDWA"), the Federal Water Pollution Control Act ("FWPCA"), the Toxic Substances Control Act ("TSCA") the Solid Waste Disposal Act ("SWDA"), the Energy Reorganization Act ("ERA"), the Clean Air Act ("CAA"), the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") (collectively, "the EPA statutes"), and the Occupational Safety & Health Act ("OSHA ACT").

F. If the Respondent had dual motives, has the Respondent met its burden to separate out the illegal from the legitimate motives and show that it would have terminated Complainant's employment even in the absence of his protected activity; and

G. What is the relief and what are the damages to which the Complainant is entitled as a result of the retaliatory actions taken by Respondent.

Complainant's counsel argues that

The trial record contains numerous examples of Mr. Dixon's internal and external disclosures, reports, and complaints which fall within legal definitions of protected activities under the federal environmental statutes. The record reflects abundant evidence throughout that Mr. Dixon had a good faith basis for raising concerns about dangers to the environment and the health of workers and the public from releases and threatened releases of toxic contaminants including radioactive wastes to air and ground water, and about potential violations of the environmental statutes. Mr. Dixon's concerns were supported by technical data, experience and first hand observations, and often shared by EPA, scientific consultants, DOI technical staff and even managers. Mr. Dixon's technical competence and good faith basis for his environmental and public health concerns are not, on the trial record at least, disputed by DOI.

Claimant's counsel states that

The Respondent, in its discovery answers, CX 5, admits the facts of Mr. Dixon's protected activities including²

a) Dixon's statements to the media disclosing that radioactive contamination had been discovered at the YMS, TR 306; CX .5 answer #15;

b) Dixon's insistence on development of a Health and Safety Plan (HASP) that addressed radioactive threats to worker health and safety, TR 306-07; CX 5 answer #15;

c) Dixon's insistence on CERCLA NCP compliance in use of CHF monies for work done on the YMS, TR 307; CX 5 answer #15;

d) Dixon's inquiries regarding the disposition of contaminated liquids transported off the YMS by NDEP contractors, CX 5 answer #15;

² The following abbreviations will be used as citations to the record:

JS	-	Joint Stipulations;
TR	-	Transcript of the hearing;
CX	-	Complainant's Exhibits;
RX	-	Respondent's Exhibits; and
JX	-	Joint Exhibits.

e) Dixon's inquiries with labs used by ARCO and ARCO contractors to determine the labs ability to perform (time sensitive) sample analyses for radioactivity, TR 308; CX 5 answer #15;

f) Dixon's statements that NDEP was not being forthcoming or timely in sharing information, such as radioactivity measurements, with BLM regarding the YMS including Dixon's statement that NDEP might be involved in a "cover-up," TR 310; CX 5 answer #15;

g) Dixon's statements that there was evidence that radioactive contamination levels on-site and in residential wells off-site might not be naturally occurring, TR 311-12; CX 5 answer #15.³

Federal officials admit that some County, State and federal officials opposed working towards listing the YMS on the federal Superfund NPL and opposed following the CERCLA, (a.k.a. "Superfund") site assessment and cleanup process at the YMS.

County Commissioner Hunewill communicated her concern about the actions of Mr. Dixon to get the YMS listed under CERCLA, and regarding Mr. Dixon declining to agree with an ARCO contractor's analysis downplaying the radioactive contamination hazard at the YMS, in a meeting with Mr. Abbey on October 1, 2004 just hours before Mr. Abbey admits that he decided to remove Dixon.

This evidence makes clear that Mr. Dixon was perceived by those who influenced Abbey's decision to terminate Mr. Dixon's employment in a meeting approximately 2 hours before that decision was made, as either having initiated or being about to initiate a CERCLA proceeding — either a proceeding to list the YMS on the CERCLA NPL or an EPA proceeding under CERCLA section 106 to order cleanup actions, and/or a CERCLA section 107 cost recovery action.

³ Individuals named in this case –

Mr. Dixon served DOI as an Environmental Protection Specialist and was assigned to be the DOI project manager for the YMS assessment and cleanup project in the DOI BLM Carson City Field Office.

Mr. Dixon's immediate supervisor was Charles Pope. TR 638-39. Mr. Dixon's second level supervisor was Elayn Briggs. TR 686-87. Mr. Dixon's third level supervisor at the time of his termination was Donald Hicks, who was the manager of the CCFO. TR 593. Mr. Robert Abbey at the times in question was the DOI BLM Nevada State Director. TR 296. Jim Sickles is YMS remedial project manager for EPA. TR 810-11. Kris Doebbler is an environmental engineer with DOI BLM in the Washington, D.C. office who works, inter alia, with DOI projects utilizing the CHF. TR 501-02. Gabriel Venegas is a hydrologist with the CCFO who worked closely with Mr. Dixon on the YMS. Robert Kelso is Hazardous Materials Program Lead for BLM Nevada. TR 737.

The trial record reflects that DOI's managers, including Mr. Abbey, who made the decision to remove Dixon, and those managers and outside parties influencing the DOI decision to remove Dixon, all had knowledge of Dixon's protected activities. Many of Mr. Dixon's protected reports were made directly to his managers including Mr. Abbey.

Counsel argues that

The trial record clearly shows that Respondent DOI had a motive to retaliate against Mr. Dixon and terminated his employment because he engaged in protected activities. The trial record clearly establishes the required nexus between the agency removal action and Complainant's protected activities.

The twist in this classic smoking gun evidence is that it initially involves a third party, government officials other than the employer, making the smoking gun statements that connect the employee's protected activity with the desire to take adverse employment action against the employee. However, the involvement of the third party (the County Commissioners) in this case does not weaken the legal effect of this direct evidence of discrimination. BLM NSO Director Abbey clearly acted on the Commissioner's desire to have BLM Yerington Project Manager Dixon removed because of Dixon's insistence on compliance with federal environmental law at the Yerington Mine site. Not only did Abbey act to fulfill the Commissioners' (illegal) desire, Abbey took this action the same day within hours of when the Commissioners made their (illegal) desire known. Clearly Abbey adopted as his own the Commissioners' decision that adverse action should be taken against Dixon because of his protected activity.

DOI admits to having issued a gag order to Mr. Dixon, and only Mr. Dixon, restricting his communications with the press regarding the Yerington Mine site contamination issues. JX 1 Tab 2 p2; CX 23 pp 81-84 (Hicks); TR 794 (Simpson).

Claimant's counsel states that

There were no communications between Dixon's three supervisors (Hicks, Briggs, Pope) and Abbey that reflected any performance or conduct concerns by Dixon's supervisors between June 3rd and Dixon's termination on October 5th and none of these three supervisors requested or desired Mr. Dixon's termination. Dixon honored the conditions imposed by management following Abbey's threat to fire Dixon on June 3rd, 2004. Dixon did the required training related to dealing with the public and stakeholders tactfully. TR 119; JX 2 Tab 5 pp 224. Dixon did not make any unprofessional statements regarding NDEP, ARCO, or the County between June 3rd and his removal October 5th, and there were no complaints in writing to Abbey, the NSO or CCFO regarding Dixon's conduct during this post-June 3rd period. JX 1 Tab 2 (the few complaints present all predated the June 3, 2004 meeting with Abbey).

It was also clear from the trial record, including former NDEP Director Allen Biaggi's testimony and EPA Remedial Project Manager, Jim Sickles' testimony, that the agencies dealing with the YMS, the "MOU partners," NDEP, BLM and EPA, had relationship difficulties and problems agreeing and communicating with each other before Mr. Dixon came on, and effectively abandoned the MOU after Mr. Dixon left.

Abbey and Hamlett decided to remove Dixon as a “probationary employee,” and so stated in the notice of termination letter, JX 1 Tab 8, without first checking with managers Hicks, Briggs or Pope, other HR staff or the computer records. However, any one of these sources would have informed Abbey and Hamlett that Dixon’s immediate supervisor Pope had, consistent with his authority amid Agency procedure and policy, already signed off on Dixon’s probationary period certification.

Finally, it is argued that

In the instant case of Mr. Dixon, all of Respondent’s alleged “legitimate” reasons are essentially complaints about the inconvenience and difficulties caused by Complainant raising protected environmental concerns and engaging in protected activities. The fact that the Agency referenced Mr. Dixon’s protected communications with the media about the Yerington Mine site contamination as one of two reasons for terminating Mr. Dixon is a prime example of why the Agency cannot meet its burden in a dual motive case. There is no way on this trial record for the Agency to show the opposite of what it has already admitted in its submissions to OSHA - that Complainant’s statements to the media about contamination at the YMS were a reason the Agency terminated Complainant. For these reasons, should the ALJ find that this case is not a pure Pretext case, the ALJ should find this case to be a dual motive case where the employer DOI cannot meet its burden to show that it would have terminated Mr. Dixon in the absence of his protected activities.

ARGUMENTS OF THE RESPONDENT

The Employer states that the issues are:

1. Which, if any, of the activities cited by the employee qualify as protected activity under CERCLA, CAA, SWDA, and/or the SDWA?
2. Which, if any, of the employer’s actions qualify as adverse actions which might be causally related to protected activities?
3. Did the employer discriminate or retaliate against the employee because he engaged in any protected activity?
4. Did the employer have a sufficient legitimate business motive for terminating the employee’s employment, or for taking any adverse action, so that it can be found to have acted notwithstanding any protected activity in which the employee might have engaged?

Dixon was employed as an Environmental Protection Specialist, GS-0028-11, in the Carson City Field Office, Division of Non-Renewable Resources, Bureau of Land Management, between October 19, 2003, and October 15, 2004, the date Dixon was terminated from his employment with the BLM.

The position occupied by the complainant was temporary in nature and was established for a 24-month period or not to exceed October 18, 2005. (Agency Exhibit, Book 1, Tab 7, pages 16, 23 (“AE-1, Tab 7, pages 16, 23”); Tr. 193-4.) Like other term position appointments, there was a possibility that the position could be extended for up to a total of four years, however, such an extension was never implied nor guaranteed at any time. *Id.* As was required of all first time federal term employees, the complainant’s continued employment was subject to a one year trial or probationary period from the date of initial appointment. See 5 C.F.R. 316.304.

Yerington Mine covers approximately 3,500 acres and was once a copper mining site that has since been abandoned. Approximately half of the acreage is public land under jurisdiction of the BLM. The Anaconda Copper Company (Anaconda) began exploration activities at the site in 1941, opened the mine in 1951, and operated a copper production facility from approximately 1953 until 1978. In 1976, Anaconda was purchased into a wholly owned subsidiary of Atlantic Richfield Company (“ARCO”). Privately owned portions of the mine were sold twice, and ended up with a Arizona Metal Company, “Arimetco,” who conducted copper processing operations at the site from 1989 to 1999. In 1998, Arimetco filed for Chapter 7 bankruptcy protection and abandoned the site, leaving approximately 90 gallons of “pregnant” leach solution containing metals and sulfuric acid. Numerous other hazardous substances have been found present at the site.

Prior to the site characterization data (a 1984 contamination report) being revealed to the BLM, and prior to Dixon’s hiring, the BLM signed a MOU with the NDEP, and with the EPA, to coordinate continuing investigations and remediation of the Yerington Mine by ARCO. (AE-1, Tab 12, pages 3-10; Tr. 202.) Pursuant to the MOU, ARCO was to submit work plans directly to NDEP, which in turn distributed them to the BLM and EPA for review and comment.

Dixon asserts that the motive to terminate his employment was illegal and in retaliation for his allegedly raising concerns to BLM officials of a cover up by the BLM and the State of Nevada related to the extent of radioactive and toxic metals contamination at the Yerington copper mine site and the extent such contamination has migrated and is migrating off site creating an endangerment to the environment and surrounding communities. Dixon contends that the behavior by BLM State Director Robert Abbey towards him in 2004 provides direct and circumstantial evidence of Director Abbey’s retaliatory motive, and thereby establishes a causal connection between his protected activity and Abbey’s decision to terminate his employment during Dixon’s first year as a probationary federal employee.

The BLM contends that Dixon has failed to establish *a prima facie* case that he was retaliated against for engaging in protected activity. Namely, that to the extent complainant expressed internal and external concerns relative to state and federal assessments of the severity of contamination present at the Yerington Mine in 2003-4, as well as his expressing concerns regarding the adequacy of the potential responsible party’s (“PRP”) proposed process area work plans, such concerns were openly discussed and known during Dixon’s tenure, and were expressed at the very outset of what could very well amount to ten or more years of efforts to gather comprehensive and collective regulatory understanding of the site. The “scientific” concerns expressed by Dixon, as alleged in his direct testimony, were not regarded as

embarrassing by the BLM, or unfit for public discussion. Rather, Dixon's purely personal viewpoints, ones that he expressed cavalierly, lacked respect for his audience and consensus by the regulatory audience, and ignored the BLM's role and mission in this site as defined by the Memorandum of Understanding (MOU). The MOU was entered into by the BLM, the State of Nevada Division of Environmental Protection (NDEP), and the U.S. Environmental Protection Agency, Region IX (EPA) in March 2002, and its purpose was to coordinate continuing investigations and remediation of the Yerington Mine by ARCO, the PRP.

One of the problems inherent in the MOU partnership, was the differing priorities and objectives of the various agencies. Lyon County Commissioners, along with the Governor and other State and Federal political leadership and NDEP, for example, did not desire to have the site listed on the National Priorities List (NPL) as a superfund site due to the stigma and economic harm a community experiences as a result of such a listing. The undisputed testimony established that for a significant period of time 2002 to late 2004 — NDEP, Congressman Gibbons, the Governor, and Lyon County Commissioners were resistant to any attempts to minimize the efficacy of the MOU as the desired course of action, or to allow the project to be shifted from the BLM's lead to EPA, which would likely become a precursor to listing the site.

During his 12 month tenure, the BLM contends that Dixon was disruptive, was disrespectful to NDEP and its employees, would not recognize need for fostering consensus or respectful disagreement under the MOU partnership, used poor judgment, was not favorably regarded by local, state and federal elected leadership, and, through his strident, self-important tactics, alienated key players in the partnership after only several months on the job.

The BLM also contends that there were legitimate business reasons for its actions regarding management of the Yerington Mine and the decision to terminate Dixon. Longstanding disagreement by local, state and federal political leadership over whether to have the mine site listed on the National Priorities List continued to hamper State Director Abbey's ability to settle on an ideal strategy for the BLM's involvement as the lead regulatory agency. These general political and regulatory disagreements evolved in 2004, and by late summer, became a focused criticism of the ineffectiveness of the Carson City BLM Field Office in the project. Meanwhile, as stated earlier, from 2002 to late 2004, NDEP, Congressman Gibbons, the Governor, and Lyon County Commissioners were resistant to any attempts to allow the project to be shifted from the BLM's lead to EPA. Ultimately, all agreed this was the prudent strategy and the project lead was transferred to EPA in December 2004. As such, after persistent complaints and debate over strategy, Abbey made the decision to terminate Dixon's probationary employment and to permanently remove the project from Carson City Field Office to the BLM Nevada State Office for daily management. The BLM contends that the criticisms, debate, and Abbey's mounting frustrations with both Dixon's and the BLM's apparent lack of adequate oversight of the project, were unrelated to, separate and apart from, and not causally connected to any protected activities alleged by Dixon.

In the opening statement at the trial, counsel for the Complainant argued that

We believe that Mr. Dixon was terminated because he was insisting on compliance with the National Contingency Plan and CERCLA and the Safe Drinking Water Act. One of Dixon's

specific protected activities was requesting that the State and ARCO do additional testing of groundwater contamination for radioactive contamination specifically to comply with the Safe Drinking Water Act. There was resistance by ARCO and the State in doing that testing, and Mr. Dixon was criticized to some extent for having insisted on doing that additional testing.

From June of 2004 until Mr. Dixon's termination there were no written complaints from any outside parties regarding Mr. Dixon or public or private statements. There was no complaint from his first-line supervisor Mr. Pope. There was no complaint from his second-line supervisor Ms. Briggs. There was no complaint from his third-line supervisor Mr. Hicks. In fact, Mr. Pope had decided to approve Mr. Dixon's probationary status.

About nine months into the first year in the probationary period the first-line supervisor, in this case Chuck Pope, is given a form by the personnel office, and he is asked to certify whether the probationary employee has adequate conduct, performance and character as to pass the probationary period. That form was relayed to Mr. Pope. Mr. Pope reviewed it, certified in writing, signed and certified in September of 2004 -- this would be less than a month before Mr. Dixon was removed by Mr. Abbey -- Mr. Pope certified that Mr. Dixon's performance, conduct and character were satisfactory and recommended his continued employment.

Counsel also stated that after the meeting with county officials, Abbey decided to fire Dixon. Dixon was insisting on using the CERCLA to clean up the Yerington Mine site and/or listing the Yerington Mine site on the Superfund List. Also, Dixon would not accept the Foxfire report from the ARCO contractor.

Earle Dixon testified that he began working on October 19, 2003 and was terminated on October 5, 2004. His assignment was to work on the Yerington Mine project to try to bring the site into compliance with a number of environmental laws, to build a case file, to act on behalf of the BLM in the partnership of the MOU to develop work plans, to try to get the site characterized and then come up with the options for cleanup.

Dixon described his extensive work history and reported that he was subject to a one-year probationary period.

The mine site was quite large and was in production during the 1950s and 1960s. The site is 51% private land and 49% land managed by BLM. About 2000, EPA decided that the site qualified for the CERCLA National Priorities List. Governor Guinn of Nevada declined that option, and a MOU was signed with state and federal agencies. NDEP took the lead in working with ARCO, and BLM and EPA submitted comments on work plans regarding clean up of the site.

In late 2003, BLM received a copy of a radioactive sampling report that was conducted in 1984. Dixon visited the site in 2003 and in 2004 and found high readings on a Geiger counter. Dixon reviewed plans from ARCO and NDEP and found these to be deficient in meeting the requirements of CERCLA.

Dixon expressed the opinion to BLM and NDEP that the radiation concentration at the site was not naturally occurring. On several occasions, he spoke publicly on this issue, but in July 2004 Pope told him to cease such comments as NDEP was upset.

Dixon was able to obtain funding from the Central Hazmat Fund (CHF) to conduct further testing. In mid-August, Ms. Doebbler from the Washington office of BLM met with Abbey, Dixon, and other BLM employees. Ms. Doebbler stated that the requirements of CERCLA had to be met in order to use CHF monies.

On September 20, 2004, the Carson City BLM office informed Dan Ferriter at ARCO that the HASP as drafted did not adequately protect visitors to the site. (RX 1, Tab 2, page 3). Dixon had drafted this letter which was signed by Hicks the office manager.

In June 2004, Abbey took him to task for making statements in meetings and emails and conversations that accused the State of Nevada, Division of Environmental Protection of a conspiracy and cover-up, and that he had received complaints and a written letter from Mr. Allen Biaggi threatening to bring in Brian Sandoval, the State Attorney General, to sue the BLM for these remarks. Hicks intervened on Dixon's behalf and Dixon attended a course on communication skills.

The Foxfire Scientific Consultants were hired by the State of Nevada to conduct a report on radioactivity. Neither EPA nor BLM could support this report. In August 2004, at a public meeting, Ms. Hunewell, a county commissioner, read the Foxfire summary, and then was upset that Dixon did not fully support the document.

The Yerington project was removed from the Carson City office to the State BLM office. None of the employees in the Carson City office continue to work on that project. In December 2004, the State requested that EPA take the site, and this was accomplished in that month. (TR. 137).

The Process Area Work Plan (PAWP) was the main plan of some 15 plans. The PAWP had been rejected several times by EPA, BLM, and by the Yerington Paiute Tribe. By April 2004, NDEP had agreed with the revisions.

During a meeting of BLM employees on June 3, 2004, Abbey criticized Dixon's conduct. (TR 169) (See meeting notes RX 1, Tab 4, page 4). Abbey indicated that the project would be transferred to the state office due to complaints from Biaggi (NDEP) and others. (TR 171).

Dixon acknowledged that during a teleconference in late March, he inferred that NDEP did not want EPA and BLM to publicly discuss the site. He suggested that BLM personnel could take a stronger stance.

Charles Pope testified that he was the first line supervisor for Dixon during his employment with BLM. In early September 2004, Pope approved Dixon's retention. (CX 25). Dixon was dismissed by Abbey before Pope could complete an annual review form. Pope was aware of

Abbey's criticisms of Dixon in June, but Pope was not critical of Dixon at any subsequent time. (TR 660).

In May 2004, Pope made notes on Dixon's employee performance plan. (RX 2, Tab 6, pp. 17-20). Subsequently, Pope cautioned Dixon about interagency relations. During 2004, there were rumors that EPA would take over the project. There were delays due to deficiencies in work plans. EPA and BLM desired more sampling than did NDEP.

Elayn Briggs testified that she was the acting field director while Dixon was in the BLM office in Carson City. In June 2004, Ms. Briggs agreed that Hicks should have time to work with Dixon after Dixon was criticized by Abbey. Ms. Briggs had no further problems with Dixon and she was aware that Pope had approved his retention. ARCO and the state were slow in responding to Dixon's request for health and safety plans. (TR 695).

Donald Hicks testified that he became Carson City field office manager on May 17, 2004. In early October 2004, Hicks did not intend to remove Dixon. (TR 595). Bob Hamlett from BLM Human Relations prepared a Dixon removal letter for Hicks to sign, but he declined.

Hicks was present with Abbey at the October 1 county commissioners meeting. Ms. Hunewill indicated that Dixon had been uncooperative at a meeting in August. Hicks agreed with Dixon's comments regarding the quality of the water sampling in the report by Foxfire. (TR 606).

Hicks acknowledged that Dixon made statements to the press regarding radioactive contamination and that Dixon insisted on a health and safety plan to address that issue. At the request of Abbey, Hicks wrote a memo which gave reasons for dismissing Dixon. Hicks had informed Dixon not to speak to the press regarding test results. Dixon and others in the office were disappointed that Hicks toned down a letter to ARCO at the request of Abbey. (TR 623).

Hicks' attention was called to the September 9, 2004 letter from Congressman Gibbons to Abbey. (RT 1, Tab 2, page 7). This letter stated, in part

I am contacting you to request that management of the Yerington Mine site project be moved from the Carson City District Office to the Nevada State Office.

As you know, on March 28, 2002, the Environmental Protection Agency (EPA), the Bureau of Land Management (BLM) and the Nevada Division of Environmental Protection (NDEP) signed a Memorandum of Understanding defining the tri-agency oversight relationship. Since that time, the NDEP has done a tremendous job of mitigating the safety problems associated with the site. However, there is still an effort to list it as a Superfund site under Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Before such a drastic measure is taken, I believe the three agencies can do better to work together to solve this problem. Your leadership and guidance is an essential component in making this tri-agency effort function effectively.

On September 20, 2004, Abbey informed the Congressman that he was to meet with state and local officials.

On October 4, 2004, Hicks drafted a rationale for Abbey to fire Dixon. (RX 1, Tab 2, page 2).

Hicks and Abbey attended the county meeting on October 1, and the focus was on moving the project from Carson City to the state office. Hicks asked about keeping Dixon in Carson City but Abbey indicated that there would be no work for him if the project was moved.

Robert Abbey testified that he had retired in July 2005 as state director for BLM in Nevada. Abbey acknowledged that he was aware that Dixon insisted on development of a health and safety plan to address radiation threats, and that Dixon insisted on CERCLA compliance. Hamlett from Human Resources drafted the dismissal letter, and there was some input from Hicks.

Around September 2004, Abbey spoke with Wayne Nastri, the Regional Administrator of EPA, regarding EPA taking the lead at Yerington. (TR 334). EPA subsequently took the lead at the request of the State.

In early August, Abbey softened a BLM letter to ARCO and ARCO responded with a request that BLM acknowledge that it was a potentially responsible party (PRP). BLM was disappointed with the response, but shortly thereafter EPA took the lead.

Abbey acknowledged his statement to the OSHA investigator and this stated that this transfer was implemented because, one, they wanted to remove Mr. Dixon from the project manager position; and, two, Mr. Dixon became an issue rather than needing to clean up the mine site being the issue. (CX 8; TR 371). Reference was made to the letter in September from Congressman Gibbons.

There was a discussion of the letter in May 2004 from Allen Biaggi, Administrator of NDEP, which reported complaints about Dixon. (See RX 1, Tab 2, page 18). This letter, plus e-mails and letters from various sources, led to the meeting in June.

Abbey testified that he was concerned about delays in the project and that data should be reviewed before being released to the public. (TR 416). Subsequent to June, none of the supervisors in Carson City criticized Dixon but Pope expressed concerns over delays.

On October 5, 2004, Abbey formally transferred management of the Yerington project from the Carson City office to the state office. (CX 10).

In late May 2004, Abbey informed Hicks that he would be removing Dixon from the project. (RX1, Tab 2, page 116). Concerns were expressed by partners in the MOU and by stakeholders such as the tribal leaders regarding lack of progress and Dixon's statements regarding undue influence by ARCO. (TR 447).

In early June, Abbey attended a meeting with numerous parties. Later that week he met with Carson City staff and NDEP personnel and he intended to replace Dixon as the project manager. If Hicks had not persuaded Abbey to keep Dixon as the project manager, Abbey would have transferred the project to the state office at that time. (TR 456).

Abbey testified that although he had received the September letter from the Congressman, he did not intend to transfer the project before he attended the meeting with the county commissioners on October 1. Abbey had hoped that he would be told that things were getting better. However, the local officials supported a transfer to the state office.

Robert Abbey testified that

I had pretty much in my own mind formulated a decision prior to that October 1 meeting with Lyon County. I was moving forward with the strategy to transfer the responsibilities for program management from Carson City to BLM Nevada State office. I was moving forward with the strategy to replace Mr. Dixon as that project manager, and to assign that responsibility to others within the BLM in Nevada. And after that meeting on October 1st I shared with Don Hicks the decision that I was making.

... I guess I did not see a need for Mr. Dixon's continued employment with the Bureau of Land Management. Certainly I did not want him, because I did not feel like he had the skills to provide that program management and leadership that we needed in that role. (TR 463).

Hicks declined to sign the dismissal letter but Abbey had no reservations taking that action. Abbey consulted only with Hicks, Hamlett from Human Relations, and Amy Lueders, the BLM associate state director. (TR 465). Dixon was to be dismissed regardless of whether or not he was a probationary employee.

The decision to switch control of the project to EPA was not influenced by the dismissal of Dixon in view of prior input from EPA and from the Governor's office. In the October meeting, the local officials were more concerned about a lack of progress than a CERCLA designation for the site.

Abbey stated that between the time of the meeting in June and early October, he expressed to Hicks disappointment in progress but did not specifically mention Dixon. At the meeting in October the county officials were concerned that Dixon had his own agenda to obtain Superfund designation for the site.

Abbey acknowledged that ARCO and county officials historically downplayed the characterization of danger at the Yerington Mine site.

Krista Ann Doebbler testified that she was an environmental engineer for BLM in Washington, D.C. Her office handled proposals and funding for the Central Hazmat Fund (CHF). In 2004, Earle Dixon and the Carson City office had made a special request for an emergency appropriation. The request was for \$1.2 million and \$493,000 was granted. (TR 503).

Radioactive contamination was discovered at the site and the grant was for health and safety work such as dust control and fencing. In mid-August, Ms. Doebbler attended a meeting with many of the Nevada BLM personnel regarding a CERCLA response at the site. In late 2004, Kelso decided not to proceed under CERCLA and some funds were returned.

Casey Padgett testified that he was a senior attorney in the Solicitor's Office of DOI and had a background in CHF proceedings. In a memorandum in July 2002, Padgett expressed concern with NDEPs approach to Yerington. (CX 1). Padgett stated that Dixon performed well and insisted on CERCLA compliance, but he became impatient and frustrated. (TR 574).

Gabriel Venegas testified that he was a hydrologist in the BLM office in Carson City and assisted Dixon in the Yerington project. Venegas thought that Kelso's comments regarding remarks by Dixon were taken out of context during a conference call in March. In addition, Commissioner Hunewill was quite hostile to Dixon. Dixon insisted on CERCLA compliance and there had been contaminant releases from the site.

Venegas, Dixon, Sickles from EPA, and another person planned to present a paper on the site at a South Carolina conference in 2005. However, Venegas did not receive approval to attend. NDEP was resistant to further testing at the site. (TR 587). Dixon's predecessor had encountered similar resistance.

Allen Biaggi testified that in July 2004 he was appointed as the Director of NDEP. His prior position was as the administrator of that department which was responsible for many sites and included Yerington. Biaggi stated that

The State of Nevada believed at that time and still believes today that it is more efficient, expedient and cheaper to remediate contaminated sites through a cooperative effort rather than through an enforcement action or through the Superfund process as initiated by the federal government.

So the purpose of the MOU was to bring the principal parties responsible for this site together into a partnership in an effort to achieve cleanup at the site. (TR 209).

Biaggi testified that NDEP took the lead among the MOU parties in dealing with ARCO. There was a "technical work group" which was composed of these parties as well as the Indian Tribes and local governments.

The MOU partners agreed to analyze data before it was released to the public. However, there were allegations that NDEP was withholding data, and NDEP staff believed that Dixon was releasing information without informing the other partners. Art Gravenstein of NDEP informed Biaggi that he was being accused of “misinformation.” Biaggi wrote to Abbey in May and expressed his concerns. (See RX 1, Tab 2, page 18) (TR 220). In addition, Biaggi was informed that Dixon had contacted a subcontractor which was employed by NDEP.

Biaggi testified that while BLM and EPA were not always pleased with progress by ARCO, NDEP had issued enforcement actions against ARCO.

It was believed that there was some trust and confidence on the part of ARCO and the part of NDEP, and that NDEP and ARCO were working to determine the extent and magnitude of contamination at the site and work toward an effective cleanup.

Biaggi stated that the only Superfund site in Nevada was in Lyon County where the Yerington Mine was located. That Superfund project had “left a very bad taste in the mouth of the State of Nevada.” Therefore, the State officials and Lyon County resisted another Superfund designation. However, the County acquiesced as the MOU was not working. (TR 230).

In May 2002, John Singlaub, then manager of the BLM field office in Carson City, wrote to EPA and suggested that the MOU suffered from a lack of reciprocation from NDEP and ARCO. (CX 3). NDEP received a copy of that letter and Biaggi responded to EPA in June. Biaggi expressed disappointment in the attitude of the Carson City office. (CX 4).

In December 2004, NDEP officials concluded that the MOU was not working, and after consulting with the Tribes, county officials, and ARCO, NDEP requested that EPA take the lead.

In May 2004, Biaggi wrote to Abbey and complained about Dixon’s e-mail exchange with Gravenstein and accusations, contact with an NDEP subcontractor, and suggestions that NDEP did not share data and withheld information. (RX 1, Tab 2, page 18).

Robert Kelso testified that he was the hazardous materials program lead for BLM in the State of Nevada. About July 2004, Kelso and Dixon drafted a memorandum regarding funding options for Yerington. (CX 7). This memo was circulated among BLM personnel. Kelso assumed that in November a meeting was held with the Governor to discuss the options.

Kelso took notes from a March 30, 2004 teleconference and prepared a memorandum for Del Fortner to send to Abbey. (RX 1, Tab 2, page 119). Kelso was concerned about “inappropriate” comments made by Dixon and by Venegas. (TR 773).

Mary Jo Simpson testified that she was the chief of communications for BLM in Nevada. (RX 1, Tab 9) consists of newspaper articles, and Simpson was concerned about Dixon’s presentation of information, and Abbey was upset on occasion. Simpson thought that she might have talked to Pope about Dixon’s comments to the press. (TR 794).

James Sickles testified that he was a remedial project manager for the Superfund Division for Region 9, for the US EPA. EPA had some involvement at Yerington as early as 1978, but became more interested about 1999 when groundwater reports became public. The site was then rescored and was eligible for the National Priority List. EPA deferred such a listing at the request of the State, and the MOU was signed.

In late 2004, the State requested that EPA take the lead. EPA then asked ARCO to commit to an RI/FS – study of the site. Sickles testified that Dixon performed sound technical work and worked well with EPA. Dixon pressed for sampling but NDEP and ARCO disagreed with that assessment. There were delays but Sickles attributed these to deficiencies in the work plans of ARCO and NDEP. (TR 818). By late 2004, State and local officials realized that the contamination was complex and that EPA should lead.

Sickles acknowledged that he had written a memorandum which indicated that NDEP had problems communicating with other parties.

Robert Hamlett testified that he was an employee relations specialist for BLM in the state office. Around October, he participated in a conference call with Abbey, Hicks, and Amy Lueders, the associate state director. They discussed problems with Dixon and Hamlett presented options.

In a second call, Abbey told Hamlett to talk to Hicks and prepare documentation for dismissal. Hicks presented reasons, but the termination letter did not mention concerns about speaking with the press or the Congressman's request for a transfer of command. Hicks also mentioned the Commissioner's concern but such did not appear in the dismissal letter. Abbey signed the letter as Hicks declined to take such action.

Subsequently, Pope asked about completing the end of the year appraisal as the rating period had ended and the probationary certification had been approved. Hamlett told Pope not to take further action as Dixon had been removed. Hamlett stated that the probationary period ran for a full year regardless of appraisals.

Patricia McNeil testified that she was an administrator support assistant for BLM. Her duties included personnel actions and she was involved in CX 25, Dixon's probationary notice. Ms McNeil stated that an employee could be dismissed after certification but still within a probationary period.

During a deposition in January 2006, **Jennifer Read** testified that she was a human resource assistant for the BLM state office. She received an electronic form which indicated that on September 9, 2004, Pope certified that Dixon was satisfactory and should be retained beyond the probationary period. The employee's status is changed when the probationary period is completed. (CX 37).

Del Fortner was deposed and testified that he was the deputy state director for mineral resources in the BLM state office. Fortner gave technical advice to Abbey and others and he relied on Kelso for information. On one occasion a consultant stated that Dixon had encouraged

him to file a law suit against BLM and the State. Kelso reported that Dixon had stated that he was having issues with management. (JX 3).

DISCUSSION

The employee protection provisions of the environmental acts prohibit an employer from taking adverse employment action against an employee because the employee has engaged in protected activity. Jenkins v. United States Environmental Protection Agency, ARB No. 98-146 at 14, 1988-SWD-00002 (ARB Feb. 28, 2003). To prevail on a complaint of unlawful discrimination under the SWDA, a complainant first must establish a prima facie case, thus raising an inference of unlawful discrimination, Id at 15. A complainant meets this burden by showing that (1) the employer is subject to the applicable retaliation statutes, (2) that the complainant engaged in activity protected under the statutes of which the employer was aware, (3) that he suffered adverse employment action, and (4) that a nexus existed between the protected activity and the adverse action. Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996); Culligan v. American Heavy Lifting Shipping Co., ARB No. 03-046, ALJ Nos. 00-CAA-09, 01-CAA-11, slip op. at 9-10 (ARB June 30, 2004).

The respondent has stipulated that it is subject to the SWDA. In essence, the Respondent does acknowledge that Dixon engaged in protected activity as the Respondent has stated that Dixon expressed internal and external concerns relative to state and federal assessments of the severity of contamination at the Yerington mine. It is also clear that BLM dismissed the Complainant from employment.

Finally, there is a nexus between the protected activity, which occurred throughout 2004, and the adverse employment action. Thus, the Complainant has established his prima facie case.

The burden then shifts to the employer to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. See Carroll v. Bechtel Power Corp., 91-ERA-46 (Sec'y February 15, 1995). In this case, Respondent has produced evidence showing that Dixon was counseled in June 2004, and that some of the MOU partners, and stockholders, blamed him for inadequate progress in clean up of the site. Therefore, I find that Respondent has met its burden of production.

The complainant may counter the respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. See Yule v. Burns Int'l Security Serv., 93-ERA-12 at 7-8 (Sec'y May 24, 1994). The complainant then must prove by a preponderance of the evidence that the employer intentionally discriminated against him. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Darty v. Zack Co., 82-ERA-2 at 5-9 (Sec'y Apr. 25, 1983) (citing Texas Dep't of Comm. Affairs v. Burdine, 450 U.S. 248 (1981)). The complainant may demonstrate pretext by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. Fradley v. Tennessee Valley Authority, 1992-ERA-19 and 34 (Sec'y Oct. 23, 1995). However, it is "not enough for the complainant to show that a reason given for a job action is not just, or fair, or sensible . . . [rather] he must show that the explanation is a 'phony reason.'" Gale v. Ocean Imaging, ARB No. 98-143, ALJ No. 1997-ERA-38 (ARB July 31, 2002).

Complainant argues that the reasons offered by Respondent for Complainant's termination are pre-textual and that the genuine reason for his termination was retaliation for his protected activity.

It is apparent that the Yerington mine site has been an environmental hazard for many years. However, focus on this site did not reach the level of a publicly noted priority until about 2000. The MOU was an attempt to rectify problems without resorting to a Superfund designation which would place a stigma on the area. A Superfund designation on another site in Lyon County had not been considered successful and discouraged investment in the area.

There had been a succession of project managers for Yerington in the BLM Carson City office, and Dixon arrived after the signing of the MOU. It appears that BLM, EPA, and the Tribes were essentially in agreement and were dissatisfied with NDEPs progress plans and responses from ARCO. In addition, there was input from the Governor, a Congressman, and from county officials and land owners.

Dixon had upset several people during April and May and he was almost fired by Abbey in June. It has been argued that the Complainant thereafter followed guidelines for conduct. None of the supervisors in Carson City – Pope, Briggs, or Hicks – made complaints about or counseled Dixon after the meeting in June. Moreover, in September Pope agreed to retain Dixon as an employee.

There was strain among the parties after June, especially when Dixon proposed groundwater sampling based on the old data and Dixon's recent testing. At least one county commissioner became upset as Dixon would not support the ARCO Foxfire report as he felt that the data was incomplete.

Abbey testified that he considered moving the Yerington project to the state office before the meeting with County officials in early October. After that meeting, he asked Hicks and Hamlett to consider the dismissal of Dixon. Hicks mentioned three incidents for a basis for dismissal. However, the final letter composed by Hamlett and signed by Abbey did not cite any of those incidents.

The MOU and the stockholders comprised an unwieldy group with some interests in common, but with other divergent interests. It seems likely that the MOU would fail with or without Dixon, and that control would have to be transferred to the state BLM office or to EPA.

As the Director of BLM in Nevada, Abbey did have the authority to transfer control of the Yerington project from Carson City to the State office. However, this action occurred shortly after the meeting with the stockholders. No one in the BLM chain of command disciplined or counseled Dixon from the time of the meeting in early July until the county commissioner's meeting in early October. Abbey was aware that the transfer of the project would eliminate Dixon's employment.

The federal courts have developed a test referred to as the “dual motive discharge test” first enunciated by the United States Supreme Court in Mt. Healthy City School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977). Under this test, once the employee has shown that a protected activity played a role in the employer’s decision, the burden shifts to the employer to persuade the court that it would have discharged the employee even if the protected activity had not occurred. Mackowiak v. University Nuclear System, Inc., 735 F.2d 1159 (9th Cir. 1984).

In enunciating the legal standard for dual motive discharge under § 5851, Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (1984). states:

“Mt. Healthy created a two-part test for ‘dual motive’ cases. Under it, once the plaintiff has shown that the protected activity ‘played a role’ in the employer’s decision, the burden shifts to the employer to persuade the court that it would have discharged the plaintiff even if the protected activity had not occurred.”

In dual motive cases, the employer bears the risk that ‘the influence of legal and illegal motives cannot be separated...’”

On brief, complainant alleges that he has established the essential elements of his claim: (1) that the party charged with discrimination is an employer under the Act; (2) that the complainant/employee was discharged; (3) that the discharge arose because the employee participated in protected activity.

In a retaliatory discharge case such as the present one, “the aggrieved employee may prevail only if he would not have been discharged but for his participation in the statutorily protected activity.” Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986).

Put differently, where an employer proves that it would have discharged an employee regardless of his protected activities, the employer must prevail.

The letter of dismissal signed by Abbey focuses on an inability to maintain professional relationships with various parties.

However, testimony by the Carson City EPA supervisors indicate that Dixon was performing within acceptable guidelines after the counseling in May. Moreover, EPA personnel state that Dixon was performing as his job required.

Therefore, the undersigned must conclude that Dixon was dismissed as his whistleblowing activities-seeking strict enforcement of environmental laws-was creating political chaos in the State.

One could also take the approach that Dixon was a probationary employee and that he could be dismissed within one year for any reason, whether or not a supervisor had certified his status for retention. During 2004, Abbey had been under great pressure from numerous sources to move the project away from Dixon and from Carson City BLM control. Transfer of the project essentially eliminated any necessity for Dixon to continue with BLM.

Ultimately, the undersigned concludes that Dixon was fired for his whistleblowing activities. His appointment was considered to be for a two-year period, with a possible extension to four years. Under such circumstances reinstatement is not an issue.

The record indicates that Dixon did obtain some type of employment when he left Nevada for Cherokee, North Carolina. The details of the earnings are not in the record.

The Respondent in this case is a federal government agency and the undersigned is reluctant to assess a penalty that will be paid by the taxpayers. However, it seems equitable to grant the sum of \$10,000.00 to cover relocation costs. Compensatory damages are apparent but exemplary damages are not indicated.

ORDER

1. The U. S. Department of the Interior, Bureau of Land Management, is ordered to pay the Complainant salary and benefits through October 18, 2005.
2. The Respondent shall pay \$10,000.00 in compensatory damages to repay for a cross-country move and associated expenses.
3. BLM shall give the Complainant a favorable or at least a neutral job reference.
4. Complainant's counsel shall have thirty days from the date of this order to submit a fee petition.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary,

Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).