



**In the Matter of:**

**CLIFF MORRISS,**

**ARB CASE NO. 05-047**

**COMPLAINANT,**

**ALJ CASE NO. 2004-CAA-14**

**v.**

**DATE: February 28, 2007**

**LG&E POWER SERVICES, LLC,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Carolyn P. Carpenter, Esq., *Carpenter Law Firm*, Richmond, Virginia**

*For the Respondent:*

**Jonathan P. Harmon, Esq., Jeffrey S. Shapiro, Esq., *McGuireWoods, LLP*,  
Richmond, Virginia**

### **FINAL DECISION AND ORDER**

The Complainant, Cliff Morriss, filed a complaint alleging that the Respondent, LG&E Power Services, LLC, retaliated against him in violation of the whistleblower protection provisions of the Clean Air Act<sup>1</sup> and its implementing regulations.<sup>2</sup> On January 13, 2005, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) finding that LG&E terminated Morriss's employment in violation of the whistleblower provisions and awarded Morriss damages and attorney's fees. Upon review, we conclude that Morriss failed to prove by a preponderance of the evidence that LG&E terminated his employment because he

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<sup>1</sup> 42 U.S.C.A. § 7622 (West 1995).

<sup>2</sup> 29 C.F.R. Part 24 (2006).

engaged in protected activity. Accordingly, we reject the ALJ's recommendation and we dismiss Morriss's complaint.

### FACTUAL BACKGROUND

Cliff Morriss went to work at LG&E's Roanoke Valley Energy facility on July 13, 1993.<sup>3</sup> He initially worked as a lead fuels tech and after five months he moved to the maintenance department.<sup>4</sup> While working in the maintenance department he first became familiar with the facility's Continuous Emissions Monitoring System (CEMS).<sup>5</sup> Morriss described the CEMS:

It's composed of hardware, software, analyzers, computers that collects the [plant emissions] data. It pulls the sample. Analyzes it in an analyzer and converts it to digital format and stores it in a computer so we can later report it to the state.[<sup>6</sup>]

From the maintenance department, Morriss moved to the electrical and instrumentation department (E&I).<sup>7</sup> E&I technicians are responsible for maintaining the electrical equipment, "software, computers, basically anything electrical in the plant from computers to the high voltage stuff."<sup>8</sup>

In the spring of 2000, Chris Hews became the E&I manager and when John Hodson left to take another job, Morriss replaced him as the E&I "heavy."<sup>9</sup> The heavy is particularly well-versed in all stages of the CEMS process from taking the sample to producing the reports that are filed with the state.<sup>10</sup>

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<sup>3</sup> Hearing Transcript (Tr.) at 42.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 42-43.

<sup>7</sup> *Id.* at 43.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 43-44.

<sup>10</sup> *Id.* at 44.

*Allegation of probability of CEMS data manipulation*

In the spring of 2001, Morriss had a disagreement with Louie Young, another E&I tech concerning the assignment of Fred Thompson to work permanently on the CEMS.<sup>11</sup> During the course of this discussion, Young made a comment that Morriss interpreted as indicating that CEMS technicians were improperly manipulating and editing the emissions data.<sup>12</sup> Morriss reported his concern that the technicians were manipulating data to Hews.<sup>13</sup> Morriss concluded that he could compare the data collected from the PI power data archiving system with the CEMS data to determine whether the CEMS data had been edited.<sup>14</sup>

Hews took Morriss to his supervisor, Quinn Morrison, so that they could get Morriss's allegation of possible data tampering "on the record."<sup>15</sup> Because Morriss was the most proficient technician with the databases, Hews asked him to check the databases to see if he could find any indication of tampering.<sup>16</sup> Hews put this assignment on the daily work sheet.<sup>17</sup>

Hews also spoke to Young to obtain his version of the discussion with Morriss.<sup>18</sup> Young told Hews that the operators could change the way the plant ran by changing the

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<sup>11</sup> *Id.* at 47.

<sup>12</sup> *Id.* at 47-49, 155.

<sup>13</sup> The ALJ found that Morriss informed Hews in October 2001 that he thought that operators might be tampering with the data. R. D. & O. at 3. This finding is not supported by the record. Morriss and Hews both testified that Morriss informed Hews of his suspicions shortly after Morriss's discussion with Young in the spring of 2001. Tr. at 47-49, 159. Morriss and Hews informed Don Keisling, the plant manager, of Morriss's allegations in October 2001. *Id.* at 206-207, 125.

<sup>14</sup> Tr. at 49-50.

<sup>15</sup> *Id.* at 155.

<sup>16</sup> *Id.* at 51, 156.

<sup>17</sup> *Id.* at 53, 156. The daily work list includes a summary of which technician in the E&I department is assigned to what work order task, a brief description of the task, the date it was assigned and whether it is completed. All the E&I technicians have access to it. *Id.* at 53-54.

<sup>18</sup> *Id.* at 157.

controls.<sup>19</sup> Changing the controls would not directly manipulate or edit the database but it would affect the data collected.<sup>20</sup>

Morriss began pulling the data from the PI and CEMS systems and comparing it.<sup>21</sup> He concluded that the data had in fact been manipulated.<sup>22</sup> In the summer of 2001, Morriss asked Hews to take the assignment off the daily work sheet and permit him to work from home on it.<sup>23</sup> Young had told Morriss that some of the controllers had raised questions concerning his investigation and Morriss believed that some of the other technicians were looking over his shoulder while he was working on the task.<sup>24</sup> Morriss testified that someone put a metal tag on his file cabinet that said, “pay back is an MF.”<sup>25</sup> Keisling and Hews addressed the incident at an “all hands meeting” at which they issued a warning that such behavior was inappropriate and they would not tolerate it.<sup>26</sup> Hews gave him permission to work at home, but Morriss had to set his investigation aside for several weeks because he was busy working on an outage.<sup>27</sup>

In October 2001 Don Keisling became plant manager.<sup>28</sup> He had initially heard of the allegations of data manipulation and the ensuing investigation in early 2001 when he was serving as the plant’s production manager.<sup>29</sup> He was not very concerned because he trusted in the integrity of the operators and could not even imagine that they would manipulate the data.<sup>30</sup> When he did not hear of any results from the investigation, he

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 53.

<sup>22</sup> *Id.* at 51.

<sup>23</sup> *Id.* at 55.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 76. Morriss accused Jeff Dixon of making the tag. Respondent’s Exhibits (R. X.) 17 at 1. He did not report the incident to Keisling and Hews until May or June 2002. *Id.*

<sup>26</sup> Claimant’s Exhibit (C. X.) 11 at 1.

<sup>27</sup> Tr. at 55.

<sup>28</sup> *Id.* at 203.

<sup>29</sup> *Id.* at 204-204.

<sup>30</sup> *Id.* at 204.

forgot about it.<sup>31</sup> Shortly after Keisling became plant manager, Hews brought Morriss to Keisling's office to discuss Morriss's data manipulation concerns.<sup>32</sup> Initially, Keisling believed that these were new allegations, but Morriss and Hews informed him that these were the same allegations that they had raised with Morrison in the spring.<sup>33</sup> Keisling was "pretty" concerned about the possibility of data manipulation and voiced his fear that he could lose his job if the allegations were substantiated.<sup>34</sup>

Keisling asked Morriss to provide him with any data that he had so he could evaluate it and if substantiated inform the Virginia Department of Environmental Quality.<sup>35</sup> Keisling also informed his boss, Charlie Braun, of Morriss's allegations.<sup>36</sup> Morriss gave Keisling some of the dates on which he concluded there had been manipulation, but when Keisling asked him for more dates, Morriss was reluctant to provide them.<sup>37</sup> Morriss preferred that Keisling conduct his own audit, but because Keisling repeatedly asked him for the dates and a copy of the CEM opacity data base in Excel format, he eventually complied towards the end of December.<sup>38</sup>

Keisling concluded his investigation on December 30 or 31st.<sup>39</sup> He determined that there were at least three discrepancies that made it difficult to compare the PI and CEMS data. First, the CEMS clocks were not adjusted for daylight savings time, while the PI clocks were adjusted.<sup>40</sup> Second, the times of the clocks on the two systems were not synchronized with each other.<sup>41</sup> Finally, the systems did not measure emissions in the same way.<sup>42</sup> Accordingly, he concluded that comparisons of the two systems did not demonstrate that the operators had manipulated the data in the CEMS system.<sup>43</sup>

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<sup>31</sup> *Id.* at 206-207.

<sup>32</sup> *Id.* at 56-57, 159, 205.

<sup>33</sup> *Id.* at 206-207.

<sup>34</sup> *Id.* at 57, 206.

<sup>35</sup> *Id.* at 57, 161, 206.

<sup>36</sup> *Id.* at 209-210.

<sup>37</sup> *Id.* at 57.

<sup>38</sup> *Id.* at 57, 213-214.

<sup>39</sup> *Id.* at 214.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 214-215.

<sup>42</sup> *Id.* at 216-217.

Keisling sat down with Morriss and explained his analysis and conclusions to him the first or second week of January.<sup>44</sup> Morriss neither disputed nor acknowledged Keisling's analysis.<sup>45</sup> Keisling invited Morriss to explain to him any flaws in his analysis or to provide him with any additional dates on which he believed there were discrepancies.<sup>46</sup> Morriss told Keisling that he was immersed in the quarterly report and that when he had finished it he would get back to Keisling and they could review the data again.<sup>47</sup> Keisling agreed, but Morriss did not approach Keisling again to review the data or discuss his analysis as he had stated that he would.<sup>48</sup>

Nevertheless, Morriss concluded that Keisling intended to "sweep it under the rug."<sup>49</sup> Accordingly, he began making inquiries to determine to whom he should speak in the Division of Air Quality (DAQ) to voice his concerns.<sup>50</sup> Morriss met initially with environmental engineers from DAQ on February 1, 2002, and then on March 1, 2002, with the engineers as well as representatives from the Attorney General's office and the Environmental Protection Agency.<sup>51</sup> They asked him to put more pressure on LG&E management "to come clean with it."<sup>52</sup> He spoke to Glen Outland, a new manager, whom Morriss had known prior to working at the plant.<sup>53</sup> Morriss described the conversation with Outland:

He had been a manager two or three months and he said, you know, he liked it pretty much. He just – Don said he had a few obstacles to get over, one of them being CEMS

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<sup>43</sup> *Id.* at 214-220; C. X. 6.

<sup>44</sup> Tr. at 219.

<sup>45</sup> *Id.* at 220.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 58, 220.

<sup>48</sup> *Id.* at 58-59, 220.

<sup>49</sup> *Id.* at 59.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 59-61; C. X. 7.

<sup>52</sup> Tr. at 61.

<sup>53</sup> *Id.* at 62.

and he leaned over and looked at me at the top of his eyes, and knowing – being that I’ve known Glen for 10 plus years, I knew exactly what that meant, that I needed to back off the issue. There was no doubt. The conversation was over. I left his office and at that point I started worrying about my job.<sup>[54]</sup>

On April 24, 2002, the DAQ conducted an annual inspection and audit of the facility.<sup>55</sup> The inspector asked about carbon monoxide excursions during the testing phase for the NeuCo system and collected data to see if the PI system might be a viable back-up for the CEMS.<sup>56</sup> She also requested, and was provided with, PI data and a complete copy of the CEMS archives.<sup>57</sup>

After pulling and examining the data, the DAQ decided not to pursue the investigation any further.<sup>58</sup> Ultimately the investigation only revealed one suspect data point.<sup>59</sup> Although DAQ representatives requested Morriss to provide them with more data, he was unwilling to do so because he was concerned that he was being watched.<sup>60</sup> The investigator agreed to talk to the U.S. Attorney, but felt that with only one suspect data point, it would be unlikely that the U.S. Attorney would attempt a prosecution.<sup>61</sup> Neither the DAQ, nor the U.S. Attorney took any further action in regard to Morriss’s allegations.<sup>62</sup>

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<sup>54</sup> *Id.* at 62-63. Outland denied in a deposition that this conversation took place. *Id.* at 151. He was not called to testify at the hearing.

<sup>55</sup> *Id.* at 63, 29.

<sup>56</sup> *Id.* at 63-64; R. X. 29.

<sup>57</sup> *Id.* at 64; R. X. 29.

<sup>58</sup> *Id.* at 69.

<sup>59</sup> *Id.* at C. X. 8.

<sup>60</sup> *Id.* at 68.

<sup>61</sup> C. X. 8 at 2.

<sup>62</sup> Tr. at 69.

### *2001 performance appraisal*

At the beginning of 2002, Morriss was provided with his performance appraisal for the January 1, 2001 to January 1, 2002 appraisal period.<sup>63</sup> Morriss objected that his appraisal did not include all of his accomplishments and he was concerned about some of the comments.<sup>64</sup> Hews invited him to put his concerns in writing and told him that he would attach them to the appraisal.<sup>65</sup> Morriss did so and Keisling reviewed the comments and added his notations to Morriss's comments.<sup>66</sup> In particular, Morriss wrote, "During the Rova 2 spring outage of 2001, Cliff discovered the probability that data tampering had been occurring with the CEMs database. Upon his discovery he immediately brought it to the attention of the E & I Manager."<sup>67</sup> Keisling noted in response, "This issue was investigated and no tampering was found."<sup>68</sup> Morriss also added:

I went from a year of promoting the team concept to this past year of frustration. Over the past year decisions were made concerning the CEMs outside of the team concept to the detriment of the plant. When I voiced my concerns over various issues, I was ignored. I received no feedback on my concerns, nor did I receive any question as why I was concerned. My obvious frustration was probably interpreted as my being "challenging or conflicting" as I was never asked about pertinent CEMS issues.[<sup>69</sup>]

Keisling testified that he believed that Morriss should get credit for bringing forward the possibility of tampering.<sup>70</sup> Keisling stated, "[A]ny time an employee has a concern over anything . . . we're going to . . . work with them and if it's anything that'll

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<sup>63</sup> C. X. 3.

<sup>64</sup> *Id.* at 11.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 11-13.

<sup>67</sup> *Id.* at 12.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 13.

<sup>70</sup> Tr. at 223.



benefit the plant, a concern they have, in this case of emissions violations, of potential emissions violations, they should receive credit for it.”<sup>71</sup>

### ***Harassment allegation***

In the spring of 2002, Morriss began feeling that his work was being heavily scrutinized.<sup>72</sup> In the summer of 2002, Jeff Dixon was selected as lead E & I tech.<sup>73</sup> Prior to Morriss’s tampering allegations, Dixon and Morriss did not get along.<sup>74</sup> Their relationship was like “oil and water.”<sup>75</sup> They had two different personalities and would have arguments and differences of opinion concerning technical issues.<sup>76</sup> On September 18, 2002, Morriss informed Susan L. Harmansky, Manager of LG&E’s HR Services, that Dixon was harassing him.<sup>77</sup> Harmansky summarized in writing her understanding of the elements of Morriss’s complaints and asked him to review her summary carefully and make any additions or corrections he thought appropriate.<sup>78</sup>

As recounted by Harmansky, Morriss indicated that since 1993 he had “felt a great deal of pressure and intimidation from Jeff Dixon.”<sup>79</sup> Morriss contended that Dixon was inciting co-workers, supervisors and managers against him.<sup>80</sup> In March 2001, Morriss had requested an investigation of the same charges, but he did not feel that it was complete and he was not given the outcome.<sup>81</sup> After this investigation, Dixon’s outward behavior to Morriss improved, but Morriss felt that Dixon was ““talking behind [his] back”” and manipulating other co-workers to intimidate Morriss and supervisors to give him unwarranted reprimands.<sup>82</sup> Since management attempts to address Morriss’s

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 75.

<sup>73</sup> *Id.* at 76.

<sup>74</sup> *Id.* at 347.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 123, 346-347.

<sup>77</sup> C. X. 9; R. X. 18.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

concerns were unsuccessful, he found it necessary to bring his concerns to the corporate level.<sup>83</sup> But because of Morriss's busy work schedule he did not want Harmansky to begin the investigation before October 28, 2002.<sup>84</sup>

On March 10, 2003, Morriss signed a Code of Business Conduct Questionnaire & Compliance Certification and indicated that he wanted to file a formal complaint against Dixon for harassment (although he did not want to actually file the complaint until late April because he was too busy with a capital project).<sup>85</sup> Donnie Lester, Human Resource Manager, and Margie Spradlin (Cain),<sup>86</sup> a Human Resource Representative, met with Morriss on April 2, 2003. Morriss identified thirteen incidents that he believed demonstrated that Dixon had harassed him, one of which involved Morriss's CEMS probability of tampering allegation.<sup>87</sup> At the hearing he testified that he believed that Dixon harassed him because he was angry that Morriss had raised the CEMS tampering issue.<sup>88</sup>

Cain and Lester conducted an investigation at the Roanoke Valley Energy facility on April 3, 4, and 9, 2003.<sup>89</sup> They spoke with each member of the E & I Department, the Plant Manager, the E & I Manager, the Production Manager and the Maintenance Manager.<sup>90</sup> They concluded that Morriss's allegations did not meet the formal definition of harassment as defined by company policy.<sup>91</sup> But they concluded that their

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> C. X. 10 at 4.

<sup>86</sup> The ALJ noted that Spradlin is also known as Spradlin-Kane. R. D. & O. at 2, n.2. LG&E noted that "Cain" was misspelled as "Kane" in the transcript. Brief of Respondent (Resp. Br.) at 9 n.3. Based on this assertion, we will hereafter refer to her as "Cain."

<sup>87</sup> C. X. 11.

<sup>88</sup> Tr. at 82.

<sup>89</sup> C. X. 11 at 1.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* Company policy prohibits harassment for any reason including "race, gender, color, medical condition, religion, national origin, or age." Harassment includes "ethnic slurs or racial epithets, name-calling, jokes, cartoons, graphic materials, derogatory posters, drawings, pictures, gestures, unwelcome physical touching, and other conduct based on a person's race sex, color, religion, ethnicity, national origin, age, disability, or medical condition, including pregnancy." R. X. 25 at 78.

investigation revealed inappropriate workplace behavior in which all members of the E & I department, including Morriss, were participating and that this unacceptable behavior must cease.<sup>92</sup>

### ***Morriss's arrest for domestic assault***

In July 2003 Morriss was arrested and spent two nights in jail for assaulting his wife, Rosemary Morriss, who also worked at LG&E's Roanoke Valley facility.<sup>93</sup> Rosemary Morriss testified that the Complainant became angry because two of their children (aged 3 and 5) and a visiting child (aged 5) were too noisy.<sup>94</sup> She stated that he cursed at them and then locked them outside on a screened porch in a thunderstorm.<sup>95</sup> After Rosemary Morriss attempted to soothe the children, the Complainant began screaming at her and accusing her of interfering.<sup>96</sup> He threatened to physically assault the children if they continued to make noise and to put her on the porch as well.<sup>97</sup> He picked Rosemary Morriss up, carried her down the hall, and slammed her to the ground, where she hit her head on a chair.<sup>98</sup> She tried to scramble away, but he picked her up, threw her out on the porch and locked the door.<sup>99</sup> The three children had entered the house and he again threatened to assault them, so Rosemary Morriss ran to a neighbor's house and called 911 to summon the police.<sup>100</sup> Initially there was a standoff, "like a hostage situation" but the Complainant finally exited the house and the police officers arrested him.<sup>101</sup>

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<sup>92</sup> C. X. 11 at 5.

<sup>93</sup> R. D. & O. at 7; Tr. at 89, 387.

<sup>94</sup> Tr. at 385.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 386.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 386-387.

<sup>99</sup> *Id.* at 387.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* This was not the first time the Complainant had assaulted his wife. *Id.* at 388. In 2000 he picked her up and dragged her down a hallway; in 2002 he threw her to the ground in the driveway and in a separate incident, shook her and beat her head against a board; and in 2002 he grabbed her by her shoulder so hard that she came out of her shoes. *Id.*

The Complainant described the incident differently. He testified that he did not realize that there was a thunderstorm when he put the children on the screened in porch.<sup>102</sup> He also thought that because he was “the man of the house,” Rosemary Morriss should allow him to decide how to discipline the children.<sup>103</sup> When Rosemary Morriss continued to press her concerns regarding the children on the porch during a thunderstorm, the Complainant

[p]icked her up in a bear hug, walked to the back door and we got to the back door, she either wiggled or wrapped her legs around mine and we stumbled. I opened the door, set her on the mat. When I shut the door she was looking up at me sitting on her butt and I shut the door and locked it and I knew she was going to be extremely mad at me for that. . . .  
[<sup>104</sup>]

After the officers arrested the Complainant and charged him with assaulting a female, he was confined for two days in the Halifax County Jail.<sup>105</sup> The Halifax County District Court entered a protective order, but two weeks later Rosemary Morriss dropped the protective order and the assault charge.<sup>106</sup> Rosemary Morriss was worried that if the Complainant faced criminal charges he could lose his job and be unable to provide support for his children.<sup>107</sup> The Complainant and his wife separated.<sup>108</sup>

Shortly after the July 2003 incident, Rosemary Morriss contacted Keisling to inform him of the circumstances of the Complainant’s arrest.<sup>109</sup> She also informed Keisling that this was not the first time that the Complainant had assaulted her.<sup>110</sup>

The Complainant also contacted Keisling, but he told Keisling that he had “never raised a hand to a woman.”<sup>111</sup> He requested a schedule change from four, ten hour days

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<sup>102</sup> *Id.* at 91.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> R. D. & O. at 8; Tr. at 92, 129-130.

<sup>106</sup> *Id.*

<sup>107</sup> R. X. 2 at 11.

<sup>108</sup> Tr. at 92.

<sup>109</sup> *Id.* at 367-368, 388.

<sup>110</sup> *Id.* at 388-389.

per week to five, eight hour days, so that he could obtain counseling.<sup>112</sup> Keisling “agreed to this schedule change without any problems.”<sup>113</sup> Keisling also cautioned the Complainant against bringing his domestic problems into the plant.<sup>114</sup> Keisling testified that because there was a domestic violence incident and both employees worked on the plant site he began having concerns “with respect to Cliff Morriss’ potential for violence in the workplace.”<sup>115</sup> Keisling testified:

[T]hat they had had a . . . domestic violence incident that Cliff was locked up it definitely raised a concern with me. The potential that . . . if they had a spat at home that was large enough to result in Cliff being locked up, that potential was there for them to have a disagreement or spat at work which could, you know, result in a workplace violence issue.<sup>116</sup>

On July 15th, Keisling contacted Margie Cain to inform her of the Morrisses’ domestic violence incident.<sup>117</sup> Although Keisling did not contact a health professional specifically to inquire whether Morriss posed a danger to others in the workplace, he did request the Human Resources department to send him information on workplace violence, so that he could educate himself on warning signs of which he should be aware.<sup>118</sup> He wanted to catch the problem early and “to ensure that we are taking all required action to prevent Cliff’s short temper from coming into the workplace.”<sup>119</sup> Margie Cain e-mailed Keisling some literature on workplace and domestic violence, the SHRM Workplace Violence Toolkit and Domestic Violence in the Workplace.<sup>120</sup> He

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<sup>111</sup> *Id.* at 93.

<sup>112</sup> *Id.* at 130.

<sup>113</sup> R. X. 2 at 2; Tr. at 130.

<sup>114</sup> Tr. at 131-132.

<sup>115</sup> *Id.* at 229.

<sup>116</sup> *Id.* at 230.

<sup>117</sup> R. X. 2 at 1.

<sup>118</sup> Tr. at 234.

<sup>119</sup> R. X. 2 at 1.

<sup>120</sup> *Id.*

spoke with Cain again on July 17th and she provided Keisling with hard copies of the workplace violence literature.<sup>121</sup> The Complainant returned to work on July 22, 2003.<sup>122</sup>

***Co-workers' concerns regarding potential workplace violence***

On July 24, 2003, Christopher Martin wrote a letter to Fred Silva, the Roanoke Valley facility's production manager, to express his concerns regarding his safety.<sup>123</sup> He indicated that the plant employees were concerned with "Cliff's state of mind" given the current relationship between Cliff and Rosemary Morriss.<sup>124</sup> In particular, Martin was concerned about his own safety because "Cliff has demonstrated escalating animosity towards me since early in my career with Roanoke Valley Energy."<sup>125</sup> Martin requested that Human Relations and plant management intervene before the situation worsened.<sup>126</sup> Martin had researched the issue of workplace violence and attached his research to his letter.<sup>127</sup> One document listed the traits of individuals with a potential for workplace violence including: marital or domestic problems and stress, a fascination with guns, a tendency to be a loner and to keep to himself.<sup>128</sup> Martin was concerned that Morriss exhibited the described tendencies.<sup>129</sup>

Keisling took Martin's letter seriously.<sup>130</sup> He immediately forwarded it to his boss and the Human Resources department to alert them to the fact that "an employee felt that his safety may potentially be in jeopardy or he didn't feel safe because of Cliff's recent domestic incidents."<sup>131</sup> Keisling testified that he believed that he was required to

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 230.

<sup>123</sup> C. X. 12.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Tr. at 233.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

alert upper management and human relations to Martin's concerns because his top priority as a manager is to "provid[e] a safe environment for the employees."<sup>132</sup>

Jeff Dixon also expressed his concerns in an e-mail to Hews and Keisling dated July 28, 2003, stating that he felt unsafe working around the Complainant because he found him to be unpredictable and unstable.<sup>133</sup> He noted that Morriss singled him out as the source of his problems in the harassment charge and he thought it prudent to bring his concerns to management's attention "before something sets him off again."<sup>134</sup>

Keisling forwarded Dixon's e-mail to his supervisor, Braun; Renea McClure in Human Resources; and Margie Cain.<sup>135</sup> McClure called him on July 29, 2003, and informed him that she had spoken to Dr. Boris of Wayne Corporation and that she wanted both the Complainant and his wife to attend mandatory counseling sessions (with different counselors).<sup>136</sup> McClure provided Keisling with talking points to follow when informing the Morrisses of the requirement that they obtain counseling through the Family Assistance Program (FAP).<sup>137</sup> When speaking with both Morrisses, Keisling was to stress that the required counseling was in response to concerns co-workers had raised and that LG&E had a responsibility to the Morrisses and their co-workers to provide them with a safe and healthy work environment.<sup>138</sup>

Keisling spoke to both Morrisses on August 5, 2003.<sup>139</sup> The Complainant informed him that he had begun marital counseling already with Carriage House in Rocky Mount and that his counselor there would contact Dr. Boris.<sup>140</sup> He readily signed the Agreement requiring him to participate in a FAP assessment, to abide by and adhere to the counselor's requirements and recommendations, and to consent to the release to

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<sup>132</sup> *Id.* at 234.

<sup>133</sup> C. X. 13

<sup>134</sup> *Id.*

<sup>135</sup> R. X. 2 at 4. Cain was on personal medical leave from July 23, 2003, until the week of Thanksgiving, 2003. Tr. at 452.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 5.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 11.

<sup>140</sup> *Id.*

LG&E of all counseling records and information.<sup>141</sup> Keisling, in notes documenting his meeting with the Complainant described the meeting with the Complainant as “a piece of cake” and wrote, “I think that he is honestly trying to resolve his problems, due to his emotions and word context I don’t think it’s an act.”<sup>142</sup>

McClure also prepared talking points for Keisling to use to speak with the plant employees.<sup>143</sup> Keisling stressed that LG&E had an obligation to provide its employees with a safe and secure environment, asked the employees to respect the privacy of their co-workers and not to add to their stress through rumor mongering, and reminded the employees of management’s open door policy if an employee had a “specific, inappropriate behavior to report.”<sup>144</sup>

### *Confrontation with co-worker’s fiancée*

On August 7, 2003, Morriss requested permission from Keisling to leave work early to attend to a personal matter.<sup>145</sup> Morriss used his time off to visit Greta Ivey, fiancée of Rick Ogburn, a co-worker, and confront her with allegations that Rosemary Morriss was having an affair with Ogburn.<sup>146</sup> Forty-five minutes after Morriss left the plant, Keisling received a call from Doug Henshaw, Ogburn’s supervisor. Ogburn was in Henshaw’s office and he was extremely angry.<sup>147</sup> Keisling asked Henshaw to send Ogburn to Keisling’s office.<sup>148</sup> Ogburn described the circumstances of Morriss’s visit to Ivey.<sup>149</sup> Ogburn informed Keisling that shortly after Morriss separated from his wife, he began calling Ivey at work and telling her that he thought Rosemary Morriss and Ogburn were having an affair and that Ogburn had something to do with the break up of his marriage.<sup>150</sup> Ivey stopped taking Morriss’s calls at work.<sup>151</sup> On August 7th, Morriss

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<sup>141</sup> *Id.*; R.X. 10.

<sup>142</sup> R. X. 2 at 12.

<sup>143</sup> *Id.* at 10.

<sup>144</sup> *Id.*

<sup>145</sup> Tr. at 98, 244-245; R. X. 2 at 13.

<sup>146</sup> Tr. at 99, 245; R. X. 2 at 13.

<sup>147</sup> Tr. at 245; R. X. 2 at 13.

<sup>148</sup> *Id.*

<sup>149</sup> R. X. 2 at 13.

<sup>150</sup> *Id.*



called Ivey at home and she told him she could not talk to him.<sup>152</sup> Shortly afterward, Morriss arrived at Ivey's home.<sup>153</sup> He told Ivey that Ogburn and his wife were having an affair at work and that Ivey was blind if she did not see it.<sup>154</sup> Ogburn told Keisling that Ivey was scared of Morriss and that she thought he was a "psycho."<sup>155</sup>

Keisling counseled Ogburn to maintain his composure and to walk away from any confrontation with Morriss.<sup>156</sup> Keisling cautioned Ogburn that if he took matters with Morriss into his own hands that he could be disciplined including possible termination of his employment.<sup>157</sup> Ogburn agreed but said that if Morriss came to his house again and became violent, he would defend himself.<sup>158</sup> Keisling, in his notes describing this incident wrote,

We have an issue here in that while nothing is happening on the plant site, it is coming back and affecting the people here. I am at the point where I am very concerned that Cliff may snap or go off of the deep end. I realize that he is going through a trying situation but it's like he sometimes had two personalities. When he is talking with me he seems to be extremely open and sincere. He then turns around and voids what he is telling me. . . .

As I said before, I am seriously concerned that Cliff is going to snap. I am pretty good at reading people but I am not a psychologist. I realize these things are happening off site but if they will happen there they can happen on the site sooner or later. I feel that we need to do something to ensure the plant employees are protected, but it's almost like our hands are tied. I think this is an accident waiting to

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151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

happen. If Cliff does not let loose, one of the guys may because of Cliff's actions.<sup>159]</sup>

Keisling called McClure immediately and e-mailed his notes to Braun and the Human Resources team.<sup>160</sup> Keisling described his biggest concern at the time:

[T]here was a strong possibility [Morriss] could do something irrational and we could end up with a workplace violence issue. . . . [T]hat was my original concern and it was even more amplified with the issue with Rick being very upset because now I have Rosemary . . . I'm concerned about, . . . potential workplace violence, but originally it was between Cliff and Rosemary and now it's kind of spread out in that I have another employee, Rick Ogburn, who's very upset at Cliff and Cliff is also, in my mind, concerned with the potential issue between Rosemary and Rick. So, now . . . I've got three individuals I'm worried about whereas originally it was two and I was just worried that it was going to snowball on the plant site down there.<sup>161]</sup>

### *Paid leave of absence*

On the morning of August 8, 2003, Keisling had several discussions with Braun, and the director of the Human Resources Department.<sup>162</sup> Several options for dealing with the situation were discussed. The head of the Human Resources Department suggested the possibility of terminating Morriss's employment.<sup>163</sup> Both unpaid leave and paid leave while Morriss attended counseling sessions were also discussed.<sup>164</sup> Keisling advocated for paid leave with counseling because, although Morriss had made an irrational decision in accosting Ivey, Keisling thought that Morriss was very open and honest with Keisling.<sup>165</sup> Therefore, Keisling "wanted to do everything we could for him" "to help

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<sup>159</sup> *Id.* at 14.

<sup>160</sup> *Id.* at 13-14.

<sup>161</sup> Tr. at 281-282.

<sup>162</sup> *Id.* at 282.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 283.

Cliff as far as . . . his counseling and everything and give him time to – a cooling off period or a time to collect his thoughts.”<sup>166</sup> Keisling knew of no other occasion at the Roanoke Valley facility on which an employee had been given paid leave to obtain counseling.<sup>167</sup>

On the afternoon of August 8th, Keisling and Hews met with Morriss, escorted him from the plant and provided him with a letter explaining the basis for and the terms and conditions of his paid leave of absence.<sup>168</sup> The letter stated that effective immediately, LG&E was placing Morriss on leave with pay.<sup>169</sup> It indicated that LG&E wished to speak with Morriss’s counselors to assure management that Morriss was addressing his domestic problems and can effectively concentrate on his work.<sup>170</sup> The letter recounted that Morriss had been advised previously that he could not allow his domestic problems to intrude into the workplace, but that as a result of his visit to Ivey, his personal problems had affected the workplace and the plant employees.<sup>171</sup> The letter informed Morriss that while he was on unpaid leave he could not enter the plant without permission and call the plant except to discuss issues with Keisling.<sup>172</sup> The letter warned Morriss that a violation of these restrictions would subject him to disciplinary action.<sup>173</sup> The letter advised Morriss not to contact other plant employees even when they were off duty and warned him that if Keisling received any complaints that Morriss was contacting other employees and “aggravating this issue,” he would be required to take further disciplinary action.<sup>174</sup> Keisling further stated:

This was not an easy decision and was made only after careful reflection. Believe me when I say that we are trying to help you get through this trying period. We feel that

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 284.

<sup>168</sup> R. X. 2 at 15-17.

<sup>169</sup> R. X. 2 at 16-17.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

providing you with this time to work out your problems is the best measure we can take at this time.<sup>[175]</sup>

***Return to work agreement***

Upon confirmation from the FAP counselor that Morriss was cleared for work, Keisling met with Morriss on August 29, 2003, to discuss the conditions of his return.<sup>176</sup> Initially, Keisling offered Morriss the opportunity for a lateral transfer to the South Hampton Power Station.<sup>177</sup> Braun suggested that a transfer would lessen Morriss's contact with Rosemary Morriss at work.<sup>178</sup> Keisling testified that if Morriss had taken the transfer it would have "minimize[d] my concerns [and those of Braun and Human Resources] about a potential workplace violence issue."<sup>179</sup> Morriss declined the transfer.<sup>180</sup>

Next, Keisling provided Morriss with a return to work agreement.<sup>181</sup> The agreement noted that LG&E had demonstrated its commitment to Morriss to help him work through his personal/domestic situation by changing his work schedule to permit him to seek counseling and by granting him a paid personal leave from August 8, 2003, to September 1, 2003, so that he could address his personal issues without the added stress of a work obligations.<sup>182</sup> The agreement stated that it was important that Morriss understood and agreed to the company's expectations for his behavior and work performance upon his return to work and listed three expectations: 1) Competent work performance; 2) No intrusion of Morriss's personal/domestic situation into the plant. This includes discussing his personal/domestic problems with co-workers, vendors or contractors or engaging in any personal activity that disrupts his work and that of his co-workers and minimal contact with Rosemary Morriss while he or she is at work; and 3) continuation of FAP counseling.<sup>183</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> Tr. at 285; R. X. 2 at 18.

<sup>177</sup> Tr. at 286.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Tr. at 102, 287.

<sup>181</sup> R. X. 2 at 18.

<sup>182</sup> *Id.* at 19.

<sup>183</sup> *Id.*

The agreement cautioned Morriss:

Because the company is required to create and maintain a safe, secure and productive environment for all employees, failure to meet these performance and behavioral expectations may result in disciplinary action, up to and including termination of employment.<sup>184</sup>

Finally, the agreement stated, “Cliff, we value the skills and expertise that you bring to this organization.”<sup>185</sup>

Morriss signed the agreement indicating that he had read and understood it.<sup>186</sup> Morriss testified that he understood that under the terms of his agreement, he must meet his work performance standards, that he could not discuss his personal domestic issues in the plant, or engage in activity that disrupts his work or that of his co-workers.<sup>187</sup> He also understood that if he violated the terms of the agreement, he would be subject to disciplinary action, including termination of his employment.<sup>188</sup>

### ***Second restraining order***

In September 2003, Rosemary Morriss and her children were living at Hannah’s Place, a shelter for battered and abused women.<sup>189</sup> On September 27, 2003, the Complainant banged on the door after hours and when he would not stop, Rosemary Morriss called the police.<sup>190</sup> Initially, an ex parte domestic violence protective order was issued and then on October 13, 2003, a Domestic Violence Protective Order and Notice to Parties – Consent Order was entered.<sup>191</sup> Morriss understood that under the terms of the Protective Order he was to have no contact with his wife except under limited

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*; R. X. 8.

<sup>187</sup> Tr. at 142.

<sup>188</sup> *Id.* at 143.

<sup>189</sup> R. D. & O. at 10.

<sup>190</sup> *Id.*

<sup>191</sup> R. X. 6, 7.

circumstances.<sup>192</sup> He knew that he was to stay away from her residence or any place that she resided temporarily, including Hannah's Place, and the area where she worked.<sup>193</sup> When asked whether Morriss understood that violating the restraining order would land him in jail, he replied, "I didn't know for sure but I guessed. I knew it would be a violation."<sup>194</sup>

### ***Final Written Warning***

After returning to work in September, Hews noticed that Morriss had trouble "dealing with his work."<sup>195</sup> He had heard rumors that co-workers had observed Morriss crying after speaking on his cell phone and Hews himself saw Morriss in an "agitated state" after ending a cell phone call.<sup>196</sup> So Hews asked Morriss to leave his cell phone outside of the plant so "he wouldn't get upset where it can affect his work."<sup>197</sup>

In October 2003 Morriss was unable to complete an assignment to repair the reheat backup dampers.<sup>198</sup> When Hews asked him at the end of the day for the status of the project, Morriss confirmed that he had been unable to finish the project, that he was still upset about his separation, and that he would prefer to leave at the end of his shift, rather than remaining to complete the work.<sup>199</sup>

In November 2003, Morriss was assisting another E&I technician working to solve a problem with the CEMS.<sup>200</sup> They worked for several hours together attempting to free the probe assembly that was stuck within the housing.<sup>201</sup> Morriss told the technician that he had seen this problem before and had spent many late nights trying to correct it.<sup>202</sup>

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<sup>192</sup> Tr. at 144.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 144-145.

<sup>195</sup> *Id.* at 186.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 104; R. X. 2 at 20.

<sup>199</sup> *Id.*

<sup>200</sup> Tr. at 104-105; R. X. 2 at 20.

<sup>201</sup> *Id.*

<sup>202</sup> R. X. 2 at 20.

At the end of Morriss's shift, the problem had not been resolved, but Morriss wished the other technician "good luck" and left the plant for the day.<sup>203</sup> It took the other technician and Hews an additional six hours to fix the problem after Morriss went home.<sup>204</sup>

As a result of these incidents Hews recommended to Keisling that Morriss be given a warning letter.<sup>205</sup> Hews did not know that the warning letter would in fact be a final warning letter because he did not know that Morriss was working under the terms of a return to work agreement.<sup>206</sup> The Final Warning Letter noted that Morriss was working under the terms of the Return to Work Agreement and that he had agreed to abide by the company's expectations for behavior and performance.<sup>207</sup> The letter identified three examples of unacceptable performance – 1) excessive personal cell phone usage, 2) the failure to complete the bypass damper project, and 3) the failure to complete the CEMS faulty assembly project.<sup>208</sup> The letter concluded:

Cliff, your failure to comply with the Return to Work Agreement is considered a breach of company policy and expectations. You are expected to complete assigned tasks and follow any and all directions; furthermore LPS employees do not assign their own work hours. Employees are expected to complete all assigned tasks and to inform their manager if they cannot complete the task before leaving work. Your current work practice will not be tolerated. This letter will serve as your final warning, failure to meet your performance expectations will result in disciplinary action, up to and including termination of employment.[<sup>209</sup>]

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<sup>203</sup> *Id.*

<sup>204</sup> Tr. at 106; R. X. at 20.

<sup>205</sup> Tr. at 183.

<sup>206</sup> *Id.* at 185.

<sup>207</sup> R. X. 2 at 21.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

### *Violation of Return to Work Agreement*

On January 18, 2004, the Complainant entered Rosemary Morriss's home, in violation of the Domestic Violence Protective Order.<sup>210</sup> Rosemary Morriss testified that the Complainant pushed the door open, grabbed and bruised her wrist and told her "there was nothing she could do about it."<sup>211</sup> Rosemary Morriss called the police and the Complainant was arrested.<sup>212</sup> When Morriss entered the house he knew that he was on a Final Warning, he knew that he was under a Return to Work Agreement, he knew that he was under a restraining order and that he could be jailed for violating the order, and he knew that if he violated the Return to Work Agreement, he would likely lose his job.<sup>213</sup> In fact, as Rosemary Morriss was dialing 911, the Complainant told her "[Y]ou're going to cost me my job."<sup>214</sup>

After the police officers arrested the Complainant, Rosemary Morriss contacted Keisling to tell him what had happened.<sup>215</sup> She was very frightened and worried about what would happen once the Complainant was released from custody.<sup>216</sup> She contacted both her attorney and the "domestic violence people."<sup>217</sup> After summarizing Rosemary Morriss's narrative of events, Keisling wrote the following notes:

I'd prefer to let [Morriss] go as I feel he is going to blow up at work. He has shown his violence off site and it seems to just happen with no warning. With the stress of the relationship, Rosemary working here and the stress of the job I strongly feel that something may happen on site. We have to protect our employees and I feel that we've done everything we can to work with Cliff. He also has

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<sup>210</sup> R. D. & O. at 10.

<sup>211</sup> R. D. & O. at 10; R. X. 2 at 23.

<sup>212</sup> R. D. & O. at 10.

<sup>213</sup> Tr. at 147.

<sup>214</sup> R. D. & O. at 10; Tr. at 149.

<sup>215</sup> R. X. 2 at 23.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*



difficulty concentrating on his tasks at work which has been discussed with him.[<sup>218</sup>]

The Complainant did not show up for work on January 19, 2004.<sup>219</sup> The Complainant's brother contacted Keisling at approximately 2:00 p.m. to inform him that the Complainant was in jail and would probably be released around noon on January 20th.<sup>220</sup> On January 20th, Cain informed Keisling that if the Complainant came to work, Keisling should send him home with pay until Human Resources could determine what steps to take next.<sup>221</sup> That afternoon the Complainant phoned Keisling.<sup>222</sup> He told Keisling that he did not know what Rosemary Morriss had told him, but that he "did not lay a finger on her."<sup>223</sup> He told Keisling that his arrest and subsequent jail time was "all about the furniture."<sup>224</sup> Keisling informed him that he was on leave with pay until Human Resources decided the best way to address his situation.<sup>225</sup>

On January 21, 2004, Keisling spoke to Sandy Morriss,<sup>226</sup> an Administrative Assistant in Human Resources, to explain that the Complainant was on paid leave so that she would understand why he should be paid although the time sheet provided to her for review would indicate that he was not on site.<sup>227</sup> Sandy Morriss told Keisling that she knew that the Morrisses were going through a difficult period and that the Complainant had spoken to her about it.<sup>228</sup> She mentioned that once on the way to her office the Complainant had seen his wife and a male technician talking and laughing together in the hall and had become very upset.<sup>229</sup> Sandy Morriss described the incident, "He was

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<sup>218</sup> *Id.* See also Tr. at 290-91.

<sup>219</sup> R. X. 2 at 23.

<sup>220</sup> *Id.*

<sup>221</sup> R. X. 2 at 24.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Sandy Morriss is not related to the Complainant. T. at 420.

<sup>227</sup> R. X. 2 at 25; Tr. at 264, 419-420.

<sup>228</sup> R. X. 2 at 25; Tr. at 264, 421.

<sup>229</sup> *Id.*

outraged. He was just going on and talking about how he could no longer take this. He couldn't . . . stand seeing that type of thing."<sup>230</sup> Sandy Morriss attempted to calm him down because she was concerned that he was becoming too emotional or irrational and that he might confront the technician.<sup>231</sup> Another time he talked to her about his daughters and Rosemary Morriss and his attempts to find a place to stay.<sup>232</sup> Sandy Morriss also told Keisling that the Complainant had spoken with Jeff Dixon and Tony Thompson about his personal situation.<sup>233</sup>

Following his conversation with Sandy Morriss, Keisling spoke with Dixon to determine whether Morriss had spoken to him regarding his personal problems.<sup>234</sup> Dixon confirmed that Morriss had spoken with him about his domestic problems.<sup>235</sup> Keisling also questioned Randy Birdsong, a maintenance mechanic, about whether the Complainant had discussed his personal problems with him at work and Birdsong confirmed that the Complainant had attempted to speak with him, but Birdsong informed the Complainant that he could not help him because he had never had to deal with a situation like the Complainant's.<sup>236</sup>

Finally Keisling spoke with Tony Thompson, another maintenance mechanic, to determine whether the Complainant had discussed his personal problems with him.<sup>237</sup> Thompson told Keisling that the Complainant did discuss his marital problems with him.<sup>238</sup> Thompson testified that the Complainant spoke with him both on site and off site four or five times a week or more for five to thirty minutes at a time.<sup>239</sup> Sometimes Thompson felt that these discussions hindered his work performance, and he attempted to avoid the Complainant.<sup>240</sup> Thompson became concerned for Rosemary Morriss's safety

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<sup>230</sup> Tr. at 422.

<sup>231</sup> *Id.*

<sup>232</sup> R. X. 2 at 25; Tr. at 421.

<sup>233</sup> Tr. at 264, 427; R. X. 2 at 25.

<sup>234</sup> R. X. 2 at 25; Tr. at 265, 358.

<sup>235</sup> *Id.*

<sup>236</sup> Tr. at 266.

<sup>237</sup> Tr. at 266, 408, 412-413; R. X. 2 at 25.

<sup>238</sup> Tr. at 266; R. X. 2 at 25.

<sup>239</sup> Tr. at 409.

<sup>240</sup> *Id.*

when he learned from the Complainant that he had been engaging in surveillance of Rosemary Morriss’s home.<sup>241</sup> Thompson warned Rosemary Morriss to “watch herself” and asked one of his friends on the Roanoke Rapids police department to cruise Rosemary Morriss’s neighborhood to check on the house.<sup>242</sup>

As a result of these conversations, Keisling concluded that the Complainant had violated the terms of his Return to Work Agreement, which prohibited him from “bring[ing] any issues about your current personal/domestic situation into the plant. This includes, but is not limited to, soliciting feedback on your marital/domestic situation from co-workers . . . .”<sup>243</sup>

### ***Termination of Employment***

On January 22, 2004, as a member of the Board of Directors of Hannah’s Place, Keisling spoke to Renee Edwards, the Executive Director of the shelter, about some shelter issues.<sup>244</sup> During the course of the conversation, Edwards asked Keisling if he was aware of the incident at the shelter between the Complainant and Rosemary Morriss.<sup>245</sup> She described another recent incident when the Complainant had confronted her and angrily accused her of being one of the primary causes of his problems.<sup>246</sup> Although the Complainant did not physically assault her, she feared for her safety and she told Keisling that she believed that the Complainant would do something very violent in the near future.<sup>247</sup> Edwards had been handling domestic violence issues for a number of years and in the 2.5 years that Keisling had worked with Edwards at the Shelter, he had never known her to “stretch the truth.”<sup>248</sup> She recommended that if LG&E took serious disciplinary action against Morriss, management should take every precaution to protect the safety of plant personnel.<sup>249</sup> She also suggested that for Rosemary Morriss’s

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<sup>241</sup> *Id.* at 411.

<sup>242</sup> *Id.* at 412, 417.

<sup>243</sup> R. X. 2 at 25; Tr. at 264.

<sup>244</sup> R. X. 2 at 26; Tr. at 292.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> R. X. 2 at 26.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

protection, LG&E should consider transferring her to another facility.<sup>250</sup> She stated, “I am scared that Cliff may kill someone as he thinks that he has nothing to live for.”<sup>251</sup>

Keisling’s notes indicate that he was very concerned that Morriss might “snap.”<sup>252</sup> He definitely believed that it was necessary to take action to remove Morriss from the plant site and that although he had concerns that removing Morriss might lead to a confrontation with Rosemary Morriss offsite, he felt that his primary concern had to be the protection of the other Roanoke Valley facility personnel.<sup>253</sup> He concluded that if LG&E terminated Morriss’s employment, it would be prudent to have security on site at both entrance gates for a while.<sup>254</sup>

Keisling recommended that LG&E terminate the Complainant’s employment.<sup>255</sup> He forwarded his recommendation to Cain.<sup>256</sup> She discussed the recommendation with Keisling and he told her that he wanted to terminate Morriss’s employment because he had learned that Morriss had violated his Return to Work Agreement.<sup>257</sup> During this discussion, Keisling mentioned his concern with work place violence.<sup>258</sup> Cain asked Keisling to draft a termination letter.<sup>259</sup> Cain edited the letter and received final approval for the letter and the discharge.<sup>260</sup>

The termination letter reiterated that LG&E had “continually demonstrated its commitment to you, as an employee, to work through your personal/domestic situation,” but that “Company representatives agree that you have violated the conditions of the Return to Work Agreement signed on August 29, 2003 and the final written warning

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Tr. at 249; 295, 440.

<sup>256</sup> *Id.* at 432.

<sup>257</sup> *Id.* at 440-441.

<sup>258</sup> *Id.* at 441.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

signed on November 25, 2003.”<sup>261</sup> The letter identified two violations of the Agreement: two unexcused absences on January 19 and 20, 2004 (dates on which Morriss was incarcerated) and discussions of his personal/domestic situation with his co-workers.<sup>262</sup>

Morriss’s CEMS data complaint was not raised at any point in the discussion of the termination of his employment<sup>263</sup> and Keisling testified that the 2001 data complaint played no role in his decision to recommend that LG&E terminate Morriss’s employment in January 2004.<sup>264</sup> Morriss agreed at the hearing that the “problems stemming from what [he] did to [his] wife . . . is what ultimately caused [him] to be discharged.”<sup>265</sup>

### JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes, including the CAA, authorize the Secretary of Labor to receive complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies.<sup>266</sup> The Secretary has delegated the authority to the Administrative Review Board (ARB) to review Department of Labor Administrative Law Judges’ recommended decisions under the environmental whistleblower statutes.<sup>267</sup>

Under the Administrative Procedure Act, the ARB, as the Secretary’s designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The Board engages in de novo review of the ALJ’s recommended decision.<sup>268</sup> Accordingly, the Board is not bound by an ALJ’s findings of fact and

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<sup>261</sup> R. X. 3.

<sup>262</sup> *Id.* Keisling did not include the reference to unauthorized absences in his draft. Tr. 441-442. Cain added it because she believed that it was important to include all of the reasons that LG&E was terminating his employment in the letter so that Morriss would understand the basis for the decision. *Id.* at 442.

<sup>263</sup> *Id.* at 443.

<sup>264</sup> *Id.* at 296.

<sup>265</sup> *Id.* at 150.

<sup>266</sup> *E.g.*, 42 U.S.C.A § 7622(b).

<sup>267</sup> *See* 29 C.F.R. § 24.8. *See also* Secretary’s Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary’s authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

<sup>268</sup> *See* 5 U.S.C.A. § 557(b) (West 2000); 29 C.F.R. § 24.8; *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997).

conclusions of law because the ALJ's recommended decision is advisory in nature.<sup>269</sup> Nevertheless, an ALJ's findings constitute a part of the record, and as such are subject to review and receipt of appropriate weight.<sup>270</sup> The Board generally defers to ALJ factual findings that are based on the credibility of witnesses as shown by their demeanor or conduct at the hearing, except "where the recommended decision is marked by error so fundamental that its fact findings are inherently unreliable."<sup>271</sup>

## PROCEDURAL BACKGROUND

Morriss, following the termination of his employment, filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging unlawful retaliation under the CAA.<sup>272</sup> OSHA conducted an investigation and determined that the evidence did not support a finding in Morriss's favor.<sup>273</sup> Morriss requested a hearing before a Department of Labor Administrative Law Judge.<sup>274</sup> The ALJ held a hearing in Washington, D.C. on September 21, 2004.<sup>275</sup> The ALJ issued his Recommended Decision and Order on January 13, 2005, upholding Morriss's complaint. LG&E filed a petition with the Board requesting it to review the R. D. & O.<sup>276</sup>

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<sup>269</sup> See Attorney Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). See generally *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), in rejecting argument that higher level administrative official was bound by ALJ's decision).

<sup>270</sup> *Universal Camera*, 340 U.S. at 492-497; *Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991).

<sup>271</sup> *Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-00005, slip op. at 27 (ARB Dec. 30, 2004), *aff'd sub nom.*, *Hall v. U.S. Dep't of Labor, Admin. Review Bd.*, No. 05-9512, 2007 WL 458009 (10th Cir. Feb. 13, 2007).

<sup>272</sup> See 29 C.F.R. § 24.3.

<sup>273</sup> See 29 C.F.R. § 24.4.

<sup>274</sup> See 29 C.F.R. § 24.4(d)(3).

<sup>275</sup> R. D. & O. at 1.

<sup>276</sup> See 29 C.F.R. § 24.8.

## DISCUSSION

### *The legal standard*

The environmental whistleblower protection provisions prohibit employers from discharging or otherwise discriminating against any employee “with respect to the employee’s compensation, terms, conditions, or privileges of employment” because the employee engaged in protected activities such as initiating, reporting, or testifying in any proceeding regarding environmental safety or health concerns.<sup>277</sup> To prevail on his CAA complaint, Morriss must establish by a preponderance of the evidence that he engaged in protected activity, that LG&E was aware of the protected activity, that he suffered adverse employment action, and that LG&E took the adverse action because of his protected activity.<sup>278</sup> Morriss’s failure to establish any of these elements defeats his CAA complaint.<sup>279</sup>

LG&E stipulated and the ALJ found that Morriss was engaged in protected activity when he reported his CEMS concerns, that LG&E was aware of the protected activity and that LG&E’s termination of Morriss’s employment was an adverse action.<sup>280</sup> We have found no basis for disturbing these findings. Thus to prevail, Morriss must prove by a preponderance of the evidence that his protected activity was a motivating factor in LG&E’s decision to dismiss him.<sup>281</sup>

In analyzing an environmental whistleblower case, the ARB and reviewing courts generally apply the framework of burdens developed for use in deciding cases under under Title VII of the Civil Rights Act of 1964<sup>282</sup> and other discrimination laws.<sup>283</sup> To

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<sup>277</sup> See 29 C.F.R. § 24.2. *Accord Hall*, slip op. at 3.

<sup>278</sup> *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. at 4 (ARB Nov. 29, 2006); *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 01-CER-1, slip op. at 5 (ARB Apr. 30, 2004).

<sup>279</sup> *Schlagel*, slip op. at 5.

<sup>280</sup> R. D. & O. at 12-13.

<sup>281</sup> *Lopez*, slip op. at 4.

<sup>282</sup> 42 U.S.C.A. § 2000e, *et seq.*

<sup>283</sup> *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 03-AIR-47, slip op. at 9 (ARB Jan. 31, 2007); *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 1988-SWD- 2, slip op. at 17 (ARB Feb. 28, 2003).

establish a prima facie case of unlawful discrimination under the environmental whistleblower statutes, a complainant need only to present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination.<sup>284</sup> A complainant meets this burden by initially showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in protected activity under the statute of which the employer was aware, that the complainant suffered adverse employment action and that a nexus existed between the protected activity and the adverse action.<sup>285</sup> Once a complainant meets his initial burden of establishing a prima facie case, the burden then shifts to the employer to simply produce evidence or articulate that it took adverse action for a legitimate, nondiscriminatory reason (a burden of production, as opposed to a burden of proof). When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, the rebuttable presumption created by the complainant's prima facie showing "drops from the case."<sup>286</sup> At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence.<sup>287</sup>

Thus, after a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity.<sup>288</sup> As the Supreme Court observed in *U.S. Postal Serv. Bd. of Governors v. Aikens*, "Because this case was tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a *prima facie* case. We think that that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*."<sup>289</sup> The Secretary of Labor further explained in *Carroll v. Bechtel Power Corp.*:<sup>290</sup>

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<sup>284</sup> *Schlagel*, slip op. at 5 n.1.

<sup>285</sup> *Id.* at 6 n.1; *Jenkins*, slip op. at 16-17.

<sup>286</sup> *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

<sup>287</sup> *Schlagel*, slip op. at 6 n.1; *Jenkins*, slip op. at 18. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>288</sup> *Schlagel*, slip op. at 6 n.1; *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 9 n.9 (ARB Oct. 31, 2003), *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 6 n.12 (ARB Sept. 30, 2003), *Simpkins v. Rondy Co., Inc.*, ARB No. 02-097, ALJ No. 2001-STA-0059, slip op. at 3 (ARB Sept. 24, 2003), *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 7-8 n.11 (ARB Mar. 29, 2000).

<sup>289</sup> 460 U.S. 711, 713-714 (1983)(footnote omitted).

<sup>290</sup> No. 91-ERA-46 (Feb. 15, 1995).



Once the respondent has presented his rebuttal evidence, the answer to the question whether the plaintiff presented a prima facie case is no longer particularly useful. “The [trier of fact] has before it all the evidence it needs to determine whether ‘the defendant intentionally discriminated against the plaintiff.’” USPS Bd. of Governors v. Aikens, 460 U.S. at 715 (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. at 253 (emphasis supplied)).<sup>[291]</sup>

Accordingly, the Board will decline to discuss an ALJ’s findings regarding the existence of a prima facie showing in a case the ALJ has fully tried on the merits.<sup>292</sup>

Finally, if the complainant proves by a preponderance of the evidence that a retaliatory motive played at least some part in the respondent’s decision to take an adverse action, only then does the burden of proof shift to the respondent employer to prove by a preponderance of the evidence that the complainant employee would have been fired even if the employee had not engaged in protected activity.<sup>293</sup>

#### ***The ALJ’s erroneous legal analysis***

Of the approximately 23 pages of legal merits analysis included in the R. D. & O., the ALJ consumed nearly 21 pages discussing whether Morriss established a prima facie case. As indicated above, since the discussion of the complainant’s prima facie showing is pointless in a case fully tried on the merits, the Board generally will not address an ALJ’s findings regarding the existence of a prima facie case. But here, the ALJ’s errors in evaluating Morriss’s prima facie showing are so extensive and so permeate his legal analysis of this case, that we find it incumbent upon us to address the most significant of these errors.

The ALJ described the “applicable standards” for analyzing this case as follows:

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

(1) The employee was engaged in protected activity;

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<sup>291</sup> Slip op. at 11.

<sup>292</sup> *Andreae v. Dry Ice, Inc.*, ARB No. 97-087, ALJ No. 95-STA-24, slip op. at 2 (ARB July 17, 1997).

<sup>293</sup> *Schlagel*, slip op. at 6 n.1.

(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.<sup>[294]</sup>

The ALJ incorrectly stated that after the complainant shows adverse action, protected activity, and nexus, the burden of proof shifts to the respondent to prove that it took the adverse action for a legitimate, non discriminatory reason. This is not so. At this stage all the respondent is required to do is to articulate or produce evidence of a non discriminatory reason for taking the adverse action.<sup>295</sup> LG&E did so in this case. Its witnesses, in particular, Keisling, testified that LG&E terminated Morriss's employment because he violated the terms of his Return to Work Agreement and because Keisling was concerned for the safety of the Roanoke Valley facility employees. This evidence was sufficient to meet LG&E's burden of production.

But the ALJ found otherwise. In so doing, he evaluated the credibility of LG&E's witnesses.<sup>296</sup> He determined that Cain had not properly interpreted LG&E's policy governing absence from the workplace.<sup>297</sup> And, he put the burden on LG&E to prove that Morriss was a threat a work,<sup>298</sup> and that the Final Written Warning and Cain's decision to add the stipulation about the violation of the absence from work policy did not demonstrate an intent to discriminate.<sup>299</sup> The ALJ's credibility evaluations and requirement that LG&E prove that it had no intent to discriminate directly contravenes

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<sup>294</sup> R. D. & O. at 2 (emphasis added).

<sup>295</sup> *Reeves*, 530 U.S. at 142; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993).

<sup>296</sup> R. D. & O. at 25, 27.

<sup>297</sup> *Id.* at 24.

<sup>298</sup> *Id.* at 28.

<sup>299</sup> *Id.* at 30, 33.

well-established Supreme Court precedent.<sup>300</sup> Further, as the Court held in *Texas Dep't of Cmty. Affairs v. Burdine*,<sup>301</sup> “The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.”

The ALJ erred when he weighed the evidence at the prima facie stage of the proceedings. Thus, we reject the ALJ’s irrelevant and incorrect finding that LG&E failed to “establish a legitimate, non-discriminatory basis for termination”<sup>302</sup> and turn to the relevant issue whether Morriss proved by a preponderance of the evidence that a retaliatory motive played at least some part in the LG&E’s decision to terminate his employment.

### ***Morriss’s burden to prove retaliation***

In *Burdine*, the Supreme Court described the plaintiff’s burden to prove unlawful discrimination, “[The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”<sup>303</sup>

#### **1. Direct evidence of retaliation**

Direct evidence of retaliation is “smoking gun” evidence; evidence that conclusively links the protected activity with the adverse action.<sup>304</sup> Such evidence must speak directly to the issue of discriminatory intent and may not rely on the drawing of inferences.<sup>305</sup> Direct evidence does not include “stray or random remarks in the workplace, statements by nondecisionmakers or statements by decisionmakers unrelated to the decisional process.”<sup>306</sup>

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<sup>300</sup> *Reeves*, 530 U.S. at 142 (the burden on the respondent at this stage “is one of production, not persuasion; it ‘can involve no credibility assessment.’” (quoting *St. Mary’s Honor Ctr.*, 530 U.S. at 509)).

<sup>301</sup> 450 U.S. 248, 254-255 (1981).

<sup>302</sup> R. D. & O. at 33.

<sup>303</sup> 450 U.S. at 256.

<sup>304</sup> *Coxen v. UPS*, ARB No. 04-093, ALJ No. 03-STA-13, slip op. at 5 (ARB Feb. 28, 2006).

<sup>305</sup> *Smith v. Esicorp, Inc.*, No. 93-ERA-00016, slip op. at 15 (Sec’y Mar. 13, 1996).

<sup>306</sup> *Talbert v. Washington Pub. Power Supply Sys.*, ARB No. 96-023, ALJ No. 93-ERA-35, slip op. at 5 (ARB Sept. 27, 1996).

Morriss summarized the ALJ's findings of direct evidence that Keisling discriminated against him in part based on his whistleblower allegations:

[1.] There was no evidence that LG&E has established a policy to protect whistleblowers. R.D.O. 17.

[2.] The operators and E&I techs were upset with Morriss for raising the data tampering issue. (citing in part the "payback is a MF" comment. Tr. 76, 85 CX 11:1) However, Keisling took no steps to protect Morriss after his protected activity. R.D.O. 17.

[3.] Keisling's testimony concerning a "vague" memory of being informed by his boss or Hews is not credible, given that Keisling was the head of the operations department, the department about which the data manipulating complaint was made. R.D.O. 17.

[4.] As soon as Keisling learned that Morriss had been arrested for domestic violence, he determined, without factual support, that Morriss posed a risk for workplace violence. R.D.O. 17.

[5.] Keisling failed to report the excursion within required 24 hours, although it was brought to his attention and he determined that it was a serious matter. R.D.O. 18.

[6.] Keisling did not investigate the data manipulation until five or six months after the complaint was made. R.D.O. 18.

[7.] Although Keisling maintained to his supervisors that no data tampering had occurred, an internal HR investigation determined that "inappropriate actions" were going on with all of the employees in the E&I Department. R.D.O. 18-19.

[8.] Keisling was aware that Hews, the E&I techs, and operators were upset with Morriss for raising issue. R.D.O. 19 See "hostile environment" discussion below.

[9.] Keisling's after-the-fact statements are indicative of an intent to cover. R.D.O. 19.

[10.] Keisling failed to conduct a thorough investigation into Morriss' complaints, as evidenced by his failure to discuss the matter with Young. R.D.O. 19.

[11.] Morriss' complaint against Dixon aired his position that he had become "persona non-grata" in part because of the whistleblowing.

[12.] Although Morriss was considered the CEMS "heavy," his input was ignored after the data manipulation complaint. R.D.O. 19.

[13.] Although, as a result of Morriss' complaint against Dixon, LG&E found that there was "inappropriate behavior" on the part of all of the members of the E&I Department, LG&E Vice President of Operation, Charlie Braun, told Dixon that he should continue to do business as usual. R.D.O. 20.

[14.] Keisling's conduct was to, in essence, cover, in the guise of an investigation. R.D.O. 20.

[15.] Keisling, who had the most to lose by exposure of the data manipulation, in essence "investigated" himself and failed to credit Morriss. "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." R.D.O. 18, 21.

[16.] The fact that there is no standard established to determine the severity or extent of a penalty is sufficient to raise an inference and to make out a *prima facie* case. R.D.O. 22. [<sup>307</sup>]

We agree with the Respondent that Morriss failed to adduce any direct evidence of retaliatory animus and the ALJ's findings of such evidence must be rejected. Not one piece of the "direct evidence" the ALJ cited directly links Morriss's CEMS contention with his dismissal, nor does any of this "evidence" speak directly to the issue of discriminatory intent. In fact almost none of the purported direct evidence is evidence at all; instead it consists almost entirely of the ALJ's inferences drawn from evidence. Even if we agreed with these inferences, which as we explain below, we do not, direct evidence may not rely on the drawing of inferences. Morriss contends that LG&E has misread the ALJ's R. D. & O. in arguing that "the evidence which the ALJ describes as 'direct' is not in fact 'direct evidence.'"<sup>308</sup> But Morriss's argument on this point consists merely of the statement that LG&E misread the R. D. & O. and a summary of the "direct" evidence that we cited in our decision above. Thus Morriss has provided no explanation of how the purported evidence links the protected activity with the adverse action or of how LG&E misread the R. D. & O. Finding no explanations ourselves, we reject the ALJ's finding that the record contains direct evidence that "Keisling discriminated against Complainant in part based on his whistleblower allegations."<sup>309</sup>

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<sup>307</sup> Brief of Complainant (Comp. Br.) at 18-19.

<sup>308</sup> *Id.* at 18.

<sup>309</sup> R. D. & O. at 22.

## 2. Indirect evidence – pretext analysis

In the absence of direct evidence of retaliation, a complainant may prove that the legitimate reasons the employer proffered were not the true reasons for its actions, but instead were a pretext for discrimination.<sup>310</sup> We find that Morriss has failed to carry his burden of proving that LG&E’s proffered reasons for termination, violation of the Return to Work agreement and concern about potential workplace violence, were a pretext for retaliation.

### *First opportunity to discriminate*

In regard to the applicability of the pretext analysis to this case, the ALJ stated, “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.’”<sup>311</sup> We do not find that the preponderance of the evidence supports this advice.<sup>312</sup>

First, Keisling did not terminate Morriss’s employment “when the first opportunity became available.” Following the incident when Morriss left work and accosted Rick Ogburn’s fiancée, Greta Ivey, Keisling had several discussions with Braun and the HR Director concerning how to handle the situation. The HR Director suggested that Morriss’s employment could be terminated. But Keisling argued for paid leave with counseling (even though he knew of no other occasion on which LG&E had offered such an option) because he wanted to do everything he could to help Morriss and because he thought that Morriss had been open and honest in his discussions with him.<sup>313</sup>

Second, the Return to Work Agreement stated that it was incumbent upon Morriss to “Continue to meet the work performance standards and goals as outlined in our PEP” and that “failure to meet these performance and behavioral expectations may result in disciplinary action, up to and including termination of employment.”<sup>314</sup> Nevertheless, when Hews noticed in September 2003 that Morriss was having difficulty dealing with his work and recommended to Keisling that he give Morriss a warning letter, Keisling did not invoke the terms of the Return to Work Agreement and recommend termination of

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<sup>310</sup> *Jenkins*, slip op. at 18. *Accord St. Mary’s Honor Ctr.*, 530 U.S. at 507-508.

<sup>311</sup> R. D. & O. at 35.

<sup>312</sup> The ALJ cited to “*Burdine*, 450 U.S. at 253, 256” as direct support for the statement, but we find no support in *Burdine* for it.

<sup>313</sup> Tr. at 282-284.

<sup>314</sup> R.X. 2 at 19.

Morriss's employment. Instead, he issued a Final Warning Letter giving Morriss another chance to reform his behavior and performance.

Finally, although the Return to Work Agreement specified that Morriss was not to discuss his domestic/personal issues at work and such discussion was one of the bases for his dismissal as indicated in his termination letter, Keisling only learned of these discussions by chance some five months after the Return to Work Agreement was issued, when he went to see Sandy Morriss to explain that he had placed the Complainant on leave with pay.<sup>315</sup> Had Keisling been looking for the first opportunity to fire Morriss, surely he would have actively sought out violations of the agreement so that he could pounce. We conclude that neither Keisling's testimony nor his contemporaneous actions substantiate the advice given to the ALJ that he could reasonably determine that Keisling had bided his time until the first opportunity for payback. Instead they indicate that Keisling had compassion for Morriss, that he hoped that he would succeed and that he advocated termination of his employment only after giving him unprecedented opportunities to conform his performance and behavior to acceptable standards.

#### *Relationship between Hews and Morriss*

Although not clearly expressed, the second basis for the ALJ's determination that LG&E's articulated reasons for terminating Morriss's employment are pretextual appears to involve Hews and his rocky relationship with Morriss.<sup>316</sup> The ALJ apparently concluded that Hews's problems with Morriss stemmed from Morriss's whistleblowing ("after [Morriss] "blew the whistle" Complainant became the subject of scorn"<sup>317</sup>) and influenced Keisling's decision to terminate Morriss's employment. The ALJ notes twice in his pretext discussion that Hews issued the Final Warning letter.<sup>318</sup> But the ALJ previously found that "[a]ccording to the preponderance of the evidence this warning was not used to determine whether termination was warranted."<sup>319</sup> The ALJ additionally cites to the facts that Hews "was Complainant's immediate supervisor, was the person to whom the initial whistleblowing was made, was the conduit of the allegation to Keisling, and was called to testify to substantiate Keisling's positions."<sup>320</sup> But none of these facts establishes that Hews possessed such authority as to be viewed as the individual

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<sup>315</sup> Tr. at 264.

<sup>316</sup> R. D. & O. at 35.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 32.

<sup>320</sup> *Id.*

principally responsible for the termination decision or that he in fact made the termination decision.<sup>321</sup> Therefore, they are not evidence of pretext.

*Selective punishment*

As further evidence of pretext, the ALJ states that Morriss 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.”<sup>322</sup> But this conclusion obviously overlooks the salient fact that Morriss and his wife and co-workers were not similarly situated. As LG&E averred in response:

This argument is specious. The fact is Rosemary Morriss had not assaulted anyone, had not admitted needing help controlling her anger, had not caused co-workers to express concerns for their safety, had not created a workplace disruption by confronting a co-worker’s fiancé, had not had three protective orders entered against her by a North Carolina state court judge, and most fundamentally, had not signed a Return to Work Agreement acknowledging that she could be terminated if she discussed her marital issues with co-workers.<sup>[323]</sup>

*“Conflict” between Cain’s and Keisling’s testimonies regarding grounds for termination*

The ALJ also points to a “conflict” in the testimony of Cain and Keisling regarding the basis for the termination as an indication of a shift in LG&E’s explanation for the adverse action. The ALJ asserts that Cain did not substantiate the threat of violence basis and therefore this “conflict” supports his conclusion that the action was motivated by retaliatory intent.<sup>324</sup> There is no conflict. While Cain testified that Keisling did not specifically recommend to her that LG&E terminate Morriss’s employment

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<sup>321</sup> *Accord Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004); *Tracanna v. Artic Slope Inspection Serv.*, ARB No. 96-168, ALJ No. 97-WPC-1, slip op. at 12 (ARB July 31, 2001)(negative remarks about a complainant by co-worker who is not in a position to take adverse action against the complainant are not evidence of anti-whistleblower animus).

<sup>322</sup> R. D. & O. at 35.

<sup>323</sup> Rebuttal Brief of Respondent at 9 n.6.

<sup>324</sup> R. D. & O. at 35.



because of his potential for workplace violence,<sup>325</sup> they did discuss Morriss’s potential for workplace violence at the time Keisling recommended to her that LG&E dismiss Morriss.<sup>326</sup> Furthermore, Keisling’s contemporaneous notes indicate that immediately following Morriss’s first domestic abuse arrest and through the following months up until the dismissal, Keisling informed the HR Department and his supervisors of his concerns that Morriss could become violent in the workplace and asked for guidance on how to prevent this from happening.<sup>327</sup> The termination letter stated that Morriss was dismissed because he violated the terms of the Return to Work Agreement by discussing his personal/domestic problems at work. Morriss admits that he that he violated the Agreement.<sup>328</sup> While the Agreement did not specifically mention workplace violence, Keisling’s concerns are embodied in its reference to LG&E’s responsibility to its employees to maintain “a safe, secure and productive environment for all employees.”<sup>329</sup> Thus Keisling’s testimony that he recommended termination because of his concerns of potential workplace violence is clearly not a post hoc rationalization demonstrating pretext, even though such concerns are not specifically identified in the termination letter.

#### *Unexcused absences*

We also reject the ALJ’s conclusion that the fact that Cain added the unexcused absences basis to the termination letter is evidence of an intent to discriminate. As an initial matter, the ALJ placed the burden on LG&E to prove that the citation to the absence policy did not demonstrate an intent to discriminate.<sup>330</sup> But as demonstrated above, LG&E had no such burden.<sup>331</sup> Instead, Morriss had the burden to prove that reliance on the policy was a pretext for discrimination. He failed to carry his burden.

The ALJ admitted that according to the LG&E Employee Handbook unexcused absences may be a violation.<sup>332</sup> The handbook also states that “two hours should be considered the minimum advance notice time to be given when an employee is expecting to be absent or late” because “[n]ormally two . . . hours is the minimum time required to

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<sup>325</sup> Tr. at 448.

<sup>326</sup> *Id.* at 441, 449.

<sup>327</sup> R.X. 2 at 1, 2, 3, 4, 5, 12, 13, 22, 25.

<sup>328</sup> R. D. & O. at 107-108.

<sup>329</sup> R.X. 8.

<sup>330</sup> R. D. & O. at 33.

<sup>331</sup> See our discussion of burdens of proof and production at. 29-34.

<sup>332</sup> R. D. & O. at 32.

fill an absence, once it is reported.”<sup>333</sup> Morriss did not show up for work on January 19th and 20th because he had been arrested and incarcerated on a domestic violence complaint.<sup>334</sup> He did not call LG&E to request an excused absence; instead his brother called at 2:00 pm, well after the start of the Complainant’s work day, to inform Keisling that the Complainant would not be at work.<sup>335</sup>

The termination letter indicated that the two unexcused absences on January 19th and 20th violated LG&E’s performance standards.<sup>336</sup> The Return to Work Agreement provided that Morriss must “[c]ontinue to meet the work performance standards” and that “failure to meet these performance . . . expectations may result in disciplinary action, up to and including termination of employment.”<sup>337</sup> Cain testified that she added the unexcused absence ground for dismissal because the unexcused absences were a violation of the Return to Work Agreement.<sup>338</sup> She further testified that for an absence to be excused the employee would have to obtain prior approval and cited examples such as vacation days, sickness, or some extremely extenuating circumstances as a death in the family or something of that nature.<sup>339</sup> She did not consider the fact that the Complainant was in jail because he physically assaulted his wife to be grounds for an excused absence.<sup>340</sup>

The ALJ found, “[i]t 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.”<sup>341</sup> He notes that Morriss had accrued leave and infers that “if the company gives accrued leave, it *may* be used.”<sup>342</sup> The ALJ also indicates that LG&E neglected to

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<sup>333</sup> *Id.* at 24.

<sup>334</sup> R.X. 2 at 23.

<sup>335</sup> *Id.*

<sup>336</sup> R.X. 3.

<sup>337</sup> R.X. 8.

<sup>338</sup> Tr. at 442.

<sup>339</sup> *Id.* at 442-443.

<sup>340</sup> *Id.* at 443.

<sup>341</sup> R. D. & O. at 32.

<sup>342</sup> *Id.*

take Morriss's "protected status" as a whistleblower into consideration when determining whether the unexcused absences were a ground for termination.<sup>343</sup>

The ALJ failed to cite to the witness testimony upon which he based his inferences concerning company policy, nor did he discuss Cain's testimony to the contrary. The fact that Morriss had accrued leave did not absolve him from complying with LG&E's excused absence procedures. Neither does the fact that he was a whistleblower entitle him to dispensation in regard to performance standards nor to special treatment in regard to determining the penalty for failure to comply with the standards or his Return to Work Agreement.<sup>344</sup> Moreover, the ALJ's inferences were obviously based on his misallocation of the burden of proof.<sup>345</sup> Morriss proffered no evidence that LG&E treated him differently than any other employee who was absent without leave from work while on a return to work agreement, nor any other evidence from which it could be reasonably inferred that the inclusion of the unexcused absence ground for termination was a pretext for discrimination. Thus, we reject the ALJ's finding to the contrary.

#### *Potential for workplace violence*

The ALJ placed the burden upon LG&E to prove that Morriss posed a threat of violence at work.<sup>346</sup> Again, this burden was misplaced. Rather, Morriss had the burden

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<sup>343</sup> *Id.* at 33.

<sup>344</sup> *Hall*, slip op. at 29 ("[T]he whistleblower protections prohibit employers from discriminating against whistleblowers. They do not require employers to treat whistleblowers more favorably than other employees."). In fact, the ALJ's belief that Morriss was entitled to special status as a whistleblower infected his analysis throughout his decision. *See e.g.*, R. D. & O. at 13 ("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."); *id.* at 13 (Mr. Morriss was subjected to heightened stress at work, that is directly caused by Respondent's failure to acknowledge his whistleblowing status."); *id.* at 15 ("[Keisling] was on notice that Complainant had status as a whistleblower and was entitled to protection."); *id.* at 20 ("As of that period in time, the Respondent remained in denial that the Complainant had whistleblower status."); *id.* at 31 ("Although the Respondent stipulated that the Complainant engaged in protected activity, this was not considered in fashioning the termination penalty.").

<sup>345</sup> *See e.g.*, R. D. & O. at 24 ("Margie Kane [sic] . . . did not set forth in her testimony what the Respondent penalty policy was."); *id.* ("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."); *id.* at 33 ("Again, this incident demonstrates an intent to discriminate, rather than supports a basis for termination. **The Respondent has the burden to prove otherwise.**" (emphasis added)).

<sup>346</sup> R. D. & O. at 28.

of proving that Keisling did not genuinely believe that Morriss posed a threat of workplace violence and therefore, his asserted reliance on this belief was merely a pretext for discrimination. There is a crucial distinction here. It is not sufficient for Morriss to establish that the decision to terminate Morriss's employment was not "just, or fair, or sensible . . . rather he must show that the explanation is a phony reason."<sup>347</sup> Thus, Morriss must show that the Keisling's proffered explanations are false and a pretext for discrimination.

The ALJ and Morriss relied on the following evidence to establish pretext:

[1.] Any violence was off-site against Morriss' spouse.  
RX , 7, 13.

[2.] Mrs. Morriss admitted that she had suffered no serious injuries nor did she seek medical treatment for injuries.

[3.] There was no evidence of any physical violence or threats of physical violence between Morriss and any other employees.

[4.] The statements by co-workers in which they express that they fear for their safety lack credibility.

[5.] Morriss has never been convicted of a crime involving violence.

[6.] Keisling unilaterally accepted Mrs. Morriss' rendition and displayed a certain amount of "zeal" in learning that there had been a marital dispute.

[7.] Although Keisling provided the company camera to Mrs. Morriss so that she could take photographs of her bruises, no photographs or other evidence of bruises were introduced.

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<sup>347</sup> *Gale v. Ocean Imaging*, ARB No. 980143, ALJ No. 97-ERA-38, slip op. at 10 (ARB July 31, 2002)(citing *Kahn v. U. S. Sec'y of Labor*, 14 F.3d 342, 349 (7th Cir. 1994)). *Accord Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000), ("[t]his court does not sit as a super-personnel department and will not second-guess an employer's decisions"); *Skouby v. The Prudential Ins. Co.*, 130 F.3d 794, 795 (7th Cir. 1997) (same); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-1508 (5th Cir. 1988) (discrimination statute "was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers;" statute cannot protect employees "from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated").

[8.] Morriss was cleared by the company medical provider to return to work.

[9.] At the time of Keisling's termination of Morriss, he did not consult the company medical provider as to whether Morriss posed a danger of workplace violence.

[10.] The only medical records which are a part of the record do not substantiate a threat.

[11.] Keisling did not inform [Cain] that he recommended termination because of Morriss' threat.

[12.] The conflict between Keisling and Kane's testimony "undermines [LG&E's ] position that any workplace threat existed and substantiates [Morriss'] position that the termination was pretextual."

R.D.O. 26-28.<sup>[348]</sup>

In addition, Morriss argues, "the ALJ rejected any 'inference that *ex parte* Domestic Relations Orders raise an inference of a tendency toward violence against fellow employees or anyone else at work.' Therefore, the ALJ found that LG&E had not demonstrated that there was a 'threat *at work*.'"<sup>349</sup>

In rebuttal LG&E argues:

Rosemary Morriss described a violent assault to Keisling in July 2003, one in which Morriss screamed that he was going to kick the "mother fucking asses" of three young children, slammed Rosemary to the ground, and had Morriss' daughter screaming "daddy don't hurt her, daddy don't hurt her. *R. Morriss Tr.* 387. After hearing of this assault, Keisling learned that (1) Morriss agreed he needed counseling to address his anger control problem; (2) other employees were concerned of Morriss' behavior; (3) a judge had found sufficient evidence to warrant a protective order; and (4) Morriss had violently confronted a co-worker's fiancé, disrupting the co-worker at work. Those are the facts which ultimately led Keisling to conclude that

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<sup>348</sup> Comp. Br. at 26.

<sup>349</sup> *Id.* at 27.

Morriss “may snap or go off the deep end.” *Keisling Tr.*  
281-82.<sup>350</sup>

We conclude that the evidence on which Morriss relies does not preponderate. Initially we note that although Morriss cites to the evidence of pretext upon which the ALJ relied, he has failed to explain how this evidence supports his argument that Keisling’s concern that Morriss posed a threat of workplace violence was pretext. It is not sufficient to simply state the fact that “[a]ny violence was offsite against Morriss’ spouse.” To carry his burden of proof, Morriss must demonstrate how this fact establishes that Keisling’s reason for terminating Morriss’s employment was “phony.”

In the absence of such a showing, we conclude that although some of the cited evidence taken in isolation might be pertinent to a determination whether Morriss, in fact, posed a threat of workplace violence, it does not address the relevant question here, whether Keisling’s belief that he posed such a threat was genuine. For example, the FAP counselor cleared the Complainant to return from his paid leave on August 29, 2003, and less than a month later Rosemary Morriss was forced to take out a second restraining order against the Complainant because he attempted to enter the shelter for battered and abused women where she was staying with her children. Furthermore, in January 2004, less than three months after a judge entered a permanent protective order, Morriss was once again arrested and jailed for domestic assault. Thus, the fact that Morriss was cleared by the company medical provider to return to work most certainly did not preclude a reasonable belief that he still had serious anger management problems that manifested themselves in a physical assault against an LG&E employee.

In regard to Keisling’s reaction to the statements of Martin and Dixon that they were concerned for their safety because of Morriss’s erratic behavior and their past histories with him, the ALJ wrote, “[Keisling] 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.”<sup>351</sup> To the extent that the ALJ infers that Keisling solicited Martin’s and Dixon’s statements of concern, the ALJ cited to no evidence in the record to support such an inference. Further, we are not persuaded by the ALJ’s generalized blanket finding, without citation to the record, that the expressed concerns all are hollow and contrary to the full weight of the evidence. But even if we agreed with the ALJ’s evaluation of the evidence, the fact that the ALJ did not believe that the concerns raised in the statements were genuine does not establish that Keisling did not believe them to be true and that he had an obligation to act on them accordingly.

Additionally, it was not just Keisling who accepted Rosemary Morriss’s rendition of events. Following the incident at the women’s shelter, a judge found sufficient

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<sup>350</sup> Respondent’s Rebuttal Brief (Resp. Reb Br.) at 9-10.

<sup>351</sup> R. D. & O. at 27.

evidence of violence to enter a protective order. The ALJ's finding that no evidence of Rosemary Morriss's bruises was entered into evidence at the hearing is not supported by the record. Rosemary Morriss testified that the Complainant bruised her wrist,<sup>352</sup> Sandy Morriss confirmed that Rosemary Morriss showed her the bruise and stated that the Complainant had caused it,<sup>353</sup> and Keisling's contemporary notes document that Rosemary Morriss's wrist was bruised following her January 18th confrontation with the Complainant.<sup>354</sup> Rosemary Morriss asked Keisling if she could take pictures of the bruises with the company camera and he allowed her to do so.<sup>355</sup> The fact that these pictures were not entered into evidence does not even suggest, much less establish, that Keisling was not concerned for the safety of his employees when he recommended the termination of Morriss's employment.

However, the evidence does support a pattern of escalating and repeated violence and unavailing attempts by Keisling to provide Morriss with the help and support that he needed to deal with his problems. Furthermore, the ALJ's refusal to infer that "*ex parte* Domestic Relations Orders raise an inference of a tendency toward violence against fellow employees or anyone else at work" ignores the facts that the October 2003 order was entered after a domestic relations state court judge heard evidence<sup>356</sup> and that Rosemary Morriss, herself was an LG&E employee, who had been the subject of violence at the Complainant's hands. We do not believe that it was necessary for Keisling to wait until the Complainant more seriously injured Rosemary Morriss or another employee while at work to reasonably believe that the Complainant might pose a threat of workplace violence and to act to fulfill his duty to provide his workforce, including Rosemary Morris, with a safe and secure work environment. Thus, while the evidence of record did not convince the ALJ that Morriss posed a threat of violence in the workplace, we find that Morriss has failed to establish by a preponderance of the evidence that Keisling did not genuinely believe this to be true. Therefore, we conclude that Morriss has failed to prove that Keisling's termination recommendation was a pretext for discrimination.

## CONCLUSION

Morriss bore the burden of proving intentional discrimination by a preponderance of the evidence. We find that he has failed to do so for the reasons stated above.

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<sup>352</sup> Tr. at 377.

<sup>353</sup> *Id.* at 426.

<sup>354</sup> R.X. 2 at 23.

<sup>355</sup> Tr. at 377.

<sup>356</sup> R. D. & O. at 25.

Accordingly we reject the ALJ's recommended decision and award of damages,<sup>357</sup> and we **DISMISS** Morriss's whistleblower complaint.

**SO ORDERED.**

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

**DAVID G. DYE**  
**Administrative Appeals Judge**

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<sup>357</sup> We note that because LG&E did not appeal the ALJ's award of damages, we will not discuss this award. *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 2005-SDW-7, slip op. at 9 (ARB Sept. 29, 2006).