

**U.S. Department of Labor**

Office of Administrative Law Judges  
90 Seventh Street, Suite 4-800  
San Francisco, CA 94103-1516

(415) 625-2200  
(415) 625-2201 (FAX)



**Issue Date: 18 June 2008**

CASE NO.: 2006-SDW-00006

*In the Matter of:*

RUSSELL KLEIN,  
Complainant,

vs.

BART,  
Respondent.

Appearances: Russell Klein,  
Pro se

Thomas Lee, Esquire,  
For the Respondent

Before: Jennifer Gee  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT**

**INTRODUCTION**

This case arises under the employee protection provisions of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9, Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1367, and Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622. The enforcing regulations are at 29 C.F.R. Part 24.

I conducted a hearing on this matter on December 6, 2006, in the Department of Labor Courtroom in San Francisco, California. The Complainant and Respondent's counsel participated in the hearing. At the start of the hearing, ALJ exhibits ("ALJX") 1 through 3 were admitted. The Complainant's exhibits ("CX") 1 through 42 were admitted, and Respondent's exhibits ("EX") A through F were admitted. Respondent's Exhibit G was admitted on January 10, 2007, after the parties were given an opportunity to object to its admission into evidence.

For the reasons stated below, the Complainant's complaint is DISMISSED.

## **STATEMENT OF THE ISSUES**

The parties stipulated that the Respondent is an employer covered by the SDWA, FWPCA, and TSCA; that the Complainant was engaged in a protected activity; that the Respondent was aware of the protected activity; and that the Respondent took adverse actions against the Complainant. The sole remaining issue is whether the Respondent's adverse actions were in retaliation against the Complainant for engaging in the protected activity.

## **FACTUAL FINDINGS**

### **Stipulations**

At the beginning of the hearing, the parties agreed to the following stipulations. (HT,<sup>1</sup> pp. 9-12.)

- 1 The Complainant was employed by BART from August 1987 to May 20, 2005.
- 2 In December 2004, the Complainant sent a letter to BART Director Zoyd Luce stating that BART had allowed oil to leak into the ground at the Union City Station.
- 3 BART is an employer covered by the SDWA, FWPCA, and TSCA.
- 4 On May 17, 2005, the Complainant was notified that BART was terminating his employment.
- 5 The Complainant was terminated on May 20, 2004.
- 6 The Complainant engaged in activity protected by the SDWA, FWPCA, and TSCA.
- 7 The Respondent was aware of the Complainant's protected activity.

The Complainant began working for BART in August 1987. He was a Senior Energy Analyst in BART's Management Analysis Division, working under Frank Schultz and Rob Umbreit. (EX A, Tab 7, p. 283.)

In 1996, the Complainant observed an underground pipe at BART's Union City Station leaking oil into the ground and obtained an above-ground pipe to replace it. (CX 3.) The leaky pipe was repaired by BART, and the Complainant was reimbursed for purchasing spare parts. (EX A, Tab 7, p. 291.)

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<sup>1</sup> References to "HT" are to the hearing transcript.

Sometime between the Complainant's 1996 observation and October 2004, the Complainant observed that the above-ground replacement pipe was leaking oil and reported his observation to his supervisor, Mr. Umbreit. (HT, pp. 87-88.)

In March 2001,<sup>2</sup> the Complainant wrote a note addressed to "Frank" (presumably his supervisor, Mr. Schultz<sup>3</sup>) saying that "not 1 penny was saved" during a trip that BART employee Connee Lloyd referred to in an e-mail she sent to the Complainant on March 12, 2001. (CX 2.) The Complainant noted that "This was to visit [Ms. Lloyd's] family in Maryland." The Complainant pursued this claim of misuse of funds, and it became part of an internal audit investigation. (EX A, Tab 7.) In an internal audit report dated March 15, 2005, the allegation was found to be unsubstantiated. (EX A, Tab 7, p. 295.)

On February 4, 2003, Richard Hairston, a consultant who had a consulting contract with BART, asked that his contract be terminated effective January 31, 2003, because of problems he had encountered with BART on his contract. (CX 6.)

On February 14, 2003, the Complainant sent an e-mail message to Mr. Hairston, with a copy to BART Director Lynette Sweet, informing Mr. Hairston that there were "civil rights and financial issues at BART" that the Complainant had not informed Mr. Hairston about because he wanted to spare Mr. Hairston's feelings and was concerned that he (the Complainant) would be fired. (EX A, Tab 2, p. 256.) In this e-mail, the Complainant praised Mr. Hairston's work and informed him that Mr. Schultz had "harassed, humiliated and withheld substantial payments" from Mr. Hairston. The Complainant implied that there was racism involved in Mr. Hairston's relationship with BART. He referred to the activities of white supremacists and the KKK, saying that white supremacists use various subtle techniques to "put African Americans 'in their place,'" that the KKK "traditionally operates at night in the dark behind hoods," and that the Complainant's e-mail to Mr. Hairston was "an effort to bring 'sunshine' to certain activities at BART." He went on to refer to a power contract that had been recently terminated, stating that an employee of Mr. Schultz's had withheld the information from Mr. Hairston. He added that this same employee then "posted a picture of a white woman whipping a black man in chains on the front of her office door for weeks. The caption read 'NOW YOU WILL LISTEN!'" (EX G.) He added that two African Americans had been upset that she would not take the picture down. He said that the employee had since been rewarded with special written honors and privileges by Mr. Schultz. At the end of his e-mail message, he referred to the "blatant racism" at BART and said that as soon as the truth came out, he would be fired by the "White Aryan Brotherhood" at BART. (EX A, Tab 3, pp. 256-257.)

The Complainant's February 14, 2003, e-mail message to Director Sweet and Mr. Hairston led to an investigation of his allegations of racism by BART's Office of Civil Rights. At the conclusion of the investigation, the Manager for the Office of Civil Rights reported on March 28, 2003, that the bulk of the Complainant's allegations were not substantiated,

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<sup>2</sup> Although the Complainant stated that this event occurred on March 9 (CX 3), the e-mail referring to the event was not sent until March 12 (CX 2).

<sup>3</sup> It was not discussed at the hearing whether Mr. Schultz received the note.

recommended that the Complainant be reprimanded, and that the Complainant, Mr. Schultz, and Ms. Lloyd<sup>4</sup> be referred to EAP. (EX A, Tab 3, pp. 258-259.)

On February 27, 2003, the Complainant sent a letter to Ann Branston, the Executive Manager of Planning and Budget for BART, complaining about how BART had treated Mr. Hairston. (CX 4.) The Complainant alleged that Mr. Hairston had been harassed and humiliated by Mr. Schultz, and that Mr. Schultz had withheld \$60,000 to \$80,000 in contractual payments owed to Mr. Hairston. The Complainant alleged that BART paid Mr. Hairston substantially less than less qualified white consultants. He reported that a subordinate of Mr. Schultz's had withheld information from Mr. Hairston and that after withholding the information, the employee "posted a picture of a white woman whipping a black man in chains on the front of her office door for weeks," with a caption that read "Now Do I Have Your Attention!" The Complainant sent copies of this letter to ten other individuals, including members of the BART Board of Directors. At the request of Ms. Branston, the Internal Audit Department investigated the Complainant's various allegations against his supervisor, Mr. Schultz. (EX A, Tabs 6 & 7.)

The Complainant's February 27, 2003, e-mail message led to an internal audit of his fraud allegations against Mr. Schultz, namely that Mr. Schultz had signed a document with PG&E that Mr. Schultz knew contained false information pertaining to the accuracy of invoices. Mike Northrup, Manager of BART's Internal Audit Department, reported to Ms. Branston on April 17, 2003, that his Department had determined that the Complainant's fraud allegations against Mr. Schultz were unfounded. (EX A, Tab 5, p. 267.) He reported that PG&E should have been independently knowledgeable of the accuracy of the document and that there was no evidence the document was not prepared in good faith. Additionally, Mr. Northrup reported that their investigation revealed that it was the Complainant's actions that might have jeopardized some of BART's assets because he had not properly reviewed PG&E invoices that he approved for payment over a two- to four-year period. The investigation disclosed that as a result of the Complainant's actions, BART could have underpaid or overpaid PG&E.

As a result of the Complainant's February 27, 2003, e-mail to Ms. Branston, another internal audit investigation was conducted into whether certain invoices submitted by Mr. Hairston should be paid, whether there was fraud in the payment of invoices to Mr. Hairston, and whether there was dishonesty or fraud in the handling of PG&E bills. The Complainant's department procedures were also reviewed as part of the investigation. This investigation resulted in another report by Mr. Northrup dated March 27, 2003, in which he recommended that BART negotiate the outstanding bills with Mr. Hairston, noting that four duplicate payments had been made to Mr. Hairston. (EX A, Tab 6, pp. 269-270.) The investigation found no fraud against the Complainant or Mr. Schultz in the handling of Mr. Hairston's contracts, and no evidence of dishonesty or fraud relating to PG&E bills. Mr. Northrup found that BART could have paid for services that were not rendered under Mr. Hairston's contract because there were inadequate contract management and internal controls in place.

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<sup>4</sup> Ms. Lloyd is the employee who posted the drawing that the Complainant found offensive. The investigation found that she removed the drawing immediately after being informed that a fellow employee was uncomfortable with it. (EX A, Tab 3, p. 259.)

In November and December 2003, the Complainant helped Mr. Schultz on electrical, plumbing, and ventilation issues at his personal residence, partly during work hours and without compensation. (CX 3; HT, pp. 125-126.) Mr. Schultz, aware of the Complainant's experience as a homeowner and owner of rental properties, asked the Complainant's opinion on the three issues, and the Complainant either offered or agreed to help. (HT, pp. 124, 164.)

In October 2004, the Complainant notified Mr. Schultz and Richard J. Leonard, Manager of Truck and Structures at BART, about the continuing oil contamination at Union City Station caused by the underground pipe that he had reported in 1996. (CX 19; HT, p. 85.) He told them that if BART did not clean up the oil, he would notify the Internal Audit Department and the Department of Toxic Substance Control ("DTSC"). In addition, he told them that he would notify BART Board Members "of all of the 9 items" in his list of allegations against BART. (CX 1, CX 19.)

On December 3, 2004, the Complainant's supervisors Mr. Schultz and Mr. Umbreit wrote a written reprimand to the Complainant, regarding the way that he had "misrepresented facts and mislead [sic] BART managers and PG&E in the way [he] handled planning for the event associated with" a \$61,000 rebate from PG&E. (EX A, Tab 7, p. 303.) According to the letter, the Complainant was incorrect when he "informed BART management of PG&E's desire to conduct a press conference," adding that "PG&E felt pressured by [him] to participate in what they thought was a BART request for a press event" and that he "did not respond to management direction during this process." The letter concludes: "[a]ny manner of publicity, press coverage, or Director involvement in any manner involving our outside vendors and/or partners is not an issue for [the Complainant] to decide," and he is "being admonished, in writing, to never again engage in these types of misrepresentations or efforts, as doing so will result in greater discipline, up to and including termination."

On December 20, 2004, the Complainant sent a letter to Director Zoyd Luce asking for his help. The Complainant sent Director Luce documents complaining of financial and civil rights issues, as well as a hydraulic oil leak.<sup>5</sup> The Complainant's letter of December 20, 2004, led Director Luce to contact Sherwood Wakeman, BART General Counsel, on January 9, 2005, to demand an investigation into the allegations. The results of this investigation were reported in an internal audit sent from Mr. Northrup to Mr. Margro, BART General Manager, and Marcia deVaughn, Executive Assistant to the General Manager, among others, on March 15, 2005. (EX A, Tab 7; HT, p. 143.) The report found all of the allegations to be unsubstantiated.

On January 18, 2005, the Complainant notified BART Director Thomas Blalock about the oil contamination at the Union City Station. (CX 3.)

On January 25, 2005, the Complainant met with Director Blalock and a chief engineer to view the oil contamination at Union City Station. The Complainant notified Mr. Schultz of this viewing. (HT, p. 179.)

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<sup>5</sup> These documents were attached as Appendix A to the Internal Audit Report, EX A, Tab 7. Director Luce had forwarded these documents to Sherwood Wakeman, BART General Counsel, in a letter dated January 9, 2005.

On January 30, 2005, the Complainant took photos of the leaking underground pipe (CX 3), which he then sent to DTSC. DTSC received his formal complaint on February 8, 2005, and sent the Complainant an e-mail on February 16 confirming receipt of the photographs. (CX 19.)

Sometime in 2004 or 2005,<sup>6</sup> the Complainant became interested in Green Technology Partners, inc. (“GTPi”) as a potential consultant for BART. The first time that the Complainant had learned about GTPi was through Ed Smeloff at the San Francisco Public Utilities Commission over a year prior to March 2005. (HT, p. 22.)

It was not until January or February 2005<sup>7</sup> that the Complainant first met Jehan Mansur, the Chairman and Chief Executive Officer of GTPi, at a Sierra Club function. (EX C, p. 15.) There they discussed the possibility of GTPi working with BART. The Complainant arranged for Mr. Mansur to meet Dr. Ike Nnaji, the Access Coordinator for BART. (EX C, p. 14.) Dr. Nnaji was interested in GTPi because he saw that GTPi was a renewable energy firm, he was interested in energy issues in Africa, and the Complainant had told him that a federal law passed in 2000 requires or encourages private U.S. businesses to do business with Africa. (EX C, p. 14.) After Dr. Nnaji and Mr. Mansur met, they met with BART Director Sweet on February 24, 2005, to discuss possible work with BART for GTPi. (EX A, Tab 2, p. 254.) Director Sweet had not heard of GTPi before Dr. Nnaji introduced Mr. Mansur to her. (EX C, p. 9.) The Complainant was not present at the meeting. (EX C, p. 9.)

The Complainant talked to Mr. Mansur on various occasions, including once on March 3, 2005, about an anticipated \$20,000 BART study in such a way that led Mr. Mansur to believe that the Complainant had submitted a purchase requisition to secure a project for GTPi, but that Mr. Schultz had refused to sign it. (CX 9.) The purchase requisition submitted by the Complainant, dated March 14, 2005, (EX A, p. 233), was for a \$20,000 study “pertaining to electrical bulk substations supplied by power from PG&E.” (CX 38.) The requisition did not identify a specific supplier and merely said “To Bid” in the space provided for the suppliers’ name. The Complainant did not present this purchase requisition to Mr. Schultz to sign (EX C, p. 3; HT, pp. 102-103), though they talked about the requisition several times (HT, p. 102). The Complainant did not discuss GTPi or a GTPi proposal with Mr. Schultz. (EX C, pp. 2, 17.)

On March 4, 2005, the Complainant called Director Sweet and told her that he had prepared a contract to be awarded to GTPi for Mr. Schultz’s signature and that Mr. Schultz had refused to sign it, saying “Niggers can’t do this kind of work.” (EX B; EX C, p. 9.) After this conversation, Director Sweet immediately contacted BART General Manager Margro’s office and demanded an investigation into the Complainant’s allegations. (EX C, p. 9.) Mr. Margro forwarded this information to Marcia deVaughn, who was assigned the task of investigating the allegations. (EX B.)

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<sup>6</sup> The Complainant alternates between saying that he already knew Mr. Mansur for a year by the time the investigation began in March 2005 (EX C, p. 15) and saying that “it might have been six weeks” prior (EX C, p.15-16; HT, p. 30).

<sup>7</sup> This would be four to six weeks prior to Ms. deVaughn’s investigation interview with the Complainant on March 16, 2005. (See EX C, p. 15.)

From March 4 to March 23, 2005, Ms. deVaughn contacted a number of BART employees and interviewed them about the allegations. (See EX C.) She prepared questions before her interviews and made a contemporaneous record of their answers. (HT, p. 140.)

On March 8, 2005, while she was conducting her investigation, Ms. deVaughn discussed with the Internal Audit Department the contents of the ongoing internal audit concerning the Complainant's allegations in his letter of December 20, 2004, to Director Luce. (See EX A, Tab 7.) This was the first time Ms. deVaughn became aware that the Complainant had reported oil spills. (HT, p. 143.)

On March 10, 2005, Ms. deVaughn interviewed Mr. Schultz and Mr. Umbreit as part of her investigation. She conducted follow-up interviews with them on March 14, March 22, and March 23. (See EX C, pp. 2-3.)

On March 11, 2005, Ms. deVaughn interviewed BART Director Carole Ward Allen. (EX C, p. 8.) Director Ward Allen informed her that Mr. Mansur had called her about trying to get a contract with BART. He had told her that the Complainant, whom she did not know, had given them her private cellular phone number. In a follow-up interview on March 22, Director Ward Allen told Ms. deVaughn that she continued to get calls from Mr. Mansur, whom she would refer back to District staff.

On March 14, 2005, Mr. Mansur wrote to Director Sweet, complaining that "repetitive illegal racial discriminatory practices by BART employee, Mr. Frank Schultz" towards GTPi had resulted in a need to contact her "again." (CX 9.) He expressed his appreciation for the assistance that the Complainant and others had provided to him in his effort to do business with BART. He informed Director Sweet that the Complainant had asked that GTPi be awarded a \$20,000 contract to conduct a study; that the Complainant had informed him on March 3, 2005, that he had submitted to Mr. Schultz a requisition for a \$20,000 BART study by GTPi; and that Mr. Schultz had refused to sign the purchase requisition.

On the same day, BART Executive Manager John Mack received a call from Mr. Mansur, who told Mr. Mack that the Complainant gave him his number and asked him to call. (EX C, p. 11.) The purpose of the call was to notify BART's Office of Civil Rights that Mr. Schultz had discriminated against GTPi.

Also on March 14, 2005, Ms. deVaughn interviewed Director Sweet, who recounted the Complainant's call to her on March 4. In a follow-up interview on March 22, Director Sweet said that she did not call the Complainant, she did not have his phone number, and she would not mistake hearing the word "nigger." She also said that at the time of the call, she did not know the Complainant and she did not remember that the Complainant was the person who had contacted her in 2003 with allegations of racism at BART. (EX C, pp. 9-10.)

On March 15, 2005, the results of the internal audit regarding the Complainant's letter of December 20, 2004, were reported to Mr. Margro and others in the Internal Audit Department. The audit found all of the Complainant's allegations to be unsubstantiated. The allegations concerned racial discrimination against Mr. Hairston (EX A, Tab 7, p. 286), Mr. Schultz forcing the Complainant to work overtime without payment (EX A, Tab 7, pp. 288, 290), dishonest

accounting practices (EX A, Tab 7, p. 289), illegal oil dumping at Union City Station (EX A, Tab 7, p. 291), removal from the 9/80 program in retaliation (EX A, Tab 7, p. 293), use of BART engineering staff for work on Mr. Schultz's private residence (EX A, Tab 7, p. 294), an employee's use of BART funds for personal travel (EX A, Tab 7, p. 295), an "executive" (referring to Mr. Hairston, who was not an executive but a contractor) being terminated for reporting poor electrical purchase decisions (EX A, Tab 7, p. 298), being threatened with termination for contacting the Directors (EX A, Tab 7, p. 299), and coping with physical threats in the workplace (EX A, Tab 7, p. 300). In response to the Complainant's allegation of illegal oil dumping, the audit found that there was "a leaky pipe that was fixed in the normal course of business." The audit also responded to the Complainant's assertion that he did not report the spill at the time because he feared retaliation. It found that the Complainant had previously used procedures that the Respondent had in place for reporting such issues. (EX A, Tab 7, p. 291.)

On March 16, 2005, Ms. deVaughn interviewed the Complainant, who was accompanied by Norma del Mercado, a union representative. He denied that he called Director Sweet, saying that Director Sweet called him, asking why GTPi did not have a contract with BART. (EX C, p. 15.) He described the nature of his interactions with GTPi, and Ms. deVaughn reminded him of the written reprimand he received in January 2005 saying that potential dealings with outside vendors exceeded the bounds of his job duties. (EX C, p. 16.)

On March 21, 2005, Ms. deVaughn conducted a follow-up interview with the Complainant. (EX C, pp. 17-18.) They discussed the events surrounding Mr. Hairston's payments in 2003, BART Labor Relations' access to the Complainant's performance appraisals, the Complainant's allegations of dishonest accounting practices in BART's dealing with PG&E, and racism in BART's dealings with contractors. The Complainant also recounted that he told Director Sweet about being made to work overtime in retaliation. When asked whether he had reported the overtime work to his union, the Complainant said that he had, but the union representative said that he had not.

The next day, on March 22, the Complainant sent an e-mail to Ms. deVaughn purporting to memorialize their meeting. (CX 3.) The e-mail notes that he showed her photos of the oil leaks at Union City Station, and that he told her that he would have no choice but to "go to outside agencies like the [DTSC] or the NAACP" if BART managers "refuse to communicate with me about the problems." (CX 21.)

On March 25, 2005, Ms. deVaughn notified the Complainant that BART was seeking to terminate his employment in response to his actions involving GTPi, stating that he was not only derelict in his duties, but he intentionally caused harm to Mr. Schultz. (EX A, Tab 1, p. 252.) In the letter, Ms. deVaughn concluded that the Complainant "deliberately concocted a false story, one that described [his] manager as being racist," and that he thereby "brought discredit on the District, impugned [his] manager and failed to perform [his] duties as an employee in a reasonable manner." (EX A, Tab 1, pp. 252-253.)

On April 6, 2005, the Complainant wrote a letter to the BART Board of Directors, complaining that Ms. deVaughn's charges against him were false and responding to the charges. (EX D.) In the letter, the Complainant said that he contacted GTPi and other consultants after office hours for non-BART projects; that "the records will show that someone took the Black



Consultant off the bidder's submittal list and left the white consultants on the list"; that he did not call Director Sweet; that he gave a requisition to Mr. Schultz but it was not for GTPi; that he never heard Mr. Schultz use the word "nigger," nor did he ever use it himself; and that his allegations of racial discrimination by the Respondent, conveyed to GTPi, had basis in the "high number of discrimination cases that have been and are being brought against the District."

On April 12, 2005, the Respondent gave the Complainant notice of his disciplinary hearing, which was to be held April 21, 2005.

On April 19, 2005, the Complainant reported the oil contamination at Union City Station to the U.S. Department of Labor ("DOL"), Occupational Safety and Health Administration ("OSHA"). (CX 3; *See* ALJX 1.)

On April 21, 2005, the Complainant's disciplinary hearing was held. He was represented at the hearing by an attorney retained by his union. (HT, p. 77.)

On May 17, 2005, the Complainant received a letter from the Respondent notifying him of his termination effective May 20, 2005.

On June 9, 2005, the Complainant filed his complaint to the DOL Investigator about his termination. (ALJX 1.)

On June 6, 2006, Robert Aragon, an engineer with the DTSC, wrote Gary Jensen, the BART Principal Engineer, informing him that DTSC had responded to a complaint of oil contamination at the Union City Station on March 23, 2006, and found high levels of contamination in a small area near a leaking pipe connection. DTSC recommended that BART remove any remaining hydraulic oil from the abandoned pipe and permanently seal the end of the pipe that remained open in a machine room. (CX 18.)

On June 24, 2006, the Complainant wrote a letter to DOL Investigator Joshua Paul, complaining that BART has a training manual called the "Orange Book" containing a rule that "contacting any outside organization like OSHA is a 'firing offense'." (CX 23.)

After Investigator Paul finished his investigation, the Acting Regional Administrator for OSHA issued findings that the Complainant was terminated for legitimate non-discriminatory reasons.<sup>8</sup> (ALJX 2.)

On July 19, 2006, the Complainant requested a hearing before the DOL, Office of Administrative Law Judges (OALJ).

## **DISCUSSION**

### **Applicable Law**

The employee protection provisions of the SDWA, FWPCA, and TSCA prohibit an employer from firing or discriminating against an employee for engaging in a protected activity

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<sup>8</sup> The report received by the OALJ on July 24, 2006, was undated.

under the particular statute. Protected activities include assisting or participating in any action for the purposes of carrying out the intent of the statutes. 29 C.F.R. § 24.102.

Claims that a covered employer retaliated against an employee's protected activity are evaluated under the framework used in cases arising under Title VII of the Civil Rights Act of 1964 and other employment discrimination laws. *See St. Mary's Honor CHT v. Hicks*, 509 U.S. 502 (1993). The complainant must first establish a *prima facie* case by showing that: (1) the employer is covered by the particular statute, (2) the complainant engaged in a protected activity, (3) the employer had knowledge, actual or constructive, of the protected activity, (4) the employer took some type of adverse action against the employee, and (5) there is evidence sufficient to at least raise an inference that the protected activity was the reason for the adverse action. *See Macktal v. U.S. Dept. of Labor*, 171 F.3d 323, 327 (5th Cir. 1999). Temporal proximity between the protected activity and the adverse action may raise such an inference. 29 C.F.R. § 24.104(d)(3).

The *prima facie* case creates a presumption of retaliation, which the respondent overcomes by producing a legitimate, non-retaliatory reason for the adverse action. The complainant must then establish by a preponderance of the evidence that the employer's explanation was a pretext, and that the protected activity was the actual reason. At that point, the respondent may escape liability if it shows, by a preponderance of the evidence, either that it was not motivated in whole or in part by the protected activity, or that even if it was motivated in part by the protected activity, it would have reached the same decision even in the absence of protected activity. *See Dartey v. Zack Co. of Chicago*, No. 82-ERA-2, slip op. at 6 (Sec'y Apr. 25, 1983).

However, where a case has been fully tried on the merits, the relevant inquiry is whether the complainant established by a preponderance of the evidence that the adverse action was in reprisal for the protected activity. *See Martin v. Azko Nobel Chemicals*, ARB No. 02-031, ALJ No. 01-CAA-16, slip op. at 3-4 (July 31, 2003).

### **Analysis**

The Complainant failed to show that the Respondent's adverse actions against the Complainant were in reprisal for reporting potential environmental violations to the Respondent and DTSC. The Complainant noted the temporal proximity between his reportings of the oil spills and the Respondent's adverse actions, but failed to show by a preponderance of the evidence that the legitimate, non-retaliatory reason offered by the Respondent was a pretext and that the Respondent would not have taken the adverse actions but for the fact that the Complainant reported the oil spills.

The Complainant claimed that the Respondent took several adverse actions against him in retaliation for his protected activity: (1) discontinuing his 9/80 program (HT, p. 42), (2) permitting his manager, Mr. Schultz, to force him to perform work on his private residence (HT, p. 55), and (3) terminating his employment (ALJX 1). I address these claims in turn.

### Discontinuation of the Complainant's 9/80 Program

The 9/80 work schedule allows an employee to take one day off every two weeks in exchange for working eight nine-hour days and one eight-hour day during those two weeks. The Complainant had been working within this arrangement in order to visit his child who had medical issues. (HT, p. 41.) The Complainant was later taken off the program by Mr. Schultz. (HT, p. 42.) The Complainant alleged in his letter of December 20, 2004, to Director Luce that Mr. Schultz did so "in retaliation" and because he "delights in meanness." (CX 1.) He alleged again at the hearing that this was in retaliation for reporting the oil spills. (HT, p. 42.)

The Complainant did not offer evidence to support this claim besides these bare allegations. In the course of the internal audit that investigated this and his other allegations, the Complainant stated that the problem was a "non-issue" and that it should not be further investigated. (EX A, Tab 7, p. 293.) He also stated to the Internal Audit Department that "he accepts the fact that managers have absolute authority to change employee work schedules." (EX A, Tab 7, p. 293.) As a result, no further evidence was gathered that may show that his manager's action was in retaliation for reporting the oil spills.

The Complainant has failed to show that his removal from the 9/80 program was in reprisal for any protected activity.

### Work Performed on Mr. Schultz's Residence

The Complainant alleged that he was required to work at Mr. Schultz's private residence in retaliation for his activities. (CX 3; HT, p. 55.)

The sequence of events does not give rise to an inference of retaliation to establish a *prima facie* case. The Complainant performed the work on Mr. Schultz's residence in November and December of 2003. He reported oil spills once in 1996, and did not make more reports until October 2004. The lack of temporal proximity between the protected activity in 1996 and the work on Mr. Schultz's residence in 2003 does not help the Complainant's case. Neither does the fact that this work on Mr. Schultz's residence took place *before* the Complainant's later disclosures.

The Respondent stated that the Complainant voluntarily helped Mr. Schultz in response to questions he asked the Complainant about his home. The Complainant and Mr. Schultz disagreed as to whether the Complainant offered to help or merely complied with Mr. Schultz's request. The Complainant maintained that he did not offer to do the work (HT, p. 125) and complied with Mr. Schultz's request because he feared that Mr. Schultz "would have kept Connie camping on [him] until he could build up a big file on every little thing [he] did wrong." (HT, p. 124.) But the reason behind the Complainant's actions, based on his perceptions of Mr. Schultz, is irrelevant to the issue in this case. The question is whether the *Respondent's* action was motivated by the Complainant's protected activity, that is, reporting the oil spills at Union City Station in 1996. The Complainant has not offered evidence to show that it was; he merely restated allegations made in previous years against the Respondent. (*See* EX A, Tab 7, p. 290.) Therefore, the Complainant failed to show that he was forced to work on Mr. Schultz's residence in retaliation for his protected activity.

### Termination of Employment

The Respondent articulated a legitimate, non-retaliatory reason for terminating the Complainant: the Complainant made false statements in the course of his dealings with GTPi that harmed the Respondent. (*See* EX A, Tab 1.) For the reasons set out below, I find that the Complainant has failed to show that the Respondent's proffered reason was a pretext for retaliating against his protected activity.

#### *Temporal Proximity Raises an Inference of Retaliation*

The Complainant establishes a *prima facie* case by noting the temporal proximity between his protected activity and his termination by the Respondent. The Complainant reported oil spills seven times: once in 1996, once between 1996 and October 2004, once in October 2004, once in December 2004, twice in January 2005, and once in April 2005. The Complainant caused the Respondent to become aware of each reporting, directly or indirectly (e.g., internal audit reports). All but the final reporting occurred before the Complainant received his Notice of Proposed Termination on March 25, 2005 (EX A, Tab 1). Four of the seven reportings were within a year before the Notice of Proposed Termination (articulating the Respondent's reasons for termination) was issued.

#### *The Complainant Made False Statements About the Respondent to Mr. Mansur and Director Sweet*

The Complainant was terminated not for his protected activity, but for spreading the false statement that Mr. Schultz refused to grant a contract to GTPi while uttering a racist statement. The Complainant denies making the statement, but his denial is not credible. Both Mr. Mansur of GTPi and Director Sweet reported to BART staff that the Complainant had made the statement.

The Complainant denied that he ever heard Mr. Schultz say "nigger" and that he, himself, ever used the word. (EX D, p. 332.) However, the Complainant has alleged in the past that Mr. Schultz was racist. Indeed, the Complainant maintained that the Respondent was racist, saying that the Respondent took GTPi, a black consultant, off the bid list. (CX 42.) Furthermore, he clarified at the hearing that by the term "white supremacists" in his February 14, 2003, e-mail to Ann Branston, he was referring to persons within BART, though not specifically to Mr. Schultz and Mr. Umbreit. (HT, p. 95.) He also mentioned the "high number of discrimination cases that have been and are being brought against the District" to support his view that the Respondent was racist. (EX D.)

The Complainant denied that he ever called Director Sweet, saying instead that she called him to ask about the status of a contract for GTPi. I do not find this denial to be credible. Director Sweet did not know who the Complainant was and had no reason to contact him. The Complainant, on the other hand, had contacted Director Sweet before, and was eager to get GTPi involved with BART through various channels. For example, on March 11, 2005, the Complainant provided Mr. Mansur with Director Ward Allen's phone number so that he could ask about a potential contract with BART. (*See* EX C, p. 8.)

I find that the Complainant's history of making allegations of racism against the Respondent, combined with his implausible denial of calling Director Sweet, renders Director Sweet's report that the Complainant called her with racism claims more credible. Given the Complainant's history of exceeding the scope of his job duties in his dealings with outside companies, it is likely that he misled Mr. Mansur to believe that there was a contract opportunity with BART when one did not exist. His urging of Mr. Mansur to contact members of the BART Board of Directors, together with attributing racist practices to the Respondent, were parts of the same contractor-soliciting behavior for which he was reprimanded on December 3, 2004. (EX A, Tab 7, p. 303.)

The Complainant's false statements to Mr. Mansur and to the BART Directors damaged the reputation of Mr. Schultz and of BART among community members. This, coupled with the false statements he made to the BART investigators, justifies his termination. I find BART terminated the Complainant for reasons unrelated to his protected activity.

### ORDER

Accordingly, it is ordered that the Complainant's claims be DISMISSED.

JENNIFER GEE  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).