In the Matter of:

KATHERINE A. GALE, **ARB CASE NO. 98-143**

COMPLAINANT, **ALJ CASE NO. 97-ERA-38**

v. **DATE: July 31, 2002**

OCEAN IMAGING,

and

OCEAN RESOURCES, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Michael I. Halfacre, Esq., *Little Silver, New Jersey*

For the Respondents:
J. S. Lee Cohen, Esq., Peter A. Tucci, Jr., Esq., *DeCotiis, Fitzpatrick & Gluck, Teaneck, New Jersey*

FINAL DECISION AND ORDER OF DISMISSAL

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974, (ERA), as amended. 42 U.S.C. § 5851 (2000), and implementing regulations at 29 C.F.R. Part 24 (2001).

Complainant, Katherine A. Gale, a former nuclear medical technician at Respondents' medical imaging center in Toms River, New Jersey, [1/] alleged that she was fired for engaging in the protected activities of telling her office manager that prior governmental approval was necessary in order to move and reconstruct a laboratory containing radioactive materials and for

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[1/] This proceeding was originally brought against X-Ray Associates, Complainant's previous employer. In 1994 Respondents purchased X-Ray Associates and retained its name for the Toms River, New Jersey facility employing Complainant. The caption of this case was amended to reflect the proper Respondents. *See* Recommended Decision and Order at 2; Jan. 20, 1998 transcript (postponing hearing), at 5-6, 11-12, 25-27, 29.

contacting the New Jersey Department of Environmental Protection (DEP) in order to obtain information for such approval. Obtaining the requisite approval resulted in delays in the movement of the laboratory.

The Administrative Law Judge (ALJ) concluded that Complainant was fired in contravention of the ERA for these whistleblowing activities, rather than for Respondents' proffered reasons: absenteeism, insubordination, rudeness to a patient, outbursts before patients and staff, violating hygiene and safety procedures (including Complainant's misadministration of a radioactive dye to a patient), and confrontational and disrespectful behavior towards a staff physician. Recommended Decision and Order (R. D. and O.), July 10, 1998, slip op. at 12-14. We reverse the ALJ's recommended decision and find for Respondents. For the reasons discussed below, we hold that Complainant has not proved by a preponderance of the evidence that her protected activities contributed to her discharge, as required by the ERA. 42 U.S.C. § 5851(b)(3)(c).

FACTUAL AND PROCEDURAL BACKGROUND

I. Facts

The record supports the following findings of fact. Respondents operate a medical imaging center in Toms River, New Jersey. Complainant was employed by Respondents as a nuclear medicine technician from 1994 until her employment was terminated in September, 1996.

Complainant's attitude towards her work and her general work performance began to deteriorate in the spring of 1996. T.147-48. Complainant testified that she "started to really, really myself suffer from the pressure and the constant craziness." T. 34. She became increasingly dissatisfied and agitated, voicing frequent criticisms in front of staff members and sometimes in the presence of patients. T. 148-49, 182; RX 14. She called in sick in May 1996 and was out sick for more than a week in June. T. 35, RX 14. Her supervisor, office manager Marilyn Ventura, attempted two or three times to reach her at home during her May absence, "to see how things were going and when she thought she would be in . . .. There was never an answer at her house." T. 150. In violation of Respondents' sick leave policy, Gale did not obtain a doctor's note for her May absence, despite being requested to supply one. T. 150-151, 180. Although she was able to arrange for some substitute coverage, her absences sometimes required Ventura to try to find another technician to accommodate the patients, resulting in last-minute test cancellations and patient rescheduling. T. 154-55, 183; RX 14.

She was so abrupt with a patient on March 11, 1996, that Respondents sent the patient a letter of apology. RX 8. On July 22, she was observed eating in the nuclear medicine examination room notwithstanding her clear understanding that this unhygienic activity was prohibited. T.122; RX 9.

Her performance also affected patient care and safety. On August 16, 1996, Complainant's failure to properly investigate a physician's confusing referral note containing a

term unknown to her resulted in the "misadministration" of the wrong radioactive isotope. She proceeded to apply the wrong test, rather than seek clarification from the in-house radiologist. T. 156-58; RX 12. This "misadministration" caused management to file an Incident Report on August 21 with the Nuclear Regulatory Commission (NRC) explaining the event and promising corrective action, *i.e.,* that no patient would be injected with an isotope unless the referral doctor's note was completely clear to the technologist (Complainant) and when the note was unclear, the technologist would request clarification from the in-house radiologist and obtain a new written directive before the patient was injected. RX 13 at 3.

On September 5, 1996, Complainant reminded Jack Colbert, Respondents' business manager, that her employee performance evaluation was four months overdue and that she expected a pay raise contingent upon its completion. He promised that the evaluation would be completed and that she would receive a pay raise, although the amount was unspecified. Complainant testified that during their conversation, Colbert said that "nobody wanted to get rid of me or fire me." T. 43. Since Colbert did not testify at the hearing and Complainant did not elaborate, the reasons for Colbert's statement and the precise context in which it was allegedly made, are not in the record.

On September 12, 1996, Complainant received the promised evaluation, which was dated September 5. T. 53. While the rating she had received for the previous year (1995) had been between "exceptional" and "clearly outstanding," the rating for 1996 in the new evaluation fell between "some deficiencies present" and "satisfactory." In the new evaluation, which consisted of fifteen traits rated on a scale of one to four, Gale was rated unsatisfactory (zero) in judgment and stability, and "some deficiencies evident" (one) with respect to innovation, courtesy, cooperation, reliability, perseverance, and attendance. She received no rating higher than satisfactory (two) for any item. The evaluation noted that while she was knowledgeable in her field and had a good rapport with patients, her judgment and stability were of daily concern; she had taken unscheduled leaves of absence without warning and had not followed office policy regarding submitting doctors' notes; and despite her many criticisms, she had never voiced suggestions or solutions to the many problems she perceived. The evaluation recommended a 2 per cent cost of living increase. R. D. and O. at 8; CX 7 at 4. Ventura testified that the evaluation was done on or before September 5, 1996, that Dr. Mezzacappa had prepared the numerical ratings, that Dr. Rondina had written the comment relating to Gale's judgment and stability and unscheduled absences, and that she had authored the comment relating to Gale's criticisms. T. 170-171.

On September 12, 1996, Respondents were in the process of renovating the facility. T. 44. When a construction worker requested Complainant to remove materials from the "hot lab," a restricted area containing radioactive materials, Complainant refused to comply because of her belief that state and federal permission were required. T. 44-46, 77-78, 173. When Complainant informed Ventura of her belief, Ventura asked her to contact the DEP for information on proper procedures. T. 173. Complainant left a message for the DEP to return her call. When no response was received from the DEP, two hours later, Ventura asked Complainant to phone the agency again. Complainant spoke briefly to an agency representative and handed the phone over to Ventura. In accordance with the advice DEP apparently then gave to Ventura, Sree Murthy,

Respondents' medical physicist, sought NRC approval through a series of correspondence commencing on September 16. T. 175-76, 196. The hot lab was moved following the NRC's approval of Respondents' license amendment. T. 176-77. Ventura testified that she was not angry at Complainant for bringing the necessity of a license amendment to her attention and that she considered it "absolutely" appropriate for Gale to have done so. T. 174.

In the early morning of September 25, 1996, Complainant was involved in a series of confrontations with Dr. Lapidus, a staff radiologist. Perceiving that a physician's requisition for a renal scan was unclear, Complainant first approached Lapidus for guidance but then told him, "Oh, you won't know" and walked away. She then returned and described the requisition to Lapidus, who told her to obtain clarification from the referring physician's office. A half hour later she approached Rondina, another radiologist, and asked whether she should proceed with the scan. Rondina asked whether she had called the referring physician's office for clarification (the same instructions previously given by Lapidus). She replied that she had left a message because the office had not yet opened for business. Lapidus overheard this discussion and interjected, "I thought I asked you to get in touch with the referring physician's office." Complainant responded, "[Y]ou can't tell me to do anything." When Rondina asked what she had just said, she replied, "He doesn't even have a user's license" (Lapidus memorandum) or "He can't tell me what to do. He's not on the license." (Rondina memorandum). RX 10 (Lapidus memo); RX 11 (Rondina memo); T.177-78.

Complainant was fired on September 26, 1996, the day after her confrontation with Drs. Lapidus and Rondina. Ventura testified that the decision to fire Complainant was made jointly by Ventura, Colbert and the doctors because of "a combination of many instances which we have gone through. The unexplained absences, the insubordination, I would call it, my feeling of and -- you know -- documentation of her constant outbursts in front of patients and other coworkers. It was a culmination of all of these things." T.178-79. Ventura stated that the reasons for Gale's dismissal "absolutely" did not have anything to do with Gale's telling her that there may be a a violation of the Nuclear Regulatory Act or the DEP Regulations. T. 179. She also affirmed that, to her knowledge, Respondents did not have a policy requiring that a decrement in an employee's performance be brought to the employee's attention so that the employee could overcome the deficiencies or problems observed, and that Gale's termination from employment was processed like any other. T. 197.

II. Procedural History

On December 28, 1996, Complainant filed a brief letter of complaint with the National Office of the U.S. Department of Labor's Wage and Hour Division, then charged with processing, investigating and initially deciding complaints under the ERA. 29 C.F.R. §§ 24.3, 24.4 (1996); RX 1.

Richard C. Richards, the Wage and Hour Division's New Jersey District Director, sent Complainant a letter on February 19, 1997, requesting that she provide more specific information. RX 2. On March 17, 1997, Complainant replied that she was too preoccupied to furnish the information at that time and inquired about any time limitation for pursuing her

complaint. RX 3. On April 4, 1997, Richards informed Complainant that her failure to provide the requested information within the 180-day statutory time limitations period resulted in the dismissal of her complaint. His letter informed her of her right to request a hearing within five calendar days of receipt of his letter by submitting a telegram or facsimile to the Chief Administrative Law Judge of the U.S. Department of Labor. RX 4. Complainant requested a hearing in a letter dated April 9, 1997. ALJ file; R. D. and O. at 3.

At the hearing, Respondents argued that the complaint should be dismissed because Complainant had not requested a hearing within the five-day filing requirement. Respondents' brief to the ALJ at 2-3. However the ALJ found that Complainant's request for a hearing had been timely filed. R. D. and O. at 3.

Proceeding to the merits, the ALJ ruled that Complainant had established a *prima facie* case of discrimination because: (1) her alleged reasons for her discharge, informing Ventura of the need for proper permits for movement of the hot lab and phoning the DEP on Ventura's behalf regarding obtaining such permits, were protected activities; (2) Respondents were aware of these protected activities through Ventura; and (3) the close two-week proximity between these protected activities and her discharge raised an inference of discrimination. R. D. and O. at 10-12. Ostensibly applying the pretext analysis framework followed by the Secretary of Labor and the Board in deciding cases involving circumstantial evidence of discrimination under the ERA, the ALJ held for Complainant because he found each of Respondents' proffered reasons for her discharge insignificant and therefore pretextual. He also found that a preponderance of the evidence weighed in Gale's favor. *Id*. at 12-14. Accordingly, he issued a preliminary order in accordance with 29 C.F.R. § 24.7(c) directing Respondents to pay complainant $66,585.11 in back pay plus interest. *Id*. at 16. The ALJ subsequently issued a recommended order awarding attorney's fees and costs and an order denying Respondents' motion to vacate pending final decision of the Board.

SCOPE OF REVIEW

The Board has jurisdiction to decide appeals from recommended decisions under the ERA. 42 U.S.C. § 5851, 29 C.F.R. § 24.8 (2001), Sec. Ord. No. 2-96, 61 Fed. Reg. 19,978 (May 3, 1996). Under the Administrative Procedure Act, the Board has plenary power to review an ALJ's factual and legal conclusions. See 5 U.S.C. § 557(b) (2000). Accordingly, we are not bound by the findings and conclusions of the ALJ, but retain the freedom to review factual and legal determinations *de novo*. *Smyth v. Johnson Controls, World, Inc.,* ARB No. 99-043, ALJ No. 98-ERA-23,slip op. at 4 (June 29, 2001); *Overall v. Tennessee Valley Authority*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 13 (Apr. 23, 2001). In this process, we give deference to the demeanor-based credibility determinations of the ALJ. *Phillips v. Stanley Smith Security, Inc.*, ARB No. 98-020, ALJ No. 1996-ERA-30, slip op. at 10 (Jan. 31, 2001).

ISSUES PRESENTED

The following issues are presented: (1) whether Complainant's request for a hearing was timely; and (2) if the request was timely, whether Complainant has proved her case of discrimination under the ERA.

DISCUSSION

A. Complainant's Request for a Hearing was Timely.

As the ALJ explained in finding Complainant's April 11, 1997 faxed hearing request timely under 29 C.F.R. Part 24 (1996):

> Once the Department issues its decision, the complainant has five days to request a hearing, by forwarding either a telegram or facsimile to the Chief Administrative Law Judge. 29 C.F.R. § 24.4(d)(2)(i). Computation of this period requires that the day following the receipt of the decision commences the time period, the fifth day is included in the computation, and intermediate Sundays are excluded since the prescribed period is less than seven days. 29 C.F.R. § 18.4(a).

R. D. and O. at 2. Therefore, the ALJ was correct in finding that Complainant's hearing request, dated April 9, was timely when faxed on April 11 because "even had the Department's letter of dismissal been mailed on the date which appears on its face (Friday, April 4, 1997), and been received the following day (Saturday, April 5), [e]xcluding the day of receipt and Sunday, April 6, in accordance with [29 C.F.R. § 18.4(a), Complainant] had until Friday, April 11 to send her request by facsimile to the Chief Administrative Law Judge. . .. " *Id.* at 3.

Contrary to Respondents' initial ARB brief at 4, the record shows that Complainant faxed her hearing request to the Chief Administrative Law Judge on "Apr-11-97 11:25 TG." ALJ file (pencil marked "97-ERA-38"). Respondents' contention that the letter was not received until April 14, 1997, and therefore was out of time, fails to recognize that the copy denoted Exhibit L in its brief to us, stamped "97 APR 14 PM 1:26," is also marked U.S. DEPARTMENT OF LABOR SOUTHERN N.J." Exhibit L is a copy of Complainant's hearing request which she sent to Richard C. Richards, Wage-Hour's New Jersey District Director, pursuant to his April 4, 1997 letter dismissing her complaint. Exhibit L contains the notation "Mr. Richards [indecipherable] copy as directed." Unlike the faxed hearing request to the Chief ALJ, the copy sent to Richards does not contain Complainant's full signature, only her initials.

Accordingly, because Complainant timely faxed her hearing request on April 11, to the Chief Administrative Law Judge, the fact that a copy was received by the Wage-Hour New Jersey District Director on a later date does not preclude her appeal from being considered timely filed, and we find that it was so filed.

B. Complainant Failed to Sustain her Burden of Proof.

1. Legal Standard and Framework for Analysis

The ERA prohibits an employer from discharging or otherwise discriminating against an employee with respect to the employee's compensation, terms, conditions or privileges of employment because the employee has notified the employer of an alleged violation of the Act, refused to engage in any practice made unlawful under the Act, testified regarding any provision of the Act, commenced any proceeding under the Act, testified in any such proceeding or participated in any such proceeding. 42 U.S.C. §5851(a). We may determine that a violation has occurred only if the complainant has demonstrated by a preponderance of the evidence that any of the aforementioned protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint. 42 U.S.C. § 5851(b)(3)(C); *Trimmer v. U.S. Dept. of Labor*, 174 F.3d 1098 (10th Cir. 1999); *Dysert v. U.S. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997). However, relief may not be ordered if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such protected behavior. 42 U.S.C. § 5851(b)(3)(D).

We apply the framework of burdens developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws, including the Age Discrimination in Employment Act. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 513 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243, 250 (3d Cir. 2002); *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 277-78 (7th Cir. 1995); *Overall v. Tennessee Valley Authority*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 14-16 (Apr. 30, 2001).

Under the burden-shifting framework of *McDonnell Douglas* and its progeny, *supra*, a plaintiff must establish a *prima facie* case of discrimination. If the plaintiff succeeds in establishing a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. This burden is one of production, not persuasion, and involves no credibility assessment. Should the defendant carry this burden, the plaintiff must be afforded the opportunity to prove by a preponderance of the evidence that the reasons offered by the defendant were not its true reasons but were a pretext for discrimination. The factfinder may consider the evidence establishing the plaintiff's *prima facie* case and inferences properly drawn therefrom in deciding whether the defendant's explanation is pretextual. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. at 146. The ultimate burden of persuading that the Respondent intentionally discriminated against Complainant remains at all times with Complainant. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 502. Thus, we review the record to determine whether the Complainant's protected activity was a factor in her dismissal.

2. Analysis

In this case, the ALJ ruled that Complainant's discussion with Ventura regarding the need to obtain proper governmental approval for removal of the hot lab, and her subsequent calls at Ventura's behest to the New Jersey DEP regarding obtaining information for such federal and/or state approval, were protected activity. R. D. and O. at 10-11. He also ruled that Respondents had knowledge of these protected activities and that Complainant's discharge was an adverse action. R. D. and O. at 11. Respondents do not contest the presence of protected activity, knowledge of the activity, or adverse action. *Id*. at 10-11; Respondents' brief to ALJ; Respondents' reply brief to ARB. The issue before us, therefore, is whether Complainant's protected activity was "a contributing factor" in her dismissal. 42 U.S.C. § 5851(b)(3)(B).[2/]

Respondents argue that the complaint should be dismissed because: (1) the two-week proximity between Complainant's protected activities and her discharge does not establish the necessary causation for a *prima facie* case and (2) assuming, *arguendo*, that Complainant has made out a *prima facie* case, she has not shown that Respondents' legitimate, nondiscriminatory reasons were pretexts for discrimination.

We agree with the ALJ that Complainant established a *prima facie* case because she demonstrated: (1) her engagement in protected activity; (2) Respondents' awareness of her engagement in the protected activity; (3) an adverse employment action; and (4) a sufficient inference of retaliatory motive. *Doyle v. U.S. Secretary of Labor*, 285 F.3d at 250; *Macktal v. U. S. Dept. of Labor*, 171 F.3d 323, 327 (5th Cir. 1999); R. D. and O. at 10-12. Under the circumstances of the instant case, the two-week proximity between Complainant's protected activity and Respondents' adverse action is sufficient to raise an inference of retaliatory motive for purposes of a prima facie case. [3/] *Id*. at 11. *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Tracanna v. Arctic Slope Inspection Service,* ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8-9 (July 31, 2001).

[2/] Because we find that Complainant has not established that her protected activity was a contributing factor in her discharge, we do not address the question of dual motive under 42 U.S.C. § 5851(b)(3)(D), providing: "Relief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such [protected] behavior."

[3/] The ALJ stated that "where protected activity and an adverse action occur within a close period of time, that coincidence constitutes solid evidence of causation, an inference of a retaliatory motive is justified, and a prima facie case of discharge is established." R. D. and O. at 11. It is correct that close temporal proximity (of the protected activity and the adverse action) may be sufficient to establish an inference of a retaliatory motive for purposes of a *prima facie* case; however, standing alone, it is not "solid evidence" of causation attributable to retaliatory motive. Rather, the temporal proximity must be considered in the context of the specific facts and circumstances. *See Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279; *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168 at 9.

However, because this case has been fully tried on the merits, we move beyond the question of whether Complainant has presented a *prima facie* case to analysis of the evidence on the ultimate question of liability. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 713-714 (1983).

Respondents' limited burden of production under *McDonnell Douglas* and related cases, *supra*, was satisfied by articulating nondiscriminatory reasons for Complainant's discharge -- absenteeism, rudeness to a patient, outbursts before patients and staff, violation of hygienic and safety procedures, including the misadministration of a radioactive dye to a patient, and confrontational, disrespectful and insubordinate behavior towards a staff physician. R. D. and O. at 12-14. Respondents offered proof of their rationale through the testimony of Ventura and various exhibits addressed to each of their alleged nondiscriminatory reasons. *Id*. at 6-9.

Complainant contends that the grounds cited by Respondent were "not enough to justify termination" in light of Gales's "exemplary employment history."[4/] However, the quality of her job performance with Respondents and their predecessor prior to her declining performance commencing in the Spring of 1996 is irrelevant, because Respondents' proffered reasons for her discharge concern her behavior during the latter period. Moreover, the thrust of Complainant's argument is that it was wrong, unfair, or unjust for Respondents not to weigh the grounds that they cited against Complainant's past performance and find in favor of retaining her, and that therefore Respondents' rationale was pretext. However, "[I]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible . . . [rather] he must show that the explanation is a 'phony reason.'" *Kahn v. U.S. Secretary of Labor*, 69 F.3d at 277, citing *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994). Thus, even if Complainant's contention were correct, that would be insufficient to establish pretext.

Complainant attacks Respondent's proffered non-discriminatory reasons for dismissing Gale as pretext on the following bases: 1) Respondents' reliance on the complaint of rudeness to a patient, which occurred in March, ignored praise from a patient provided in much closer proximity; 2) the incident of eating in the laboratory took place two months before Gale's protected activity and Gale's employment was not terminated at the time it occurred; 3) there were no "excessive unexcused absences" -- Ventura testified that the only violation of office policy was one day without a doctor's note and that Gale had not exhausted her accumulated sick time; further, Ventura's testimony that she had to find someone to accommodate patients is contradicted by Ventura's testimony that Gale arranged for coverage when she was absent; 4) the misadministration was immediately reported to Rondina, who advised her, contrary to law, not to report it, and Gale was not even disciplined for it at the time it occurred; and 5) the incident with Lapidus was trivial. Complainant's Brief at 16-18.

[4/] *See* Complainant's pretext discussion in its brief to ARB at 16-18 ("Respondent supplies, on appeal, five reasons for termination. However, none of these was considered by Respondent as grounds for termination prior to the protected activity, and taken in light of Ms. Gale's exemplary employment history, are not enough to justify termination.").

We have examined the incidents cited by Respondents in support of their rationale, the Complainant's attack on them, and the reasons cited by the ALJ for finding them pretextual. In each instance, there is evidence that the incident did occur as Respondents stated. Unlike the ALJ, based on our examination, we find that Respondents' rationale for their action is credible and that Complainant has failed to show by a preponderance of the evidence that it was a pretext for discrimination. We consider each incident below.

The ALJ dismissed the incident of discourtesy which prompted the letter of apology to a patient at RX 8 on the basis that it was "a single incident" substantially outweighed by Gale's exemplary skills and record of service (as documented by her resume, prior evaluation, letters from her prior employer, a staff physician and a patient). R. D. and O. at 13. With the exception of the letter from a patient, all of the evidence cited by the ALJ (as documenting Gale's skills and record of service) related to Gale's performance prior to the spring of 1996. None of that evidence disproves the existence or veracity of the letter cited by Respondents, which related to an incident in March of 1996 and resulted in Respondents' letter of apology that April. (See also our analysis *supra* of Complainant's argument concerning Gale's exemplary record.) Moreover, we find that the evidence cited by the ALJ does not make it unreasonable to believe that the Respondents considered the incident of discourtesy, along with the other incidents they cited, as a basis for terminating Gale's employment. Additionally, the performance evaluation of September 5, which , based on its date and on Ventura's unrebutted testimony, was created less than a month before the decision to terminate Gale's employment and prior to Gale's protected activity, evidences Respondents' view (as of that time) of Gale's courtesy to patients. In that document, Respondents rated Gale as having deficiencies in the category of "courtesy." That rating is consistent with Respondents' citing of the discourtesy to a patient incident as a factor in her dismissal. It supports finding that Respondent's consideration of the discourtesy incident was genuine, rather than pretextual.

The ALJ also indicated that Colbert's alleged statement, "nobody wants to get rid of or fire you" (made prior to the protected activity) was a factor in his conclusion that Gale's rudeness to the patient did not lead to her discharge. R. D. & O at 13. The reasons and context for Colbert's alleged statement, assuming it was made, were not established. However, the Colbert statement is not inconsistent with Respondents' considering this incident of rudeness when deciding to terminate Complainant's employment after the confrontation with Lapidus. The Colbert statement was not a promise to ignore Gale's past failings should an additional incident occur thereafter. We discuss *infra* whether Respondents' failure to discipline Gale or terminate her employment (until after the incident with. Lapidus) established pretext.

The ALJ dismissed the meal in the laboratory incident as pretext on the basis that it was an isolated occurrence, no disciplinary action was taken at the time, no evidence was presented showing that it was mentioned to Complainant and it preceded her release by over two months. R. D. and O. at 13. Again, these considerations do not call into question the existence of that incident. We discuss *infra* whether the fact that Respondents did not discipline Gale for the cited incidents prior to terminating her employment establishes pretext.

The ALJ further found that the memoranda at RX 10 and 11 did not "adequately" convey that Gale was confrontational and disrespectful, "but rather indicate her belief that she is bound to follow a certain policy." R .D. and O at 13. Our review of the memoranda in question leads us to a contrary conclusion. According to Lapidus's memorandum, Gale walked into the room where he was reading studies and said, "Oh you won't know." She then described a renal scan order to him, and he asked her to call the referring physician's office for clarification. She subsequently brought the same inquiry regarding the renal scan to Rondina, and Lapidus pointed out that he had already asked her to call the referring physician's office. Lapidus's memorandum states that Gale then replied, "First of all you can't tell me to do anything." When Rondina then asked, "What did you just say," Gale responded, "He doesn't even have a user's license," or "He can't tell me what to do. He's not on the license." The statements concerned radiology procedures and were said to and about a physician who was present and was responsible for delivering radiology services at the facility at the time. Taken together in context, we find that these statements indicate something other than, as the ALJ found, "her belief that she is bound to follow a certain policy." Rather, these statements indicate that Gale conveyed to the physician her belief that he was not knowledgeable ("oh you won't know"), that she was unwilling to follow the physician's directions (" you can't tell me to do anything"), and that she not only doubted the physician's authority, but may have belittled him ("he doesn't even have a user's license"or "he can't tell me what to do; he's not on the license"). We determine that, based on the statements from the physicians, particularly Lapidus, Respondents reasonably could have believed that Gale had been disrespectful and insubordinate.

Ventura's testimony concerning Gale's outbursts in front of patients and coworkers, and her citing of a particular incident which occurred when the office was low on a particular kind of film, was discounted by the ALJ on the basis of a more contemporaneous memorandum which, he stated, "conveys little more than that Ms. Gale believed the office was low on the supply of film." R. D. and O. at 13. The memorandum reads, in pertinent part:

> ON THIS DAY AT ABOUT 11 AM HEARD KATHY AT THE FRONT DESK LOUDLY SAYING SOMETHING ABOUT RESCHEDULING PATIENTS BECAUSE WE WERE OUT OF FILM. I STEPPED OUT OF MY OFFICE IMMEDIATELY TO STOP THIS CONVERSATION IN FRONT OF PATIENTS WAITING IN THE RECEPTION AREA. . . . WE DID NOT HAVE TO RESCHEDULE ANY PATIENTS.

RX 14 (June 15, 1996 memo from Ventura to Colbert).

Unlike the ALJ, we find that the memorandum supports Ventura's testimony concerning the incident and conveys more than a belief on Gale's part that the office was low on film. The memorandum provides evidence of Gale making an erroneous statement in a manner which could cause patients to believe that their appointments would have to be rescheduled because Respondents failed to have on hand material essential for conducting Respondents' business. The memorandum thus supports, rather than contradicts, Ventura's testimony citing the incident

as an example of how Gale loudly made statements in front of patients which unfairly cast the company in a negative light. T. 148-149.

The misadministration of the radiopharmaceutical was discounted by the ALJ on the basis that Gale's testimony that she was told "there was no problem" was uncontested, and indicated that while an infraction took place, it was not deemed sufficiently errant to warrant disciplinary action. The ALJ also found that the lapse of over a month between the misadministration and Gale's dismissal provided support for this conclusion. Moreover, the ALJ "found no indication in the record that the infraction was raised with Complainant subsequent to her conversation with Mr. Murphy for the purposes of completing his report of the incident to the NRC." R. D. and O. at 13. The uncontested evidence shows that Gale injected a patient with the wrong isotope and that Respondents believed that she did so because she failed to obtain clarification when she did not understand the referring physician's order. T. 32, T. 155-160, RX 13. In addition, Gale herself testified that the Respondents put her under a directive following the incident that she "would never do another injection without a clear, written slip," that is "a clear, written script saying what are we supposed to do and why are we supposed to be doing it in the way of a Nuclear Medicine Diagnostic Study." T 33-34. The Respondents' citing of this incident as a reason for her dismissal is consistent with the unsatisfactory rating they gave Gale in the category of judgment, and the written statement on her performance evaluation that her "judgement and stability were of daily concern." CX 7.

The ALJ similarly found that Respondents' complaints concerning Gale's "work attendance" were pretextual because "[t]here is no indication that Complainant violated Respondent's policy with regard to using sick leave; rather it is clear from Ms. Ventura's testimony that the sole infraction of Respondent's sick leave policy was that Ms. Gale failed to procure a physician's note for using one additional sick day, which was not cited as a reason for her discharge." R. D. and O. at 14. He further cited Gales' scheduling a substitute and the approximately 3.5 months between these absences and Gale's termination. R. D. and O. at 14. We find that the evidence is that Gale failed to provide required medical documentation for her absence of almost a full week in May, and that this was a violation of Respondents' sick leave policy. T. 180. RX 14 (June 15, memo from Ventura to Colbert). Moreover, Ventura testified that she was unable to reach Gale during that period. T. 150. Under the circumstances, we find that Respondents reasonably could have believed this was "absenteeism." Gale also was absent on sick leave for over a week in June. T. 151-52, RX 14. Further, although it is uncontradicted that Gale scheduled substitutes for part of the time she was absent, the evidence that Ventura had to seek substitutes and that tests had to be cancelled because of Gale's absences also was uncontradicted. T. 154-55, 183, RX 14 (June 15 memo). In addition, Ventura testified, without contradiction, that Gale's attendance record was poor compared to that of other technicians. T. 154. Consistent with the testimony and exhibit, Respondents rated Gale's attendance as deficient, and specifically noted on her performance evaluation that she had taken unscheduled leaves of absence without warning or following office policy regarding submitting an appropriate doctor's note. CX 7.

The absence of disciplinary action against Complainant prior to her protected activity does not establish that Respondents' alleged reasons for her discharge were pretextual. Ventura

testified without contradiction that Gale was terminated under the same process as any other employee and that Respondent did not have a policy requiring it to bring decrements in an employee's performance to the employee's attention. T. 197. The ALJ's contention that the absence of prior disciplinary acts showed pretext assumes that Respondent had to take other disciplinary measures before dismissing Complainant. There was no evidence that Respondent had a policy or practice of progressive discipline, under which it imposed lesser sanctions prior to terminating employment, nor does the ERA require Respondents to have had such a policy or practice. Similarly, Respondents' failure to weigh the favorable comment of a patient in August against the earlier comment on Gale's rudeness, made by a different patient in March, does not establish pretext. "We [courts] do not sit as a super-personnel department that reexamines an entity's business decisions." *Morrow v. Wal-Mart Stores, Inc.* 152 F.3d 559, 564 (7th Cir. 1998). Section 5851 of Title 42 of the U.S. Code is a discrimination statute, not a code of sound personnel management.

Ventura explained that the decision to fire Complainant was made because of "a *combination* of many instances, which we have gone through . . .. It was a *culmination* of all these things." T. 178-79 (emphasis added). However, by addressing each reason in isolation, and citing the length of time between each individual incident and Gale's dismissal (all occurred within a period of seven months, with the final incident occurring the day before Respondent terminated Gale's employment), we conclude that the ALJ failed to appreciate that Respondents' reasons were not separate or in the alternative, but were a *"combination*"or a *"culmination*." In other words, we find that Respondents' proffered reasons were cumulative,[5/] with the September 25 confrontation with Lapidus constituting the final, and decisive, incident

In addition, the ALJ's holding that Respondents' proffered reasons were pretextual was inconsistent with his findings that: (1) Ventura's testimony explaining Respondents' motivation for the discharge, including her testimony that Complainant's protected activity was not a factor in her discharge; that she was not angry at Complainant for bringing the need for proper permits to her attention and that she viewed Complainant's action as appropriate, T. 174, 179, "was convincing and lacked contradiction," R. D. and O. at 8; and (2) Respondents' documentary evidence, containing Complainant's work record of declining performance, including the critical memoranda of Lapidus and Rondina, was unchallenged for its "verity." *Id*. at 12. (Ventura and Complainant were the only witnesses at the hearing.). *Id*. at 4.

Further, we note that both Gale and Ventura testified that Gale contacted the DEP at Ventura's request. T. 79, 174. Thus Respondents were not antagonistic to Complainant's protected activity. In fact, they specifically instigated a significant part of it. No adverse action was taken against Gale immediately following her protected activity, and her employment was not terminated until after an intervening event occurred, the confrontation with Lapidus. Under the circumstances, the fact that the discharge occurred within two weeks of the protected activity is insufficient to establish a violation of the Act.

[5/] *I.e.,* "the plethora of reasons that have been enumerated previously," Respondents' initial brief to ARB at 23; "[i]n the aggregate," Respondents' reply brief to ARB at 9.

We find that Gale engaged in protected activity under the ERA and that Respondents had knowledge of that activity. However, as we have concluded *supra,* Respondents have provided a credible non-discriminatory basis for discharging Gale (the reasons cited by Respondents, taken in totality). Gale has not established by a preponderance of the evidence that Respondents' explanation is pretext for discrimination or that more likely than not a discriminatory reason was a motivation for her dismissal by Respondents. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Thus Complainant has not proved by a preponderance of the evidence that her protected activities were a factor in her discharge. We therefore find that Complainant has not sustained her burden of proof.

CONCLUSION

Since Complainant has not demonstrated by a preponderance of the evidence that she was discharged in contravention of the ERA, her complaint is **DISMISSED.**

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge