In the Matter of:

MILTON TIMMONS,

COMPLAINANT,

v.

FRANKLIN ELECTRIC COOPERATIVE,

RESPONDENT.

ARB CASE NO. 97-141

ALJ CASE NO. 97-SWD-2

DATE: December 1, 1998

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Kevin C. Gray, Esq.
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For the Respondent:
Fern Singer, Esq.
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FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Solid Waste Disposal Act (SWDA) (also known as the Resource Conservation and Recovery Act), 42 U.S.C. §6971 (1994). Before this Board for review is the Recommended Decision and Order (R. D. and O.) of the Administrative Law Judge (ALJ) issued on August 25, 1997. The ALJ concluded that Complainant, Milton Timmons (Timmons), established that Respondent, Franklin Electric Cooperative (Franklin), had violated the SWDA by taking adverse action against Timmons in retaliation for engaging in activity protected under that statute. The ALJ also determined that reinstatement and back pay should be ordered, as well as an attorney's fee and other litigation expenses. R. D. and O. at 10-12.

Based on a review of the record and the arguments of the parties, we conclude that Timmons has established that Franklin terminated his employment in violation of the employee protection provision of the SWDA. As discussed below, we agree with the ALJ that Timmons established that he was terminated, at least in part, because of his protected activity. We also explicitly conclude that Franklin has not established a basis for avoiding liability under the dual, or mixed, motive doctrine. Finally, we reach a different conclusion regarding the amount of back pay that is due Timmons.

FACTUAL BACKGROUND

Unless otherwise noted in this decision, we agree with the pertinent facts as found by the ALJ, R. D. and O. at 3-6. We provide the following factual background to focus our discussion.

Timmons began work at Franklin on August 5, 1996, as a "right of way" worker. HT at 11-13.[1/] Timmons was hired by A.H. Akins, the company manager, who alone had the authority to hire or terminate Franklin employees. HT at 12 (Timmons), 72-73 (Miller), 98-99 (Akins). Under the collective bargaining agreement between Franklin and the International Brotherhood of Electrical Workers, new employees like Timmons were subject to a six-month probationary period. RX 1; *see* HT at 100 (Akins).

At Franklin, Timmons worked closely with co-worker Wayne Black trimming brush and trees near electric power lines maintained by Franklin. HT at 13, 14-15 (Timmons), 60 (Black). In the course of his work, Timmons used a chain saw and operated a tractor with a bush hog attachment. HT at 27 (Timmons), 79-82 (Miller). Timmons' immediate supervisor was Lindon Miller, who visited Black and Timmons at their various work sites frequently and who was occasionally accompanied by Akins. HT at 14 (Timmons), 77 (Miller).

Akins began to express concern about Timmons' performance around August 20, 1996. HT at 74 (Miller), 102-03 (Akins). Specifically, Akins expressed concern to Miller, then later to the line foreman, Mark Stockton, and the union steward, Oscar McCulloch, that Timmons' operation of a company tractor was too slow. HT at 52-58 (McCulloch), 74-76, 80-81 (Miller), 84-85, 93-94 (Stockton), 102-06, 116-20 (Akins). Miller also raised concerns about Timmons because it had been necessary for Miller to work extra hours, on a Friday and a Saturday, to complete a job when Timmons had been unavailable to work overtime. HT at 73 (Miller).[2/] On

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[1/] The following abbreviations will be used to refer to the evidence of record: hearing transcript, HT; complainant's exhibit, CX; respondent's exhibit, RX.

[2/] The R. D. and O. erroneously indicates that Akins' testimony includes statements about Timmons' having "cut a tree that touched a three-phase power line, knocking out power to many customers." R. D. and O. at 5. Although Black, Timmons' co-worker, testified regarding his concern about that incident, neither Akins nor Miller referred to the incident in their testimony. HT at 60-62,

(continued...)

October 7, Akins met with Miller, Stockton, and McCulloch and stated that he was considering terminating Timmons. HT at 85-86, 93 (Stockton), 104-06, 118 (Akins). Stockton, who was acquainted personally with Timmons, asked that Akins give Timmons more time to demonstrate his suitability for the job. *Id.*

During Timmons' tenure of approximately ten weeks, neither Akins nor Miller advised Timmons about either specific or general concerns that they had regarding his work performance or his continued employment. HT at 16-17 (Timmons), 78-80 (Miller), 103, 119 (Akins). On October 11, 1996, co-worker Wayne Black did advise Timmons, however, that Timmons was mistaken in construing Miller's "offers" of overtime literally; such "offers" actually indicated a crucial need for Timmons to work after regular hours or on weekends to complete work necessary to Franklin's operation as an electrical power provider and should not be declined. HT at 20-21, 25-26 (Timmons), 63, 69-70 (Black); *see* HT at 82 (Miller), 91-92 (Stockton). Stockton, who did not ordinarily supervise Timmons, also broached the overtime issue with Timmons outside of work and advised him of the importance of being available to work overtime when asked. HT at 95-96 (Stockton).

On the morning of Friday, October 11, 1996, Timmons was asked to work overtime that day and the next. HT at 17-21, 25-26 (Timmons). Timmons initially declined, but after Black explained to Timmons that he should not decline Miller's "offers" of overtime, Timmons confirmed with Miller that it was necessary for Franklin's operations for him to work the extra hours, and he agreed to do so. HT at 20-21, 25-26 (Timmons), 63, 69-70 (Black).

Later that afternoon, Stockton directed Timmons to place four barrels of oil in a hole that was being dug in the ground at the company's pole yard. HT at 21-25, 32-34 (Timmons), 86-88, 94-95 (Stockton). Stockton had initiated the plan to bury the oil and discussed it with Akins, who did not object. HT at 87, 94 (Stockton), 109, 120-21 (Akins). Timmons, who had undergone a training course in the handling of hazardous waste, became particularly concerned because he believed that the oil was contaminated and the barrels were leaking. HT at 21-22, 32-34 (Timmons); CX 1.[3/] Timmons told Stockton that he thought it would be a violation of the environmental laws to bury the oil. HT at 23-25 (Timmons), 87-88 (Stockton). In response to Timmons' concerns, Stockton discussed the matter further with Akins, and they both agreed to transfer the oil to a hazardous waste disposal company that Franklin had engaged in the past for that purpose. HT at 86-88, 94-95 (Stockton), 109 (Akins).

[2/](...continued)
70 (Black); *see* HT at 71-83 (Miller), 98-126 (Akins); *see also* HT at 43-45 (Timmons). Moreover, neither Miller nor Akins testified that they believed Timmons had been careless while performing his job. HT at 79 (Miller), 103, 116-18 (Akins); *see also* HT at 56-59 (McCulloch).

[3/] The certification for the 40 hour training course that had been completed by Timmons indicates that the course was provided by the International Union of Operating Engineers in accordance with Occupational Safety and Health Act guidelines. CX 1.

Timmons worked overtime on Friday, October 11 and Saturday, October 12, 1996. Monday, October 14 was a holiday. Timmons worked a regular workday on Tuesday, October 15. Near the end of the workday, Akins informed Timmons that his employment was terminated, effective immediately. HT at 26-27 (Timmons). Timmons asked Akins and then Miller if his previous failure to work overtime had led to his dismissal. HT at 15-16, 38 (Timmons). They both denied that the overtime issue was the reason for the termination, but neither Akins nor Miller provided any other explanation to Timmons. *Id.*

DISCUSSION

I. Liability

To prevail in this complaint under the SWDA, Timmons must prove by a preponderance of the evidence that his termination by Akins was based, at least in part, on his protected activity. *See White v. Osage Tribal Council*, ARB No. 96-137, ALJ Case No. 95-SDW-1, Aug. 8, 1997, slip op. at 4 and cases cited therein.[4/] In this circumstantial evidence case, Timmons must establish retaliatory intent by proving that he engaged in protected activity, that Akins was aware of such activity when he decided to terminate Timmons, and that the protected activity provided a basis for that decision. *Id.* Timmons bears the burden of establishing that the reasons advanced by Franklin for the termination action were not the true reasons for the action. *See Bechtel Const. Co. v. Sec'y of Labor,* 50 F.3d 926, 935 (11th Cir. 1995) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 (1993)).

If Timmons establishes by a preponderance of the evidence that the termination decision was based in part on his protected activity, Franklin may nonetheless avoid liability under the dual, or mixed, motive doctrine. Under that doctrine, the employer must establish by a preponderance of the evidence that it would have taken the adverse action in the absence of the protected activity engaged in by the complainant. *Combs v. Lambda Link,* ARB No. 96-066, ALJ Case No. 95-CAA-18, Oct. 17, 1997, slip op. at 4 and cases cited therein.

As we discuss below, we concur with the ALJ's ruling that Timmons engaged in protected activity. Akins knew of Timmons' protected activity when he terminated him, and Akins was motivated to terminate Timmons at least in part by Timmons' protected activity. Finally, we conclude that Franklin failed to prove by a preponderance of the evidence that it would have terminated Timmons' employment absent his protected activity.

[4/] Unless otherwise indicated, all Secretarial and Administrative Review Board cases cited in this decision arise under the SWDA or the employee protection provision of an analogous statute listed in 29 C.F.R. §24.1 (1998).

A. Protected activity

We reject Franklin's contention that Timmons did not engage in activity protected by the SWDA on October 11, 1996. The ALJ properly concluded that the concern raised by Timmons regarding Stockton's plan to bury barrels of oil on the Franklin property is within the scope of activity protected under the statute.[5/]

As the ALJ found, R. D. and O. at 6-7, Timmons objected to the planned burial of the oil because he reasonably believed that the interment would violate the law.[6/] HT at 21-25, 32-34 (Timmons), 94-95 (Stockton), 106-10, 120-24 (Akins); *see Minard v. Nerco Delamar Co.,* Case No. 92-SWD-1, Sec. Dec., Jan. 25, 1995, slip op. at 4-25. We agree that the intracorporate nature of Timmons' activity does not deprive Timmons of the protection afforded by the SWDA. R. D. and O. at 7; *see Minard*, slip op. at 4 n.4 and cases cited therein; *Dodd v. Polysar Latex*, Case No. 88-SWD-00004, Sec. Dec., Sept. 22, 1994, slip op. at 6-7 and cases cited therein. Contrary to Franklin's contentions, it was not necessary for supervisory personnel to proceed with the original plan to bury the oil barrels or for Timmons to file a more formal internal complaint in order to invoke the protection of the SWDA. It was enough that Timmons, acting on a reasonable belief that the burial of the oil barrels would be in violation of pertinent environmental law, raised his objection to the interment plan to supervisory personnel. *See Oliver v. Hydro-Vac Servs. Inc.,* Case No. 91-SWD-00001, Sec. Dec., Nov. 1, 1995, slip op. at 9-13; *Minard*, slip op. at 4-25; *Dodd,* slip op. at 6-7; *see generally Bechtel Const. Co.*, 50 F.3d at 933-34 (raising specific safety concerns to supervisory personnel is activity protected under the employee protection provision of the Energy Reorganization Act, 42 U.S.C. §5851 (1988)). Timmons' objection to the plan to bury the barrels of oil on October 11, 1996, qualifies for protection under the SWDA.

[5/] The ALJ analyzed the October 11, 1996 incident under the "work refusal" standard provided in *Pensyl v. Catalytic, Inc.,* Case No. 83-ERA-1, Sec. Dec., Jan. 13, 1984. R. D. and O. at 6-8. Unlike the typical work refusal scenario that is addressed in *Pensyl*, however, the record in the instant case indicates that Stockton (the Franklin foreman who was directing Timmons at the time) withdrew his directions almost immediately after Timmons voiced his objections to the oil burial plan, and thus did not place Timmons in a position where he may have refused to comply with supervisory instruction. HT at 21-25 (Timmons), 86-88, 94-95 (Stockton), 106-07, 120-21(Akins); *see* Comp. Brief at 4-5, 9-12; Resp. Brief at 5, 7-8. Because a direct conflict between supervisory direction and employee response was avoided, the *Pensyl* work refusal analysis is not applicable.

[6/] Timmons testified that he thought the oil had been taken from electrical transformers, thus raising the possibility that the oil was contaminated by PCB's. HT at 21-22*; see* RX 2; *see also Minard v. Nerco Delamar Co.,* Case No. 92-SWD-1, Sec. Dec., Jan. 25, 1995, slip op. at 9-15. The U. S. Environmental Protection Agency, acting on Timmons' October 18, 1996, request, investigated the Franklin work site and found that the four barrels of oil had been transferred to the disposal company on October 16, 1996. RX 2. Although Akins testified that a report from a laboratory that had subsequently tested the four barrels of oil showed no PCB contamination, Akins' testimony also indicates that, on October 11, he was not certain whether any of the oil had been used in electrical transformers. HT at 122-24.

B. Timmons' proof that termination was based in part on protected activity

The ALJ correctly concluded that the preponderance of the evidence established that Franklin terminated Timmons, at least in part, because of Timmons' protected activity. There is no dispute that Akins was aware of Timmons' October 11 protected activity when, near the end of the work day on October 15, 1996, Akins advised Timmons that his employment was terminated. R. D. and O. at 7. Therefore, the key issue to resolve is whether Timmons' protected activity motivated Akins, at least in part, to fire Timmons. In order to resolve this issue it is necessary to weigh Franklin's argument that Timmons was fired out of concerns about the adequacy of Timmons' performance during the approximate ten week period of his employment with Franklin.

The ALJ rejected Akins' explanation that the pace of Timmons' operation of a company tractor and Timmons' failure to work overtime on two occasions formed the sole basis for Akins' termination decision; the ALJ concluded instead that Timmons "was not the team player Mr. A[ki]ns was seeking and when [Timmons] refused to bury the oil barrels this was the last straw." R. D. and O. at 8. In support of that conclusion, the ALJ cited (a) the temporal proximity between Timmons' protected activity on Friday, October 11, 1996, and his termination by Akins on the following regular workday, Tuesday, October 15, as well as (b) Akins' failure to provide a plausible explanation for choosing October 15 to terminate Timmons. *Id.* at 8-9. As we fully explain in the following analysis, the preponderance of the evidence establishes that while Akins had expressed concerns about Timmons' employment to Miller, Stockton, and McCulloch on various occasions, Akins had not determined whether or when he would terminate Timmons until after Timmons engaged in protected activity on October 11, 1996.

In asserting that Timmons would have been terminated even in the absence of his raising concerns about the oil tanks, Franklin's witnesses articulated three primary rationales that served as justification for his removal on October 15, 1996: (1) Timmons generally was not a team player, *i.e.*, did not fit in as part of the crew; (2) Timmons was unwilling to work overtime when requested, and (3) Timmons was not a good worker. Viewed in full context, we share the ALJ's view that the reasons offered by the company are pretext, and that the motivating event behind the termination was Timmons' objection to the oil drum burial. We consider each of these rationales in turn.

1. The "not a team player" issue

Before we address the evidence that supports the ALJ's conclusion that Timmons' protected activity triggered the termination, the significance of the ALJ's conclusion that Akins had found Timmons not to be a "team player" warrants clarification. Our inquiry into whether Timmons' termination was based on prohibited criteria is restricted to the narrow focus of the employee protection provision of the SWDA. It is well-settled that the employee protection provided by the SWDA and similar statutes does not prohibit an employer from imposing a wide

range of requirements on employees. *See, e.g., Kahn v. U. S. Sec'y of Labor,* 64 F.3d 271, 279 (7th Cir. 1995) (under the Energy Reorganization Act); *see also Smith v. Monsanto Chem. Co.,* 770 F.2d 719, 723 n.3 (8th Cir. 1985) (noting, in a case arising under Title VII of Civil Rights Act of 1964, that employer may develop arbitrary, ridiculous and even irrational policies as long as they are applied in a nondiscriminatory manner), *cert. denied*, 475 U.S. 1050 (1986). When an employer applies an otherwise legitimate criterion in such a way that it interferes with the exercise of specific whistleblower rights, however, the employer acts in violation of the employee protection provision of the corresponding statute. *See Assistant Sec'y and Ciotti v. Sysco Foods of Philadelphia,* ARB No. 98-103, ALJ Case No. 97-STA-00030, July 8, 1998, slip op. at 8 (citing *Self v. Carolina Freight Carriers Corp.,* Case No. 91-STA-25, Sec. Dec., Aug. 6, 1992, slip op. at 5).

An employer's expectation that an employee interact with others in the company as a "team player" does not constitute a proscribed criterion *per se. See Odom v. Anchor Lithkemko/ International Paper,* ARB No. 96-189, ALJ Case No. 96-WPC-0001, Oct. 10, 1997, slip op. at 12; *Erb v. Schofield Mgmt.,* ARB No. 96-056, ALJ Case No. 95-CAA-1, Sept. 12, 1996, slip op. at 2-3. Nonetheless, the extension of that expectation to a point where it interferes with protected activity is prohibited. Therefore, Akins legitimately could require Franklin employees to follow management's lead unquestioningly in most aspects of their work, including the scheduling of overtime work and the manner in which Franklin's work generally was accomplished. However, Akins could not legitimately penalize Timmons for raising SWDA-based objections to Franklin's plan to bury the drums of oil.

We agree with the ALJ that the evidence indicates that Timmons was not seen as a team player by Akins. The testimony of Akins and other Franklin supervisors establishes that Franklin is operated as a close-knit company where a new employee is expected to receive orientation to company practices informally, through information provided by co-workers, and where employees routinely are expected to work overtime on short notice. *See* HT at 63, 69 (Black), 73-74, 78, 82 (Miller), 91-92 (Stockton), 106, 112-13, 124-26 (Akins). When Timmons started work at Franklin, he requested an employee handbook from Akins, who replied that the only written employee guidelines were found in the contract with the union, which Timmons could not join until after he had been employed for six months. HT at 99-101 (Akins); *see* RX 1. Miller testified that Timmons "at times" suggested that particular work should be done in a manner different from the way it ordinarily would be done at Franklin. HT at 78. Akins contrasted Timmons' failure to work overtime with the commitment demonstrated by a Franklin employee who postponed his wedding ceremony to a later date in order to assist with emergency work occasioned by a damaging ice storm. HT at 124-26. The evidence that Akins repeatedly commented on Timmons' performance to other Franklin employees while not discussing those issues with Timmons also suggests that Akins viewed Timmons as an outsider.[7/]

[7/] Although Stockton testified that he spoke with Timmons, after hours, about the need to work overtime when requested, his testimony also indicates that such guidance was provided not in his (continued...)

However, the following inconsistencies in the record evidence cast doubt on the reasons proffered by Franklin in defense of this complaint and provide support for the ALJ's further conclusion that Timmons' protected activity triggered the termination. Although Akins testified that he had decided by September 9, 1996, that he would terminate Timmons based on work performance, Akins could not explain why he waited until October 15 (more than a month) to terminate him. HT at 104. Rather, the only reason cited by Akins for not terminating Timmons prior to October 15 was a request by Stockton, on October 7, to give Timmons' employment "some more time." HT at 85-86, 93 (Stockton), 104-06, 118-19 (Akins); *see* R. D. and O. at 5. Stockton's October 7 request does not explain why Akins had not terminated Timmons between September 9 and October 7. *Cf. Paul v. Newmont Gold Co.,* 18 FMSHRC 181, 197, 1996 WL 86396, **11 (F.M.S.H.R.C.) (employer's failure to take disciplinary action until after complainant's protected activity undermined employer's argument that such action was based on earlier, unprotected conduct); *Palmer v. Western Truck Manpower,* Case No. 85-STA-6, Sec. Dec., Jan. 15, 1987, slip op. at 15-16 (same), *vac'd on other grounds sub nom., Western Truck Manpower v. U. S. Dep't of Labor,* 943 F.2d 56 (9th Cir. 1991) (table).

In addition, Akins' testimony that he had decided by September 9 to terminate Timmons is contradicted by Miller's testimony indicating that, as late as October 7, he and Akins were uncertain regarding whether or not Timmons should be terminated. Miller summarized an exchange with Akins on September 27, 1996, thus: "We [Miller and Akins] were just talking about his performance again . . . . We didn't think it was going to work." HT at 75. Miller similarly described the October 7 discussion with Akins, Stockton and McCulloch regarding Timmons' employment: "[W]e was just talking, you know. All of us. We was just talking. We was talking about we didn't [think] it was going to work, you know. We was going to get -- let him go." HT at 76. In addition, McCulloch testified that, at the October 7 meeting regarding Timmons' future at Franklin, he had suggested that "[M]aybe it'll work out." HT at 53. As previously noted, the October 7 meeting was when Stockton had asked Akins to give Timmons more time in which to prove his suitability for employment with Franklin. HT at 85-86, 93 (Stockton), 104-06, 118 (Akins). Contrary to Akins' testimony that he had made the termination decision by September 9, the weight of the testimony suggests that Akins was still assessing Timmons' performance as of October 7.

2. The overtime issue

Even if we assume that Akins was fully prepared to terminate Timmons on October 7 and delayed taking that action only because of Stockton's request, the timing of the termination action on October 15 would still be questionable. Although Akins testified that he did not "really know" why he terminated Timmons on October 15, he added that he had "got to thinking

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[7/](...continued)
capacity as a foreman at Franklin, but out of his personal concern regarding the future of Timmons' employment. HT at 95-96.

about the ice storms" and other circumstances in which Franklin needed employees to work overtime. HT at 106; *see* HT at 119, 124-26 (Akins). Thus, Akins implied that renewed concern regarding Timmons' past refusal to work overtime led Akins to terminate him. However, on Friday evening, October 11, and on Saturday, October 12, Timmons had worked overtime, after he confirmed that there was a crucial need for him to work the extra hours to ensure the timely completion of necessary work. HT at 17-21, 25-26, 34-35 (Timmons); *see* HT at 69-70 (Black), 95-96 (Stockton). Akins made no attempt to explain why he developed renewed concern about Timmons working overtime in spite of Timmons' acceptance of two overtime assignments. Akins cited no other action on Timmons' part during the October 7 through 15 period that precipitated the termination action. HT at 105-06; *see* R. D. and O. at 5, 8.

Akins' claim that concerns about Timmons' reluctance to work overtime led him to fire Timmons is further undermined by Timmons' uncontradicted testimony. Timmons testified that after Akins advised him that he was being fired as of the end of the workday on October 15, Timmons first asked Akins and then Miller whether the action was being taken because of the two days when Timmons had declined to work overtime. HT at 15, 38; *see* R. D. and O. at 4. Akins and Miller denied that the overtime issue had played a role, and they did not offer Timmons any further explanation. HT at 15, 27, 38 (Timmons); *see* R. D. and O. at 4. Such a shift in Franklin's explanation for the termination action provides support for the conclusion that the action was motivated by retaliatory intent. *See Bechtel Const. Co.,* 50 F.3d at 935; *James v. Ketchikan Pulp Co.,* Sec. Dec., Case No. 94-WPC-4, Mar. 15, 1996, slip op. at 4-5 and cases cited therein; *Hoffman v. W. Max Bossert,* Sec. Dec., Case No. 94-CAA-0004, Sept. 19, 1995, slip op. at 9-10 and cases cited therein.

We also conclude that these denials by Akins and Miller (the decision-maker and immediate supervisor, respectively) at or soon after the time that the termination decision was made are more probative of the retaliatory intent issue than are Stockton's later statements to Timmons regarding the basis for the termination. Stockton testified -- and Timmons acknowledged -- that Stockton had approached Timmons at the church that they both attended with the intention of telling Timmons that his termination had not been the result of the oil barrels incident and that "before that time, a lot of different things [were] going on." HT at 39-42 (Timmons), 90-91 (Stockton). Stockton also testified that he raised this subject with Timmons because he "understood [that Timmons] probably had the idea that this all happened because of what [Timmons] said" about the oil barrels on October 11. HT at 90-91. In cases involving prohibited employee discrimination, "[t]he presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive. . . ." *Ellis Fischel State Cancer Hosp. v. Marshall,* 629 F.2d 563, 566 (8th Cir. 1980), *quoted in Mackowiak v. University Nuclear Systems, Inc.,* 735 F.2d 1159, 1162 (9th Cir. 1984).

3. Timmons' work performance

Franklin's failure to adduce testimony that projects a clear image of the shortcomings in Timmons' work performance allegedly relied on by Akins casts further doubt on whether Akins

was motivated solely by those factors. *See Lieberman v. Gant,* 630 F.2d 60, 65 (2d Cir. 1980) (arising under Title VII of the Civil Rights Acts of 1964); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1012 (1st Cir. 1979) (arising under the Age Discrimination Act). For example, Akins supported his conclusion that Timmons' operation of a company tractor was too slow by recounting a specific occasion when he had observed Timmons performing such work. HT at 103-04. On cross-examination, however, Akins acknowledged that on the particular occasion cited he was observing Timmons' operation of the tractor immediately after the discovery that the tractor (while driven by either Black or Timmons) had knocked a breather off a gas line, *i.e.,* after an accident. HT at 116-18; *see* HT at 84-85 (Stockton), 103-04 (Akins). We do not find this example to provide adequate support for the claim that Timmons' work was inordinately slow, and we note that on cross-examination Akins failed to rehabilitate his credibility by explaining how, when observing Timmons' work during a period when anyone naturally would have proceeded with caution, he nonetheless concluded that Timmons' work was unacceptable. In addition, Miller's testimony regarding the pace of Timmons' operation of the tractor provides only qualified support for Akins' testimony. Miller stated that Timmons' work was slow "[j]ust on the tractor. Just the new one. It's slow. We weren't getting enough work done." HT at 73. Miller also testified, "On August 26, we [Miller & Akins] w[ere] out on the job site when they w[ere] operating the tractor and stuff. And he was operating a tractor and we seemed to think it wasn't -- he wasn't operating it fast enough, you know, good enough." HT at 74. In response to a question regarding whether Timmons had performed his work with a chain saw satisfactorily, Miller testified, "Probably did. Yes." HT at 79.

On the basis of the foregoing analysis, we reject Franklin's contention that Timmons was terminated on October 15, 1996, based solely on Akins' concerns about legitimate work performance issues. The termination was motivated at least in part by Timmons' protected activity on October 11, 1996.

Franklin contends that rejection of its explanation for the termination action effectively imposes a requirement on employers to provide formal warnings prior to terminating whistleblowing employees on the basis of unsatisfactory performance, even if such warnings are not required by the employer's established practice or procedure. Resp. Brief at 13-14. We disagree. The conclusion that Franklin's termination of Timmons was prompted by his protected activity is based on the several factors discussed above and does not run afoul of the prohibition against our supplanting the employer's business judgment. *See Kahn,* 64 F.3d at 279. The failure of Franklin supervisory personnel to advise Timmons of any perceived shortcomings in his work performance is a relevant factor, which we have considered in our analysis. *See* R. D. and O. at 9; *Loeb,* 600 F.2d at 1012. That factor has not, however, played a determinative role in our conclusion that Timmons' termination was based, at least in part, on his protected activity of October 11, 1996.

C. Franklin's failure to avoid liability under the dual, or mixed, motive doctrine

We turn now to the question whether Franklin has established a basis for avoiding liability under the dual motive doctrine. As indicated above, Franklin may avoid liability if it

establishes by a preponderance of the evidence that it would have terminated Timmons even if he had not engaged in protected activity on October 11, 1996. *See Combs,* slip op. at 4 (citing *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977)).

As summarized above, the evidence shows that Akins had expressed concern to Miller, Stockton, and McCulloch about Timmons' continued employment with Franklin. Nonetheless, the evidence also demonstrates that Akins was involved in a continuing evaluation of Timmons as a probationary employee, and it is uncertain when (or if) Akins would have acted to terminate him had the oil barrels incident not occurred. Indeed, the evidence regarding the overtime issue suggests that, had Timmons not been terminated on October 15, he might have succeeded in conforming to Akins' legitimate expectations. In sum, the relevant evidence demonstrates that Akins' evaluation of Timmons as a candidate for permanent employment was a matter of continuing consideration and does not establish that Akins would have terminated Timmons on October 15 were it not for the oil barrels incident. We therefore conclude that Franklin has not established by a preponderance of the evidence that it would have terminated Timmons in the absence of that activity. *See Dodd*, slip op. at 17-18.

II. The remedy

Timmons seeks reinstatement to his former position, back pay, and a reasonable attorney's fee and other litigation expenses. Comp. Brief at 20-21. The employee protection provision of the SWDA, as implemented at 29 C.F.R. Part 24, provides for the remedies sought. 42 U.S.C. §6971(b), (c); 29 C.F.R. §§24.7(c)(1), 24.8(d) (1998); 29 C.F.R. §§24.6(b)(2), (3) (1997); *see Ishmael v. Calibur Systems, Inc.,* ARB No. 97-118, ALJ Case No. 96-SWD-2, Oct. 17, 1997.

The ALJ concluded that Timmons should be reinstated by Franklin to his former, or a substantially equivalent, position, with credit for the time previously worked toward his six-month probationary period and any other privileges that are based on length of employment. The ALJ also concluded that Franklin should expunge from its personnel records any reference to Timmons' wrongful termination on October 15, 1996. The ALJ also found that Timmons' counsel had substantiated a total attorney's fee of $3,200.00 plus $83.50 in litigation expenses. However, the ALJ concluded that Timmons could have found alternative work within eight weeks after his termination had he exercised reasonable diligence in seeking such employment and therefore recommended that Timmons be awarded only eight weeks of back pay. R. D. and O. at 10-12.

We agree with the ALJ regarding all aspects of Timmons' remedy, other than back pay. As we discuss below, the ALJ did not apply the correct legal standard in determining that Timmons had not exercised reasonable diligence in mitigating his back pay damages. Application of the correct standard constrains us to order back pay for a longer period of time.

With regard to the back pay calculation, we must determine, as the ALJ observed, whether Timmons has fulfilled his duty to mitigate his income losses through the exercise of

reasonable diligence in seeking suitable work. *See Cook v. Guardian Lubricants,* ARB No. 97-055, ALJ Case No. 95-STA-43, May 30, 1997, slip op. at 5-6. The back pay award must be reduced by any amounts that Timmons received from interim employment or by amounts that he could have earned, with reasonable diligence, during the interim period. *See Rasimas v. Michigan Dep't of Mental Health,* 714 F.2d 614, 623 (6th Cir. 1983).

However, and of significance here, the allocation of the burden of proof is reversed at the remedy stage of a case such as this. Once Timmons has proven that he was unlawfully retaliated against, it is Franklin's burden to prove by a preponderance of the evidence that Timmons did not exercise reasonable diligence in finding other suitable employment, and to establish any amounts that Timmons could have earned through the exercise of such diligence. *See Assistant Sec'y and Lansdale v. Intermodal Cartage Co.,* Case No. 94-STA-22, Sec. Dec., July 26, 1995, slip op. at 6-7; *aff'd sub nom. Intermodal Cartage Co. v. Reich,* 113 F.3d 1235 (6th Cir. 1997) (table); *Office of Federal Contract Compliance Programs v. Cissell Mfg.,* Case No. 87-OFC-26, Acting Asst. Sec. Dec., Feb. 14, 1994, slip op. at 15-17 (under §503 of the Rehabilitation Act of 1973, 29 U.S.C. §793), *rev'd on other grounds,* Civ. Action No. C-94-0184-LM (W.D. Ky. Mar. 15, 1994), *rev'd and remanded,* 101 F.3d 1132 (6th Cir. 1996), *reh'g denied*, Mar. 7, 1997; *Office of Federal Contract Compliance Programs v. Louisville Gas & Elec. Co.,* Case No. 88-OFC-12, Asst. Sec. Dec., Jan. 14, 1992, slip op. at 3-8 (also under §503).[8/] Moreover, back pay awards are approximate, and any "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer." *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 260-61 (5th Cir. 1974), *quoted in Artrip v. Ebasco Servs.,* ARB No. 89-ERA-23, ALJ Case No. 89-ERA-23, Sept. 27, 1996, slip op. at 4.

The record contains the following evidence relevant to Timmons' mitigation of income losses between the time of his termination on October 15, 1996, and the time the hearing was held before the ALJ on June 17, 1997. Timmons was earning approximately $11.00 per hour at Franklin when he was terminated. R. D. and O. at 11; *see* HT at 13. During the period following his termination Timmons unsuccessfully sought work through a machinists union local and through an operating engineers local. HT at 28-31. Timmons testified that a short-term labor-intensive project in the area had just ended, leaving a shortage of available positions, except for day-to-day construction work assignments. HT at 27-31. He also testified that his lack of seniority lessened the prospect of his finding any positions through the union hiring halls. HT at 27-31. Timmons testified that the house and farm where his family had lived had been purchased for the development of an industrial site. Timmons had intended to have a new house

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[8/] In both the *Louisville Gas and Electric* and *Cissell Manufacturing* decisions, the Secretary's designee adhered to the two prong requirement set forth above (adopted from *Rasimas,* 714 F.2d at 624), while acknowledging that the two prong requirement has not been universally applied by the United States Courts of Appeals for the various circuits. *Louisville Gas and Elec.,* slip op. at 7 n.4; *Cissell Mfg.,* slip op. at 16 n.13. We note that evidence regarding the availability of suitable alternative work is essential for determining "the individual characteristics . . . of the job market" against which the complainant's efforts must be evaluated. *Rasimas*, 714 F.2d at 624.

constructed by a builder, but after he was terminated by Franklin "it seemed feasible to do it" himself. HT at 47-48.

In response to Franklin's question regarding whether he had not been available for employment because of his construction work on his new residence, Timmons testified that "if a good job had come along where I could make money, I would have took the job and hired someone to finish my house." HT at 48. Timmons also testified that he earned some money through self-employment in a logging and sawmill operation. HT at 27, 31. In response to the ALJ's request, Timmons submitted documentation reflecting gross receipts from his sawmill operation in 1997, which totaled $518.87. Comp. [Post-hearing] Brief at 17, Attachment A. In sum, Timmons presented evidence that he sought alternative employment, accepted suitable employment when it was presented, and remained available for employment even while engaged in building his house.

Franklin failed to counter this evidence with proof that Timmons failed to exercise reasonable diligence in seeking employment. First, Franklin failed to present any evidence that suitable alternative work was available for Timmons or that Timmons had declined such work. *Cf. Louisville Gas and Electric,* slip op. at 3-8 (employer demonstrated availability of other positions by newspaper advertisements and statistical summaries prepared by state employment office). The burden of proof with regard to mitigation was Franklin's, not Timmons'; Franklin's failure to come forward with evidence of available employment is a serious omission.[9/]

Second, Franklin failed to prove that Timmons' work on the construction of his own house amounted to his removal from the job market. *See Hanna v. American Motors Corp.,* 724 F.2d 1300, 1308 (7th Cir. 1984) (under Vietnam Era Veterans' Readjustment Act, complainant's college enrollment did not bar back pay: complainant's uncontradicted testimony established that he had "applied for and was at all times ready, willing, and available to accept [comparable] employment . . . ."). *Cf. Miller v. Marsh,* 766 F.2d 490, 492 (11th Cir. 1985) (holding in Title VII case that lack of evidence that plaintiff had pursued any employment along with plaintiff's enrollment in law school supported finding that plaintiff had removed herself from the job market). In view of the foregoing, we conclude that Franklin failed to prove that it should be relieved of liability for a back pay award in this case.

Under the employee protection provision of the SWDA and analogous statutory provisions, an award of back pay continues to accrue until the complainant is reinstated by the

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[9/] Not only did Franklin fail to carry *its* burden under our analysis, we also note that Timmons provided evidence of his efforts to find suitable employment, thus distinguishing this case from one in which the complainant made no efforts to obtain suitable employment during the back pay period, *e.g., Brock v. Metric Constructors,* 766 F.2d 469, 472 (11th Cir. 1985) (under whistleblower provision of Federal Coal Mine Health and Safety Act, 30 U.S.C. §815(c), evidence of complainant's complete failure to seek employment held adequate to bar back pay award).

employer or the complainant declines a *bona fide* offer of reinstatement. *See Cook*, slip op. at 2-5 and cases cited therein; *Hoffman*, slip op. at 5 and cases cited therein. Accordingly, Franklin's liability for back pay, subject to offsets from any further earnings received by Timmons since the date of the June 1997 hearing in this case,[10/] continues to accrue at the rate of $440.00 per week, until such time as Timmons is either reinstated in Franklin's employ or declines Franklin's *bona fide* offer of reinstatement. In addition, pre-judgment interest on the back pay award is to be calculated at the rate prescribed at 26 U.S.C. §6621 (1994). *See Hoffman v. W. Max Bossert,* Case No. 94-CAA-0004, Sec. Rem. Dec., Sept. 19, 1995, slip op. at 12; *Williams v. TIW Fabrication & Machining,* Case No. 88-SWD-3, Sec. Dec., June 24, 1992, slip op. at 14 and cases cited therein.

[10/] Timmons must advise Franklin of any business income, wages or salaries that he has received during the back pay period and since the June 17, 1997 hearing before the ALJ. *See Hoffman*, slip op. at 5.

ORDER

Accordingly, Respondent Franklin Electric Cooperative is ORDERED to:

1) Expunge from the Respondent's records any reference to the termination action of October 15, 1996;

2) Offer Complainant Milton Timmons reinstatement to his former position, or a substantially equivalent position with Respondent;

3) Pay Complainant Milton Timmons back pay for the period beginning October 16, 1996, and continuing until such time as Respondent extends an unconditional offer of reinstatement to Complainant; for the period beginning Wednesday, October 16, 1996 through Tuesday, June 17, 1997, the amount after deductions for income from self-employment totals $14,881.13;

4) Pay interest on all amounts due, at the rate provided at 26 U.S.C. §6621 (1994), to accrue from the dates that each salary payment, minus the applicable interim income, would have been paid had Complainant not been terminated by Respondent on October 15, 1996;

5) Pay attorney's fees for services rendered through August 4, 1997 in the proceedings before the ALJ, which total $3,200.00, plus $83.50 in other expenses incurred in pursuit of the complaint below.

It is further ORDERED that Complainant shall have 20 days from the date of this Decision and Order to submit to this Board an itemized petition for additional attorney's fees and other litigation expenses incurred on or after August 5, 1997. Complainant shall serve the petition on Respondent, who shall have 30 days after issuance of this Decision and Order to submit any response. This Board will issue a supplemental order setting forth the additional attorney's fees and related expenses to which Complainant is entitled.[11/]

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Acting Member

[11/] Because this decision resolves all issues with the exception of the collateral issue of attorney fees and other litigation expenses, it is final and appealable. *See Fluor Constructors, Inc. v. Reich*, 111 F.3d 979 (11th Cir. 1997) (under the analogous employee protection provision of the Energy Reorganization Act, a decision that resolves all issues except attorney fees is final).