



**DAISY ABDUR-RAHMAN
and RYAN PETTY,**

**ARB CASE NOS. 08-003
10-074**

COMPLAINANTS,

**ALJ CASE NOS. 2006-WPC-002
2006-WPC-003**

v.

DATE: May 18, 2010

DEKALB COUNTY,

RESPONDENT

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

Robert N. Marx, Esq., *Marx & Marx, L.L.C.*, Atlanta, Georgia

For the Respondent:

Randy C. Gepp, Esq., *Taylor English Duma LLP*, Atlanta, Georgia; Stephen E. Whitted, Esq., *Dekalb County Law Department*, Decatur, Georgia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Wayne C. Beyer, *Administrative Appeals Judge*; Judge Beyer concurring.

FINAL DECISION AND ORDER

The Complainants, Daisy Abdur-Rahman and Ryan Petty, filed complaints with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Dekalb County, their employer, retaliated against them in violation of the employee protection provisions of the Federal Water Pollution Control Act (FWPCA) and its implementing regulations.¹ The Complainants claimed that Dekalb County violated the FWPCA when it discharged them in retaliation for complaining that the County did not properly report sanitary sewer overflows. After an

¹ 33 U.S.C.A. § 1367 (West 2001); 29 C.F.R. Part 24 (2008).

evidentiary hearing, a Department of Labor Administrative Law Judge (ALJ) concluded that the Complainants had engaged in FWPCA-protected activity, of which Dekalb County was aware, and had suffered an adverse action when the County fired them. The ALJ further determined that protected activity contributed to the decision to discharge Abdur-Rahman and Petty but was not the motivating factor. The ALJ determined that the inability of Chester Gudewicz, the Complainants' supervisor, to manage them motivated their discharges. He concluded that Dekalb County established that it would have discharged Abdur-Rahman and Petty even if they had not engaged in protected activity. Accordingly, the ALJ recommended that both complaints be dismissed. The Complainants appealed. Dekalb County cross-appealed from the ALJ's finding of protected activity. We conclude that the Complainants engaged in FWPCA-protected activity. Therefore, we deny Dekalb County's cross-appeal. We agree that Gudewicz's supervisory incompetence motivated Dekalb County to discharge Abdur-Rahman and Petty. But we conclude that Gudewicz's supervisory incompetence was integral to his inability to manage Abdur-Rahman's and Petty's protected activity. Therefore, we conclude that Dekalb County is not relieved from liability under the theory of dual motive. We **REMAND** the case for a determination of remedies.

BACKGROUND

Dekalb County hired Abdur-Rahman in August 2004 and Petty that September as compliance inspectors.² Abdur-Rahman and Petty were probationary employees for a period of approximately six months.³ Chester Gudewicz was their supervisor.⁴ Their job duties included working with the Fats, Oils, and Grease (FOG) program to investigate the cause of sanitary sewer overflows (SSO).⁵ In September, John Walker, Gudewicz's supervisor, also assigned Abdur-Rahman and Petty to the Codes and Ordinance Committee. The committee's purpose was to expand the terms of the County's sewer ordinance pursuant to which the County ran the FOG program; to identify the party responsible for releasing fats, oils, and grease into the sewer system; to develop a

² Complainants' Exhibits (CXs) 15, 16, 43, 50, 52, 53, 64; Hearing Transcript (T.) at 549, 944.

³ T. at 315, 706, 718, 2399; *see* CX 60.

⁴ T. at 1404.

⁵ A sanitary sewer overflow or "SSO" occurs when sewage escapes the sewer system. T. at 315, 316. An SSO that reaches state waters is a "spill," and spills are reportable to the state of Georgia. T. at 1689, 1693, 1867, 1927; CX 132. Dekalb County employees, including Abdur-Rahman and Petty, used the terms "SSO" and "spill" interchangeably. *See* R. D. & O. at 7, 8. Abdur-Rahman and Petty believed that all SSOs were reportable to the state. *Id.* at 8-9.

permitting system for grease traps; and to apply the ordinance to reduce the number of spills.⁶

During the course of their committee work, Abdur-Rahman and Petty asked Gudewicz and Walker, as well as Roy Barnes, Walker's supervisor, for historical SSO reports so they could identify and address "hot spots" existing in Dekalb County. Abdur-Rahman testified that a "hot spot" is a cluster of sanitary sewer overflow episodes.⁷ Abdur-Rahman and Petty each testified that the committee sought these reports to chart the "hot spots" and target them for reduction by applying the ordinance to the responsible party.⁸ Abdur-Rahman and Petty were rebuffed each time they asked their supervisors for these reports. Walker told them that they were being "too thorough" and "too scientific," and should "just cut and paste the ordinance." Gudewicz then told them, "[D]on't rock the boat, you're ruffling too many feathers. Do it Dekalb's way."⁹ Abdur-Rahman ultimately asked Gudewicz whether the SSO reports existed.¹⁰ Gudewicz admitted Abdur-Rahman's and Petty's persistence agitated him, and he frequently walked away from them.¹¹

Petty and Abdur-Rahman were involved in work-related incidents in November and December 2004. In November, Petty and Craig Mason had a conflict. In December, Mason claimed that Petty stared at him.¹² Petty denied staring at Mason and asserted that he and another employee were being "singled out" because of the November incident.¹³ Gudewicz wrote a January 13, 2005 memo to Walker and Barnes regarding Petty. He wrote, "Notice of termination is required on the following grounds: Insubordination, Confrontational, Belligerent, Disruptive, Unattentive [sic]," and "An immediate termination is required prior to permanent employee status."¹⁴

Sometime between late January 2005 and February 8, Gudewicz wrote in an undated memo to Walker, that Abdur-Rahman became argumentative with him on January 26. Gudewicz stated that Abdur-Rahman argued that the County's "hot spots"

⁶ T. at 208, 211, 318, 356-60, 955, 1415, 2014.

⁷ T. at 359-360.

⁸ T. at 359-360, 1083.

⁹ T. at 361, 362.

¹⁰ T. at 363-64, 962-63.

¹¹ T. at 2155.

¹² CXs 8, 9.

¹³ CX 47.

¹⁴ CX 41.

continued to exist due to Gudewicz's inattention and non-corrective action. Gudewicz wrote, "And this warranted me being incompetent."¹⁵ Abdur-Rahman denied calling Gudewicz incompetent.¹⁶ Walker testified, however, that he met with Abdur-Rahman after reading Gudewicz's above-described memo and asked her why she had called Gudewicz "incompetent." Walker testified that Abdur-Rahman replied, "Because he is incompetent."¹⁷ But Abdur-Rahman denied that that the exchange with Walker ever happened and denied ever telling Walker that she had called Gudewicz incompetent.¹⁸

On January 27, 2005, Abdur-Rahman and Petty investigated a spill at "Panthersville," the first of several SSO sites that they investigated.¹⁹ Abdur-Rahman and Petty both complained to Gudewicz that the county had not done any bioremediation of the raw sewage spill and had not cordoned off the affected area. Abdur-Rahman and Petty also asked Gudewicz why the County had pre-printed "no fish kill" on the form notifying Gudewicz's department of the spill, when the County had yet to investigate and, moreover, Panthersville was a dry land spill involving no fish. They believed the County was prejudging an issue.²⁰

Walker testified that a few days after he received Gudewicz's undated memo about Abdur-Rahman's January 26 conduct, but before February 8, he met with Gudewicz. Walker testified that Gudewicz told him that Abdur-Rahman and Petty did not fit in, that Abdur-Rahman was rude, insubordinate, disruptive at meetings, acted like she wanted to run the department, and that it was one battle after another with her. Walker replied that he would back Gudewicz on any recommendation that he would make to discharge Abdur-Rahman and Petty. Subsequently, on February 8, Gudewicz and Walker initialed the routing sheets attached to Abdur-Rahman's and Petty's then-blank performance appraisals, to recommend that Dekalb County discharge them.²¹

¹⁵ CX 10.

¹⁶ T. at 582, 583, 2867-69.

¹⁷ T. at 2663.

¹⁸ T. at 2888, 2902-2903, 2907.

¹⁹ CXs 48, 88. *See also* CXs 78, 79, 80, 87; T. at 455-481, 507-511, 976-980, 1927 (February 2005 Fairlakes spill); CX 17; T. at 523-530, 980-84, 980, 984 (February 2005 Rocky Valley Drive spill); T. at 984-88 (February 2005 Snap Finger Woods Drive spill); CX 13; T. at 512-516, 518-52 (February 2005 Rock Cliff Road spill).

²⁰ T. at 426-455, 965-976. *See* CX 48.

²¹ T. at 2665-2668, 2670. *See* CXs 16A, 40A.

Gudewicz testified that only thereafter did he complete Abdur-Rahman's and Petty's appraisals. Gudewicz, Walker, and Barnes each signed the appraisals February 15.²²

Dekalb County does not dispute that it (1) did not inform Abdur-Rahman or Petty of the February 2005 recommendation to terminate their employment, and (2) did not give them their appraisals.²³ The Complainants continued to work until March 11, 2005, when Gudewicz discharged them.²⁴

On April 11, 2005, Abdur-Rahman and Petty each filed a complaint with OSHA, alleging that Dekalb County discharged them in retaliation for activity that the FWPCA protects.²⁵ The Wage and Hour Division investigated. OSHA's Regional Administrator, Atlanta, Georgia, (the Administrator) determined that Abdur-Rahman and Petty engaged in protected activity when they complained that Dekalb County did not properly report sanitary sewer overflows. The Administrator also determined that their protected activity was not the reason for their discharge and, therefore, the complaints lacked merit.²⁶ Abdur-Rahman and Petty objected to the Administrator's findings and requested a hearing.

The ALJ held a hearing on thirteen days between September 2006 and March 2007. On September 10, 2007, the ALJ issued a [Recommended] Decision and Order Denying Relief (R. D. & O.) The ALJ concluded that Abdur-Rahman and Petty engaged in protected activity, of which Dekalb County was aware, and suffered an adverse action when the County discharged them. The ALJ also found that the "Complainants' protected activity was a factor in connection with other factors, which tended to affect the decision to terminate them."²⁷ He further determined that Abdur-Rahman and Petty established by a preponderance of the evidence that Dekalb County's articulated reasons for their discharge were a pretext for the true reason, namely supervisory incompetence

²² CXs 16B, 40B, 42. Barnes testified that Walker told him that he recommended discharging the Complainants because they were disruptive, disrespectful to Gudewicz and constantly challenged him, argumentative, and not the type of employees he wanted. Barnes reviewed the performance appraisals but did not assess them. Barnes decided to approve the discharges based on his conversation with Walker and his review of the performance appraisals. T. at 1789-1797, 1800-1803 (Barnes); *see* T. at 2675-76 (Walker).

²³ Petty asked Gudewicz on March 2 about his appraisal due on March 7, and Abdur-Rahman asked him on March 11 about getting an appraisal. CXs 35, 44.

²⁴ T. at 542-43, 956, 988-91; CXs 63, 67, 68.

²⁵ *See* Respondent's Exhibits 99, 100.

²⁶ Respondent's Exhibits 99, 100.

²⁷ R. D. & O. at 25.

and not protected activity.²⁸ The ALJ also found that the Complainants “expressed environmental concerns were not the motivating factor for terminating” them; that Gudewicz’s “own, admitted, inability to manage the Complainants, was the true motivation for the recommendation and decision” to discharge them.²⁹ The ALJ further found that Dekalb County established that it would have discharged Abdur-Rahman and Petty even if they had not engaged in protected activity “because managing them was above their supervisor’s means and they did not fit in the peculiar culture of the Water and Sewer Department.”³⁰ Accordingly, the ALJ recommended that the complaints be dismissed.

JURISDICTION AND STANDARD OF REVIEW

The FWPCA’s employee protection provision authorizes the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies.³¹ The Secretary has delegated authority to the Administrative Review Board (ARB or Board) to review an ALJ’s initial, recommended decision.³²

Under the Administrative Procedure Act, the ARB, as the Secretary’s designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ’s recommended decision.³³

²⁸ *Id.* at 30.

²⁹ *Id.* at 31.

³⁰ *Id.*

³¹ 33 U.S.C.A. § 1367(b).

³² 29 C.F.R. § 24.8 (2006). *See also* Secretary’s Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010) (delegating to the ARB the Secretary’s authority to review ALJ recommended decisions issued under, inter alia, the statutes listed in 29 C.F.R. § 24.1). The regulation at 29 C.F.R. § 24.8 was in effect when Abdur-Rahman and Petty filed their complaints in April 2005. DOL amended 29 C.F.R. Part 24 in August 2007. 72 Fed. Reg. 44,956 (Aug. 10, 2007).

³³ *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng’g v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Masek v. The Cadle Co.*, ARB No. 97-069, ALJ No. 1995-WPC-001, slip op at 9 (ARB Apr. 28, 2000). New regulations provide for substantial evidence review of the ALJ’s factual findings in an FWPCA case. *See* 29 C.F.R. § 24.110(b) (2009). Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Clean Harbors Env’tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). We have applied the law in

DISCUSSION

1. Legal Standard

To prevail on their complaints of unlawful discrimination under the FWPCA's whistleblower protection provisions, Abdur-Rahman and Petty must establish by a preponderance of the evidence that they engaged in activity that the FWPCA protects, that Dekalb County was aware of the protected activity, that they suffered an adverse employment action, and that their protected activity was the reason for the adverse action. Under the environmental acts such as the FWPCA, the employee complainant must establish by a preponderance of the evidence that his protected activity was a motivating factor in the adverse action.³⁴

The parties do not dispute that Dekalb County knew about the alleged protected activity and that the Complainants suffered an adverse action when Dekalb County discharged them. Dekalb County contests the ALJ's finding that the Complainants engaged in protected activity and the Complainants contest the ALJ's findings on causation. We address these issues in turn.

2. Protected Activity

The FWPCA's objective is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.³⁵ The FWPCA prohibits employers from firing or in any other way discriminating against an employee "by reason of the fact that such employee ... has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter."³⁶ A "proceeding"

effect at the time the complaints were filed. Exercising de novo review, we find error in the ALJ's legal conclusions.

³⁴ *Dixon v. U.S. Dep't of Interior, Bureau of Land Mgmt.*, ARB Nos. 06-147, -160, ALJ No. 2005-SDW-008, slip op. at 8 (ARB Aug. 28, 2008); *Seetharaman v. Stone & Webster, Inc.*, ARB No. 06-024, ALJ No. 2003-CAA-004, slip op. at 5 (ARB Aug. 31, 2007); *Morriss v. LG&E Power Servs., LLC*, ARB No. 05-047, ALJ No. 2004-CAA-014, slip op. at 31-32 (ARB Feb. 28, 2007), petition den. on appeal, *Morriss v. U.S. Dept. of Labor*, 276 Fed. Appx. 277, 2008 WL 1931213 (4th Cir. May 2, 2008). *Accord* 29 C.F.R. § 24.100(a), 24.109(a) (2009)(requiring a FWPCA complainant to demonstrate by a preponderance of the evidence that the protected activity was "a motivating factor" in the unfavorable personnel action).

³⁵ 33 U.S.C.A. § 1251(a).

³⁶ 33 U.S.C.A. § 1367. The FWPCA applies to employers and those acting in the capacity of an employer. *See Lewis v. Synargo Techs., Inc.*, ARB No. 02-072, ALJ Nos. 2002-CAA-012, -014, slip op. at 10-15 (ARB Feb. 27, 2004). Commenting on the inclusion

includes all phases of a proceeding that relates to public health or the environment, including the initial internal or external statement or complaint of an employee that points out a violation.³⁷ The employee need not prove that the hazards to public health or the environment he perceived actually violated the FWPCA, or that his assessment of the hazard was correct.³⁸

The ALJ found that Abdur-Rahman and Petty engaged in protected activity when they, (1) complained to their supervisors that Dekalb County did not properly treat or report sanitary sewer overflows, and (2) sought historic SSO reports to identify “hot spots” and bring the parties responsible into compliance with the County sewer ordinance.³⁹

We have reviewed the record and find it consistent with the ALJ’s conclusion that Abdur-Rahman and Petty engaged in protected activity when they made internal complaints related to violations of environmental laws. Abdur-Rahman and Petty repeatedly sought from their supervisors the County’s historic SSO reports. They explained that they needed the reports both for their committee work and to identify those within the business community who were responsible for recurring clusters of sanitary sewer overflows. Abdur-Rahman and Petty complained that the County needed to bring these businesses into compliance with the sewer ordinance. They indicated that they would enforce the ordinance. The record shows that Abdur-Rahman and Petty were charged with expanding the terms of that ordinance specifically and administering and enforcing it generally.⁴⁰ In fact, according to Gudewicz himself, Abdur-Rahman specifically claimed that these “hot spots” continued to exist due to Gudewicz’s inattention and lack of corrective action.⁴¹ Further, the record is consistent with the ALJ’s findings that Abdur-Rahman and Petty engaged in protected activity when, after inspecting Panthersville, they reported to Gudewicz that the County had not done any

of Section 1367, the Senate Report states that, “[u]nder this section employees and union officials could help assure that employers do not contribute to the degradation of the environment.” S. Rep. No. 414, 92d Cong., 1st Sess. 83, reprinted in 1972 U.S.C.C.A.N. 3668, 3748.

³⁷ *Redweik v. Shell Exploration & Prod.Co.*, ARB No. 05-052, ALJ No. 2004-SWD-002, slip op. at 8 (ARB Dec. 21, 2007) citing *Passaic Valley Sewage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474, 478-479 (3d Cir. 1993) and *Sasse v. Office of U.S. Attorney*, ARB Nos. 02-077, -078, 03-044, ALJ No. 1998-CAA-007, slip op. at 9 (ARB Jan. 30, 2004).

³⁸ See e.g. *Dixon*, ARB Nos. 06-147, -160, slip op at 9.

³⁹ R. D. & O. at 22-23.

⁴⁰ T. at 359-360; 1083. See CX 49.

⁴¹ CX 10.

bioremediation of the raw sewage spill nor cordoned off the affected area, presenting a public health hazard. The ALJ also found protected Abdur-Rahman's and Petty's complaint that the County had pre-printed "no fish-kill" on a form prior to the investigation and determination of that issue in relation to the Pantherville SSO, apparently prejudging an issue.⁴² Because it is consistent with the record, we agree with the ALJ's conclusion that Abdur-Rahman and Petty engaged in protected activity.

Dekalb County argues that the Complainants did not engage in protected activity. It asserts that the Complainants merely commented to Gudewicz about conditions they saw at spill sites and requested information on how to conduct investigations. Dekalb County contends that likewise, when the Complainants requested historic SSO reports, they merely sought information and did not allege any violation of an environmental law. But the record shows that Abdur-Rahman and Petty complained that Dekalb County was improperly treating and reporting sanitary sewer overflows, and through its inaction was allowing clusters of these SSOs to continue unmitigated. The FWPCA protects such internal complaints about violations of environmental laws.⁴³

Dekalb County further notes that Gudewicz wrote a January 13, 2005 memo to his supervisors that Petty's employment should be immediately terminated.⁴⁴ Dekalb County argues that the concerns Petty later raised in connection with the January 27, 2005 investigation at Panthersville cannot serve as the reason for Gudewicz's prior January 13 recommendation that Petty be discharged. The record shows, however, that Gudewicz and Walker did not recommend Petty's termination until February 8, 2005, subsequent to the complaints he raised in connection with the Panthersville site.⁴⁵

In sum, because it is consistent with the record, we agree with the ALJ's conclusion that the Complainants established by a preponderance of the evidence that they engaged in activity protected by the FWPCA. Accordingly, we deny Dekalb County's cross-appeal.

3. Motivating Factor

To establish discrimination under the FWPCA, the Complainants must prove by a preponderance of the evidence that their protected activity was a "motivating factor" in

⁴² CXs 48, 88; T. at 426-455, 965-976. Contrary to Dekalb County's assertion, there is no requirement that activity protected by the FWPCA be in writing.

⁴³ *Passaic Valley Sewerage Comm'rs*, 992 F.2d at 478-480.

⁴⁴ CX 41.

⁴⁵ T. at 2665-2668, 2670. *See* CXs 16A, 40A. The ALJ's contrary findings are not consistent with the record. *See* R. D. & O. at 24-26.

Dekalb County's decision to discharge them.⁴⁶ We find, as Dekalb County urges us to find, that the ALJ erred when he applied the "contributing factor" standard.⁴⁷ The ALJ did not determine, as he must, whether the Complainants demonstrated by a preponderance of the evidence that their protected activity was *a* motivating factor in the decision to discharge them.⁴⁸

We have reviewed the evidence in its entirety. The evidence shows that when the Complainants engaged in protected activity, by confronting Gudewicz to ask for historic SSO reports and to report untreated or misreported environmental hazards, Gudewicz rebuffed them or simply walked away.⁴⁹ Gudewicz provided no answers to their requests and complaints. Gudewicz himself wrote that Abdur-Rahman became "argumentative" when she complained that the County's "hot spots" continued to exist due to his inattention and lack of corrective action, which "warranted [him] being incompetent."⁵⁰ Abdur-Rahman may have been "argumentative," but she was engaged in activity the FWPCA protects. Gudewicz admitted that managing Abdur-Rahman was above his means.⁵¹ That Abdur-Rahman called Gudewicz "incompetent," even if true, is no defense to her unlawful discharge where Dekalb County *admits* Gudewicz's supervisory incompetence.⁵² Based on the foregoing, we find that the Complainants met their burden

⁴⁶ *Dixon*, ARB Nos. 06-147, -160, slip op. at 8; *Seetharaman*, ARB No. 06-024, slip op. at 5; *Morriss*, ARB No. 05-047, slip op. at 31-32; *accord* 29 C.F.R. § 24.100(a), 24.109(a).

⁴⁷ Petition for Review at 1. *See* R. D. & O. at 17, 19, 20, 25. After a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity. To the extent that the ALJ addressed the existence of a prima facie showing in this case fully tried on its merits, we decline to address those findings. *Morriss*, ARB No. 05-047, slip op. at 32-33.

⁴⁸ The ALJ found, later in his decision, (1) "I have no doubt, whatsoever, that the evidence establishes *the* "motivation" for terminating the Complainants was the result of Mr. Gudewicz's abject inability to manage them" (emphasis added), and (2) "It is proven by a preponderance of the evidence that expressed environmental concerns were not *the* motivating factor for terminating these Complainants." R. D. & O. at 31 (emphasis added). But the Complainants need only establish that their protected activity was *a* motivating factor, not *the* motivating factor, in the decision to discharge them.

⁴⁹ *E.g.*, T. at 361-365, 435, 436 (Abdur-Rahman); T. at 959, 962, 974-976 (Petty); T. at 2155 (Gudewicz).

⁵⁰ Complainants' Exhibit 10.

⁵¹ T. at 2077-78, 2096.

⁵² Respondent's Brief at 23.

to demonstrate by a preponderance of the evidence that their protected activity was a motivating factor in the decision to discharge them.

4. Mixed or Dual Motive Analysis

A mixed or dual motive analysis is appropriate when an adverse employment action is motivated in part by lawful reasons, and in part by unlawful reasons.⁵³ Since Abdur-Rahman and Petty met their burden of proving that their discharge was motivated in part by discrimination based on protected activity, an unlawful reason, and by Gudewicz's inability to manage them, an apparent lawful reason, the burden shifts to Dekalb County. Dekalb County may avoid liability by demonstrating by a preponderance of the evidence that it would have discharged Abdur-Rahman and Petty even if they had not engaged in protected activity.⁵⁴ Dekalb County's burden is an affirmative defense and arises at this juncture in the case because the Complainants proved that Dekalb County discharged them in part because of their protected activity.⁵⁵ Dekalb County, however, bears the risk that "the influence of legal and illegal motives cannot be separated."⁵⁶

The ALJ did not recognize that the burden shifted to Dekalb County at this juncture of the case. Rather, the ALJ next analyzed the evidence to determine whether the Complainants proved that Dekalb County's articulated reasons for discharge were a pretext for an unlawful reason, namely discrimination based on protected activity. The ALJ found, "The Complainants established by a preponderance of the evidence that the reasons offered by the Respondent were not its true reasons and have set forth sufficient evidence to show that the Respondent's proffered explanation is unworthy of credence, i.e., a pretext. But, it was a pretext for incompetence, not protected activity."⁵⁷ The ALJ thereby erred when he imposed upon the Complainants a burden of proof that is not theirs to bear.

The ALJ did, however, at the end of his decision, ultimately address the issue of whether Dekalb County demonstrated by a preponderance of the evidence that it would have discharged Abdur-Rahman and Petty even if they had not engaged in protected

⁵³ *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

⁵⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989); *Seetharaman*, ARB No. 06-024, slip op. at 5; *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-001, slip op. at 5 (ARB Apr. 30, 2004).

⁵⁵ *Seetharaman*, ARB No. 06-024, slip op. at 5.

⁵⁶ *Mackowiak v. Univ. Nuclear Sys.*, 735 F.2d 1159, 1164 (9th Cir. 1984), quoting *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983).

⁵⁷ R. D. & O. at 30.

activity.⁵⁸ The ALJ found that the evidence demonstrated that Gudewicz's admitted inability to manage Abdur-Rahman and Petty was the true motivation for their discharge. The ALJ determined that the record establishes management's "failure to follow [its] own guidance and to properly lead these high-motivated and well-educated employees."⁵⁹ The ALJ also found that Gudewicz, as well as other supervisors, were "thin skinned," taking offense at the slightest possible perceived affronts and labeling them "insubordination." He determined that the Complainants, as well as another probationary employee, were terminated for their supervisors' "inability to handle common challenges posed by enthusiastic and more highly-educated inspectors." Accordingly, the ALJ concluded that protected activity was not the motivating factor in the Complainants' discharge. Specifically, he concluded that Dekalb County established that it would have discharged the Complainants even in the absence of their protected activity "because managing them was above their supervisor's means and they did not fit in the peculiar culture of the Water and Sewer Department."⁶⁰

Because it is consistent with the preponderance of the record as set forth above, we agree with the ALJ's finding that Gudewicz was unable to manage Abdur-Rahman and Petty and that his supervisory incompetence motivated the County to discharge them. We, however, arrive at a different legal conclusion than the ALJ. Where, as here, the evidence plainly demonstrates that Gudewicz's very inability to manage Abdur-Rahman and Petty was inextricably tied to their FWPCA-protected activity, we conclude that Dekalb County did not meet its burden to show by a preponderance of the evidence that it would have discharged Abdur-Rahman and Petty *even in the absence of their protected activity*. Dekalb County bears the risk that the influence of legal and illegal motives cannot be separated. Therefore, we conclude that Dekalb County violated the FWPCA's employee protection provisions when it discharged Abdur-Rahman and Petty.⁶¹ On this record, we further conclude that Dekalb County is not relieved from liability under the theory of dual motive. Accordingly, we reverse the ALJ's conclusion that Dekalb County is relieved of liability because it demonstrated that it would have discharged Abdur-Rahman and Petty even if they had not engaged in protected activity.

⁵⁸ *Id.* at 31.

⁵⁹ *Id.* Uncontroverted evidence shows that Gudewicz never gave Abdur-Rahman or Petty the appraisals they were due. On appeal to us, Dekalb County argues that the appraisals were never intended to reflect the grounds for discharge and were only prepared after Gudewicz and Walker recommended discharge. Brief at 25. Because the issue is not before us, we do not reach the Complainants' challenge to the appraisals. Complainants' Brief at 21-37.

⁶⁰ R. D. & O. at 31.

⁶¹ We acknowledge that the record contains other alleged reasons for the discharges, for example that Abdur-Rahman was disrespectful and Petty was belligerent. But these reasons have been largely discounted. R. D. & O. at 10-16, 24-25.

We remand the case for the ALJ to determine the issue of what remedies are due Daisy Abdur-Rahman and Ryan Petty.⁶² The imposition of remedies is only against Dekalb County.

CONCLUSION

The Complainants demonstrated that they engaged in FWPCA-protected activity. Accordingly, we **DENY** Dekalb County's cross-appeal. We conclude that the Complainants demonstrated that their protected activity was a motivating factor in their discharge. We find that Gudewicz's inability to manage the Complainants as their supervisor was integral to his inability to manage Abdur-Rahman's and Petty's protected activity. Therefore, we conclude that Dekalb County is not relieved of liability under the theory of dual motive. We **REVERSE** the ALJ's conclusion that Dekalb County avoids liability in this case because it demonstrated that it would have discharged Abdur-Rahman and Petty even if they had not engaged in protected activity. We **REMAND** the case for a determination of remedies for which Dekalb County is liable. The imposition of remedies is only against Dekalb County.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

⁶² 29 C.F.R. § 24.7(c)(1). The Complainants ask us to review the ALJ's decision to dismiss certain supervisors as named respondents and to exclude from the record proposed Complainants' Exhibit 131. Petition for Review at 9, 11. We have reviewed the ALJ's September 22, 2006 Order Dismissing Respondents Ted Rhinehart, Roy Barnes, John Walker, and Chester Gudewicz Jr. as named respondents. We uphold it as it is consistent with law. *Lewis*, ARB No. 02-072, slip op. at 10-15 (FWPCA applies to employers and those acting in the capacity of an employer). With regard to the ALJ's exclusion of proposed CX 131, *see* R. D. & O. at 3, the ARB reviews an ALJ's determination on evidentiary rulings under an abuse of discretion standard, i.e., whether, in ruling as he did, the ALJ abused the discretion vested in him to preside over the proceedings. *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, -115, ALJ Nos. 2004-SOX-020, -036, slip op. at 8 (ARB June 2, 2006); *Waechter v. J.W. Roach & Sons Logging and Hauling*, ARB No. 04-183, ALJ No. 2004-STA-043, slip op. at 2 (ARB Dec. 29, 2005). We have reviewed the ALJ's ruling and find no abuse of discretion.

WAYNE C. BEYER, Administrative Appeals Judge, concurring:

I also reach the conclusion that the County did not prove that it would have fired Abdur-Rahman and Petty absent their protected activity, but do so via a different path.

Under the applicable evidentiary regime, (1) Abdur-Rahman and Petty had to make a prima facie case of retaliation; (2) the County had to articulate a legitimate, non-discriminatory reason (or reasons) for discharging them while they were probationary employees; and (3) Abdur-Rahman and Petty had to prove that (a) the County's proffered reasons were pretexts for retaliation, or (b) (the mixed motive test) that the County's reasons, although true, were only some of the reasons for its conduct, the others being retaliation for Abdur-Rahman and Petty's protected activity. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See also Desert Palace v. Costa*, 539 U.S. 90 (2003).

If Abdur-Rahman and Petty proved that retaliation was a motivating factor in the adverse employment actions, the burden shifted to the County to prove that it would not have retained Abdur-Rahman and Petty even if they had not engaged in protected activity. *Price Waterhouse*, 490 U.S. at 250. *See Collins v. Village of Lynchburg, Ohio*, ARB No. 07-079, ALJ No. 2006-SDW-003, slip op. at 8-9 (ARB Mar. 30, 2009); *Dixon v. Dep't of Interior, Bureau of Land Mgmt.*, ARB Nos. 06-147, -160, ALJ No. 2005-SDW-008, slip op. at 8 (ARB Aug. 28, 2008). The County bore the risk that "the influence of legal and illegal motives [could not] be separated." *Id.*

FWPCA's whistleblower provision would protect Abdur-Rahman and Petty if they "filed, instituted, or caused to be filed . . . any proceeding under [the FWPCA]" or "testified in . . . any proceeding resulting from the administration or enforcement of the provisions of [the FWPCA]." 33 U.S.C. § 1367(a). The ARB has interpreted "proceeding" to include internal or external employee complaints that may precipitate a proceeding. *Dixon*, slip op. at 8.

Abdur-Rahman and Petty were involved in drafting a new FOG ordinance and written procedures; they attempted to obtain SSO reports; and they participated in investigations. These activities were either formal enough to constitute "proceedings" or complaints that could have precipitated proceedings. Either way, I conclude, as did the ALJ and my colleagues, that Abdur-Rahman and Petty engaged in protected activities under the FWPCA.

The ALJ found that Abdur-Rahman and Petty made out a prima facie case (i.e., an inferential case of discrimination in which their protected activity was a factor). R. D. & O. at 23. He next found that the County articulated legitimate, non-discriminatory reasons for their discharge: in essence, that they were rude, insubordinate, argumentative, told him to his face or behind his back that their boss, Gudewicz, was incompetent, and were not a good fit for the organization. R. D. & O. at 26. These are ample reasons, if true, for not making probationary employees permanent.

In the next sequential step, the ALJ had to consider whether (a) the County's proffered reasons were pretexts for retaliation, or (b) (the mixed motive test) that the County's reasons, although true, were only some of the reasons for its conduct, the others being retaliation for Abdur-Rahman and Petty's protected activity. The ALJ followed the former course. He attempted to show that the County's reasons were pretext. Impressed that these trainees were recent college graduates and their experienced boss, Gudewicz, was a thin-skinned, less educated manager, the ALJ discounted evidence in the record that the reasons the County identified were true. He concluded that Gudewicz's bad management explained (and evidently excused) their bad behavior. But the reasons identified in their performance evaluations were not pretexts for whistleblower retaliation, but to obscure the "real" reason for not making them permanent, Gudewicz's inability to cope with them (they were "above his means"). R. D. & O. at 26.

The ALJ followed course (a) above, concluding that the County's reasons were pretexts, but not pretexts for retaliation. He did not apply an authentic mixed motive analysis, under (b) above. Although the ALJ said Abdur-Rahman and Petty's protected activity may have been a contributing factor, it was not *the* motivating factor in their discharge (erroneously stating their burden). Compare R. D. & O. at 23 with 31. Nevertheless, proceeding to the next (and final) step in the mixed motive analysis, he held that the County would have discharged them even if they had not engaged in protected activity. R. D. & O. at 31. Accordingly, under what I consider to be an emotional rather than an analytical response to the evidence (note, e.g., that the opinion contains no record citations), the ALJ denied Abdur-Rahman and Petty's complaint.

My colleagues come closer to the mark. They agree with the ALJ that Gudewicz was unable to manage Abdur-Rahman and Petty, but draw the completely opposite conclusion from that; Gudewicz's inability to manage them was "inextricably tied" to their protected activity. But some effort should be made on separation. Yes, the written performance appraisals coming after the decision not to make them permanent employees appear trumped up. But two other probationary employees who did not claim whistleblower status, Deidre Stokes and Manyon Anderson, were not made permanent on similar grounds. Stokes, like Abdur-Rahman, was involved in an auto accident, and Anderson, like Petty, was disrespectful and had anger management problems. And co-workers like Bernard Bethea and Miltrea McMichael testified that Abdur-Rahman and Petty were opinionated, disrespectful and uncompromising. I do not excuse all of the documented incivility based upon Abdur-Rahman and Petty's whistleblower status or lay blame on the County's inability to manage it, if that is what I am asked to do.

I agree, however, that the evidence in this case proceeded to the final stage of the regime, where the County must prove that it would not have retained Abdur-Rahman and Petty, absent their protected activity. I look to the County to pour the evidence through a sieve that separates the permissible from the "illegal" reasons for their discharge. Unfortunately, after a thirteen day trial, the County presents almost no evidence or argument on that issue. See Dekalb County's Brief to Administrative Review Board at 29-30. Since the County must prove that it would have taken the same action even if Abdur-Rahman and Petty had not engaged in protected activity, and it has failed to meet

its burden, I, too, would reverse the decision of the ALJ and remand this case for a determination of remedies.

WAYNE C. BEYER
Administrative Appeals Judge