



In the Matter of:

**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: February 16, 2011

DEKALB COUNTY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

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

For the Respondent:

Randy C. Gepp, Esq., *Taylor English Duma LLP*, Atlanta, Georgia.

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown,
Deputy Chief Administrative Appeals Judge, and Luis A. Corchado, *Administrative
Appeals Judge*; Judge Brown concurring.**

ORDER DENYING RECONSIDERATION

Daisy Abdur-Rahman and Ryan Petty filed complaints with the Labor Department in which they alleged that their former employer, DeKalb County, discharged them in violation of the employee protection provisions of the Federal Water Pollution Control

Act (FWPCA) and its implementing regulations.¹ The Labor Department’s Occupational Safety and Health Administration (OSHA) investigated and denied the complaints.

We very briefly highlight the Administrative Law Judge’s (ALJ) factual findings that formed the basis of our Final Decision and Order and form the basis of this order. The ALJ found that Abdur-Rahman and Petty had engaged in protected activity and suffered an adverse action, being fired. He also found that the protected activity was “a factor, in connection with other factors, which tended to affect the decision to terminate them.”² The ALJ found that all of DeKalb County’s stated reasons for the terminations were a pretext.³ Specifically, the ALJ rejected all of the reasons based on the performance appraisals and the performance issues, including the issues related to: (1) Petty’s “anger management;”⁴ (2) Abdur-Rahman’s alleged “challenging, argumentative, or insubordinate” behavior;⁵ and (3) issues related to “attendance; sick leave; accident; number of inspections; or, compliance letter errors.”⁶ Ultimately, the ALJ determined that the true reason for the terminations was the inability of their supervisor, Chester Gudewicz, to manage Abdur-Rahman and Petty.⁷ Therefore, the ALJ concluded that

¹ 33 U.S.C.A. § 1367 (Thomson/West 2006); 29 C.F.R. Part 24 (2009).

² ALJ’s Decision and Order Denying Relief (D. & O.) at 25. The ALJ’s finding of a nexus is initially confusing. The ALJ found that the Complainants established an “inferential showing of a nexus between the protected activity and the adverse employment action.” *Id.* This finding is not, by itself, a factual finding of a nexus. Rather, it is simply a finding of an inference, consistent with the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)/*Texas Dept of Comty Affairs v. Burdine*, 450 U.S. 248 (1981) prima facie analysis, and is sometimes used in a confusing manner in evidentiary hearings. Nevertheless, the ALJ also concretely found that protected activity was “a factor, in connection with other factors” which affected the decision to terminate the Complainants’ employment. *Id.* By reasonable inference, we conclude that the ALJ ultimately found that the Complainants’ protected activity was a factor. Our inference from the ALJ’s factual finding is buttressed by his unequivocal findings that the Complainants’ “pestering” related to environmental concerns “contributed to [their supervisor’s] irritation” and inability to manage them. *Id.* at 24.

³ *Id.* at 30.

⁴ *Id.* at 27.

⁵ *Id.*

⁶ *Id.* at 29 (pertaining to the second level supervisors). The ALJ’s findings, that higher level supervisors (Roy Barnes and John Walker) either failed to independently develop a reason for the terminations and/or rejected the immediate supervisor’s cited performance reasons, was a finding of ratification of retaliation. *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006); *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150 (D.C. Cir. 1982).

⁷ D. & O. at 30.

DeKalb County was not liable because it established that it would have discharged Abdur-Rahman and Petty even if they had not engaged in protected activity because managing them was beyond their supervisor's abilities and they "did not fit in the peculiar culture of the Water and Sewer Department."⁸ In reality, having eliminated every other stated reason for the terminations, the ALJ's finding was then inextricably intertwined with his finding that protected activity was a factor leading to the adverse actions. Nevertheless, the ALJ recommended that the complaints be dismissed. Abdur-Rahman and Petty appealed to the Administrative Review Board (ARB or Board). DeKalb County appealed the ALJ's finding of protected activity.

In its June 8, 2010 Final Decision and Order (F. D. & O.), the ARB agreed with the ALJ's finding of protected activity.⁹ Consistent with the ALJ's fact findings, the ARB also determined that protected activity was a motivating factor in the County's discharge decision.¹⁰ The Board further agreed with the ALJ's findings that Gudewicz was unable to manage Abdur-Rahman and Petty and that his supervisory incompetence motivated the County's discharge decision. The ARB accepted these findings as "consistent with the preponderance of the record."¹¹ The Board noted the ALJ's resulting conclusion that the County's proffered reasons were "unworthy of credence, i.e., a pretext. But, it was a pretext for incompetence, not protected activity."¹² Recognizing that the ALJ had rejected all of DeKalb County's stated reasons, the ARB arrived at a different conclusion based on the ALJ's factual findings:

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.^[13]

⁸ *Id.* at 31.

⁹ F. D. & O. at 7-9.

¹⁰ *Id.* at 9, 10.

¹¹ *Id.* at 12.

¹² F. D. O. at 11 *quoting* from the ALJ's D. & O. at 30.

The ARB thus reversed the ALJ's dismissal of this action and remanded the case for the ALJ to determine what remedies the County is liable for.

On July 7, 2010, DeKalb County filed a Motion for Reconsideration. The Complainants responded, and DeKalb County replied.

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued.¹⁴ Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . ." ¹⁵ In considering a motion for reconsideration, the ARB has applied a four-part test to determine whether the movant has demonstrated:

- (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.^[16]

While the ARB is authorized to reconsider its previous order, it refuses to grant motions for reconsideration that repeat arguments made on appeal.¹⁷

In moving for reconsideration, DeKalb County argues that the ARB applied an incorrect standard to review the ALJ's factual findings. DeKalb County contends that the ARB should have applied the substantial evidence standard in effect at the time of its

¹³ F. D. & O. at 12 (emphasis in original). We note the agreement from our Concurring former colleague, Judge Beyer, who agreed that DeKalb County failed to present legally sufficient evidence that it would have fired the Complainants in the absence of the protected activity. *Id.* at 14-16.

¹⁴ *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

¹⁵ Fed. R. App. P. 40(a)(2).

¹⁶ *Getman v. Southwest Secs., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 1-2 (ARB Mar. 7, 2006).

¹⁷ *McCloskey v. Ameriquest Mortg. Co.*, ARB No. 06-033, ALJ No. 2005-SOX-093, slip op. at 3 (ARB Mar. 26, 2008)(order denying motion for reconsideration).

decision, rather than the de novo standard in effect at the time the complaints were filed.¹⁸ DeKalb County asserts that if the ARB had applied the substantial evidence standard, it would have found in its favor on all issues including protected activity and causation. On reconsideration, DeKalb County requests that the ARB reinstate the ALJ's conclusion on causation, relieving it of liability.¹⁹

The Complainants agree that the correct standard is substantial evidence review of the ALJ's factual findings. The Complainants argue, however, that DeKalb County mischaracterizes as factual findings the ALJ's legal conclusions, which the ARB properly reviewed de novo. The Complainants contend that the ARB permissibly reversed the ALJ's legal conclusion on causation not because it rejected the ALJ's underlying factual findings but to correct a legal error. The Complainants thus contend that DeKalb County has established no reason why the ARB should reconsider its decision.²⁰

DeKalb County has not demonstrated that any of the provisions of the ARB's four-part test for reconsideration apply. The County presents no new matters of law or fact or a consequential change in law after the ARB's decision or any failure to consider the facts before us.

Even if we were to accept the parties' contention that the applicable standard is substantial evidence review of the ALJ's factual findings, application of this standard would not compel us to reconsider or change our decision. As we indicated above, the ALJ's factual findings support the conclusion that when the County fired the Complainants because of their supervisor's "inability to manage" them, in reality, the County terminated their employment because they engaged in protected activity. We reached this conclusion based on the ALJ's finding that the protected activity was a contributing factor and his rejection of every other stated non-retaliatory reason. Our ruling is consistent with our previous decisions in which we found indirect admissions of retaliation when the employer's stated non-retaliatory justifications for adverse action flowed entirely or almost entirely from the protected activity.²¹ Stated differently, it is

¹⁸ Respondent's Brief at 1-14; *see* F. D. & O. at 6, at 6 nn.32, 33.

¹⁹ Respondent's Brief at 14-18; Respondent's Reply Brief at 2-13.

²⁰ Complainants' Brief at 2-27.

²¹ *See, e.g., Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 481 (3rd Cir. 1993) ("We have reviewed this evidence and conclude that it permits the conclusion that any alleged 'personality' problem or deficiency of interpersonal skills was reducible in essence to the problem of the inconvenience Guttman caused by his pattern of complaints. There is no evidence before us that Guttman's alleged personality or professional deficiencies arose in any other context outside of his complaint activity."); *Dodd v. Polysar Latex*, 1988-SWD-004, slip op. at 8 (Sec'y Sept. 22, 1994) (supervisor claimed that he recommended termination after considering complainant's deteriorating relationships, attitude, and performance, but his testimony taken as a whole shows that he

not a valid legal defense to fire employees because a supervisor is incompetent to deal with whistleblowing activities.²² Given the ALJ's findings in this case, the supervisor's incompetence was clearly not a legitimate, non-retaliatory reason.²³

For the above reasons, we find that DeKalb County did not satisfy any grounds for granting its motion for reconsideration. Accordingly, its motion is **DENIED**.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

E. COOPER BROWN, Deputy Chief Administrative Appeals Judge, concurring:

I concur in my colleagues' decision denying Respondent's motion seeking reconsideration of the Board's June 8, 2010 Final Decision and Order (ARB Final D. & O.) in this case. I write separately to explain that while I am of the opinion that the "substantial evidence" standard is the appropriate standard for review of the ALJ's findings of fact, see *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974); *Thorpe v. Hous. Auth. of the City of Durham*, 393 U.S. 268, 282 (1969); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994), I nevertheless am also of the opinion that application of the "substantial evidence" review standard to the ALJ's findings,

recommended termination solely because of complainant's conflict with another manager over complainant's protected complaints).

²² Such a defense would be analogous to firing victims of sexual or racial harassment because the supervisor was not able to interact appropriately with women or with individuals from different ethnic cultures or because the supervisor was not trained to respond properly to complaints of sex or race discrimination. In cases involving claims of sex discrimination, failure to take corrective action is detrimental to an employer's ability to assert a valid defense against vicarious liability. See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

²³ Having rejected the ALJ's finding on a legal analysis, we do not find it necessary and, therefore, do not opine on whether the ARB should have applied substantial evidence review of the fact findings.

particularly to the question of Respondent's motive in terminating Complainants' employment, does not alter the results reached in our original decision.

The ALJ found in his D. & O that a host of environmental concerns raised and activities undertaken by Complainants constituted FWPCA-protected activity, that Respondent was aware of Complainants' activities, and that Complainants sustained adverse employment action in the form of employment discharge. The substantial evidence of record clearly supports the ALJ's findings of fact with respect to each of these determinations.

Concerning the question of causation, the ALJ found that Complainants' protected activities were a factor in Respondent's decision terminating their employment. However, the ALJ went on to determine that the true reason for their discharge was management incompetence on the part of Complainants' immediate supervisor and that because of the supervisor's managerial incompetence, Respondent would have discharged Complainants even if they had not engaged in the protected activity.

In the ARB Final D. & O., the majority affirmed the ALJ's findings of protected activity, knowledge on the part of Respondent, and adverse action. As to the issue of causation, the Board, reviewing the ALJ's findings of fact de novo, agreed that Complainants met their burden of demonstrating that their protected activity was a motivating factor in the decision to discharge them. Assessing the ALJ's "dual motive" analysis and the question of whether Respondent would have discharged Complainants even if they had not engaged in protected activity, the majority agreed with the ALJ's finding that supervisory incompetence was the motivation for the Complainants' discharge, but found that the evidence "plainly demonstrates" that the supervisor's inability to manage Complainants "was inextricably tied" to their FWPCA-protected activity. Thus, the majority held that Respondent, "bear[ing] the risk that the influence of legal and illegal motives cannot be separated," failed to meet "its burden to show by a preponderance of the evidence that it would have discharged [Complainants] even in the absence of their protected activity." ARB Final D. & O. at 12 (emphasis omitted).²⁴

Applying the "substantial evidence" review standard does not alter the Board's ultimate decision rejecting the ALJ's ruling in Respondent's favor. The majority in the Board's original decision, as well as Judge Beyer, viewed the supervisor's inability to manage Complainants as "inextricably tied" to their protected activity. ARB Final D. & O. at 15. Certainly the ALJ's decision supports that observation. As the ALJ noted, "It is likely that a part of what was viewed by [the supervisor] as pestering and 'insubordination' was not much more than the manifestation of the Complainants'

²⁴ Judge Beyer, concurring, agreed with the majority that the supervisor's inability to manage Complainants was "inextricably tied" to their protected activity. Placing the onus on Respondent to separate its permissible from its impermissible (retaliatory) motives, Judge Beyer concluded that Respondent failed to meet its burden of proof "that it would have taken the same action even if [Complainants] had not engaged in protected activity." ARB Final D. & O. at 15-16.

protected activity.” ALJ D. & O. at 25. Consequently, the ALJ’s finding that Respondent would have terminated Complainants’ employment because of the supervisor’s “managerial incompetence” in the absence of any protected activity is not only unsupported by the substantial evidence of record, it fails as a matter of law.

Under the “dual motive” test developed by the Supreme Court in *Mt. Healthy City Sch. Dist. Bd. of Education v. Doyle*, 429 U.S. 274 (1977), once the employee has shown, as Complainants did in this case, that protected activity “played a role” in the employee’s discharge, the burden shifts to the employer to “prove that it would have discharged the employee *even if* he had not engaged in protected activity.” *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1164 (9th Cir. 1984). Under the “dual motive” test, “the employer bears the risk that ‘the influence of legal and illegal motives cannot be separated.’” *Id.* (quoting *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983)). In this case, as the Board previously held, and as herein reiterated, by relying upon a supervisor’s “mismanagement” that is inseparable from Complainants’ protected activity, Respondent simply failed to meet its burden of proof under the “dual motive” standard. This was the Board’s ruling as a matter of law. Applying the “substantial evidence” standard to the ALJ’s finding does not alter the outcome. Having failed to meet its burden of proof, by failing to separate Complainants’ protected activity from the supervisor’s “mismanagement,” the substantial evidence of record simply does not support the ALJ’s finding that the supervisor’s inability to manage Complainants would have resulted in their employment termination even if they had not engaged in protected activity.

For the foregoing reasons, I would thus reaffirm the Board’s prior decision, and remand this case to the ALJ for the imposition of remedies as previously ordered.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge